

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

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

This appeal is limited to the issue of whether employer-paid Flexible Benefit compensation and employer-paid deferred compensation can be included as compensation earnable for the purpose of calculating Respondent's final compensation.

Respondent Carlos Sanchez (Respondent) was employed as an Administrative Services Director for the City of Sanger (the City), from July 1, 1996 through January 31, 2010. Respondent was the Vice President of the City's Executive Staff, and he participated in negotiating the terms of all applicable Memorandums of Understanding (MOU's).

Respondent submitted an application for service retirement from the City on January 12, 2010. He retired for service effective February 1, 2010, with 34.531 total years of service credit, and has been receiving his service retirement allowance from that date.

There are three relevant MOU's which provided Respondent's final compensation during his employment. The City contracted with CalPERS for a three year final compensation period. CalPERS reviewed compensation reported on Respondent's behalf by the City during his last three years of employment. CalPERS flagged several special compensation amounts which needed further clarification. CalPERS contacted the City to request additional information.

In order to provide a timely retirement benefit to Respondent, CalPERS initially calculated his retirement benefit without adding any special compensation amounts reported on his behalf. CalPERS mailed letters to the City and to Respondent, explaining that his retirement allowance would be calculated without any additions of unidentified special compensation.

On May 24, 2010, the City submitted detailed identification of all special compensation amounts and copies of the relevant MOUs. The MOUs are signed and dated by Respondent in his capacity as Vice President of the Sanger Executive Staff. CalPERS determined that the amounts identified as Bilingual Pay and Merit Pay were paid and reported in accordance with the provisions of the Gov. Code section 20636(c)(1) (2) (3) and (4), and California Code of Regulations (CCR) section 571 (a) and (b). Therefore, those amounts were reportable, and could properly be included in Respondent's final compensation amount.

In the City's MOU, effective from July 1, 2007 through June 30, 2010, the City and Sanger Executive Staff agreed to a 10% Flexible Benefit for all employees hired by the City on or prior to July 1, 2007. The City reported the Flexible Benefit as special compensation for Respondent from July 2007 to July 2009.

The City and Sanger Executive Staff agreed to a new MOU for a term effective July 16, 2009 through June 30, 2011, which eliminated the Flexible Benefit provision.

On June 9, 2010, CalPERS again requested clarification for the Flexible Benefit option paid to Respondent. The City confirmed that Respondent used the Flexible Benefit for deferred compensation. Deferred compensation may be used in the calculation of a retirement benefit if it meets the provisions of Gov. Code section 20636(b)(2). As an interim measure, CalPERS re-calculated Respondent's retirement benefit by adding the special compensation amounts that met the provisions of the California Public Employees' Retirement Law (PERL) (Bilingual pay and Merit pay). Still excluded were the Flexible Benefit amounts and Employer Paid Member Contributions (EPMC) percentages calculated on the Flexible Benefit amounts.

In August 2010, the City confirmed that the Flexible Benefit was paid to Respondent as additional salary. CalPERS reviewed the components of Respondent's final compensation again.

On February 28, 2011, CalPERS sent a determination letter to the City and to Respondent, denying his request for enhanced final compensation. CalPERS determined that Respondent's Flexible Benefit and EPMC percentages calculated on the Flexible Benefit do not qualify as special compensation under PERL section 20636(c)(1) because they were not payments received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions. Moreover, CalPERS found that the Flexible Benefit claimed as additional salary was not included in the exclusive list of special compensation items under CCR section 571(a). Respondent appealed.

The Administrative Law Judge (ALJ) reviewed the facts and legal authorities, and found the sole factor relevant to Respondent's appeal was calculation of his final compensation. Final compensation consists of a retiree's payrate and any special compensation. According to the publicly available pay schedules, Respondent's payrate during his final three years of employment was \$8,448 per month. Neither the deferred compensation nor the Flexible Benefits compensation was included in his payrate because neither was included in the publicly available pay schedules. Further, the language in the MOUs that provided for deferred compensation is clear that such benefit would be paid *on top of* base salary, rather than as a part of base salary (emphasis by the ALJ).

The ALJ further found that while the City reported the deferred compensation and Flexible Benefits compensation to CalPERS as special compensation, neither qualifies as incentive pay, educational pay, premium pay, special assignment pay nor payment for statutory items under CCR section 571(a). The Flexible Benefits compensation was not available to all members in the group or class as provided in CCR 571(b)(2). Since neither qualified as special compensation, the ALJ found that CalPERS properly excluded both from Respondent's final compensation and its calculation of his monthly retirement benefit.

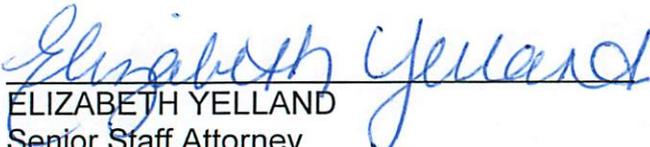
The ALJ also examined Respondent's potential claim of estoppel, and found that an estoppel claim failed for two reasons. First, there was no evidence to show privity

between the City and CalPERS. Second (and more important), the ALJ found that estoppel cannot be applied against CalPERS if to do so would nullify a strong rule of policy adopted for the benefit of the public. CalPERS' desire to maintain the actuarial soundness of the system is a recognized public policy. Additionally, public policy disfavors permitting a contracting agency such as the City to determine what elements of its compensation package should be considered compensation for retirement purposes. Allowing the City to estop CalPERS would permit the City to usurp CalPERS' statutory authority to determine compensation for retirement purposes.

For all the foregoing reasons, the ALJ denied Respondent's appeal. The ALJ found that CalPERS correctly determined that Respondent's final compensation should not include enhancements for flexible benefit or deferred compensation. The Proposed Decision is supported by the law and the facts. Staff argues that the Board 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.

February 21, 2013

  
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