

**ATTACHMENT I**  
**CALPERS' POST HEARING BRIEF, REPLY BRIEF, AND**  
**REQUEST FOR OFFICIAL NOTICE**

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8 BOARD OF ADMINISTRATION

9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
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11	In the Matter of the Appeal Regarding the	)	AGENCY CASE NO. 2020-0436
	Full-Time Payrate Reporting of	)	
12		)	OAH NO. 2020090431
	TUSTIN UNIFIED SCHOOL DISTRICT,	)	
13		)	CALPERS' CLOSING BRIEF IN
		)	SUPPORT OF DETERMINATION
14	Respondent.	)	
		)	Hearing Date: September 2 & 3, 2021
15		)	Hearing Location: Virtual
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1 **I. INTRODUCTION**

2 The California Public Employees' Retirement System (CalPERS) conducted an  
3 audit of Tustin Unified School District's (Tustin) compensation reporting practices. The  
4 audit ultimately determined that Tustin's reporting was erroneous, and out of  
5 compliance with the Public Employees' Retirement Law, and Government Code  
6 Section 20636.1. Tustin appealed CalPERS' determination.

7 **II. FACTUAL BACKGROUND**

8 CalPERS Audit and Determination

9 CalPERS Office of Audit Service (OAS) performed an audit of 64 public  
10 agencies in 2017 and 2018. On July 18, 2018, CalPERS issued its Draft Audit Report  
11 (Draft) to Tustin. (CalPERS Exhibit 3, pages 35-50.) The Draft included six specific  
12 findings related to Tustin's reporting of employee compensation to CalPERS. (*Id.* at pp.  
13 37-39.) Finding four stated that: 1) Tustin was incorrectly reporting payrate for its full-  
14 time classified employees; 2) the reporting was based on a less than 40-hour  
15 workweek; and 3) that the reporting was not based on 12 months of the year. (*Id.* at  
16 38.) Finding four was based on the sampling of a single CalPERS classified school  
17 member (Member) employed by Tustin. Tustin's reporting of Member's payrate was  
18 representative of all of its classified employee members.

19 By letter dated August 6, 2018, Tustin responded to the Draft, and disputed  
20 finding four. (Exh. 4, pp. 52-60.) Tustin argued that Government Code section 20636.1<sup>1</sup>  
21 does not require reporting based on 2080 hours per year, or 173.33 hours per month.  
22 (*Id.* at 56-57.)

23 CalPERS issued its Final Audit Report (Audit) on December 6, 2018. (Tustin  
24

25 <sup>1</sup> All future statutory references will be to the Government Code unless otherwise noted.

1 Exh. 1, pp. B 1-13.) The Report included the previous finding four, which stated:

2 The Agency did not correctly report full-time payrates for a  
3 sampled classified employee who retired in January 2015.  
4 Specifically, the reported payrates were not based on a 40-  
5 hour workweek for all months of a year as required by  
6 Government Code section 20636.1. For example, the  
7 Agency reported a monthly payrate of \$4,022 for the  
8 employee in the pay period ended August 31, 2012;  
9 however, the reported monthly payrate should have been  
10 \$3,915.60. The payrates reported for the retired sampled  
11 employee reflected a workweek of less than 40 hours and  
12 the payrates were not based on all 12 months of the year.  
13 The incorrect reporting resulted in decreases to the  
14 employee's reported payrates that were not in compliance  
15 with Government Code section 20636.1. (Tustin Exh. 1, p.  
16 B11.)

17 CalPERS notified Tustin of the Audit by letter dated December 18, 2018. (Exh.  
18 5.) Following its December 18, 2018 letter, CalPERS continued to correspond with  
19 Tustin regarding the Audit, and the parties worked on resolving the matter, including  
20 finding four. (Exh. 6.) Through its counsel, Tustin disputed the Audit's finding four by  
21 letter dated December 10, 2019. (Exh. 8, pp. A95-99.) In its letter, Tustin argued that  
22 CalPERS lacked a "basis in law to dictate the difference between monthly and hourly  
23 payrates." (Id.)

24 CalPERS responded to the December 10, 2019 letter with a determination letter  
25 (Determination) dated December 19, 2019. (Exh. 7.) The Determination detailed  
CalPERS' position regarding finding four, by stating that Tustin's reporting overreported  
the payrate for the sampled member. (Id.) The Determination explained the difference  
between earnings and payrate. The Determination stated that the earnings for the  
sampled Member, based on an eight hour workday over 210 days per year, were; an  
annual salary of \$37,950; a monthly salary, \$37,950 divided by 10 months, of  
\$3795.00; a daily salary, \$37,950 divided by 210 days, of \$180.71; and an hourly rate,

1 \$180.71 divided by 8 hours, of \$22.59. (*Id.*) \$22.59 is the accurate hourly rate. The  
2 Determination then explained the difference between earnings and payrate by stating:

3 Pursuant to Gov. Code section 20636.1(b), the earnings are  
4 not considered the same as payrate because the earnings  
5 are not equivalent to the normal rate of pay or base pay  
6 based on full-time employment of 40 hours per week.  
7 Further, for classified school members, CalPERS does not  
8 deem employment of less than 40-hours per week as full-  
9 time employment for purposes of service credit accrual;  
10 therefore, employment of less than 40-hours per week  
11 should not yield full service credit per month worked.

12 (*Id.* at A74.)

13 The Determination also calculated the accurate payrate of the Member under  
14 20636.1 based on a 40-hour workweek. First, the accurate hourly rate of \$22.59 is  
15 multiplied over a 40-hour week, which is then multiplied by 52 weeks in the year. That  
16 amount, \$46,987.20, is then divided by twelve months. CalPERS determined that the  
17 correct, and accurate, monthly payrate for the Member was \$3,915.

18 Because of the relationship between earnings and service credit, the  
19 Determination then explained that the incorrectly reported payrate resulted in  
20 overreported service credit.<sup>2</sup> (Exh. 7, pp. A74-75.) Section 20962 governs how service  
21 credit is calculated, over a fiscal year, for full-time members: 10 full months for monthly  
22 members, 215 days for daily members, and 1720 hours for hourly members. (*Id.*) The  
23 Audit's sampled Member worked 8 hours per day over 210 days in a fiscal year, which  
24 totaled 1680 hours. (*Id.*) Both the 210 days and 1680 hours are less than the required  
25 amounts for a full-time member under Section 20962. So, even though Tustin reported  
full annual service credit for the Member, the full service credit was inaccurate and

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<sup>2</sup> At the hearing, Tustin objected to testimony regarding the erroneous reporting's effect on service credit as irrelevant and unfair surprise, which was sustained. The Determination, which is ultimately at issue in this appeal, gave Tustin full notice of the service credit issue. CalPERS' Statement of Issues references Section 20962, which governs service credit calculation.



1 overreported. To accurately calculate the Member's monthly service credit, the monthly  
2 earnings of \$3795 are divided by the corrected monthly payrate of \$3915, which is then  
3 divided by 10 (months of service), to reach .09692. Over the full fiscal year, the  
4 accurate service credit is thus .9692, as opposed to the full year reported for the  
5 Member.

6 The Determination concluded that, because the Member's payrate was  
7 understated and the service credit overstated, the erroneous reporting could impact  
8 Member's retirement warrant. The Determination gave Tustin appeal rights.

9 Tustin appealed CalPERS determination by letter dated February 19, 2020.  
10 (Exh. 8, pp. A78-81.) CalPERS confirmed the appeal through a letter dated February  
11 21, 2021. (Exh. 9, pp. A118.)

#### 12 Administrative Hearing

13 The Administrative Hearing was held on September 2 and 3, 2021. Anthony  
14 Suine, Sam Camacho, and Kevin Lau testified for CalPERS. Gary Stine, Anthony  
15 Soria, and Nam Nguyen testified for Tustin.

#### 16 *Anthony Suine*

17 Anthony Suine (Suine) is the Deputy Executive Officer in charge of CalPERS'  
18 Customer Services and Support, overseeing six CalPERS divisions. Suine has worked  
19 at CalPERS for 30 years and worked in a myriad of positions.

20 CalPERS' 2,800 member agencies report employee compensation to CalPERS  
21 and are required to report employee payrates on an hourly, daily, or monthly basis. (1  
22 Reporter's Transcript (RT) 71:10-72:12.) In spite of edits and audits CalPERS has in  
23 place to try and prevent erroneous reporting, CalPERS is unable to review all the  
24 reporting as the agencies report it. (1 RT 72:13-23.)

25 In addition to the reporting of payrate and special compensation, agencies

1 report contributions to CalPERS. (1 RT 72:24-73:16.) Contributions are the percentage  
2 of earnings paid to members, and both employers and members contribute towards  
3 retirement. (1 RT 72:24-73:16.) Contributions are based on earnings and not payrate,  
4 so the method of reporting payrate to CalPERS (hourly, weekly, or monthly) does not  
5 affect contributions. (1 RT 73:18-74:11.) Earnings are what the employee earned and  
6 was paid, while payrate is used for final compensation purposes. (*Id.*) A full-time and  
7 half-time employee can have the same payrate, but the half-time employee will have  
8 half the earnings. (1 RT 73:18-74:11.) The earnings, though, may ultimately affect  
9 service credit. (1 RT 75:4-25.)

10 Suine worked in training, education, and outreach in the early and mid-2000s,  
11 where he was responsible for implementing Section 20636.1. (1 RT 57:5-25.) Suine is  
12 thus familiar with how CalPERS has historically implemented Section 20636.1, which  
13 states that full-time for classified employees is 40 hours in a week, and that requires  
14 the 173.33 conversion for payrate reporting purposes. (1 RT 58:2-9.) 173.33  
15 represents the average monthly hours over the year for a CalPERS member, which is  
16 based on a 40-hour workweek. (1 RT 58:10-22.) To reach that figure, you multiply “40  
17 hours per week times 52 weeks divided by 12 comes up with the 173.33.” (1 RT 59:5-  
18 6.) Because the hours per month vary, CalPERS breaks down the monthly hours to an  
19 equivalent for an entire year. (1 RT 61:1-13.) Although Section 20636.1 doesn’t  
20 expressly include the 173.33 conversion, the “conversion is derived from the 40 hours  
21 per week for classified school employees.” (1 RT 60:12-16.)

