

MEETING  
STATE OF CALIFORNIA  
PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
BOARD OF ADMINISTRATION  
OPEN SESSION

CALPERS AUDITORIUM  
LINCOLN PLAZA NORTH  
400 P STREET  
SACRAMENTO, CALIFORNIA

MONDAY, APRIL 18, 2022

9:18 A.M.

JAMES F. PETERS, CSR  
CERTIFIED SHORTHAND REPORTER  
LICENSE NUMBER 10063

APPEARANCES

BOARD MEMBERS:

Theresa Taylor, President

Rob Feckner, Vice President

Fiona Ma, represented by Sertan Usanmaz

Lisa Middleton

David Miller

Eraina Ortega

Jose Luis Pacheco

Ramon Rubalcava

Betty Yee, represented by Lynn Paquin

STAFF:

Marcie Frost, Chief Executive Officer

Matthew Jacobs, General Counsel

Charles Glauberman, Senior Attorney

Pam Hopper, Board Secretary

ALSO PRESENT:

Chirag Shah, Chirag Shah and Associates

Joshua Morrison, Atkinson, Andelson, Loya, Ruud and Romo  
representing Tustin Unified School District

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PRESIDENT TAYLOR: Good morning, everyone. This is the full Board hearing. Let's take roll call first, please?

BOARD SECRETARY HOPPER: Theresa Taylor?

PRESIDENT TAYLOR: Here.

BOARD SECRETARY HOPPER: Rob Feckner?

VICE PRESIDENT FECKNER: Good morning.

BOARD SECRETARY HOPPER: Sertan Usanmaz for Fiona Ma?

ACTING BOARD MEMBER USANMAZ: Present.

BOARD SECRETARY HOPPER: Lisa Middleton?

BOARD MEMBER MIDDLETON: Present.

BOARD SECRETARY HOPPER: David Miller?

BOARD MEMBER MILLER: Here.

BOARD SECRETARY HOPPER: Eraina Ortega?

BOARD MEMBER ORTEGA: Here.

BOARD SECRETARY HOPPER: Jose Luis Pacheco?

BOARD MEMBER PACHECO: Present.

BOARD SECRETARY HOPPER: Ramon Rubalcava?

BOARD MEMBER RUBALCAVA: Present.

BOARD SECRETARY HOPPER: Shawnda Westly?

PRESIDENT TAYLOR: Excused. Thank you.

BOARD SECRETARY HOPPER: Lynn Paquin for Betty Yee?

1           ACTING BOARD MEMBER PAQUIN: Here.

2           PRESIDENT TAYLOR: Madam Chair, all is in  
3 attendance with an excused from Shawnda Westly for the  
4 Board of Administration full Board hearing.

5           PRESIDENT TAYLOR: Thank you very much.

6           We now will turn to Agenda Item 2 and open the  
7 record for the full Board hearing in the appeal of Tustin  
8 Unified School District or Tustin USD, CalPERS case number  
9 2020-0436. The proposed decision in this case was  
10 originally considered by the Board at the February 2022  
11 Board meeting. At that meeting, the Board rejected the  
12 proposed and scheduled this matter for a full Board  
13 hearing.

14           I note for the record that all parties have  
15 received notice of this full Board hearing, along with  
16 copies of the Statement of Policy and Procedures for full  
17 Board hearings before the Board. In addition, all parties  
18 have been informed that oral arguments will be limited to  
19 10 minutes for each position and rebuttal will be limited  
20 to three minutes for each position.

21           Would counsel please take a moment to introduce  
22 themselves starting with staff counsel and then the  
23 members counsel.

24           SENIOR ATTORNEY GLAUBERMAN: Good morning, Madam  
25 President, fellow Board members --

1 THE COURT REPORTER: Microphone.

2 PRESIDENT TAYLOR: Microphone.

3 SENIOR ATTORNEY GLAUBERMAN: Okay.

4 PRESIDENT TAYLOR: Okay.

5 SENIOR ATTORNEY GLAUBERMAN: Good morning, Madam  
6 President, and fellow Board members. Charles Glauberman  
7 on behalf of CalPERS staff.

8 PRESIDENT TAYLOR: Thank you.

9 Mr. Morrison.

10 MR. MORRISON: All right. Good morning.  
11 Hopefully my microphone is working. Good morning, members  
12 of the Board. My name is Joshua Morrison with Atkinson,  
13 Andelson, Loya, Ruud and Romo. I'm here on behalf of the  
14 Tustin Unified School District.

15 PRESIDENT TAYLOR: Thank you. I've been informed  
16 that we needed to go into closed session for counsel to  
17 talk to the Board. So if everyone doesn't mind, I'm going  
18 to have -- is that -- Mr. Shah, go ahead.

19 MR. SHAH: Mr. Jacobs is going to have -- Mr.  
20 Jacobs is going to -- sorry. Can you hear me?

21 PRESIDENT TAYLOR: Yeah. Now, I can.

22 MR. SHAH: Mr. Jacobs has something to say about  
23 that I believe.

24 PRESIDENT TAYLOR: Oh, okay.

25 GENERAL COUNSEL JACOBS: Good morning, Board

1 members. Matt Jacobs, CalPERS team member. We have not  
2 noticed that for this time --

3 PRESIDENT TAYLOR: Okay.

4 GENERAL COUNSEL JACOBS: -- so we will have to  
5 proceed directly to the open session.

6 PRESIDENT TAYLOR: Okay. Thank you, Mr. Jacobs.

7 GENERAL COUNSEL JACOBS: You're welcome.

8 PRESIDENT TAYLOR: I apologize, folks. That's  
9 what we weren't sure of. So thank you very much and thank  
10 you, both.

11 Let the record also reflect that Chirag Shah, the  
12 Board's independent counsel on full Board hearings and  
13 proposed decisions from the Office of Administrative  
14 Hearings will advise the Board on the procedural and  
15 substantive issues, and answer questions that the Board  
16 members may have today. Mr. Shah, will also provide a  
17 brief summary of the case before we begin oral arguments.

