

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Involving:

JULIE STOTHERS HORNER, TRUSTEE
OF THE GLORIA J. STOTHERS 1993
REVOCABLE TRUST,

Respondent.

Case No. 2013-0683

OAH No. 2014100797

PROPOSED DECISION

This matter was assigned to Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California.

California Public Employees' Retirement System and the Judges' Retirement System (JRS) were represented by Jeffrey R. Rieger, Attorney at Law, Reed Smith LLP.

Respondent Julie Stothers Horner, Trustee of the Gloria J. Stothers 1993 Revocable Trust, was represented by H. Lee Horner, Jr., Attorney at Law, Goldstein, Horner & Horner, Attorneys.

On February 6, 2015, a telephonic prehearing conference was held. The parties agreed that this matter presents questions of law and few, if any, factual disputes. To facilitate the establishment of a factual context in which to decide the legal issues, briefs were submitted in accordance with an agreed-upon schedule. The parties agreed that respondent's brief would include a factual summary and JRS's brief would identify any factual matters recited by respondent with which it takes issue. If necessary, these disputed would be resolved by stipulations, declarations or the receipt of evidence on April 7, 2015. The parties agreed that the Administrative Law Judge may rely on the undisputed factual recitations in the preparation of the Proposed Decision in this matter for his Factual Findings.

Respondent's initial brief was received on March 3, 2015. JRS's response brief was received on March 11, 2015. Respondent's reply brief was received on March 19, 2015. After consideration of the written arguments submitted by the parties, the Administrative Law Judge informed the parties that as no factual disputes existed and the Administrative Law Judge did not require oral argument. On April 6, 2015, the administrative law judge issued an Order Vacating Hearing Date and Closing Record. The matter was submitted on

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April 6, 2015, based on the briefs, including the undisputed factual summary in respondent's brief.

DOCUMENTS CONSIDERED

As no hearing was held, the following documents that were relied upon in consideration of this matter were marked as joint exhibits and are made a part of the record:

Exhibit 1. Statement of Issues and Related Procedural Documents

Exhibit 2. JRS's Prehearing Conference Statement

Exhibit 3. Respondent's Prehearing Conference Statement with Attachment

Exhibit 4. Prehearing Conference Order

Exhibit 5. Order Modifying Briefing Schedule

Exhibit 6. Respondent's Opening Brief

Exhibit 7. JRS's Response Brief

Exhibit 8. JRS's Request for Official Notice

Exhibit 9. Respondent's Reply Brief

Exhibit 10. Order Vacating Hearing Date and Closing Record

FACTUAL FINDINGS

1. Sue Kane, Acting Chief, Customer Account Services Division, Judges' Retirement System, California Public Employees' Retirement System, filed the Statement of Issues solely in her official capacity.

Background

2. Judge Stephen R. Stothers (Judge Stothers) was appointed to the Municipal Court in Los Angeles County and sworn in on December 29, 1967. He was elevated to the Superior Court bench of Los Angeles County and sworn in to this position on December 21, 1970.

3. Judge Stothers died on March 6, 1985, while actively serving as a Superior Court Judge. He was survived by his widow, Gloria J. Stothers. Mrs. Stothers was paid a

survivor's benefit effective March 4, 1985, until her death on January 2, 2000. Pursuant to Government Code section 75091, her monthly allowance was 29.25 percent of the monthly salary payable to the judge holding her husband's former judicial office. JRS credited Judge Stothers with 17 years, 2 months, and 5 days of judicial service. Mrs. Stothers had established a living trust for estate planning purposes and her trust succeeds to any unpaid benefits due and payable.

4. This action was brought by the successor trustee Julie Stothers Horner. She and her sister Susan Massey are the sole beneficiaries of the Gloria J. Stothers 1993 Revocable Trust.

5. Judge Stothers served in the United States Navy during and after World War II for more than four years, including reserve duty after the end of the war.

