

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Thomas S. Blanco (Respondent) was an employee of Respondent Department of Corrections and Rehabilitation (Respondent CDCR) from June 1, 1988 through July 1, 2020. Respondent's last full-time position with Respondent CDCR was Special Agent. By virtue of his employment, Respondent was a state safety member of CalPERS.

On September 1, 2019, Respondent Blanco was appointed to work in an out-of-class position. Respondent Blanco worked as a Senior Special Agent through February 23, 2020. As a result of working in an out-of-class position, Respondent Blanco received a pay differential which increased the compensation he received from Respondent CDCR.

On June 10, 2020, CalPERS received Respondent Blanco's application for service retirement. Respondent Blanco retired for service effective July 1, 2020, with 26.040 years of service credit, and has been receiving his retirement allowance from that date.

In reviewing Respondent Blanco's final compensation to ensure compliance with the Public Employees' Retirement Law (PERL; Gov. Code, § 20000 et seq.), CalPERS noted that the out-of-class differential pay was only paid to Respondent Blanco during his final compensation period.¹

On August 21, 2020, CalPERS sent Respondent Blanco and Respondent CDCR a determination letter notifying them that the out-of-class pay differential Respondent Blanco received solely in his final compensation period would be excluded from his final compensation calculation. CalPERS determined that Respondent Blanco's out-of-class pay differential did not qualify as compensation earnable under section 20636, as well as California Code of Regulations, title 2, sections 570 and 571 (hereafter, CCR sections 570 and 571). For these reasons, CalPERS determined that it should not be included in Respondent Blanco's final compensation amount for purposes of determining his monthly CalPERS retirement allowance.

Respondents Blanco and CDCR appealed this determination and exercised their right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on September 15, 2021. Respondent Blanco and Respondent CDCR were each represented by counsel at the hearing.

CalPERS' staff testified at the hearing in support of its determination. Staff explained that the out-of-class differential pay was paid exclusively during Respondent Blanco's final compensation period. Staff testified that when an item of special compensation is paid exclusively during the member's final compensation period and is not consistent with prior payments to the member, it creates an unfunded liability. Staff acknowledged

¹ All future references are to the Government Code, unless otherwise noted.

that CCR section 571, subdivision (a) expressly applies to local agency and school members, but that CalPERS uses CCR section 571, subdivision (a) for guidance as to state members and sections 571, subdivisions (b)-(d) for all members.

CalPERS argued that the nine criteria contained in CCR section 571, subdivision (b) should apply to all members for special compensation to qualify as pensionable under the PERL. CalPERS stipulated that the sole basis for excluding Respondent Blanco's out-of-class differential pay was that it violated CCR section 571, subdivision (b)(7) which provides special compensation cannot be "paid exclusively in the final compensation period." Consequently, CalPERS' determination with respect to Respondent Blanco was not based on criteria contained in section 20636.

Respondent Blanco and Respondent CDCR argued that CCR section 571 does not apply to state members. Respondent Blanco and Respondent CDCR also argued that even if CCR section 571 applied to state members, it would improperly contravene section 20636, subdivision (g)(3)(b) which controls what constitutes special compensation for state members. Finally, Respondent Blanco argued that equitable estoppel should compel CalPERS to include his out-of-class differential pay in his final compensation.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted the appeal. The ALJ found that CCR section 571, subdivision (b)(7) does not apply to the out-of-class pay differential Respondent Blanco received solely in his final compensation period.

In the Proposed Decision, the ALJ concludes that CalPERS' determination should be reversed and that it must include Respondent Blanco's out-of-class differential pay in his final compensation for purposes of determining his service retirement allowance.

Based on the unique set of circumstances related to Respondent Blanco's out-of-class differential pay, as well as the legal arguments raised at the hearing, staff does not oppose the Proposed Decision being adopted by the Board.

April 19, 2022

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