

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Final Compensation
Benefit Calculation of:

BRADLEY J. HUDSON,

Respondent,

and

CITY OF RIVERSIDE,

Respondent.

Case No. 2015-0664

OAH No. 2016070419

PROPOSED DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Riverside, California, on October 25, 2016.

John Shipley, Senior Staff Attorney, represented petitioner, Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System, State of California (CalPERS).

Katrina A. Veldkamp, Attorney at Law, Best, Best & Krieger LLP, represented respondent Bradley Hudson.

Robert L. Hansen, Supervising Deputy City Attorney, City of Riverside, represented respondent City of Riverside (City).

The record remained open until December 28, 2016, for the parties to submit closing briefs. CalPERS's brief was marked as Exhibit 53; respondent Hudson's brief was marked as Exhibit 54; and respondent City's Notice of Joinder was marked as Exhibit 55. The reporter's transcript was marked and received as Exhibit 56.

**CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM**

FILED 2/2 2017
Debra Wooten

ISSUES

1. Did CalPERS correctly determine respondent's service retirement allowance? Specifically, did a five percent stipend granted Mr. Hudson in his employment agreements with City constitute "payrate" for purposes of calculating his service retirement benefit?
2. Was the five percent stipend included in a publically available pay schedule?
3. If the answer to No. 1 or No. 2 is "No," may CalPERS recover any overpayment received by Mr. Hudson due to the improper inclusion of the stipend in CalPERS's calculation of Mr. Hudson's service retirement benefit?¹

FACTUAL FINDINGS

CalPERS's Functions

4. CalPERS manages pension and health benefits for California public employees, retirees, and their families. Retirement benefits are provided under defined benefit plans that are funded by member and employee contributions and by interest and earnings on those contributions.
5. A member's service retirement allowance is based on the member's age on the date of retirement, years of credited service and "final compensation." "Final compensation" is defined as the highest average compensation during any consecutive 12 or 36 months of covered service. "Compensation earnable" is defined as "payrate" and "special compensation."² In calculating a member's service retirement allowance, CalPERS may review earnings reported by an employer to ensure that only those items allowed under the Public Employee Retirement Law (PERL) are included as "final compensation" for purposes of calculating a retirement allowance.
6. The City of Riverside is a public agency that contracts with CalPERS for the provision of benefits to eligible employees under the PERL.

Provisions of the Riverside City Charter

7. The Riverside City Charter, effective January 5, 2007, section 601, "Powers and Duties," states that "[t]he City Manager shall be the head of the administrative branch of the City government. The City Manager shall be responsible to the City Council for the

¹ The parties stipulated that the issues in this proceeding should include whether CalPERS was entitled to recover from Mr. Hudson the amount of any overpayment.

² Mr. Hudson did not assert the stipend he received was special compensation.

proper administration of all affairs of the City. . . .” Section 601, subsection (g), provides that “the City Manager shall have the power and be required to: . . . [p]erform such other duties consistent with this Charter as may be required of the City Manager by the City Council.”³

Mr. Hudson's Employment with City

2005

8. Mr. Hudson was hired by City as its City Manager in April 2005. This assignment was Mr. Hudson's first position as a City Manager; however, City was in need of redevelopment expertise which Mr. Hudson possessed.

9. Mr. Hudson and City entered into an Employment Agreement dated April 21, 2005, wherein Mr. Hudson was employed “as City Manager of the City of Riverside, to perform the functions and duties of the City Manager as specified in Article VI of the City Charter and to perform other legally permissible and proper duties and functions consistent with the office of the City Manager, as the City Council shall from time to time assign.” The 2005 Employment Agreement provided Mr. Hudson with a salary of \$225,000 per year and other financial benefits, including an agreement that City would pay for Mr. Hudson's employee contribution and City's employer contribution to CalPERS.

10. When Mr. Hudson was hired, it was understood that he would be appointed Executive Director of the Redevelopment Agency and that he would have various duties that were not specified in the employment agreement. At the time City did not have, but planned to establish, a Housing Authority. Mr. Hudson had previously served as the Executive Director of the Riverside County Housing Authority and, based upon his experience, it was understood that, as part of his employment duties, Mr. Hudson would lead the Housing Authority when it was established.

11. A Personnel Action Notice (PAN) prepared by City personnel, dated June 6, 2005, stated that Mr. Hudson's employment as City Manager began on June 1, 2005. A PAN dated July 12, 2005, reflected that Mr. Hudson received a 2.5 percent salary increase and that his earnings were \$19,217 per month (\$230,628 per year.) Mr. Hudson's monthly and annual compensation was listed in the City's Salary Schedule Report effective December 13, 2005.

12. Within a few months of his being hired as City Manager, the City Council appointed Mr. Hudson as Executive Director of the Redevelopment Agency.

³ The Riverside City Charter that was effective on January 6, 2003, contained the same provision.

2006 TO 2007

13. A PAN dated March 28, 2006, indicated that Mr. Hudson received a three percent salary increase. In November 2006, Mr. Hudson received a one percent salary increase that increased his monthly earnings to \$19,994 (\$239,928 per year). Mr. Hudson's increased monthly and annual compensation was reflected in a Salary Schedule Report effective November 14, 2006.

14. By Resolution No. 21275, dated November 7, 2006, City established the City of Riverside Housing Authority. Resolution No. 21275 provided that the "City Manager shall serve as its Executive Director"

15. The City Council and Redevelopment Agency Agenda for January 9, 2007, included a City Council item related to the approval of an updated employment agreement between City and Mr. Hudson. Minutes from the January 9, 2007, meeting confirmed that City approved Mr. Hudson's updated employment agreement and adopted Resolution No. 21310. Resolution No. 21310 required that Master Salary and Fringe Benefits Resolution 21052 be amended to include the terms of the proposed updated employment agreement. Resolution 21310 directed City's Human Resource Director to "revise the specific pages of Resolution No. 21052 to reflect the various changes detailed above." The agenda, meeting minutes, and Resolution 21310 did not contain any specifics related to the proposed employment agreement, including compensation. Resolution 21310 stated that the proposed employment agreement was "attached to the City Council Memorandum dated January 9, 2007."