LEGAL CONCLUSIONS

Respondent's Legal Contentions

1. Respondent contends that Judge Stothers was entitled to an additional four years' service credit based on his military service.

2. Respondent also contends that JRS miscalculated the benefits payable to Judge Stother's surviving spouse by improperly limiting the cost of living adjustments to her benefits during her lifetime.

Judge Stothers' Military Service Credit

3. Respondent claims that Judge Stothers was entitled to purchase military service credit under Government Code section 20930.3, which was enacted in 1974 and was later re-codified as section 21024. Government Code section 20930.3 provided that "local members" of CalPERS could purchase service credit for public service with the active Armed Forces or the Merchant Marine of the United States, and during any period of rehabilitation afforded by the United States Government for six months thereafter. This service would be credited only if it was continuous, and the service credit granted could not exceed four years.

4. Government Code section 21024 was enacted in 1995 and provides in pertinent part:

(a) "Public service" with respect to a local member, other than a school member, also means active service with the Armed Forces or the Merchant Marine of the United States, including time during any period of rehabilitation afforded by the United States government other than a period of rehabilitation for

purely educational purposes, and for six months thereafter prior to the member's first employment by the employer under this section in which he or she was a member.

(b) Any member electing to receive credit for that public service shall make the contributions as specified in Sections 21050 and 21052. However, any eligible member who requests costing of service credit between January 1, 2001, and December 31, 2003, may, instead of making those contributions, make the payment calculated under this article as it read on December 31, 2000, which payment shall be made in the manner described in Section 21050.

(c) The public service under this section shall not include military service (1) in any period for which credit is otherwise given under this article or Article 4 (commencing with Section 20990) or (2) to the extent that total credit under this section would exceed four years.

[¶]...[¶]

(f) This section shall not apply to any contracting agency nor to the employees of any contracting agency until the agency elects to be subject to this section by amendment to its contract made in the manner prescribed for approval of contracts or in the case of contracts made after this section takes effect, by express provision in the contract making the contracting agency subject to this section. The amendments to this section made during the second year of the 1999–2000 Regular Session shall apply to contracts subject to this section on January 1, 2001.

(Underlining added for emphasis,)

5. JRS maintains that Government Code section 20930.3, re-codified as section 21024, pertains only to "local members" of CalPERS and that members of the JRS are not local members of CalPERS. Accordingly, JRS maintains that the judges were not eligible to purchase service credit for military service pursuant to those Government Code sections.

6. Government Code section 20370 defines "local members" as follows:

(a) "Member" means an employee who has qualified for membership in this system and on whose behalf an employer has become obligated to pay contributions.

[¶]...[¶]

(c) "Local member" includes:

(1) Local miscellaneous members.

(2) Local safety members.

[¶]...[¶]

7. Government Code section 20383 defines "local miscellaneous member" as follows:

"Local miscellaneous member" includes all employees of a county office of education, school district, or community college district who are included in a risk pool and all employees of a contracting agency who have by contract been included within this system, except local safety members.

8. Government Code section 20420 defines "local safety member" as follows:

"Local safety member" includes all local police officers, local sheriffs, firefighters, safety officers, county peace officers, and school safety members, employed by a contracting agency who have by contract been included within this system.

9. Government Code section 20022 defines "contracting agency" as:

"Contracting agency" means any public agency that has elected to have all or any part of its employees become members of this system and that has contracted with the board for that purpose. "Contracting agency" also means any county office of education, school district, or community college district that has elected to have all or part of its employees participate in a risk pool and that has contracted with the board for that purpose.

10. Respondent's position is without merit. Members of the JRS belong to a Judges' Retirement System, which is codified at Government Code sections 75000 through 75613. Members of the JRS are not local members of CalPERS pursuant to Government Code sections 20370, 20383, and 20420. Accordingly, members of the JRS were not entitled to purchase service credit for military service under Government Code section 20930.3, re-codified as section 21024.¹ In addition, members of the JRS are not employed by a

¹ The right to purchase credit for military service time was not added to the Judges' Retirement Law until January 1, 2005, which was the effective date of the Legislature's enactment of Government Code section 75031.5.