22 Suine then explained the history behind the 173.33 conversion for classified  
23 school members. There are 600-800 school districts in California reporting their  
24 employees to CalPERS, and correct reporting is the lifeblood of retirement calculations.  
25 (1 RT 63:1-7.) The average CalPERS retirement allowance is \$3,200, but classified

1 school employees earn the least in retirement at around \$3,000. (1 RT 63:8-14.)

2 Suine explained the final compensation and retirement variances that arise from  
3 erroneous reporting by agencies to CalPERS. School unions wanted to create  
4 consistency across districts, and also ensure the highest payrate possible for  
5 retirement purposes. (1 RT 63:15-19.) If an agency fails to convert the payrate, using  
6 the 173.33 conversion, based on a 40-hour workweek, and instead chooses its own  
7 conversion based on a 37.5 hour workweek, the conversion becomes 162.5 instead of  
8 173.33. (1 RT 66:5-18.) At retirement, the conversion could have a \$50 to \$100  
9 monthly impact on a member's retirement allowance. (1 RT 66:5-18.)

10 Suine confirmed that Section 20636.1 does not expressly require the 173.33  
11 conversion. (1 RT 64:1-7.) But the law does indicate that 40 hours is full-time for  
12 classified workers, which is what requires the 173.33 conversion. (1 RT 64:4-19; See  
13 also Section 20636.1(b).)

14 CalPERS has business rules that implement the 173.33 conversion once  
15 payrate is reported. (1 RT 64:20-65:2.) Business rules are the CalPERS laws and  
16 regulations built into CalPERS' database for pension reporting and retirement  
17 calculation purposes. (1 RT 70:14-23.) Once a classified school member's hourly  
18 payrate is reported, the CalPERS system automatically converts the hourly to the  
19 173.33 monthly equivalent. (1 RT 64:20-65:2.)

20 Suine has trained and instructed agencies regarding the business rules and  
21 requisite reporting. (1 RT 65:3-6.) The two main school agency training issues after  
22 Section 20636.1 was passed were reporting the 40-hour full time equivalent and  
23 reporting as earned. (1 RT 78:10-25.) Even though school employees would generally  
24 work over 11 or 12 months of the year, their pay will generally be consolidated over 10  
25 months. (1 RT 79:18-24.) CalPERS' trainings would illustrate the impacts of reporting

1 the payrate as earned over the 11 or 12 months they actually worked, regardless of  
2 whether the employees were only paid during 10 months. (1 RT 79:18-24.) An  
3 employee who works for any increment in a month, be it one or ten days, should have  
4 a payrate reported during that month. (1 RT 79:25-80:6.) In addition, regardless of how  
5 many months a person works, final compensation is always calculated over 12 months.  
6 (1 RT 80:12-22.)

7 Suine explained the final compensation variances that arise from erroneous  
8 reporting by agencies to CalPERS. If an agency fails to convert the payrate based on a  
9 40-hour workweek, and instead chooses its own conversion based on a 37.5 hour  
10 workweek, the conversion becomes 162.5 instead of 173.33. (1 RT 66:5-18.) At  
11 retirement, the conversion could have a \$50 to \$100 monthly impact on a member's  
12 retirement allowance. (1 RT 66:5-18.)

13 Although there are not exactly 52 weeks in a year, the 173.33 conversion  
14 standardizes reporting across all of CalPERS' 2,800 agencies. (1 RT 69:24-65:10.)

15 *Sam Camacho*

16 Sam Camacho has worked at CalPERS since 2006 and has worked in  
17 CalPERS compensation review unit since 2011. (1 RT 136:6-11.) Camacho was the  
18 lead analyst on CalPERS' audit of Tustin. (1 RT 137:16-22.)

19 Camacho clarified that CalPERS is not directing Tustin to report a payrate in  
20 excess of what it pays to classified employees. (1 RT 191:6-13.) CalPERS is directing  
21 Tustin to report the full-time equivalent payrate, which is based on a 40-hour  
22 workweek, 12 months a year, or 2080 hours per year. (1 RT 193:2-8.)

23 *Kevin Lau*

24 Kevin Lau (Lau) is a Staff Services Manager II for CalPERS in the Employer  
25 Account Management Division under the Audit Compliance and Resolution Section. (1

1 RT 197:22-25.) One of his duties as the SSMII is that he oversees resolution of audits  
2 such as Tustin's. Lau was familiar with CalPERS' audit of Tustin.

3 Lau reviewed the pay reporting for the sampled Member provided from Tustin to  
4 CalPERS. (See Exh. 14, A384; 1 RT 199:8-15.) The pay reporting showed Tustin  
5 reported the Member on a monthly basis and reported her payrate as \$3,795. (Exh.  
6 14.) Lau explained that Tustin paid the Member \$3,795 per month, or \$37,950 over the  
7 full year, but that \$3,795 was not an accurate payrate for the Member. (1 RT 201:9-22.)  
8 Instead, \$22.59 per hour was the true base rate of pay for the member, making \$3,915  
9 the accurate monthly payrate for the Member. (1 RT 203:21-204:17.)

10 Lau then explained that the pay sampling showed the Member worked 209  
11 days, not the 215 days required for full-time service under Section 20962. (1 RT  
12 206:12-22.) In addition, the Member worked 1672 hours per year, and not the 1720  
13 hours required for full service. (*Id.*) The Member was a 10-month employee, and may  
14 have been paid over 10 months, but she worked during 11 months. (*Id.*) Based on its  
15 review CalPERS was able to determine that the Member did not render a full year of  
16 service credit in the sampled fiscal year.

17 Lau explained the specific finding from the Audit, finding four, which was the  
18 subject of the appeal. Lau reiterated that Tustin's monthly reporting of \$3795 was  
19 based on her true earnings over 209 days, but not her payrate. (1 RT 222:4-11.)  
20 Instead, using the 173.33 conversion, the sampled Member's accurate payrate was  
21 \$3,915.

22 Underreported payrate, as was the case here, can cause an improperly  
23 decreased retirement benefit. (1 RT 222:19-224:4.)

24 Although the 173.33 conversion is not expressly included in Section 20636.1,  
25 Lau explained that the conversion is derived from 40-hour workweek in that statute. (2

1 RT 10:17-12:18.) CalPERS multiplies the 40-hour week times 52 weeks in a year,  
2 which is 2,080 hours, and CalPERS uses that same math to determine the true and  
3 accurate payrate for reporting purposes. (*Id.*) To determine the hourly payrate for  
4 someone earning \$100,000 in a year, CalPERS' interpretation of Section 20636.1  
5 dictates that \$100,000 be divided by 2080 hours, for the hourly payrate of \$48.08 an  
6 hour. (*Id.*)

7 Underreported payrate, as was the case here, can cause an improperly  
8 decreased retirement benefit. (1 RT 222:19-224:4.) Correcting the reporting, though,  
9 would increase the final compensation, while decreasing the service credit. (2 RT  
10 20:16-21:2.) And for the sampled Member, the corrected reporting would increase her  
11 retirement allowance. (2 RT 21:19-22:12.)

12 Lau's testimony also made clear that CalPERS' reporting requirements under  
13 Section 20636.1 do not affect contribution calculations. (2 RT 17:10-24, 23:12-20.) Nor  
14 will CalPERS' reporting requirements increase the actual amount paid by Tustin to its  
15 employees. (2 RT 19:13-21.) Tustin need not change what it pays its employees, or  
16 how it pays its employees; Tustin only needs to alter how it reports compensation.

17 Lau also testified about the different factors for calculating final compensation,  
18 which includes three factors: payrate, service credit, and special compensation. To  
19 calculate the service credit, CalPERS divides the earnings by the payrate, divided by a  
20 factor that is dependent on the type of payrate being reported (monthly, hourly, or  
21 weekly). (2 RT 25:8-19.) If monthly payrate is reported, the earnings are divided by  
22 payrate, which is then divided by the factor of 10. (*Id.*) The factor of 10 comes from  
23 Section 20962, which dictates that it takes 10 full months for someone to earn a full  
24 year of service. (*Id.*)

25 Lau then explained how Tustin's reporting affects service credit. Using the

1 Member's reported monthly earnings of \$3795 divided by a payrate of \$3795, equals 1,  
2 which is then divided by the factor of 10 due to Section 20962. This results in 0.1  
3 service credit per month. (2 RT 26:6-22.) Using the same earnings divided by an hourly  
4 payrate of \$22.59 equals approximately 168; divided by 1720 hours due to Section  
5 20962 is approximately .977 service credit. (*Id.*) So, the differences in reporting result  
6 in different service credit earned.

7 Lau then explained what Tustin reported to CalPERS for the sampled Member,  
8 and why it was erroneous. (See Exh. 20, p. A479.) Although Tustin considered the  
9 Member to be a 10-month employee (See Exh. 14, A384), she was reported to  
10 CalPERS over 11 months based on the District's conversion of the annual payrate  
11 divided by 10. (2 RT 34:3-16.) When Tustin reported the sampled Member over 11  
12 months and divided that payrate by 10, Tustin was creating its own conversion.  
13 Because Tustin uses its own conversion, and does not report the true base pay,  
14 CalPERS has to look at the true base pay of the member.

15 Lau explained the two options offered by CalPERS for the resolution of the  
16 audit: 1) Tustin could either report the accurate monthly payrate based on the 173.33  
17 conversion, in this case \$3915.00; or 2) Tustin could report the classified employees on  
18 an hourly basis. (2 RT 153:11-24.) If reported on an hourly basis, CalPERS will then  
19 apply the 173.33 conversion based the full time 40-hour workweek over all 12 months  
20 in the year.

21 CalPERS never asked Tustin to reduce its employees' payrate, and never  
22 suggested that Tustin should pay its employees more money. (2 RT 153:11-24.)

