

## MEMORANDUM OF LAW

DATE: January 14, 1992  
TO: Larry B. Grissom, Retirement Administrator  
FROM: City Attorney  
SUBJECT: Overpayment of Pension Benefits

Recently you requested a legal opinion concerning the steps to be utilized by the City Employees' Retirement System ("CERS") to recoup an overpayment of pension benefits. The specific case involved in your earlier case has been addressed in a separate memorandum. However, in light of the importance of this issue, we submit the following Memorandum of Law.

### DISCUSSION

Discovery of an overpayment of pension benefits necessitates an immediate investigation into the facts and circumstances surrounding the overpayment. Depending on the results of such an investigation, recovery of the overpayment rests on two possible causes of action. The first involves an analysis of a mistake of fact. The second involves an analysis of public trust funds. Each of these legal theories is subject to various defenses including statute of limitations and estoppel. The causes of action and defenses referenced above have been separately addressed.

### MISTAKE OF FACT

Civil Code section 1577 defines mistake of fact as follow:

Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,
2. Belief in the present existence of a thing material to the contracts, which does not exist, or in the part existence of such a thing, which has not existed.

It is well settled that "money paid under a mistake of fact may be recovered back, however, negligent the party paying may have been making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund." *Doyle v. Matheron*, 148 Cal. App. 2d 521, 522-523 (1957). "Overpayments caused by clerical or accounting errors and oversights have been treated as over-payments made under a mistake of fact." *American Oil Service v. Hope Oil Co.*, 233 Cal. App. 2d 822, 830 (1965).

If money has been paid pursuant to a mistake of fact, CERS would be

entitled to recover this overpayment providing that the overpayment has not caused such a change in the recipients position that it would be unjust to require him or her to repay it. *Doyle v. Matheron*, 148 Cal. App. 2d at 523. In this regard, the change in position should be so substantial that it would be sufficiently unjust, unfair, and inequitable to compel repayment of the excess as to create an estoppel. *Id.* This, of course, is a question of fact.

Importantly, the Board will require information concerning the financial situation of the recipient. Specifically, the Board will need to know whether the overpayments made to recipient have caused such a change in his or her position that it would be unjust for CERS to require repayment.

Concurrent with its investigation into the facts and circumstances of the overpayment and its effect on the recipient, CERS could and if the facts so warrant, should attempt to negotiate an equitable settlement. In this regard, the Board could offer such incentives as an interest free repayment schedule designed to accommodate the recipient's financial situation. The Board could also agree to accept a lesser amount as a compromise.

Should CERS elect to pursue legal recourse, the City Attorney would file an action in the appropriate court. The cause of action for the recovery of the money would be the common count of money had and received. Prior to the institution of such a suit, CERS would be required to make a demand for the repayment. Assuming the suit is filed, there are several defenses which, if raised, could bar recovery of some or all of the overpayment. These defenses have been addressed separately.

#### STATUTE OF LIMITATIONS

An action for relief on the ground of mistake is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the mistake. Upon such discovery a party has three (3) years to bring action. California Code of Civil Procedure section 338(d).

A cause of action for mistake accrues, and the limitations period commences to run, when the aggrieved party could have discovered the mistake through the exercise of reasonable diligence. *Sun 'N Sand, Inc. v. United California Bank*, 21 Cal. 3d 671, 701 (1978). Since the provision tolling operation of the statute until discovery is an exception, CERS "must affirmatively excuse  $\pi$ its failure to discover the fraud within three years after it took place, by establishing facts showing that  $\pi$ it was not negligent in failing to make the discovery sooner and that  $\pi$ it had no actual or presumptive knowledge of facts sufficient to put  $\pi$ it on inquiry." *Id.* at 701-702.

In this regard, at least one court has charged the payor with actual

notice of the overpayment due to the fact that the records which would have revealed the overpayment were at all times within the possession of the payor. *Edgar Rice Burroughs Inc. v. Commodore Productions & Artists Inc.*, 167 Cal. App. 2d 463, 475 (1959). "The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inactive, and afterwards allege a want of knowledge that arose by reason of his own laches or negligence . . . ." *Id.* Thus, applying this principle, the Burroughs court found that since the payor had at all times after the payment to the payee such means of information with reference to the account between them and him and of the mistake in payment that:

¶ Their failure to avail themselves of it charged them with the same result as though they had actual knowledge therefor. The accounts were kept under their supervision, or by their bookkeeper, the statement was made out by him; the book in which the account was kept, and from which the statement was presumably made, was retained by them and was afterwards used by them in which to place their own individual transactions, and was afterwards stored away by them.

