

ATTACHMENT A

RESPONDENT'S PETITION FOR RECONSIDERATION

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
BOARD OF ADMINISTRATION

In the Matter of the Calculation of Final
Compensation of:

MARK BILLS and JUDI CUTAIA,

and

CITY OF DAVIS

Agency Case Nos.	2017-0776
	2018-0096

OAH Nos.	2018010294.1
	2018030636.1

PETITION FOR RECONSIDERATION

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I.

INTRODUCTION

Pursuant to Government Code section 11521, Mark Bills and Judi Cutaia (“Appellants”) bring this Petition for reconsideration of the Decision of the Board dated September 23, 2019 to ask “What more could we have done?”

Appellants both served the City of Davis (the “City”) as firefighters for more than 25 years. Prior to making the decision to retire, both Appellants respectively went to CalPERS and asked for calculation of their retirement benefits. Cutaia went so far as to request an audit of her account, which a CalPERS employee or agent represented would occur. Some months later, CalPERS sent a written report to Cutaia, expressly stating that CalPERS “[r]eviewed payroll up through 12/10/12-12/21/12 service period. ... Special compensation are Educational incentive, Longevity pay, Lead worker, Uniform allowance all okay to use as earned.” Based on the representations by CalPERS, both Appellants chose to retire.

Several years after retirement, however, both Appellants received notice from CalPERS that it had deemed reported special compensation, specifically “Longevity Pay,” to be not pensionable, that CalPERS would be (significantly) reducing Appellants’ monthly pension allowance, and was seeking reimbursement for “overpayment” of pension benefits in amounts substantially into five figures.

CalPERS made the determination that the Longevity Pay did not comply with the requirements of the pension law and Appellants’ monthly allowances must be markedly reduced. CalPERS declined to exercise its discretion to forgive the overpayments, despite the tremendous financial hardship which has resulted to both Appellants. Consequently, they will literally pay for this, one way or another, for the rest of their lives.

It is difficult, if not impossible, to reconcile how Appellants wound up in such a position, given the actions they took to confirm the validity of their retirement benefits and given the determination by CalPERS that the longevity pay was not pensionable some three years before CalPERS notified Appellants.

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1 What more could Appellants have done? What can other City firefighters do to be assured
2 they will not wind up like Appellants during a time of their lives when they are so vulnerable? By
3 way of this Petition, Appellants also request the opportunity for their union, the Davis Professional
4 Firefighters Association, Local 3494, to meet with CalPERS and the City to discuss implementing
5 a procedure that will allow members to confirm the integrity of their pension benefits BEFORE
6 they retire.

7 II.

8 **THE AMENDED PROPOSED DECISION IS NOT SUPPORTED BY THE RECORD**

9 The Administrative Law Judge (“ALJ”) rejected Appellants’ estoppel defense, finding that
10 “CalPERS did not deliberately or negligently mislead [Appellants].” See Amended Proposed
11 Decision at p. 14, ¶ 15. The ALJ further found that CalPERS was not aware that the City was
12 reporting longevity pay contrary to the pension law until the 2016 audit, after Appellants retired.
13 *Ibid.* But both of these conclusions are contradicted by the record. CalPERS, at the very least,
14 negligently misled Appellants by reporting to Cutaia that it had reviewed her account and that the
15 longevity pay was “okay to use as earned.” Also, at the very least, CalPERS was on inquiry notice
16 to verify the source and legality of the Longevity Pay.

17 At the appeal hearing, CalPERS tried to distance itself from its representations to Cutaia,
18 with its analyst Leianne Generoso, testifying that the document given to Cutaia was not an “audit”
19 to confirm the propriety of the Longevity Pay. Hearing Transcript (“HT”) 74:5-21. Rather, Ms.
20 Generoso testified that this was simply the product of a CalPERS analyst “generally looking to see
21 if the numbers match up.” HT 74:22-75:4.

22 But CalPERS never told that to Cutaia. Why should CalPERS not be responsible for the
23 representations of its employees and agents? Who are the members to trust? And how are the
24 members to know who they can and cannot trust?

25 A year later, Bills sought and received from CalPERS an estimate of his retirement
26 benefits, which included the Longevity Pay.

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1 Both Appellants respectively retired, relying on the representations by CalPERS of the
2 amount and accuracy of their monthly benefits allowance. Cutaia retired in December 2012 and
3 Bills retired in February 2014.

4 Contrary to the ALJ’s finding the Amended Proposed Decision, CalPERS was not unaware
5 of the City labeling cafeteria cash out payments to its fire department employees as Longevity Pay
6 in its reporting of special compensation to CalPERS prior to the October 2016 audit report. See
7 Amended Proposed Decision at p. 14 ¶15. CalPERS told the City that the Longevity Pay was not
8 reportable special compensation two and a half years earlier.

9 It is undisputed that in an email dated March 4, 2014, a CalPERS “Compensation Review
10 Analyst” notified the City that CalPERS had reviewed Section 3B of the MOU with respect to a
11 different firefighter and concluded that the City’s Longevity Pay set forth therein (and at issue
12 here) was “final settlement pay.” Exhibits C and 8. Final settlement pay is expressly excluded
13 from pensionable special compensation in Title 2 of the California Code of Regulations, Section
14 571. In that same email, CalPERS directed the City to “make reversal for all pay periods where
15 longevity was reported.” Exh. 8.

16 On March 13, 2014, the City notified CalPERS of four firefighters exercising the option to
17 receive Longevity Pay - including Bills and Cutaia. On August 29, 2014, CalPERS requested
18 confirmation from the City that reversals of the Longevity Pay had been made. Exh. 8. The City
19 responded that it had not made the reversals and that it was going to take a lot of work to do so. *Id.*

20 But CalPERS did not notify Appellants for three years after CalPERS first determined the
21 Longevity Pay was not reportable. Then CalPERS slashed Appellants’ retirement benefits and
22 began withholding an additional monthly amount as reimbursement for the “overpayments.” This
23 is unconscionable.

24 Pension rights have a “unique importance” to the well-being of the holders of those rights.
25 See *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210,
26 242 quoting *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28. Certainly the Board
27 members, employees and agents of CalPERS would not want firefighters to have the same
28 reckless disregard for the public’s well-being as CalPERS has shown Appellants.

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III.

CALPERS SHOULD BE ESTOPPED FROM FINACIALLY HARMING APPELLANTS AS A RESULT OF CALPERS' INACTION AND MISREPRESENTATIONS

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, supra*, 224 Cal.App.4th at 239. Equitable estoppel may be applied against a government entity when five elements are met:

1. The party to be estopped must be apprised of the facts;
2. He must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;
3. The other party must be ignorant of the true state of facts;
4. He must rely upon the conduct to his injury; and,
5. That “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.”

Here, all of these elements are met. Appellants relied on representations by CalPERS in reviewing and calculating their estimated retirement benefits that the Longevity Pay was appropriately included. CalPERS understood that its members would rely on estimations and reviews CalPERS conducted. Generoso testified that there was no reason that Cutaia should not have relied on the response she received from CalPERS that her Longevity Pay was “okay to use as earned” as special compensation. HT 81:18-24, Exh. C. The ALJ even queried Generoso at the hearing, “what more should [Cutaia] have done?” HT 86:5-6. Generoso gave the non-answer: “I cannot speak to what happened in the past.” HT 86:23-24.

Appellants were ignorant of any possibility that the Longevity Pay might not be legally special compensation and certainly relied upon CalPERS’s conduct to their injury.

Finally, CalPERS’s beef should be with the City, not with the individual firefighters. First, the City, represented by counsel during the MOU negotiations, knew or should have known the

1 Longevity Pay might be non-pensionable as an improper cafeteria cash out, or failed to verify that
2 the conversion of the cafeteria cash out to Longevity Pay was statutorily proper. Accord, *City of*
3 *Oakland, supra*, 224 Cal.App.4th at 241. Second, the City failed for more than three years to
4 notify Appellants that their pension benefits would be reduced after CalPERS directed the City to
5 reverse longevity payments. This is the rare situation where the injustice, in this situation, which
6 would result from the failure to uphold an estoppel is of sufficient dimension to justify any effect
7 upon public interest or policy which would result from imposing an estoppel.

8 The City was named as a party in this matter. There is no reason that the Board cannot
9 forgive the overpayments to Appellants and, arising out of its constitutional duty to its participants
10 that takes precedence over any other duty, the Board could pay the difference in Appellants'
11 monthly allowance as a lump sum payment of damages based on estimated life expectancy of say,
12 90 years. The Board could then seek reimbursement of or indemnity from this damages payment
13 from the City.

14 This resolution would not enlarge CalPERS's powers, nor would it provide a benefit to
15 Appellants to which they are not otherwise statutorily entitled. It would be a payment for damages
16 incurred by Appellants as a result of CalPERS's negligence, for which CalPERS could then seek
17 indemnity from the City.

18 "[P]ursuant to article XVI of the California Constitution, the duty of a public retirement
19 board to its participants and their beneficiaries 'shall take precedence over any other duty.'" *City*
20 *of Oakland, supra*, 224 Cal.App.4th at 242 citing Cal. Const., art. XVI, § 17, subd. (b). Based on
21 this duty, Board has discretion to forgive the overpayments. *Id.* at 244. Based on this duty, the
22 Board has an obligation to take responsibility for the actions and representations of its employees,
23 an obligation to take responsibility for the representations and actions that resulted in CalPERS
24 violating its fiduciary duty towards its members.

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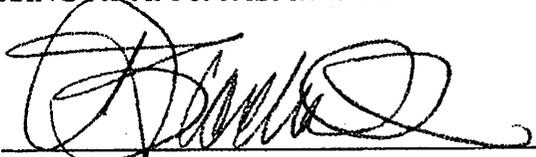
IV.

CONCLUSION

For each of the foregoing reasons, Appellants Mark Bills and Judi Cutaia, who in this case did nothing wrong, respectfully request that the Board grant their Petition for Reconsideration, forgive the overpayments of \$28,086.45 to Bills and \$41,822.22 to Cutaia and meet and confer with the City of Davis and Davis Professional Firefighters Association, Local 3494 regarding what steps can be taken by the members to protect the integrity of their pensions PRIOR to retirement.

Dated: October 18, 2019

MESSING ADAM & JASMINE LLP

By 

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PROOF OF SERVICE

In the Matter of the Calculation of Final Compensation of MARK E. BILLS AND JUDI L. CUTAIA
Agency Case Nos. 2017-0776, 2018-0096

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 980 9th Street, Suite 380, Sacramento, CA 95814.

On October 18, 2019, I served true copies of the following document(s) described as **PETITION FOR RECONSIDERATION** on the interested parties in this action as follows:

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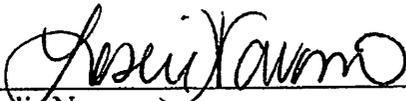
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BY FAX TRANSMISSION: I faxed a copy of the document(s) to the persons at the fax numbers listed in the Service List. The telephone number of the sending facsimile machine was 916.448.5047. No error was reported by the fax machine that I used. A record of the fax transmission was properly issued by the sending fax machine.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 18, 2019, at Sacramento, California.



Leslie Navarro