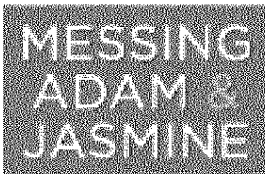


ATTACHMENT C

Respondents' Arguments

ATTACHMENT C



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FACSIMILE TRANSMISSION

FROM	Messing Adam & Jasmine (Sac)
TO	Cheree Swedensky
COMPANY	
FAX NUMBER	19167953972
DATE	2022-03-28 17:07:33 PDT
RE	Respondent's Argument re Proposed Decision re Appeal of Thomas S. Blanco - Case No. 2020-1209 - OAH Case No. 2021030825

MESSAGE

No. of pages: 3

Message: Attached, please find Respondent's Argument re: Proposed Decision in the Matter of the Appeal Regarding the Final Compensation Calculation of Thomas S. Blanco and California Department of Corrections and Rehabilitation; Agency Case No. 2020-1209; OAH Case No. 2021030825. A hard copy will follow.

Jon Davis

Legal Assistant to Lina Balciunas Cockrell & David Kruckenber

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March 28, 2022

VIA FACSIMILE AND PERSONAL DELIVERY
(916) 795-3972

Cheree Swedensky
Assistant to the Board
CalPERS Executive Office
Lincoln Plaza North
400 Q Street, Room 3340
Sacramento, CA 95811

Re: Respondent's Argument re: Proposed Decision in the Matter of the Appeal Regarding the Final Compensation Calculation of Thomas S. Blanco and California Department of Corrections and Rehabilitation; Agency Case No. 2020-1209; OAH Case No. 2021030825

Dear Ms. Swedensky:

The undersigned represents respondent Tom Blanco in the above-referenced matter. We urge the Board to adopt the Proposed Decision issued by administrative law judge Wim van Rooyen on or about February 23, 2022. The issue in this case was whether Mr. Blanco's out-of-class pay earned in his final compensation period constituted pensionable special compensation pursuant to Government Code section 20636(g) or whether it was excluded pursuant to Title 2, Section 571 of the California Code of Regulations. Judge van Rooyen conducted a comprehensive review of the applicable law, legislative history and interpreting representations by CalPERS and concluded that Section 571 does not apply to state CalPERS members as a matter of law. The Board should give deference to Judge van Rooyen reasoned and well-supported analysis and adopt the Proposed Decision.

Sincerely,

MESSING ADAM & JASMINE LLP

A handwritten signature in black ink, appearing to read "Lina Balciunas Cockrell", written over a light gray grid background.

Lina Balciunas Cockrell

LBC:jpd
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8
9 **BOARD OF ADMINISTRATION**
10 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

11 In the Matter of the Appeal Regarding the
12 Final Compensation Calculation of

13 THOMAS S. BLANCO,

14 Respondent,

15 and,

16 DEPARTMENT OF CORRECTIONS
AND REHABILITATION,

17 Respondent.
18
19

Agency Case No.: 2020-1209
OAH Case No.: 2021030825

**RESPONDENT CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION'S
ARGUMENT FOR APRIL 19, 2022
MEETING OF THE BOARD OF
ADMINISTRATION OF THE
CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM**

Hearing Date: September 15, 2021
Hearing Judge: Hon. Wim van Rooyen

1 The Board of Administration (“Board”) of the California Public Employees’
2 Retirement System (“PERS”) must administer the retirement system for the benefit of its
3 members, to whom it owes undivided fiduciary duties of loyalty and prudence that “take
4 precedence over any other duty.” *See generally*, Cal. Const. art. XVI, § 17. This means that
5 the Board “has a fiduciary duty to follow the law.” *City of Pleasanton v. Board of Admin.*
6 (2012) 211 Cal.App.4th 522, 544. To discharge that duty, this Board must act to ensure that
7 the system’s members are paid their full, earned benefits under the Public Employees’
8 Retirement Law, § 20000, et. seq. (“PERL”).¹ *City of Oakland v. Public Employees’*
9 *Retirement System* (2002) 95 Cal.App.4th 29, 46.

10 Respondent California Department of Corrections and Rehabilitation (“CDCR”)
11 respectfully submits that this Board has a fiduciary duty to adopt the Proposed Decision
12 issued in this matter. The Proposed Decision is well-reasoned and legally correct and was
13 decided based on stipulated facts and fully considered evidence, arguments, and authority.
14 This Board should also designate the Proposed Decision as a Precedential Decision because
15 its holding that California Code of Regulations, title 2, section 571 (“CCR 571”) does not
16 apply to State members and that special compensation for State members is governed by
17 Section 20636(g)(3) resolves a significant issue of general application that is likely to recur.
18 *See generally*, § 11425.60(a).

