

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Hodi Harchegani (Respondent) was employed by the San Diego Unified School District (Respondent District) from 1981 to 2021. He retired as a Transportation Operations Supervisor in 2021.

The sole issue for determination was whether the COVID-19 Pay reported by Respondent District as Hazard Premium Pay constituted special compensation to be included in Respondent's final compensation when calculating his retirement allowance.

In April 2020, a Memorandum of Understanding (MOU) was entered into between the District and the California School Employees Association (CSEA) to address the impacts of the COVID-19 pandemic. Respondent was a part of this bargaining unit. In the MOU, the District declared that all employees, including CSEA members, were considered "disaster service workers and are subject to disaster service activities assigned to them (Gov. Code § 3100) and provisions should be made for those employees impacted by the epidemic." The MOU expired in June 2020. It provided in relevant part that:

Effective March 16, 2020, employees who are required to report to a school site/department and/or employees who are required to come into contact with the public/other employees, shall be compensated for such services at one and a half (1.5) times their standard rate of pay for hours worked each day they report to an onsite location.

The MOU does not describe the additional pay as Hazard Premium Pay or special compensation. The District reported Hazard Premium Pay on Respondent's behalf totaling \$8,086.44 from March to June 2020, and deducted contributions for that pay.

On November 1, 2021, Respondent submitted an application for service retirement with a retirement date of December 31, 2021. Upon review of his application, CalPERS determined that Respondent District had mis-reported the additional pay as Hazard Premium Pay, and that it could not be included in the calculation of Respondent's pension benefits because it did not qualify as compensation earnable under Government Code section 20636.1 and California Code of Regulations (CCR), title 2, section 571, subdivisions (a)(1) and (b).

Compensation for school members is defined as payrate plus special compensation. (Gov. Code § 20636.1, subd. (a).) Payrate is defined as the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. (Gov. Code § 20636.1, subd. (b)(1).)

Special compensation is defined as payments received by a member for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions (Gov. Code § 20636.1, subd. (c)(1).) Special compensation must be paid pursuant to a written labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment, in addition to payrate. (Gov. Code § 20636, subd. (c)(2).) The CalPERS Board has specifically and exclusively identified what constitutes special compensation and under what conditions payments to a member may qualify as special compensation. (Gov. Code § 20636.1, subd. (c)(6); CCR § 571.)

Hazard Premium Pay is defined as “compensation to employees who are routinely and consistently exposed to toxic, radioactive, explosive or other hazardous substances or perform hazardous activities to implement health and safety procedures” (CCR § 571(a).) Special compensation must also meet all requirements set forth under CCR section 571, subdivision (b).

CalPERS determined that there were no issues with Respondent’s payrate and one item of special compensation: longevity pay. CalPERS determined the Hazard Premium Pay did not qualify because Respondent was not exposed to toxic, radioactive, explosive or other hazardous substances nor did he perform hazardous activities. Rather, the pay was for a four-month period when Respondent worked on-site during the COVID-19 pandemic. CalPERS explained that the type of jobs that qualify for Hazard Premium Pay are safety positions, such as police, fire, corrections, and labor-intensive jobs. Hazard Pay should not be reported for administrative positions, paid on a temporary basis, or paid for natural disaster response.

On February 18, 2022, CalPERS notified Respondents of its determination. Respondent appealed the determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). Two days of hearing were held on January 25 and February 6, 2023. Respondent was represented by counsel at the hearing. Respondent District did not appeal or appear at the hearing.

At the hearing, Respondent testified that his goal was to earn at least \$10,000 per month from his service retirement. He made the decision to retire after using the CalPERS online Retirement Estimate Calculator in 2021, which provided an estimate of over \$10,000 per month. Respondent contended that because CalPERS contributions were taken out of his Hazard Pay, that pay should be included in the calculation of his CalPERS retirement allowance. Respondent argued the doctrine of equitable estoppel should be applied to prevent CalPERS from excluding his Hazard Pay.

CalPERS presented evidence and the testimony of two representatives in support of its determination. CalPERS’ witnesses explained the relevant portions of the PERL, and why the Hazard Premium Pay did not meet those requirements. CalPERS explained the method by which a member’s retirement allowance is calculated using service credit, age, final compensation, and formula at retirement. CalPERS assumes information reported by employers is correct until there is a final compensation review after the member retires. A final compensation review can also occur when a member requests

that CalPERS provide an estimate. In this case CalPERS provided Respondent with two estimates in 2021, neither of which was over \$10,000. Finally, a member can use the CalPERS Retirement Estimate Calculator online, which requires the user to agree to the following terms:

The Retirement Estimate Calculator is intended to provide an estimate only. The estimate does not constitute an official CalPERS retirement allowance, nor should it be relied upon as such. Estimates will be based on the information you provide, and are non-binding between you and CalPERS. Your actual retirement allowance, including optional allowances, will be determined by CalPERS after you formally apply for retirement. CalPERS is governed by the California Public Employees' Retirement Law. If there is a conflict between the law and the information you provide, the law takes precedence.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that the payments Respondent received were not historically consistent with any prior payments and the pay does not meet the definition of Hazard Premium Pay. Respondent provided no evidence of any change to his duties to receive the additional pay other than continuing to work on-site for the district. The ALJ similarly rejected Respondent's claims based on equitable estoppel because he failed to meet the requisite elements, and because applying estoppel in this case would require CalPERS to act beyond its statutory authority.

In the Proposed Decision, the ALJ concluded that Respondent had the burden of proof to establish by a preponderance of the evidence that his Hazard Premium Pay should have been included in his final compensation for purposes of determining his CalPERS retirement allowance, and he failed to meet his burden. Therefore, his appeal must be denied.

Pursuant to Government Code section 11517, subdivision (c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." To avoid ambiguity, staff recommends correcting the spelling error of "alloance" with the word "allowance" on page 11, paragraph 24 of the Proposed Decision.

For all the above reasons, staff argues that the Proposed Decision should be adopted, as modified by the Board.

April 18, 2023

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