16. On January 16, 2007, City and Mr. Hudson entered into the employment agreement that had been approved by City on January 9, 2007. Like the 2005 agreement, City employed Mr. Hudson "as City Manager of the City of Riverside, to perform the functions and duties of the City Manager as specified in Article VI of the City Charter and to perform other legally permissible and proper duties and functions consistent with the office of the City Manager, as the City Council shall from time to time assign." The 2007 agreement added a provision stating that Mr. Hudson "shall also serve as Executive Director of the City's Redevelopment Agency and as Executive Director of the City's Housing Authority, as has previously been determined by the respective agencies." The agreement confirmed that, during the course of his employment with City, Mr. Hudson was expected to be a "full-time City Manager."

Under the 2007 agreement, Mr. Hudson received a salary of \$248,000 and "[i]n recognition of additional duties [as Executive Director of the City's Redevelopment Agency and as Executive Director of the City's Housing Authority]," Mr. Hudson received a five percent stipend "for such services in addition to any other compensation payable under [the] terms of this agreement." As had also been included in the 2005 agreement, City agreed to pay for Mr. Hudson's employee contribution and City's employer contributions to CalPERS.

17. A PAN dated January 18, 2007, confirmed Mr. Hudson's salary was \$20,667 per month (\$248,000 per year) plus a five percent stipend "for duties as Executive Director of the agency ___ & Housing Authority." (Blank in original.) The City Salary Schedule Report effective February 6, 2007, provided that the City Manager's monthly salary was \$20,667, and his annual salary was \$248,004.

18. A PAN dated July 2, 2007, documented that Mr. Hudson received a 3.5 percent increase in his salary "per MOU." The salary increase raised his monthly salary, not including the five percent stipend, to \$21,390 (\$256,680 per year), which was contained in the City Salary Schedule Report effective July 1, 2007.

2008 TO 2010

19. A PAN dated July 3, 2008, provided that Mr. Hudson received a 2.5 percent cost of living increase in his salary. This increase raised his monthly salary to \$21,925 (\$263,100 per year). This 2.5 percent increase was not included in a City Salary Schedule offered at the hearing.

20. On July 23, 2008, City and Mr. Hudson entered into a new employment agreement. Like the 2007 agreement, City employed Mr. Hudson "as City Manager of the City of Riverside, to perform the functions and duties of the City Manager as specified in Article VI of the City Charter and to perform other legally permissible and proper duties and functions consistent with the office of the City Manager, as the City Council shall from time to time assign. [Mr. Hudson] shall also serve as Executive Director of the City's Redevelopment Agency and as Executive Director of the City's Housing Authority, as has previously been determined by the respective agencies." The 2008 agreement confirmed that, during the course of the agreement, Mr. Hudson was expected to be a "full-time City Manager."

Under the 2008 agreement, Mr. Hudson received a salary of \$275,000, and "[i]n recognition of additional duties [as Executive Director of the City's Redevelopment Agency and as Executive Director of the City's Housing Authority]" Mr. Hudson received a five percent stipend "for such services in addition to any other compensation payable under terms of this agreement." The 2008 agreement provided that City would pay for Mr. Hudson's employee contribution and City's employer contributions to CalPERS. A handwritten note on the 2008 agreement calculated that Mr. Hudson's monthly income was \$22,916.67.

21. A City of Riverside Salary Schedule Report, effective June 28, 2008,⁴ showed that the City Manager earned a monthly salary of \$22,917 and a \$275,004 annual salary. This report did not include the five percent stipend. A PAN dated July 24, 2008, reported the same salary amounts as set forth in the June 28 schedule.

⁴ Although it contains the compensation agreed to in the 2008 employment agreement, this Salary Schedule pre-dates the date of that agreement.

22. A City of Riverside Salary Schedule Report, effective June 25, 2010, showed that the City Manager earned a monthly salary of \$23,375 and an annual salary of \$280,500. A PAN dated June 29, 2010, indicated the most recent salary increase was the result of a two percent cost of living increase. The salary amounts were included in a Salary Schedule Report effective September 2, 2011, which did not include the five percent stipend.

23. From 2007 through Mr. Hudson's retirement in 2011, City reported Mr. Hudson's five percent stipend amounts to CalPERS as special compensation.

Mr. Hudson's Retirement

24. On June 21, 2011, Mr. Hudson signed a Service Retirement Election Application in which he announced his intention to retire effective August 13, 2011.

25. By letter dated April 22, 2012, eight months after Mr. Hudson retired, CalPERS informed Mr. Hudson that CalPERS had reviewed the compensation reported to CalPERS by City that included the five percent stipend that had been agreed to in the employment agreements between City and Mr. Hudson. CalPERS cited to Government Code section 20636 that defined payrate and special compensation and advised Mr. Hudson that, since he was the "only one to receive this stipend," the five percent stipend did not constitute part of his "payrate," and that a stipend that was provided for additional duties was not special compensation as defined in California Code of Regulations, title 2, section 571.⁵ Therefore, CalPERS excluded the five percent stipend and re-calculated Mr. Hudson's monthly retirement benefit.⁶

26. CalPERS sent a similar letter to City and advised City that the compensation it had reported for Mr. Hudson did "not comply with the California Public Employees' Retirement Law (PERL)" because the five percent stipend was not payrate or special compensation. CalPERS requested that City "correct the reported special compensation by reversing this compensation out of our payroll system in order to recover the contributions paid for this benefit." CalPERS further requested that City "immediately stop reporting this stipend to CalPERS."