23 *Gary Stine*

24 Tustin called Gary Stine (Stine), Orange County Department of Education's  
25 Director of Support Services, to testify in support of its case. Stine testified that he has

1 not experienced training or direction by CalPERS to convert payrates based on 173.33  
2 working hours in a month. Stine discussed the California Association of School  
3 Business Officials (CASBO) payroll training documents during his testimony. (2 RT  
4 58:13 – 59:19.) CASBO serves as the professional development source for California  
5 school Districts. (*Id.*) The CASBO payroll training documents included commonly  
6 accepted knowledge and business practices within California school districts. (2 RT  
7 59:17-20; See Tustin Exh. 9, 10;)

8         The CASBO payroll documents recommend that school agencies use 21.667  
9 days in a month as its daily rate factor, and 173.33 hours in a month as its hourly  
10 factor. (Tustin Exh. 9, B117.) Stine confirmed that the 173.33 conversion factor for  
11 hours in a month is the most common conversion factor. (2 AR 76:18-22.) The 173.33  
12 conversion factor is recommended by the CASBO payroll documents. (*Id.*)

13         Tustin uses a 21-day divisor when converting payrates. (2 RT 49:9-15; See  
14 Tustin Exh. 11, p. B264.) Using that 21-day divisor, Tustin converts its payrates to 168  
15 hours in a month for reporting purposes. (2 RT 50:8-22; See Tustin Exh. 11, p. B264.)

16         *Anthony Soria*

17         Anthony Soria, Tustin's Chief Financial Officer, testified for Tustin. As CFO,  
18 Soria oversees all of Tustin's business operations, which includes collective bargaining  
19 and setting salary schedules with Tustin's different unions. (2 AR 82:8 – 82:3.) Soria  
20 stated that Tustin uses different salary schedules for hourly and monthly employees.  
21 Other than paying employees on an hourly or monthly basis, Soria had no idea about  
22 who may be hourly and who may be monthly, or why different employees were on  
23 different salary schedules. (RT 89:17 through 90: 6.)

24         Soria claimed that using the same salary schedule for both hourly and monthly  
25 employees would cost Tustin three percent, or \$5 million every year. (RT 83:5 – 84:18.)



1 As Tustin's CFO, he had no idea where that three percent number came from and was  
2 only testifying as to what someone told him. (2 RT 94:4 – 95:20.)

3 Soria had no idea how Tustin calculates its employees' overtime pay. (2 RT  
4 91:17-25.)

5 *Nam Nguyen*

6 Nam Nguyen (Nguyen), Senior Director of Business Services, testified for  
7 Tustin. Nguyen worked with CalPERS on the Report's findings. To resolve the findings,  
8 Nguyen was under the impression that CalPERS either wanted Tustin to increase  
9 employee salaries, or to reduce the hourly rates it paid employees. (2 RT 105:3-17; 2  
10 RT 111:2-11.) Nguyen also explained that monthly employees are paid a fixed monthly  
11 amount, regardless of how much they work. Whereas hourly employees are paid  
12 based on how many hours they work. (2 RT 125:22-126:16.) Although monthly  
13 employees are paid according to the monthly pay schedule, the true payrate or base  
14 pay for such employees is their hourly rate. (2 RT 128:25-129:8.)

### 15 III. BURDEN OF PROOF

16 Tustin bears the burden of proof to establish that CalPERS' determination,  
17 regarding Tustin's erroneous reporting of payrate, was wrong. The party asserting the  
18 affirmative at an administrative hearing has the burden of proof. (*McCoy v. Board of*  
19 *Retirement* (1986) 183 Cal. App. 3d 1044, 1051.) The person against whom a  
20 statement of issues is filed generally bears the burden of proof at the hearing regarding  
21 the issues raised. (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139  
22 Cal.App.4th 471, 476.)

23 The issue in CalPERS' precedential *Woods* decision is analogous. In *Woods*,  
24 CalPERS determined that certain items of compensation, previously reported to  
25 CalPERS by the local agency, were not compensation earnable, and *Woods* appealed.

1 In that case, CalPERS filed the Statement of Issues, but it was Woods's burden to  
2 show that the reporting was correct, and that he was entitled to the benefit.

3 Although there are no retirees seeking retirement benefits here, this case is  
4 analogous to *Woods*. Tustin reported payrate for its classified members, and CalPERS  
5 determined that the reporting was erroneous. Just like in *Woods*, the burden is on  
6 Tustin to show that its reporting was correct, and that CalPERS' determination was  
7 wrong.

#### 8 **IV. ADMINISTRATIVE INTERPRETATION**

9 This appeal contains one issue: whether Tustin correctly reported payrates for  
10 its classified employees.

11 Courts have found that the contemporaneous administrative construction of an  
12 enactment by those charged with its enforcement is entitled to great weight, and courts  
13 will not depart from such construction unless it is clearly erroneous or unauthorized.  
14 (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1565.) As to the PERL,  
15 deference to CalPERS' interpretation is "in recognition of the fact that as the agency  
16 charged with administering the PERL, PERS has expertise and technical knowledge as  
17 well as an intimate knowledge of the problems dealt with in the statute and various  
18 administrative consequences arising from particular interpretations." *City of*  
19 *Pleasanton v. Board of Administration of the California Public Employees' Retirement*  
20 *System* (2012) 211 Cal.App.4th 522, 539.

21 As the sole agency charged with the enforcement of the PERL, and specifically  
22 membership and benefits, CalPERS' determinations are entitled to great deference.  
23 (*City of Pleasanton v. CalPERS Bd. of Admin, supra*, 211 Cal.App.4th at 539, "Where  
24 our review requires that we interpret the PERL or a PERS regulation, the court accords  
25 great weight to PERS' interpretation"; see also *Molina v. Bd. of Admin.* (2011) 200

1 Cal.App.4th 61; *Prentice v. Bd. of Admin.* 157 Cal.App.4th 989; *City of Sacramento v.*  
2 *CalPERS* (1991) 229 Cal.App.3d 1470, 1478.)

3 “There is a strong policy favoring statewide uniformity of interpretation as  
4 between the PERS and all of its contracting agencies.” (*City of Los Altos v. Board of*  
5 *Administration* (1978) 80 Cal.App.3d 1049, 1051.) “PERS has contracts with several  
6 hundred public agencies and cannot be expected to accept different interpretations for  
7 different agencies. (*Id.* at 1052.)

8 CalPERS’ determination was based on its interpretation of Sections 20630,  
9 20636.1, and 20962, and its interpretation should be entitled to great weight and not  
10 disregarded unless clearly erroneous or unauthorized.

#### 11 **V. CALPERS’ FINAL COMPENSATION FRAMEWORK**

12 CalPERS is a prefunded, defined benefit retirement plan. (*Oden v. Board of*  
13 *Administration* (1994) 23 Cal.App.4th 194, 198). A member's retirement benefit takes  
14 into account: (1) years of service; (2) a percentage figure based on the age on the date  
15 of retirement; and (3) final compensation. (*Prentice v. Public Employees Retirement*  
16 *System* (“*Prentice*”) (1991) 229 Cal.App.3d 1470, 1479.)

17 Compensation is defined as the “remuneration paid out of funds controlled by  
18 the employer in payment for the member’s services performed during normal working  
19 hours....” Section 20630 provides that “[c]ompensation shall be reported in accordance  
20 with . . . Section 20636.1 for school members and **shall not exceed compensation**  
21 **earnable**, as defined in Section 20636 or Section 20636.1.” (Section 20630(b).)

22 “Payrate” means the normal monthly rate of pay or base  
23 pay of the member paid in cash to similarly situated  
24 members of the same group or class of employment for  
25 services rendered on a full-time basis during normal  
working hours, pursuant to publicly available pay schedules.  
For purposes of this part, for classified members, full-time  
employment is 40 hours per week, and payments for

1 services rendered, not to exceed 40 hours per week, shall  
2 be reported as compensation earnable for all months of the  
3 year in which work is performed. "Payrate," for a member  
4 who is not in a group or class, means the monthly rate of  
5 pay or base pay of the member, paid in cash and pursuant  
6 to publicly available pay schedules, for services rendered  
7 on a full-time basis during normal working hours, subject to  
8 the limitations of paragraph (2) of subdivision (e). (Section  
9 20636.1(b)(1).)

## 6 VI. SECTION 20636.1

7 Section 20636.1 was added to the PERL in 2000 by Assembly Bill 2077. Prior to  
8 its passage, some school employers:

9 considered work to be overtime only if over 40 hours in a  
10 week, while others consider work in excess of regularly  
11 scheduled part-time work (i.e., over a regularly scheduled 4  
12 hours per day or during summer school) to be overtime for  
13 the purpose of reporting compensation. (See CalPERS  
14 Request for Official Notice, p. A5 (from CalPERS' agenda  
15 item proposing the CalPERS' Board of Administration's  
16 support for the bill.)

17 Classified school members could work 25 hours in a primary job, and then work  
18 15 hours in a second classified school position for the same district. The first 25 hours  
19 in the primary job would be paid at the regular rate. The second job, working 15 hours,  
20 would often be considered overtime, and thus not earn service credit.

21 The discrepancy in reporting caused inconsistencies and inequities in reporting  
22 for compensation and service credit. (*Id.*) The inequities in reporting could result in  
23 employees on the same pay scale, but employed by different districts, receiving  
24 different, and inequitable, retirement allowances. (*Id.* at A8, from California Bill  
25 Analysis, A.B.2177 Assem., 8/25/2000.) So, Section 20636.1 was proposed, and  
ultimately passed, to standardize the reporting of compensation of school employees,  
and to ensure that all hours worked up to 40 earn service credit. (*Id.* at A5 and A8.)

///

1 CalPERS published guidance to assist in the implementation of Section  
2 20636.1. The Public Agency Reference guide explains that school employees need a  
3 40-hour workweek to earn full service credit. (Exh. 18, A401.) CalPERS circular letters,  
4 issued by CalPERS to all of its agencies, further explain Section 20636.1's 40-hour  
5 workweek requirement for classified members. (See Exhs. 15-17, pp. A388-96.)