18 As stated previously, each position will have 10  
19 minutes for oral argument. Mr. Glauberman will have the  
20 first 10 minutes to present staff's argument. After that,  
21 Mr. Morrison will have 10 minutes to present the argument  
22 on behalf of Tustin USD. Neither side is compelled to use  
23 the full 10 minutes. However, if a party concludes  
24 argument in less than the time allotted, it will not be  
25 permitted to carry that time to any other portion of the

1 proceeding.

2           After Board -- both sides have presented oral  
3 arguments, each side will be provided three minutes for  
4 rebuttal arguments in the same order as original  
5 presentation, first Mr. Glauberman for staff and then Mr.  
6 Morrison for Tustin USD. Here, too, you may, but do not  
7 have to, use the entire time allocated for the rebuttal.  
8 But if you decide to use less time, you will not receive  
9 another opportunity to use any time remaining in your  
10 rebuttal.

11           There's a timer in the front here, which will be  
12 set for ten minutes for the initial argument and three  
13 minutes for rebuttal. The timer will begin when you start  
14 to speak. Please pay close attention to the timer as you  
15 make presentations, in order to avoid going over your  
16 allotted time. When the timer's right turns red, your  
17 time will have expired.

18           After all sides' arguments and rebuttals are  
19 concluded, the Board may ask questions of any of the  
20 parties to this proceeding, as well as our independent  
21 counsel. The alternatives available to the Board are set  
22 forth at Agenda Item 2 of the Board meeting materials.

23           Any questions so far? Do all parties understand  
24 the procedures?

25           MR. MORRISON: Yes, thank you.



1 SENIOR ATTORNEY GLAUBERMAN: Yes.

2 PRESIDENT TAYLOR: All right. Thank you.

3 Now then, Mr. Shah, please provide a brief  
4 summary of the case.

5 MR. SHAH: Thank you. Good morning, Madam  
6 President and members of the Board. As you said, my name  
7 is Chirag Shah and I'm the Board's independent counsel on  
8 full Board hearings.

9 Given that the material facts are not in dispute  
10 in this appeal, my summary will be very brief this  
11 morning. I will let each counsel educate the Board on the  
12 details and the merits of their respective positions.

13 The origin of this appeal is a 2018 CalPERS audit  
14 of school employers. Among other things, the audit  
15 revealed that the Tustin Unified School District, who we  
16 will refer to as the district for purposes of this  
17 hearing, was reporting payrate for monthly members  
18 according to its own formula. More specifically, the  
19 District's formula for reporting hours provided that a  
20 full month of work equates to 168 hours. CalPERS formula,  
21 however, mandates for reporting equivalencies for monthly  
22 employees that a full month of work equates to 173.333  
23 hours of service.

24 At the conclusion of the audit, which included an  
25 opportunity for the District to respond to the -- to the

1 preliminary findings and for CalPERS to go back and forth,  
2 the Cal -- the System finalized its results and demanded  
3 that the District revise its reporting to comply with the  
4 CalPERS formula. At that time, staff also provided the  
5 District an opportunity to file an appeal to its  
6 determination citing Section 20134 and PERL regulations at  
7 sections 555 through 555.4.

8           The District took advantage of this opportunity  
9 and filed this -- this appeal challenging staff's  
10 determination. After that, the case proceeded to an  
11 administrative law judge of the Office of Administrative  
12 Hearings, which is an independent agency, who conducted a  
13 two-day hearing and issued a proposed decision, which is  
14 before the Board for action today.

15           Staff's formula is based on section 20636.1,  
16 which requires that full-time work must equal to 40 hours  
17 per week. Staff arrives at its monthly equivalency for  
18 hours worked as follows.

19           Staff assumes 40 hours per week multiplies that  
20 by 52, and then divides that by 12. So 40 times 52 equals  
21 2880 divided by 12 is 137.333. The District's formula is  
22 also grounded in 20 -- section 20636.1 and takes into  
23 account the fact that not all years are equal. In any  
24 given year, you might -- you're not going to have the same  
25 number of days as you have in another year. The District

1 relies substantially on an average of 21 work days per  
2 month, which is then multiplied by an 8-hour workday to  
3 arrive 168 hours per month. In so doing, the District's  
4 formula discounts 11 holidays per year in its  
5 calculations.

6 In the proposed decision before the Board, the  
7 administrative law judge essentially concludes that both  
8 formulas are logical, and therefore the District's formula  
9 must be permitted. Moreover, the administrative law judge  
10 finds that staff's insistence on its own formula amounts  
11 to an underground regulation. The District argues that  
12 the administrative law judge has reached a correct legal  
13 determination, and therefore the Board should adopt the  
14 proposed decision in its entirety and grant the appeal.

15 CalPERS staff argues that the Board should deny  
16 the appeal and issue its own decision finding that the  
17 District has no legal authority to craft or implement its  
18 own formula for calculating hourly equivalencies. The  
19 details of the case, the merits of the litigation -- the  
20 history of the litigation, the merits of each party's  
21 position are presented in the written arguments and the  
22 administrative record before the Board at Agenda Item 2.

23 With that Madam President, members of the Board,  
24 I conclude my brief summary of the case this morning.

25 Thank you.

1           PRESIDENT TAYLOR: Thank you, Mr. Shah.

2           Let us now turn to preliminary evidentiary  
3 reissues. As all parties are aware, we are not hear to  
4 relitigate factual issues or resubmit evidence into the  
5 administrative record. However, in rare circumstances,  
6 the interests of achieving a just result, may require  
7 consideration of newly discovered relevant documentary  
8 evidence, which could not, with reasonable diligence, have  
9 been discovered and produced at the hearing before the  
10 administrative law judge and which there is -- there --  
11 and which therefore is not part of the administrative  
12 record.

13           Under no circumstances may the Board adopt --  
14 accept new witness testimony or any kind of examination or  
15 cross-examination of anyone, including Board members, in  
16 today's proceeding. Under the Board's procedure, requests  
17 to introduce newly discovered documentary evidence must  
18 have been submitted in writing to the Board's secretary no  
19 later than the due date for written argument, which in  
20 this case was March 30th, 2022.