27. In a letter dated May 4, 2012, City told Mr. Hudson that, for the period July 9, 2009 through June 24, 2010, it had reported to CalPERS earnings of \$311,854.65, which was composed of his regular earnings and a five percent special compensation that it reported as "PERSable." In the letter, City reminded Mr. Hudson that CalPERS made the final determination of whether the reported amounts are "PERSable."

⁵ Section 571 provides an exclusive list of reportable special compensation. However, and as previously noted, Mr. Hudson did not assert the stipend was special compensation in this proceeding.

⁶ The letter did not set forth the original benefit given to Mr. Hudson or CalPERS's re-calculated amount.

28. In a letter dated May 25, 2012, CalPERS advised Mr. Hudson that it had "received additional information about [his] benefit" and, based on that information, would be adjusting the amount of his service retirement allowance. CalPERS determined the "adjustment resulted in an *increase* to [Mr. Hudson's] current allowance," resulting in a payment to him of \$15,120.21 in retroactive compensation from the date of his retirement through May 31, 2012. (Emphasis added.) CalPERS calculated that Mr. Hudson's new monthly benefit was \$18,024.41.

29. A note in "my CalPERS" dated May 12, 2014, stated CalPERS incorrectly used the five percent stipend when it calculated the 2012 adjustment of Mr. Hudson's benefits. The note stated the error resulted in an overpayment to Mr. Hudson of \$20,742.14 from the date of his retirement through calendar year 2014.

30. In a letter dated May 21, 2014, CalPERS advised Mr. Hudson that it "discovered an error in [his] retirement calculation" computed in 2012. The "error" involved CalPERS including the five percent stipend – which it previously had disallowed – in the 2012 re-calculation. CalPERS's error resulted in an increase in Mr. Hudson's final compensation and receipt of a \$15,120.21 retroactive payment to which CalPERS asserted Mr. Hudson was not entitled. CalPERS reiterated that the five percent stipend was not special compensation and was not reportable. On this basis, CalPERS decreased Mr. Hudson's reportable final compensation and claimed it had overpaid Mr. Hudson \$20,742.14.

31. By letter dated June 15, 2014, Mr. Hudson objected to CalPERS's proposed reduction of his benefit by disallowing the inclusion of the five percent stipend in his final compensation calculation. He asserted the issue had been fully vetted and determined in 2012, when the determination was made that the five percent stipend was properly included as compensation. Mr. Hudson stated the stipend was "regular and recurring," and he "paid state and local taxes and PERS contributions on this pay." Mr. Hudson suggested the stipend was part of payrate. He provided support for his position and requested CalPERS not take any action to reduce his monthly benefit until all appeals and hearings were exhausted.

32. In a letter dated September 19, 2014, CalPERS rejected Mr. Hudson's argument that the stipend was properly included in his final compensation. CalPERS sent a similar letter to City, noting that City failed to make adjustments to remove the stipend amount from CalPERS's system; CalPERS again requested that City "immediately stop reporting this benefit to CalPERS for all impacted employees and that the improper payments be reversed out of our payroll system to recover the contributions paid." CalPERS accepted Mr. Hudson's letter as an appeal of CalPERS's decision to exclude the stipend in calculating Mr. Hudson's final compensation.

33. On October 9, 2015, Renee Ostrander, on behalf of CalPERS, signed the Statement of Issues in Case No. 2015-0664. In the Statement of Issues, CalPERS sought a determination of "whether respondent Hudson's final compensation shall be adjusted to exclude the 5 percent stipend as determined by CalPERS 2012 determination." As

previously noted, the parties stipulated to include as an issue in this proceeding whether CalPERS may collect an overpayment it made to Mr. Hudson, if any is determined.

Mr. Hudson's Testimony

34. In 2007, when a City Manager in another town received a "very healthy salary," The City Council became concerned that Mr. Hudson might be encouraged to leave City for higher compensation. The City Council decided to provide an incentive for Mr. Hudson to remain at City by increasing his salary. A subcommittee of two council members and Mr. Hudson negotiated a yearly salary amount that did not include a stipend. The subcommittee took the negotiated yearly compensation to the full council. The council agreed to the amount of compensation negotiated, but offered it in the form of a yearly base salary of 248,000 plus a five percent stipend. Mr. Hudson said he told City he would accept that offer as long as the stipend amount was "PERSable."⁷ According to Mr. Hudson, he received assurances the stipend was "PERSable."

35. In addition to serving as the Executive Director of the Redevelopment and Housing Agencies, as City Manager, Mr. Hudson served as an executive member on a number of boards and commissions, including the Community Police Review Commission, Parks and Recreation Commission, and the Library Commission. He also served on a number of regional bodies. He did not receive additional compensation for those duties; however, when he was hired, Mr. Hudson was not immediately appointed Executive Director of the Redevelopment Agency, and the Housing Authority had not yet been established.

36. City established a Housing Authority after Mr. Hudson became employed as City Manager and appointed him Executive Director. This position included duties for which he was not responsible under his original employment agreement. Both prior and subsequent to his appointment as Executive Director of the Redevelopment Agency and Housing Authority, Mr. Hudson was a full-time employee of City. Before being appointed the Executive Director of the Redevelopment Agency, Mr. Hudson worked 60 plus hours per week. After his appointment, his hours of work increased "somewhat." The appointment as Executive Director of the Housing Authority did not increase his work hours to any significant extent as it was a new authority; the Housing Authority did not have a lot of assets to manage; and Redevelopment Agency and Housing Authority meetings were held at the same time as City Council meetings that the City Manager was already required to attend.

37. Resolution 21052 was the City of Riverside master salary and fringe benefit resolution. It was adopted on April 27, 2004, and was amended several times thereafter. Part IV of the resolution, entitled "Addendum - Salary Schedule Report by Pay Ranges," set forth City's published pay rates for all positions in City, including City Manager.

⁷ An amount reported to CalPERS and used in calculations to determine retirement benefits.