## 6 VII. ARGUMENT

### 7 A. Reporting Must Be Based On a 40-Hour Workweek.

8 Section 20636.1's implementation standardized the reporting of compensation  
9 for school employees to ensure that classified members receive service credit for up to  
10 40 hours per week. (Section 20636.1(b); See CalPERS' Request for Official Notice, pp.  
11 A5, A8, and A11; Exhs. 15-18.) Section 20636.1 standardizes how service credit is  
12 calculated. That standardization is tied to the reporting of payrate and earnings<sup>3</sup>, while  
13 using factors from Section 20962. It thus makes eminent sense that Section 20636.1  
14 not only standardizes how service credit is calculated, but also requires payrate  
15 reporting based on the full-time equivalent of 40 hours a week, 52 weeks a year, over  
16 all 12 months.

17 CalPERS is correct in its determination that Section 20636.1 requires payrate to  
18 be reported based on the 173.33 conversion. Full-time employment for classified  
19 school members is 40 hours per week, and service credit is earned for all hours up to  
20 40. (Section 20636.1.) CalPERS' interpretation requiring the 173.33 monthly  
21 conversion is a logical extension of the 40-hour workweek from Section 20636.1. First,  
22

---

23 <sup>3</sup>Using the Member's reported monthly earnings of \$3795 divided by a payrate of \$3795, equals 1, which  
24 is then divided by the factor of 10 due to Section 20962. This results in 0.1 service credit per month. (2  
25 RT 26:6-22.) Using the same earnings divided by an hourly payrate of \$22.59 equals approximately 168;  
divided by 1720 hours due to Section 20962 is approximately .977 service credit. (*Id.*) So, the  
differences in reporting result in different service credit earned.

1 you multiply the 40-hour workweek times 52 weeks in a year to get 2080 hours in a  
2 year. Dividing 2080 hours over 12 months results in 173.33 working hours in a month.

3 To increase uniformity and to standardize reporting across hundreds of member  
4 agencies, CalPERS has consistently required the 173.33 conversion pursuant to  
5 Section 20636.1. CalPERS' interpretation ensures that members earning the same  
6 payrate, but employed by different districts, receive the same retirement benefits.  
7 CalPERS achieves uniformity by establishing reporting standards for its hundreds of  
8 school agencies. (See *City of Los Altos v. Board of Administration*, supra, 80  
9 Cal.App.3d at 1052-53.) CalPERS' interpretation accomplishes the stated purpose,  
10 uniformity and standardization, behind Section 20636.1's implementation. (See  
11 CalPERS Request for Official Notice.) Accordingly, CalPERS' reporting standard based  
12 on a 40-hour workweek, or 173.33 hours in a month, is correct.

13 **B. Tustin's Reporting Is Erroneous**

14 Tustin's reported payrate to CalPERS was in error. Instead of following Section  
15 20636.1 and reporting payrate based on all twelve months and a 40-hour workweek  
16 using the 173.33 monthly conversion, Tustin used their own 168-hour conversion.<sup>4</sup>  
17 Instead of complying with the CASBO's recommended use of the 173.33 monthly  
18 conversion, Tustin instead used their own conversion. That conversion is not based on  
19 a 40-hour workweek, is not based on a 12-month year, and is out of compliance with  
20 Section 20636.1. A simple fix, which Tustin refused, is to report the member's hourly  
21 payrate, which is already on Tustin's pay schedules.

22 ///

23 ///

24 \_\_\_\_\_  
25 <sup>4</sup> As shown in Tustin's Exhibit 11, different school districts under the Orange County Office of Education generally choose their own conversion factors. The different conversions show the inconsistencies, in a single county, that lead to inequities in retirement benefits.

1 Tustin's conversion underreported payrate for the sampled Member: Instead of  
2 the accurate monthly reporting of \$3915 per month or \$22.59 and hour, Tustin  
3 underreported her payrate as \$3795. The inaccurate reporting caused the sampled  
4 Member's service credit to be overreported. Although Tustin contended at hearing that  
5 it was blindsided by the service credit issue, the Determination and Statement of  
6 Issues place service credit at the forefront of this matter. The errors also caused a  
7 reduction to the Member's retirement allowance.

8 **C. ALJ Walker's Requested Briefing Issues**

9 Underground regulations are not at issue here, and determinations on such  
10 issues are vested with the Office of Administrative Law under Section 11340.5 and  
11 Title 1, California Code of Regulations, Section 260. Regardless, Section 20636.1  
12 requires reporting be based on a 40-hour workweek, or 173.33 hours per month. An  
13 underground regulation analysis requires a finding in CalPERS' favor.

14 ALJ Walker also requested the parties address if Section 20636.1's reporting  
15 could affect bargaining. There was no evidence to suggest any effect on bargaining. In  
16 fact, the evidence was clear that correcting Tustin's reporting would not affect  
17 employee pay or contributions. Nguyen confirmed that the base rate of pay for the  
18 monthly employees was an hourly rate, so there would be no change to employee  
19 compensation. The only impact would be an increase to the sampled Member's  
20 retirement benefit. Hence, correcting Tustin's reporting would not affect employee pay,  
21 and would not impact bargaining.

22 **VII. CONCLUSION**

23 CalPERS' correctly determined that Tustin erroneously reported its classified  
24 employee payrate. Section 20636.1 requires classified employee reporting be based  
25 on a 40-hour workweek. When reported on a monthly basis, Section 20636.1 requires

1 payrate be reported based on 173.33 hours in a month. Tustin reported based on 168  
2 hours in a month, which runs afoul of Section 20636.1. Its reporting ultimately reduced  
3 the sampled Member's retirement allowance. The appeal should be denied.

4 Respectfully submitted,

5 BOARD OF ADMINISTRATION, CALIFORNIA  
6 PUBLIC EMPLOYEES' RETIREMENT SYSTEM

7 Dated: October 29, 2021

*Charles Glauberman*

8 CHARLES GLAUBERMAN  
9 Senior Attorney

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## PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On October 29, 2021, I served the foregoing document described as:

CALPERS' CLOSING BRIEF IN SUPPORT OF DETERMINATION- In the Matter of the Appeal Regarding Full-Time Payrate Reporting of TUSTIN UNIFIED SCHOOL DISTRICT, Respondent. Case No. 2020-0436; OAH No. 2020090431.

on interested parties in this action by placing \_\_\_ the original XX a true copy thereof enclosed in sealed envelopes addressed and/or e-filed as follows:

Joshua E. Morrison  
Atkinson, Andelson, Loya, Ruud & Romo  
12800 Center Court Dr. South, Ste. 300  
Cerritos, CA 90703-9364  
jmmorrison@aalrr.com

Office of Administrative Hearings  
Emerald Plaza  
402 W. Broadway, Ste. 600  
San Diego, CA 92101-8511  
(Via OAH SECURE e-FILE)

Jacquelyn Takeda Morenz  
Atkinson, Andelson, Loya, Ruud & Romo  
20 Pacifica, Suite 1100  
Irvine, CA 92618  
jmorenz@aalrr.com

- [ X ] BY MAIL -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.
- [ X ] BY ELECTRONIC TRANSMISSION: I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.
- [ X ] BY ELECTRONIC FILING: I caused such documents to be e-Filed via OAH SECURE e-FILE.

Executed on October 29, 2021, at Sacramento, California.

Attachment I  
CalPERS' Post Hearing Brief, Reply Brief, and Request for Official Notice  
Page 25 of 54 I declare under penalty of perjury under the laws of the State of California  
that the above is true and correct.

Tonya Hutchins  
\_\_\_\_\_  
NAME

*TONYA HUTCHINS*  
\_\_\_\_\_  
SIGNATURE

1 MATTHEW G. JACOBS, GENERAL COUNSEL  
CHARLES GLAUBERMAN, SBN 261649  
2 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811  
3 P. O. Box 942707, Sacramento, CA 94229-2707  
Telephone: (916) 795-3675  
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5 Attorneys for California Public  
Employees' Retirement System  
6  
7

8 BOARD OF ADMINISTRATION

9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

10	In the Matter of the Appeal of the Full Time )	AGENCY CASE NO. 2020-0436
	Payrate Reporting of )	
11	)	OAH NO. 2020090431
	TUSTIN UNIFIED SCHOOL DISTRICT, )	
12	)	<b>CalPERS' REQUEST FOR</b>
	Respondent. )	<b>OFFICIAL NOTICE</b>
13	)	
	)	Hearing Location: San Diego/Virtual
14	)	
	)	
15	)	
	)	

16 TO THE COURT, ALL COUNSEL AND PARTIES OF RECORD:

17  
18 Petitioner California Public Employees' Retirement System (CalPERS) hereby  
19 requests Official Notice pursuant to California Government Code ("Government Code")  
20 section 11515 and California Evidence Code ("Evidence Code") section 452 be taken  
21 of the following documents.

22 ///

23 ///

24 ///

25 ///

1 **CalPERS Precedential Decision**

2 *In the Matter of the Appeal Regarding Calculation of Final Compensation of Craig F.*  
3 *Woods, Respondent, and Tahoe-Truckee Sanitation Agency, Respondent; Case No.*  
4 8705, OAH No. N-2010040719, Precedential Decision 12-01.

5 Respectfully submitted,

6 BOARD OF ADMINISTRATION, CALIFORNIA  
7 PUBLIC EMPLOYEES' RETIREMENT SYSTEM

8 Dated: October 29, 2021

*Charles Glauber*

9 CHARLES GLAUBERMAN, SENIOR ATTORNEY





BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA

In the Matter of the Appeal Regarding  
Calculation of Final Compensation of:

CRAIG F. WOODS,

Respondent,

and

TAHOE-TRUCKEE SANITATION  
AGENCY,

Respondent.

CalPERS Case No. 8705

OAH No. 2010040719

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings (OAH), on July 18, 2011, in Truckee and on September 30, 2011, in Sacramento, California.

Jeanlaurie Ainsworth, Senior Staff Counsel, represented the petitioner California Public Employees' Retirement System (CalPERS).

Tahir J. Naim,<sup>1</sup> Attorney at Law, represented Craig F. Woods. Craig Woods (respondent) was present.

The appearance of Stephen A. Kronick,<sup>2</sup> Attorney at Law, representing Tahoe-Truckee Sanitation Agency (TTSA) was previously waived.