21           In order to avoid interruptions during each  
22 party's respective time today, please let us know if  
23 either party has any relevant newly discovered evidence,  
24 which could not have been discovered and produced at the  
25 hearing that it seeks to be admitted into the

1 administrative record today as to which a timely written  
2 request was submitted to the Board.

3 MR. MORRISON: No, the District does not.

4 SENIOR ATTORNEY GLAUBERMAN: No new evidence,  
5 ma'am.

6 PRESIDENT TAYLOR: Okay. Thank you very much.  
7 Mr. Shah, do you have a recommendation for -- sorry.  
8 Seeing that there are no requests to submit newly  
9 discovered evidence, let us begin oral arguments.

10 Mr. Glauberman, please present staff's arguments  
11 and please start the clock for 10 minutes when he begins  
12 start -- talking.

13 SENIOR ATTORNEY GLAUBERMAN: Good morning, Madam  
14 President, members of the Board.

15 CalPERS is the agency charged with the  
16 implementation of the Public Employees' Retirement Law,  
17 and found through an audit that the Tustin Unified School  
18 District was incorrectly reporting employee payrate to  
19 CalPERS. Instead of reporting employee rate based on  
20 40-hour our workweek over all 12 months, based on  
21 Government Code section 20636.1, Tustin reported employee  
22 payrate based on its own rules. Tustin's errors caused it  
23 to underreport employee payrate, and that underreported  
24 payrate likely resulted in decreased retirement benefits  
25 for its classified school employees.

1 I'm now going to get into the more technical and  
2 legal aspects of this case, which involves classified  
3 school members. That's CalPERS largest membership group.  
4 Of the membership groups, school, State, and local agency,  
5 classified school on average earn the least in retirement.  
6 Prior to 2001, not only did they earn the least, but  
7 classified school members were treated differently,  
8 earning more or less in retirement based entirely on which  
9 district they worked for.

10 For example, imagine two school employees, both  
11 working 25 hours a week as school bus drivers, making the  
12 same hourly rate of pay, and then 15 hours for their same  
13 respective districts as grounds keepers making the same  
14 rate of pay for those jobs also. They worked for  
15 different districts though. And because they worked for  
16 different districts, their respective school district  
17 employers could report their compensation to CalPERS in a  
18 different manner.

19 Overtime is not reportable to CalPERS, so the  
20 first district who considered the extra 15 hours in that  
21 second position to be overtime, those extra 15 hours were  
22 not reportable to CalPERS, so 25 hours and not 40 would be  
23 reported to CalPERS. But if the second district  
24 considered those extra 15 hours to be regular hours and  
25 not overtime, the second district would report all 40

1 hours to CalPERS. Because the second district reports all  
2 40 hours to CalPERS and 25 for the first, the person who  
3 worked for the second district will have a higher  
4 retirement based on 40 hours reported each week, whereas  
5 that first district, the person who worked for the first  
6 district, would have retirement like a part-time  
7 individual, except they worked 40 hours, full time each  
8 week.

9           That unequal treatment led the Legislature to  
10 pass 20636.1 in 2001. That section standardized the  
11 reporting of payrate and service credit by ensuring that  
12 all employers report all hours worked up to 40. So now in  
13 the above example, all 40 hours for both employers are  
14 reportable, both the first job at 25 hours and the second  
15 job with 15 hours. Everything worked in excess of 40  
16 hours is overtime and not reportable. Also, 40 hours is  
17 considered full time for classified school employees.  
18 Other members should -- groups can sometimes work less  
19 than 40 in a week and still be considered full time, not  
20 classified school. They have to work 40.

21           In standardizing the reporting of payrate for  
22 school employees, 20636.1 defines payrate for school  
23 members as the normal monthly rate of pay, or base pay,  
24 paid in cash for services rendered on a full-time basis.  
25 That allows employers to report a base rate of pay like an

1 hourly rate or a monthly payrate. But if employers are  
2 reporting a monthly rate of pay, they must report based on  
3 a full-time schedule 40 hours a week over an entire year.  
4 That requires employers to report based on a conversion  
5 factor of 173.33 hours in a month.

6           What is a conversion factor? Well, not all  
7 months have the same amount of work days and the amount of  
8 workdays in a year will also change sometimes. Because  
9 workdays in a month change and workdays in a year change,  
10 so do the days -- the workdays in a year or the work hours  
11 in a year. Because of the fluctuation, CalPERS uses a  
12 conversion factor that averages monthly work hours and  
13 standardizes reporting to ensure consistency across all  
14 school agencies.

15           The factor is calculated as follows. You start  
16 with a 40-hour workweek. Because there are 52 weeks, you  
17 multiply 40 times 52, which results in 2,080 work hours in  
18 a year. To figure out how many work hours there are in a  
19 month, CalPERS just divides that 2,080 by 12 months in a  
20 year, and that gives you approximately 173.33 work hours  
21 in a month.

22           How does this work for reporting? Well, if a  
23 district chooses to report an hourly payrate, it doesn't  
24 need to use this 173.33 conversion factor. A district can  
25 just report the hourly payrate in that situation and



1 CalPERS takes care of the rest. But if a district is  
2 reporting a monthly payrate, it must take the hourly, or  
3 base rate of pay, and multiply it by 173.33. That gives  
4 you the monthly payrate that should be reported to  
5 CalPERS.

6           Since its 2001 implementation, CalPERS has always  
7 required the 173.33 conversion factor for monthly  
8 reporting. To ensure consistent and accurate reporting  
9 across all school agencies, CalPERS conducts training and  
10 outreach, and that includes training on this specific  
11 issue.

12           Tustin though does not follow CalPERS direction  
13 on this issue. Instead, it uses its own conversion factor  
14 of 168 work hours in a month. For its employees, Tustin  
15 takes the hourly, or base rate of pay, and multiplies it  
16 by 168 to determine the monthly payrate. In this case,  
17 the sampled member had an hourly payrate, or her base  
18 payrate, of \$22.59 an hour. Using its monthly conversion  
19 factor of 168, they multiplied 168 times 22.59 to reach  
20 its incorrect and underreported monthly payrate of \$3,795.

