

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Appeal of Recalculation of Retirement
Allowance of:**

MARC I. HERSHMAN, Respondent.

Case No. 2022-0133

OAH No. 2022060511

PROPOSED DECISION

Marcie Larson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on November 15 and December 20, 2022, from Sacramento, California.

Austa Wakily, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Attorneys Tamarah P. Prevost and Kevin J. Boutin represented respondent Marc I. Hershman, who appeared at the hearing.

Evidence was received, and the record was held open to allow the parties to file closing briefs.¹ The parties timely filed their closing briefs, the record closed, and the matter was submitted for decision on February 21, 2023.

ISSUE

The issue on appeal is whether CalPERS, in accordance with the Public Employees Retirement Law (PERL), correctly determined that respondent's final compensation for his 9.901 years of service credit with the City of Millbrae (City) is subject to Government Code section 20039 and that his final compensation amount is limited to the compensation he received while a City Council official.

FACTUAL FINDINGS

Procedural History

1. Respondent became a member of CalPERS through his position as a City Council official from November 1997 through December 2007. Other than a short period working for the County of San Mateo (County), from December 2008 until his retirement, respondent worked for the California state legislature. At that time his CalPERS membership was based on his state service. On or about December 30, 2020,

¹ Respondent's closing brief was marked as Exhibit DS. CalPERS's closing brief was marked as Ex. 25. Respondent's reply brief was marked as Exhibit DT. The briefs were admitted as argument.

respondent submitted to CalPERS a Service Retirement Election Application (application) with an effective retirement date of February 28, 2021.

2. By letter dated March 4, 2021, CalPERS informed respondent his application was processed and the amount of his monthly service retirement allowance was \$3,393.29. Respondent was provided an account detail information sheet showing how his retirement allowance was calculated.

3. On or about March 9, 2021, respondent contacted CalPERS and disputed his monthly service retirement allowance. Respondent explained that the official CalPERS retirement estimates he received in 2015 and 2016, indicated his retirement allowance would be based on his highest final pay with the State of California.

4. By letter dated March 15, 2021, CalPERS informed respondent that the official retirement estimates he received in 2015 and 2016 were incorrect. The letter explained that:

Your service with the City of Millbrae is subject to Government Code section 20039 which means the final compensation used to compute the portion of your retirement allowance attributable to the City of Millbrae is limited to the highest average one-year compensation earnable during your city council time. When we calculated your retirement estimates, we incorrectly applied your State of California compensation for all your service.

CalPERS informed respondent he was receiving the correct retirement allowance and there was no legal authority to change the calculation of his allowance.

5. By letter dated July 6, 2021, CalPERS informed respondent that additional information was received that effected his retirement allowance. His total service credits were adjusted from 22.251 years to 23.208 years. CalPERS adjusted respondent's monthly retirement benefit to \$3,550.73, with a one-time retroactive adjustment of \$635.38.

6. On November 15, 2021, respondent contacted CalPERS and requested to appeal the calculation of his retirement allowance. The same day, CalPERS sent respondent a final determination letter. CalPERS again explained to respondent that the service credit accrued during his time on the City Council is subject to Government Code section 20039. The letter explains in part:

You were elected to the City of Millbrae city council after July 1, 1994; therefore, your service with the City of Millbrae is subject to section 20039. Accordingly, your final compensation of \$345.00 is the correct amount to use in calculating the 9.901 years of service credit with the City of Millbrae.

CalPERS further explained there was no authority to calculate his final compensation in a different manner or pay him a higher retirement benefit amount than the law allows. Respondent was informed of his right to appeal CalPERS's determination.

7. On or about December 15, 2021, respondent appealed CalPERS's decision. On December 22, 2021, CalPERS acknowledged receipt of the appeal. On June 15, 2022, Kimberlee Pulido, Chief of CalPERS's Retirement Benefit Services Division, signed and thereafter filed the Statement of Issues, in her official capacity.

