

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Calculation of Final
Compensation of:

MARK E. BILLS,

Respondent,

and

JUDI CUTAIA,

Respondent,

and

CITY OF DAVIS,

Respondent.

Case No. 2017-0776

OAH No. 2018010294.1

Case No. 2018-0096

OAH No. 2018030636.1

AMENDED PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on July 19, 2018.

Austa Wakily, Senior Staff Attorney, represented petitioner Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS).

Lina Balciunas Cockrell, Attorney at Law, Messing Adam & Jasmine, LLP, represented respondents Mark E. Bills (respondent Bills) and Judi Cutaia (respondent Cutaia).

Respondent City of Davis did not appear at the administrative hearing and was not otherwise represented.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 7/25 20 19

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Evidence was received and the record was left open for preparation of a transcript and to permit the parties to file closing arguments. On September 24, 2018, respondents Bills and Cutaia filed their closing brief that was marked Exhibit D. On September 25, 2018, petitioner filed her closing brief that was marked Exhibit 14. On October 9, 2018, respondents Bills and Cutaia filed their reply brief that was marked Exhibit E. On October 10, 2018, petitioner filed her reply brief which was marked Exhibit 15. The four briefs were made a part of the record. The matter was submitted on October 10, 2018.

On December 19, 2018, the CalPERS Board of Administration (Board) ordered that this matter be remanded to the Office of Administrative Hearings for the taking of additional evidence. Specifically, the Board requested that the Administrative Law Judge receive additional evidence to “determine whether the language of Legal Conclusion 6 is accurate.” The Office of Administrative Hearings, in consultation with the parties, set a hearing date of June 25, 2019, for the taking of additional evidence.

On June 16, 2019, the Office of Administrative Hearings received the parties’ written stipulation by which they agreed that the issue raised by the Board could be resolved without an additional hearing and without additional evidence. The parties requested that the Administrative Law Judge determine whether the references to respondent “Hall” and “performance pay” in paragraph 6 of the Proposed Decision were made intentionally or were unintentional typographical errors and whether the analysis, as initially worded, applied to respondents’ appeal.

Upon review of Legal Conclusion 6 in the original Legal Conclusions, it has been determined the references were typographical errors which have been corrected.

ISSUE PRESENTED

Whether payments designated longevity compensation by respondents Bills’ and Cutaia’s employer respondent City of Davis, based on unused cafeteria benefits, should be considered in the determination of respondents Bills’ and Cutaia’s final compensation for calculation of retirement benefits from CalPERS?

FACTUAL FINDINGS

1. Petitioner Renee Ostrander filed the Statements of Issues solely in her official capacity as Chief, Employee Account Management Division, California Public Employees’ Retirement System.¹

¹ As the caption in this matter reflects, these matters were consolidated for hearing and the issuance of a single Proposed Decision.

2. Respondent Bills was employed by respondent City of Davis as a Firefighter II. By virtue of his employment, respondent Bills is a local safety member of CalPERS.

3. Respondent Cutaia was employed by respondent City of Davis as a Fire Captain. By virtue of her employment, respondent Cutaia is a local safety member of CalPERS.

4. On October 7, 2013, respondent Bills signed an application for service retirement with CalPERS. Respondent Bills retired for service effective February 11, 2014, with 29.522 years of service credit and has been receiving his retirement allowance from that date.

5. On October 10, 2012, respondent Cutaia signed an application for service retirement with CalPERS, with a service retirement date of December 21, 2012. Respondent Cutaia retired for service effective December 21, 2012, with 29.406 years of service credit and has been receiving her retirement allowance from that date.

6. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions, and by interest and other earnings on those contributions. The amount of a member's contributions is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a rate to the agency's payroll. Using certain actuarial assumptions specified by law, the CalPERS Board of Administration sets the employer contribution rates on an annual basis.

Longevity Compensation Reported by Respondent City of Davis

7. In 2009, respondent City of Davis and the Davis Professional Firefighters' Association (DPFA) negotiated a Memorandum of Understanding (MOU) for the period December 16, 2009, through June 30, 2012. The agreement included a provision by which DPFA members who did not use all of the amount allocated by respondent City of Davis for health and benefits would receive 80 percent of the unused amount as a cash payout (commonly referred to as "cafeteria cash out"). The MOU also included this benefit for those members with at least 25 years of service: "Employees with 25 years of service or more can convert the cafeteria cash out amount to longevity pay, which will be included as taxable income to the employee."

8. Respondents Bills and Cutaia each opted to convert their cafeteria cash out amounts to longevity pay once they accumulated 25 years of service and, as detailed below, they relied upon the reporting of such amounts as longevity pay to CalPERS when calculating their ability to retire when they did.

