

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT REGARDING THE PROPOSED DECISION

Respondent Bradley J. Hudson (Respondent) was the City Manager for Respondent City of Riverside (Riverside). Riverside contracts with CalPERS for retirement benefits for its eligible employees. On June 21, 2011, Respondent submitted an application for service retirement to CalPERS with an effective retirement date of August 13, 2011. On August 17, 2011, based on a final compensation amount of \$24,750.27, CalPERS informed Respondent that his monthly retirement benefit would be \$16,451.50.

In April 2012, CalPERS' Compensation Review Program analyzed additional information provided by Riverside relating to Respondent's final compensation. CalPERS reviewed Respondent's January 16, 2007 and July 23, 2008 employment agreements (Employment Agreements) with Riverside. Pursuant to the terms of the Employment Agreements, Respondent received a 5% stipend for performing additional duties which consisted of serving as Executive Director of Riverside's Redevelopment Agency and Housing Authority. Riverside had reported to CalPERS the 5% stipend as special compensation. CalPERS determined that the 5% stipend did not qualify as compensation earnable under the California Public Employees' Retirement Law (PERL) because the stipend amounted to overtime pay for additional duties. In addition, based on new information provided by Riverside, CalPERS determined that Respondent's correct monthly payrate was \$25,244.85.

On April 22, 2012, CalPERS informed Respondent that the 5% stipend for performing additional duties did not qualify as compensation earnable under the PERL and should not have been included when CalPERS determined Respondent's final compensation. Consequently, CalPERS informed Respondent that his retirement benefits would be adjusted to remove the improper amount. At this time Respondent did not appeal CalPERS' determination that the 5% stipend should not be included in his final compensation for purposes of calculating his retirement benefits.

On May 4, 2012, Riverside sent correspondence to Respondent informing him that it reported the 5% stipend to CalPERS as special compensation; however, Riverside informed Respondent that CalPERS is responsible for ultimately determining if an item qualifies as special compensation under the PERL.

On May 25, 2012, CalPERS sent Respondent a letter informing him that CalPERS was amending his monthly retirement allowance. Unfortunately, when recalculating Respondent's benefits, CalPERS took into consideration the higher payrate (\$25,244.85) but failed to exclude the 5% stipend from his final compensation amount.

On July 18, 2012, CalPERS informed Respondent that because his retirement allowance exceeds the limitations imposed by Internal Revenue Code (IRC) Section 415, CalPERS would have to pay a portion of Respondent's retirement allowance through the Replacement Benefits Plan (RBP).

On or around May 12, 2014, while CalPERS was reviewing Respondent's information to ensure compliance with IRC Section 415, it was discovered that CalPERS failed to adjust Respondent's final compensation amount in May 2012 to deduct the 5% stipend from his final compensation amount. This error resulted in an overpayment of Respondent's retirement benefits.

On May 21, 2014, CalPERS informed Respondent that CalPERS erroneously failed to exclude the 5% stipend from his final compensation when it was recalculating his benefits in May 2012. CalPERS informed Respondent that these errors resulted in an overpayment of benefits in the amount of \$20,742.14. CalPERS provided Respondent with options for repaying the overpayment amount.

On June 15, 2014, Respondent appealed CalPERS' determination. In addition, Respondent requested that CalPERS take no action with respect to his pension until all informal and formal appeals and administrative hearings had been exhausted. Pursuant to his request, CalPERS did not take any action with respect to collecting the amount overpaid to Respondent.

A hearing took place on Respondent's appeal on October 25, 2016. Both Respondents Hudson and Riverside were represented by counsel at the hearing.

At the hearing, CalPERS elicited testimony from a Retirement Program Specialist II with CalPERS' Compensation Review and Analysis Unit. The witness testified that it was CalPERS' determination that the 5% stipend did not qualify as special compensation under the PERL. In addition, the witness testified that the 5% stipend could not qualify as payrate because it was not included in Riverside's publicly available pay schedule for Respondent's position. Since the stipend did not qualify as either payrate or special compensation, it could not be included in the calculation of his pension.

Respondent testified on his own behalf. Immediately prior to the hearing, Respondent withdrew the argument contained in his appeal letter that the 5% stipend should qualify as allowable special compensation. Instead, he argued that the 5% stipend was actually part of his payrate. Respondent testified that it was Riverside's mistake for not revising its master fringe benefits and Salary Schedule (Salary Schedule) to include the 5% stipend. It was Respondent's position that when Riverside adopted resolutions to approve the Employment Agreements, the Salary Schedule should have been revised. Respondent also testified that the Salary Schedules were revised over time to reflect the raises he received pursuant to the terms of the Employment Agreements, and that they should have also been revised to include the 5% stipend as payrate. Respondent asserted that the 5% stipend was not supposed to be reported by Riverside as special compensation but that it was always supposed to be included as part of his payrate. Respondent argued, in the alternative, that CalPERS should be estopped from collecting the overpayments he received due to CalPERS' error.

Respondent testified that prior to retiring from Riverside he had reached an agreement to work at the County of Sacramento as its Chief Executive Officer (CEO.) Respondent estimated his salary with Sacramento County was \$250,000.00. Respondent worked as CEO of Sacramento County for approximately 4.5 years after he retired. Currently, Respondent is the General Manager of Village Management Services and earns approximately \$325,000.00 per year, or \$27,083 per month.