Evidence was received and the record remained open for parties to submit written closing arguments. On October 24, 2011, OAH received CalPERS' Closing Brief and Declaration of Jeanlaurie Ainsworth in Support of Closing Brief, which were marked as Exhibits 33 and 34, respectively. On that same date, OAH received respondent's Closing Brief which was marked as Exhibit E. On November 14, 2011, OAH received CalPERS'

<sup>1</sup> Tahir J. Naim, Attorney at Law, P.O. Box 391293, Mountain View, California 94039.

<sup>2</sup> Stephen A. Kronick, Attorney at Law, Bartkiewicz, Kronick & Shanahan, 1011 22nd Street, Sacramento, California 95816-4907.

PUBLIC EMPLOYEES RETIREMENT SYSTEM  
FILED Dec. 16 20 11

Original Signed

Closing Reply Brief which was marked as Exhibit 35, and respondent's Reply Brief which was marked as Exhibit F. The record closed on November 14, 2011.

### ISSUE

Whether the automobile allowance and employer paid deferred compensation paid by TTSA to respondent, and reflected as an increase in respondent's hourly rate during his last year of employment, should be included in his final compensation for purposes of calculating his retirement allowance?

### FACTUAL FINDINGS

1. The Statement of Issues was made and filed on April 30, 2010, by Lori McGartland, Chief of the Employer Services Division, California Public Employees' Retirement System, in her official capacity.
2. TTSA contracted with the CalPERS Board of Administration to participate as a public agency member pursuant to Government Code section 20460 et seq. The provisions for local public agencies contracting with CalPERS are set forth in the Public Employees' Retirement Law (PERL).
3. TTSA operates regional wastewater collection and treatment facilities for the Tahoe-Truckee region. Respondent was employed by TTSA for approximately 30 years, ending in May 2007, as an engineer and then General Manager. By virtue of this employment, respondent became a miscellaneous member of CalPERS subject to the provisions of the Government Code.
4. On or about February 21, 2007, CalPERS received respondent's Service Retirement Election Application (Application). Respondent retired for service effective May 16, 2007, and he has been receiving a retirement allowance since that date. Subsequent to that date, respondent and CalPERS staff engaged in numerous correspondence over CalPERS' exclusion of certain amounts paid directly to respondent by TTSA in addition to his monthly base pay. The additional payments consisted of a monthly car allowance of \$800 and a \$920 monthly allowance for his deferred compensation plan (PERS 457 program); a combined total of \$1,720.00.
5. Respondent's employment as a General Manager for TTSA was pursuant to two employment contracts (Agreements). Respondent's first three-year Agreement with TTSA was effective from December 1 to November 30, 2004 (Agreement #1). Agreement #1 specified a salary of \$10,000 per month, with cost of living adjustments. In addition, TTSA agreed to reimburse respondent for business expenses including travel, and to provide respondent with a "four-wheel drive vehicle for official business...or the Agency shall reimburse him for mileage ... if he chooses to use his own vehicle for official business.



Since the Employee is on call twenty-four (24) hours per day, seven (7) days per week, the Agency vehicle is available for Employee's use at all times."

6. Respondent's second Agreement with TTSA was effective from May 12, 2004 to January 15, 2007 (Agreement #2). The relevant terms of compensation are:

- a. Paragraph four of Agreement #2 specified a base salary of \$10,662 per month, with cost of living adjustments.
- b. Paragraph five of Agreement #2 stated that in addition to salary, TTSA agreed to reimburse respondent for travel expenses including automobile insurance, pay him an \$800 per month vehicle allowance, and allow him use of an "agency vehicle ... for work related purposes on an occasional basis."
- c. Paragraph six of Agreement #2 stated that TTSA would pay respondent an additional \$920 per month "for deposit in Employee's retirement fund, PERS 457 program, additional retirement service credit and/or similar retirement programs." This amount was also subject to cost of living adjustments.

7. At the November 8, 2006 TTSA Board Meeting, members discussed respondent's proposal to retire as General Manager effective January 15, 2007. The plan was that respondent would remain until May 4, 2007, as an advisor to the incoming General Manager. In his new advisory role he would continue to earn the same salary and benefits, including his car allowance, on a pro rata basis for number of days worked. Per the TTSA Board Meeting minutes, "[Respondent] said that he would like the Board to accept the offer that he has made in its entirety or he would be separating his employment on January 15, 2007." Director S. Lane Lewis asked respondent if his salary was \$12,500 per month. Respondent responded that his salary was "set at \$13,344.78 per month."<sup>3</sup> The board agreed to amend respondent's contract and make it "not retroactive, so that this new amended contract could provide whatever compensation that the Board desires to provide."

8. On December 13, 2006, TTSA made the first of two amendments to respondent's Agreement #2. Amendment No. 1 provided that respondent would remain an employee of TTSA in an advisory capacity to the new General Manager, from January 16, 2007 through May 4, 2007 (Transition Period). Regarding compensation, paragraph three stated:

[Respondent] shall be paid at the hourly rate of \$76.99. [Respondent] shall provide Employer with a record of hours worked each month. For

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<sup>3</sup> In a letter dated May 21, 2007, written by Carlous Johnson to TTSA, Mr. Johnson provided that respondent's monthly base salary for the period July 2006 to May 2007 was \$11,324.78. This figure included the yearly cost of living increases based on the Consumer Price Index as provided for in the Agreements. Adding this amount to the other named benefits amounts to \$13,044.78. The additional \$300 cited by respondent at the meeting was not explained at hearing.

work days or portions thereof where [Respondent does not provide services to the Agency, [Respondent] shall be entitled to apply already accumulated vacation and sick leave in the amount of approximately 150 days, against such non-work days... [Respondent's] contributions to PERS shall be paid by Employer.

9. On April 11, 2007, TTSA made the second of two amendments to respondent's Agreement #2. Amendment #2 sought to clarify items of respondent's compensation as follows:

...it always was the intention of the parties that for the duration of the Agreement, the pay set forth in said paragraphs 5 and 6 of the Agreement be a part of [respondent's] base pay, and consistent with such intention, [respondent] throughout the term of the Agreement, received one rate of pay in his regular paycheck, the amount of which represented the sum of the pay set forth in paragraphs 4, 5, and 6 of the Agreement.

Amendment #2 provided that Paragraph 4 of Agreement #2 (see Factual Finding 6), was "amended in full" to read as follows: "For services rendered by Employee during the period from January 16, 2007 to May 15, 2007, [respondent] shall be paid at the hourly rate of \$76.99." Amendment #2 also provided that Paragraphs 5 and 6 of Agreement #2 were "hereby eliminated." Amendment #2 superseded Amendment #1 making it null and void.

10. The TTSA Board minutes for the April 11, 2007 meeting provide background information on the intent of the parties respecting respondent's compensation. Ms. Beal addressed this agenda item to the Board and provided that Amendment #2 was needed to "accurately reflect what was intended" in Amendment #1. That being that TTSA would pay respondent:

[A]n hourly rate of \$76.99, which was made up of three different pay components from the Employment Agreement. ...Ms. Beals said that [Amendment #1] did not delete references to two of the pay components (deferred compensation and car allowance). Therefore, [Amendment #2] states that TTSA will pay [respondent] the hourly rate which is the sum of the three pay components, plus deferred compensation and car allowance. Amendment No. 2 corrects this error and provides that [respondent] is paid only the hourly rate....

Hence, Amendment #2 sought to delete all references to two components of respondent's original compensation package: car allowance and deferred compensation, and to subsume these components into one rate of pay. Respondent also informed the Board that he wished to extend his last day of employment from May 4 to May 15, 2007.

*CalPERS' Final Compensation Determination*

11. Carlous Johnson is a Compensation Review Analyst at CalPERS. He has worked for CalPERS for over ten years and conducts training to staff and public agencies at educational forums. Mr. Johnson's duties include performing base compensation calculations and determining whether final compensation reported to CalPERS is accurate. When a final compensation calculation is denied, the Section Manager for the Review Unit must review and sign-off on the determinations. Mr. Johnson's supervisor in this unit was Marion Montez.

12. Mr. Johnson stated that in making final compensation determinations, the first thing he looks at are "publically available salary schedules" and any employment contracts in existence for the member. TTSA salary schedules included the management position of Chief Engineer/Assistant General Manager, but did not include respondent's position of General Manager. According to Mr. Johnson, it should have been. As such, Mr. Johnson needed to review respondent's employment contracts with TTSA. From Agreement #2 (employment term May 2004 to January 2007), Mr. Johnson determined that respondent's payrate was \$10,662. Mr. Johnson stated that the monthly vehicle allowance of \$800 and employer paid deferred compensation of \$920 per month paid to respondent should never be included in payrate. Mr. Johnson explained that if the deferred compensation is "deducted from an employees salary" the law allows it to be reported. But, whereas here, it is paid "in addition to regular salary," then it is excluded.

13. Mr. Johnson cited Government Code section 20636 and California Code of Regulations, title 2, section 571, which together define payrate and special compensation (compensation earnable), and outline limitations to items that can be included by employers. He stated that CalPERS does not attempt to interpret members' intent, but looks to the language of any employment contract. Section 571 provides the exclusive list of nine criteria that all special compensation must meet.

14. Mr. Johnson stated that in reviewing Agreement #2, the vehicle allowance set forth in Paragraph 5 and employer paid deferred compensation set forth in Paragraph 6, did not meet the statutory definition of "payrate." These components were not paid to similarly situated members for work performed and rendered pursuant to a publicly available salary schedule. Also, neither component of respondent's compensation was considered "special compensation" pursuant to Section 571. Hence, CalPERS properly excluded these two components of compensation from respondent's final compensation earnable for purposes of calculating his retirement benefits.

15. Mr. Johnson also reviewed both amendments made to respondent's employment contract. He stated that the amendments were designed to convert car allowance and deferred compensation to payrate. He noted that the payrate of \$76.99 equals the amount of the previous payrate plus car allowance plus deferred compensation. According to Mr. Johnson, this is prohibited under California Code of Regulations, title 2, section 570, which defines final settlement pay as a conversion of a non-reportable item into

a base pay rate. Car allowance and employer paid deferred compensation are considered by CalPERS to be "non-reportable" items of compensation.