8. The matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Compensation

9. In November 1997, respondent was elected to serve on the City Council. He was reelected for four-year terms in 1999 and 2003. In December 1997, the City submitted to CalPERS a "Member Action Request" indicating that respondent was designated as a full-time "appointment" membership with CalPERS. Respondent did not complete this form. This was not the correct form. Respondent should have completed the "Election of Optional Membership" to join CalPERS. However, CalPERS processed the form and respondent became a member of CalPERS effective from his first day as an elected official. On November 3, 2000, respondent signed and submitted to CalPERS the correct "Election of Optional Membership."

Respondent was considered a full-time employee of the City for the purpose of receiving CalPERS service credit. Respondent worked 20 to 40 hours per week as an elected official. From December 1, 1997, through November 30, 1999, respondent received \$300 per month from the City. From December 1, 1999, through December 31, 2007, he received \$345 per month. Respondent left the City Council on December 31, 2007, due to term limits. Respondent had 9.901 years of service credit with the City.

10. Respondent worked full-time as an attorney for a law firm while he was on the City Council. Respondent earned between \$80,000 and \$110,000 per year at the firm. He also had a law firm 401k retirement account.

11. In October 2007, prior to leaving his elected position, respondent considered his employment options. He could have stayed with his law firm and

sought partnership. He also learned of a position with the County working as a Chief Legislative Aide for County Supervisor Jerry Hill. Respondent spoke to Jeff Killian, Assistant City Manager for the City, about whether the County had reciprocity with CalPERS.

12. On October 25, 2007, Mr. Killian informed respondent that he spoke with CalPERS and confirmed the County had reciprocity with CalPERS. Mr. Killian also explained in relevant part that:

If a person worked for a PERS agency, such as Millbrae, and then worked for the County of San Mateo, he or she would receive two different retirements upon the date of retirement from the County. Both retirements would be based upon the highest salary provided, regardless of whether the higher salary was received in the City or the County. So if someone were to retire from the County after working also for a City under PERS they would receive two different checks. The check from the PERS retirement would be based on the years of service under the City and the PERS retirement formula in calculating the retirement annuity. Under Millbrae's case, PERS would use the highest annual salary paid during a consecutive 12 month period even if the highest salary were obtained in the County.

Mr. Killian explained that he needed additional information about vesting and the County retirement formula before asking CalPERS to confirm whether the information he provided to respondent was correct. No evidence was presented that

Mr. Killian obtained the additional information or had the information he provided respondent confirmed by CalPERS.

13. Respondent accepted the position with the County, in part, based on his belief that he could establish reciprocity with CalPERS and receive service credit for his years with the City, at the highest salary he made whether at the City or County. Other than Mr. Killian, respondent did not discuss his CalPERS benefits with any other person prior to taking a position with the County.

14. By letter dated February 20, 2008, CalPERS confirmed that reciprocity had been established between CalPERS and the County effective December 12, 2007. The letter explained that “[r]eciprocity is an agreement between CalPERS and certain other public retirement systems that allows an employee to move from one retirement system to the other without losing retirement and related benefits.” CalPERS provided respondent a publication titled “When You Change Retirement System” explaining various issues regarding reciprocity. The publication provides the following for calculation of final compensation for CalPERS members who make a qualified move between reciprocal retirement systems:

[¶...¶]

Highest Final Compensation: CalPERS will compute your final compensation based on the highest rate of pay under any system, as long as you retire on the same date from all systems. Some systems use 12-month highest final compensation; others use 36-month highest final compensation.

[¶...¶]

If you became an elective or appointed officer on or after July 1, 1994, we will use your highest rate of pay under CalPERS.

The publication also provided the following disclaimer:

While reading this material, remember that we are governed by the California Public Employees' Retirement Law. The statements in this booklet are general. The Retirement Law is complex and subject to change. If there is a conflict between the law and this booklet, any decisions will be based on the law and not this booklet.

