ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)
December 5, 2018

VIA FAXSIMILE AND U.S. MAIL
(916) 795-3972

Ms. Cheree Swedensky
Assistant to the Board
CalPERS Executive Office
Post Office Box 942701
Sacramento, CA 94229-2701

Re: Revised Argument of Members Mark Bills and Judi Cutaia for the Board

Dear Ms. Swedensky:

The key facts of this case are (1) retired City of Davis firefighters Mark Bills and Judi Cutaia (collectively, “Appellants”) neither proposed nor negotiated that the compensation at issue, their longevity pay, be deemed pensionable. They simply exercised an option set forth to them in their memorandum of understanding (“MOU”). (2) They based their retirement date on financial calculations that included the longevity pay in reliance on confirmation from Respondent California Public Employees’ Retirement System (“CalPERS”) that their pensionable compensation was accurate. (3) CalPERS informed the City in March 2014 that the longevity pay was not pensionable, but neither the CalPERS nor the City notified Appellants until May 2017, by which time both Appellants had been retired and relying on their pension benefits as originally calculated for upwards five years. (4) CalPERS has reduced the pension benefits of Bills and Cutaia and is collecting reimbursement of three years’ worth of “overpayment,” resulting in a reduction in income of approximately $1,250 and $2,000 respectively per month — a crushing financial hardship for them both. Appellants requested forgiveness for the overpayments but the administrative law judge (“ALJ”) ordered that CalPERS is entitled to recoup the overpayments in his Proposed Decision and inquiry to CalPERS counsel has netted no response.

Appellants did nothing wrong and in fact, took every available step to ensure that they would not wind up in this position and yet, here they are. And Appellants come before the Board alone, with the City and CalPERS unwilling to take responsibility for their failures. This cannot stand.

Background Facts:

The facts are largely undisputed. Appellants spent nearly three decades working as firefighters for the City of Davis. Proposed Decision (“PD”) at p. 2, ¶¶ 2-5. In 2009, the City negotiated an MOU with the Davis Professional Firefighters Association, Local 3494 (the “PFFA”) for the period of December 2009 through June 2012. PD at p. 3, 7. Section 3B of the MOU provided that the City would take the amount allocated to each member for health and dental benefits.
and, at the member’s election, pay 80% of that amount to the member either as a “cafeteria cash out”/“cash in lieu” payment or, for members with at least 25 years of service, the City would convert the money to “longevity pay.” Id. The longevity pay would be reported to CalPERS as pensionable special compensation.

Appellants learned about the longevity pay when it was presented to them by the PFFA and thus, did not participate the creation or the negotiation of Section 3B. Hearing Transcript (“HT”) at pp. 41:8-14; 51:3-9. Appellants, both having more than 25 years of service, elected to have their “cafeteria cash out” funds converted to longevity pay. PD at p. 3, ¶ 8. The City and Appellants made CalPERS contributions on the longevity payments, which were received as part of Appellants' bi-weekly paychecks. PD at p. 3, ¶ 10.

Bills had been injured on the job. HT at p. 40:8-13. He purchased additional service credit in order to be able to retire as soon as he could. HT at p. 40:14-24. He sought an estimate from CalPERS of his retirement benefits and CalPERS provided that estimate based on the reporting of the longevity pay as pensionable. HT 43:13-18. Bills received no notice from the City or from CalPERS, prior to his retirement, that the longevity pay might not be legal for inclusion in the calculation of his retirement benefits. HT 43:10-12. Had he known, he would have delayed his retirement for another year past when he did retire in February 2014. PD at pp. 2, ¶ 14 and p.4, ¶ 15.