21           To fix the issue, Tustin could just report the  
22 hourly payrate of 22.59 an hour and there would be no  
23 problems after that, CalPER would take -- CalPERS would  
24 take care of the rest or Tustin could convert the hourly  
25 based on the 173.33 conversion factor. That leads to a

1 monthly payrate of \$3,915, \$120 more than Tustin's  
2 improperly converted payrate. They could report that  
3 3,915 to CalPERS. Neither option, reporting the base pay  
4 or the converted monthly amount based on 173.33 would  
5 require an increase in employee compensation for Tustin.

6 That also would not require an increase of  
7 employee or employer contributions. In retirement, the  
8 sampled member though will likely earn more. That's the  
9 net effect. A \$120 monthly increase in payrate likely  
10 results in increased retirement for the sampled member and  
11 also for Tustin's classified school employees.

12 There about 800 different school agencies in  
13 California. Different reporting standards for 800  
14 different agencies could result in countless different  
15 monthly payrates for individuals earning the same hourly  
16 rate working the same hours. That could also result in  
17 countless variations in member retirements based solely  
18 not on the hours worked or the base payrate, but on how  
19 their employers report to CalPERS.

20 Inconsistent reporting across agencies is the  
21 exact issue that section 20636.1 sought to fix, and  
22 CalPERS interpretation and implementation of that section  
23 fixes the issue. Requiring all districts to report by the  
24 same 173.33 conversion factor standardizes payrate across  
25 all districts. It also standardizes retirement benefits,

1 ensuring that members who earn the same payrate while  
2 working earn the same amounts in retirement. In all  
3 likelihood, it would also result in a net increase for all  
4 of Tustin's classified school employees in retirement.

5 CalPERS and the Board have the responsibility and  
6 the authority to implement the PERL. CalPERS is entitled  
7 to deference in its interpretation of the PERL and it need  
8 not accept different interpretations from different  
9 agencies. The options for the Board here are either to  
10 let Tustin continue with its incorrect reporting that  
11 results in inequitable treatment and reduced retirements  
12 or CalPERS can require Tustin to report consistent with  
13 section 20636.1, so that reporting is standardized, which  
14 likely results in increased retirement for Tustin's  
15 employees.

16 Staff asks that you reject the proposed decision,  
17 deny Tustin's appeal, and we also ask that you adopt the  
18 decision consistent with CalPERS determination  
19 interpreting section 20636.1.

20 Thank you.

21 PRESIDENT TAYLOR: Thank you, Mr. Glauberman.

22 Mr. Morrison, you're up. Please start the clock  
23 for 10 minutes.

24 MR. MORRISON: All right. Good morning. Both of  
25 the counsel to my left suggest that the District is

1 employing one obscure formula to come up with payrate and  
2 that CalPERS is employing another. That's -- that's not  
3 the case. I want to be very clear, Government Code  
4 20636.1(b)(1), the section that defines payrate for school  
5 employees, it's paragraph 12 of the ALJ's proposed  
6 decision, states that, "Payrate means the normal monthly  
7 rate of pay", and it goes on from there. But that's what  
8 we reported. We reported our normal monthly rate of pay.  
9 If you go to the District's salary schedules, there's a  
10 salary schedule for full 10-month employees. Ten months  
11 is a full year for purposes of service. And the set --  
12 the amount on that salary schedule is what we reported as  
13 payrate. That's what the statute says. That's what we  
14 did. There's no formula. There's no conversion. There's  
15 nothing.

16 I'd like you to understand what your staff is  
17 arguing. If you take a look at the opening brief that we  
18 submitted to the ALJ, page 14 of that brief -- and I'm not  
19 going to spend a lot of time on it right now, but I really  
20 do want you to look at that -- we've taken the statute and  
21 we've subtracted a few words and we've added a few words  
22 to reflect what your staff is actually arguing. What they  
23 are essentially saying is that the District should not  
24 report the normal rate of pay that's paid to these  
25 employees as payrate. Instead, we should open up a

1 different salary schedule, as salary schedule the District  
2 has for hourly employees. We should take the numbers in  
3 that salary schedule and multiply them by the number  
4 173.33, and the results, which is actually larger than our  
5 monthly salary schedule, is what we should actually report  
6 as payrate.

7           Now normally, if a district were to come to you  
8 and say, hey, we want to report payrate that's higher than  
9 we're actually paying the employees, you would call that  
10 pension spiking, and that's exactly what it is. We're  
11 being told by CalPERS to engage in pension spiking. And  
12 for that reason, we are obviously not particularly  
13 amenable to that.

14           Now, this use of the number 173.33, this decision  
15 to start with an hourly payrate and multiply it rather  
16 than look at the District's monthly payrate, none of that  
17 is in the PERL. It's not in 20636.1. It's not in any  
18 regulation. There is testimony from Anthony Suine on  
19 this, as discussed on page 14 and 15 of our opening brief  
20 to the ALJ. This formula, this 173.33 formula, this  
21 decision to start with an hourly payrate and multiply it,  
22 it's not in any written document that was produced to us  
23 or available for purposes of this hearing. It simply  
24 doesn't exist anywhere. It's not in a statute. It's not  
25 in a regulation. It's not in a document. The only

1 document that we actually saw that reflects this  
2 particular formula was the documentation that was  
3 submitted -- the legal briefs that were submitted for  
4 purposes of this hearing. So if this is a rule, it's not  
5 a rule that CalPERS has ever reduced to writing and it's  
6 inconsistent with the statutory language that we rely on.  
7 It's not reflected in the regulatory language that we rely  
8 on.

9           Now, if CalPERS wants to require employers to  
10 start with an hourly rate, multiply it by 173.33, and  
11 report that as payrate, there's a way to do that. The way  
12 is to work with the Legislature to adopt a statute that  
13 says that. You can then follow up by adopting  
14 implementing regulations that clarify that, and districts  
15 will abide by that, but that's not what happened here. In  
16 this case, again, this formula, this starting point of the  
17 hourly rate, it's not in the statute. It's not in the  
18 regulation.

19           And actually, the Orange County Department of  
20 Education, the Office of Education for our county  
21 testified at hearing that they had no idea this was a  
22 requirement. They're the main intermediary between  
23 CalPERS and districts in Orange County. They had no idea  
24 this was being required. And for that reason, there's  
25 exactly one district in Orange County that uses this

1 173.33 multiplier. Every other district has something  
2 else going on.