16. Mr. Johnson also noted that prior to the approval of the amended employment contracts, respondent had announced his intent to retire and serve in an advisory capacity. Mr. Johnson contends that the amended contracts had the effect of artificially inflating respondent's pay rate reported to CalPERS; a practice called "pension spiking." This practice involves giving large raises to members who are retiring and is prohibited.

17. Mr. Johnson submitted a copy of the CalPERS "Reportable Compensation" pamphlet which was disseminated to all member public agencies. The pamphlet lists specific "Items that are NOT reportable to CalPERS" which included "Employer payment to deferred compensation plans" and "Automobile allowance." (Emphasis in original.) CalPERS also periodically forwards Circular Letters that inform and clarify the law to all member agencies. Circular Letter (No. 200-090-03) was issued on March 21, 2003 and specifically states that automobile allowances are not part of "payrate."

18. By letter dated May 21, 2007, Mr. Johnson informed TTSA of CalPERS' final retirement benefits determination for respondent. TTSA was requested by CalPERS to "reverse the car allowance and deferred compensation out of our payroll system and report only the base pay for [respondent]." There was additional correspondence between the parties in October and November 2007. After meeting with respondent, Mr. Johnson, by letter dated October 9, 2007, put forth respondent's position to Ms. Montez. He stated that the TTSA Board would only agree to increase respondent's salary "in an indirect way" accomplished by way of the Amendments retroactive to May 12, 2004. Mr. Johnson's wording conflicts with the substance of the November 8, 2006 TTSA Board meeting minutes wherein the proposed amendments were described as "not retroactive." (Factual Finding 7.) By letter dated November 16, 2007, Ms. Montez provided that the PERL controlled and that CalPERS employees had no authority to grant exceptions to the law. Ms. Montez reiterated the relevant statutes and regulations governing respondent's case.

19. Respondent submitted at hearing a letter dated August 18, 2000, written by Lillian Winrow, a former CalPERS Retirement Specialist, in which she directed another agency, the Squaw Valley Public Service District, to include vehicle allowance in the employee's base payrate. Ms. Winrow testified at hearing that her advice at the time was erroneous. She had worked in the unit for 11 months and could not remember the specifics of her training. Ms. Montez's position that the PERL does not authorize individual employees to authorize exceptions to the law, applies to Ms. Winrow's erroneous advice in 2000. Additionally, numerous CalPERS Compensation Review Analysts testified at hearing that they had never advised any member nor could they find any instances where a member was advised to include vehicle allowance or employer paid deferred compensation as payrate. CalPERS' policy is consistent with the law and the erroneous advice of an individual employee does not control.

### *Limitations on Final Compensation*

20. Respondent argued that Amendments #1 and #2 were meant to replace his prior employment Agreements and therefore, the original Agreements should not be considered. He asserted that the last reported "payrate" of \$76.99 should stand alone. Mr. Johnson testified that if there were only a single contract, CalPERS would not have been able to determine that car allowance and deferred compensation had been subsumed into the rate. However, the Amendments were not the only documents that Mr. Johnson analyzed. The Amendments referenced Agreement #2 which governed respondent's term of employment from May 12, 2004 to January 15, 2007. Further, the TTSA meeting minutes make it clear that the intent of respondent and TTSA was to incorporate two disallowed components of respondent's compensation package into his final base pay.

21. Further, had the TTSA Board approved another stand-alone Agreement increasing respondent's final compensation for his last five months of employment through May 15, 2007, the increase would have been subject to the spiking provisions of Government Code section 20636, subdivision (e)(1). That section limits increases in compensation earnable during the final compensation period to employees who are not in a group or class to "the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification." In respondent's case, the salary schedule for the "Management" class would have been available to limit any TTSA Board-approved increases in his final compensation.

22. Any other assertions put forth by respondents at the hearing and in closing briefs, and not addressed above are found to be without merit and are rejected.

## LEGAL CONCLUSIONS

### *Applicable Statutes and Regulations*

1. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198). The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) "final compensation" (Gov. Code, §§ 20037, 21350, 21352, 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)

2. Government Code section 20630 defines "compensation" as the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of holidays, sick leave, industrial disability leave, vacation, compensatory time off, and leave of absence. Compensation shall be reported in accordance with section 20636 and shall not exceed compensation earnable, as defined in section 20636. (Gov. Code, § 20630, subs. (a) & (b).)

3. "Compensation earnable" is composed of (1) pay rate, and (2) special compensation, as defined in Government Code section 20636.

4. "Pay rate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours. "Pay rate" for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e). (Gov. Code, § 20636, subd. (b)(1).)

5. "Special compensation" of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions." (Gov. Code, § 20636, subd. (c)(1).)

"Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e)." (Gov. Code, § 20636, subd. (c)(2).)

"Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned." (Gov. Code, § 20636, subd. (c)(3).)

6. "The board shall promulgate regulations that delineate more specifically and exclusively what constitutes 'special compensation' as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee . . . shall be included as special compensation and appropriately defined in those regulations." (Gov. Code, § 20636, subd. (c)(6).)

7. Special compensation does not include: "(A) Final settlement pay, (B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise, or (C) Other payments the board has not affirmatively determined to be special compensation." (Gov. Code, § 20636, subd. (c)(7).)

8. A "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work related grouping. One employee may not be considered a group or class. (Gov. Code, § 20636, subd. (e)(1).)

“Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification...” (Gov. Code, § 20636, subd. (e)(2).)

9. California Code of Regulations, title 2, section 570 defines “Final Settlement Pay” to mean any pay or cash conversions of employer benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to CalPERS, in either pay rate or compensable earnable. (Gov. Code, § 20636, subd. (f).)

10. California Code of Regulations, title 2, section 571 exclusively identifies and defines special compensation items for members employed by contracting agency that must be reported to CalPERS if they are contained in a written labor policy or agreement. (Cal. Code Regs., tit. 2, § 571, subd. (a).) The Board has determined that all items of special compensation listed in subsection (a) are:

- (1) Contained in a written labor policy or agreement;
- (2) Available to all members in the group or class;
- (3) Part of normally required duties;
- (4) Performed during normal hours of employment;
- (5) Paid periodically as earned;
- (6) Historically consistent with prior payments for the job classification;
- (7) Not paid exclusively in the final compensation period;
- (8) Not final settlement pay; and
- (9) Not creating an unfunded liability over and above PERS' actuarial assumptions.

(Cal. Code Regs., tit. 2, § 571, subd. (b).)

- (c) “Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).” (Cal. Code Regs., tit. 2, § 571, subd. (c).)

- (d) "If an item of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual." (Cal. Code Regs., tit. 2, § 571, subd. (d).)

### *Legal Cause*

11. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement, absent a statutory provision to the contrary. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54, 57.)

12. Respondent did not meet his burden to establish that compensation he received for automobile allowance and employer paid deferred compensation are properly included as compensable earnable for the purpose of calculating his retirement benefits. Respondent's pay for these two components is specifically excluded by the PERL. (Gov. Code, § 20636, subd. (g)(4)(E) & (I).)

### *Legal Analysis*

13. Respondent's last six years of employment as General Manager/Chief Engineer for TTSA was defined by the terms of two employment contracts. The second contract term spanned from May 12, 2004 to January 15, 2007. Two months before the end of the contract term respondent made known his intent to retire. At the November 8, 2006 TTSA Board meeting, members negotiated the terms of his departure. Respondent would stay from January 15, 2007 through May 4, 2007,<sup>4</sup> in an advisory capacity to the new General Manager and TTSA Board. TTSA agreed to amend respondent's contract. Whereas respondent's prior Agreements separated his base salary, car allowance, and other benefits, the Amendments combined into one "hourly rate," his base salary, \$800 per month automobile allowance, and \$920 per month employer paid deferred compensation payment. This constitutes "final settlement pay" and is an impermissible salary increase under the PERL. (Gov. Code, § 20636, subd. (e)(1) & (f); Cal. Code Regs., tit. 2, § 570.) The restructuring of components of compensation does not alter the nature of the pay. The law does not respect form over substance. (Civ. Code, § 3528; *Dept. Veterans Affairs v. Superior Court* (1999) 67 Cal.App.4th 743, 758.)

14. Case law supports a finding that the benefits at issue here are not a part of compensation earnable for purposes of calculating retirement benefits. "An employee's compensation is not simply the cash remuneration received, but is exactly defined to include or exclude various employment benefits and items of pay." (*Oden v. Bd. of Admin. Of the Public Employees' Retirement System* (1994) 23 Cal.App.4th 194, 198.) "Employer-paid member contributions were authorized to reduce employees' income tax liability, they were not meant to increase retirement awards." (*Id.* at p. 209.)

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<sup>4</sup> The Amendment #2 extended respondent's last day to May 15, 2007.



*Conclusion*

15. CalPERS correctly determined that respondent's compensation earnable for purposes of calculating his retirement benefits cannot include amounts previously paid to respondent as an automobile allowance and employer paid deferred compensation. The form and wording of Amendments #1 and #2, do not alter the nature of the inflated "hourly rate" reported to CalPERS during respondent's final five months of service. CalPERS adjustment to respondent's final compensable earnable is supported by the PERL. (Gov. Code, § 20636; Cal. Code Regs., tit. 2, §§ 571, 570.)

**ORDER**

The appeal of respondent Craig Woods and respondent Tahoe-Truckee Sanitation Agency to include automobile allowance and employer paid deferred compensation into respondent Woods' compensable earnable, as reflected in his increased hourly rate, for purposes of calculation his final service retirement allowance is DENIED.

