ATTACHMENT C

RESPONDENT'S ARGUMENT

(Submitted)

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BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding Final Compensation Calculation of JANINE G. TARKOW, Respondent.	AGENCY CASE NO. 2020-1464 OAH NO. 2021030855 **RESPONDENT'S ARGUMENT**

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1. Respondent's stipend is "special compensation" under CCR §571(a)(3) despite the ALJ's misinterpretation of "upgraded position/classification" in that regulation.

It was Respondent Tarkow's position at hearing and in her briefs that her "Administrative Stipend" is "special compensation" under the category of "Temporary Upgrade Pay" in CCR §571(a)(3) because it was, "Compensation to employees who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration," and it was a "special assignment" that required her to utilize "special skills, knowledge and abilities" under GC §20636(c)(1). (Respondent's Hearing Brief, pp. 2-8; Reply Brief, pp. 3-9)

The ALJ rejected Respondent's position on the erroneous basis that a position/classification is "upgraded" only if the employee is required to perform duties of a *higher* position/classification or their job title is changed to that of a *higher* position/classification. (Proposed Decision, pp. 29-31) This ruling is clearly wrong under the case law, Government Code and regulations because doing the work of a *higher* position/classification is not within one's *regular job duties* and having one's job title changed to a *higher* position/classification would carry with it a higher salary that would be included in one's "payrate" and, therefore, included in calculating one's retirement benefits so no issue of "special compensation" would arise.

In *Snow v. Board of Administration* (1978) 87 Cal.App.3d 484, the Court of Appeal ruled that an Assistant Land Agent who was assigned to perform the duties of the higher position/classification of Associate Land Agent could not have the salary difference between the two positions included in the calculation of his retirement benefits holding that, " ... work performed above the class of employment to which he had been appointed may not be considered in determining the amount of his pension benefits." (87 Cal.App.3d at 486) GC §20636(g)(4) and CCR §571(a)(3) both require that "special compensation" be limited to that received for performing work *within one's regular duties*. By definition, performing work of a *higher* position/classification is performing work *outside*

one's regular duties and, therefore, cannot be "special compensation."

The ALJ is similarly mistaken in claiming that "upgraded position/classification" means that the employee's job title has been changed to that of a *higher* position/classification. A position/classification with a *higher* job title would carry with it a higher salary. In that situation no issue of "special compensation" would arise because the higher salary would be part of the employee's "payrate" and, as such, would be included in calculation of their retirement.[1]

2. The portion of the *Prentice v. Board of Administration* decision relied upon by the ALJ to rule that Respondent's stipend is not pursuant to a "labor policy or agreement" is non-binding *dicta* rather than the "holding" in *Prentice* and should not be followed.

The ALJ purports to dispose of Respondent Tarkow's appeal by invoking *Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983, to rule that Respondent's stipend is not pursuant to a "labor policy or agreement." (Proposed Decision, pp. 31-36) However, the portion of the *Prentice* opinion the ALJ relies upon is mere *dicta* rather than the *holding* in that case and is not binding on lower courts or public agencies like CALPERS. The distinction between the "holding" in an appellate decision and "dicta" is the following: A "holding" is the statement of a legal principle necessary to a court's decision which is binding on lower courts and public agencies.[2] "Dicta" is where an appellate court opines on a matter unnecessary to rendering its decision and it may be disregarded by lower courts or public agencies unless they choose to follow the "dicta" because it is found to be persuasive.[3] The "legal principle" in *Prentice* relied on in the ALJ's

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[1]Although Respondent Tarkow makes these same arguments in her Hearing Brief, at pp. 4-9, and Reply Brief, at pp. 3-9, the ALJ's Proposed Decision fails to analyze or even mention them. This is evidence of judicial bias in violation of Respondent's 14th Amendment right to "due process."

[2]See *CalPERS v. WorldCom, Inc.* (2d Cir. 2004) 368 F.3d 86, 107, n. 19: "A 'holding' is a court's 'determination of a matter of law pivotal to its decision; a principle drawn from such a decision.'"

[3]See *People v. Xue Vang* (2011) 52 Cal.4th 1038, 1047, n. 3, which defines "dicta" as: "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the

Proposed Decision, at p. 36, to find that Respondent's stipend was not provided for in a "labor policy or agreement" (that a "labor policy or agreement" supposedly cannot pertain to only one employee) is "dicta" because it was unnecessary for the *Prentice* court to reach that issue because the court's finding that the manager's salary increase in that case was not "available to other managers" determined that it was not "special compensation."[4] The ALJ in this case should have known the portion of *Prentice* she relied on was "dicta," but she applied it as if it were a "holding" with no discussion of whether or not it should be followed. This is evidence of judicial bias.

Much worse is the fact that *neither party cited Prentice at hearing or in their briefs!* It was the ALJ who found the *Prentice* case, but instead of bringing it to the attention of the parties and ordering them to brief their respective positions as to whether it was applicable to this case and, if so, how it should be applied, as she should have done, the ALJ misused *Prentice* to find that Respondent's stipend was not "special compensation" without affording Respondent any opportunity to argue to the contrary, thereby leaving it to Respondent to somehow fit her arguments on *Prentice* (and the rest of her critique of the 37-page Proposed Decision) into the "Procrustean bed" of this brief which is arbitrarily limited to a paltry six pages. The ALJ did not act as an objective or neutral fact-finder, but rather as a "second attorney" for CALPERS. This is evidence of judicial bias.

The ALJ did not discuss whether or not the "dicta" in *Prentice* should be followed, although *Prentice* cites no legal authority to support its peculiar interpretation of GC §20049 and makes no reference to its legislative history. *Prentice* violates the Rules of Statutory Construction under which

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decision in the case and therefore not precedential (although it may be considered persuasive) ..."