“contracting agency” that contracted with CalPERS to make sections 20930.3 and 21024 available to its employees, pursuant to Government Code section 21024, subdivision (f).

11. Respondent’s claim that Judge Stothers was entitled to service credit for military service under Government Code section 20930.3, re-codified as section 21024, is not supported by law and is therefore rejected.²

Proper Calculation of Cost of Living Adjustments

12. While somewhat unclear, respondent apparently contends that Judge Stothers acquired a vested interest in continued unlimited cost of living adjustments (COLA’s) for purposes of calculating retirement benefits payable to Judge Stothers’ surviving spouse. This contention is based on his judicial service during the years that salaries for active judges were adjusted annually by an amount equal to the rise in the Consumer Price Index (CPI). Government Code section 68203, in effect from January 1, 1970, through December 31, 1976, provided for such unlimited COLA’s. Respondent argues, in essence, that this vested right survived the statutory change effective January 1, 1977, limiting annual COLA’s to five percent. Thus, respondent contends, Gloria Stothers was entitled to 29.25 percent (if military service is not counted) of Judge Stothers’ salary on January 1, 1977, adjusted by annual *unlimited* COLA’s until the day of her death.

13. Respondent relies, in part, on the California Supreme Court decision in *Olson v. Cory* (1980) 27 Cal. 3d 532 (*Olson I*)³ that determined the Legislature’s imposition of a five percent cap for judicial COLA’s effective January 1, 1977, was unconstitutional as to judges still serving their terms or the terms of a predecessor beyond January 1, 1977. The Supreme Court also held that pensioners whose retirements were based on the salaries of such active judges were also entitled to the benefit of unlimited COLA’s for the duration of the active judge’s term of office.

14. In *Olson I*, the California Supreme Court addressed the very issue raised by respondent. As noted above, the Court held that the 1976 amendment to Government Code section 68203 freezing judicial salaries at the September 1, 1976 level, and imposing a five percent cap on future COLA’s for judges impaired the rights of judges who entered office after January 1, 1970, with the expectation that they would be entitled to unlimited COLA’s based on the CPI. The court held that these judges were entitled to such raises for the

² This holding is consistent with the Board of Administration’s Decision in *Joy, Cantera and Phelps v. JRS/CALPERS* (Oct. 15, 2014), of which official notice is taken at the request of JRS pursuant to Government Code section 11515. An administrative decision may be used to convey an agency’s administrative interpretation, even if the agency has not designated it as precedential pursuant to Government Code section 11425.60. (*Styne v. Stevens* (2001) 26 Cal. 4th 42, 53, fn. 4.)

³ The court referred to the decision as *Olson I* to distinguish it from later court decisions deciding related issues.

remainder of their judicial terms. However, the court also held that upon the expiration of such terms and the beginning of a new judicial term, the judges would have no similar expectation and would have “impliedly agreed to be bound by the salary benefits then offered by the state for the different term.” (*Olson I*, at page 541.)

15. The Supreme Court also ruled that judges whose services were terminated during what has been characterized as “the protected terms” from 1970 to 1977 were entitled to continued unlimited COLA’s because their pensions were also impaired and were based on the salaries paid the active judges occupying their former positions. (*Olson I*, at page 542.) Significantly, the Court noted: “Finally, as in the case of judges or justices who enter upon a new or unexpired term of a predecessor judge after 31 December 1976, benefits of judicial pensioners based on the salaries of such judges will be governed by the 1976 amendment.” This was exactly Judge Stothers’ situation. He entered upon multiple new judicial terms after the expiration of his “protected term,” and his pension was properly based on his salary at the time of his death as the incumbent. Going forward, his widow was entitled to her established percentage of the salaries of active judges holding Judge Stothers’ position, including any COLA’s made in accordance with the formula established by statute thereafter.