DATED: December 13, 2011

Original Signed

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DIAN M. VORTERS  
Administrative Law Judge  
Office of Administrative Hearings

## PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On October 29, 2021, I served the foregoing document described as:

CALPERS' REQUEST FOR OFFICIAL NOTICE- In the Matter of the Appeal Regarding Full-Time Payrate Reporting of TUSTIN UNIFIED SCHOOL DISTRICT, Respondent. Case No. 2020-0436; OAH No. 2020090431.

on interested parties in this action by placing \_\_\_ the original XX a true copy thereof enclosed in sealed envelopes addressed and/or e-filed as follows:

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(Via OAH SECURE e-FILE)

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- [ X ] BY MAIL -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.
- [ X ] BY ELECTRONIC TRANSMISSION: I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.
- [ X ] BY ELECTRONIC FILING: I caused such documents to be e-Filed via OAH SECURE e-FILE.

Executed on October 29, 2021, at Sacramento, California.

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

Tonya Hutchins  
NAME

*TONYA HUTCHINS*  
SIGNATURE

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8 BOARD OF ADMINISTRATION

9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
10

11 In the Matter of the Appeal Regarding the ) AGENCY CASE NO. 2020-0436  
Full-Time Payrate Reporting of )  
12 ) OAH NO. 2020090431  
TUSTIN UNIFIED SCHOOL DISTRICT, )  
13 ) CALPERS' REPLY BRIEF IN  
Respondent. ) SUPPORT OF DETERMINATION  
14 ) Hearing Date: September 2 & 3, 2021  
15 ) Hearing Location: Virtual  
16 )  
17 )

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1 **A. Tustin's Reporting Is Erroneous**

2 Tustin's reported payrate to CalPERS was in error. Tustin contends that  
3 CalPERS requirement for the 173.33 conversion is erroneous and without basis in law.  
4 Yet, Tustin's 168-hour conversion is certainly not endorsed by any PERL section.  
5 Instead of following Section 20636.1 and reporting payrate based on all twelve months  
6 and a 40-hour workweek using the 173.33 monthly conversion, Tustin used its own  
7 168-hour conversion.<sup>1</sup> CalPERS, and not Tustin, is vested with the authority to interpret  
8 the PERL, and CalPERS interpretation is entitled to great deference. (*City of*  
9 *Pleasanton v. CalPERS Bd. of Admin, supra*, 211 Cal.App.4th at 539, "Where our  
10 review requires that we interpret the PERL or a PERS regulation, the court accords  
11 great weight to PERS' interpretation"; see also *Molina v. Bd. of Admin.* (2011) 200  
12 Cal.App.4th 61; *Prentice v. Bd. of Admin.* 157 Cal.App.4th 989; *City of Sacramento v.*  
13 *CalPERS* (1991) 229 Cal.App.3d 1470, 1478.)

14 Instead of complying with the CASBO's recommended use of the 173.33  
15 monthly conversion, Tustin instead used their own conversion. That conversion is not  
16 based on a 40-hour workweek, is not based on a 12-month year, and is out of  
17 compliance with Section 20636.1. A simple fix, which Tustin refused, is to report the  
18 member's hourly payrate, which is already on Tustin's pay schedules.

19 Tustin's conversion underreported payrate for the sampled Member: Instead of  
20 the accurate monthly reporting of \$3915 per month or \$22.59 an hour, Tustin  
21 underreported her payrate as \$3795. The inaccurate reporting caused the sampled  
22 Member's service credit to be overreported. Tustin contended at hearing, and again

23  
24 \_\_\_\_\_  
25 <sup>1</sup> As shown in Tustin's Exhibit 11, different school districts under the Orange County Office of Education generally choose their own conversion factors. The different conversions show the inconsistencies, in a single county, that lead to inequities in retirement benefits.

1 argues in its brief, that it was blindsided by the service credit implications. CalPERS'  
2 Calculation of retirement benefits is not the ultimate issue, but it is certainly implicated  
3 by the determination. Tustin curiously discusses the retirement benefit implication, but  
4 argues that the one of the three retirement benefit factors, service credit, was  
5 somehow an unfair surprise. (Tustin Brief, pages 12-13.)

6 The Determination, Statement of Issues, and Audit place service credit at the  
7 forefront of this matter. The Audit states that "reporting member payrates accurately is  
8 a necessary precursor to correctly calculating service credit and member benefits at  
9 retirement." (Tustin Exhibit 1, page B5.) The Audit also states that misreporting payrate  
10 can result in miscalculation of service credit and incorrect payment of benefits. (*Id.*)  
11 Although the Audit's finding four concluded that the reporting of payrate was  
12 erroneous, the Audit, Determination, and Statement of Issues put Tustin on full notice  
13 that service credit was implicated by Tustin's errors. (CalPERS Exh. 7, pp. A74-75.)  
14 The testimony at the hearing made clear that payrate reporting and service credit are  
15 interconnected, and CalPERS cannot look at one without consideration of the other.  
16 The errors also caused a reduction to the Member's retirement allowance.

17 **B. Reporting Must Be Based On a 40-Hour Workweek.**

18 Tustin's reporting was inaccurate. Tustin contends that CalPERS determination  
19 is wrong because the plain language of Section 20636.1 does not expressly include the  
20 173.33 factor. (See Tustin Brief, section C, pp. 13-16.) Tustin is correct that the 173.33  
21 conversion is not expressly stated in the statute, and that the first step of statutory  
22 interpretation is to look at the plain language of the statute. (*Huff v. Securitas Security*  
23 *Services USA, Inc.* (2018) 23 Cal.App.5<sup>th</sup> 745, 754.) Tustin's interpretation isolates the  
24 language it likes, while ignoring the entire definition of payrate, and also ignoring the  
25 rest of the PERL.

1           The ultimate goal of statutory interpretation is to ascertain the legislature's  
2 intent. (Code of Civil Procedure section 1959.) The interpretation should harmonize all  
3 sections of a statute. (*Huff v. Securitas Security Services USA, Inc, supra*, 23  
4 Cal.App.5<sup>th</sup> at 759.) When interpreting statutes, courts "consider the consequences  
5 which would flow from our interpretation and avoid constructions which defy common  
6 sense, frustrate the apparent intent of the Legislature or which might lead to mischief or  
7 absurdity." (*Henry v. Workers' Comp. App. Bd.* (1998) 68 Cal.App.4<sup>th</sup> 981, 985.)

8           Tustin incorrectly contends that Section 20636.1's definition of payrate is only  
9 the "normal monthly rate of pay" for classified school members. Interpreting those  
10 words in isolation, and isolated from Section 20962, leads to absurd results. The  
11 definition of payrate reads:

12                   "Payrate" means the normal monthly rate of pay or base  
13                   pay of the member paid in cash to similarly situated  
14                   members of the same group or class of employment for  
15                   services rendered on a full-time basis during normal  
16                   working hours, pursuant to publicly available pay schedules.  
17                   For purposes of this part, for classified members, full-time  
18                   employment is 40 hours per week, and payments for  
19                   services rendered, not to exceed 40 hours per week, shall  
20                   be reported as compensation earnable for all months of the  
21                   year in which work is performed. "Payrate," for a member  
22                   who is not in a group or class, means the monthly rate of  
23                   pay or base pay of the member, paid in cash and pursuant  
24                   to publicly available pay schedules, for services rendered  
25                   on a full-time basis during normal working hours, subject to  
                    the limitations of paragraph (2) of subdivision (e). (Section  
                    20636.1(b)(1).)

21           Payrate is not just the amount an agency pays a member, but is the "normal  
22 monthly rate of pay **or** base pay", and it **MUST** be based on services rendered on a  
23 "full-time basis" (Section 20636.1; emphasis added.) The base pay for the Member was  
24 the hourly rate, which was the base used to determine her compensation for all  
25 purposes.

1 "Full-time employment is 40 hours per week. . ." (*Id.*) Section 20962 also  
2 defines full-time employment over an entire year at 1720 hours, 215 days, and 10  
3 months. So, not only does full-time for classified members mean 40 hours per week,  
4 but full-time employment also requires classified members to work 1720 hours, 215  
5 days, and 10 months. Section 20636.1 and Section 20962 should be interpreted to  
6 harmonize the meanings of full-time employment to prevent absurd results, and  
7 CalPERS' interpretation meets that end.

8 As the sole agency charged with the enforcement of the PERL, and specifically  
9 membership and benefits, CalPERS' determinations are entitled to great deference.  
10 (*City of Pleasanton v. CalPERS Bd. of Admin, supra*, 211 Cal.App.4th at 539, "Where  
11 our review requires that we interpret the PERL or a PERS regulation, the court accords  
12 great weight to PERS' interpretation"; see also *Molina v. Bd. of Admin.* (2011) 200  
13 Cal.App.4th 61; *Prentice v. Bd. of Admin.* 157 Cal.App.4th 989; *City of Sacramento v.*  
14 *CalPERS* (1991) 229 Cal.App.3d 1470, 1478.)

15 Tustin labeled the Member as a full-time ten-month employee and she worked  
16 209 days and 1672 hours over 11 calendar months. She did not work full-time under  
17 the thresholds of section 20962, so cannot receive full-time service credit for her  
18 service. The 209 days and 1672 hours are both roughly 97% of the full-time  
19 requirements of 215 days and 1720 hours. Using the 173.33 conversion factor from  
20 CalPERS' interpretation leads to the same result. Dividing the sampled Member's  
21 earnings by payrate by the Section 20962 factor also provides for roughly .97 service  
22 credit over the entire year. (2 RT 26:6-22.) Hence, CalPERS interprets Sections  
23 20636.1 and 20962 in concert, which harmonizes them for consistent and standardized  
24 results.

25 Conversely, Tustin believes it gets to pick how it reports its employees' payrate;

1 which CalPERS must then accept as gospel. Such an interpretation of Section 20636.1  
2 leads to absurd results. Tustin labels its ten-month employees as full-time. Under  
3 Tustin's interpretation, any employee classified as ten-month full-time employee,  
4 regardless of how many hours or days actually worked, should be considered full-time  
5 for reporting purposes. Regardless of the actual payrate to earnings relationship of  
6 Tustin's reporting, or the actual hours worked in a year, the sampled Member earns  
7 one full year of service credit. This interpretation leads to absurd results.

