

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Neleen Fregoso (Respondent) worked as the General Manager for the Humboldt Transit Authority (HTA), which contracts with CalPERS for retirement benefits. Respondent submitted an application for service retirement on September 28, 2011, and retired effective October 15, 2011.

CalPERS Compensation Review Unit (CalPERS) reviewed the compensation reported by HTA on behalf of Respondent, and determined that some of the compensation paid to Respondent during her last year of employment reflected a 20 percent salary increase that did not meet the criteria for "compensation earnable." CalPERS sent notice of this determination to HTA and Respondent in letters which explained that the compensation reported to CalPERS must meet the criteria for "compensation earnable" as outlined in Government Code sections 20630 and 20636, and California Code of Regulations, title 2, sections 570 and 571.

Respondent timely appealed CalPERS' determination and a hearing was held on July 8, 2014. Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her case with witnesses and documents. CalPERS also provided Respondent with an informational brochure on the General Procedures for Administrative Hearings. Respondent chose not to be represented by counsel.

The issue before the ALJ was whether CalPERS correctly excluded a 20 percent salary increase received by Respondent in January 2011, as non-compliant with the Public Employees' Retirement Law (PERL) for the purpose of calculating her final compensation and retirement allowance.

During the hearing, Respondent disputed CalPERS' presumption that the 20 percent salary increase was for the purpose of providing her with a "golden handshake" or final settlement pay in anticipation of retirement. Respondent asserted that the increase was the result of a salary survey and was supported by a positive employment evaluation.

"Compensation earnable" is composed of (1) pay rate, and (2) special compensation, as defined in Government Code section 20636. Government Code section 20636 subdivision (b) (1) defines "payrate" as follows:

(b) (1) "Payrate" 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, pursuant to publicly available pay schedules. "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).

“Special compensation’ of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.” Government Code section 20636(c)(1). Special Compensation does not include: “(A) Final settlement pay. (B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise. (C) Other payments the board has not affirmatively determined to be special compensation.” Gov. Code section 20636(c)(7).

CalPERS presented testimony regarding Respondent’s final compensation determination. This process included reviewing data for the 36 months prior to the final pay reported by HTA on behalf of Respondent. CalPERS’ witness explained that the payrates reported by HTA for Respondent were not in compliance with the PERL for the nine months to one year prior to Respondent’s retirement. Documents provided by HTA showed that Respondent received final settlement pay in anticipation of retirement. The CalPERS staff witness defined “final settlement pay” as a pay increase or conversion of some type of employee benefit granted or awarded in anticipation of a member’s separation or retirement. Cal. Code Regs., tit. 2, section 570. Final settlement pay is excluded from reportable income upon which benefit calculations can be made. Cal. Code Regs., tit. 2, section 571(b)(8), (d).

Respondent’s last position with HTA was as a general manager. The Humboldt County Board of Supervisors (Board) was required to formally approve Respondent’s salary and wage increases. During the 2009 through 2010 time period, Board minutes show approval of hourly wage increases of \$.50 to \$1.50 per hour for HTA employees. In February 2010, Respondent announced her intent to retire before the end of the year. In the fall of 2010, the HTA attempted to recruit a new general manager to replace Respondent, but its efforts were unsuccessful and the Board determined that the current salary being offered was not high enough to attract qualified general managers from other transit agencies in California. Thus, the HTA conducted a statewide salary survey for the general manager position that revealed an average salary range of \$77,000 to \$98,000. On December 15, 2010, the Board approved an increased wage range for the general manager position consistent with the survey. The Board asked Respondent to remain in her general manager position while a second round of recruitments took place. Although Respondent agreed, she was now earning below the newly approved salary range for a general manager since her annual salary in December 2010 was \$71,365.

To address this salary discrepancy, the Board conducted a performance evaluation of Respondent’s work, which was deemed to be excellent, and on January 19, 2011, approved a salary increase of 20 percent for the remainder of her tenure as a general manager. As of January 2011, the 20 percent salary adjustment resulted in an annual salary of \$85,634. On August 17, 2011, Respondent received one additional increase of \$.75 per hour as approved by the Board for all employees. Respondent’s last day on the job was September 30, 2011. She retired from the HTA effective October 15, 2011, at an annual salary of \$87,194.

CalPERS’ witness explained at the hearing that the 20 percent increase “stood out” as historically inconsistent with prior increases for the general manager position. Further,

the increase was paid “exclusively in the final compensation period.” The increase was effective January 2011, and Respondent’s official retirement date was October 15, 2011. Thus, the 20 percent increase occurred and was reported by HTA to CalPERS only in the last nine months of Respondent’s three-year final compensation period.

Finally, CalPERS argued that allowing the 20 percent pay increase would create an unfunded liability over and above CalPERS’ actuarial assumptions. Actuarial calculations provided at the hearing indicate that allowing the higher final compensation would result in an additional liability to the retirement system of \$21,617.

After receiving all testimonial and documentary evidence, the Administrative Law Judge (ALJ) held that:

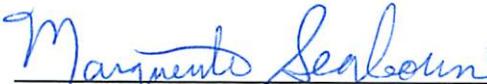
Case law supports a finding that the pay raise at issue here cannot be included as compensation earnable for the purpose of calculating retirement benefits. An employee’s compensation is not simply the cash remuneration received, but is exactly defined to include or exclude various employment benefits and items of pay.” (*Oden v. Bd of Admin. of the Public Employees’ Retirement System* (1994) 23 Cal.App.4th 94,198.) Respondent’s 20 percent pay raise was not granted to any other employee in the same membership classification, was not historically consistent with prior pay increases, was paid exclusively in her final compensation period, and created an unfunded liability above CalPERS’ actuarial assumptions. As such, it constitutes an impermissible salary increase under the PERL.

The ALJ found that CalPERS correctly determined that Respondent’s compensation earnable for purposes of calculating her retirement benefits cannot include the 20 percent salary increase applied during her last year of employment with HTA. CalPERS’ adjustment to Respondent’s compensation earnable is supported by the PERL and was upheld.

The ALJ concluded that Respondent’s appeal should be denied. 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.

October 15, 2014


for JOHN A. MIKITA
Senior Staff Attorney