38. The City agenda for the January 9, 2007, City Council and Redevelopment Agency meeting was available to the public online, and it was posted in various places in the community, including City Hall and libraries.

39. Mr. Hudson estimated that the overpayment he would be required to pay back to CalPERS if the stipend was not included in his final compensation has increased from \$20,742.14 in 2014 to approximately \$40,000. Mr. Hudson estimated that, without inclusion of the stipend, his monthly benefit would decrease by \$600 to \$700 and, if he would were required to pay back an overpayment, his monthly benefit would be reduced by another \$1,300, for a total loss of approximately \$2,000 per month until the overpayment was fully reimbursed.

40. Mr. Hudson currently receives retirement benefits of approximately \$13,000 per month. Before retirement he estimated his monthly budget and standard of living based upon CalPERS's original determination of his retirement benefit. A \$2,000 reduction in monthly benefits would have a significant impact on him and his family. Mr. Hudson's mother has Alzheimer's disease and resides in an assisted living facility. She has a small pension and Mr. Hudson supplements his mother's income so she can afford to remain in suitable assisted living. Mr. Hudson also cares for his disabled adult son and three-year-old grandson.

41. Mr. Hudson has had other employment following his retirement from City. He was the County Executive Officer for Sacramento County for four and one-half years, and he had been the General Manager of Village Management Services for approximately nine months at the time of the hearing. Mr. Hudson's compensation in these two positions was similar to his compensation from City.

Testimony of Miriana Gonzalez

42. Miriana Gonzalez has been City's Interim Deputy Human Resources Director since August 2016. She is the direct assistant to the Human Resources Director in overseeing the various divisions within Human Resources, which include recruitment benefits, training, employee relations, and Workers' Compensation.

43. For nine years prior to serving as Interim Deputy Human Resources Director, Ms. Gonzalez was a Human Resources Analyst. In 2015, Ms. Gonzalez served as the Principal Human Resources Analyst and had occasion to amend the master fringe benefits and salary schedule in accordance with City Council resolutions. Ms. Gonzalez reviewed documents, such as City Council agenda items, reports, and minutes and confirmed that the master fringe benefits and salary schedule items were approved and properly amended. She reviewed the language within those documents and determined specifically what needed to be updated, whether it be the actual master fringe benefit salary, or schedule, or other documents within the fringe benefit salary resolution.

44. Ms. Gonzalez was familiar with Resolution 21310. She stated that, in her opinion, the resolution "clearly instructed and authorized the HR Director to amend the appropriate parts of the fringe benefits resolution schedule . . . to reflect . . . the additional compensation for Mr. Hudson." She testified the salary schedule should have been amended by inflating the range⁸ for City Manager to include the five percent stipend. She stated if the calculation had been done correctly and the salary report amended as directed by Resolution No. 21310, the total compensation would have been reported to CalPERS as base salary.

45. Ms. Gonzalez identified an error in the reporting of Mr. Hudson's annual leave under his 2007 employment agreement. His 2007 employment agreement granted him 42 days of leave. His leave allowances should have been updated in the master fringe benefit and salary schedule pursuant to Resolution 21310. However, the master fringe benefit and salary resolution effective December 18, 2007, wrongfully reflected that the City Manager's annual leave was 32 days.

The City Manager, City Attorney, City Clerk and other executive level classifications, which included department heads and directors, are included in Bargaining Unit 1. Ms. Gonzalez did not know whether any former City Manager or the current City Manager received additional compensation for duties associated with being the Executive Director of the Redevelopment Agency or the Housing Authority. She was not aware whether a City Attorney, City Clerk, or other member of Bargaining Unit 1, received additional compensation for performing additional duties for the Redevelopment Agency or the Housing Authority. She stated that she did not know whether any members of Bargaining Unit 1, negotiated additional compensation as part of their original contract.

Testimony of Taras Kachmar

46. Taras Kachmar has been a Retirement Program Specialist II with CalPERS for nine years. He works in the Compensation Review and Analysis Unit. Mr. Kachmar is familiar with PERL and with Government Code sections 20630 and 20636. He is also familiar with California Code of Regulations, title 2, sections 570.5 and 571.

47. When a member applies for retirement, the Compensation Review and Analysis Unit reviews the compensation used to calculate the member's final compensation to ensure that the compensation used was reported to CalPERS by the employer and that the calculation was in compliance with the statutes and regulations governing public employees' retirement benefits.

48. As an agency that contracts with CalPERS to provide benefits to eligible employees, City must comply with provisions of the PERL.

⁸ The Salary Schedules did not include a range of compensation for City Manager, but contained a set salary amount.

49. Mr. Kachmar was familiar with Mr. Hudson's appeal. He described the issues in the appeal as related to Mr. Hudson's receipt of a stipend for performing various duties in addition to his City Manager duties.

50. When Mr. Hudson submitted his application, Compensation Review and Analysis Unit personnel entered his information into the system. Mr. Hudson's retirement benefit was calculated in accordance with a formula based on age, the benefit factor City contracted for, and the highest 12 months of consecutive compensation reported by City to CalPERS and contained in City's salary schedule. During the normal course of business, Mr. Hudson's application was flagged for review.

51. In conducting its review of Mr. Hudson's retirement benefit, the Compensation Review and Analysis Unit received Mr. Hudson's employment agreements. They reviewed the salary provisions in the employment agreements and compared them with what was listed in the salary schedule.

52. Unit personnel also reviewed and considered PANs that were in Mr. Hudson's file to determine final compensation. When a PAN included a note that indicated an increase was to be added to Mr. Hudson's salary, the unit tried to determine where and how the increase was reported. If a PAN included a provision that was not properly reportable to CalPERS as payrate, the unit would confirm that these additional funds had not been reported to CalPERS as payrate compensation.