19 By adopting the Proposed Decision, this Board will ensure that respondent Thomas
20 Blanco (“Blanco”) is paid the pension benefits he has earned and is statutorily entitled to
21 under the PERL. And, by designating the Proposed Decision a Precedential Decision, this
22 Board will ensure that the retirement system is administered in the manner that the law
23 requires. By contrast, rejecting the Proposed Decision would constitute a clear abuse of the
24 Board’s discretion because it would deprive Blanco of the benefits he has earned and is
25 indisputably entitled to under the PERL. *See, e.g., O’Neal v. Stanislaus County Employees’*
26 *Retirement Assn.* (2017) 8 Cal.App.5th 1184, 1215-1216 (a retirement board’s discretion is

27 _____
28 ¹ Unless specified otherwise, all paragraph citations are to the Proposed Decision and all
statutory citations are to the California Government Code.

1 constrained by its' fiduciary obligations).

2 **I. The Underlying Facts Germane To The Appeal Are Undisputed.**

3 Blanco was employed by CDCR from 1986 through July 1, 2020. (¶ 1.) During his
4 final year of employment, Blanco was appointed to work out-of-class ("OOC") by his
5 department from September 1, 2019 to February 23, 2020 to fill a vacancy in a critical
6 supervisory position in CDCR's Office of Internal Affairs, which investigates allegations of
7 employee misconduct. (¶ 8.) Blanco performed the normally required working duties of his
8 OOC position during this time and was paid an OOC pay differential equal to 5% of his
9 monthly salary for his non-OOC position. (¶ 5.) CDCR properly reported the OOC
10 compensation to PERS as an item of special compensation at the time it was paid. (¶ 7.)
11 PERS member contributions were deducted from Blanco's monthly OOC paycheck for the
12 pay differential. (¶ 7.)

13 After Blanco's retirement, PERS determined, as set forth in its August 21, 2020 letters
14 to Blanco and CDCR, that because the OOC compensation was "paid exclusively in
15 [Blanco's] final compensation period" it could not be included in his special compensation,
16 and by extension his pensionable compensation, pursuant to CCR 571(b)(7). (¶¶ 3-4.) Blanco
17 and CDCR timely appealed and PERS filed a consistent Statement of Issues on February 10,
18 2021. (¶ 4.) Thereafter, the parties engaged in discovery and proceeded to hearing on
19 September 15, 2021. Four witnesses testified and over 40 exhibits were received into
20 evidence. (¶ 3.) Following extensive post-hearing briefing, the Court issued its Proposed
21 Decision directing PERS to reverse its determination.

22 **II. Legal Framework**

23 Under the PERL, a State member's benefits are the product of the member's "final
24 compensation," multiplied by an age-adjusted factor, and the member's credited service.
25 *Paxton v. Board of Admin.* (2019) 35 Cal.App.5th 553, 557 (*Paxton*). "Final compensation"
26 consists of the member's highest annual average compensation earnable, which consists of
27 both payrate and special compensation. *Id.* For State members, special compensation is
28 defined by Section 20636(g)(3). *Id.* In relevant part, Section 20636(g)(3)(B) states:

1 (3) Notwithstanding subdivision (c), “special compensation” for
2 state members shall mean all of the following:

3 (B) Compensation for performing normally required
4 duties, such as [...] out-of-class pay, [...]

5 **III. The Proposed Decision Is Legally Correct In All Respects, Supported By
6 Substantial Evidence, And There Is No Basis For The Board To Reject It.**

7 The Proposed Decision addressed a single issue based on undisputed facts: whether
8 OOC compensation paid to Blanco exclusively in his final compensation period constitutes
9 special compensation that must be included in his final, pensionable compensation under the
10 PERL. The Proposed Decision answered in the affirmative and found that Respondents had
11 easily met their burden to establish that CCR 571 did not apply to State members and that
12 the plain language of Section 20636(g)(3) required that the OOC compensation qualified as
13 special compensation. (¶ 14.)