When Cutala was contemplating retirement, she had concerns that the City was not accurately reporting her compensation earnable to CalPERS. PD at p. 5, ¶ 17; HT at pp. 53:18-54:2. She brought these concerns to CalPERS, whose representative suggested an audit of her membership account. PD at p. 5, ¶ 17. Approximately three months later, CalPERS returned a report to Cutala that included a section stating:

"Reviewed payroll through 12/10/12 12/21/12 service period. Payrate within pay schedule. Special compensation are Educational incentive, Longevity pay, Lead worker, Uniform allowance. All okay to use as highest, final compensation period. Okay to calc from transcripts." PD at p. 5, ¶ 17 (emphasis added).

Based on this representation by CalPERS, Cutala decided to retire in December 2012, despite having been offered a promotion to Division Chief at the Fire Department. PD at p. 5, ¶ 20. Cutala received no notice from the City or from CalPERS, prior to her retirement, that the longevity pay might not be legal for inclusion in the calculation of her retirement benefits. HT 53:12-15. Had she known, she would have accepted the Division Chief promotion and worked for at least another two years. PD at p. 5, ¶ 20.

Not referenced in the ALJ’s Proposed Decision is the procedural history between when Bills and Cutala retired and when they were finally notified that CalPERS had determined the longevity pay to be not pensionable and was slashing their retirement benefits.

In an email dated March 4, 2014, a CalPERS “Compensation Review Analyst” notified the City that CalPERS had reviewed Section 3B of the MOU with respect to a different firefighter and concluded that the longevity pay offered therein was “final settlement pay.” Exhibits C and 8. Final settlement pay is expressly excluded from pensionable special compensation in Title 2 of the California Code of Regulations, Section 571. In that same email, CalPERS directed the City to “make reversal for all pay periods where longevity was reported.” Exh. 8.
The City notified CalPERS on March 13, 2014 that there were four firefighters exercising the option to receive longevity pay - including Bills and Cutaia. Id. Yet neither the City nor CalPERS notified Bills and Cutaia that there was an issue with their pension benefits. HT at p. 81:8-8.

On August 29, 2014, CalPERS requested confirmation from the City that reversals of the longevity pay had been made. Exh. 8. The City responded that it had not made the reversals and that it was going to take a lot of work to do so. Id. Again, nothing was disclosed to Bills or Cutaia and CalPERS does not appear to have raised the issue again until May 2017, when it sent notices to Bills and Cutaia that their pension benefits were being drastically reduced. HT at pp. 43:24-44:2; 56:15-18. By this point, Cutaia had been retired for four and a half years and Bills had been retired for three years.

On May 6 and May 20, 2017, CalPERS notified Bills that it was removing the calculation of his retirement benefits, reducing his monthly allowance by $760.65 effective June 1. PD at p. 4, ¶ 14. CalPERS further informed Bills that he had been overpaid $30,147.66 and, though the amount would be reduced by the three-year statute of limitations for recovering erroneous payments set forth in Government Code section 20164, he was still obligated to reimburse CalPERS $28,086.45. Id. The recalculation of his pension benefits plus repaying the overpayment in monthly installments has reduced Bills's monthly pension income by approximately $1,250. Exh. 9.

This reduction is a severe financial burden to Bills, who helps financially support his grown children. HT at p. 46:5-14.

On May 8, 2017, CalPERS notified Cutaia that it was removing the longevity pay from the calculation of her retirement benefits, reducing her monthly allowance by $1,183.18 effective June 1. PD at p. 5, ¶ 19. CalPERS further informed Cutaia that she had been overpaid $60,349.12 and, though, as with Bills, the amount would be reduced by the three-year statute of limitations, she was still obligated to reimburse CalPERS $41,822.22. Id. The recalculation of her pension benefits plus repaying the overpayment in monthly installments has reduced Cutaia's monthly pension income by nearly $2,000. Exh. 9.

This reduction is a severe financial burden to Cutaia, who has a child with special needs living at home. PD at p. 5, ¶ 20. She had her husband have had to dip into their savings in the amount of $15,000 to stay afloat financially. Id. The income reduction also forced Cutaia to go back to work and she now holds two jobs, but they only provide approximately $1,000 per month in extra income. Id.