15. In 2008, Mr. Hill was elected to the California State Assembly. Beginning in December 2008, respondent worked for Mr. Hill as his District Director. On or about January 9, 2009, respondent signed the CalPERS "Election of Optional Membership - Legislative Employee" electing to become a member of CalPERS through his position with the California State Assembly. In 2012, Mr. Hill was elected to the California State Senate. Respondent continued to work for Mr. Hill as the District Director with the California State Senate. On December 5, 2012, respondent signed an "Election of Optional Membership - Legislative Employee" electing to become a member of CalPERS through his position with the California State Senate. Respondent worked for Mr. Hill until his retirement in February 2021. Respondent's highest 12 consecutive months of compensation for his state legislature employment was \$11,956.67.

Annual Member Statements, Estimates, and CalPERS Publications

16. CalPERS provides employers and members information concerning the PERL and the calculation of retirement benefits through several sources including annual member statements (Annual Statements) and retirement estimates.

ANNUAL STATEMENTS

17. Greta Moritz, Staff Services Manager I for CalPERS, oversees a team of analysts who perform complex retirement calculations, as well as respond to and resolve administrative issues, compliance issues, and complaints related to retirement benefits. Ms. Moritz testified at hearing that CalPERS provide members an Annual Statement which includes information about the members' service and retirement contributions.

18. Beginning in 1998, respondent received an Annual Statement which provided information concerning his retirement benefits. Respondent's 1998 and 1999 Annual Statements provided the following information regarding calculation of his retirement allowance:

Service Retirement Benefits

You will be eligible to retire when you have 5 years of service credit and have attained age 50.

When you retire, CalPERS will calculate your allowance based on three factors: (1) service credit with each of your employers, (2) benefit factor(s) determined by your retirement formula(s) and your age at retirement, and (3) final compensation. "Final compensation" is your average

monthly pay rate for the last, or highest, 12 consecutive months of work with your current employer. If you have service with more than one CalPERS employer or are covered by Social Security, please see Final Compensation on page 6. Please refer to your CalPERS member benefits booklet for benefit factors and examples of retirement benefit calculations.

Final Compensation on page six of the Annual Statements provides in relevant part:

"Final compensation" for school service is the average monthly pay rate for the last or highest 36 consecutive months of overall CalPERS membership. For any State service, it is based on the last or highest 12 consecutive months. For public agency service, either 36 months or 12 months is applicable, based on each employer's contract provision at the time of the member's retirement. [¶...¶]

19. Respondent's Annual Statements for 2004 through 2008 contained the following information regarding the calculation of final compensation:

Your future CalPERS monthly service retirement benefit will be based on your:

- service credit with each of your employers,
- benefit factor(s) of your retirement formula(s) for your retirement age, and

- final compensation which is your average monthly pay rate for the last, or highest, 12 or 36 months.

Your benefit is calculated as follows:

$$\text{Service Credit} \times \text{Benefit Factor} \times \text{Final Compensation} = \text{Unmodified Allowance (highest monthly pension)}$$

20. In 2009 respondent received his first Annual Statement that included his City and State of California service credit. The Annual Statement included the same explanation regarding the calculation of final compensation as his 2004 through 2008 Annual Statements. Although Government Code section 20039 was in effect and applied to respondent's City service credit, it was not mentioned in the Annual Statements.

21. Respondent continued to receive Annual Statements each year he was employed with the state. There was no mention of Government Code section 20039 in any of those statements.

22. All of the Annual Statements contained the following disclaimer:

While every effort has been made to ensure the accuracy of this report, it should be understood that it does not have the force and effect of law, rule, or regulation governing the payment of benefits. Should any difference or error occur, the law will take precedence.

RETIREMENT ESTIMATES

23. CalPERS members have the option of requesting an estimate of future retirement benefit amounts. In August 2015, respondent completed and submitted to CalPERS a completed "Retirement Allowance Estimate Request." Respondent requested an estimate of his retirement allowance if he retired on August 6, 2016.

24. By letter dated September 10, 2015, CalPERS provided respondent an estimate of his retirement allowance if he retired on August 6, 2016. The estimate explained that his final compensation would be based on his "highest average monthly pay rate for 12 or 36 months of consecutive employment." The final compensation applied to all of his years of service, including the 9.901 years with the City, was \$10,540. His estimated monthly unmodified allowance was approximately \$4,700. There was no mention of Government Code section 20039. There was no disclaimer on the estimate. This estimate was incorrect.

