

**ATTACHMENT C**

**RESPONDENT'S ARGUMENT**

May 25, 2022

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Dear Members of the Board,,

My name is William Richards and I have been a member of CalPERS since 1990. This is in response to the proposed decision of the Administrative Law Judge concerning my appeal regarding the calculation of my final compensation. Please note that I am against the Judge's proposed decision and am requesting that the Board consider the very unique and extenuating circumstances of my situation. I am extremely likely to be the only person in this situation, particularly if my former employer corrects this situation before the few remaining unrepresented classic employees having reciprocity with CalPERS retire. And it is highly unlikely that any other person would have a need to file an appeal regarding a matter such as mine.

I want to make it clear that my projected retirement calculations and my decision to retire when I did were made with the hope and expectation that my entire base salary would remain intact and be considered "Compensation Earnable." Such life decisions are not taken lightly.

I also want to state that the Administrative Law Judge and CalPERS attorney assigned to the case were both very professional. The assigned attorney, in particular, was personable, helpful, and also very good at his job. (I wish he was on my side.) But I will share later in my statement some frustrations I had with my application for retirement and the following appeals process.

#### Some Background

My total compensation package when I accepted employment with the South Coast Air Quality Management District (AQMD) in November of 2001 included my base salary and a number of other compensations including a monthly employer paid benefit allowance, a monthly parking fee advance, an annual opportunity to sell back some unused vacation time, and an annual opportunity to sell back some unused sick leave. I understood that each of these compensations would be excluded by CalPERS when determining my final compensation.

However, my total compensation package at that time also included an Employer Paid Member Contribution (EPMC) to the retirement system of 7.89% of my salary. This percentage was unique to me within my classification as an unrepresented employee because it was determined by "my" age-at-entry into the retirement system administered by the San Bernardino County Employees' Retirement Association (SBCERA), which offers reciprocity with CalPERS.

As many of you may recall, in anticipation of pension reform and, later, in response to enactment of the 2013 California Public Employees' Pension Reform Act (PEPRA), many cities,

counties, and special districts were trying to decrease their ongoing pension obligations. One way of doing so was for an agency (such as AQMD) to alter the total compensation package offered to their employees so that the employee received a higher base salary, but in turn would be responsible for paying their full share of the member contribution. The result was a transfer of the full employee's share of the pension obligation back to the employee, while keeping the employee whole through a comparable salary adjustment, so that there would be no more EPMC paid by the agency. (I'm sure your Board is aware of cities, counties, and other agencies that used that same strategy.)

In the fall of 2014, AQMD addressed this matter with its represented employees during labor negotiations through reaching a labor agreement to gradually shift over a three-year period (2015 - 2017) the pension obligation back to employees, with no further EPMC, in exchange for corresponding increases to the employee's base salary. (For me, this translated to a shift in increased employee pension contributions of 2.63% of salary for each of the 3 years, and a corresponding increase to base salary that was intended to be compensation earnable; that is, pensionable.) The clear and unmistakable intent and understanding by both management and the unions during the 2014 negotiations was for the increases to base salary to be compensation earnable. In fact, members of AQMD's executive management staff, including the Chief Financial Officer, would regularly state throughout the negotiation process that it was better for employees to receive an increase to base salary (since it is compensation earnable) then to receive an additional non-pensionable benefit (i.e., an employer contribution to their deferred compensation account).

Unfortunately, at the time of these negotiations, AQMD's unrepresented employees (of which I was one) were not permitted to negotiate their compensation and benefit packages. They were simply told what they would receive, at the discretion of the Executive Officer and Governing Board. As a result, the intent was for unrepresented management and confidential employees to be subject to the same agreement as that negotiated for represented employees, and for it to result in the elimination of the EPMC for them as well.

Both CalPERS staff and the Administrative Law Judge have been provided with numerous documents that show the disputed adjustments to my base salary were clearly intended to be "compensation earnable." Each of the cited documents make clear reference to the salary adjustments as "Regular Earnings", "Base Salary", "Salary Increase", "Earnable Salary", "Wage Increase", and "Earnable Compensation".

- Twelve (12) months of pay advices detailing my pay for each pay period specify my "**regular earnings**" for my highest 12 month period, including \$76.85 per hour for all but one pay period..
- The spreadsheet provided by SBCERA in response to CalPERS' request for a "Breakdown of Components of Final Average Compensation (FAC)" shows my "**Earnable Salary**" Tier I compensation at \$76.85 (25 pay periods) and \$74.79 (1 pay period), which is inclusive of the July 2015, 2016 and 2017 increases to base salary.