3 Now, I'd like to respond to some of the points  
4 raised by staff. And I understand I've got some rebuttal  
5 time, which I will also likely use. There was some  
6 discussion of Government Code 20636.1 being implemented  
7 with the idea of avoiding disparities in overtime  
8 reporting. That's not an issue in this case. There's no  
9 contention that the employee worked overtime. There's no  
10 contention that we reported overtime. That's simply  
11 not -- not an in issue that was litigated.

12 There's also a suggestion that the employee in  
13 this case -- there is one employee who was audited.  
14 There's a suggestion that she was not working on a  
15 full-time basis. That's not the case. She worked a  
16 40-hour week. Every week, 40 hours. That's full time.  
17 There's also an implication that she was not working a  
18 full year and shouldn't get a full year of service credit.  
19 That's not an issue that was litigated in this case. The  
20 audit that was issued looked at one month, the month of  
21 August, 2012, and it looked at payrate, and it looked at  
22 the payrate reporting. It didn't look at service credit.  
23 There was no finding about service credit. There's no  
24 suggestion the employee didn't earn a full year of service  
25 credit. It was simply not an issue in the audit.

1           The issue was introduced very late in the game at  
2 the hearing and we objected. On the record, we said this  
3 case does not involve an issue of service credit. Why is  
4 CalPERS counsel introducing the issue and the judge agreed  
5 with us and sustained our objection.

6           What that means is this case does not involve  
7 service credit. If there is an allegation that this  
8 employee did not work a full year and did not qualify for  
9 a full year of service credit, that should have been dealt  
10 with differently. That's a separate issue. That's not  
11 the issue before us today. That's not the issue in this  
12 particular hearing.

13           There's also a suggestion that we can simply  
14 report a higher payrate, and employees will benefit, and  
15 the District will incur no additional cost. That's not  
16 the case. I think -- well, everything being equal, if you  
17 report a higher payrate, the employees will get a higher  
18 retirement allowance. You're paying more money. But if  
19 we're not paying any more money, if the District isn't  
20 paying any more money in, how does that work? It doesn't.

21           What your staff is -- what the staff argument on  
22 that point seems to be that the District should report a  
23 higher payrate than the employee has actually earned, but,  
24 and this is addressed in our briefing, they account for  
25 that by crediting the employee with less than a full year



1 of service credit. And this is for employees who  
2 indisputably are working a full year. What they're saying  
3 is report a higher payrate than they earned, report less  
4 service credit than a year. When you multiply that out,  
5 you end up with essentially the same number.

6 That's not how the PERL works. The PERL says  
7 report the normal monthly rate of pay as their payrate.  
8 If they work a full year, they get a full year of service  
9 credit. When they retire, they've got their service  
10 credit. They've got their final compensation. You  
11 multiply it all together and everything comes out fine in  
12 the end.

13 Now, I do want to address this 173.33 formula.  
14 The District has a normal monthly rate of pay. CalPERS  
15 counsel suggests that we started with an hourly rate and  
16 we multiplied it by 168 to come up with a monthly rate of  
17 pay. That's not the case. The undisputed testimony at  
18 hearing was that the District has a monthly rate of pay.  
19 That's what we report as payrate. But we also have hourly  
20 employees and we need an -- we need an hourly employee  
21 salary schedule. And so what we did is we took the  
22 monthly rate of pay, we divide it by 168, and we come up  
23 with an hourly rate of pay. That's the number that goes  
24 on hourly salary schedule. That's the only formula that  
25 we have going on.

1           What CalPERS seems to say is that we should take  
2 the monthly rate of pay divide it by 173.33 to get an  
3 hourly rate of pay. Again, it's not in the statute.  
4 There's nothing that tells we have to do this. And if we  
5 have divided by 168 rather than 173.33, the finding could  
6 very well have been you're overpaying your hourly  
7 employees, not you are underreporting for your monthly  
8 employees. What they're talking about is a relationship  
9 between hourly and monthly rates of pay. But again, that  
10 relationship is interesting, but it's not the issue here.  
11 The issue here is what is payrate and the statute clearly  
12 defines payrate as normal monthly rate of pay, which is  
13 what we reported.

14           There's also a suggestion that CalPERS is owed  
15 deference. The Campbell versus Arco Marine case, which is  
16 cited in our briefing to the ALJ, indicates that an  
17 agency's interpretation of a statute that is found in an  
18 internal memo rather than in an administrative regulation  
19 that might be subject to the notice and hearing  
20 requirements of proper administrative procedure is  
21 entitled to very slight difference.

22           And here, there is no internal memo. There is  
23 again nothing in writing that contains this 173.33  
24 formula. There is a suggestion that there was training  
25 provided. None of that was introduced into evidence.

1 There was no training materials we saw in writing produced  
2 by CalPERS referring to this formula.

3 I'll reserve the rest of my time on my three  
4 minutes on rebuttal. Thank you very much.

5 PRESIDENT TAYLOR: Thank you, Mr. Morrison.

6 Mr. Glauberman, would you like to issue a  
7 rebuttal, and start the clock for three minutes.

8 SENIOR ATTORNEY GLAUBERMAN: Thank you, Madam  
9 President.

10 Just a few things real quick. CalPERS is not  
11 contending that the sampled member in the audit didn't  
12 work 40 hours a week on a regular basis, but the reporting  
13 at issue here under section 20636.1 has to be based on  
14 full-time 40 hours a week over an entire year. And  
15 CalPERS conversion factor does just that. The 173.33  
16 averages full time over an entire year.

17 In addition to that, 173.33 may not be included  
18 in section 20636.1, but it is elsewhere in the PERL,  
19 specifically in sections 21221 and 21224, which are both  
20 working-after-retirement statutes, but those discuss how  
21 to determine an hourly payrate based off of a monthly  
22 payrate by dividing by 173.33.