8         For example, consider the Member, and Person A, both working at different  
9 districts earning \$3795 a month, and are both labeled as ten-month full-time  
10 employees by their employers. The Member works 209 days, 1,672 hours a year over  
11 11 months, and is reported based on the factor of 168. Person A works 209 days, but  
12 only works 1,567 hours (7.5 hours each day), and is reported based on the factor of  
13 157.5. Person A works roughly six percent less than the Member (7.5 hours divided by  
14 8 hours, or 1567 hours divided by 1672 hours). Since both are labeled as full-time ten-  
15 month employees, Tustin's interpretation requires CalPERS to accept the reported  
16 payrate and service credit as is. Tustin's interpretation precludes CalPERS from  
17 inquiring further to ensure that the reporting complies with the PERL. Although Person  
18 A only works 94% percent of the hours as the Member, they earn service credit as if  
19 they both worked the equal hours. That is an absurd result, especially considering that  
20 someone working 10 months, 215 days, and 1720 hours, nine-percent more than  
21 Person A, would also have the same payrate and service credit.

22         In a more extreme example, someone labeled as ten-month employee who only  
23 works 1200 hours in a year, or 30% less than 1720 hours, would also get one full year  
24 of service credit. Tustin's position is that CalPERS, the agency charged with  
25 administering and interpreting the PERL, would be powerless to correct payrate or



1 service credit in any situation.

2 CalPERS standardizes the reporting so that how an employer labels an  
3 employee, or how it converts payrate, takes a backseat to the law of Sections 20636.1  
4 and 20962. Regardless of how the employer would report Person A, Section 20636.1  
5 requires the employer to report Person A's payrate using the 173.33 conversion factor  
6 by examining Person A's entire appointment. That monthly payrate is \$4,176.51<sup>2</sup>.  
7 Then, to determine service credit, CalPERS would divide the earnings of \$3,795 by the  
8 \$4,176.51, and apply a Section 20962 factor, to ensure that Person A receives service  
9 credit consistent with all other CalPERS' members. CalPERS evaluation of payrate is  
10 not dependent on the existence of an hourly salary schedule, but looks to the actual  
11 hours worked in relation to earnings. (1 RT 127:5-20.).

12 Section 20636.1 was passed to standardize the reporting of compensation for  
13 school employees to ensure that classified members receive service credit for up to 40  
14 hours per week, and to ensure that full service is earned for 1720 hours. (Section  
15 20636.1(b); See CalPERS' Request for Official Notice, pp. A5, A8, and A11; Exhs. 15-  
16 18.) CalPERS' interpretation, which requires the conversion to the 173.33 factor,  
17 standardizes the results for all classified members based on their earnings, payrate,  
18 and Section 20962 factors.<sup>3</sup> As argued previously, "there is a strong policy favoring  
19 statewide uniformity of interpretation as between the PERS and all of its contracting  
20 agencies." (*City of Los Altos v. Board of Administration* (1978) 80 Cal.App.3d 1049,  
21 1051.) Whereas, Tustin thinks that it, and other school agencies, should define full-time

22 \_\_\_\_\_  
23 <sup>2</sup> Earnings of \$3,795 divided by 157.5 hours is \$24.10 an hour. Multiplied by 2,080 hours, then divided by  
173.33 is roughly \$289.15 is \$4,176 per month based on a 40 hour workweek over an entire year.

24 <sup>3</sup> CalPERS interpretation also standardizes and harmonizes with Section 21224. Tustin recognizes that  
25 Section 21224 requires a 173.33 conversion, but argues that its appearance in Section 21224, but not in  
Section 20636.1, means that the conversion does not exist in Section 20636.1. (See Tustin Brief pp. 16-  
17.) CalPERS disagrees, as Section 21224 shows the 173.33 factor is being implemented by CalPERS  
to consistently standardize reporting based on full-time employment for all members.

1 employment and reporting for CalPERS, CalPERS harmonizes the interpretations of  
2 Sections 20636.1 and 20962 by standardizing reporting for all agencies and members.  
3 (*Id.* at 1052.)

4 **B. OCOE Is Not CalPERS' Agent**

5 The Orange County Office of Education (OCOE) is not CalPERS' agent. Tustin's  
6 brief relies on the finding from *Baxter v. State Teachers' Retirement System* (2017) 18  
7 Cal.App.5th 340 (*Baxter*) where the school district was found to be an ostensible agent  
8 of STRS for determining when STRS had notice of erroneous reporting under a statute  
9 of limitations. The *Baxter* court applied a three-part fact-specific test, which Tustin  
10 omits from its brief, to reach its conclusion, and those three parts are: 1) the dealings  
11 with the purported agent were based on a belief in that agent's authority; 2) the  
12 principal must have been responsible for creating the party's reasonable belief in the  
13 agency; and 3) the third-party must not have been negligent in its belief of the agency.  
14 (*Baxter* at 365-66.) The court then detailed its fact specific analysis explaining how  
15 STRS acted as the school district's ostensible agent, and led the schools and school  
16 employees to believe that STRS, through trainings and other outreach programs, was  
17 their ostensible agent for the issue at hand. (*Baxter* at 366.)

18 None of Tustin's witnesses, either from the district itself, or from the OCOE,  
19 testified that OCOE had the authority to act on behalf of CalPERS. There was no  
20 evidence that CalPERS advised Tustin, Tustin's employees, or OCOE that it was its  
21 agent. Instead, Tustin relies on the fact that it reports its compensation to CalPERS  
22 through OCOE, and also relies on a 2007 letter between Tustin and OCOE that  
23 discusses the different district reporting conversions. Neither CalPERS nor the PERL  
24 are even mentioned in the letter. The dearth of facts does not create ostensible  
25 agency, but instead shows that OCOE is not CalPERS' agent.

1           Because of the purported agency, Tustin then argues that equitable estoppel  
2 applies here, but does not make any assertion about what acts, if any, must be  
3 estopped. Tustin does not contend how it relied on CalPERS conduct, or even OCOE's  
4 conduct, to its detriment. Tustin does not allege harm or prejudice, a requisite for  
5 estoppel.

6           Estoppel can only apply against a public agency like CalPERS to prevent  
7 injustice, and it cannot apply if doing so would nullify public policy. (*City of Long Beach*  
8 *v. Mansell* (1970) 3 Cal.3d 462, 493; *Barrett v. Stanislaus Co. Employees Retirement*  
9 *Assn.* (1987) 189 Cal.App.3d 1593, 1607; *Crumpler v. CalPERS* (1973) 32 Cal.App.3d  
10 567, 582.) Tustin does not cite to any injustice, and applying estoppel would  
11 contravene the public policy of requiring accurate reporting for the calculation of  
12 service credit and retirement benefits.

13           Regardless, the issue here is not whether OCOE was CalPERS' agent, or that  
14 the purported agency somehow blesses Tustin's erroneous reporting. The only issue  
15 for hearing is whether Tustin reported its compensation in compliance with the PERL.  
16 As argued in CalPERS' Post Hearing Brief, and reiterated herein, Tustin's reporting  
17 was erroneous. The appeal should be denied.

### 18 **C. CalPERS' Determination Costs Tustin Nothing**

19           CalPERS is not asking Tustin to pay its employees more, or change how  
20 bargaining works. Yet, Tustin argues that CalPERS' insistence on the law in Section  
21 20636.1's 173.33 conversion factor somehow conflicts with how Tustin compensates  
22 its employees. Tustin even goes so far as to invoke Education Code sections 45022,  
23 45160, and 35160, but cannot point to any conflicts with those laws, or actual adverse  
24 impact on the district. Tustin's brief conflates the issue of earnings and payrate, again  
25 somehow contending that CalPERS wants Tustin to increase employee compensation.

1 (Tustin Brief, page 22-23.) Tustin's own finance director could not even explain how the  
2 reporting may financially affect Tustin. CalPERS is not interested in what Tustin pays  
3 its employees. As repeatedly indicated at hearing, CalPERS' determination only looks  
4 to fix payrate reporting. And the PERL gives CalPERS, not Tustin, the authority to  
5 dictate how Tustin reports payrate.

6 The fix is simple: Tustin pays its employees whatever it wants, but Tustin must  
7 either: 1) report the payrate based on the 173.33 conversion factor; or 2) Tustin can  
8 report the base pay, or hourly rates, to CalPERS. (2 RT 153:11-24.)

9 CalPERS determination is correct and should be upheld.

### 10 **C. There is No Underground Regulation**

11 As argued previously, underground regulations are not at issue here, and  
12 determinations on such issues are vested with the Office of Administrative Law under  
13 Section 11340.5 and Title 1, California Code of Regulations, Section 260. Regardless,  
14 Section 20636.1 requires reporting be based on a 40-hour workweek, or 173.33 hours  
15 per month. CalPERS' interpretation of Section 20636.1 standardizes the reporting  
16 across all school agencies based on a 40-hour workweek over an entire year. That  
17 interpretation harmonizes Sections 20636.1, 20962, and 21224. CalPERS'  
18 interpretation is the only tenable interpretation that standardizes and harmonizes these,  
19 and other, PERL sections. An underground regulation analysis requires a finding in  
20 CalPERS' favor.

21 Moreover, CalPERS' instructions for Tustin to report based on the 173.33  
22 conversion does not place Tustin at any risk, as a ruling in CalPERS' favor would  
23 further sanction the correct and standardized reporting of payrate.

## 24 **VII. CONCLUSION**



### PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On November 12, 2021, I served the foregoing document described as:

CALPERS' REPLY BRIEF IN SUPPORT OF DETERMINATION- In the Matter of the Appeal Regarding Full-Time Payrate Reporting of TUSTIN UNIFIED SCHOOL DISTRICT, Respondent. Case No. 2020-0436; OAH No. 2020090431.

on interested parties in this action by placing \_\_\_ the original XX a true copy thereof enclosed in sealed envelopes addressed and/or e-filed as follows:

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Via Mail

Via Mail

- [ X ] BY MAIL -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.
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Attachment I

CalPERS' Post Hearing Brief, Reply Brief, and Request for Official Notice

[Page 54 of 54] BY ELECTRONIC FILING: I caused such documents to be e-Filed via  
OAH SECURE e-FILE.

Executed on November 12, 2021, at Sacramento, California.

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

Tonya Hutchins

NAME

*TONYA HUTCHINS*

SIGNATURE