53. Mr. Kachmar disputed that CalPERS changed its determination of Mr. Hudson's final compensation "on numerous occasions." He cited the April 22, 2012, letter to Mr. Hudson in which Mr. Hudson was correctly advised that the five percent stipend, reported by City as special compensation, did not qualify as special compensation, and would not be included in the calculation of his final compensation. Mr. Kachmar testified the stipend was not included in the final compensation calculation because it was for additional duties and because Mr. Hudson was the only employee to receive that extra compensation.

54. Mr. Kachmar reviewed the allowance adjustment letter dated May 25, 2012, in which Mr. Hudson was notified that CalPERS had recalculated his retirement benefit and that the recalculation resulted in a monthly increase in benefits he would receive. In addition to an increase in monthly benefits, Mr. Hudson received retroactive pay of \$15,120.21. Mr. Kachmar stated that this recalculation erroneously included the stipend as special compensation.

55. Mr. Kachmar identified the May 12, 2014, note in CalPERS's system as the first document that identified the improper inclusion of the stipend in determining Mr. Hudson's final compensation. Mr. Hudson was advised of the error in a letter from CalPERS dated May 21, 2014. Therefore, Mr. Kachmar did not feel there were "numerous" changes to Mr. Hudson's benefits.

56. Mr. Kachmar stated that a public employee's pay rate must be publicly available for transparent and accountability reasons. Mr. Kachmar agreed that Mr. Hudson's employment agreement was publicly noticed by City; however, he still opined that the only appropriate pay rate that could be used to determine Mr. Hudson's retirement benefits was the amount listed in City's salary schedule reports.

57. Mr. Kachmar agreed that if the City Council had taken action to establish the City Manager the Executive Director of the Redevelopment Agency and Housing Authority before Mr. Hudson's employment, and if Mr. Hudson was paid for those duties as part of his base pay rate, Mr. Kachmar would not have concluded that Mr. Hudson's duties as Executive Director of the two agencies were in addition to Mr. Hudson's duties as City Manager.

58. Mr. Kachmar further agreed that if, pursuant to its charter, the City Council assigned additional responsibilities to Mr. Hudson and compensated him for those additional duties, the compensation would be for duties as City Manager if the compensation was part of his base pay rate.

59. Mr. Kachmar was less certain about whether amending the salary schedule to add the dollar amount of the five percent to the reported salary amount would have resulted in Mr. Hudson's retirement benefit being calculated on that reported salary amount. Mr. Kachmar testified CalPERS would still look to Mr. Hudson's employment agreement wherein the five percent was designated as an addition to his base pay.

60. Mr. Kachmar agreed the \$20,742.14 final compensation overpayment adjustment of which Mr. Hudson was advised in 2014, had likely increased by approximately \$20,000 at the time of the hearing in this matter.

Mr. Hudson's Position

61. Although the five percent stipend was reported to CalPERS as special compensation, Mr. Hudson argued the stipend should have been reported as payrate compensation and should be included in his retirement benefit calculation. Mr. Hudson further argued City staff failed to update the salary schedule to include the five percent stipend as instructed by Resolution No. 21310.

62. Mr. Hudson stated his employment agreement, the agenda providing notice that his employment agreement would be considered at the January 9, 2007 City Council meeting, the resolution adopting the employment agreement, and the minutes from the January 9, 2007, meeting confirming the adoption of his employment agreement were all available to public online, in city hall, libraries and City Council Records, and were, therefore, publicly available.

63. Serving as Executive Director of the Redevelopment Agency and the Housing Authority were part and parcel of his duties of City Manager. Mr. Hudson did not occupy

two positions with separate pay schedules and the stipend did not constitute compensation for overtime.

64. Alternatively, if the stipend was excluded from his final compensation amount, Mr. Hudson asserted CalPERS should be estopped from collecting overpayments he received due to CalPERS's error.

LEGAL CONCLUSIONS

General Principles Relating to CalPERS's Functions

THE CONSTITUTIONAL MANDATE

1. Article XVI, section 17, subdivision (a), of the California Constitution provides in part:

The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

ADMINISTRATION OF THE RETIREMENT FUND

2. "A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty." California Constitution, article XVI, section 17, subdivision (b).

3. The Constitution imposes on CalPERS a duty to "ensure the rights of members and retirees to their full, earned benefits." *City of Oakland v. Public Employees' Retirement System* (2002), 95 Cal.App.4th 29, 46. (cited with approval in *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 544. But, "[CalPERS's] fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. [CalPERS] has a duty to follow the law." *City of Pleasanton, supra*.

4. Pension legislation should be liberally construed and all ambiguities should be resolved in favor of the pensioner. (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 473.) "However, this rule of liberal construction is applied for the purpose of effectuating obvious legislative intent and should not blindly be followed so as to eradicate the clear

language and purpose of the statute.” (*Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1603.

5. “Final compensation” is a function of the employee’s highest “compensation earnable.” “Compensation earnable” consists of a member’s “payrate” and “special compensation.” “Payrate” is the monthly amount of cash compensation received by the employee pursuant to publicly available pay schedules. *Prentice v. Board of Admin., California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 989-90 (*Prentice*). An employee’s pension “will not necessarily reflect his total personal compensation because payrate, like special compensation, is ‘measured by the amounts provided by the employer to similarly situated employees.’” *Molina v. Bd. of Admin., California Pub. Employees’ Ret. Sys.* (2011) 200 Cal.App.4th 53, 65–66. (Citing, *Prentice, supra.*, 157 Cal.App.4th at p. 992.)

“Under PERL, the determination of what benefits and items of pay constitute ‘compensation’ is crucial to the computation of an employee’s ultimate pension benefits.” (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.)

Burden and Standard of Proof

6. Evidence Code section 500 states, “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

7. Evidence Code section 550 provides:

(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence.

(b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact.