23 In addition to that, counsel suggested that  
24 CalPERS wants Tustin to divide their monthly payrates by  
25 173.33 to reach the hourly. That is an incorrect

1 assertion. At hearing on this issue, it was undisputed  
2 that the base payrate or hourly rate was the amount that  
3 was used to determine overtime and pay reductions and  
4 docking, and things like that for their monthly members.  
5 So that makes it the true base rate of pay for these  
6 monthly individuals. So with that, CalPERS only is  
7 looking for a reporting of once -- of an hourly rate or a  
8 conversion based on 173.33.

9 And I will leave it at that, Madam President.

10 PRESIDENT TAYLOR: All right. Thank you, Mr.  
11 Glauberman.

12 Mr. Morrison, would you like to offer a rebuttal?

13 MR. MORRISON: Yes, please.

14 PRESIDENT TAYLOR: Okay. Please start the clock  
15 for another three minutes, and please proceed.

16 MR. MORRISON: All right. There's a reference to  
17 Government Code 21221 and 21224. Those code sections do  
18 reference 173.33 in the context of retired members coming  
19 back and working. Those sections are exactly how a  
20 formula like this can be implemented, and adopted, and  
21 made clear to school employers.

22 I'm aware of those sections, because they're in  
23 the code. We're not aware -- school districts generally  
24 are not aware that they are supposed to be using a special  
25 173.33 formula to report monthly -- to report payrate

1 because that's not in the code. There's a difference.

2 All right. There was a reference to the employee  
3 in question not working a year -- a full year of service  
4 credit. That's not the case. That is in dispute. And  
5 that was an issue that was not raised in the hearing. And  
6 again, when they -- when they -- sorry, it was not raised  
7 in the audit. And again, when they tried to raise it in  
8 the hearing, we objected, and the objection was sustained.  
9 It's improper for CalPERS counsel to suggest that this  
10 employee was not providing a full year of service credit.  
11 That was not an issue that was audited. It was not an  
12 issue that was litigated. And when they tried to litigate  
13 it, we objected, and the objection was sustained.

14 To now come here and suggest that you should  
15 consider the employee not to have worked a full year of  
16 service credit is -- you know, the issue -- the issue is  
17 not before you. And had the issue been litigated, we have  
18 a perfectly good explanation, but that pertains to the  
19 employee, one employee.

20 What we're also talking about is payrate. And  
21 we've got a 10-month salary schedule for 10-month  
22 employees that clearly identifies a normal monthly rate of  
23 pay. The District reported that as payrate. That is what  
24 the statute provides. That's what the statute allows.

25 Counsel also talked about the hourly rate of pay

1 being the true -- the true rate of pay. There's nothing  
2 in the statute that says that. What the statute says is  
3 payrate is the normal monthly rate of pay. The statute  
4 does not refer at all to hourly rates of pay. So to  
5 suggest that the monthly rate of pay, which is the only  
6 rate of pay referenced in the statute can't be reported,  
7 that's not the -- that's not the true rate. There's  
8 simply nothing to support that.

9           The ALJ looked at that issue specifically and  
10 said, look, there's nothing that says the hourly rate of  
11 pay is true rate of pay. The statute says monthly is the  
12 true rate of -- it says payrate is the normal monthly rate  
13 of pay. I think we appropriately reported monthly rates  
14 of pay as payrate.

15           I will just briefly address one issue. There was  
16 a discussion up front about uniformity. Districts should  
17 be reporting in a similar manner. As I noted, one  
18 district in Orange County reports in the way that CalPERS  
19 is suggesting. The vast majority of districts -- well,  
20 all the other districts report differently and roughly  
21 half the districts report the same way as Tustin. We'd  
22 ask you to honor the PERL and uphold the ALJ's  
23 determination. Thank you very much.

24           PRESIDENT TAYLOR: Thank you.

25           Are there any questions from the Board members?

1 Mr. Feckner.

2 VICE PRESIDENT FECKNER: Thank you, Madam Chair.  
3 The first question for Mr. Glauberman. Is there anywhere  
4 in the California Constitution that it talks about the  
5 System's authority, the CalPERS System's authority, to  
6 making policy and/or enforcing the PERL?

7 SENIOR ATTORNEY GLAUBERMAN: Mr. Feckner, CalPERS  
8 is the only agency authorized to interpret and implement  
9 the PERL and we are the agency charged with those duties.

10 VICE PRESIDENT FECKNER: All right. Thank you.

11 For Mr. Morrison, I -- vaguely I believe I heard  
12 you say that there was no training provided. There's  
13 never been training provided. I don't know whether the  
14 District, the employer, is aware of the fact or not, but  
15 CalPERS puts on a forum every year for just the employers.  
16 We've been doing it for over 20 years. And I wonder if  
17 you could tell how many times Tustin has attended?

18 MR. MORRISON: Well, I'll tell you we submitted a  
19 discovery request to CalPERS and asked for any  
20 documentation that referenced this 173.33 formula and we  
21 received nothing. At hearing, we pointed that out, and we  
22 asked your witnesses -- we asked Anthony Suine and other  
23 CalPERS witnesses is there anything in writing that refers  
24 to this formula? What we were told was no. There's  
25 nothing in a statute that refers to 173.33 for active

1 school employees. There's nothing in a regulation.  
2 There's no training materials. There is nothing. If  
3 there was something, they would have put it into evidence  
4 at hearing.

5 VICE PRESIDENT FECKNER: While I appreciate that,  
6 you did not answer my question. I asked you if Tustin has  
7 attended and availed themselves of the opportunity of the  
8 education for the employer, over 20 years?

9 MR. MORRISON: That didn't come up at hearing. I  
10 don't know which conferences the District would have  
11 attended. But it appears that if that had they attended,  
12 there would have been no materials from CalPERS directing  
13 use of this 173.33 formula.

14 VICE PRESIDENT FECKNER: Well, I respectfully  
15 disagree with that. I've attended more than 20 years of  
16 these forums and there's all kinds of forms for questions  
17 to be -- questions asked and answered, whether in a forum  
18 or in a one-on-one conversation with members of the staff  
19 during the conference. So unfortunately, the training has  
20 been offered. It sounds like Tustin hasn't availed  
21 themselves of the opportunity.

