

ATTACHMENT C

RESPONDENT ARGUMENT

FROM THE DESK OF
DIETER CARLOS DAMMEIER

Attachment C

Telephone: [REDACTED]

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Oct 19, 2023

CalPERS Board of Administration
c/o Board Services Unit Coordinator
CalPERS
P.O. Box 942701
Sacramento, CA 94229-2701

Via email and UPS
Board@CalPERS.ca.gov

**Re: Respondent's Argument – Appeal of Benefit Formula, Dieter Carlos Dammeier
Calculation Method Used When Combining Classic and PEPRA Service Credit**

Dear CalPERS Board,

Prior to becoming an Administrative Law Judge for the State, I was a labor attorney representing public sector labor unions throughout California. Because of this background, I fully understand and appreciate the Board's effort to protect Classic Members pension rights in the aftermath of PEPRA, by passing regulation 2 C.C.R. section 579.24(b). As explained below, while that effort was well intentioned; now ten years later, this Board created regulation does the opposite of what it was intended to do. Instead of protecting Classic Member's pension rights, it now diminishes them.

The ALJ handling the hearing below decided to punt. Instead of deciding the case on the merits. She decided that since I have not yet retired, the case is moot and need not be decided at this time. Hopefully the Board sees an interest in resolving the issue, not just for myself but also the multitude of other members in similar situations. It is not practical, or frankly kind, to tell these members they should be left guessing as to what their pensions might be, as ultimately decided in a case two years after they retire.

It appears after PEPRA was enacted, CalPERS understandably passed a multitude of implementing regulations. One of those regulations involved handling calculations when dealing with a member who has both Classic time and also time as a "new member" under PEPRA. Specifically, Section 579.24(b) reads as follows:

Where a member has accrued service credit as a Classic Member and separately accrues service credit as a New Member, each with a period of service resulting in a different final compensation amount, CalPERS will apply one final compensation amount for the service credit accrued as a Classic Member, and a second final compensation amount for the service credit accrued as a New Member. CalPERS will then use both figures to calculate the total retirement benefit owed.

When the Board implemented 579.24(b) in 2013, it is assumed CalPERS was attempting to give peace of mind to "classic" members who were concerned about their benefits being altered by the then just passed PEPRA. CalPERS responded by creating a bifurcated system, giving assurance to classic members that their classic time would be protected even if they left and came back as a "new member". While this assurance may have been welcomed by classic

members coming back as “new members” in the 2014/2015 era, time has flipped that notion. In 2015, final compensation would not be much different from someone’s prior classic time so the preference would be a better “classic” formula with a slightly lower final compensation. In 2023 and beyond however, the opposite is true; the preference would be for the higher compensation, even with the lessor PEPRA formula. If the purpose of the regulation was to in fact give some protection to “classic” members, that purpose is no longer needed for classic members coming back into public service. The consequences, looking several years down the road, were not fully vetted when contemplating this regulation in 2013. Ten years later and beyond, the detrimental impact is significant. If I retire at age 62 (assuming \$160,000 final compensation based on three-year average), I would have 20 total years in CalPERS, earning me 40% of \$160,000, equating to a \$5,333 monthly pension under the PEPRA statutory formula. Under the conflicting CalPERS regulation method being used, my pension is cut in half since my first ten years in CalPERS is not counted using my true final compensation, but instead uses a “final compensation” from 1999 (\$36,000).

My position is that as a “new member” I am subject to only one retirement formula, described at Government Code Section 7522.20(a), as clearly laid out by the Legislature in the Public Employees’ Pension Reform Act (PEPRA). CalPERS staff provides no justification, legal or otherwise, why it’s conflicting regulation (2 C.C.R. section 579.24(b)), creating two retirement formulas, must be used instead of the clear mandate proscribed by the Legislature.

I simply seek what is required by statute; one formula with one final compensation amount. As opposed to what CalPERS is imposing by regulation, giving some years the 2% at age 55 formula and some years the 2% at age 62 formula with two different final compensation amounts. I acknowledge that as a “new member” I am seeking (and required to use) the lessor formula (2% at age 62), but for ALL my years of service, effectively giving me a smaller percentage per year of service but a significantly higher “final compensation” amount. In reviewing the implementing PEPRA statutes, the legal conclusion is inescapable; that one pension formula, including one final compensation amount applies.

I, by returning to public service with a lapse of more than six months am a “new member”.

Government Code Section 7522.04 reads:

(f) “New member” means any of the following:

(1) An individual who becomes a member of any public retirement system for the first time on or after January 1, 2013, and who was not a member of any other public retirement system prior to that date.

(2) An individual who becomes a member of a public retirement system for the first time on or after January 1, 2013, and who was a member of another public retirement system prior to that date, but who was not subject to reciprocity under subdivision (c) of Section 7522.02.