Administrative Appeal and Proposed Decision

Appellants appealed the decision to reduce their pension benefits to CalPERS. CalPERS also named the City of Davis as a party to the administrative proceedings, but the City did not participate.

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1 CalPERS conducted a formal audit of the City of Davis, issuing a report in October 2016 in which CalPERS found that the City incorrectly "reported a cafeteria cash out as special compensation for ... a Fire Captain" which was not pensionable special compensation for the pay period ending April 13, 2014 — past the retirement dates of both Bills and Cutaia. Exh. 7.
Following an evidentiary hearing and briefing by Appellants and CalPERS, the ALJ concluded that the longevity pay was not pensionable as a matter of law. PD at p. 11, ¶¶ 4 and 7. The ALJ found that the Section 3B longevity pay did not meet the definition of longevity pay set forth in Section 571 because it was not extra compensation for Appellants. PD at p. 12, ¶ 7. The ALJ concluded Appellants were receiving the same compensation they were when it was labeled a "cafeteria cash out" and the fact that they made 9% contributions to PERS was inconsequential. Id.

The ALJ further found that the amount of the Section 3B longevity pay was not set forth in the MOU as is required by Section 571, since the amount of the longevity pay was variable and entirely dependent on the unexhausted portion of the individual firefighter's health benefits allocations. PD at p. 12, ¶ 8.

The ALJ further found that the payments were not, as required by Government Code section 20636(c), available to every member of the relevant group or class of employees because even if a firefighter had at least 25 years of service, s/he could not receive longevity pay if s/he needed the money for health benefits. PD at p. 12, ¶ 8.

The ALJ further found that the payments were not historically consistent with prior payments for the job classification as required by Section 571(b)(8) since the cafeteria cash outs were not potentially treated as pensionable longevity pay prior to Section 3B of the 2009-2012 MOU. PD at p. 12, ¶ 8.

Finally, the ALJ rejected Appellants affirmative defenses of laches and equitable estoppel, concluding that, for the latter, including the Section 3B longevity pay as pensionable special compensation would violate public policy and exceed the powers accorded CalPERS by the Legislature. PD at pp. 12-14.

The Section 3B Longevity Pay Should Be Deemed Pensionable or, In the Alternative, the Matter Should be Remanded for Further Briefing on the Section 571 Requirements

The ALJ erred in determining that the MOU Section 3B longevity pay did not meet the requirements of Section 571. First, the longevity pay is extra compensation for the purposes of calculating retirement benefits.

Moreover, the amount of the longevity pay is set forth in Section 3B - 80% of the amount allocated to the firefighter for health and dental benefits. The precise amount of the payment does not need to be expressed in the MOU. This is no different from, as the CalPERS analyst testified at the evidentiary hearing, the "usual" calculation of longevity payments based on a percentage of pay rate. The percentage is set forth in the MOU, but the pay rate on which the percentage is based for the individual firefighter is not. Each eligible firefighter could be at a different pay rate according to seniority, rank, step levels and the like.

The longevity pay is available to all City firefighters with at least 25 years of service because they can opt to receive the longevity pay to go toward their pension benefits and independently fund their health benefits.

The ALJ's conclusion that the longevity pay was not historically consistent with prior payments for the job classification seems illogical. Pay differentials have to start somewhere. Under the ALJ's reasoning, an employer could not ever add a pension benefit. An element of special
compensation would not be historically consistent with prior payments for the job classification if that special compensation suddenly wildly varied in amount of eligibility.

These conclusions by the ALJ were not addressed at the evidentiary hearing nor in the briefing by the parties. In the alternative, Appellants would respectfully request that the Board remand the matter for taking further evidence and briefing on the Section 571 requirements for longevity pay and special compensation.