- The December 5, 2014 AQMD Board Letter states repeatedly that as employees begin to pay their full member contribution, and the EPMC is phased out over a 3-year period, the employees shall receive an **“increase to base salary”**.
- Section 116.1 of AQMD’s Administrative Code states that with the start of the pay periods encompassing July 1st of 2015, 2016, and 2017, respectively, unrepresented employees shall receive a **“salary increase”** equivalent to the amount of the additional retirement obligation assumed under this provision.
- The Teamsters, Local 911, *“Agreement in Concept”* that was sent to all AQMD employees in the two bargaining units they represent communicates that as employees begin to pay their share of retirement (phased in over a three year period), AQMD will give a **corresponding “wage increase”**.
- The personal handwritten notes of the Teamsters Chief Negotiator (the Secretary-Treasurer of Local 911) specifies the percentages to be added to base salary, in exchange for eliminating the EPMC, and includes a written notation that the salary increases are **“earnable compensation”**.

What seems to be at issue:

Unlike CalPERS, which typically has a flat contribution rate for each employee within a bargaining unit, SBCERA bases its contribution rate for its classic members on their “age-at-entry” into the retirement system. And because SBCERA bases the contribution rate for classic members on their age-at-entry into the system, the percent of salary is almost always different for each unrepresented employee within a given management or confidential classification. (For example, the two Human Resources Managers at AQMD were classic employees and each had a different member contribution rate.) Consequently, the resulting increase to base salary for unrepresented classic employees (hired prior to January 1, 2013) was different for each employee, even within the same classification, and was commensurate with each employee's EPMC since it was determined by their age-at-entry into the retirement system. Therefore, the creation of a salary schedule that reflected the employee’s increase to base salary would almost, if not totally, need to be done on an employee-by-employee basis for the unrepresented employees. (That is, a separate pay schedule for each unrepresented management or confidential classic employee.) Once again, this is a manifestation of SBCERA’s formula for member contribution rates which is dependent upon the employee’s age-at-entry into the retirement system. I share this information as the former Human Resources Manager over Classification & Compensation and, later, Employee & Labor Relations, Benefits & Records..

Consequently, those employees who have ALL their years of service within the SBCERA retirement system will receive the full benefit of the negotiated increase to base salary in exchange for eliminating the EPMC. However, with a CalPERS determination not to include these negotiated wage increases in my base salary as “compensation earnable”, **I will lose a substantial portion of the negotiated salary increases I received to my base salary, forever negatively impacting my retirement.** With 11.5 years working for CalPERS agencies, I, in effect, will have worked for far less compensation earnable than fellow employees (even if they have the same member contribution rate) who worked only for agencies within the SBCERA retirement system, **even though it was a negotiated, union approved, and AQMD**

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**Board-adopted increase to base salary for all employees.** Once again, these were increases to base salary that every employee, including myself, believed (and was told) would be “compensation earnable.” **That was without a doubt the intent of the action by executive management, the unions, and the Governing Board.**

#### Regarding a Published Salary Schedule

Unfortunately, it did not seem possible to the management team to create a salary schedule for the unrepresented classic employees because of the different (age-at-entry dependent) member contribution rates for each employee within a classification

There is, however, a master spreadsheet that was prepared by the former Chief Financial Officer that contains all the information necessary for every employee at AQMD (including the unrepresented classic employees) which was used to process the annual salary adjustments made in July of 2015, 2016 and 2017, as well as all other personnel transactions (e.g., step advances, promotions, working-out-of-class assignments, etc.); as negotiated with the unions and approved by AQMD’s Governing Board.

Additionally, all salary information for every AQMD employee is published on **Transparent California**, so the salaries are public and made known to all who may be interested.

#### Some Frustrations with the Appeals Process

When the Compliance Review Analyst who was initially assigned to my retirement calculations contacted me, he kept insisting I was a Senior Air Quality Engineer and kept referring to that salary range. I told him repeatedly that I was a Human Resources Manager. He also kept referring to an older salary schedule and, again, to the salary tied to Senior Air Quality Engineer. It took quite a lot of effort to get him to understand and acknowledge he was using the incorrect classification and salary range.

