

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DECLINE TO ADOPT THE PROPOSED DECISION

Respondent John W. Heeren (Respondent) was employed by California State University, San Bernardino (CSU) as an associate professor. CSU is a public agency which provides retirement benefits for its eligible employees through CalPERS. By virtue of his employment, Respondent was a university member of CalPERS.

Respondent submitted a Service Retirement Election Application on June 1, 2007, and retired effective July 1, 2007. Subsequently, Staff advised Respondent that his service retirement benefit had been calculated on the basis of an average monthly compensation of \$8,524.00 (\$102,288.00 annually). Respondent believed that his service retirement benefit should have been calculated on an annual compensation of \$107,000.00. Respondent appealed Staff's determination and a hearing was held on December 3, 2013.

Prior to hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process handbook. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

There are multiple problems with the Proposed Decision.

First, the administrative law judge (ALJ) incorrectly states that there was more than one issue presented at the hearing. The Statement of Issues correctly articulated that the single issue created by Respondent's exercise of his appeal of the CalPERS determination was as follows:

This appeal is limited to the issue of whether CalPERS, in applying the applicable provision of the PERL and the information provided by respondent Heeren and respondent University, correctly determined respondent Heeren's service retirement allowance.
(SOI, Paragraph X)

To that purpose, on December 3, 2013, the record was opened, both documentary evidence and testimony was presented to the ALJ, and the matter was submitted for decision by the parties (Respondent and CalPERS).

The Administrative Procedure Act (APA) controls the handling of administrative appeal hearings, such as the present matter. In the APA, there is no provision giving an ALJ the authority to *sua sponte*, reopen the record of a matter which had been previously submitted by the parties to the ALJ for the preparation of a Proposed Decision. Government Code, section 11517 states, in relevant part, as follows:

(c)(1) If a contested case is originally heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted to him or her a proposed decision in a form that may be adopted by the agency as the final decision in the case.
(Emphasis added.)

The mandatory language (“shall”) of the above-quoted section of the APA means that the ALJ did not have the discretion to reopen the record, schedule a second day of hearing, require CSU to appear and provide evidence and insert into the appeal issues of the ALJ’s creation; i.e. Issues No’s 2 and 3 of the Proposed Decision.

A second problem with the Proposed Decision is that the Factual Findings and Legal Conclusions made by the ALJ flow from the evidence received on the second day of the hearing. What the ALJ learned from that testimony had nothing to do with the original determination made by Staff (that Respondent’s service retirement allowance had been correctly calculated based upon the information related by CSU to CalPERS), but it did educate the ALJ (as well as Respondent and CalPERS) as to the real basis of Respondent’s claim that his service retirement benefit should be calculated on an annual final compensation of \$107,000.00. As is discussed in greater detail below, and as characterized by the ALJ, “The classification of respondent’s position as a full-time and part-time faculty position was entirely fictional.” (Factual Finding No. 16)

There is little, if any, disagreement regarding the operative facts in this matter. Respondent had been a faculty member of CSU for over 30 years. In the spring of 2006, Respondent took a sabbatical leave for one quarter (April – June). Before he took sabbatical leave, Respondent was asked to serve the next year in an administrative position, Associate Dean, rather than as a faculty member. Respondent agreed to serve as an Associate Dean and the annual salary for that position was \$107,000.00.

Respondent returned from sabbatical and served in his final year (July, 2006 – June, 2007) as an Associate Dean. Unfortunately, CSU did not report to CalPERS that Respondent was working as an Associate Dean and CSU did not report to CalPERS Respondent’s compensation as being that of an Associate Dean. Rather, for the period July, 2006 to December, 2006, CSU reported two teaching positions for Respondent; one such position as a full-time position and the second as a part-time position. For the period of January, 2007 through June, 2007 CSU did report Respondent as an Associate Dean, with the correct monthly compensation, based upon an annual salary of \$107,000.00.

The evidence was clear, as of the end of the first day of the hearing, when the matter was submitted to the ALJ, that CSU had not correctly reported to CalPERS Respondent’s final year of compensation. Respondent’s testimony had established that fact and the CalPERS witnesses did not dispute that fact. Accordingly, there was no reason for the ALJ to reopen the record for the purpose of taking additional evidence. The authority to reopen the record rests with the CalPERS Board, not the ALJ. Section 11517 of the APA provides, in relevant part, as follows:

- (a) A contested case may be originally heard by the agency itself and subdivision (b) shall apply. Alternatively, at the discretion of the agency, an administrative law judge may originally hear the case alone and subdivision (c) shall apply.

(2) Within 100 days of receipt by the agency of the administrative law judge's proposed decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. ...The agency may do any of the following:

(A) Adopt the proposed decision in its entirety.

...

(C) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(D) Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. ...

(E) Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. ...

(Emphasis added.)

During the first day of the hearing, Respondent testified that when he returned from sabbatical and began serving as an Associate Dean, he was told by CSU personnel that he could not be paid as an Associate Dean, but CSU would pay him the equivalent of the Associate Dean salary, only it would appear that he was working and being paid as a faculty member.

[Respondent] described how CSU created the fictional full and part-time faculty positions to reach the compensation of an Associate Dean because CSU believed the MOU required him to be on a faculty pay scale when he returned from sabbatical. Because the highest payrate for a faculty member was less than that for an Associate Dean, CSU created the fictitious full and part-time positions.

(Factual Finding No. 29)

Respondent was told by CSU personnel that the Memorandum of Understanding (MOU) required faculty members, like him, returning from a sabbatical leave, to return to a teaching – as opposed to an administrative – position for an amount of time equal to the time taken on sabbatical. Respondent was told that this CSU “campus practice” (which was not part of the MOU and did not exist anywhere in written form) required the “creative solution” of reporting Respondent to CalPERS as a full and part-time faculty member, instead of as an Associate Dean. Respondent accepted CSU's explanation. However, Respondent testified that he did ask CSU personnel if this “creative solution” devised by CSU would affect his retirement. Over a hearsay objection, Respondent testified that he was reassured that as long as employer and employee contributions were paid to CalPERS, this arrangement was acceptable to CalPERS.

The uncorroborated statement of an unidentified, purported CalPERS employee, supposedly giving CalPERS' approval to CSU's "creative solution" cannot be relied upon as credible evidence. There are no Participant Notes recording or referencing any conversation between CSU personnel and CalPERS staff regarding the CSU "creative solution". The concern is not with Respondent's credibility. The problem is that the hearsay statement (what was said to Respondent by a CSU employee) may or may not have been accurate, cannot be authenticated and is, therefore, inherently unreliable. But the ALJ used such hearsay testimony to find that Respondent reasonably relied on the statement even though it was an unauthenticated, undocumented claimed communication from CalPERS, from an unidentified CalPERS employee, and who may or may not have said what the CSU employee claims was said, who may or may not have had authority to bind CalPERS in making such statement. The ALJ then used this hearsay testimony to find that the necessary elements for the application of an equitable estoppel were present.

A CalPERS Retirement Program Specialist (RPS), with experience working in the Compensation Review Unit, testified that CalPERS relies on the member's employer to accurately report compensation information. In the present instance, because CSU reported a full-time and part-time faculty position and compensation for Respondent for the time period of July, 2006 through December, 2006, only the compensation for the full-time position could be used in calculating his service retirement benefit. That is consistent with the controlling law, Public Employees' Retirement Law (PERL); See Government Code, sections 20630, 20635 and 20636. The reporting by CSU for the period January, 2007 through June, 2007 was accurate, accepted and used in the calculation of Respondent's service retirement benefit. As noted by the ALJ:

... CalPERS considered the entire six months of the half-time position to be non-reportable. It calculated respondent's retirement benefit based solely upon his six month appointment to a full-time faculty position (\$8,131.00 per month) and his six month appointment to the position of Associate Dean (\$8,917.00).
(Factual Finding No. 24)

In making that finding, the ALJ answered the only issue raised by the appeal, the only issue set forth in the Statement of Issues ("Did CalPERS correctly determine respondent's service retirement allowance?") The answer; Yes.

Another problem with the Proposed Decision is that while the appeal did not ask the ALJ to craft a remedy, the ALJ took it upon herself to do so. Already in possession of the evidence from the first day of the hearing, which clearly showed that CSU had not correctly reported Respondent's compensation information to CalPERS, the ALJ – in ordering the second day of hearing – decided to investigate "what remedies are available in this proceeding?" This inquiry, and the ALJ's findings, conclusions and therefore the Proposed Decision, as a whole, suffer from this unsupported exercise of authority. The ALJ acknowledged her attitude in this regard by stating,

“This is a unique case in which an unusual situation gave birth to a creative solution that had an unintended and significant detrimental impact on respondent.” (Legal Conclusion No.15)

The ALJ, seeking to craft a remedy, went beyond what was being asked by CalPERS in presenting Respondent’s appeal. In Legal Conclusion No. 16, the ALJ attempts to create a “fiduciary duty” by CalPERS to investigate “erroneous” reporting of information by contracting agencies. There is no basis for this in the PERL and it would create an unrealistic, unreasonable – and possibly impossible – burden on CalPERS staff. How would CalPERS staff know, or even suspect, an item of reporting was “erroneous” and therefore worthy of investigation?

The ALJ correctly described that CSU created the problem that led to Respondent’s appeal.

. . . In this case, CSU admittedly created a fictional scheme designed to accurately pay respondent on an established scale for an Associate Dean. The idea that CSU was required to do that because of a provision in the MOU, is not persuasive. There was no impediment to elevating respondent to the position of Associate Dean upon his return from sabbatical leave so long as he rendered service to CSU in an amount of time equal to his sabbatical. ...The uncontroverted fact is that CSU created the fictional, concurrent, faculty positions so that respondent would be correctly paid under the established salary schedule for the job he was performing. Had CSU correctly reported respondent’s position and salary, respondent would be entitled to an increase in retirement benefits...

(Legal Conclusion No. 16)

The Proposed Decision reflects the ALJ’s belief that the necessary elements of equitable estoppel are present, so as to give CalPERS the authority to require CSU to retroactively correct position and compensation information regarding Respondent, during the relevant time period and report that to CalPERS. Staff disagrees with the ALJ’s conclusions in this regard. The requirements for application of equitable estoppel against CalPERS are not supported.

A more efficient tool to achieve the same result, and that will allow Respondent’s service retirement benefit to be calculated on the basis of the position of Associate Dean at CSU with the then-current salary of \$107,000.00 per year for Respondent’s final year of service, is available in the provisions of Government Code, section 20160. Section 20160 provides, in relevant part, as follows:

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

...

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

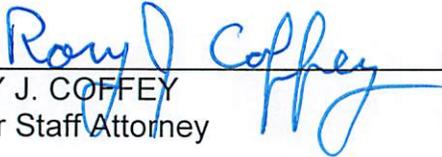
That the correction cannot be performed in a retroactive manner.

That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

The manner in which the ALJ reached her conclusions includes potentially problematic misapplication of law. Allowing the Proposed Decision to be adopted as written could expose Program and the Board to unnecessary legal challenges in future cases. Given all of the above, Staff recommends that the Board reject the Proposed Decision and instead decide the matter on its own, on the basis of the record produced from the hearing.

December 17, 2014



RORY J. COFFEY
Senior Staff Attorney