25. In July 2016, respondent sent CalPERS a second Retirement Allowance Estimate Request. Respondent requested an estimate of his retirement allowance if he retired on December 31, 2016.

26. By letter dated July 13, 2016, CalPERS provided respondent an estimate of his retirement allowance if he retired on December 31, 2016. The estimate again explained that his final compensation would be based on his "highest average monthly pay rate for 12 or 36 months of consecutive employment." The final compensation applied to all of his years of service, including the 9.901 years with the City, was \$10,962. His estimated monthly unmodified allowance was approximately \$5,031. There was no mention of Government Code section 20039. There was no disclaimer on the estimate. This estimate was incorrect.

27. On May 21, 2020, respondent contacted CalPERS to discuss the process of filing for retirement. He spoke to Kiran Natha, Associate Governmental Program Analyst in the Operations Support Services Division for CalPERS. Mr. Natha testified at hearing that his duties included providing retirement counseling to CalPERS members. Mr. Natha explained that respondent was designated as a "Very important Person" or "VIP" although he did not know why. A member can be designated as a VIP if they are an elected officer, a legislator or works in the Governor's office.

28. Mr. Natha did not provide respondent specific information regarding the amount his retirement allowance. Rather he suggested respondent file with CalPERS a Retirement Allowance Estimate Request. He also informed respondent he could obtain an estimate online through the MyCalPERS system. Respondent requested assistance to obtain an estimate from myCalPERS. Mr. Natha helped respondent log into myCalPERS to obtain an estimate. Mr. Natha told respondent to enter his highest final compensation and that amount would apply to all his service credit.

Respondent entered into the estimate that his final compensation was \$12,090. His estimated monthly unmodified allowance was approximately \$6,982. Mr. Natha also told respondent to file a Retirement Allowance Estimate Request so that he could compare the two estimates. Mr. Natha mailed respondent the publication "A Guide to Completing Your Service Retirement Application." Respondent did not file a Retirement Allowance Estimate Request with CalPERS.

29. Mr. Natha incorrectly told respondent that his highest salary would apply to all of his service credit. At the time Mr. Natha helped respondent obtain the online estimate, he did not know respondent had been an elected official. Mr. Natha had several communications with respondent between May and October 2020. He never told respondent that Government Code section 20039 would apply to his City service

credit, which would limit his 9.901 years of service with the City to his highest final compensation with the City, which was \$345.

CALPERS PUBLICATIONS

30. Robin Owens, Associate Governmental Program Analyst in the Retirement Services Division for CalPERS, testified at hearing that CalPERS provides employers information on many different topics including the type of CalPERS memberships and the benefits associated with the various memberships. Employers are provided the information to give to employees during the on-boarding process.

31. Ms. Owens also explained that annual circular letters are sent to employers to provide updates and changes in the law. Notice regarding the enactment of Government Code section 20039 was sent to employers in a 1994 circular letter. There are also online reference materials which inform employers and members of the Government Code section 20039 limitations.

32. Ms. Owens explained that a CalPERS optional member for a local elected office is anyone who was elected or appointed at the City or County level. For the elected officer to become a member of CalPERS, the official must "opt into membership and complete with the direction of their employer an optional member election form." Ms. Owens explained that the City failed to provide respondent the correct membership form when he signed up for CalPERS membership. The correct form contained information regarding Government Code section 20039. CalPERS processed respondent's form even though it was incorrect. However, the City should have provided respondent information regarding Government Code section 20039.

Respondent's Final Compensation Review

33. Ms. Owens is a subject matter expert in retirement issues for optional members and for more complex retirement calculations within the CalPERS Retirement Benefit Services Division. Ms. Owens explained that a very small number of staff at CalPERS are trained to review retirement applications for optional members. When an optional member applies for retirement, their application is reviewed to determine if any statutes are applicable based on their elected title of member of the city council or board of supervisors, because those elected positions have added limitations to their final compensation, as set forth in Government Code section 20039.