8. The standard of proof is a “preponderance of the evidence.” (Evid. Code, § 115.)

9. Although the parties agreed at the hearing that the burden of proof was with Mr. Hudson and City, the allocation of burden must be split between the parties. CalPERS had the burden of establishing that it made an error in the payments that were provided to Mr. Hudson, the nature and extent of its error, and that CalPERS was entitled to correct the error and recover any overpayment authorized by law. On that issue, Mr. Hudson had the

burden of establishing that CalPERS' recovery of the overpayment would be unjust and inequitable.⁹

The Five Percent Stipend Was Not Contained in a Publicly Available Pay Schedule and Must be Excluded from the Calculation of Mr. Hudson's Final Compensation

STATUTORY AUTHORITY

10. Government Code section 20630 provides in part:

(a) As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of any of the following:

[¶] . . . [¶]

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.

11. Government Code section 20635 provides:

When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service. For the purposes of this part, overtime is the aggregate

⁹ A party has the burden of proof as to each fact essential to the claim for relief or defense that he is asserting. (Evid. Code § 500.) "[C]ourts may alter the normal allocation of the burden of proof based on considerations of fairness and policy. [Citation.] . . . [B]urden-shifting decisions recognize that "determining the incidence of the burden of proof . . . 'is merely a question of policy and fairness based on experience in the different situations.'" [Citations.]" "In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: The knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact." [Citations.]" (*In re Marriage of Margulis* (2011) 198 Cal.App.4th 1252, 1267-1268.)

service performed by an employee as a member for all employers and in all categories of employment in excess of the hours of work considered normal for employees on a full-time basis, and for which monetary compensation is paid. If a member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full time, the position with the highest payrate or base pay shall be reported to this system. This provision shall apply only to service rendered on or after July 1, 1994.

12. Government Code section 20636 provides in part:

(a) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b)(1) "Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. . . .

[¶] . . . [¶]

(c)(1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

[¶] . . . [¶]

(d) Notwithstanding any other provision of law, payrate and special compensation schedule, ordinances, or similar documents shall be public records available for public scrutiny.

[¶] . . . [¶]

(e)(1) As used in this part, "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class.

[¶] . . . [¶]

13. California Code of Regulations, title 2, section 570.5, became operative August 10, 2011. It provides:

(a) For purposes of determining the amount of "compensation earnable" . . . payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

(1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

(2) Identifies the position title for every employee position;

(3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

(4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;

(5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

(6) Indicates an effective date and date of any revisions;

(7) Is retained by the employer and available for public inspection for not less than five years; and

(8) Does not reference another document in lieu of disclosing the payrate.

(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:

(1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;

[¶] . . . [¶]

EVALUATION

14. The City Manager is the "head of the administrative branch of the City government." As such, the City Manager serves as an executive member of numerous boards and commissions and serves, as well as he serves on multiple regional bodies. By City Charter, the City Council may assign to the City Manager any other duties "that may be required of the City Manager."

15. Serving as Executive Director of the Redevelopment Agency and Housing Authority are responsibilities within the job duties of a City Manager, and those appointments do not constitute service in two positions. The fact that the City Council assigned these duties to Mr. Hudson after he began employment as City Manager did not convert them to duties performed outside of his employment contract or outside the scope of services of a City Manager. Services performed as Executive Director of these City agencies were performed within normal working hours of the City Manager. The compensation Mr. Hudson received for performing services as Executive Director of these agencies was not overtime compensation. No evidence was presented to suggest the stipend was part of a scheme to spike Mr. Hudson's retirement benefit.

16. The calculation of Mr. Hudson's retirement benefit must be determined by his "compensation earnable," which is the sum of his payrate and special compensation. (Govt Code § 20636, subd. (a).) Mr. Hudson has not argued the five percent stipend is special compensation; he asserts the stipend must be included as payrate. In Mr. Hudson's case, payrate is defined as the normal base pay paid to similarly situated employees (employees in his bargaining unit) for full-time work performed during normal working hours "pursuant to publicly available pay schedules." (Govt Code § 20636, subd. (b).) The five percent stipend cannot be considered payrate because it was not paid to other employees in his bargaining unit and, the five percent amounts were not contained in City's published salary schedules.

PUBLICLY AVAILABLE PAY SCHEDULE

17. Under well-established rules of statutory construction, courts must ascertain the intent of the drafters to effectuate the purpose of the law. Because statutory language is generally the most reliable indicator of legislative intent, the words of a statute are first examined, giving them their usual and ordinary meaning and construing them in context. When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. Thus, if the language is unambiguous, the plain meaning governs and it is unnecessary to resort to extrinsic sources to determine legislative intent. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1560-1561.)

18. The word “available” means “suitable or ready for use” and “readily obtainable; accessible.” ([http://www.dictionary.com/browse/available.](http://www.dictionary.com/browse/available)) The word “publicly” modifies “available.” “Publicly” means “in a public or open manner or place” and “in the name of the community” and “by public action or consent.” ([http://www.dictionary.com/browse/publicly?s=t.](http://www.dictionary.com/browse/publicly?s=t))

19. The word “schedule” means “a written or printed list, catalog, or inventory.” (Merriam-Webster’s Collegiate Dict. (11th ed. 2006, p 1110m col. 1.)” *Tanner v. California Public Employee’ Retirement System*, Cal. App.4th (2016 C.D.O.S. 6932)

20. Mr. Hudson argued that before California Code of Regulations, title 2, section 570.5 (which became operative August 10, 2011, just two days before the effective date of his retirement), City was without guidance as to what constituted a “publicly available pay schedule” and what steps had to be taken to comply with the requirement that compensation be included on a publically available pay schedule. He argued that his employment agreement, which was attached to a memorandum, approved by City Council Resolution, and contained his pay information, satisfied the “publicly available pay schedule” requirement as it existed in 2011 when he retired. This argument, however, fails to acknowledge that the term “publicly available pay schedule” was not a new term first used in 2011. Instead, reference to “publicly available pay schedule” was included in Government Code section 20636, subdivision (b)(1) in 2006, as a “matter of clarification.” (*Prentice, supra.*, 157 Cal.App.4th at p.990, fn. 4.) As noted above, the plain meaning of the words “publicly,” “available,” and “schedule” give ample guidance of what was required to satisfy Government Code section 20636.

