

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

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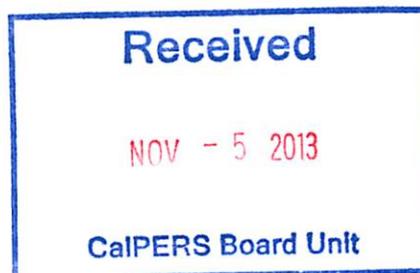
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Re: Respondent's Argument
 In the Matter of the Calculation of Final Compensation of Durand Rall
 Case No. 2011-0772; OAH No. 2013010269

Respondent Durand Rall submits the following argument urging the CalPERS Board to reject the Proposed Decision of Administrative Law Judge David L. Benjamin.

1. The Proposed Decision Erroneously Applies Cal. Code Regs., tit. 2, § 570.5, subd. (b).

The proposed decision finds that Respondent Durand Rall's employment contract does not constitute a "publicly available pay schedule" because it fails to "identify the position title of every employee position and must show the payrate for each identified position." (Page 7). Accordingly, it concludes that under Cal. Code Regs., tit. 2, § 570.5 subd. (b), CalPERS has the discretion "to determine an amount that will be considered payrate, based upon relevant documents." (*Id.*) However, in applying its discretion under this Regulation, CalPERS is not free to ignore fundamental logic and reason. But that is exactly what Judge Benjamin did in the reasoning he cites to support the conclusion that Respondent's payrate did not include the amounts that were added to his salary when his employment contract was formally amended.

Judge Benjamin writes in paragraph 6 on page 7:

In the absence of a pay schedule, it is within the discretion of CalPERS to determine an amount that will be considered payrate, based upon relevant documents. CalPERS concluded that Omnitrans' in lieu payments are not part of the payrate for the position of CEO/GM, and the evidence fully supports CalPERS' conclusion. From the beginning of the contractual relationship between respondent and

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Omnitrans, respondent's deferred compensation benefit and his automobile benefit were not included in his payrate. *Even after Omnitrans and respondent amended their contract to provide for payments in lieu of deferred compensation, and in lieu of an agency-provided vehicle, and nominally made those payments part of respondent's salary, the contracts continued to identify those benefits and the amounts of those benefits separately.* Respondent's contracts demonstrate that the in lieu payments were benefits payable to him, not part of the payrate for the position of CEO/GM. (Emphasis added).

Accordingly, the sole purported reason that Judge Benjamin cites to support his conclusion that the contracts supposedly demonstrate that the additional salary amounts were not part of payrate is that the contracts continued to identify those amounts and their historical origin separately. But the Precedential Decisions of this Board are replete with citations to the fundamental maxim of legal jurisprudence that the law does not respect form over substance. Cal. Civ. Code § 3528. In basing its decision that Respondent's amended contract did not set forth the amount of his payrate, nothing could be more a question of form over substance than the fact that the contract amendments continued to identify how his deferred compensation and use of an agency vehicle were treated in his original contract. Certainly, it is a common approach to the amendment of contracts to have the amendment continue to refer to the provision that is being altered by the amendment. That fact alone does not establish that the amounts were just "*nominally made*" and not a real and legitimate part of respondent's salary.

Moreover, the problem with resting the whole decision on this single point is there is no factual evidence in the record to support a conclusion that these payments were just "nominally made" and were not intended by the Omnitrans Board to be included in Respondent's payrate. The evidence is plainly to the contrary. As the Court itself found, the amendment regarding use of automobiles was an across the board change affecting a group of agency employees who had previously received the use of an automobile as an agency provided vehicle. And the change in deferred compensation was one clearly within the providence of the Omnitrans Board to decide how to fairly compensate its CEO.

In this regard, the factual finding that the in lieu of payment "advance no legitimate business purpose of the agency" is completely unsupported on the record and as such cannot be used as a basis for the legal conclusions in the proposed decision. The undisputed evidence was that the Omnitrans Board conducted a review of other comparable districts to determine whether it was paying its employees competitively and, based on that review, it determined that Respondent's compensation package was below market. Certainly deciding to increase Respondent's compensation to make it more fair serves a legitimate business purpose which CalPERS is not free to ignore in making its decision.

This Board is honor bound to resolve disputes according to established law for determining an employee's pension rights. That means an employee's pension rights under PERL is a question of statutory construction. (*Hudson v. Board of Administration of the Public Employees' Retirement System*, 59 Cal. App. 4th 1310, 1319 (1997)). Public agencies are not free

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to determine what is or is not compensation under PERL; the Legislature makes those determinations. (*Oden v. Board of Administration*, 23 Cal. App. 4th 194, 201 (1994). It is well settled that pension provisions shall be liberally construed in favor of the applicant. (*Cory v. Board of Admin.*, 57 Cal. App. 4th 1411, 1418 (1997). If an ambiguity or uncertainty exists, the PERL is to be construed in favor of the pensioner so as to effectuate legislative intent. (*City of Huntington Beach v. Board of Administration of the Public Employees' Retirement System*, 4 Cal. 4th 462, 472 (1992); *County of Sacramento v. Public Employees' Retirement System*, 229 Cal. App. 3d 1470, 1488 (1991); *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 940 (1981).

Surely it cannot be a liberal construction in favor of Respondent to find that the drafter of the amendments to Respondent's employment contract restricted his pension rights by separately identifying the changes being made in each of the contract amendments. Since this is the only purported fact cited by Judge Benjamin for the proposition that the contested amounts are not properly included in Respondents' payrate, the case should be remanded to him for a further hearing and examination of the question of what should be included in Respondents' payrate.

2. The Legal Conclusions in the Proposed Decision Are Inconsistent With and Not Supported by its Factual Findings.

Paragraph 14 of factual findings states:

"Respondent testified that, when he entered into the 2006 and 2007 contract amendments, he was not considering retiring, no one at Omnitrans had suggested to him that he retire, and there was no discussion between him and the Omnitrans board about him retiring in exchange for the contract amendment. *No contrary evidence was offered, and respondent's testimony on these points is not questioned.*" (Emphasis added).

Given this finding, the legal conclusion in paragraph 14 of the Legal Conclusions section is unsupportable. The opinion states:

"Although respondent was not considering retiring at the time those payments began, it would be naïve to believe that, at that state in respondent's life and career, payment of that magnitude were not 'in anticipation' of retirement. That is all section 20636 requires to establish that the payments were final settlement pay."

Having found that there was no evidence refuting Respondent's testimony on this point, the Court is not free to substitute its own surmise that these payments "must have been 'in anticipation' of retirement." The evidence established that Omnitrans had no mandatory retirement age. It is the purest of speculation to conclude legally that something which happened when Respondent was 62 must have been related to an event when he later reached 65. Rather, this surmise reflects the Court substituting its own conjecture about what happened factually without any evidence to support this finding and contrary to the Court's own express finding that

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Respondent's testimony on these issues was not questioned. The Court is bound to rest its legal conclusions on the factual findings in the record and is not free to offer its own surmise about the underlying factual situation.

Moreover, the decision's statement to the effect that the Court's surmise regarding what must have been on Respondent's mind is all that section 20636 requires to establish that the payments were final settlement pay is wrong. Section 20636 speaks to payments that are either "granted or awarded" to a member. As such, there must be evidence of what the *Board* was considering at the time—not what respondent may have been thinking. There is absolutely no evidence—none at all—that the Omnitrans Board was amending Respondent's contract in anticipation of his future retirement. That is what section 20636 requires, and there is no factual finding here regarding that.

Once the Board reexamines the Proposed Decisions' legal reasoning in light of this proposition, then it should find that both of CalPERS' arguments-- to the effect that Respondent's contract amendments constituted impermissible final settlement pay-- fall. Then the case is left with the simple and single issue of whether Respondent's contract, including all of its amendments, is the best evidence of Respondent's payrate. There is no question that these documents meet the definition used in Cal. Code of Regs., tit. 2, § 570.5, subd. (b)(1) of "[d]ocuments approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer." That leaves the Court with resting its entire decision on the legal conclusion in paragraph 6—"Even after Omnitrans and respondent amended their contract to provide for payments in lieu of deferred compensation, and in lieu of an agency-provided vehicle, and nominally made those payments part of respondent's salary, the contracts continued to identify those benefits and the amounts of those benefits separately."

For all of the foregoing reasons, we ask that the Board reverse the Proposed Decision or remand the matter for a further hearing so that the reasoning and legal conclusions in the Final Decision will conform to the evidence presented at the hearing and set forth in the Proposed Decision.

Sincerely,

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