14 The Proposed Decision looked first to the plain language of CCR 571 and then to
15 extrinsic aids, as directed by the California Supreme Court, to assess PERS’ claim that CCR
16 571(b) applies to State members. (¶ 15, citations omitted.) Because by its plain language
17 subdivision (a) of CCR 571 applies exclusively to Public Agency and School members, and
18 because subdivisions (b), (c), and (d) of CCR 571 are textually integrated with and internally
19 reference Subdivision (a), the Proposed Decision found that a plain reading of CCR 571 as a
20 whole confirms that CCR 571 applies exclusively to Public Agency and School members and
21 not State members. (¶¶ 16, 17.) This conclusion is further supported by the fact that CCR 571
22 does not contain a single reference “nor does it otherwise textually signal that it intends to
23 sweep State members within its ambit.” (¶¶ 17-18.)

24 Next, even assuming there were some ambiguity with respect to CCR 571’s
25 application to State members, the Court surveyed the extrinsic aids and concluded they
26 overwhelmingly established it did not. (¶¶ 19-23.) *First*, the Rulemaking File for CCR 571—
27 which represents the regulatory history related to promulgation of CCR 571—revealed that
28 the primary intent of CCR 571 was to address “a statewide problem with *local agency*
employers converting various benefits of selected employees to salary, only during the final

1 compensation period.” (§ 20.) The benefits of State members are, by contrast, set by statute
2 and otherwise appropriated for on an annual basis by the Legislature and therefore not subject
3 to similar manipulation. (§ 20.) Consistent with this stated purpose, the Rulemaking File
4 expressly states that the intent of CCR 571 is to “make specific what constitutes special
5 compensation *for local agencies and school districts*, as required by the revised statutory
6 scheme.” (§ 20.) In stark contrast to PERS’ current position, the Rulemaking File specifically
7 states that, for State members, “the definition of special compensation for state employees
8 will remain substantially the same.” (§ 20.)² Last, the Rulemaking File “instructively notes
9 that CCR 571 was developed solely based on input from Public Agency and School members
10 in response to surveys—which were not sent to State members—and that “this reasonably
11 suggests that [State members] were never intended to be governed by CCR 571.” (§ 20.)

12 *Second*, a 2011 Circular Letter issued by PERS—and that has never been rescinded—
13 expressly states that “CCR Section 571, subdivision (b) applies to all schools and public
14 agencies reporting compensation to CalPERS.” (§ 21.) That Circular Letter is available on
15 the PERS’ website at <https://www.calpers.ca.gov/docs/circular-letters/2011/200-056-11.pdf>

16 *Third*, the special compensation section of the Public Agency and Schools Reference
17 Guide spans ten pages, the first of which cites to Section 20636(c). But the remaining 9 pages
18 excerpt the entirety of CCR 571 to explain what qualifies as special compensation for Public
19 Agency and School members. (§ 22.) By contrast, the special compensation section of the
20 State Reference Guide consists only of a single page that cites solely to Section 20636(g)(3)
21 and simply restates the statutory language to explain what qualifies as special compensation
22

23 ² Consistently, the legislative history for Senate Bill 53, which amended the PERL to enact
24 what is now codified as Section 20636 and granted PERS the authority to promulgate CCR 571,
25 confirms that the Department of Personnel Administration (now CalHR) objected to inclusion of
26 language set forth in an initial draft of the bill proposed by PERS that would have granted it the
27 authority to promulgate a regulation that would govern special compensation for State members,
28 explaining: “*Neither could we support any requirement which would provide PERS with rule-
making authority to identify items of special compensation or provide other discretionary authority
over the policy issues affecting the State. We believe the State would be much better served having
statutory requirements as described earlier, rather than have the PERS Board adopt rules.*” That
language was removed from the final bill passed by the Legislature.

1 for State members. (¶ 22.) This stark contrast is also reflected in the January 2022 Reference
2 Guides recently issued by PERS, which are available on PERS’ Website at
3 <https://www.calpers.ca.gov/docs/forms-publications/pas-ref-guide.pdf> and
4 <https://www.calpers.ca.gov/docs/forms-publications/state-ref-guide.pdf>.

5 *Last*, the Proposed Decision held that PERS had consistently maintained in the
6 underlying administrative appeal and in its briefing to the Court of Appeal in *Paxton* that
7 CCR 571 only applies to Public Agency and School members. (¶ 23.) For example, in the
8 *Paxton* appeal, PERS represented that “*Cal. Code Regs. § 571(b)(9)* exclude[es] from special
9 compensation payments to *local members* that ‘creat[e] an unfunded liability over and above
10 PERS’ actuarial assumptions’.” (PERS’ Respondents’ Brief in *Paxton*, 2018 WL 2727989,
11 *22, fn. 3. internal marks omitted, emphasis added; *see also id.* at p. 23, n. 4 [“[a] regulation
12 [like CCR § 571] directed to State members was not needed because [...] the PERL already
13 provides CalPERS the authority to approve or disapprove the PERSability of payments to
14 [S]tate members”].)

