

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

After an extensive and exhaustive evidentiary hearing, Administrative Law Judge Dian M. Vorters (ALJ) held that CalPERS staff correctly determined respondent Joseph M. Tanner's (Tanner) unmodified annual retirement allowance to be \$216,446. The ALJ found that Tanner's attempt to increase his annual unmodified retirement allowance to \$306,667 constituted unlawful spiking that is prohibited by Board Regulation 570 (excluding "final settlement pay" from "compensation earnable") and Public Employees' Retirement Law (PERL) section 20636(e)(2) (which prevents extraordinary increases in "compensation earnable" to high ranking officials like Tanner). The ALJ's Proposed Decision is correct and the Board's Decision adopting the Proposed Decision (with minor technical changes) was correct. Tanner's Petition for Reconsideration provides no good reason for the Board to revisit its decision.

Tanner is a CalPERS member who retired in January 2007 after many years of service with several local agencies that participate in CalPERS. He was receiving an unmodified annual retirement allowance of \$131,543. Tanner claims that, by coming out of retirement to work as the City Manager of the City of Vallejo (Vallejo) for about two and a half years, he was able to increase his unmodified annual retirement allowance to \$306,667. CalPERS determined his unmodified annual retirement allowance to be \$216,446.

The PERL includes safeguards to protect against pension spiking. Tanner attempted to circumvent those anti-spiking laws by characterizing the first two months of his three-year employment contract with Vallejo as "limited term" employment, so that he could qualify as a "retired annuitant" with CalPERS for those first two months. His contract provided that, during that "limited term" period, he would receive an annual base salary of \$216,000 along with a host of non-salary pay items. Then, two months into his tenure when his "limited term" period expired and he became a regular employee of Vallejo (reported to CalPERS as an active employee), the non-salary pay items would automatically convert to base salary, causing that base salary to skyrocket from \$216,000 to \$305,844.

When CalPERS staff learned of Tanner's attempted pension spike, it informed both Tanner and Vallejo that the additional base salary resulting from the conversion of non-salary pay items constituted "final settlement pay" under Board Regulation 570, and therefore could not be included in his "compensation earnable."

Without seeking CalPERS approval, Vallejo and Tanner then purported to enter into an amended contract in an attempt to achieve the same pension spike, but in a way that was even less transparent than the original contract. For the next couple of years, Vallejo reported employer and employee contributions to CalPERS based on Tanner's post-conversion salary of \$305,844. Upon Tanner's retirement, CalPERS staff determined that the additional base salary resulting from the conversion of non-salary items to base salary must be excluded from his "compensation earnable."

Although the cost of the pension spike Tanner seeks would be partially paid by Vallejo, the vast majority of that cost would be paid by Tanner's prior public employers who participate in CalPERS. This is because Tanner's highest one year of "compensation earnable" from any one of his employers is applied to all of his years of CalPERS service credit when CalPERS determines his retirement allowance.

After hearing ten days of testimony, reviewing hundreds of pages of exhibits and considering over two hundred pages of written argument (CalPERS submitted 52 pages; Tanner submitted over 200 pages), the ALJ held that CalPERS staff properly excluded the amounts at issue from Tanner's "compensation earnable." The ALJ found that the amounts at issue were not "special compensation" under PERL section 20636(c) and Board Regulation 571. The ALJ further found that Tanner's conversion of non-salary pay items to base salary violated both Board Regulation 570 and PERL section 20636(e)(2). The Board then adopted the Proposed Decision as its own, with some minor technical changes to correct a few minor typographical and citation errors.

Tanner's Petition for Reconsideration offers no new information or argument. All of the arguments in his Petition for Reconsideration were duly considered by the ALJ and the Board when it adopted the ALJ's Proposed Decision.

Fundamentally, Tanner's arguments are premised on the notion that a CalPERS member can thwart the Legislature's and the Board's efforts to prevent pension spiking through clever contracting. The ALJ's Proposed Decision was based on the rules of statutory construction and a correct application of the PERL and the Board's Regulations to facts that were established by the evidence. Tanner's arguments are not supported by the plain terms of the PERL or the Board's Regulations. But even if they were, adopting Tanner's argument would be elevating form over substance.

If the Board were to accept Tanner's arguments, high ranking officials would be able to more easily circumvent the anti-spiking provisions of the PERL and the Board's Regulations through clever contracting. Accordingly, staff urges the Board not to revisit its Decision, which is correct in all respects.

For all the reasons stated above, staff argues that the Board deny the Petition for Reconsideration and uphold its decision.

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

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