34. Ms. Owens explained that in 2011, CalPERS performed a computer software update that failed to transfer some types of member information. Consequently, optional members were not identified in the new system which resulted in incorrect information regarding estimated retirement benefits being given to optional members. When respondent's 2015 and 2016 retirement estimates were processed, respondent was not identified as an optional member subject to Government Code section 20039. As a result, respondent's final compensation with the state legislature was incorrectly applied to all years of service credit.

35. In 2018, Ms. Owens was tasked with identifying optional and elected members to ensure accurate information was provided regarding retirement benefits. Ms. Owens explained that if respondent had submitted a request for an official estimate in 2020, he would have been identified as an optional member and provided the correct retirement allowance estimate applying Government Code section 20039.

36. Although respondent received incorrect estimates, once respondent filed his application, Government Code section 20039 was correctly applied to his City

Council service credit. Respondent has been receiving the correct retirement allowance. Ms. Owens explained that CalPERS must apply Government Code section 20039 and has no authority to pay respondent a retirement allowance that is in excess of what is allowed by the PERL.

Respondent's Additional Evidence

37. Respondent has been active in politics since 1980. He graduated from law school in 1984. He worked in a fellowship position in Washington D.C. from 1984 through 1987. In 1988, he passed the California State Bar and began practicing law. In 1997, while practicing law, respondent ran for City Council and was elected. Respondent began receiving CalPERS Annual Statements in 1998. From that point he believed that upon his retirement, his allowance would be based on his 12 highest consecutive months of salary.

38. In 2007, when respondent was deciding whether to continue with public sector employment or pursue a partnership at his law firm, he questioned the City manager concerning how County employment may affect his CalPERS retirement benefits. He relied on the information provided by Mr. Killian that his highest salary with the County would be applied to his almost ten years of service on the City Council. This served as further confirmation of respondent's understanding regarding how his CalPERS retirement allowance would be calculated. After respondent began working for the state legislature, his Annual Statements also confirmed his belief that his retirement allowance would be based on his 12 highest consecutive months of salary.

39. In late 2014, respondent's son began struggling. The services he needed were very expensive. Respondent and his wife, who testified at hearing, were

considering various financial options to pay for his care. Respondent was considering leaving his state government position so he could make more money working in the private sector. In 2015, respondent requested an official estimate from CalPERS. Based on that estimate, respondent continued to believe that his retirement allowance would be based on his 12 highest consecutive months of salary. Respondent decided that the retirement benefits were significant and would continue to increase as his salary increased. Respondent decided to continue working in his government position.

40. In 2016, respondent obtained a home equity line of credit to pay for his son's medical expenses and his daughter's college costs. Again, respondent was considering whether he should leave public service and seek higher pay. He requested another official estimate from CalPERS. The estimate reflected a pay increase he received, and his 12 highest consecutive months of salary were applied to all of his service credit, including the years with the City. Respondent and his wife relied on this information when deciding that respondent would stay in his government position.

41. By 2018, respondent had "maxed out" his home equity line of credit and depleted much of his savings. Respondent and his wife met with a financial advisor to seek assistance on how they should address their financial commitments. They shared their salary information and the CalPERS retirement estimates. The advisor suggested respondent and his wife refinance their house, and take money from the equity of their home to pay off their home equity line of credit. They also took out additional money to pay for continued expenses related to their children. Respondent believed that once he retired from the legislature, he could find private sector employment and use his CalPERS retirement allowance to pay his mortgage. Respondent and his wife would not have taken on additional debt if they knew respondent's retirement allowance would be less than the estimates respondent received.

42. In 2020, when respondent was getting ready to file his application, he provided his financial planner the online retirement estimate he generated based on the information provided by Mr. Natha. Respondent had been offered a job with the state senate by the incoming state senator for San Mateo. After considering the offer and retirement allowance estimates from CalPERS, respondent decided it was better for his family to leave state service and seek employment outside the CalPERS system.