15 The Proposed Decision also correctly rejected PERS’ claim that its interpretation of
16 CCR 571 was entitled to deference as it was belied by the regulatory language, and all of the
17 record evidence confirmed that PERS had never actually maintained such an interpretation.
18 (¶ 24.) Consistently, the Proposed Decision correctly held that PERS’ reliance on a non-
19 precedential decision involving a PERS member employed by the California State University
20 system was unavailing because that decision was poorly reasoned. (¶ 25.) The Proposed
21 Decision correctly noted that, while policy concerns are valid, they provide no basis upon
22 which to override statutory or regulatory language. (¶¶ 26-27.)

23 Having concluded that CCR 571 does not apply to State members, the Proposed
24 Decision held that the plain language of Section 20636(g)(3)(B) required inclusion of the
25 OOC compensation in Blanco’s final compensation because that language is mandatory and
26 the statute itself “includes no limitation concerning when the OOC compensation was
27 earned.” (¶ 28.) Nor had PERS promulgated another regulation placing such a limitation on
28 special compensation for State members. (¶¶ 28-29.)

1 **IV. The Board Must Adopt The Proposed Decision.**

2 The Proposed Decision was based on stipulated facts and correctly applied the law to
3 those facts. PERS' primary response will likely be that its contrary interpretations are entitled
4 to deference; but, PERS' interpretations contravene the statutory and regulatory language as
5 the Proposed Decision correctly found. PERS' interpretations are also contrary to the record
6 evidence and PERS' own written representations, including in judicial proceedings, which
7 evidence uniformly and overwhelmingly confirmed that CCR 571 does not and, indeed,
8 cannot be applied to State members.

9 Fundamentally, PERS' authority to administer the retirement system does not
10 authorize it to invoke policy to deny its members benefits they are statutorily entitled to.
11 When the Legislature speaks through legislative enactments, those words have meaning.
12 Here, the meaning of those words could not be more clear and the Proposed Decision
13 correctly divined their meaning.

14 The paramount fiduciary duty to follow the law requires that this Board vote to adopt
15 the Proposed Decision. And, because the Proposed Decision resolves a significant issue of
16 general application that is likely to recur, the Board should designate it as a Precedential
17 Decision. So acting will ensure that Blanco and other State members are paid the benefits
18 they have earned and are entitled to under the PERL.

19 DATED: March 28, 2022

HANSON BRIDGETT LLP

21 By: /s/ Matthew J. Peck
22 EDWARD M. BERNARD
23 MATTHEW J. PECK
24 Attorneys for CALIFORNIA DEPARTMENT
25 OF CORRECTIONS AND
26 REHABILITATION
27
28

1 **PROOF OF SERVICE**

2 **In the Matter of the Appeal Regarding the Final Compensation Calculation Of**
3 **Thomas S. Blanco and Department of Corrections and Rehabilitation**
4 **(OAH Case No.: 2021030825; Agency Case No.: 2020-1209)**

5 **STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA**

6 At the time of service, I was over 18 years of age and not a party to this action. I am
7 employed in the County of Contra Costa, State of California. My business address is 1676
8 N. California Blvd., Suite 620, Walnut Creek, CA 94596.

9 On March 28, 2022, I served a true and correct copy of the following document
10 described as:

11 **RESPONDENT CALIFORNIA DEPARTMENT OF CORRECTIONS AND**
12 **REHABILITATION'S ARGUMENT FOR APRIL 19, 2022 MEETING OF THE**
13 **BOARD OF ADMINISTRATION OF THE CALIFORNIA PUBLIC EMPLOYEES'**
14 **RETIREMENT SYSTEM**

15 **BY OVERNIGHT DELIVERY:** I enclosed said document(s) in an envelope or
16 package provided by the overnight service carrier and addressed to Ms. Swedensky at the
17 address listed in the Service List. I placed the envelope or package for collection and
18 overnight delivery at an office or a regularly utilized drop box of the overnight service carrier
19 or delivered such document(s) to a courier or driver authorized by the overnight service
20 carrier to receive documents.

21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct.

23 Executed on March 28, 2022 at Walnut Creek, California.

24 
25 _____
26 Jeffrey Washington

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SERVICE LIST

In the Matter of the Appeal Regarding the Final Compensation Calculation Of Thomas S. Blanco and Department of Corrections and Rehabilitation

(OAH Case No.: 2021030825; Agency Case No.: 2020-1209)

Cheree Swedensky, Assistant to the Board
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