16. The *Olson I* decision was quoted at length in *Staniforth v. Judges’ Retirement System* (2014) 226 Cal. App.4th 978 (*Staniforth*) in which judicial pensioners who served during the protected term argued unsuccessfully that the five percent statutory cap on COLA’s could not be constitutionally applied to them. One of the pensioners’ contentions was that judges who retired after 1976, but served any part of their judicial service during the protected term, acquired a constitutional right to unlimited COLA’s. This is the very argument raised by respondent in this matter. Moreover, one of the two cases cited in support of the judicial pensioners’ contention was *Legislature v. Eu* (1991) 54 Cal.3d 492 (*Eu*), upon which respondent primarily relies. The *Staniforth* court interpreted the judicial pensioners’ contention as asserting that such judges “should have been paid a percentage of the salary an active jurist would have hypothetically earned if that active jurist’s salary had continued to rise based on unlimited COLA’s after January 1, 1977.” (*Staniforth*, at page 983.)

17. The *Staniforth* court rejected the pensioners’ contention, ruling:

This construction⁴ of the statutory scheme confirms our understanding that the import of the holdings of *Olson I* was not to decouple the rights of judicial pensioners from the salaries paid to actual active jurists. Instead, we read *Olson I* as confirming the allowance for judicial pensioners remained tethered to the salaries paid to actual (rather than hypothetical)

⁴ Referring to the court’s conclusion that the pensioners’ rights were derivative of the benefits conferred upon active jurists and the pensioners held no separate vested right to particular retirement allowances.

active jurists, and *Olson I* held the allowances for judicial pensioners were temporarily exempted from the cap on COLA's because, and only to the extent that, salaries for some active jurists were likewise temporarily exempted from the cap on COLA's.

(*Staniforth, supra*, 226 Cal. App.4th at page 989.)

18. The *Staniforth* court concluded, at page 990: "To the extent petitioners' claims are based on the theory that *Olson I* held judicial pensioners are exempted from changes in the underlying salary structure applicable to actual active jurists, those claims must fail, and the trial court correctly sustained JRS's demurrer without leave to amend."

19. The *Staniforth* court distinguished the holding in *Eu* in footnote 4. The court acknowledged that the *Eu* decision (and another decision cited by pensioners) held that promised pension benefits cannot be impaired once vested, even if the pensioner later begins a new term of office that would have provided reduced benefits. The court held, however, that petitioners' reliance on *Eu* was misplaced. The court explained that in *Eu*, the pensioner had been expressly promised pension rights that would become vested and increase with years of service. Thus, an amended law purporting to reduce the benefits that had become vested was unenforceable. The court stated that these cases were of no aid to pensioners because what was promised to judicial pensioners and had become vested was the right to receive a pro-rata share of the salary paid the judge occupying the office formerly occupied by the pensioner, not a pro-rata share of a hypothetical salary. This, the court noted was the "crucial distinction" missed by the judicial pensioners.

20. The discussion above illustrates that respondent's contention does not present a case of first impression. The same theory has been rejected in two published appellate decisions, one decided by the California Supreme Court. Therefore, respondent's assertion is similarly rejected in this matter.

Statutes of Limitation

21. JRS contends that respondent's claims are barred by one or more statutes of limitation. These are Code of Civil Procedure sections 338, subdivision (a), and 343, and Government Code section 75006. With respect to the claim based on miscalculation of benefits, JRS cites Code of Civil Procedure section 337.5, subdivision (b). Respondent counters that Government Code section 20164, subsection (b), governs claims for underpayment of benefits and includes no limitation on actions.