9. The evidence presented at hearing established that the payments designated as longevity pay for those with 25 years who chose this option were variable. They depended on factors including the member's marital status, total number of dependents, whether the

member had alternative health care (such as that provided by a spouse) and selection of a less expensive health care plan than Kaiser Permanente, the plan used to calculate the maximum amount allocated for each member. Thus, the amount of the payments designated "longevity" pay for a member was based entirely on 80 percent of the unexpended portion of the City's contribution to the member for health and dental benefits.

10. Respondent City of Davis reported the longevity payments as such to CalPERS and the members who opted for this treatment received the payments as part of the bi-weekly paychecks, minus their nine percent CalPERS contribution. As noted below, when members sought retirement allowance benefits calculations from CalPERS from the inception of the benefit until in or about 2016, members were provided final compensation figures that included the longevity payments.

CalPERS 2016 Audit

11. In October of 2016, CalPERS Office of Audit Services conducted a public agency review of respondent City of Davis to determine the City's compliance with applicable sections of the Public Employees Retirement Law. The review period was July 1, 2011, though June 30, 2014. On October 20, 2016, CalPERS issued its final audit report. The audit findings addressed reported longevity payments to respondent City of Davis Police Chief and Fire Captain for the pay period ending April 13, 2014. CalPERS determined that the payments did not meet the statutory criteria for special compensation and should not have been reported to CalPERS.

12. After consultation with CalPERS, respondent City of Davis agreed to make payroll adjustments reversing the cafeteria cash outs as reportable income. Respondent City of Davis provided CalPERS with a listed of affected employees that included respondents Bills and Cutaia.

Respondent Bills

13. Respondent Bills began his employment with respondent City of Davis as a firefighter trainee and progressed to become a Firefighter I and then Firefighter II. He had a stint as an Acting Fire Captain, but preferred the duties of a firefighter. He suffered an injury to his neck several years before his retirement which required a spinal fusion. He was concerned about further injuring his neck and interested in an early retirement. He purchased three years of service credit and believed he could afford to retire based on retirement allowance estimates that included the cafeteria cash out payments reported by respondent City of Davis to CalPERS as longevity payments. These began in 2013.

14. On May 5 and May 20, 2017, CalPERS sent letters to respondent Bills notifying him of an adjustment in his one-year final compensation from \$8,824.57 to \$7,944.01. Respondent Bills was informed that this adjustment would reduce his monthly retirement allowance by \$790.65 effective with his June 1, 2017 warrant. He was also informed that he had been overpaid \$30,147.56. This amount was reduced to \$28,086.45

because of the three-year limitation on recoupment for erroneous payments.² Respondent Bills' retirement allowance has been further reduced to reflect his monthly payments to satisfy his obligation to CalPERS for the overpayment.

15. Had respondent Bills known that the longevity payments would not count towards his retirement allowance, he would have delayed his retirement for another year.

Respondent Cutaia

16. Respondent Cutaia began her employment for respondent City of Davis on April 1, 1985, as an entry level firefighter. She rose through the ranks to become a Fire Captain. When she learned about the new option for those with 25 years, she was close to having the required years of service and opted to receive the payments as longevity pay in or about April of 2010. Her husband provided their family with health care benefits, so approximately \$1,800 each month was paid to respondent Cutaia as longevity pay.

17. Respondent Cutaia explored retirement with CalPERS representatives in October of 2012 and noticed that the figures provided in the CalPERS estimate were different than her own. When respondent Cutaia expressed concern about the discrepancy, a CalPERS representative suggested an audit to review the figures reported to CalPERS by respondent City of Davis. Respondent was provided with a three-page document containing the amounts reported by respondent City of Davis and assuming a retirement date of December 21, 2012. The last page of the document included a section entitled "Instructions." This section stated:

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.

18. The CalPERS employee who performed the audit was identified in the report, but the employee did not testify. Lianne Generosa, the CalPERS employee who did testify, did not speak with that person. Ms. Generosa contrasted the report for respondent Cutaia and the Public Agency Review described above that led to curtailing the reporting of the longevity payments to respondents as special compensation. She explained that the review undertaken for respondent Cutaia was not an audit. Rather, it involved determining if the numbers generally match up. Ms. Generosa acknowledged that reviewers normally look at the figures in more depth to see if they comport with applicable law, but she did not know what the analyst did in this case.

19. On May 8, 2017, CalPERS sent a letter to respondent Cutaia notifying her of an adjustment in her one-year final compensation from \$10,408.13 to \$9,121.77. Respondent

² Government Code section 20164.