Respondent testified that he currently supplements his mother's income to allow her to live in an assisted living facility. Respondent also testified that he cares for his disabled adult son and a three-year-old grandson. Respondent testified that if his monthly benefits were reduced and he was required to pay back the overpayment amount, it would have a significant impact on him and his family. Respondent testified that his "plate is pretty full right now without, you know, having financial problems to go with it" and that having to repay the overpayment amount for the next several years was, "pretty much going to wipe me out." Respondent provided no details or offered any evidence regarding the total amount of expenses he incurs in supporting his mother, son and grandson. When Respondent's current gross retirement allowance (\$18,141) and current gross pay (\$27,083) are combined, his total gross income is \$45,224. Respondent asserted that his retirement benefits would be reduced by approximately \$1,300 if he were required to pay back the overpayment amount. This amounts to 2.9% of his gross pay, far less than the 5-15% reduction in pay that state workers experienced when mandatory furloughs were ordered.

In addition, Respondent and Riverside elicited testimony from Miriana Gonzalez. Ms. Gonzalez is currently Riverside's Interim Deputy Human Resources Director. Prior to serving as Interim Deputy Human Resources Director, Ms. Gonzalez was a Human Resources Analyst. As part of her duties Ms. Gonzalez had occasion to amend the Salary Schedule in accordance with City Council Resolutions. It was Ms. Gonzalez' testimony that the Salary Schedule should have been revised to include the additional compensation owed to Respondent, including the 5% stipend.

On February 1, 2017, the Administrative Law Judge issued her Proposed Decision. The Proposed Decision correctly finds that the 5% stipend was not contained in a publicly available pay schedule and must be excluded from the calculation of Respondent's final compensation. In other words, the Proposed Decision correctly recommends that the 5% stipend is not compensation earnable under the PERL and should not be included in the calculation of Respondent's retirement benefits. With regard to this issue, the Proposed Decision is thorough, well-reasoned and correctly applies the law to the facts, and it should be adopted.

The Proposed Decision also finds that CalPERS may correct errors made to the calculation of Respondent's retirement benefits. The Proposed Decision correctly finds that pursuant to Government Code section 20160, subdivision (e), CalPERS is required to make a correction that returned the parties (Respondent, Riverside and CalPERS) to the status they would have occupied but for the error. The Proposed Decision found that CalPERS made an error in May 2012, by including the 5% stipend in its calculation

of Respondent's retirement benefits which resulted in Respondent receiving benefits to which he was not entitled. The Proposed Decision finds that CalPERS notified Respondent of this mistake in May 2014, and that Respondent collected increased benefits based upon an erroneous calculation that included the 5% stipend since that time. The Proposed Decision finds that allowing CalPERS' mistake to go uncorrected would result in Respondent's receipt of a benefit to which he is not entitled. With regard to this issue, the Proposed Decision is thorough, well-reasoned and correctly applies the law to the facts, and it should be adopted.

The Proposed Decision finds that CalPERS is not entitled to collect overpayments made to Respondent up to May 21, 2014, the date CalPERS notified Respondent of its mistake in including the 5% stipend in his pension calculation. The Proposed Decision finds that CalPERS' right to recover overpayments is subject to legal and equitable defenses. The Proposed Decision finds that CalPERS' right to correct any overpayment is governed by Government Code section 20163, and CalPERS' right to recovery is subject to a three-year-period of limitations set forth in 20164.

The ALJ found that Respondent established by a preponderance of the evidence that Respondent reasonably believed and relied upon CalPERS' calculation of his benefits in May 2012, and that his spending habits were reasonably related to the amounts obtained from CalPERS before he received CalPERS' May 21, 2014 letter. The Proposed Decision concluded that requiring Respondent to repay retirement benefits he received before CalPERS notified him of its error would be unjust and unfair, despite the fact the ALJ found he was not entitled to receive the benefits.

It is staff's position that the Proposed Decision is contrary to established case law that holds a member is not entitled to receive and/or retain retirement benefits to which he was not entitled. See *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 543-544; see also, *Chaidez v. Board of Administration* (2014) 223 Cal.App.4th 1425, 1431-32.)

Furthermore, it is staff's position that the Proposed Decision, in finding that requiring Respondent to repay any overpayments made to him prior to May 21, 2014 would be unjust and unfair, improperly applies the law regarding estoppel against a public entity. Pursuant to *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, to apply estoppel against a public entity, the interest of the private party (Respondent) must outweigh the effect on public interest and policies. Here, it is staff's position that by finding Respondent was not entitled to include the 5% stipend as part of his compensation earnable, Respondent's interests in retaining benefits which he was not entitled to receive **cannot** outweigh the effect on CalPERS' interests and policies relating to the collection of overpayments. In addition, it is staff's position that the finding that it would be unjust and unfair for Respondent to repay the amounts he was not entitled to receive would put Respondent in a position superior to that of other CalPERS' members who are required to repay benefits to which they were not entitled to receive. Finally, it is staff's position that the record does not contain evidence that would allow one to

conclude that it would be a hardship to require Respondent Hudson to repay the full amount of the overpaid benefits.

The Proposed Decision correctly recommends that the Board exclude from Respondent's final compensation the 5% stipend that he received for performing additional duties. The Proposed Decision also correctly finds that CalPERS is entitled to correct errors and collect from Respondent overpayments made to Respondent after May 21, 2014.

It is staff's position that the law and the evidence do not support the Proposed Decision's finding that requiring Respondent to repay the full amount would be a hardship. Consequently, staff believes that the Board should remand the matter back to the Office of Administrative Hearings to take additional evidence on this issue.

The risks of remanding the matter for the taking of further evidence are minimal because the Proposed Decision after Remand would come back to the Board for further review.

April 12, 2017



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