22 MR. MORRISON: If I can respond to that. There  
23 is a 173.33 formula for State members. There's a 173.33  
24 formula for retired school members who come back and work  
25 post-retirement. There is -- there were CASBO -- CASBO



1 materials, not CalPERS materials, CASBO materials that  
2 presented 173.33 as one possibility among several.

3 But I would urge you to read -- if you're  
4 suggesting that there is something in the administrative  
5 record or some evidence that was presented in writing  
6 either at conferences or elsewhere by CalPERS to school  
7 districts directing use of 173.33 for active school  
8 members, there is nothing of the sort.

9 VICE PRESIDENT FECKNER: I hear what you're  
10 saying. I also heard you say that there was no training.  
11 There has been training. My question was have they  
12 availed themselves of the opportunity. I believe you said  
13 you do not know.

14 So thank you.

15 MR. MORRISON: And if I can respond to that.  
16 There was testimony from Orange County Department of  
17 Education, who advises the District, that they had  
18 attended numerous trainings over the years and they had  
19 some CASBO materials that suggested -- that had 173.33 as  
20 one formula among several. We had CASBO materials going  
21 back 20 years that had a variety of different formulas.  
22 So if the implication is that the District should have  
23 attend a training at which some materials that don't exist  
24 should have -- you know would have been presented to them  
25 to clarify the issue, that's not the case. I'm sure the

1 District did training. That issue didn't come up at  
2 hearing. I don't -- you know, I don't have --

3 PRESIDENT TAYLOR: Thank you, Mr. Morrison. We  
4 got you.

5 MR. MORRISON: Thank you.

6 PRESIDENT TAYLOR: Mr. Glauberman.

7 SENIOR ATTORNEY GLAUBERMAN: If I may real quick.  
8 There was undisputed testimony at hearing from Anthony  
9 Suine, Deputy Executive Officer, wherein he stated he  
10 personally trained on this specific issue after 20636.1's  
11 implementation. And that -- that testimony was not  
12 rebutted or contradicted in any way, shape, or form.

13 PRESIDENT TAYLOR: Thank you.

14 And as I recall in the documents that we just  
15 didn't have any documentation that went back farther than  
16 I think 2013 or something like that. Wasn't that the  
17 case?

18 SENIOR ATTORNEY GLAUBERMAN: That sounds about  
19 right, but I'd have to check on that again.

20 PRESIDENT TAYLOR: That's what I understood as  
21 well.

22 Ms. Middleton.

23 BOARD MEMBER MIDDLETON: All right. Thank you.  
24 And this is a question for both counsel. But should not  
25 the term "month" have a common meaning for everyone?

1 SENIOR ATTORNEY GLAUBERMAN: I think it should  
2 have a common meaning and it should be interpreted the  
3 same way for everyone and not different based on which  
4 districts they work for.

5 BOARD MEMBER MIDDLETON: All right. Mr.  
6 Morrison.

7 MR. MORRISON: Yeah. I think the word month is  
8 very clear. We had 10-month employees. They have a  
9 monthly rate of pay. That's what we reported. I don't  
10 think we need a regulation or a statute to tell us what a  
11 month is. And I'll stop there. I'm not sure if I've  
12 answered your question.

13 BOARD MEMBER MIDDLETON: All right. If an  
14 employee works a period of time other than what is the  
15 commonly understood definition of a month, then they have  
16 worked either more or less than a month, have they not?

17 SENIOR ATTORNEY GLAUBERMAN: That's correct.

18 MR. MORRISON: I think the way you're describing  
19 the question, yes.

20 BOARD MEMBER MIDDLETON: All right. Thank you.

21 PRESIDENT TAYLOR: Thank you. I have a quick  
22 question for staff counsel. Are there any circumstances  
23 under which staff's interpretations or policies can be  
24 overruled by the ALJ?

25 SENIOR ATTORNEY GLAUBERMAN: If -- I mean, there

1 are circumstances where they can be overruled where it's  
2 not founded in statute and the interpretation and the  
3 motivation or the impetus behind the statute. They are  
4 able to do that, but there has to be a reason behind it.  
5 It can't just be disagreeing with how CalPERS does things.

6 PRESIDENT TAYLOR: Okay. So it can't be just  
7 disagreeing with our rulemaking.

8 SENIOR ATTORNEY GLAUBERMAN: Correct.

9 PRESIDENT TAYLOR: Okay. Okay. And then for Mr.  
10 Morrison, have you ever heard of any other multi-employer  
11 benefit plan in the public sector that allows  
12 participating agencies to adopt their own rules?

13 MR. MORRISON: Well, I would note that we're not  
14 adopting our own rules. We are paying our employees. And  
15 CalPERS staff have repeatedly told me, and this is from  
16 CalSTRS as well, that the districts sets rates of pay. We  
17 then report based on that. And all we did here was to set  
18 monthly rates of pay for our employees.

19 Now, according to your statute, the payrate is  
20 the normal monthly rate of pay. So we took our rate of  
21 pay that we set for own employees through the collective  
22 bargaining process - it's reflected in a salary schedule -  
23 and we reported that exact number as payrate, which is  
24 what the statute says.

25 PRESIDENT TAYLOR: Okay.

1 MR. MORRISON: That's -- that's all we're doing.

2 PRESIDENT TAYLOR: And so do you assert then that  
3 CalPERS does not have the right to rulemake, is that what  
4 you're asserting here to make these --

5 MR. MORRISON: No. I'm saying -- I'm saying two  
6 things. One is I would welcome adoption of a statute that  
7 clarifies --

8 PRESIDENT TAYLOR: We're not -- I'm not asking  
9 that question, sir. I'm asking are you saying that  
10 CalPERS does not have the right to interpret the statutes  
11 and make rules as Congress has allowed federal agencies to  
12 do, and as the State allows CalPERS to do?