43. The first time respondent learned his service credit with the City was not calculated with his 12 highest consecutive months of his state salary was when he received the March 4, 2021 account detail information sheet. Respondent was "shaken and upset." He believed the information was incorrect because the calculations were inconsistent with the other estimates and information he had received from CalPERS. Respondent contacted CalPERS and eventually spoke to Ms. Moritz. She explained that Government Code section 20039 applied to his City service credit. This was the first time respondent had heard of Government Code section 20039.

44. Respondent and Ms. Hershman explained that as a result of respondent's significantly lower retirement allowance, they will need to work longer. In April 2021, respondent began working for Peninsula Clean Energy. His salary is \$200,000 per year. Ms. Hershman worked for the Jewish Community Federation for 26 years and currently works for a non-profit organization. Together they have saved approximately \$1,300,000 in their various retirement funds, excluding respondent's CalPERS retirement pension. Despite their savings, respondent and Ms. Hershman are concerned that because of respondent's lower retirement allowance they may not have enough money to live as they planned once they both retire. Respondent estimated that he has lost approximately \$684,000 in retirement allowance as a result

of CalPERS failing to apply his 12 highest consecutive months of salary to all of his service credit.

Parties' Arguments

RESPONDENT'S ARGUMENTS

45. Respondent does not dispute that his 9.901 years of service credit with the City are subject to Government Code section 20039. Rather, he contends that as a result of the repeated information provided to him by CalPERS that his 12 highest consecutive months of salary would be applied to all of his service credit, including the years with the City, Government Code section 20039 should not be applied. Respondent contends CalPERS breached its fiduciary duty to him and that the theories of promissory and equitable estoppel should be applied.

46. Respondent contends that CalPERS breached its fiduciary duty to him by "repeatedly providing him with inaccurate information about how his pension would be calculated, failing to inform him when CalPERS learned of its error, waiting until after his retirement, and failing to honor its past promises." Relying on *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal. 3d 374, 392–393, respondent argues that the court allows "relief for a pensioner where the administrator conceals material information from him." Respondent proposes the appropriate relief is to "compensate him for his expected retirement benefits, paid based on a final compensation of \$11,956.67."

47. Respondent also contends that the elements of promissory and equitable estoppel are met. Citing *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 239, the "elements of equitable estoppel 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 is ignorant of the facts; and (4) the party asserting estoppel suffered injury in reliance on the conduct.”

Respondent contends that CalPERS “was apprised of the relevant facts of [respondent’s] public employment” but repeatedly failed to appraise him of the application of Government Code section 20039 until after he filed his application. This is evidenced by the Annual Statements and estimates respondent received throughout the course of his City and state employment. This information also demonstrates CalPERS intended for respondent to rely on its erroneous representations regarding how his retirement allowance would be calculated. Respondent “was unaware that CalPERS’ representations were not accurate, nor could he reasonably have discovered their inaccuracies.” Finally, respondent argues that he is harmed as a result of CalPERS’s conduct because of the \$684,000 financial loss he has suffered as a result of relying on the erroneous information.

CALPERS’S ARGUMENTS

48. CalPERS contends that equitable relief is not available to respondent because the “law is well settled” on the issue of whether equitable defenses can be used to “override a statute.” Relying on *Chaidez v. Board of Administration of California Public Employees’ Retirement System* (2014) 223 Cal.App.4th 1425, CalPERS explained that the court “rejected the same fiduciary duty argument made by respondent.” CalPERS explained:

The plaintiff, in that case, Leonard Chaidez (Chaidez),
worked full-time as the city administrator for the City of

Hawaiian Gardens from 1988 until 1997. His highest salary as the city administrator was \$7,374. Subsequently, from 1999 until 2007, Chaidez served as an elected member of the City Council of Hawaiian Gardens. He received \$721.85 per month as a member of the City Council. Chaidez elected to become an "optional" member of CalPERS for his service on the City Council.

