

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Lloyd Kuhn ("Respondent Kuhn") worked as the Deputy Superintendent of the Sanger Unified School District ("Respondent District") which contracts with CalPERS for retirement benefits. Respondent Kuhn submitted an application for service retirement on June 9, 2008, and retired effective July 26, 2008.

Respondent Kuhn worked under a series of three-year employment contracts with Respondent District. Pursuant to his individual contracts, he was paid a salary, vehicle allowance, benefits, and expenses. Respondent District reported the salary and other benefits all as "payrate." The amount reported as "payrate" included \$750 a month in auto allowance, and \$791.67 per month for health benefits.

During a routine compensation review process, CalPERS staff determined Respondent District had erroneously reported the two benefit items as "payrate" for Respondent Kuhn. These items, auto allowance and health benefit payments, do not meet the definition of "compensation earnable" under Government Code section 20636 because they are not "payrate" nor "special compensation."

CalPERS staff determined that the correct "compensation earnable" for use in computing Respondent Kuhn's retirement benefit was his salary plus longevity pay for a total of \$13,346 per month. An additional raise was granted in July 2008 and Respondent Kuhn was allowed that raise for the limited period of 26 days to slightly increase his final compensation.

Respondent Kuhn appealed the determination. A hearing was held on August 2, 2012. Respondent Kuhn was represented by counsel. At the hearing, Respondent Kuhn withdrew his appeal seeking the inclusion of the health benefit payments in final compensation. Respondent Kuhn did appeal the exclusion of the auto allowance and of a raise to which he believed he was entitled, but which was never paid (and it was never reported by Respondent District to CalPERS).

During the hearing, Respondent Kuhn asserted that his car allowance, and later, the subsequent conversion of it to salary, were within the definition of "payrate." Government Code section 20636 subdivision (b) (1) defines "payrate" as follows:

(b) (1) "**Payrate**"<sup>1</sup> 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. "Payrate," 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 pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e). (*Emphasis added*)

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<sup>1</sup> The bolding of certain words or phrases hereinafter has been added for emphasis.

CalPERS presented testimony supporting its contention that the auto allowance and the unpaid raise were not "payrate" nor "special compensation," and therefore not "compensation earnable." In addition, CalPERS staff testified that the conversion of the auto allowance to "salary" or "pay" would make it "final settlement pay." The regulations define "final settlement pay" as follows:

**Final settlement pay**" means any pay or cash conversions of employee 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 PERS, in either payrate or compensation earnable

.....  
Final settlement pay may take the form of any item of special compensation not listed in Section 571. **It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.** (Emphasis added)

During the hearing, Respondent Kuhn's individual employment contracts were introduced and admitted as evidence. Respondents Kuhn and District entered into a three-year employment agreement dated October 28, 2003 (2003 contract). The pertinent parts of the contract are set forth below:

Under the heading "**Salary**," the 2003 contract provided:

The...**annual base salary shall be \$110,000** ... the salary shall be increased annually based on the average step and column increase of the certificated salary schedule. This increase shall be effective beginning July 1, 2004 and continue July 1 of each contract year thereafter unless modified in writing by the parties.

Under the heading "**Automobile Mileage Allowance**," the 2003 contract provided:

The Deputy Superintendent is required to have a vehicle available at all times to exercise his powers and to perform his duties both inside and outside of the district. In order to reimburse [him] for this vehicle requirement, [he] shall be entitled to a ... **\$750 monthly vehicle allowance to cover reasonable transportation expenses incurred for travel required by [his] employment**, including expenses for repairs, gasoline, license, insurance and all other costs associated with the operation of an automobile.

Under the heading "**Fringe Benefits**," the 2003 contract provided:

In the final year of the Deputy Superintendent's employment . . . [he] **may elect to roll into his salary the value of all non-salary benefits including, but not limited to... the automobile allowance.**

Respondents Kuhn and District entered into a second three-year employment agreement in 2006.

Under the heading "**Salary**," the salary was identified as \$125,236. The language regarding the annual increase in salary based upon the average step and column increase of the certificated salary schedule was identical to the 2003 contract. The language regarding provision of an automobile mileage allowance was identical to the 2003 contract.

Under the heading "**Fringe Benefits**," the 2006 contract differed from the 2003 contract in that it allowed Respondent Kuhn to **elect to convert the automobile mileage allowance to salary at any time**. The 2003 contract had allowed him to do so in his final year of employment. The 2006 contract provided:

At his discretion, the Deputy Superintendent may elect to **convert the value of all non-salary benefits including, but not limited to ... the automobile allowance into salary**.

On June 26, 2007, Respondents Kuhn and District entered into a third three-year employment agreement (2007 contract). Under the heading "**Salary**," the salary was identified as \$140,000. The "**Salary**" section further stated:

The 2007 base salary shall be increased by a percentage equal to that granted to all other administrative employees as the result of negotiations. The salary shall be increased annually based on the average step and column increase of the certificated salary schedule and the percentage of increase granted to all other administrative employees as the result of negotiations. This increase shall continue July 1 of each contract year hereafter unless modified in writing by the parties.

Under the heading "**Fringe Benefits**," the 2007 contract provided:

The value of any provided benefits including, but not limited to...**the automobile and expense allowances, will be considered salary** in addition to any base salary....

After considering all the evidence, the Administrative Law Judge (ALJ) found the conversion of auto allowance to "payrate" in anticipation of the separation from employment constitutes "final settlement pay" and is not to be included in special compensation.

With respect to the issue of the unpaid raise, District Payroll Supervisor Vicky Lacy testified that because Respondent Kuhn negotiated a new base salary of \$140,000, Respondent Kuhn was not eligible for the step and column increase because it was already included in his pay as a raise.

The ALJ also found that final compensation cannot exceed what a member earned and has been paid.

As a result, the ALJ found that CalPERS properly determined Respondent Kuhn's compensation earnable for purposes of calculating his retirement benefits. She confirmed that CalPERS cannot include amounts previously paid to him as an automobile allowance, or a raise which was never paid, and denied Respondent Kuhn's appeal.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board should adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

December 12, 2012

  
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