Cutaia was informed that this adjustment would reduce her monthly retirement allowance by \$1,183.18 effective with her June 1, 2017 warrant. She was also informed that she had been overpaid \$60,349.12. This amount was reduced to \$41,822.22 because of the three-year limitation on recoupment for erroneous payments. Respondent Cutaia's retirement allowance has been further reduced to reflect her monthly payments to satisfy her obligation to CalPERS for the overpayment.

20. Respondent Cutaia would not have retired when she did if she knew that the payments designated longevity would not be considered in the calculation of her retirement allowance. She had been offered a promotion to Division Chief and she would have accepted the position and remained employed for two more years. Respondent Cutaia could not afford to retire on the allowance that excludes the payments designated longevity pay. She has a child with special needs and she and her husband had to expend approximately \$15,000 in emergency funds to make up for the lost income and reimbursement payments to CalPERS. She has gone back to work as a test administrator for entry level firefighters and as a fire safety inspector examining elder care facilities. These two jobs provide approximately \$1,000 per month in extra income.

LEGAL CONCLUSIONS

Applicable Law

1. Government Code section 20636, subdivisions (a) through (f), reads:

(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. 'Payrate,' for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e).

(2) 'Payrate' shall include an amount deducted from a member's salary for any of the following:

(A) Participation in a deferred compensation plan.

(B) Payment for participation in a retirement plan that meets the requirements of Section 401(a) of Title 26 of the United States Code.

(C) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of Title 26 of the United States Code.

(D) Participation in a flexible benefits program.

(3) The computation for a leave without pay of a member shall be based on the compensation earnable by him or her at the beginning of the absence.

(4) The computation for time prior to entering state service shall be based on the compensation earnable by him or her in the position first held by him or her in state service.

(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.

(2) Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e).

(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.

(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

(5) The monetary value of a service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes 'special compensation' as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 et seq. of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

(7) Special compensation does not include any of the following:

(A) Final settlement pay.

(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

(C) Other payments the board has not affirmatively determined to be special compensation.

(d) Notwithstanding any other provision of law, payrate and special compensation schedules, 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.

(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise

be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

(f) As used in this part, "final settlement pay" means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay.

2. The Board of Administration of CalPERS has promulgated a regulation that exclusively and definitively delineates "special compensation." California Code of Regulations, title 2, section 571, reads, in pertinent part:

(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement:

(1) INCENTIVE PAY

Longevity Pay - Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.

[¶] . . . [¶]

(b) The Board has determined that all items of special compensation listed in subsection (a) are:

(1) Contained in a written labor policy or agreement as defined at Government Code section 20049, provided that the document:

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

(B) Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;

(C) 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;

- (D) Indicates an effective date and date of any revisions;
 - (E) Is retained by the employer and available for public inspection for not less than five years; and
 - (F) Does not reference another document in lieu of disclosing the item of special compensation;
 - (2) Available to all members in the group or class;
 - (3) Part of normally required duties;
 - (4) Performed during normal hours of employment;
 - (5) Paid periodically as earned;
 - (6) Historically consistent with prior payments for the job classification;
 - (7) Not paid exclusively in the final compensation period;
 - (8) Not final settlement pay; and
 - (9) Not creating an unfunded liability over and above PERS' actuarial assumptions.
- (c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).
- (d) If an item of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual.

Burden of Proof

3. The parties raised this issue at the inception of the administrative hearing, each contending that the other party bore the burden of proof. They agreed that the Administrative Law Judge could defer a resolution of this issue and include it in the Proposed Decision after consideration of legal arguments in the post hearing briefs. None of the cases or the precedential decision cited by the parties addresses the burden of proof issue in a case involving the determination of which forms of public employment compensation

may be considered for the calculation of a retirement allowance. CalPERS' citations establish that in disability retirement matters, the burden falls upon the injured employee to establish that his or her injury renders the employee substantially incapacitated for the performance of the employee's usual duties. (*Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.2d 234, 238 [citing *Lindsay v. County of San Diego Retirement Board* (1964) 231 Cal.App.2d 156, 160-162.]) Respondents rely on the general legal principle that the party seeking to change the status quo bears the burden of proof, citing the Board's Precedential Decision *In the Matter of the Application for Reinstatement from Industrial Disability of Willie Starnes*, CalPERS Precedential Decision 99-03. The *Starnes* matter involved a challenge by the California Highway Patrol to CalPERS' determination that Starnes was no longer incapacitated and his application for reinstatement should be granted. The application of the "status quo" rule in this matter would seem to depend upon whether one regards the status quo as the initial calculation of the retirement allowances for respondents Bills and Cutaia (including the longevity pay) which were changed by CalPERS or the revised allowances (excluding the longevity pay) challenged by respondents.

