

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Respondent Britt Wilson (Respondent) was employed with the City of Highland, the City of La Quinta, the City of Ranch Cucamonga, and, most recently, the City of Rancho Mirage (Respondent City). By virtue of his employment, Respondent is a local miscellaneous member of CalPERS.

On February 28, 2019, Respondent City and Respondent entered into a Retirement Agreement and a Comprehensive Release of Claims (Agreement). Prior to the execution of the Agreement, Respondent's hourly payrate was \$45.48. After execution of the Agreement, Respondent's hourly payrate was raised to \$50.65, and this raise was paid retroactive to June 18, 2018. The Agreement also placed Respondent on administrative leave from February 28, 2019 through June 22, 2019. Under the terms of the Agreement, Respondent agreed to retire on June 23, 2019.

Also on February 28, 2019, CalPERS received Respondent's application for service retirement, with a requested retirement date of June 23, 2019. Respondent retired for service effective June 23, 2019, with a total service credit of 21.940 years and has been receiving his retirement allowance since July 1, 2019. The final compensation amount initially reported and used to calculate Respondent's retirement allowance was \$8,754.03.

On June 4, 2020, CalPERS Office of Audit Services (OFAS) completed an audit review for Respondent City to determine whether its publicly available pay schedules (pay schedules) complied with the PERL, and whether the payrates contained in the pay schedules included any additional types of compensation. The audit period covered sampled employees' earnings for the period July 1, 2017 through August 31, 2019.

Through the audit, CalPERS learned of the Agreement between Respondents. The audit finding stated that the raised payrate of \$50.65 given to Respondent exceeded the maximum allowable amount in Respondent City's pay schedules. In addition, Respondent's raise constituted final settlement pay under Title 2, California Code of Regulations section 570 (Regulation 570). Under Government Code section 20636 and Regulation 570, final settlement pay is not compensation earnable and cannot be included when calculating a member's final compensation for retirement purposes.

Because CalPERS determined that Respondent's pay increase was not compensation earnable, the payrate increase from the Agreement could not be used to calculate Respondent's final compensation for retirement purposes. Respondent's final compensation was reduced to \$7,880.30 from the originally reported \$8,754.03. Based on the decreased final compensation, Respondent's monthly retirement allowance was reduced to \$4,242.33. CalPERS also determined that Respondent's retirement allowance had been overpaid by a total of \$7,180.99, which CalPERS must collect.

In August 2020, CalPERS sent Respondent a pre-deprivation letter notifying him of the reduction and overpayment collection.

On September 10, 2020, CalPERS sent Respondent a determination letter notifying him of the reduction and overpayment collection. The determination letter provided Respondent with appeal rights.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on July 8, 2021. Respondent represented himself at the hearing. Respondent City appeared at the hearing and was represented by counsel.

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.

CalPERS staff testified at the hearing and explained that the payrate increase from the Agreement was non-reportable final settlement pay as defined by Regulation 570. Regulation 570 defines final settlement pay as compensation paid in anticipation of separation from employment, and states that it may take the form of payrate or special compensation. Under Government Code section 20636 and Regulation 570, final settlement pay cannot be used to calculate final compensation. Because the Agreement made clear that the payrate increase from \$45.48 to \$50.65 was in anticipation of retirement, CalPERS determined that the increase was final settlement pay that had to be excluded.

Staff then explained that Government Code section 20636 defines payrate as the normal monthly rate of pay that is paid to similarly situated employees of the same group or class for services rendered, pursuant to publicly available pay schedules. The payrate of \$50.65 was higher than the maximum payrate in the City's pay schedules.

Staff further explained that CalPERS was required to exclude the retroactive increase as final settlement pay. Because the City reported the retroactive increase in Respondent's final compensation, Government Code section 20160 required CalPERS to exclude the increase. Correcting and excluding the increases resulted in a retroactive and prospective reduction to Respondent's retirement warrant. The reduction also resulted in an overpayment to Respondent, which he repaid prior to the hearing.

Respondent City's staff testified at the hearing. Respondent City's staff explained that Respondent was given a promotion in February 2019, which was retroactive to June 2018. Although the usual raise given by Respondent City in conjunction with a raise is limited to five percent, the raise given to Respondent for his promotion was more than twice that amount. Respondent City's staff explained that following the promotion,

Respondent approached the Respondent City about retiring. Respondents then entered into the Agreement.

Respondent testified on his own behalf at the hearing. Respondent began working for Respondent City in 2011 as a Management Analyst. Respondent claimed that he often performed the duties of a Senior Management Analyst, although he was not compensated as such. Respondent noticed that others who performed out of class duties, as he claimed he was, were often compensated for that out of class work. So, Respondent initiated an out of class action against Respondent City, which was denied.

Respondent met with the Respondent City's City Manager in February 2019 and asked for a promotion. Based on Respondent's recollection of events of the February 2019 meeting, the City Manager suggested that Respondent retire and told him the promotion in conjunction with a retirement would result in a higher retirement allowance. Respondent agreed to the promotion and retirement, and subsequently entered into the Agreement with Respondent City.

After considering all of the testimony and evidence introduced at the hearing, the ALJ denied Respondent's appeal. Under Government Code section 20160, CalPERS was seeking to correct a mistake within the system, so CalPERS had the burden at hearing. The ALJ found that CalPERS met its burden.

The ALJ held that Government Code section 20636 and Regulation 570 provide that the additional compensation or final settlement pay be excluded from Respondent's final compensation as final settlement awarded in anticipation of retirement. Respondent's testimony and the Agreement both confirmed that the increase from \$45.48 to \$50.65 was given in anticipation of Respondent's retirement. The evidence also showed that Respondent never performed services at the payrate of \$50.65. Plus, the payrate of \$50.65 exceeded the maximum allowable payrate on Respondent City's pay schedule.

Further, the ALJ held that once CalPERS learned of the reporting error through the audit, CalPERS had a duty to correct the error under Government Code section 20160. Correction of the error here required CalPERS to recalculate his prospective and retroactive payrate, and to collect the overpayment from Respondent.

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 payrate increase given to Respondent constituted non-reportable final settlement pay that must be excluded from Respondent's final compensation.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes in the proposed decision." To avoid ambiguity, staff recommends that the first line of the ORDER on page 28 of the Proposed Decision be changed to say "The appeal by Britt Wilson is denied" removing "and the City of Rancho Mirage" since Respondent City did not file an appeal.

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

November 17, 2021

Charles H. Glaberman
Senior Attorney