

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Julia Erickson (Respondent Erickson) was employed by the City of Vallejo (City) as an Executive Assistant to the City Manager. By virtue of this employment, Respondent Erickson is a miscellaneous member of CalPERS. Respondent Erickson, previously classified as a Secretary, performed high level secretarial work as an Executive Assistant until her retirement in October 2012. During her employment, Respondent Erickson received additional, off pay-schedule compensation, initially as a "general-flex benefit" and later, as "Management Incentive Pay." Upon her application for retirement, CalPERS determined that Respondent Erickson was not a management employee, and therefore not entitled to Management Incentive Pay as special compensation added to her final compensation in calculating her pension. CalPERS informed Respondent Erickson and the City of this determination, and Respondent Erickson appealed that finding.

A hearing was held on February 10, 2015, before an Administrative Law Judge (ALJ) on the issue of whether Respondent Erickson was entitled to Management Incentive Pay as special compensation. The ALJ issued a Proposed Decision on May 26, 2015, denying Respondent Erickson's appeal. On August 19, 2015, the Board of Administration adopted the Proposed Decision as its own.

In Respondent Erickson's Petition for Reconsideration, no new evidence or facts have been presented for consideration. Instead, a laundry list of arguments that have previously been made and dismissed are once again rekindled. Each argument will be addressed in turn:

- Respondent Erickson argues that for over 17 years she received written and verbal promises that the Management Incentive Pay would be included in her retirement allowance. However, these promises, if made, were by the City, not CalPERS. The City does not have the authority to promise its employees benefits that CalPERS is statutorily prohibited from providing. To find otherwise, would create an environment rife with pension spiking schemes and the equitable authority of contracting agencies to enforce those schemes against CalPERS.
- Respondent Erickson argues that for over 17 years she had no reason to believe the Management Incentive Pay would not be included in her retirement allowance and planned her retirement on that belief. While this may be true, and unfortunate for Respondent Erickson, it is not a legal basis for CalPERS to bestow upon her a benefit for which she is not entitled. Both the ALJ and CalPERS staff concluded that Respondent Erickson's work did not include management duties.

- Respondent Erickson argues that for over 17 years every similarly situated City employee received and continues to receive the Management Incentive Pay as part of their retirement allowance. No other employees, besides Respondent Erickson, were the subject of this matter or the CalPERS determination at issue. If CalPERS staff becomes aware of any other non-management employees that receive Management Incentive Pay, CalPERS will make similar determinations. None of those facts are in evidence and the issue is not before the Board in this petition.
- Respondent Erickson argues that for over 17 years she and the City made all required CalPERS retirement contributions related to receipt of the Management Incentive Pay. While this argument is a true statement of fact, the fact that contributions were made to fund this additional benefit does not and cannot transform an otherwise unlawful benefit into a lawful one. To find otherwise would create an environment rife with pension spiking schemes and the equitable authority of contracting agencies to enforce those schemes against CalPERS.
- Respondent Erickson argues that she is the only City employee adversely affected by CalPERS' decision regarding the Management Incentive Pay and the CalPERS determination was made after Respondent Erickson retired, making it too late for the City to implement corrective action. Respondent Erickson is the only City employee subject to the CalPERS determination because the determination was made as a result of Respondent Erickson submitting *her* retirement application. Had another executive assistant with the City, that was receiving the Management Incentive Pay, submitted his or her retirement application, CalPERS would have made the same determination. With respect to the timing of the determination, Respondent Erickson is not prejudiced in any way. The argument that the City does not have time to implement corrective action is illusory. Any 'corrective action' taken by the City with the intention of increasing Respondent Erickson's retirement benefit prior to Respondent Erickson's retirement would constitute final settlement pay and also be prohibited from inclusion in final compensation.
- Respondent argues that she has been the subject of disparate treatment by CalPERS. There is absolutely no evidence to substantiate this accusation. CalPERS staff's review of Respondent Erickson's retirement application and final compensation was performed in the same manner and using the same criteria as all final compensation reviews.

- Respondent Erickson argues that the City challenged CalPERS' determination to exclude the Management Incentive Pay, but CalPERS staff ignored the City's position. This accusation is not true. While CalPERS staff disagreed with the City's position, staff did not ignore the City. Importantly, the City was a named respondent in this matter. The City was sent the Statement of Issues and was properly noticed of the time and location of the hearing. The City chose not to participate and the matter proceeded as a default against Respondent City pursuant to Government Code section 11520. The City was given the opportunity to present evidence and argument in this matter and made an informed decision not to. Respondent Erickson's argument that CalPERS ignored the City is baseless.
- Respondent Erickson argues that because the inclusion of the Management Incentive Pay allowance in her retirement benefit is unopposed by the City, CalPERS should permit it. Again, to base an allowable benefit on whether or not the employer opposes its inclusion would create an environment rife with pension spiking schemes and bestow equitable authority on contracting agencies to enforce those schemes against CalPERS.
- Respondent Erickson argues that a 17 year delay by CalPERS in asserting its rights is unreasonable and prejudiced Respondent Erickson for the remainder of her life. In these regards, the ALJ was directly on point and found that CalPERS does not have a duty to investigate the manner in which the City classified its employees during employment, and imposing such a duty on CalPERS would be onerous and unworkable. "CalPERS cannot be required to continuously review and monitor the employment decision of contracting agencies."
- Respondent Erickson argues that the California Constitution demands that a retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty. It is hard to determine what, exactly Respondent Erickson is attempting to argue by making this statement. CalPERS, by enforcing the provisions of the California Public Employees' Retirement Law (PERL) and *not* permitting unlawful benefits from being paid, *is* acting pursuant to its fiduciary duties to *all* participants and their beneficiaries.

While Respondent Erickson's frustration is understandable given the circumstances, the fact that the City made promises and representations to her and that she reasonably relied on those promises and representations, CalPERS does not have the authority to include the Management Incentive Pay as part of Respondent Erickson's final compensation. The statute is clear. CalPERS staff correctly applied the facts of Respondent Erickson's employment and her reported compensation to the requirements of the PERL. That application does not permit the inclusion of Management Incentive Pay in Respondent Erickson's final compensation. The reliance of Respondent Erickson and the position of the City are irrelevant in the analysis.

For all the reasons stated above, staff argues the Board deny the Petition for Reconsideration and uphold its decision.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Petition for Reconsideration are minimal. Respondent Erickson may file a writ petition in superior court seeking to overturn the decision of the Board.

October 21, 2015.

for Marguerite Seaborn
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