*Id.* at 476.

Under these circumstances, the rule of later discovery to extend the statute of limitations was not allowed. Should this occur, CERS could be precluded from recovering those payments made in violation of the three year statute of limitations period set forth in Code of Civil Procedure section 338(d).

#### EQUITABLE ESTOPPEL

Equitable estoppel is another defense the recipient might raise against CERS to bar it from recovering any of the funds mistakenly paid. As stated earlier, money paid under a mistake of fact may be recovered back, however, negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund. *Doyle v. Matheron*, 148 Cal. App. 2d at 522-523.

The doctrine of equitable estoppel historically has not been applied to government agencies. However, in recent years that rule has been changed and, as discussed by the California Supreme Court in *City of Long Beach v. Mansell*, 3 Cal. 3d 462 (1970), the doctrine will now be applied to governmental agencies by the courts in certain situations. Generally, four elements must be present for the courts to apply the doctrine. In the case of public agencies, an additional element must be present. They are as follows:

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 intended.

3. The other party must be ignorant of the true state of facts.

4. He must rely upon the conduct to his inquiry.

(Driscoll v. City of Los Angeles, 67 Cal. 2d 297, 308 (1967).

Once a party has proved the existence of the above four elements, in the case of governmental agencies, the party must go on to prove 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." City of Long Beach v. Mansell, 3 Cal. 3d at 496-497.

Importantly, "the doctrine of equitable estoppel, . . . is not applicable to a municipal agency which has not acted in compliance with a statute which is the measure of its power." El Camino Community College Dist. v. Superior Court, 173 Cal. App. 3d 606, 617 (1985). In the present case the Board's powers are limited by the City Charter. Section 144 states in pertinent part: "The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system . . . ."

There is no statutory authority for overpayments of pension benefits. Lacking this statutory authority, it is doubtful that CERS would be equitably estopped from seeking recovery of the overpayment. It is, however, ultimately a question of fact.

#### PUBLIC TRUST FUNDS

In addition to a cause of action based on mistake of fact, CERS would also attempt to recover the overpayment based on a public trust funds theory. Money paid out by mistake by the state or an agency of government can be recovered. The reason for this, and the theory underlying it, is that the funds paid out are public funds -- trust funds, -- and not the property of an individual who can deal with them as he pleases. Holtendorff v. Housing Authority, 250 Cal. App. 2d 596, 632 (1967).

In Holtendorff, the Los Angeles Housing Authority sought to recover money that it paid to Holtendorff to reimburse him for attorney's fees and expenses in connection with criminal proceedings taken against him. The authority subsequently determined that the reimbursement was unauthorized and sought recovery of the amounts paid. The court held paying of the legal expenses had no relation to a proper legislative purpose or any purpose of the Housing Authority authorized by law. *Id.* at 633.

However, the Holtendorff public trust funds theory was distinguished in Shoban v. Board of Trustees, 276 Cal. App. 534, 545 (1969). The presence of equitable estoppel elements in Shoban was held to make the public trust funds argument inapplicable. Therefore, the success of the

cause of action based on public trust funds would most likely depend on the success of any equitable estoppel defense raised by the recipient.

#### CONCLUSION

In considering its action on an overpayment situation described in this Memorandum of Law the Board is faced with conflicting duties and responsibilities. On one hand, the Board is charged with the management and care of retirement funds. On such, the Board acts as a fiduciary for trust funds and must exercise the appropriate degree of financial management. On the other hand, the predicament of the recipient must be considered and accorded appropriate equity.

The facts and circumstances of the overpayment must be investigated. The financial situation of the recipient including the effect, if any, of the overpayment must be ascertained. Depending on the results of this inquiry an equitable settlement should be considered.

Should the Board decide to seek recovery of the total amount through legal action, the "discovery rule" codified in Code of Civil Procedure section 338(d) would not necessarily bar complete recovery of funds based on a statute of limitations defense. However, the reasonable diligence exception to the rule could bar CERS from recovering those overpayments in excess of the three year statute of limitations in Code of Civil Procedure section 338(d). In addition, an equitable estoppel defense, although unlikely, could preclude CERS from recovering any amount paid to the recipient. Regardless, CERS would still have a cause of action based on a theory of public trust funds.

I hope this Memorandum of Law has addressed your concerns. Please let me know if I can be of any further assistance.

JOHN W. WITT, City Attorney

By

Loraine L. Etherington

Deputy City Attorney

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