The Equities and Public Policy Demand a Remedy for Appellants, the Innocent Victims

Contrary to the ALJ's conclusion, public policy and the powers accorded to CalPERS by the State Constitution and Legislature dictate that such a gross miscarriage of justice cannot stand. Appellants spent nearly three decades risking their lives and safety to protect that of the citizens of the City of Davis. The City and CalPERS knowingly allowed Appellants' liabilities to accrue to astronomical proportions at a time in their lives when they are most vulnerable. Now the City and CalPERS turns its backs on Appellants.

The ALJ found that CalPERS was not aware that the City was converting cafeteria cash outs to purportedly pensionable longevity pay until its 2016 audit and thus, CalPERS did not negligently or deliberately mislead Appellants. Why does CalPERS not have a duty to verify the legality of the pension benefits an employer is offering? Certainly it would be less onerous to review each employer's contract rather than each employee's pension calculations. Moreover, why is CalPERS entitled to fail to act, reap the benefit of that failure in contributions over a period of years and then get a "do-over" when the error is finally disclosed? Why should Appellants bear the burden for this?

The City failed - or perhaps refused - to participate in the administrative proceedings in any manner, despite being named a party. The City offered the longevity pay as a benefit to its firefighters without confirming that it was legally entitled to do so. Why should Appellants bear the burden for this?

The City and CalPERS both were aware that the longevity pay might not be considered legally pensionable as early as March 2014, when Cutela had been retired for about a year and Bills for about a month. Any action at that point could have at least lessened Appellants' liability and better prepared them for a future of reduced income. Perhaps Appellants could have even returned to work as City firefighters. Now the liabilities are greater and the opportunities are fewer. Why should Appellants bear the burden for this?

At the evidentiary hearing, Appellants presented evidence that reimbursement of the overpayment - even as reduced by the statute of limitations - would cause undue financial hardship. The Board has, as a matter of law, "the discretion to decide whether, how and to what extent any overpayments made" to CalPERS retirees should be repayable to CalPERS. City of Oakland v. Oakland Police and Fire Retirement System (2014) 224 Cal.App.4th 210, 244. Appellants requested a finding or directive that Appellants' overpayments be forgiven. The ALJ instead found, with no explanation or basis despite making factual findings of Appellants' financial hardship, that CalPERS is entitled to recoup the overpayments. PD at p. 14, Order ¶ 2.

At the evidentiary hearing, CalPERS's counsel made a comment off the record to Appellants' counsel that she would look into whether the Board would forgive the overpayments on its own
accord. Following the issuance of the Proposed Decision, on November 5, 2018, Appellants' counsel sent CalPERS's counsel an email reiterating Appellants' request that the overpayments be forgiven. To date, there has been no response. Even if, by law, their monthly pension benefits moving forward must be reduced to remove the factor of the longevity pay, why must Appellants bear the added burden of reimbursing the overpayments?

It is a gross violation of public policy and the public trust to allow the Proposed Decision to stand. Appellants respectfully request that the Board reject the Proposed Decision and allow the Section 3B longevity pay to remain pensionable. In the alternative, Appellants respectfully request that the Board rejected the Proposed Decision and remand the matter for the taking of additional evidence and submission of briefing regarding the Section 571 requirements for special compensation and longevity pay.

Finally, as set forth in Appellants' initial Closing Brief, Appellants respectfully request that the Board forgive the overpayments and, in addition, pay the difference in Appellants' monthly allowance as a lump sum payment of damages and seek indemnity from the City.

Very truly yours,

MESSING ADAM & JASMINE LLP

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00052808-3
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CalPERS Executive Office

FROM: Lina Balciunas Cockrell

Re: Revised Argument of Members Mark Bills and Judi Cutala for the Board

Case No. 2017-0776 / OAH No. 2018010294
Case No. 2018-0096 / OAH No. 2018030636

In the Matter of the Calculation of Final Compensation of Mark E. Bills and Judi Cutala and City of Davis

Number of Pages, Including Cover: __7__

Message:

Please see Appellants' Revised Argument for the Board regarding the above referenced matter. We are re-submitting to correct a typo as to the amount of total claimed overpayment to Judi Cutala on page 3. The total is $60,349.12.