

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

George P. D'Ablaing (Respondent) was employed by respondent San Diego Association of Governments (SANDAG) as a Senior Transportation Engineer.

On October 21, 2019, CalPERS received Respondent's application for service retirement. Respondent retired for service effective November 7, 2019 and has been receiving his retirement allowance since December 7, 2019.

In 2020, CalPERS' Office of Audit Services (OFAS) performed an audit of 58 public agency employers, including SANDAG, to determine whether the public agencies reported special compensation in a manner consistent with the Public Employees' Retirement Law's (PERL) requirements. Specifically, the public agency review was conducted to ensure that special compensation was reported in compliance with Government Code section 20636<sup>1</sup> and California Code of Regulations, title 2, (CCR) section 571 for classic members who are active or retired. CalPERS determined that the compensation reported by SANDAG as bonus pay did not qualify as special compensation under the PERL and should not have been reported. The pay did not meet the definition of bonus because it did not identify specific performance goals and objectives nor was the bonus contained in a written labor policy approved by SANDAG's Board in accordance with public meeting laws. (CCR § 571(a) and (b).)

SANDAG identified Respondent as one of the impacted members who received the bonus pay. SANDAG agreed that the bonus pay did not comply with the PERL and decided rather than to bring the item of pay into compliance, it would reverse the bonus pay from the impacted members' payroll reported to CalPERS.

On March 22, 2021, CalPERS sent Respondent a pre-deprivation of retirement allowance letter notifying him that the bonus pay would be excluded from his final compensation calculation. Respondent was given 30 days to provide any information he wanted to be considered before CalPERS made a final determination. Respondent did not submit any additional information but did inform CalPERS that his employer might submit information directly to CalPERS.

On April 22, 2021, CalPERS notified Respondent of its final determination that the bonus pay would not be included in the calculation of his compensation earnable. As a result of SANDAG's reporting error, Respondent was informed that his monthly retirement benefit would be reduced by \$437.55 per month, and CalPERS would seek to collect an overpayment of \$8,136.41.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH).

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<sup>1</sup> All future references are to the Government Code.

A hearing was held on December 28, 2021. Respondent represented himself at the hearing. SANDAG was represented by counsel at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

At the hearing, CalPERS presented evidence explaining why Respondent's bonus pay did not meet the statutory definition of compensation earnable. Evidence was also presented explaining why the bonus pay did not qualify as reportable special compensation under CCR section 571, which exclusively identifies and defines items of special compensation that must be reported for members employed by contracting agencies.

SANDAG's performance bonus was included in its 2017 and 2018 employee handbooks, which describe the bonus as follows:

Regular and Limited-Term employees are eligible for bonus awards in recognition for superior performance as demonstrated by exceeding performance goals and objectives in their annual performance evaluation. Bonus awards must be authorized by the Executive Director and provided for in the annual budget.

While the employee handbooks do contain a description of a bonus plan, SANDAG confirmed that the employee handbooks were not approved by SANDAG's Board of Directors, which is a requirement of CCR section 571(b). Further, the handbooks do not identify specific performance goals and objectives as required by CCR section 571(a). Thus, the bonus pay did not meet the requirements of CCR section 571(a)(1) and violated the criteria in CCR section 571(b)(1).

For these reasons, CalPERS argued the bonus pay should not have been included in Respondent's final compensation for purposes of determining his retirement allowance. CalPERS also argued that pursuant to Section 20160(b), it is required to correct mistakes and recover overpayments in benefits.

Respondent testified on his own behalf. Respondent testified that he spoke with various CalPERS team members and SANDAG employees regarding his bonus pay prior to his retirement. He made his decision to retire based on his belief that the bonus pay would be included in his final compensation. He believes that SANDAG could have made the adjustment when CalPERS found the error during the June 2020 audit, but CalPERS did not notify him of the issue until March 2021. Consequently, Respondent argued that CalPERS did not correct SANDAG's mistake within the six-month window provided to correct a mistake. (Gov. Code § 20160(a)(1).) Respondent also argued that

changing his retirement allowance two years after he retired would result in a financial hardship.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that CalPERS was correct in its determination that the bonus pay reported by SANDAG from June 27, 2017, through September 15, 2019, on behalf of Respondent, did not comply with the PERL and therefore, cannot be included in the calculation of his final compensation.

The ALJ found that SANDAG's employee handbook, which seemed to be an attempt to create a bonus pay program, did not contain any performance goals or objectives as required by the definition of bonus found at CCR section 571(a)(1). In addition, the ALJ found that the employee handbook did not qualify as a document approved by SANDAG's Board of Directors; therefore, it did not meet the criteria found in CCR section 571(b). For these reasons, the ALJ found that the bonus pay reported on Respondent's behalf between June 27, 2017, through September 15, 2019, erroneously inflated his final compensation and resulted in an overpayment of \$8,136.41.

The ALJ similarly rejected Respondent's argument that the correction should have been made within six months. The ALJ found that Section 20160(b) does not contain a discovery rule or six-month time limitation. If an error is made by the employer, there is no discretion. The error must be corrected. For this reason, the ALJ rejected Respondent's argument that CalPERS is barred from correcting SANDAG's reporting error.

The ALJ concluded that a thorough audit found that SANDAG had erroneously been reporting bonus pay as special compensation. SANDAG agreed that the error had been made. CalPERS is required to correct SANDAG's mistake in reporting bonus pay on behalf of Respondent by reducing his monthly retirement benefit by \$437.55 per month and collecting the overpayment amount of \$8,136.41.

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

March 16, 2022

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