Like Respondent, Chaidez thought his retirement benefits would be based on his highest salary (his city administrator salary) multiplied by all his years of service, including his years on the city council. CalPERS determined that the statutory scheme required it to calculate Chaidez's retirement benefits on a bifurcated basis: his time as a City employee would be calculated using his highest employee salary, and his time on the city council would be calculated separately using his highest compensation as an elected official. The bifurcated calculation resulted in retirement benefits that were lower than Chaidez had expected.

CalPERS explained that Chaidez argued that he was "entitled to higher pension benefits because CalPERS did not timely inform him that section 20039 would apply to his service on the City Council." Chaidez contended that CalPERS had a fiduciary duty to provide members with accurate information and that CalPERS was "equitably estopped from applying" Government Code section 20039.

49. CalPERS explained that the court rejected Chaidez's arguments, ruling that the "State Constitution did not give him a right to benefits he did not earn" and

“that applying estoppel against CalPERS in relation to section 20039 would directly contravene statutory limitations.” CalPERS contends that the “*Chaidez* decision is dispositive” and that “[r]espondent’s claim for equitable estoppel against CalPERS should be denied.”

50. CalPERS also contends that even assuming equitable estoppel is an available remedy, respondent “failed to establish the first, second, and fourth element[s] of equitable estoppel against CalPERS.” Specifically, “respondent did not present evidence that CalPERS knew about his discussions with Mr. Killian or that respondent was relying on Mr. Killian in deciding on his career path.” Additionally, “CalPERS provides employers with information about retirement benefits and expects the employer to relay the correct information to their members” including a reference manual and a circular letter provided to employers with information about Government Code section 20039.

Additionally, CalPERS did not intend for respondent to “rely on annual statements or other general publications.” This is evidenced by the disclaimer placed in every Annual Statement and publication that “retirement benefits were based on statute and in the event of a conflict, the law would take precedence.” Finally, CalPERS contends that respondent’s “alleged detrimental reliance is based purely in speculation and insufficient to establish the fourth element of equitable estoppel.”

LEGAL CONCLUSIONS

1. CalPERS is governed by the PERL. The purpose of the PERL is “to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or

prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits." (Gov. Code, § 20001.) CalPERS also provides services to California state employees and employees of other governmental entities that choose to participate in the CalPERS pension system by contract. (Gov. Code, § 20460.)

2. Deference to CalPERS's interpretation of the PERL is "in recognition of the fact that, as the agency charged with administering the PERL, [Cal]PERS has expertise and technical knowledge as well as an intimate knowledge of the problems dealt with in the statute and various administrative consequences arising from particular interpretations." (*City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 539.)

Burden of Proof and Applicable Law

3. Respondent has the burden of proof in this matter, because he requests to alter the status quo by seeking a higher retirement allowance. "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence....." (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044.)

4. CalPERS is a prefunded defined benefit retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198). The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) final compensation. Government Code section 20039 defines final compensation for a local member as follows:

Notwithstanding any other provision of this part, "final compensation" of a local member for the purpose of determining any pension or benefit resulting from state service as an elective or appointed officer on a city council or a county board of supervisors accrued while in membership pursuant to Section 20322, shall be based on the highest average annual compensation earnable by the member during the period of state service in each elective or appointed office. Where that elective or appointed service is a consideration in the computation of any pension or benefit, the member may have more than one final compensation.

This section shall apply to a local member first elected or appointed to a city council or a county board of supervisors on or after July 1, 1994, or elected or appointed to a term of office not consecutive with the term of office held on June 30, 1994.

5. Government Code section 20160 provides for the correction of errors and omissions made by members, employers, and CalPERS. Government Code section 20160, subdivision (a), provides in relevant part that:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

6. Government Code section 20322 provides:

(a) An elective officer is excluded from membership in this system unless the officer files with the board an election in writing to become a member. The election effective date shall be the start date of the current term, provided the election is received by this system within 90 days of the applicable start date. If the election is not received by this system within 90 days from the start date, the effective date shall be the first day of the month in which the election is received by this system. Upon electing to become a member, the officer may further elect at any time prior to retirement to receive service credit for their prior, excluded

service by making the contributions as specified in Sections 21050 and 21051.