[4]Prentice, supra, 157 Cal.App.4th at 995: "The record is undisputed the increase was not available to all other members of the Management Confidential group as required ..." Respondent Tarkow's stipend was available to other members of her group as per the testimony of her supervisor, Pearl Trinidad, Executive Director of UCSD's Business and Financial Services Department. (Respondent's Reply Brief, pp. 14-17)

courts should first interpret a statute according to the "usual and ordinary meaning" of its words.[5] It is only when there is an ambiguity in the statute that courts may ascertain its meaning using additional rules for statutory interpretation to divine the Legislature's intent in enacting the statute.[6]

The statute at issue herein is GC §20049 which defines a "labor policy or agreement:"

> "'Labor policy or agreement' means any written policy, agreement, memorandum of understanding, legislative action of the elected or appointed body governing the employer, or any other document used by the employer to specify the payrate, special compensation, and benefits of represented and unrepresented employees."[7]

The "usual and ordinary meaning" of this statute is exactly what it says: A "labor policy or agreement," can be *any* "written policy, agreement, memorandum of understanding, legislative action" of the employer's governing body, OR it can be *any other document* which is, "used by the employer to specify the payrate, special compensation, and benefits of represented and unrepresented employees." There is nothing "ambiguous" about this statutory language which would permit the *Prentice* court to go beyond its "usual and ordinary meaning," but. the *Prentice* court wrongly claimed that:

> "As used in the regulation [CCR §571(b)(1),(2), which incorporates the definition from GC §20049], the term 'labor' modifies boh 'policy or agreement,' and implicitly restricts the referenced policies or agreements to either policies which cover a whole class of employees or collective bargaining agreements."[8]

There are two major fallacies here: *Firstly*, the contention that the use of the adjective "labor" to modify "policy or agreement" purportedly "restricts" such documents to those which cover a class

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[5]See *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 162; *Klein v. United States* (2010) 50 Cal.App.4th 68, 74; *Ailanto Props., Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 582.

[6]*People v. Dieck* (2009) 46 Cal.4th 934, 936.

[7]CALPERS' witness, Mr. Martin, admitted he was unaware of GC §20049 and its definition of "labor policy or agreement." (Respondent's Hearing Brief, p. 11)

[8]*Prentice*, *supra*, 157 Cal.App.4th at 995.

of employees or collective bargaining agreements is *merely asserted.* And, contrary to the court's unsupported assertion, there are diverse dictionary definitions of "labor" most of which can refer without distinction to an individual employee or to a class of employees. For example, *Webster's II New College Dictionary* (Houghton Mifflin Co., Boston, 2001), p. 613, defines "labor" as follows:

> "1. Physical or mental exertion: Work. 2. A specific task. 3. A particular form of work or method of working ... 4. Work for wages as opposed to work for profit. 5.a. Workers as a whole. b. The trade-union movement, esp. its officials. 6. Labor. A political party ... 7. Something made by labor. 8. The physical efforts of childbirth ..."

Secondly, "labor policy or agreement" is *not a definition*; to the contrary, it is the *term to be defined.* The portion of the definition misused in *Prentice* is, "any other document used by the employer to specify the payrate, special compensation, and benefits of represented and unrepresented employees." Rather than using the statutory definition to understand the meaning of "labor policy or agreement," the *Prentice* court "put the cart before the horse" by using the term to be defined to ascertain the meaning of the definition. This makes no sense. Even if it were to be assumed, *arguendo*, that GC §20049 is "ambiguous" the *Prentice* court (and the ALJ) misconstrue the statute against retirees/pensioners (including Respondent) contrary to, "the general intent of the retirement law [which is] that the provisions of the PERS are to be liberally construed in favor of pensioners if they are ambiguous or uncertain."[9]

Finally, the *Prentice* court's stated reason for utilizing these rhetorical maneuvers[10] makes no sense and serves no purpose other than to deprive retirees of benefits they have earned with their

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[9]*City of Sacramento v. PERS* (1991) 229 Cal.App.3d 1476, 1489, citing *Rose v.City of Hayward* (1981) 126 Cal.App.3d 930, 940.

[10]"This restricted and more literal reading of the regulation [which the court adopts] is required because the broad interpretation offered by Prentice would essentially provide no limit on the compensation a local agency could provide to individual employees by way of individual agreements." (*Prentice, supra,* 157 Cal.App.4th at 995)

labor. There is no limit on the amount of "special compensation" that a local agency may provide to a class or group of employees although it would be much more costly than whatever amount of such compensation might be paid to a few individuals. And why should there be a limit on how much "special compensation" may be paid to individual employees when there is no such limit on the amount which may be paid to a class or group of employees?

3. The testimony of Respondent's direct supervisor, Pearl Trinidad, proves that Respondent's stipend meets all the requirements in CCR §571(b)(1).

The ALJ claims that none of the provisions of CCR §571(b)(1)(A)-(F) are satisfied by Respondent's stipend, but ignores the detailed testimony of Respondent's direct supervisor, Pearl Trinidad, that the stipend does meet these requirements. (Respondent's Reply Brief, pp. 9-11)

The ALJ claims that Respondent's stipend was the result of an informal agreement with her supervisor and was not approved by her employer's "governing body," but ignores Respondent's Reply Brief, pp. 10-13, which cites the evidence which proves the stipend was duly approved by Cheryl Ross, UCSD's Controller/Assistant Vice-Chancellor, on behalf of the Office of the Chancellor which is the "governing body" of UCSD.

Conclusion

The Board should reject the ALJ's Proposed Decision and adopt its own decision that Respondent's stipend is "special compensation" to be included in calculation of her retirement.

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Respectfully submitted,

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