

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Durand Rall ("Respondent Rall") worked as the Chief Executive Officer and General Manager for a public transit agency, Omnitrans ("Respondent Agency") which contracts with CalPERS for retirement benefits. Respondent Rall submitted an application for service retirement which led to a dispute with CalPERS over his pension benefit calculation.

Respondent Rall worked under an individual employment contract beginning in 1994. The contract was amended several times during his employment with Respondent Agency. Pursuant to his individual contract, he was paid a salary, provided an automobile and his employer paid an amount for deferred compensation. Respondent Agency reported the salary and other benefits all as "payrate."

In 2006 and 2007, \$1,000 a month in lieu of providing an automobile and \$15,000 per year in lieu of employer paid deferred compensation was reported as "payrate."

During a routine compensation review process, CalPERS staff determined Respondent Agency had erroneously reported the two benefit items as "payrate" for Respondent Rall. These items, payments in lieu of providing an automobile and payments in lieu of employer paid deferred compensation, did not meet the definition of "compensation earnable" under Government Code section 20636 because they are not "payrate" nor "special compensation."

Respondent Rall's pay was not listed on a publicly available pay schedule as required by Government Code section 20636. CalPERS staff determined that the correct "compensation earnable" for use in computing Respondent Rall's retirement benefit was his salary plus raises for a total of approximately \$17,503 per month for his employment with Omnitrans and \$16,467 for his employment with Riverside Transit Authority. Respondent Rall appealed the determination. A hearing was held on August 20, 2013. Respondent Rall was represented by counsel.

During the hearing, Respondent Rall asserted that his agency-provided automobile and employer paid deferred compensation, 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**"¹ 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*)

¹ The bolding of certain words or phrases hereinafter has been added for emphasis.

CalPERS presented testimony supporting its contention that the payment in lieu of providing an automobile (auto allowance) and payment in lieu of employer paid deferred compensation were not "payrate" nor "special compensation," and therefore not "compensation earnable." In addition, CalPERS staff testified that the conversion of the in lieu amounts 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 Rall's individual employment contract and amendments were introduced and admitted as evidence. Respondents Rall and Agency entered into the contract in 1994. The pertinent parts of the contract are set forth below:

Under the heading Section 4 "**Salary and Compensation**," the 1994 contract provided:

A. [Respondent's] salary is hereby fixed and established beginning with the commencement of the term of this Contract at the annual salary rate of \$105,000.00 which shall be paid in the manner and at the same times as other salaries of OMNITRANS are paid. After each annual evaluation of [respondent] as required by Section 11 is completed, the OMNITRANS Board shall review the salary level of [respondent] and approve any adjustment of [respondent's] salary as determined by the Board of Directors to be appropriate based on the performance of [respondent].

Under the heading section 6 "**Deferred Compensation**," the 1994 contract provided:

A. [Respondent] shall receive an annual deferred compensation paid by OMNITRANS of Seven Thousand Five Hundred Dollars (\$7,500.00). The amounts contributed by OMNITRANS under this provision shall be subject to the terms and conditions of the plan selected at the [respondent's] option and the Internal Revenue Code requirements...

Under the heading section 10 "**Automobile**," the 1994 contract provided:

OMNITRANS agrees that [respondent] shall have exclusive and unrestricted use, at all times during the term of this Contract, of an automobile provided by OMNITRANS provided [respondent] pays OMNITRANS the sum of \$100 per month. Said automobile shall be a fully equipped, full-sized sedan . . . and shall not be required to display exempt license plates. OMNITRANS shall be responsible for providing liability, property damage and comprehensive insurance . . . The cost of such insurance premium shall be borne by OMNITRANS. OMNITRANS shall be responsible for paying for the operation, repair and maintenance of said automobile.

Over time, Respondent Agency increased the amount of deferred compensation to reach \$15,000 in 2005.

Respondents Rall and Agency amended the contract on July 1, 2006, with all provisions of the contract remaining in effect except section 4 and 6. Under the amendment, Section 6 set the amount of employer paid deferred compensation at zero and changed section 4 as follows:

. . . Section 4, entitled "SALARY AND COMPENSATION", is hereby amended to fix [respondent's] annual salary for the period July 1, 2006 through June 30, 2007 at \$191,018 which includes a 4% increase over the annual salary for 2005, as provided in Section 4 of the Amendment effective July 1, 2004, and \$15,000, in lieu of deferred compensation contribution.

At hearing, Respondent Rall explained that converting the employer paid benefit items to pay was his idea due to personal financial circumstances. No other employee received this conversion.

Respondents Rall and Agency amended the contract again effective July 1, 2007; Respondent Agency stopped providing an agency-leased vehicle and instead agreed to pay him \$1,000 a month as salary, "in lieu of providing an agency vehicle."

The Administrative Law Judge (ALJ) found that there was no publicly available payrate for Respondent's position. In the absence of a "Publicly Available Payrate," Respondent Rall failed to establish that payments in lieu of deferred compensation or in lieu of providing an agency automobile were "payrate." The ALJ relied on the specific language of Respondent's employment contract to support his finding in this regard. The ALJ also explained that neither item met the requirement for "special compensation."

The ALJ also found that conversion of employer paid deferred compensation to salary was "final settlement pay." The conversion occurred two weeks before Respondent Rall turned 62 and three months before his final compensation period.

As a result, the ALJ found that CalPERS properly determined Respondent Rall's "compensation earnable" for purposes of calculating his retirement benefits. He confirmed that CalPERS cannot include in its calculation amounts previously paid to Respondent Rall in lieu of an automobile, or employer paid deferred compensation, and denied Respondent Rall'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.

November 20, 2013


JEANLAURIE AINSWORTH
Senior Staff Attorney