(3) An individual who was an active member in a retirement system and who, after a break in service of more than six months, returned to active membership in that system with a new employer. For purposes of this subdivision, a change in employment between state entities or from one school employer to another shall not be considered as service with a new employer.

Once this premise, that I am a “new member”, is recognized, as was conceded at hearing by CalPERS, the PEPRA road map ends in only one place. In reviewing the provisions of PEPRA, it becomes clear exactly what pension formula is applicable (and required) here.

PEPRA starts out at section 7522.02;

“(a)(1) Notwithstanding any other law, except as provided in this article, on and after January 1, 2013, this article shall apply to all state and local public retirement systems and to their participating employers, including the Public Employees' Retirement System. . .”

PEPRA goes on;

7522(b) “The benefit plan required by this article shall apply to public employees who are new members as defined in Section 7522.04.”

PEPRA continues;

7522.15 “Except as provided in subdivisions (d) and (e) of Section 7522.02, each public employer and each public retirement system that offers a defined benefit plan shall offer only the defined benefit formulas established pursuant to Sections 7522.20 and 7522.25 to new members.”

The PEPRA formula (2% at age 62) provided at 7522.20 bolsters the mandate:

Government Code Section 7522.20(a), which applies to “new members”, reads as follows:

Each retirement system that offers a defined benefit plan for nonsafety members of the system shall use the formula prescribed by this section. The defined benefit plan shall provide a pension at retirement for service equal to the percentage of the member's final compensation set forth opposite the member's age at retirement, taken to the preceding quarter year, in the following table, multiplied by the number of years of service in the system as a nonsafety member. A member may retire for service under this section after five years of service and upon reaching 52 years of age.

<i>Age of Retirement</i>	<i>Fraction</i>
52	1.000
52 ¼	1.025
52 ½	1.050
52 ¾	1.075
53	1.100
53 ¼	1.125
53 ½	1.150
53 ¾	1.175
54	1.200
54 ¼	1.225
54 ½	1.250
54 ¾	1.275
55	1.300
55 ¼	1.325
55 ½	1.350
55 ¾	1.375
56	1.400
56 ¼	1.425
56 ½	1.450
56 ¾	1.475
57	1.500

57 ¼	1.525
57 ½	1.550
57 ¾	1.575
58	1.600
58 ¼	1.625
58 ½	1.650
58 ¾	1.675
59	1.700
59 ¼	1.725
59 ½	1.750
59 ¾	1.775
60	1.800
60 ¼	1.825
60 ½	1.850
60 ¾	1.875
61	1.900
61 ¼	1.925
61 ½	1.950
61 ¾	1.975
62	2.000
62 ¼	2.025
62 ½	2.050
62 ¾	2.075
63	2.100
63 ¼	2.125
63 ½	2.150
63 ¾	2.175
64	2.200
64 ¼	2.225
64 ½	2.250
64 ¾	2.275
65	2.300
65 ¼	2.325
65 ½	2.350
65 ¾	2.375
66	2.400
66 ¼	2.425
66 ½	2.450
66 ¾	2.475
67	2.5007522.20(a)

PEPRA also mandates the “final compensation” at section 7522.32:

“For the purposes of determining a retirement benefit to be paid to a new member of a public retirement system, the following shall apply:

- (a) Final compensation shall mean the highest average annual pensionable compensation earned by the member during a period of at least 36 consecutive months, or at least three consecutive school years if applicable, immediately preceding his or her

retirement or last separation from service if earlier, or during any other period of at least 36 consecutive months, or at least three consecutive school years if applicable, during the member's applicable service that the member designates on the application for retirement.”

Not only is the CalPERS regulation in direct conflict with the above statutory scheme, the bifurcated formula adopted by CalPERS violates the statutory mandate of requiring CalPERS (and all other public pension systems) to “offer only the defined benefit formulas established pursuant to sections 7522.20 and 7522.25 to new members.” (Gov. Code § 7522.15). The end result is inescapable. The clearly conflicting regulation creating a different formula than prescribed by statute must give way. The only question is will the Board make the decision, ending years of uncertainty by a multitude of its members, or require each member when they retire to contest and appeal the issue until it is finally resolved by the Courts.

CalPERS Staff’s Defenses Raised at Hearing

Bifurcated Formula Previously Allowed. CalPERS pointed out at hearing where a bifurcated formula may be used, citing *Chaidez v. Board of Administration etc.*, (2014) 223 Cal. App. 4th 1425. This only bolsters my position. In *Chaidez*, the Court correctly allowed CalPERS to use a bifurcated formula, separating time served as an elected official and time served as a fulltime city employee. The reason this was allowed was because the Legislature required this by statute (Gov. Code, § 20039), enacting a specific provision dealing with regular members who become elected officials still covered by CalPERS. There is no question that had the bifurcated formula in *Chaidez* been a result of CalPERS regulation, instead of statute, it would have been struck down as in conflict with the statutory formula laid out by the Legislature. Had the Legislature wanted to create other bifurcated situations, it would have and could have done so. The Legislature is allowed to conflict with and supersede other statutes, unlike administrative agencies, who must follow and not regulate in direct conflict with such statutes.

