

ATTACHMENT C

RESPONDENT'S ARGUMENT



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August 30, 2019

VIA FACSIMILE AND FEDEX
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Ms. Cheree Swedensky
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**Re: Argument of Members Mark Bills and Judi Cutaia for the Board re:
Amended Proposed Decision**

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 respective retirement dates on financial calculations that included the longevity pay, after requesting and obtaining 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 Appellants' pension benefits and is collecting reimbursement of three years' worth of "overpayment," resulting in a reduction in income of approximately \$1,250 for Bills and \$2,000 for Cutaia per month – a crushing financial hardship for them both.

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.

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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 did not participate in the creation or the negotiation of Section 3B. Hearing Transcript (“HT”) at pp. 41:9-14; 51:3-9. Appellants, both with 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 from CalPERS an estimate of his retirement benefits and CalPERS included the longevity pay as pensionable in that estimate. 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 pensionable. 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, ¶ 4 and p.4, ¶ 15.

When Cutaia 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 contacted CalPERS, whose representative suggested an audit of her membership account. PD at p. 5, ¶ 17. Approximately three months later, CalPERS returned a report to Cutaia 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 5, ¶ 17 (emphasis added).

Based on this representation by CalPERS, Cutaia decided to retire in December 2012, despite having been offered a promotion to Division Chief at the Fire Department. PD at p. 5, ¶ 20. Cutaia 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.

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

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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.

On March 13, 2014, the City notified CalPERS of four firefighters exercising the option to receive longevity pay - including Bills and Cutaia. *Id.*

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.*

CalPERS does not appear to have raised the issue again until May 2017, when it sent notices to Appellants 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. But neither the City nor CalPERS had previously notified Bills and Cutaia that there was an issue with their pension benefits. HT at p. 81:6-8.

CalPERS notified Bills that by removing the longevity pay from the calculation of his retirement benefits, his monthly allowance would be reduced by \$760.65 effective June 1, 2017. PD at p. 4, ¶ 14. CalPERS further informed Bills that he had been overpaid \$30,147.56 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 reduced Bills' 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.

CalPERS notified Cutaia that by removing the longevity pay from the calculation of her retirement benefits, her monthly allowance would be reduced by \$1,183.18 effective June 1, 2017. 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 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 special needs living at home. PD at p. 5, ¶ 20. She and her husband 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.*

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Administrative Appeal, Original Proposed Decision and Remand

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

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)(6) 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.

At its meeting on December 19, 2018, the CalPERS Board did not accept the Proposed Decision. Instead, the Board remanded the matter for "the taking of additional evidence to determine whether Legal Conclusion No. 6 is accurate." Legal Conclusion No. 6 appeared to be simply a restatement of the definition of longevity pay and requirements for special compensation under Section 571. But there were also what appear to be typographical errors in referring to "performance pay," "bonus pay" and respondent Hall (who was not a party or witness in this matter).

A further hearing was set for June 28, 2019; however, the parties stipulated to have the ALJ decide the remand matter on the documentary evidence already record. On July 24, 2019, the ALJ issued an Amended Proposed Decision in which he concluded the above references were typographical errors, which he corrected. The rest of his original decision denying Appellants' appeal remained unchanged.

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The Equities and Public Policy Demand That Appellants' Overpayments Be Forgiven

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 be tolerated. The City and CalPERS knowingly allowed Appellants' liabilities to accrue astronomically at a time in their lives when they are most vulnerable.

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. But this ignores the fact that both Appellants specifically requested confirmation from CalPERS of the accuracy of their pension calculations in prior to their respective retirements. CalPERS confirmed the numbers for both Appellants, and represented to Cutaia that CalPERS had conducted an "audit" of her account, noting "Special compensation are ... Longevity pay ... all okay to use as earned." Exh. C. As the ALJ himself posited, "what more could she have done?" HT 86:5-6. CalPERS had no answer. Moreover, CalPERS notified the City that the longevity pay was not legally pensionable final settlement pay as early as March 2014, when Cutaia 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. CalPERS directed the City, at that time, to "make reversal for all pay periods where longevity pay is reported." Exh. 8. The City did nothing, CalPERS failed to follow up and both the City and CalPERS failed to notify Appellants for another three years, willfully allowing Appellants' liabilities to increase, month after month, while their earning potential declined. This is, as a matter of public policy, unconscionable. Equitable estoppel is "founded on the notions of equity and fair dealing and provides that a person may not deny the existence of a state of facts if that person has intentionally led others to believe a particular circumstance to be true and to rely upon such belief to their detriment." *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 239.

The ALJ rejected Appellants' equitable estoppel argument, finding that to include the longevity pay as special compensation would violate public policy and exceed the powers accorded CalPERS by the Legislature. PD 14, ¶ 16. However, CalPERS should be estopped, at the very least, from collecting the overpayments.

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, supra*, 224 Cal.App.4th at 244. Even if, by law, Appellants' monthly pension benefits moving forward must be reduced to remove the factor of the longevity pay, it would not exceed the Board's authority – it is actually expressly within the Board's authority – to forgive the overpayments. Public policy, equity and fair dealing compel this result.

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.

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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 is 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.

Conclusion

It is a gross violation of public policy and the public trust to allow the Amended Proposed Decision to stand. Appellants respectfully request that the Board reject the Amended Proposed Decision and allow the Section 3B longevity pay to remain pensionable. In the alternative, Appellants respectfully request that the Board forgive Appellants' overpayments in their entirety, including allowing Appellants to recoup the overpayments that have already been repaid since June 1, 2017.

Sincerely,

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