I was initially told it would take 30 to 60 days for me to receive my first pension check from CalPERS. **However, I retired July 30, 2020 and did not receive my first pension check until March 2021; about 7.5 months later.**

Once I filed my appeal and received the CalPERS statement of issues, in some places the document correctly referred to me as Mr. Richards, but in other places they incorrectly referred to me as **Mr. Roberts.**

During my administrative hearing, the administrative law judge kept referring to me as **Mr. Williams**, until I respectfully corrected him. This is somewhat understandable since my name is William Richards, but he made a point of stating that he was incorrectly provided that name.

**AFTER the hearing was concluded, there was further discussion between the CalPERS attorney and the Administrative Law Judge about my case.** It was not part of the formal hearing, but the attorney continued to argue his case AFTER the hearing was over.

- The Judge made the comment that he was sympathetic to my circumstances, the position I am in, and my cause. (That was nice to hear.) However, the attorney soon made a comment that things are different now that it's come to light that I was receiving another pension (i.e., through SBCERA); as if I had been trying to hide something. He may not have meant it that way, but it certainly came across in that manner.
- When the Hearing Officer mentioned the possible application of the CalPERS "Mistakes Provision," the CalPERS attorney responded that the provision did not apply here since my employer was not contracted with CalPERS, but with SBCERA. I understand the implications of that, but I would have appreciated the Hearing Officer being able to look into this matter himself, and possibly explore other plausible options on his own without immediately being discouraged by the opposing attorney.
- And when the Hearing Officer mentioned the possibility of dealing with my situation in and of itself, due to its very unique nature, the attorney replied that doing so may result in "a domino effect," regarding other future appeals. However, the nature of my situation is so very unique, I do not see how that would even be a possibility. And, along those lines, because of the extremely unique circumstances of my individual situation, I recommend that your Board does **not** designate this decision as precedent setting.
- I also take exception to the Administrative Law Judge's comment in his proposed decision that it is "speculation" to conclude that AQMD's failure to publish a salary schedule that included the salary adjustments in question was indeed an error; and that it may have been to avoid the perception that its employees were being overpaid. The Judge's example itself is total speculation and as the Human Resources Manager at the time this negotiated agreement was put into place, I can truthfully attest under oath, as can other key witnesses (who were otherwise predisposed at the time of my administrative hearing) that such speculation is not accurate. It simply was not the case.

The Assistant Deputy Executive Officer over Administrative & Human Resources at the time of those negotiations can certainly attest to this, as can the former Chief Financial Officer, the current Human Resources Manager, and the Deputy Executive Officer over Administrative & Human Resources. (I truly regret that I did not use the power of a subpoena to assure the presence of these individuals and to compel their testimony during the administrative hearing; as they can also attest to the fact that AQMD was **not** trying to hide salaries.)

Please note that on December 18, 2020, the current AQMD Human Resources Manager over Employee & Labor Relations, Benefits & Records communicated in an email to the CalPERS Compliance Review Analyst, "In July 2015, South Coast AQMD discontinued paying any portion of the employee's contribution towards retirement, but offset this cost by increasing the employee's salary in an amount equal to what the agency had previously paid on the employee's behalf. The offset does not appear on the salary

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schedule because the offset amount is unique to each individual, depending upon the employee's bargaining group and age of entry into the system."

Additionally, not long after the December 18 email, that same AQMD Human Resources Manager and the current Deputy Executive Officer over Administrative & Human Resources also had a virtual meeting with CalPERS management representatives regarding the inclusion of the July 2015, 2016 and 2017 salary increases as part of compensation earnable. My understanding is that the sticking point, again, was not having a salary schedule published for the unrepresented classic (pre-2013) employees due to the different contribution rates tied to age-at-entry into the retirement system.

In conclusion, I am hopeful that this information will help you understand that it truly was the intent of all those concerned for the negotiated increases to base salary, offered in exchange for elimination of the EPMC, to be considered compensation earnable. Without a doubt, the spirit of the negotiations with the unions, as well as the implementation of a similar package for the agency's unrepresented employees, was for these salary increases to be pensionable; that is, compensation earnable.

Thank you for your time and consideration. I request and sincerely hope that your Board will exercise some compassion, grace, and understanding regarding my very unique situation, particularly during these very difficult and uncertain times of pandemic, heightened inflation and sky-rocketing costs of living, and the uncertainty of today's financial future. Additionally, there are so very few AQMD employees in my situation that I sincerely doubt any, if there even are any, would appeal this matter as I have. So, if the Board decides to rule in my favor, I do **not** see any reason for your decision to be designated as precedent as this would most likely be a one-time decision applicable only to me.

Thank you for your time and consideration.

Sincerely & respectfully,

*W.L. Richards*

William L. Richards