Unfunded Liability Hail Mary. CalPERS staff attempted to use the “unfunded liability” claim, making an argument that requiring CalPERS to comply with PEPRAs somehow creates an “unfunded liability” because my three public employers over the years are required to fund my pension. CalPERS argues that since the first ten years were funded at a lower compensation, if I retire at a higher compensation that it is somehow “unfunded”. CalPERS argument is without merit, and while the ALJ may have been confused by the unsupported claim, the Board knows better. Public employers fund the pension system based on all of its employees. For example, an employee who was a clerk for 27 years and made manager her last three years, retires at her final compensation. Is this an “unfunded liability” since the vast majority of CalPERS contributions were based on her lower pay? What about a police officer who gets injured his first year and is forced to retire, getting a CalPERS pension for life? Is this an “unfunded liability”? Of course not, as the employer’s contribution rate is adjusted based on the actuarial of all its employees’ current and future pension costs. Employers even make contributions for employees who don’t retire; CalPERS does not return that money to the employer, it is put in the employer’s pool for all of its employees. If Respondent will retire at a higher compensation than CalPERS has assumed in its actuarial used to set the State’s CalPERS rate (because CalPERS has used the incorrect formula), it is not an “unfunded liability” as the State’s rates could be adjusted going forward based on Respondent’s newly estimated final compensation amount being added to the

actuarial that sets the State's rate. Actually, given the number of State employees, both active and receiving pensions, it is hard to believe that complying with the formula required by PEPRA would have any change in CalPERS actuarial or contribution rates.

For CalPERS Staff to throw out half the facts (without evidence) on how pensions are funded, and claim "unfunded liability" is disingenuous to be kind. Even if it was a "unfunded liability" is that my fault or CalPERS? Who created the dual formula in direct conflict with PEPRA, thereby causing incorrect information in the actuarial used to set the rates?

Mootness. Only after the ALJ requested briefing on this subject, Staff saw this as a way to get out of the case without arguing the merits, as it had no winning argument on the underlying merits (regulation conflicting with statute). The ALJ bought the mootness argument and kicked the can down the road for another Court or this Board to do the heavy lifting and decide the merits of the case. The Board here can decide the case as there are exceptions to the mootness doctrine that clearly apply. As explained by the Appellate Court in *Cucamongans United for Reasonable Expansion (Id.)*, "there are three discretionary exceptions to the rules regarding mootness: (1) when the case presents an issue of broad public interest that is likely to recur (*Lundquist v. Reusser* (1994) 7 Cal. 4th 1193, 1202, fn. 8 [31 Cal. Rptr. 2d 776, 875 P.2d 1279]); (2) when there may be a recurrence of the controversy between the parties (*Grier v. Alameda-Contra Costa Transit Dist.* (1976) 55 Cal. App. 3d 325, 330); and (3) when a material question remains for the court's determination (*Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal. App. 3d 200, 205)." "A material question exists when the judgment, if left unreversed, would preclude a party from litigating its liability on an issue still in controversy." (Id.)

Here, there is an argument that at least two of the three exceptions apply. First, PEPRA was enacted to "reform" public pensions for all public employees in California. Its enforcement certainly impacts a matter of public interest. I am not the first or the last Classic Member turned New Member who will be impacted by CalPERS continued deviation from PEPRA's statutory mandate. CalPERS Staff even submitted a prior CalPERS case at hearing (*In Re: Stanfiel*) with similar circumstances, exemplifying this is a repeating issue. Accordingly, this is a matter of public interest likely to recur and falls under exception number one listed above.

Secondly, and the strongest argument that mootness should not apply, is exception number two cited above; "when there may be a recurrence of the controversy between the parties." If this matter is dismissed as moot because I have not yet retired, it is not only likely of "a recurrence of the controversy between the parties", it is a 100% certainty. I will retire at some point, and this issue will need to be resolved. By pushing it off to that time only serves to frustrate this and other members by creating the troubling position of not having any level of certainty as to what his/their pension will be until two years after retirement, not a very fair position to put CalPERS members in when it can be resolved in this case.

For the above reasons, I ask the Board to direct CalPERS to use my "final compensation" based on my employment immediately preceding retirement pursuant to section 7522.32, and use all years of service in CalPERS, multiplied by the appropriate percentage based on my age at retirement, as proscribed in Government Code section 7522.20(a).

Respectfully Submitted,

Dieter Dammeier
Dieter C. Dammeier