

**ATTACHMENT C**  
**RESPONDENT'S ARGUMENT**

1 Richard A. Schulman (SBN 118577)  
Sara G. Vakulskas (SBN 299517)  
2 **HECHT SOLBERG ROBINSON GOLDBERG & BAGLEY LLP**  
600 West Broadway, Suite 800  
3 San Diego, California 92101  
Tel: (619) 239-3444  
4 Fax: (619) 232-6828  
E-mail: rschulman@hechtsolberg.com

5 Attorneys for Respondent  
6 DR. ROBERT PAXTON

7  
8 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**  
**BOARD OF ADMINISTRATION**

9 **In the Matter of the Statement of Issues:**

10 **CALIFORNIA PUBLIC EMPLOYEES'**  
11 **RETIREMENT SYSTEM,**

12 **Agency,**

13 v.

14 **DR. ROBERT B. PAXTON,**

15 **Respondent.**

16 consolidated with:

17 **HOWARD M. SKOPEC, M.D., and**  
**DANILO V. LUCILA, M.D.,**

18 **Respondents.**

**Paxton:**

**OAH CASE NO. 2014080002**  
**AGENCY CASE NO. 2014-0336**

**Skopec:**

**OAH CASE NO. 2014050198**  
**AGENCY CASE NO. 2013-1120**

**Lucila:**

**OAH CASE NO. 2014050199**  
**AGENCY CASE NO. 2014-0335**

**DR. ROBERT B. PAXTON'S**  
**RESPONDENT'S ARGUMENT IN**  
**OPPOSITION TO, AND REQUEST FOR**  
**RECONSIDERATION TO BE ORDERED OF,**  
**PROPOSED DECISION**

**Meeting Date: September 17, 2015**

19 **REQUEST**

20 Respondent ROBERT B. PAXTON ("Paxton") objects to CalPERS approving the "Proposed  
21 Decision" of the administrative law judge ("ALJ") in this matter. Paxton requests that CalPERS  
22 send the matter back to the ALJ for reconsideration based on the following.

23 **ARGUMENT**

24 When a court evaluates a decision of a lower body, such as CalPERS, it usually accepts the  
25 lower body's factual findings but considers matters of law independently of the lower body's  
26 decision. In the specific context of pensions, courts resolve ambiguities in a statute "in favor of the  
27 pensioner." *Ventura County Deputy Sheriffs' Association v. Board of Retirement* (1997) 16 Cal.4th  
28 483, 490. The Proposed Decision found in favor of Respondents on the only disputed factual issue –

1 i.e., that they had not worked an average of more than forty hours per week, which means they  
2 earned the bonuses during their regular shifts. The errors in the Proposed Decision are matters of  
3 law – the interpretation and application of statutes – making it vulnerable to reversal by a court.

4 **1. The Statute Expressly Makes Bonuses PERSable “Special Compensation.”**

5 GOVERNMENT CODE §20636 *twice* expressly makes “bonuses” PERSable by including them  
6 in “special compensation” for “state members”:

7 (3) Notwithstanding subdivision (c), “special compensation” for state  
8 members shall mean all of the following: . . .

9 (B) Compensation for performing normally required duties, such as holiday  
10 pay, bonuses (for duties performed on regular work shift) . . . GOVERNMENT  
11 CODE §20636(g)(3).

12 (6) (A) Subparagraph (B) of paragraph (3) prescribes that compensation  
13 earnable includes compensation for performing normally required duties, such  
14 as holiday pay, bonuses (for duties performed on regular work shift) . . .  
15 GOVERNMENT CODE §20636(g)(6).

16 **a. The Statute Deprives CalPERS Of Any Authority To Say Otherwise.**

17 It is elementary administrative law that an agency may only implement, and not contradict or  
18 alter, a governing statute. E.g., *California School Employees Association v. Personnel Commission*  
19 (1970) 3 Cal.3d 139, 143-144. When the Legislature made bonuses PERSable, as quoted above, it  
20 took away any authority or discretion CalPERS may have had to say otherwise.

21 The Proposed Decision tries to work around this clear legislative command by citing  
22 provisions of the statute giving CalPERS the authority to find that “other” payments are or are not  
23 “special compensation” or “payrate,” whether because of a (non-existent) conflict with a  
24 memorandum of understanding or because CalPERS staff said so. Again, however, it is elementary  
25 that CalPERS’ authority and discretion cannot contradict an express statutory statement, such as the  
26 command that bonuses are part of special compensation. E.g., *id.*; *Pardee Construction Co. v.*  
27 *California Coastal Commission* (1979) 95 Cal.App.3d 471, 478-479. CalPERS may only fill in  
28 “gaps” left in the statute, e.g., *Aguilar v. Superior Court* (2009) 170 Cal.App.4th 313, 324-325; *RCJ*  
*Medical Services, Inc. v. Bontá* (2001) 91 Cal.App.4th 986, 1005, but this statute left no gaps for  
interpretation; it flatly included “bonuses” as “special compensation.”

1                   **b.       The Bonuses Need Not Reflect “Special” Work, But They Do.**

2           The Proposed Decision also tries to work around the statutory command by characterizing  
3 the effort required to earn the bonuses as *mere* “extra work.” To do this, the Proposed Decision cites  
4 part of subdivision (c) of Section 20636, which defines “special compensation” as pay for special  
5 skills and so on. However, subdivision (g)(3) of Section 20636, which governs “state members”  
6 such as Paxton, makes “bonuses” “special compensation” “[n]otwithstanding subdivision (c).” The  
7 Proposed Decision relies on language the Legislature expressly made inapplicable.

8           Even if the inapplicable language applied, the Proposed Decision tendentiously chops parts  
9 off the statute. Although the Proposed Decision occasionally quotes the entire provision regarding  
10 “special compensation,” it repeatedly only applies part of that provision: that “special compensation”  
11 is payment for special skills, knowledge, and abilities. However, the rest of that provision includes,  
12 as “special compensation,” payment for “special” “work assignment” “or other work conditions.”  
13 GOVERNMENT CODE §20636(c)(1). Even under the facts found in the Proposed Decision, working  
14 more than the threshold required to earn bonuses was a special assignment and a special work  
15 condition. The Proposed Decision does not interpret those terms incorrectly; it reached its desired  
16 conclusion by ignoring them.

17           The Proposed Decision argues that the bonuses did not qualify as “bonuses” under 2 CAL.  
18 CODE REGS. §571. Both the employing authority and the Legislature-approved collective bargaining  
19 agreement designated the bonuses as “bonuses.” Moreover, Rule 571 is irrelevant because it does  
20 not apply to state members, such as Respondents. Even if Rule 571 applied, earning these bonuses  
21 required Paxton’s “superior performance,” the phrase appearing in the regulation, i.e., he was  
22 extraordinarily fast and efficient so as to perform a superior number of disability evaluations.  
23 Calling this mere “extra work,” as the Proposed Decision does, uses a term without legal meaning  
24 and demeans these Respondents’ efforts; indeed, “extra work” *is* “superior performance.”

25                   **c.       The Bonuses Were Paid For Work Performed During Regular Shifts.**

26           The statute that expressly makes “bonuses” “special compensation” excludes only work not  
27 “performed on regular work shift.” The Proposed Decision correctly found as a fact that none of the  
28 Respondents worked more than forty hours per week to earn their bonuses. As to Paxton, the

1 Proposed Decision even repeats some basic arithmetic showing how easily his superior performance  
2 could earn his bonuses during his regular work shifts. The factual finding makes the exclusion (for  
3 work not performed on “regular work shifts”) inapplicable, and thus leaves the bonuses as “special  
4 compensation.”

5 The Proposed Decision then goes off the tracks, confusing these bonuses with something  
6 metaphorical. The Proposed Decision concludes that, because the disability review program used to  
7 offer an overtime component, these bonuses must therefore reflect overtime pay. This conclusion  
8 again conflicts with the governing statute: The statute recognizes bonuses as long as they were paid  
9 “for duties *performed* on regular work shift,” GOVERNMENT CODE §20636(g)(3)(B), (g)(6)(A)  
10 (emphasis added), which they were. The Proposed Decision says that, because some medical  
11 consultants (“MCs”) *might* have worked extra hours, the bonuses were “akin to overtime”; the  
12 Proposed Decision’s speculation transforms into overtime a bonus system that was expressly  
13 intended *not* to be overtime, “whether formal or informal” (UAPD Agreement, *Exh.* 18:18  
14 [§7.6.C.3]; see also CalPERS’ trial Exh. 16, first page, “eliminate all current formal and informal”  
15 forms of overtime) and which the Proposed Decision itself found was *not, in fact*, earned outside  
16 regular work shifts. Indeed, the only testimony on point was that MCs were instructed *not* to work  
17 more than their regular shift. A pension dispute is no place for metaphors.

18 **d. The Bonuses Need Not Have Been “Available” To All MCs.**

19 Subdivision (g) of GOVERNMENT CODE §20636 defines “compensation earnable” for state  
20 employees like Paxton in terms of two components, “payrate” and “special compensation.” Payrate  
21 is for groups – “similarly situated members.” As quoted above, though, bonuses are special  
22 compensation, which can be individualized. Nevertheless, the Proposed Decision concludes that the  
23 bonuses are not “compensation earnable” because they were not available to all persons in the same  
24 class. No one who wanted bonus work was denied it, but more importantly the Proposed Decision  
25 reaches its conclusion by alternately creating and ignoring statutory language.

26 The Proposed Decision claims that paragraph (g)(1) of Section 20636 requires that the  
27 bonuses have been “available” to all class members, including MCs doing non-psychiatric work,  
28 MCs working in the state program, and MCs working in locations without the backlogs that

1 triggered the bonuses. However, “available” appears nowhere in that paragraph. As indisputably  
2 shown at trial, non-psychiatric MCs are in a different employment “class” (code 7784) than  
3 psychiatric MCs (code 7785), who do different work. Even if bonuses were subject to a group  
4 requirement, it would have been satisfied here because the test is “similarities in job duties, work  
5 location, collective bargaining unit, or other logical work-related grouping,” GOVERNMENT CODE  
6 §20636(e)(1), and the MCs who did not earn bonuses had different duties, locations, and logical  
7 work-related groupings such as backlogs. The only reference to groups concerns “average time”  
8 worked by members in the class, GOVERNMENT CODE §20636(g)(1), which concerns time spent,  
9 *Ventura County Deputy Sheriffs’ Association v. Board of Retirement* (1997) 16 Cal.4th 483, 504,  
10 which is irrelevant given Respondents’ performance during regular working hours.

11 The key error the Proposed Decision makes in this context is that it *again* ignores the  
12 statutory provision that renders its desired provision inapplicable. The Proposed Decision’s  
13 argument that special compensation must be available to other class members derives from  
14 subdivision (c) of Section 20636 and *Molina v. Board of Administration* (2011) 200 Cal.App.4th 53,  
15 65-66. However, subdivision (c) concerns employees other than state employees, and *Molina*, which  
16 interpreted subdivision (c), concerned a city employee. Subdivision (c) and *Molina* are irrelevant  
17 because Paxton and the other Respondents are *state* employees subject to subdivision (g), and  
18 subdivision (g) expressly makes subdivision (c)’s rules for payrate and special compensation  
19 inapplicable. According to *Ventura County*, each member’s pension is still based on “the individual  
20 employee’s pay,” which includes ““special compensation’ items” for each employee. *Id.* at 504-505.  
21 *Ventura County*, in fact, approved as special compensation a series of items such as bilingual pay  
22 and a motorcycle bonus, *id.* at 488, 488n2, 488n8, which were unavailable to many members.

23 For state employees, groups matter for payrate, but bonuses are part of individualized special  
24 compensation. The statute specifically makes bonuses special compensation. The Proposed  
25 Decision again applied the wrong part of the statute.

26 **2. Whether CalPERS Budgeted For This Is Irrelevant.**

27 The Proposed Decision concludes that the bonuses are not PERSable because they will create  
28 an unfunded liability. However, CalPERS’ failure (or refusal, in light of the first ALJ’s decision in

1 the related Hurwitz/Norbeck matter) to recognize the PERSability of these bonuses is irrelevant as a  
2 matter of law; if someone earns a pension, they have a vested contractual right to that pension. E.g.,  
3 *Teachers' Retirement Board v. Genest* (2007) 154 Cal.App.4th 1012, 1036; *County of Orange v.*  
4 *Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 47. The California  
5 Supreme Court has expressly rejected the notion that "unanticipated costs" can justify "denying  
6 these plaintiffs" their pension rights. *Ventura County, supra*, 16 Cal.4th at 507.

7 The Proposed Decision's conclusion on this point is particularly odd because the ALJ had  
8 agreed at trial that CalPERS' costs were irrelevant; he thus barred testimony about the costs to  
9 CalPERS of Respondents' pensions. In addition to being wrong on the law, negating that ruling  
10 after trial deprives Respondents of the ability to have countered it factually at trial.

11 **CONCLUSION**

12 The ALJ allowed CalPERS' counsel, over Paxton's objection, to search for evidence  
13 favoring CalPERS by putting on witness after witness who lacked knowledge of the facts. For the  
14 CalPERS Board now to approve the Proposed Decision is to invite litigation based on result-oriented  
15 misreadings of a statute. The statute repeatedly makes irrelevant the provisions on which the  
16 Proposed Decision relies; the statute stripped CalPERS of the authority to conclude otherwise.

17 Paxton requests that the Board reject the Proposed Decision and remand the matter to the  
18 ALJ for reconsideration. Paxton requests that, along with reconsideration of the law as discussed  
19 above, the ALJ be directed to address three undisputed facts shown at trial: that the psychiatric and  
20 non-psychiatric MCs had different class codes; that they were instructed not to work more than their  
21 regular hours; and that work supervisors were responsible for assigning the "bonus" work.

22 Dated: September 1, 2015

**HECHT SOLBERG ROBINSON GOLDBERG & BAGLEY LLP**

23  
24 By:

  
Richard A. Schulman, Attorneys for Respondent  
DR. ROBERT B. PAXTON

25  
26  
27 080192-01 4843-4523-7543\_2

1 Richard A. Schulman (SBN 118577)  
Sara G. Vakulskas (SBN 299517)  
2 **HECHT SOLBERG ROBINSON GOLDBERG & BAGLEY LLP**  
600 West Broadway, Suite 800  
3 San Diego, California 92101  
Tel: (619) 239-3444  
4 Fax: (619) 232-6828  
E-mail: rschulman@hechtsolberg.com

5 Attorneys for Respondent  
6 DR. ROBERT PAXTON

7  
8 **OFFICE OF ADMINISTRATIVE HEARINGS**

9 In the Matter of the Statement of Issues:

10 CALIFORNIA PUBLIC EMPLOYEES'  
11 RETIREMENT SYSTEM,

12 Agency,

13 v.

14 DR. ROBERT B. PAXTON,

15 Respondent.

16 Consolidated with:

17 HOWARD M. SKOPEC, M.D., and DANILO V.  
18 LUCILA, M.D.,

19 Respondents.

Paxton:  
OAH CASE NO. 2014080002  
AGENCY CASE NO. 2014-0336

Skopec:  
OAH CASE NO. 2014050198  
AGENCY CASE NO. 2013-1120

Lucila:  
OAH CASE NO. 2014050199  
AGENCY CASE NO. 2014-0335

**DECLARATION OF SERVICE**

**Hearing:**  
**Date: April 13-16, 2015**  
**Time: 9:00 a.m.**

20 I, the undersigned, declare that I am over the age of eighteen years and not a party to this  
21 action; that my business address is Hecht Solberg Robinson Goldberg & Bagley LLP, 600 West  
22 Broadway, Suite 800, San Diego, California 92101, and that I caused to be served the individuals  
23 and entities on the service list below the following document(s) described as:

- 24 1. **Dr. Robert B. Paxton's Respondent's Argument in Opposition to, and**  
25 **Request for Reconsideration to be Ordered of, Proposed Decision**

1 Office of Administrative Hearings  
2 2349 Gateway Oaks Drive, Ste 200,  
3 Sacramento, CA 95833-4231  
4 fax 916-376-6349

Danilo V. Lucila, M.D.

[av1aoc47@aol.com](mailto:av1aoc47@aol.com)

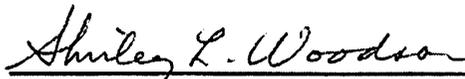
Howard M. Skopec, M.D.

Janine LaMar  
Department of Social Services  
744 P Street, MS 8-15-49  
Sacramento, CA 95814-5512  
Janine.LaMar@DSS.ca.gov

[hmskopecmd@gmail.com](mailto:hmskopecmd@gmail.com)

- 6
- 7  **By United States mail (all parties):** I enclosed the documents in a sealed envelope or  
8 package addressed to the person(s) addressed above and placed the envelope for collection  
9 and mailing, following our ordinary business practices. I am readily familiar with this  
10 business's practice for collection and processing correspondence for mailing. On the same  
11 day that correspondence is placed for collection and mailing, it is deposited in the ordinary  
12 course of business with the United States Postal Service, in a sealed envelope with postage  
13 fully prepaid.
- 14  **By e-mail or electronic transmission (Lucila, Skopec, LaMar):** Based on a court order or  
15 an agreement of the parties to accept service by e-mail or electronic transmission, I caused  
16 the document(s) to be sent to the person(s) at the e-mail address(es) listed above. I did not  
17 receive, within a reasonable time after the transmission, any electronic message or other  
18 indication that the transmission was unsuccessful.
- 19  **By overnight delivery:** I enclosed the document(s) in an envelope or package provided by  
20 an overnight delivery carrier and addressed to the person(s) at the address(es) above. I placed  
21 the envelope or package for collection and overnight delivery at an office or a regularly  
22 utilized drop box of the overnight delivery carrier.
- 23  **By fax transmission OAH:** Based on an agreement of the parties to accept service by fax  
24 transmission, I faxed the document(s) to the person(s) at the fax number(s) listed above. No  
25 error was reported by the fax machine used.

26 I declare under penalty of perjury under the laws of the State of California that the above is  
27 true and correct. Executed on September 1, 2015, at San Diego, California.

28   
Shirley L. Woodson, Declarant



Danilo V. Lucila, M.D.



BEFORE THE  
BOARD OF ADMINISTRATION OF THE  
CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Calculation of Final Compensation of

DANILO V. LUCILA, M.D.  
OAH Case No. 2014050199  
Agency Case No. 2014-0335  
Respondent

**ORIGINAL**

Consolidated with:

DR. ROBERT B. PAXTON  
OAH Case No. 2014080002  
Agency Case No. 2014-0336

and

DR. HOWARD M. SKOPEC  
OAH Case No. 2014050198  
Agency Case No. 2013-1120

Respondents.

Date of Hearing: April 13-16, 2015 ALJ Jonathan Lew

**RESPONDENT'S ARGUMENT**

The undersigned Respondent, DANILO V. LUCILA, to the Honorable Board of Administration of the California Public Employees' Retirement System (CalPERS), respectfully submits the following ARGUMENTS:

Respondent found issues in the interpretation of facts and of laws in the Proposed Decision of the Administrative Law Judge:

The statement in the Proposed Decision that “No one monitored the number of hours a medical consultant was physically present at the work site” is simply not true. As indicated in an earlier pleading, each MC psychiatrist belongs to a team headed by the Team Manager who tracks and monitors the time of each member of the team. Time sheets are submitted indicating the number of hours of leave times and the totals of the required work hours for the pay period. This is similar but not the same as the punch cards of employees in a factory. These time sheets are completed by the Team manager, signed and certified by the MC psychiatrist as well as by the Team Manager. Eventually, the certified timesheets are sent by the branches to the Disability Evaluation Division Office in Sacramento. It would be inappropriate and even illegal, perhaps a federal crime since it involves federal funds, for a Team Manager to certify the time sheets when the MC psychiatrist was not physically present for the required work hours. The presumption that no one monitors the work hours of the MC psychiatrist finds no support in the evidence presented during the hearing. Certified time sheets of Respondent were submitted as Exhibit “A”. It is presumption versus factual, physical evidence.

CalPERS further contends that the “. . . MC bonus payments can easily be manipulated by members, were periodic in payment, and thus ‘make it a prime tool for pension spiking’”. (Proposed Decision, page 15, par. 34). No system, for that matter, is immune from abuse or fraudulent manipulations. The fact of the matter is that the internal system of the bonus program has enough safeguards through oversight by senior management. In each branch, the official managing the bonus program is the Case Adjudication Branch Chief (CABC) who is the second ranking officer in the branch and reports directly to the Branch Chief. The audit by the Social Security Office of Inspector General (OIG) did not indicate any such fraudulent manipulation. Additionally, no evidence was presented during the hearing that Respondents engaged in any kind of fraud. It is not fair to impute fraudulent intention on the part of the respondents or put them under a cloud of suspicion when no such evidence existed and presented during the hearing. It is a general rule that the party asserting such allegation of possible fraud or manipulation has the *onus probandi* to prove it. Here nothing was presented in evidence, just unproven suspicion.

Respondent has no knowledge or information that “CalPERS repeatedly advised DSS to stop reporting bonus checks as special compensation” (CF: Proposed Decision, pages 9-10 paragraph 22) and therefore denies that such action has ever taken place. Respondent further denies that “. . . it [CalPERS] is prepared to correct this by returning any amounts withheld” as he has no knowledge or information nor did he receive any communication from CalPERS. The statement that “CalPERS has done so” is news to him when he first learned of it during the hearing. No evidence was ever presented during the hearing to support that allegation.

After this revelation was made during the hearing, there was a sense among Respondent’s colleagues that this refund to several medical consultants was made in a hush-hush environment. Why this was done in a non-transparent manner is a good question.

The court’s conclusion that “medical consultants can work 30 hours one week and 50 hours the next” is not accurate. Flex time simply means that the MC psychiatrists do not have to report at a fixed time provided that they are in the office during the core work hours, and they are able to complete the eight

hours of work at the end of the day. Again it is a misunderstanding or misinterpretation of the dynamics of the internal operation at the ground level.

Nowhere is the inability and failure to grasp the administrative or operational minutiae of this case concretely demonstrated or shown than on page 11, paragraph 23-c of the Proposed Decision where it stated categorically that Respondent Lucila's ". . . highest documented monthly bonus of \$11,880 was received in May 2009. . . Dr. Lucila closed 440 cases that month. . ." (underscoring supplied). Respondent NEVER received that amount, and NEVER processed 440 cases in the month of May 2009. No evidence was ever submitted by CalPERS to support this contention. Nor was there any testimony during the trial to support this erroneous and unfair conclusion.

On the contrary, CalPERS' Exhibit 13 indicated that Respondent only received \$4,968 for the month of May, 2009 and processed only 184 cases. This is identified on page 000027 of said Exhibit. Again, on CalPERS' Exhibit 11, posted on October 31, 2009 for the period from May 1-31, 2009 indicated that Respondent received special compensation of \$4,968. Respondent's Exhibit B showed deposit slip pay of \$4,968 for the same pay period. These are three written proofs of evidence submitted.

This is not a simple typo, but a grievous allegation as this supposedly "documented" payment was even foot-noted. If in fact, it is true as it is stated in the decision, the question is, who received the difference of \$6,912, and who processed the remaining 256 cases in this Respondent's name?

On the issue of availability: The statement in the Proposed Decision that ". . . the bonus payments were never made available to medical consultants in the state program branches, and rarely to the non-psychiatric medical consultants." (Cf: Proposed Decision, page 19, paragraph 42) is simply inaccurate and misleading. It arises from a misunderstanding or misinterpretation of the specific operational details at the basic levels. There are a number of variables to be considered in the application of the bonus program: the class of consultants, whether psychiatrist or non-psychiatrist; the federal as distinguished from the state branches; the location of the federal branches where there are backlogs; and the trigger factors. As stated before, medical consultants both at the federal and state levels have different job duties, work in different locations, different branches (federal or state), different titles of law with different fundings, and are in programs managed by different departments. The bonus plan was to be implemented in the different federal branches of the Disability Evaluation Division when certain conditions are met. If a federal branch has a backlog or they have a shortage of MC's which aggravates or contributes to the backlog, the plan is implemented with equal access to the MC psychiatrists and non-psychiatric per demands of the program. This could happen in one federal branch at a certain time but at a different time in another federal branch, but in both cases, equal access to the bonus program is open to those who are participating. The backlog may just be psychiatric but not physical cases, and vice versa. It is to be understood that MC psychiatric and non-psychiatric MC at the federal level are in a class of employment, different from categories of employment by the state program.

To lump them together into the same group or class of employment without distinction for purposes of applying the bonus program would certainly lead to an erroneous conclusion. . . And this is what happened

in the decision. For example, the cited decision stated that “.. DSS medical consultants in different branch offices had unequal access to the bonus program” (CF: Decision, page 20, par. 44) is a misstatement of fact. DSS medical consultants, both psychiatric and non-psychiatric in a particular federal branch have equal access to the bonus program once the trigger point kicks in. The existence of the trigger point – the chronic backlog of evaluation cases in a branch – has never been questioned by CalPERS. It is also true that in a branch where the trigger factor does not exist, the bonus program is not implemented because there is no backlog. The key to understanding this issue is to perceive the sublime purpose of state governance - to render efficient and responsible service to disability claimants who are in most cases in dire financial need, including many veterans who are in a similar situation. To negate this noble purpose by some bureaucratic red tape or strict and restrictive interpretation of the retirement law so that no incentives (pensionable bonus) are given to the medical consultants to relieve the chronic backlog is simply unconscionable and irresponsible. As a result, when the bonus program was discontinued, the backlog of evaluation cases was never resolved and was “exported” to other federal branches in other states. This caused inconveniences to claimants and delays in the processing of their applications.

On the major issue of the concept of bonus as special compensation: Respondent was a state employee of California as an MC psychiatrist in the Oakland DDS Branch at the federal level hired to evaluate disability claimants’ cases. When he participated in the bonus program, he believed in good faith that his bonus payments for superior performance by exceeding the threshold of 90 cases a week would be pensionable. He had this understanding and impression all the time while participating in the bonus program that it would be pensionable because his bonus checks from DSS indicated “Med Bonus”, and the DSS monthly payrate/reporting statements always identified these payments as “special compensation”. He never had any doubt about it. More significantly, retirement contributions were being deducted from his bonus paychecks. Similarly, the state was also submitting retirement contributions in his own behalf. This was never changed or altered even when the Respondent retired on May 1, 2012, and in fact received the first pension check on June 1, 2012 without the amount corresponding to the bonus payments.

After he retired, however, he received a letter from CalPERS dated September 20, 2013, that is, a year and four months after retirement, that his bonus payments would not be included in the calculation of his final pension benefit without giving any explanation or reason. Prior to retirement, and while still working, Respondent was never informed, no formal notice was given him, and nobody contacted him, that his bonus would not be pensionable. He was confident during his working years that his pension covering his total compensation and all bonus payments would be honored by the system.

The issue before us is, if the money that he earned for superior performance in exceeding the threshold of 90 evaluation cases a week is not bonus in the legal sense, then what is it? CalPERS claims that it is “extra pay for extra work” whereas Respondent firmly believes that this bonus for superior performance was special compensation under Govt. Code Section 20636 (c)(1).

Without going into the details as it was sufficiently discussed in our earlier pleadings, the Administrative Law Judge sided with CalPERS' argument that this issue is more governed by the guidelines of Rule 571 which identifies and defines "special compensation" for members who are employed by a "contracting agency". Respondent is not a contracting agency employee but a state employee, and contends that this issue of bonus pensionability is more appropriately governed by the guidelines set forth in Govt. Code Section 20636 (c)(1).

The evidence on the facts of this case is on our side including the burden of persuasion by a preponderance of the evidence. The only issue in this case is in the interpretation of the retirement laws and whether the Administrative Court did NOT liberally construe the provisions of the pension provisions, and whether the ambiguities in the interpretation and application of the laws were NOT resolved in favor of the Respondent as provided for in decided cases and the PERL.

The broader issue, however, with deeper implications, is whether the exclusion of his bonus payments in the calculation of his final compensation after the fact; that is, after his complete retirement when his pension rights fully matured into a fully protected contractual obligation, violated his constitutional rights. Corollary to this broader issue is whether the questionable private interpretation of bonus not being special compensation under PERL at the Compensation Review Unit at CalPERS, a question of law that is not well settled, could be legally used to reduce the already FULLY VESTED PENSION BENEFITS of a fully protected contractual obligation. More profoundly, does CalPERS have the authority to unilaterally divest benefits of a FULLY VESTED protected pension right one year and four months after retirement without violating Respondent's constitutional rights? Can CalPERS legally revoke the VESTED PENSION RIGHT to receive the benefits arising out of the bonus payments one year and four months after retirement when all contingencies have already occurred? To do so would be to revoke an irrevocable constitutionally protected contractual right to receive the whole pension benefits.

In a case in another Administrative Court, albeit the judgment there was not precedent-setting, under similar facts and circumstance and the same bonus program, and the same applicable pension laws, the decision there clearly stated that Rule 571 does not apply and the decision was made in favor of the respondents. Identical facts, same bonus program, same laws, divergent or opposing administrative court decisions. So this is not a well settled issue. It would probably take a court of higher jurisdiction to settle this issue once and for all - whether the closure fee as an incentive bonus for superior performance in exceeding the threshold of 90 cases a week constitutes special compensation under PERL, and whether CalPERS in the exercise of its authority can alter or reduce an already vested pension benefits after an employee retires, pension rights that already evolved into a fully protected contractual obligation under the aegis of the State and US Constitutions.

While non-vested pension rights may be changed or altered while the employee is still working, the fundamental doctrine protecting public employee pension rights enshrined in the leading case of Kern vs. Long Beach decided by the Supreme Court of California in 1947 states that a public employee's pension constitutes an element of compensation and a vested contractual right to pension benefits and may not be destroyed, ONCE VESTED AND ALL CONTINGENCIES HAVE HAPPENED, without impairing a

contract obligation. The California Supreme Court a long time ago also established that a promise of a pension by a public employer to its employees is a promise that must be kept. It is a sacred promise, and once the pension rights become vested, they cannot be taken away and must be honored.

It is significant to note that in both decisions, the Administrative Courts did not, perhaps out of abundance of caution or jurisdictional matter, address the constitutional issue of impairment of vested pension rights of respondents.

The Administrative Court in this case recognizes that "Respondents have vested pension rights is undisputed. However, the amount of the pension may not always be ascertained until the last contingency has occurred, or even be lost upon occurrence of a condition such as a lawful termination from employment", (Cf: Proposed Decision, page 22, par. 49). But the issue of uncertainty in the calculation of the pension amount does not apply to the herein Respondent as he has fully retired and therefore was completely vested when this dispute arose. The calculation of his final compensation could easily be made on which his pension benefits could be based because the last contingency already occurred upon retirement.

In summary, Respondent wishes to cite a fundamental doctrine upheld in California appellate courts since the 1940s and the California Supreme Court in 1947 that once pension rights are vested, they cannot be destroyed without impairing the contractual obligations. Respondent's pension benefits became completely vested when the last contingency occurred upon which the pension becomes due and payable on retirement on May 1, 2012, and matured into irrevocable contractual rights to receive the full retirement benefits. His vested pension rights - rights to his own contribution and his employer's contribution as well as the income accruing therein - are fully protected under California State Constitution under Article I, Section 9. To impair these rights would be a gross violation of the "contract clause" not only of the State Constitution but also the US Constitution under Article I, Section 10.

It is now up to the Honorable Board of Administration of the California Public Employees Retirement System to exercise its best judgment, authority and discretion to act appropriately under the above circumstances. May the Honorable Board be respectfully reminded that its duty to the participants and their beneficiaries shall take precedence over any other duty.

In this regard, it is respectfully requested of the Board of Administration of the California Public Employees Retirement System to grant the relief prayed for in the earlier pleading, the inclusion of his bonus payments into his final pension benefits. Failing so, he may seek other remedies available to him. It is hoped, however, that it can be avoided because of potential costs and the adverse publicity it may attract.



DANILO V. LUCILA, M. D

Respondent