4. In this case, there is no need to allocate the burden of proof regarding the appropriate treatment of the amounts reported by respondent City of Davis to CalPERS as longevity pay. Burden of proof issues affect the obligation of parties to present evidence in support of one or more factual issues and where, as here, the law does not specify the degree of proof required, the default standard is a preponderance of evidence. (Evid. Code, §115.) The parties do not dispute the facts as they relate to designated longevity payments. Thus, whether such payments constitute special compensation is strictly a question of law. Moreover, with regard to the affirmative equitable defenses asserted by respondents, laches and equitable estoppel, they shoulder the burden of establishing the requisite elements discussed below. (*Mt. San Antonio Community College Dist.* (1989) 210 Cal.App.3d 178, 188; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

Cafeteria Cash Outs Converted to Longevity Pay

5. Government Code section 20636, subdivision (a), read in conjunction with subdivision (c)(1), authorizes the consideration of special compensation in the form or payments to an employee for "special skills, knowledge, abilities. . ." Subdivision (c)(2) requires that that all special compensation be paid "pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate." The statute directs, in subdivision (c)(6), that CalPERS promulgate regulations that "delineate more specifically and exclusively what constitutes 'special compensation' as used in this section." Finally, the statute, in subdivision (c)(7)(C), makes clear that only those payments that CalPERS has affirmatively determined to be special compensation are to be considered in the calculation of retirement benefits. (See *DiCarlo v. County of Monterey* (1971) 12 Cal.App.5th 468, 483-484; *City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App. 4th 522, 527.)

6. CalPERS promulgated a regulation more specifically defining “special compensation” and the requirements for consideration of such payments as such. Under the heading “INCENTIVE,” in subdivision (a)(1) of California Code of Regulations, title 2, section 571, is the definition of Longevity Pay: “Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.” Subdivision (b) of the implementing regulation lists the requirements for all special compensation. Those pertinent to respondents’ cafeteria cash outs reported as longevity pay are that such payments be: (1) contained in a written labor policy or agreement that is duly approved and adopted by the entity’s governing body; (2) that such document indicate the conditions for payment of the bonus, including eligibility for, and the amount of, the special compensation; (3) that the document does not reference another document to satisfy these conditions; (4) that the compensation is available to all members of the group of class, and (5) that the payment is historically consistent with prior payments for the job classification. Subdivisions (c) and (d) of the regulation clarify that only items listed in the regulation and complying with the requirements of subdivision (b) qualify as special compensation for calculation of “final compensation” for retirement purposes.

7. The cafeteria cash outs reported by respondent City of Davis to CalPERS as longevity payments on behalf of respondents Bills and Cutaia do not qualify as such or any other authorized type of special compensation. The definition of longevity payments in Regulation 571, recited above, requires that such payments constitute “additional compensation to employees who have been with an employer . . . for a certain minimum of time.” In this case, there was no “additional compensation” for fire department personnel reaching at least 25 years. Every employee, regardless of years of service, was “compensated” the same in the form of bi-weekly payments for unexpended health benefit funds. There was no *extra* compensation based on years of employment. In essence, respondent City of Davis simply labeled the cash out payments as longevity payments for those with 25 years of service who opted for this change. The fact that the employees paid nine percent (as a reduction in the payments to them) as their CalPERS share of retirement benefits is inconsequential.³

8. The additional requirements for all special compensation listed in subdivision (b) of Regulation 571 have also not been satisfied. The option to convert cafeteria cash outs (80 percent) offered employees with 25 years or more of service was contained in a Memorandum of Understanding (MOU) duly approved by respondent City of Davis. The MOU included the conditions for payment of the special compensation, but not the amount. The amount was variable and entirely dependent on the unexhausted portion of individual fire department employees’ health benefits allocations. While the MOU did not reference another document specifically, the benefit for any particular employee could not be gleaned without resort to other documentation. The payments were also not available to every member of the class of employees with at least 25 years of service. If an employee

³ Presumably, respondent City of Davis also paid its normal share for such reported compensation.

exhausted his or her health benefits because of the number of dependents and health coverage selected, he or she would have nothing to convert to longevity payments. And even for those who had some amount remaining, their payments would not be the same, or at least the same percentage of base pay, as those in the same class which is required by Regulation 571, subdivision (b)(2). Finally, the payments were not historically consistent with prior payments for the job classification as required by Regulation 571, subdivision (b)(6). Before the MOU change in 2009, cafeteria cash outs were not treated as longevity payments that would enhance retirement benefits for Fire Department employees.⁴

Laches

9. Laches is an equitable defense which may be asserted against a government entity if the party asserting the defense establishes both of the two elements. The first is an unreasonable delay by the agency in prosecuting the action. The second element is demonstrated prejudice suffered as a result of such delay, generally in the party's ability to adequately mount a defense because of the delay. (*Gates v. DMV* (1979) 94 Cal.App.3d 921, 925; *Green v. Board of Dental Exam'rs* (1996) 47 Cal.App.4th 786, 795.)