(b) As used in this part, "elective officer" includes any officer of the Senate or Assembly who is elected by vote of the members of either or both of the houses of the Legislature, and any appointive officer of a city or county occupying a fixed term of office, as well as officers of the state or contracting agencies elected by the people, and persons elected to a city council or a county board of supervisors.

[1...1]

(e) In accordance with Section 20125, the board shall be the sole judge of which elected or appointed positions qualify the incumbent as an "elective officer" in this system under this section.

(f) Notwithstanding any other provision of law, with respect to elective officers of contracting agencies, payment by a contracting agency of employer contributions and any other amounts for employer paid benefits under this system shall not be construed as receipt of salary or compensation by the elective officer for purposes of any statutory salary or compensation limitation.

Cause for Denial of Appeal

7. Pursuant to the doctrine of equitable estoppel, CalPERS may be estopped from denying benefits to a member. Estoppel requires that: (1) the party to be estopped must be apprised of the facts; (2) that party must intend their conduct will be acted upon; (3) the other party must be ignorant of the true facts; and (4) the other party must have relied upon the conduct to her injury. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

Estoppel seeks to prevent a person or entity from profiting from their own wrongdoing. "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." (*California School Employees Assn. v. Jefferson Elementary School District* (1975) 45 Cal.App.3d 683, 692 [internal quotations and emphasis omitted].)

8. Respondent failed to establish the second element of estoppel. CalPERS provided respondent with Annual Statements with disclaimers explaining that "retirement benefits were based on statute and in the event of a conflict, the law would take precedence." While respondent's 2015 and 2016 retirement estimates failed to apply Government Code section 20039, these were simply estimates, which by their very nature are approximations. It is not until a final compensation review is conducted that CalPERS must ensure that applicable statutes are applied to a member's retirement allowance. CalPERS conducted this review of respondent's final compensation, and he has since been receiving the correct retirement allowance.

9. However, even if all four of these elements were proven, equitable estoppel "will not be applied against the government if to do so would effectively

nullify 'a strong rule of policy, adopted for the benefit of the public.....'" (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.) As the court explained: "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, 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 pp. 496-497.)

10. Here, applying the doctrine of equitable estoppel would be contrary to strong public policy. CalPERS has a fiduciary duty to protect the retirement fund for the benefit of all its beneficiaries. It cannot ignore a mistake that benefits one beneficiary in a manner that is inconsistent with the law or inequitable to its other beneficiaries. The court in *Chaidez v. Board of Administration of California Public Employees' Retirement System* has directly addressed the application of Government Code section 20039, and ruled that applying estoppel against CalPERS in relation to Government Code section 20039 would directly contravene statutory limitations.

Additionally, the court recently addressed this issue in *Blaser v. California State Teachers Retirement System* (2022) 302 Cal.Rptr.3d 428, finding that estoppel is not available against the governmental entity if its invocation would require that government entity to take action beyond its statutory authority. (See *id.* at p. 447.) The court further stated that "equitable estoppel cannot be applied [...] to effectively perpetuate the erroneous calculation and payment of monthly benefits because to do so would contravene the law prohibiting a gift of public funds." (*Id.* at p. 451.)

11. Respondent is requesting CalPERS to act beyond its statutory authority by allowing him to receive a retirement allowance he is not entitled to under the PERL.

Such conduct is not allowed. Respondent may only receive the retirement benefit allowance he is legally entitled to under the PERL. (See *In the Matter of the Appeal of Decreased Level of Retirement Allowance of Harvey H. Henderson*, Precedential Board Decision No. 98-02.) Respondent did not establish, by a preponderance of the evidence, that his retirement allowance is inaccurate, that equitable remedies can be applied to defeat the statutory requirement set forth in Government Code section 20039, or that there is a correctable mistake under Government Code section 20160. Therefore, his appeal must be denied.

ORDER

Respondent Marc I. Hershman's appeal is DENIED.

DATE: March 22, 2023

Marcie Larson

Marcie Larson (Mar 22, 2023 12:19 PDT)

MARCIE LARSON

Administrative Law Judge

Office of Administrative Hearings