21. It is correct that the fact that Mr. Hudson had an employment agreement with City was public information because it was mentioned in a City Council agenda and City Council minutes and it was the subject of a City Council resolution. It is also correct that the amount of Mr. Hudson’s compensation was contained in his employment agreement and the agreement was attached to a memorandum that was a public document. However, these public documents do not satisfy the requirement that the City Manager’s compensation be in a publicly available pay schedule.

The Legislature authorized the use of a public employee’s payrate to calculate a public service retirement allowance only when the payrate was readily available to an interested person without unreasonable difficulty. The legislative intent is not realized where the public employee’s payrate is buried in an agreement, agenda, minutes or other document that prevents easy calculation or is not contained in a published pay schedule. The fact that a public employee’s contract of employment may be found somewhere in public records does not render that employment contract “publicly available” within the meaning of PERL.

22. The very fact that City’s salary schedule purports to accurately list the compensation for the City Manager operates to discourage a member of the public from looking further to determine the actual amount of compensation and constitutes evidence that Mr. Hudson’s true compensation was not readily available. Unless an individual knew the

City Manager had an employment agreement that provided him with an extra five percent stipend, there would be no motive to look further than the publically available salary schedule. Similarly, a member of the public would need to know when the most recent employment agreement was entered into to perform the calculations necessary to determine the City Manager's current salary. The argument that the agreement and City resolution was a public record and therefore available to the public is specious and does not satisfy the requirements of a publicly available salary schedule.

23. An argument that Mr. Hudson's employment agreement and related public documents complied with pay schedule requirements as they existed before enactment of California Code of Regulations, title 2, section 570.5, was implicitly rejected by the court in *Tanner v. California Public Employee' Retirement System, supra*. In *Tanner*, the public employee, a City Manager, submitted his application for retirement in mid-2009, two years before California Code of Regulations, title 2, section 570.5, became effective. Nonetheless, although without specific citation to section 570.5, the *Tanner* court determined an employment contract with the City Manager and a document purporting to be a cost analysis of the City Manager's compensation, both of which were available to the public, did not constitute pay schedules. The court stated, "These documents relate only to Tanner personally, without listing any other position or person." *Id.* at p. 752. The court concluded the documents Tanner relied on were not pay schedules and could not be used to determine Tanner's final compensation or the amount of his retirement benefits.

24. The five percent stipend was not part of a publicly available pay schedule and it may not be included in calculating Mr. Hudson's compensation earnable in determining the amount of his retirement benefit.

AVAILABLE TO SIMILARLY SITUATED EMPLOYEES

25. Compensation paid to a public employee that was not part of a publicly available pay schedule and was not part of payrate for similarly situated employees can not be considered in calculating retirement benefits (*Prentice, supra*., at pps. 993-994; *Tanner, supra*.) No evidence was presented that established any other City employee in Mr. Hudson's bargaining unit received a five percent stipend between 2007 and 2011. Periodic increases in pay that were afforded to Mr. Hudson and other similarly situated employees were reflected in City's salary schedules. Including as compensation earnable those sums that are disclosed only in an employment agreement improperly allows a public agency to provide additional compensation to a particular individual without disclosing the actual compensation to other similarly situated employees.

FAILURE TO INCLUDE THE STIPEND DUE TO ERROR OR CITY PERSONNEL

26. Mr. Hudson and City argued that, in 2007, Human Resource personnel erred when they did not update City's salary schedule by calculating five percent of Mr. Hudson's base salary and adding it to the amount reported in the salary schedule. The fact that City personnel did not include the stipend in the City's published salary schedule is unfortunate,

and was not related to any fault of Mr. Hudson. However, the fact is that the amount of the stipend was not included in five salary schedules between 2007 and 2011.¹⁰ The legislature requires that the process of compensating public employees be transparent and the results available to the public. Permitting City's alleged continuing error to override important statutory provisions and legislative intent would violate significant policy considerations and cannot be permitted.

CalPERS May Correct Errors Made to the Calculation of Mr. Hudson's Retirement Benefit

STATUTORY AUTHORITY

27. Government Code section 20160 provides, in part:

[¶] ... [¶]

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of . . . this system.

[¶] ... [¶]

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction . . .

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties . . . are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

¹⁰ Salary Schedules with effective dates February 6, 2007, July 1, 2007, June 28, 2008, June 25, 2010 and September 2, 2011, did not include the five percent stipend.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

28. Government Code section 20163 provides in part:

(a) If more or less than the correct amount of contribution required of members, the state, or any contracting agency, is paid, proper adjustment shall be made in connection with subsequent payments, or the adjustments may be made by direct cash payments between the member, state, or contracting agency concerned and the board or by adjustment of the employer's rate of contribution. . . . Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person . . . will receive the actuarial equivalent of the allowance to which the member is entitled. . . .

29. Government Code section 20164, subdivision (b) provides:

(b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:

(1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.

(2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

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EVALUATION

30. CalPERS has the authority to challenge or correct erroneous reports of income made by employers. For example, CalPERS disallows "spiking," the intentional inflation of a public employee's final compensation, when it has reason to believe it occurred. In *Hudson. v. Board of Administration* (1997) 59 Cal. App. 4th 1310¹¹, a city passed a resolution that permitted its employees to convert employer-paid benefits to salary increases if they agreed to retire within twelve months. As a result of the resolution, the salaries of the employees who exercised this option were artificially inflated in the employee's last year of employment, which increased their retirement benefit. CalPERS's refusal to include these amounts in calculating retirement benefits was upheld by the appellate court.

CalPERS made an error in May 2012 by including the five percent stipend in its calculations of Mr. Hudson's retirement benefits and by paying him increased benefits to which he was not entitled. CalPERS notified Mr. Hudson of its error by letter dated May 21, 2014. Mr. Hudson appealed CalPERS determination to reduce his retirement benefit; he has collected increased benefits since then based upon an erroneous calculation that included the stipend.

A preponderance of the evidence established that, in April 2012, CalPERS advised Mr. Hudson that the five percent stipend would not be included in his retirement calculation. Mr. Hudson did not agree with this determination. A preponderance of the evidence established that when Mr. Hudson was advised by CalPERS a few weeks later that it had received additional information and, based on that information, recalculated and increased the amount of Mr. Hudson's retirement benefit, Mr. Hudson reasonably assumed he was entitled to receive the re-calculated amount of the increased benefit. Mr. Hudson's and his family's spending habits and accepted financial obligations were based on the increased benefit amounts he received. CalPERS produced no evidence to the contrary.

Once CalPERS discovered its error, two years later, CalPERS had the duty as a fiduciary to correct the error in a just and equitable fashion. It was proper for CalPERS to notify Mr. Hudson of its error and to inform him that CalPERS would terminate the erroneous payment to which he was not entitled. Under Government Code section 20160, subdivision (e), CalPERS was required to make a correction that returned the parties to the status they would have occupied but for the error.

31. The calculation of Mr. Hudson's payrate does not include the five percent stipend he received. CalPERS mistakenly included the five percent stipend in calculating Mr. Hudson's retirement benefit. Allowing the mistake to go uncorrected would result in Mr. Hudson's receipt of a benefit to which he is not entitled. The mistake must be corrected.

¹¹ This decision does not relate to respondent in this matter.

CalPERS May Not Collect Overpayments Made up to May 21, 2014, but CalPERS May Collect Overpayments Made after May 21, 2014

LEGAL AUTHORITIES

32. It is well settled that estoppel cannot be used to enlarge the powers of the Public Employees' Retirement System. (See, *Page v. City of Montebello* (1981) 112 Cal.App.3d 658 at 667; *Bd. of Administration, State Employees' Retirement System v. Ames* (1963) 215 Cal.App.2d 215 at 230; and, *Boren v. State Personnel Board* (1951) 37 Cal.App.2d 634), or provide a benefit which is not otherwise statutorily authorized because public employee benefits are wholly statutory. (See *Hudson v. Posey* (1967) 255 Cal.App.2d 89.).

Estoppel is an equitable doctrine that is centuries old. It seeks to prevent a person or entity from profiting from their own wrongdoing. "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *California School Employees Association v. Jefferson Elementary School District* (1975) 45 Cal.App.3d 683, 692 (Internal quotations and emphasis omitted). In determining whether or not estoppel shall be applied to a given situation, the burden of establishing that all of the requirements have been met is upon the party asserting the estoppel.

33. The court in *Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 868-869, discussed when equitable estoppel may be asserted against a governmental entity:

Equitable estoppel may be asserted against the government in some circumstances. . . . The requisite elements for equitable estoppel against a private party are: (1) the party to be estopped was apprised of the facts; (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended; (3) the party asserting estoppel was ignorant of the facts; and (4) the party asserting estoppel suffered injury in reliance on the conduct. [Citation.] . . . The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel are present and . . . the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.

EVALUATION

34. CalPERS's right to correct any overpayment to Mr. Hudson is governed by Government Code section 20163, and its right to recovery is subject to a three year period of

limitations set forth in 20164. Under law and equity, CalPERS's right to recovery is also subject to any legal or equitable defense Mr. Hudson might establish.

35. Application of the legal authority cited above supports a finding that CalPERS must correct its error so that, once the error was discovered and Mr. Hudson was notified of it, Mr. Hudson was treated in the same manner as all other members of the retirement system who performed like duties and functions and retired with the same number of years.

36. Mr. Hudson established by a preponderance of the evidence that, upon receipt of CalPERS's letter of May 25, 2012, he reasonably believed that CalPERS had properly calculated his retirement benefit until he was notified to the contrary by CalPERS's letter dated May 21, 2014; that his spending habits were reasonably related to the amounts that he obtained from CalPERS before he received CalPERS's May 21, 2014 letter; and that requiring him to repay any overpayments that were made before CalPERS notified him of its error would be unjust and unfair.¹²

37. Equitable estoppel does prohibit CalPERS from collecting amounts overpaid after Mr. Hudson was notified of CalPERS's error. Mr. Hudson, aware that CalPERS asserted he was being overpaid, appealed CalPERS's determination and elected to continue receiving the increased benefits until all appeals were exhausted. Mr. Hudson understood and accepted the risk that his appeal might result in a reduction of his retirement benefits. Retaining the overpayment amounts after being on notice of a potential amount does not satisfy equitable principles.

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¹² CalPERS suggested Mr. Hudson's "healthy" retirement payments and the equally "healthy" salaries he received after he retired established he did not reasonably rely on the amounts received from CalPERS and/or he would not suffer any financial impediment by having to repay all overpaid amounts. The interpretation of law and application of equity in this case does not turn upon the amount of Mr. Hudson's retirement benefits or his ability to be highly compensated in his employment. Mr. Hudson testified credibly that requiring payment of the estimated \$40,000 in overpayments would have a significant impact on his financial situation and there was no evidence to the contrary.

ORDERS

1. CalPERS's determination that Bradley J. Hudson's final compensation shall be adjusted to exclude the five percent stipend contained in Mr. Hudson's employment agreement is affirmed.
2. CalPERS may collect overpayments made to Bradley J. Hudson after May 21, 2014.
3. CalPERS may not collect overpayments made to Bradley J. Hudson before May 21, 2014.

DATED: February 1, 2017

DocuSigned by:
Susan J. Boyle
B1906978EFC743F...

SUSAN J. BOYLE
Administrative Law Judge
Office of Administrative Hearings