10. CalPERS learned in 2016 that respondent City of Davis had been improperly reporting cafeteria cash-outs as longevity pay. CalPERS sought a list of affected employees and adjusted the retirement benefits for respondent Bills and Cutaia in May of 2017. There was no evidence suggesting that CalPERS was aware that respondent City of Davis reporting of "longevity pay" was improper. CalPERS acted diligently in discussing their discovery with respondent City of Davis and securing the City's agreement to end the practice. CalPERS asked for and received the names of affected employees and took action to adjust retirement benefits where appropriate. In summary, there was no unreasonable delay.

11. Other than raising the laches issue, respondents made no claim of prejudice in their ability to fully litigate their position regarding the longevity pay issue by reason of any alleged delay on CalPERS' part. Further, the Administrative Law Judge did not observe any prejudice to respondents in the presentation of their evidence.

12. Thus, respondents have failed to establish either of the two required laches elements. The contention is therefore rejected.

Equitable Estoppel

13. Equitable estoppel may be asserted against a government agency. (*City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, 493.) The elements 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 CalPERS argued that disallowed payments created an unfunded liability, but there was insufficient evidence to determine if this assertion was true.

(4) the party asserting estoppel suffered injury in reliance on the conduct. (*Id.* at p. 489.) The application of equitable estoppel in the government pension rights context has been approved by the California Supreme Court. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.) However, estoppel may not be applied against the government when doing so is contrary to public policy. (*Mansell, supra*, 3 Cal.3d at p. 493.)

14. Estoppel cannot be used to enlarge the powers of CalPERS. (*Page v. City of Monebello* (1981) 112 Cal.App.3d 658, 667; *Board of Administration, State Employees' Retirement System v Ames* (1963) 215 Cal.App.2d 215, 230.) The equitable remedy also cannot support providing a benefit to a member to which he or she is not otherwise statutorily authorized because public employee benefits are wholly statutory. (*Hudson v. Posey* (1967) 255 Cal.App.2d 89.)

15. Regarding the four elements to establish equitable estoppel, CalPERS was not aware that respondent City of Davis was labeling cafeteria cash out payments to its fire department employees as longevity pay in its reporting of special compensation to CalPERS. This fact was disclosed in the 2016 audit, after respondents retired. Certainly, respondents Bills and Cutaia relied upon calculations by CalPERS in deciding to retire, but CalPERS did not deliberately or negligently mislead them. Respondents Bills and Cutaia were not ignorant of the true facts - they knew that cafeteria cash outs were being reported to CalPERS as longevity pay. However, they were unaware that such reporting was improper and that such payments would not be considered in the calculation of their respective retirement allowances. Respondents Bills and Cutaia suffered economic injury as a result of the misinformation by reason of their decisions to retire before they otherwise would have, thereby giving up the opportunity to enhance their retirement allowances. In summary, at least two of the required elements were not satisfied to estop CalPERS from adjusting respondents' retirement allowances. The same is true with respect to CalPERS' ability to recoup the overpayments within the three-year limitation period.

16. Even if all of the four basic elements of equitable estoppel were established, including the cafeteria cash outs as special compensation would violate public policy and exceed the powers accorded CalPERS by the Legislature. The recited statute and implementing regulation could not be clearer: only those items that meet the criteria for special compensation may be considered in the calculation of a member's retirement. The cafeteria cash outs labeled longevity pay by respondent City of Davis did not fulfill the requisite requirements, as explained, and should not therefore be considered in the calculation of respondents' retirement allowances.

ORDER

1. The payments made by respondent City of Davis to respondents Mark E. Bills and Judi Cutaia as longevity pay (cafeteria cash outs) shall not be considered in the determination of respondents' retirement benefits from CalPERS.

2. CalPERS is entitled to recoup the overpayments to respondents Mark E. Bills and Judi Cutaia, subject to the three-year statutory limitation.

3. The appeals of respondents Mark E. Bills and Judi Cutaia are denied.

Dated: July 24, 2019

DocuSigned by:
Karl Engeman
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KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings