

ATTACHMENT C

**RESPONDENT'S ARGUMENT REGARDING THE PETITION FOR
RECONSIDERATION**



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November 5, 2019

VIA FACSIMILE AND FEDEX
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Ms. Cheree Swedensky
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CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

NOV - 5 2019

**Re: Argument of Members Mark Bills and Judi Cutaia for the Board re:
Request for Reconsideration**

Dear Ms. Swedensky:

Appellants Mark Bills and Judi Cutaia ("Appellants") present this written argument in support for their request for reconsideration of the Decision of the Board dated September 23, 2019.

Appellants both served the City of Davis (the "City") as firefighters for nearly three decades, with Cutaia retiring effective December 2012 and Bills retiring effective February 2014 (but began receiving a monthly pension allowance in 2013). Amended Proposed Decision ("APD"), as approved by the Board, at pp. 3, ¶¶ 4-5 and 4, ¶ 13 .

In May 2017, 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. APD at p. 4-6, ¶¶ 14 and 19.

Appellants challenged the decision and participated in an evidentiary hearing before an Administrative Law Judge ("ALJ") in which they contended that the Longevity Pay was appropriately reported as pensionable compensation. Appellants further argued that, to the extent the Longevity Pay was not pensionable, CalPERS is estopped from reducing their monthly allowances and/or seeking reimbursement of the overpayments because CalPERS represented to Cutaia that it had conducted an "audit" and concluded the Longevity Pay was "okay to use as earned." APD at p. 5, ¶ 17. Additionally, CalPERS admitted it was aware that the City was improperly reporting the Longevity Pay as pensionable as early as March 2014

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(undisputed facts that the ALJ failed to include in his findings in the Amended Proposed Decision) but did not inform Appellants or take any action for three years, allowing the claimed "overpayments" to unnecessarily accrue and putting Appellants in extreme financial hardship by refusing to forgive reimbursement of the overpayments.

In seeking reconsideration of the Board's Decision, Appellants ask why they bear the burden of the mistakes of others when Appellants themselves are wholly innocent. Appellants respectfully request that the Board reconsider forgiving reimbursement of the overpayments, either through its discretion (see *City of Oakland v. Oakland Police & Fire Ret. Sys.* (2014) 224 Cal. App. 4th 210, 244 ("we believe that the Board has discretion to decide whether, how and to what extent any overpayments made to [] retirees should be repayable ..." (emphasis added)) or based on the principles of estoppel as set forth below.

Argument

The Amended Proposed Decision contains – for the purposes of Appellants' Request for Reconsideration¹ – two critical errors: (1) The ALJ failed to include in his factual findings the undisputed fact that CalPERS had knowledge that the Longevity Payments were not pensionable as early as March 2014; and (2) the ALJ found that Appellants failed to establish the elements of estoppel.

CalPERS First Took the Position the Longevity Payments Were Not Pensionable Well Before the 2016 Public Agency Review

The ALJ found that "[i]n October 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. ... On October 20, 2016, CalPERS issued its final audit report. ... CalPERS determined that the [Longevity Pay] did not meet the statutory criteria for special compensation and should not have been reported to CalPERS. [¶] After consultation with CalPERS, Respondent City of Davis agreed to make payroll adjustments reversing the cafeteria cash outs [Longevity Pay] as reportable income. Respondent City of Davis provided CalPERS with a list of affected employees that included Respondents Bills and Cutaia." APD at p. 4, [¶¶] 11-12.

There is no mention whatsoever in the Amended Proposed Decision of the following undisputed facts (which have been raised in every filing with the Board since the evidence was admitted at the evidentiary hearing): In an email dated March 4, 2014, a CalPERS "Compensation Review Analyst" notified the City of Davis that CalPERS had reviewed the operative memorandum of understanding ("MOU") between the City and Appellants' union, the Davis Professional Firefighters Association, Local 3494, with respect to a different firefighter and concluded that the "Longevity Pay" offered therein was "final settlement pay." Exhibit 8 (attached for reference). Final settlement pay is expressly excluded from pensionable special

¹ Appellants do not waive their earlier arguments that the Longevity Pay was properly reported as pensionable compensation.

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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. Exh. 8. Yet neither the City nor CalPERS notified Bills and Cutaia that there was an issue with their pension benefits. Hearing Transcript ("HT") at p. 81:6-8.

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 receiving retirement benefits for four years.

At the hearing, CalPERS was quick to disavow its initial, pre-retirement "audit" report to Cutaia, that CalPERS had reviewed her 12/12 payroll and that her reported special compensation, including the Longevity Pay, were "all okay to use as earned" (APD at p. 5, ¶ 17), as being simply a review of whether "the numbers generally match up." APD at p. 5, ¶ 18. However, CalPERS provided no defense to its actions in 2014 with respect to seeking reversals of the City reporting the Longevity Pay, failing to follow up with the City to ensure the corrections were made and failing to notify Appellants that their pension benefits might have been improperly calculated.

CalPERS Should Be Estopped from Collecting Overpayments for the Three Years it was Aware of the Longevity Pay Being Non-Pensionable and Failed to Ensure Correction

Appellants argued that CalPERS should be estopped from reducing their pension benefits and collecting reimbursement of the overpayments. The ALJ appears to have only considered the affirmative defense for as to whether the Longevity Pay could be included in the calculation of benefits moving forward, not for the purpose of forgiving the overpayments. This was improper.

Government Code section 20164(b)(1) limits CalPERS's ability to collect an erroneous payment to three years from the date of payment. CalPERS went back three years from May 2017 – resulting in claimed overpayments of \$41,822.22 to Cutaia and \$28,086.45 to Bills. But really, CalPERS should be estopped from collecting these overpayments because, during this entire period, CalPERS knew the Longevity Pay to be non-pensionable, yet allowed Appellants to rely on the erroneous calculation of their benefits and accrue liability for overpayments.

The ALJ erroneously found that "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

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after [Bills and Cutaia] retired. Certainly, Respondents Bills and Cutaia relied upon by CalPERS in deciding to retire, but CalPERS did not deliberately or negligently mislead them.” APD at p. 15, ¶ 15. Query how CalPERS could not have misled Appellants, particularly Cutaia, when Appellants affirmatively requested confirmation of the propriety of their reported compensation and relied on CalPERS’s response; however, it is also simply not true that CalPERS was unaware that the City was reporting “cafeteria cash outs” as Longevity Pay until the 2016 audit. CalPERS was aware and took the position that the Longevity Pay was improperly included in reported compensation – including specifically to Bills and Cutaia – more than two and a half years earlier.

Consequently, CalPERS did mislead Appellants – at least through CalPERS’s negligence - into believing their pension income was secure by continuing to pay their monthly allowances at a rate that included the Longevity Pay for three years when CalPERS was already aware that this rate was inaccurate. This is unconscionable and a violation of CalPERS’s fiduciary duties to its members.

There ALJ was therefore incorrect in determining that the first element of estoppel – that the party to be estopped, here CalPERS, be apprised of the facts - was not met. See *City of Oakland v. Oakland Police & Fire Ret. Sys.*, 224 Cal. App. 4th 210, 239 (2014). The other elements of estoppel were also met. CalPERS intended that its conduct be acted upon, or so acted that Appellants had a right to believe it was so intended. Contrary to the ALJ’s finding, Appellants were ignorant of the true state of facts, which was not – as the ALJ found – that the cafeteria cash outs were being reported as Longevity Pay but that the Longevity Pay was non-pensionable and that CalPERS was aware of this as early as March 2014. Finally, Appellants relied upon CalPERS’s conduct to their injury. *Ibid*.

“[T]he government may not be bound by an equitable estoppel in the same manner as a private party unless, ‘in the considered view of a court of equity, 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.’” *Id.* at 204 quoting *Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496–497. This element is clearly met here. CalPERS repeatedly failed to act in Appellants’ best interests, from CalPERS’s failure to properly investigate the Longevity Pay when Cutaia sought review in 2012 – despite representing that it was pensionable, and then failing to notify Appellants that their pension benefits would be reduced for more than three years after directing the City to reverse Longevity Pay payments. This is the rare situation where the injustice, in this situation, which would result from the failure to uphold an estopped is of sufficient dimension to justify any effect upon public interest or policy which would result from imposing an estoppel.

Therefore, CalPERS should be estopped from collecting the reimbursement of the overpayments.

Conclusion

It is a gross violation of public policy and the public trust to allow the Decision to stand as written, requiring reimbursement of the overpayments made to Appellants. Appellants respectfully request that the Board forgive Appellants’ overpayments in their entirety, including

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allowing Appellants to recoup the overpayments that have already been repaid since June 1, 2017. Additionally, Appellants request that the Board direct CalPERS to meet with the City of Davis and Davis Professional Firefighters Association, Local 3494 regarding what steps can be taken by the members to confirm accurate reporting of compensation and calculation of prospective pensions PRIOR to retirement.

Sincerely,

MESSING ADAM & JASMINE LLP



Lina Balciunas Cockrell

LBC:ln

00079013-1

EXHIBIT 8

Generoso, Lei Anne

From: Saechao, Chan
Friday, May 19, 2017 2:51 PM
To: Generoso, Lei Anne
Subject: FW: Martin J Eckhardt Longevity Pay Issue

Hi Lei Anne,

See my threads of emails below. Jackie stated that she was going to make the special compensation reversals, but I never heard from her again.

Chan Saechao, *Compensation Review Analyst*
CalPERS | Employer Account Management Division
☎: 916.795.3805 | 📠: 916.795.9372 | chan.saechao@calpers.ca.gov

She stated that she was going to make the special compensation reversals.

From: Jackie Jaskowiak [<mailto:JJaskowiak@cityofdavis.org>]
Sent: Friday, September 05, 2014 2:36 PM
To: Saechao, Chan
Subject: RE: Martin J Eckhardt Longevity Pay Issue

No they have not been made. I will work on them in the next week or so, it is going to be a lot of work.

Jackie

From: Saechao, Chan [mailto:Chan_Saechao@CalPERS.CA.GOV]
Sent: Friday, August 29, 2014 11:57 AM
To: Jackie Jaskowiak
Subject: FW: Martin J Eckhardt Longevity Pay Issue

Hi Jackie,

Please see thread of emails below. Let me know if the special comp reversals were ever made.

Thanks,
Chan Saechao

From: Dan Cueva [<mailto:DCueva@cityofdavis.org>]
Sent: Monday, March 17, 2014 7:28 AM
To: Saechao, Chan
Subject: RE: Martin J Eckhardt Longevity Pay Issue

Chan,
Mark E. Bills, calpers ID [REDACTED] I will let you know as soon as Eckhardt is completed.

Thanks,
Dan

From: Saechao, Chan [mailto:Chan_Saechao@CalPERS.CA.GOV]
Sent: Friday, March 14, 2014 10:35 AM

To: Dan Cueva
Subject: RE: Martin J Eckhardt Longevity Pay Issue

Dan,

Can you provide me Bills' full name and his/her CalPERS ID number? Also for Robert Weist has he notified the City if he is going to do the cash out yet? Please inform him that if he choose to do the cash out the City may honor the Fire MOU and allow the cash out, but the City cannot report it to CalPERS as a longevity special comp item. If so, the City will be instructed to once again make reversals.

Let me know when the reversals are made for Eckhardt, so I could check the report

Once I get a final decision from management about Cutaia and Bills I will email you.

Thank you,

Chan Saechao, Compensation Review Analyst
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☎: 916.795.3805 | 📠: 916.795.4166 | ✉: chan_saechao@calpers.ca.gov

City of Davis Human Resources Department

From: Dan Cueva [mailto:DCueva@cityofdavis.org]
Sent: Thursday, March 13, 2014 10:56 AM
To: Saechao, Chan
Subject: RE: Martin J Eckhardt Longevity Pay Issue

Dan,

Yes the City is willing to make the reversals on Martin Eckhardt's longevity pay since you have clearly explained the State code in which our MOU contradicts.

Answers to your other questions

The cash out is related to our Cafeteria 125 benefit plan. Monthly allowance not used to cover medical, dental, etc can be converted to cash in lieu up to amounts and limits specified in MOU. There is a provision in Fire MOU stating this cash amount can be converted to longevity pay if employee has at least 25 yrs of City service; monetary compensation remains the same it is just reported to PERS as a special compensation.

To date, 4 total employees have exercised this option. Eckhardt, Cutaia, and Bills (retirees) and current employee Robert Weist. This conversion to longevity pay is converted when and if the particular employee notifies us that they would like to change their cash lieu of benefits to longevity pay. It is not intentionally done prior to retirement although we had a case (Cutaia) in which she would have been eligible for longevity cash out at a particular time so we retro-actively reported this back to date she specified and she picked up 9% member contribution on it at that time.

Let me know if you have any further questions.

Dan

From: Saechao, Chan [mailto:Chan_Saechao@CalPERS.CA.GOV]
Sent: Wednesday, March 12, 2014 3:46 PM
To: Dan Cueva
Subject: RE: Martin J Eckhardt Longevity Pay Issue

Hi Dan,

Thanks for the information. So, to answer your question in why the Judi Cutala's compensation issue wasn't brought forward when she retired is that CalPERS has a tremendous amount of cases to review and during our review period we may not catch anything in the process. My prediction in why the analyst may not have caught it is due to the fact that longevity is a reportable item and didn't look further into it and just move forward with allowing the longevity pay. But since I looked further into it and found that the "longevity pay" is really a cash out it must be reversed from the payroll system and will not be used to calculate Martin Eckhardt's retirement. Is the City willing to make "longevity pay" reversals on Martin Eckhardt's reported special compensation?

In regards to Judi Cutala I have brought the matter to my manager and she will make a determination in how to proceed with it but, before she can proceed with it she needs some clarification.

1. What exactly are the cash out? Are they vacation time, sick time, etc.?
2. How many employees are doing the cash outs? Specifically how many active members have done the cash outs and how many retired members have done the cash outs?
3. When is the cash outs reported? Is it only when the employee is about to file for retirement?

Thank you,

Chan Saechao, Compensation Review Analyst

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----- Forwarded Message -----

From: Dan Cueva [<mailto:DCueva@cityofdavis.org>]

Sent: Wednesday, March 12, 2014 3:04 PM

To: Saechao, Chan

Subject: RE: Martin J Eckhardt Longevity Pay Issue

Chan,

Judy's Calpers ID number: [REDACTED]

Thanks for looking into this Chan,

Dan

From: Saechao, Chan [mailto:Chan_Saechao@CalPERS.CA.GOV]

Sent: Wednesday, March 12, 2014 1:55 PM

To: Dan Cueva

Subject: RE: Martin J Eckhardt Longevity Pay Issue

Hi Dan,

I am trying to do another review on the Judy. Can you provide me her CalPERS ID number? I want to make sure it's the correct person I am looking at. The spelling of her name is a bit different.

Thanks,

Chan Saechao, Compensation Review Analyst

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[Redacted]

From: Dan Cueva [mailto:DCueva@cityofdavis.org]
Sent: Monday, March 10, 2014 4:33 PM
To: Saechao, Chan
Subject: RE: Martin J Eckhardt Longevity Pay Issue

Chan,
I had a question, we had another retiree leave service with the City in December of 2012 and she had exercised the same MOU provision to exchange cash in lieu of benefit for longevity pay. Why wasn't this retiree's final compensation brought to our attention? Her name is Judy Cutaia. Please let me know.

thanks,
Dan

From: Saechao, Chan [mailto:Chan_Saechao@CalPERS.CA.GOV]
Sent: Tuesday, March 04, 2014 1:29 PM
To: Dan Cueva
Subject: Martin J Eckhardt Longevity Pay Issue

Hi Dan,

From reviewing Martin J Eckhardt's reported special compensation the Longevity Pay is not considered as Longevity pay. Normally longevity pay is when the employer pays the employee for years of service for a certain dollar amount. The language in the Firefighter MOU states "Employees with 25 years of service or more can convert the cafeteria cash out amount to longevity pay, which will be included as table income to the employee" this is considered as Final Settlement Pay according to PERS. Final settlement pay is not reportable to CalPERS.

California Code of Regulations CCR § 570. Final Settlement Pay is defined as:

"Final settlement pay" means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

For example, final settlement pay may consist of severance pay or so-called "golden parachutes". It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or period payments.

Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also be the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.

The City may allow the employee to convert the cafeteria cash out amount to longevity pay, but this cash out is not reportable to CalPERS. Looking at the reported payroll transcript it shows longevity pay was reported for pay periods from 02/04/2013 – 01/20/2014. Please make reversal for all pay periods where longevity pay is reported.

Thank you,
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