22. Code of Civil Procedure section 338, subdivision (a), imposes a three-year limitation on actions "upon liability created by statute, other than a penalty or forfeiture." Code of Civil Procedure section 343 is a catch-all provision imposing a four year limitation for "[a]n action for relief not hereinbefore provided for...after the cause of action shall have accrued." Government Code section 337.5, subdivision (b), establishes a ten-year statute of

limitations for an “action upon a decree of any court of the United States or of any state within the United States.”

23. Government Code section 20164, subdivision (b), reads:

(b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:

(1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.

(2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

24. Government Code section 20164 deals specifically with limitations on actions regarding claims by and against CalPERS and JRS, and therefor prevails over the more general Code of Civil Procedure sections 338 and 343. (*Woods v. Young* (1991) 53 Cal.3d 315, 325; *People v. Tanner* (1979) 24 Cal.3d 514, 521.).

25. The application of the limitation periods in Government Code sections 20164 and 337.5 were discussed by the *Staniforth* court beginning on page 992. The trial court had sustained JRS's demurrer without leave to amend based, in part, on its conclusion that the claims of the 10 judicial pensioners grounded in the *Olson I* decision were time-barred by section 337.5 and that the death of the claimants ended any further obligations by JRS under Government Code section 20164. The Court of Appeal concluded that the trial court erred. First, it held that there was no final enforceable judgement triggering the 10 year limitation on enforcement of such a judgment, as *Olson I* was purely declaratory. On page 994, the *Staniforth* court addressed the Government Code section 20164 bar. The court held that Government Code section 20164 “contains no explicit statute of limitations for accrued but unpaid pension payments that might form a chose in action that the decedent's estate or trust might be entitle to assert.” Thus, such claims are not extinguished upon the death of the judicial officer and his or her beneficiary.

26. In its response brief, JRS asked that official notice be taken of the Minute Order issued by the Superior Court of California, San Diego County, on March 5, 2015. Official notice is taken pursuant to Government Code section 11515, in conjunction with Evidence Code sections 452 and 453. Respondent's objection that reference to unpublished opinions is impermissible is overruled, with the explanation that the Administrative Law Judge limits consideration of the Superior Court Order to its recitation of a final order in the *Olson* litigation (*Olson I, II, and III*) dated June 18, 1986, stating that it “‘ordered, adjudged and decreed’ that JRS was required to make specific payments to the different classes of

retired judges and justices who were owed amounts under the court's three decisions." However, in this matter, Judge Stothers was an active judge during the protected term and therefore entitled to salary enhancements in that capacity based on *Olson I*. While neither party produced evidence (or agreed-upon fact) that Judge Stothers salary was adjusted based on the California Supreme Court decision in *Olson I*, it is fair to presume that Los Angeles County adjusted his salary retroactively. (*Evid. Code*, §664, requires a presumption that official duty has been properly performed.) Such an adjustment would have satisfied Los Angeles County's obligation to Judge Stothers, and as he was not yet retired, Judge Stothers had no final judgment against JRS for alleged miscalculation of benefits that he could have enforced.

27. The *Staniforth* court, in the context of its discussion of the inapplicability of Government Code section 20164 as a time-bar to the pensioners' claims, suggested that some other provision might limit the time within which a decedent's trust would be authorized to receive amounts due a retired jurist that were accrued and unpaid at the time of the jurist's death. (*Staniforth*, at page 994.) JRS cites no such provision.

28. In summary, issues regarding limitations on action in this matter may have been rendered moot by reason of the determinations that Judge Stothers was not entitled to judicial service credit for military service and JRS did not miscalculate the amounts owing to Judge Stothers' widow (by way of the trust). In any event, JRS has not established that the claims were otherwise barred by any applicable statute of limitations.

ORDER

1. Respondent's request to credit Judge Stothers' with four additional years of judicial service based on his military service is denied.

2. Respondent's request to recalculate Judge Stothers' (and/or Gloria J. Stothers') retirement benefits is denied.

DATED: April 21, 2015



KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings