

**ATTACHMENT C**

**RESPONDENT'S ARGUMENT**

January 12, 2024

Ref. No. 2023-0316

Board Services Unit Coordinator  
California Public Employee's Retirement System  
Post Office Box 942701  
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Respondent's Argument  
Agency Case No. 2023-0316  
OAH No. 2023080587

Board of Administration  
California Public Employees' Retirement System

CalPERS Board:

This letter is to request that the CalPERS Board not designate the Proposed Decision of the Administrative Law Judge in this appeal as precedent.

The proper and correct administration of retirement benefits is critical and so important. Statutory directives have an administrative purpose and must be followed. The challenge is that meaningful precedent can only be truly established when actions are confirmed to be based on statutory provisions, requirements, and directions. CalPERS staff have offered words to justify their position that retirement benefits must be denied, however, they have not or cannot confirm that their actions to audit final compensation records of sick leave to decide eligibility for a retiree to receive sick leave service credit are authorized, directed, required and in full compliance with the statute that governs the administration of the sick leave service credit retirement benefit.

The requirements and provisions to implement and administer the unused sick leave service credit benefit are not scattered throughout PERL. They are not part of various general retirement provisions. They are not established by a formula involving age, years of service, or a review of compensation. They are not undefined and subject to opinion or discretion. The unused sick leave service credit requirements and provisions are clearly and squarely established in a single PERL statute – Government Code Section 20965 (attached for reference and use).

Here are the total, specific, and complete requirements of GCS 20965 in the administration of the unused sick leave service credit retirement benefit:

**GCS 20965 requirements of an Employee/Retiree**

The employee must retire within four months of separation from employment with the employer which granted the sick leave credit.

### **GCS 20965 requirements of an Employer**

The statute requires the employer to submit a report to CalPERS providing the number of unused sick leave days accrued by the employee during the normal course of employment.

**Note: If an employer does not report those days of unused sick leave accrued by the member during the normal course of his or her employment to CalPERS, the employer is not in compliance with the statute.**

### **GCS 20965 requirements of CalPERS**

The statute requires that CalPERS *shall* take those unused sick leave days accrued during the normal course of employment and *shall* convert them into a retirement service credit at the rate of 0.004 year of service credit for each day of sick leave certified to CalPERS by the employer.

**Note: If CalPERS does not use those specific days of unused sick leave accrued by the member during the normal course of his or her employment and convert those unused sick leave days into a service credit with 0.004 year of service credit for each of those days, then CalPERS is not in compliance with the statute.**

### **GCS 20965 additional requirement for the Employer Report of unused sick leave**

The statute specifies that only those days of unused sick leave that were accrued by the member during the normal course of his or her employment shall be used to convert those days into a retirement service credit. Any additional days of sick leave reported for the purpose of increasing the member's retirement benefit shall not be reported. Reports of unused days of sick leave shall be subject to audit (by CalPERS) to ensure that only days of unused sick leave accrued during the normal course of employment are used to calculate the retirement service credit for unused sick leave.

**Note: This means that the directed purpose of a CalPERS audit is to make sure that the Employer's sick leave report only include those days of unused sick leave that were accrued by the member during the normal course of his or her employment and not any additional days of sick leave. If CalPERS initiates an audit of the Employer's sick leave report using *any condition(s) or criteria* other than the statutory requirement that the unused sick leave retirement service credit is determined by the number of days of unused sick leave accrued during the normal course of an employee's employment then CalPERS is acting outside of statutory authority and direction, and their actions are not in compliance with the statute.**

These statutory requirements listed above comprise *all* the conditions, instructions, and directives for how the unused sick leave service credit retirement benefit is to be administered. *There are no other words or directives in GCS 20965 that allow any other condition(s) or directives to be used to administer, audit, or deny this benefit.*

CalPERS confirmed the provisions of GCS 20965 as written in several key documents. Attached is an example of a CalPERS – Member Agency service contract language regarding GCS 20965 and how it would be administered. It reflects GCS 20965 as written and summarized above. Also attached is a copy of the information CalPERS provided to members attending CalPERS sponsored pre-retirement seminars to explain the unused sick leave credit benefit so members could make informed decisions for their retirement. The summary reflects GCS 20965 as written and summarized above.

Despite the clarity and completeness of GCS 20965 and these other seminal CalPERS written documents confirming and affirming how the unused sick leave service credit would be administered; CalPERS announced 30 months after retirees received CalPERS written final approval of retirement benefits, that CalPERS had initiated audits of unused sick leave reports. They directed that these audits were to look at final compensation records of retirees to see if any retirees had received compensation for any amount of their sick leave in their final paycheck. If they received compensation for even a portion of their sick leave days through something like a city sponsored and funded unused sick leave incentive program, then the conclusion of the audit was that all of that retiree's sick leave hours would be considered 'compensated' and there would be no sick leave days for the Employer to report to CalPERS for the purposes of receiving the unused sick leave service credit. CalPERS further ruled that if a retiree received the unused sick leave service credit retirement benefit under these circumstances that the retiree would retroactively be required to repay the total benefit amount of the of the unused sick leave service credit they received, and all future retirement benefits would be correspondingly reduced.

For 2 years now I have been asking CalPERS to provide the legal standing – the 'chapter and verse' legal explanation and documentation *for how their actions* to set aside the provisions, conditions, and instructions of GCS 20965 and substitute outside, non-statutory conditions and instructions for the focus, purpose, direction, and determinations of these audits *were in compliance with and required by GCS 20965*. CalPERS has not or perhaps cannot respond to this request.

I have read and re-read GCS 20965; CalPERS and Member Agency contract language, and the pre-retirement educational material CalPERS prepared to explain how the sick leave service credit would be administered. I cannot find where the CalPERS sick leave compensation audits were conducted under the provisions, directions and requirements as specified in GCS 20965. If those audits were not conducted under statutory direction – what is their status; are they valid? – how can they be binding?

## **The ALJ Hearing Process**

When CalPERS notified me that my appeal of CalPERS' actions would be headed to an ALJ Hearing Process, I requested that the Statement of Issues be just that, a *complete* Statement of Issues for consideration and resolve. That complete Statement did not happen – instead here are the narrow issues CalPERS staff prepared for the ALJ's decision:

- (1) Whether CalPERS can convert 125.50 days of sick leave credit that respondent was compensated for into .502 years of service credit; and
- (2) Whether CalPERS is required and authorized to collect the overpayment of retirement benefits due to improper reporting by the City.

These issues miss the mark – they bypass the fundamental question which is, did/does CalPERS have the statutory direction to conduct audits to confirm if any sick leave compensation took place; and if there was any compensation, then statutory direction to declare that the City report be declared improper, and statutory direction to cancel benefit eligibility and define this as an overpayment to be collected. By CalPERS design, the ALJ Hearing process addressed none of these issues. Statutory compliance remains a serious unanswered question. The Proposed ALJ Decision should not be given precedent status.

In the 2-year process of this appeal, I have felt the CalPERS staff conclusion that I am an appellant that is selfishly focused on my own retirement situation... I want CalPERS to know that I have persevered and continued with this appeal process because I know others have been and will be affected by CalPERS' actions in this matter. I know these employees/retirees – and am a witness to the quality of their public service. I know of their work attendance and dedication. I also know they relied on the information they received from CalPERS before they retired only to get a letter years later that CalPERS has chosen a different and aggressive path now and the retirement benefit CalPERS previously supported and approved is now being revoked and recovered; and the justification for this action is filled with unanswered questions. GCS 20965 needs to be brought forward and its requirements respected. This appeal and effort is on behalf of all that are so affected.

CalPERS does some things very well; they are regarded as an organization that responds to questions in a timely manner; they strive to be a service organization and to educate members so they may make informed decisions. I appreciate all of that – I am grateful and recognize these services. But CalPERS' actions and thought process in this matter to set aside statutory provisions in order to retroactively administer an audit process to

reverse and recover retirement benefits has been difficult to understand. The actions and resulting effects of this matter have not been your best work.

Given my experience with the CalPERS staff in this appeal process, I have long thought that CalPERS has just not wanted to give careful thought and serious consideration to this appeal and its points, issues, and the unintended consequences CalPERS' actions have facilitated. Please, in the staff work to prepare this request to go before the Board for consideration and action February 21, 2024; take a step back and look at the fundamental questions of this appeal:

- What does GCS 20965 really require and expect of CalPERS; what are your statutorily established responsibilities?
- Did CalPERS resolutely and accurately follow this statute with their actions?
- If CalPERS has not followed the statute – then what is the right thing to do?

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink that reads "Blaine Michaelis".

Blaine Michaelis

Attachments:

Government Code Section 20965

Sick Leave Service Credit information prepared and published by CalPERS to explain the how the service credit will be administered.

CA Govt Code § 20965 (2017)

A local miscellaneous member and a local safety member, whose effective date of retirement is within four months of separation from employment with the employer which granted the sick leave credit, shall be credited at his or her retirement with 0.004 year of service credit for each unused day of sick leave certified to the board by his or her employer. The certification shall report only those days of unused sick leave that were accrued by the member during the normal course of his or her employment and shall not include any additional days of sick leave reported for the purpose of increasing the member's retirement benefit. Reports of unused days of sick leave shall be subject to audit and retirement benefits may be adjusted where improper reporting is found.

This section shall not apply to any contracting agency nor to the employees of a contracting agency until the agency elects to be subject to this section by contract or by amendment to its contract made in the manner prescribed for approval of contracts, except that an election among the employees is not required, or, in the case of contracts made after September 26, 1974, by express provision in the contract making the contracting agency subject to this section.

This section shall only apply to members who retire after the effective date of the contract amendments.

*(Repealed and added by Stats. 1995, Ch. 379, Sec. 2. Effective January 1, 1996.)*

The following is an excerpt from a CalPERS publication entitled 'Optional Benefits Listing.' This explains to member agencies how the Credit for Unused Sick Leave benefit is to be contractually administered. It reflects the provisions of GCS 20965 as it is written.



CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM

## OPTIONAL BENEFITS LISTING

### 11. Section 20965 Credit for Unused Sick Leave

This benefit is mandated for pooled plans.

Unused accumulated sick leave at time of retirement may be converted to additional service credit at the rate of 0.004 year of service credit for each day of unused sick leave (i.e., 250 days of sick leave equals one additional year of service credit).

The employer must report only those days of unused sick leave that were accrued by the member during the normal course of employment. Additional days of unused sick leave reported for the purpose of increasing the member's retirement benefit are prohibited. Most safety member formulas limit the member benefits to a maximum of 90% of final compensation. The addition of this benefit does not increase the maximum percentage allowable.

This section applies to members whose effective date of retirement is within four months of separation from employment and who retire after the effective date of the contract amendment.

Employer Cost: Valuation required for non-pooled plans only.

Rough Estimate: Impact on Employer Normal Cost:

- 0.1% to 0.2% of payroll for all groups
- Change in Unfunded Accrued Liability will be determined by a future valuation

Member Cost: None.

These two summaries are excerpts from one of the many pre-retirement seminars I attended. The excerpt explains the consistent message and information provided by CalPERS to potential retirees desiring to make sure they understood their retirement benefits so that they could make informed decisions. To the right is the CalPERS prepared narrative regarding the Sick Leave Credit benefit. Note that this reflects the provisions of GCS 20965 as it is written.

### **Sick Leave Credit**

(Applies only if your employer has contracted to provide this benefit)

At retirement, any unused sick leave you have will be converted to additional service credit (the additional service will not change your age at retirement). You will receive credit for each day of unused sick leave certified by your employer. It takes 250 days of sick leave to receive one year's service credit. (For example, if your employer certified 120 days, your additional credit would be 120 ÷ 250, or .480 of a year's service credit.) This adjustment is calculated after your retirement and paid retroactively to your retirement effective date.

To receive sick leave credit, your retirement date must be within 120 days from the date of separation from employment.

Here is your Public Employees' Retirement System (PERS) member benefit booklet. This two-part booklet tells you about your retirement program. The outside portfolio contains information on contributions, health insurance, and other considerations. The booklet inside tells you about your

specific formula and benefits. It will help you choose the best retirement plan for you and your beneficiaries. As you begin to think about retirement, you should get a copy of our *Planning Your Service Retirement* brochure, available from your personnel office.

We urge you to attend a retirement planning workshop several months before you retire to help with this

decision. Your personnel office can help you arrange an appointment at the nearest PERS office or with PERS staff who travel to your area.

We hope this booklet will help you understand your retirement program and the benefits it provides you and your beneficiaries.

A handwritten signature in dark ink, appearing to read "Dale M. Harrison".  
Dale M. Harrison  
Executive Officer