13 MR. MORRISON: I would say two things. First,  
14 they didn't adopt a rule here. There was no formal  
15 rulemaking process. Again, there's no regulation that  
16 speaks to any of this. What did happen is it appears  
17 CalPERS, behind the scenes, adopted a rule --

18 PRESIDENT TAYLOR: You keep talking about a  
19 regulation. That's not the question I asked. I asked  
20 we -- the statute is out there about the 40 hours. We  
21 have interpreted that and made a rule on that. And have,  
22 as evidenced in our -- in your -- the case here, have  
23 presented factual information that shows that we did talk  
24 to employers about the rule. Are you stating -- are you  
25 asserting that we don't have the right as CalPERS to make

1 that rule? That's what I'm asking --

2 MR. MORRISON: What I'm say --

3 PRESIDENT TAYLOR: -- or the staff doesn't have  
4 the right.

5 MR. MORRISON: What I'm saying is there is a  
6 process in the law that CalPERS needs to follow to adopt  
7 rules. And when that process isn't followed, as it wasn't  
8 here, the rule is an underground regulation. And that's  
9 what the ALJ found.

10 PRESIDENT TAYLOR: You're asserting they didn't  
11 follow. You're asserting. You're -- I'm not -- I'm not  
12 asking that. I'm asking does -- do they have the right to  
13 rulemake?

14 MR. MORRISON: In this case, I think the  
15 regulation that might have been adopted would be  
16 inconsistent with the statute. As a general matter, does  
17 CalPERS have the ability to adopt regulations? Sure. But  
18 they need to adhere to the statute and there's a process  
19 to adopt regulations, and that process was not followed  
20 here.

21 PRESIDENT TAYLOR: Mr. Glauberman, did you have  
22 an answer to that?

23 SENIOR ATTORNEY GLAUBERMAN: I would say the  
24 statute does prescribe how to report and it's base on a  
25 40-hour workweek overall 12 months of the year. In

1 addition to that, this is not an underground regulation.  
2 It's just the District disagreeing with CalPERS  
3 interpretation. And the District's incorrect  
4 interpretation is based on 168 work hours, which is  
5 nowhere in the PERL, or in any regulation, or otherwise.

6 PRESIDENT TAYLOR: Correct. Okay. I appreciate  
7 that.

8 Ms. Or -- hold on a second. Ms. Ortega.

9 BOARD MEMBER ORTEGA: Yeah, my question is just  
10 along these lines for Mr. Glauberman. Do you think that  
11 it would be better were there a regulation or a specific  
12 document that was introduced into the record that explains  
13 the 177.33? I do -- I'm asking would it -- even if you're  
14 asserting it's not conflicting with the statute, wouldn't  
15 it be a stronger case if there was an actual document that  
16 had that down?

17 SENIOR ATTORNEY GLAUBERMAN: I'm not sure it  
18 would be. According to Mr. Morrison, he's actually stated  
19 I think it would conflict if there were a regulation that  
20 did say 173.33. I think he said that a second ago. But  
21 in a perfect world, maybe. But the education on this, and  
22 the training has been clear, and the practice has been in  
23 place for at least 20 years now. So it's been consistent  
24 all along.

25 BOARD MEMBER ORTEGA: Yeah. And this is my

1 comment, not a question. I recognize that the practice  
2 has been in place, but I think that my view is it would be  
3 a lot better if there was an actual document. And I think  
4 it is a weakness in the case that there was nothing  
5 provided in discovery.

6 PRESIDENT TAYLOR: Thank you.

7 I'm seeing no further questions from the Board,  
8 so we're going to adjourn now to go into closed -- I'm  
9 sorry, we're going to recess and go into closed session  
10 for the Board, if there are no more questions. I just  
11 want to make one more call for questions.

12 Okay. We're going to recess for now and go into  
13 closed session for the Board.

14 MR. MORRISON: All right. Thank you very much.

15 MR. GLAUBERMAN: Thank you.

16 PRESIDENT TAYLOR: Yeah, we're going to  
17 adjourn -- go into the back. Thank you.

18 (Off record: 10:06 a.m.)

19 (Thereupon the meeting recessed into  
20 closed session.)

21 (Thereupon the meeting reconvened  
22 open session.)

23 (On record: 10:42 a.m.)

24 PRESIDENT TAYLOR: Thank you all for your  
25 patience. We are rejoining open session. And for this to



1 take action on Agenda Item 4. And for this, I will turn  
2 it over to the Vice President, Mr. Feckner.

3 VICE PRESIDENT FECKNER: Thank you, Madam Chair.  
4 I move that the Board reject the proposed decision of the  
5 administrative law judge, deny the appeal, and issue a  
6 revised final decision of the Board as argued by staff.

7 BOARD MEMBER MILLER: (Raised hand).

8 PRESIDENT TAYLOR: Okay. The motion has been  
9 made Mr. Feckner, seconded by Mr. Miller. Is there any  
10 discussion on the motion?

11 No discussion. Ms. Hopper, can you go ahead and  
12 do a roll call vote on this?

13 (Thereupon an electronic vote was taken.)

14 PRESIDENT TAYLOR: All right.

15 BOARD SECRETARY HOPPER: Ramon.

16 PRESIDENT TAYLOR: All right. Motion carries.

17 Thank you very much, both of you. I appreciate  
18 the time you took.

19 At this point, I think we -- oh, wow, we're kind  
20 of early. We're going to go into a break until 11, when  
21 it is noticed that Pension and Health Benefits Committee  
22 is our next session. So thank you very much.

23 MR. MORRISON: Thank you.

24 SENIOR ATTORNEY GLAUBERMAN: Thank you.

25 //

(Thereupon, the California Public Employees'  
Retirement System, Board of Administration  
meeting open session adjourned at 10:43 a.m.)

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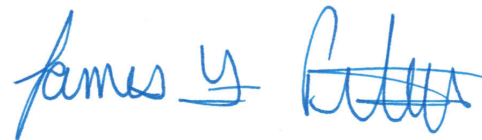
CERTIFICATE OF REPORTER

I, JAMES F. PETERS, a Certified Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing California Public Employees' Retirement System, Board of Administration open session meeting was reported in shorthand by me, James F. Peters, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed, under my direction, by computer-assisted transcription;

I further certify that I am not of counsel or attorney for any of the parties to said meeting nor in any way interested in the outcome of said meeting.

IN WITNESS WHEREOF, I have hereunto set my hand this 21st day of April, 2022.



JAMES F. PETERS, CSR  
Certified Shorthand Reporter  
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