

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

The Petitions for Reconsideration of Respondents Robert B. Paxton, M.D. and Danilo V. Lucila, M.D. should be denied. Respondents raise no new arguments in their petitions. The Board already rejected the arguments they rehash when it adopted the Administrative Law Judge's (ALJ's) Proposed Decision with slight modifications.

1. The productivity payments received by Respondents do not meet the requirements for "special compensation."

Paxton argues the productivity payments he received were bonuses required by law to be treated as special compensation and to be included as compensation earnable. This argument contradicts the statutory definition and limitations on special compensation.

Government Code § 20636(g) details specific items to be included as special compensation. The statute also vests the CalPERS Board with authority to determine what payments may be included as special compensation. (Proposed Decision, Item 33, p.14, citing Gov. Code § 20636(g)(2)(F), (3)(D) and (4)(L).)

Special compensation for state members includes "normally required duties, such as ... bonuses (for duties performed on regular work shift)" Gov. Code § 20636(g)(3)(B). But to determine what qualifies as "bonuses," one must look at the entire statute and to other regulations for guidance.

To begin, the PERL provides that special compensation is an item of compensation earnable, and that for state employees, compensation earnable cannot include payments not based upon, "the average time put in by members in the same group or class of employment . . ." Gov. Code. § 20636(g)(1). The ALJ found the productivity payments were never made available to all members of Respondents' group or class. (Proposed Decision, pp. 19-20.)

First, Paxton contends the productivity payments need not be made available to all medical consultants in his group and class – the payments were permitted as "individualized special compensation." (Paxton Petition, p. 5.) No citation is given for the concept of "individualized special compensation" because the concept does not exist. Alternatively, Paxton contends the productivity payments were in fact made available to all medical consultants in his group or class. He speculates other medical consultants did not receive productivity payments because they had "different duties, locations, and logical work-related groupings." (Paxton Petition, p. 5.) Paxton's speculation, however, is unsupported by the evidence.

Second, Paxton argues his bonuses were special compensation because they were for "special work." (Paxton Petition, p. 3.) The ALJ properly rejected this argument. (Proposed Decision, Item 11.c, p. 26.) "Special compensation 'includes a payment to a member for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.' (Gov. Code § 20636, subd. (g)(3)(B).)" (Proposed Decision, Item

11.c, p. 26.) Here, Paxton's bonuses were not triggered by special skills or better work, but by doing more work – his review of cases above the 90-case productivity threshold for medical consultants. (Proposed Decision, Item 11.c., p. 26.)

Paxton contends the productivity payments were for superior performance, but he lacks evidence to support this contention. Moreover, although Paxton contends he was "extraordinarily fast and efficient" at his job (Paxton Petition at p. 3), being fast and efficient is simply not the same thing as being superior. In fact, Paxton "characterized the review process as repetitious work." (Proposed Decision, Item 18, p. 8.) He also noted the shift to electronic review and computerized access to records increased his efficiency, yet the bonus "threshold was never adjusted to account for the increased efficiencies occasioned by computerization." (Proposed Decision, Item 18, p. 8). The ALJ opined, "[p]iecework is an apt description of the medical consultant bonus program because it simply created an inducement for medical consultants to perform more work, whether they worked additional hours or not." (Proposed Decision, Item 11.c, pp. 26-27.) There was no evidence the bonus program required special skills or was intended to be compensation for a "superior performance"; thus, it did not constitute a "bonus" within the meaning of section 20636(g)(3)(B). (Proposed Decision, Item 11.c, p. 27.)

Third, Paxton argues his productivity payments qualify as special compensation because they were bonuses for work performed during regular shifts. (Paxton Petition, pp. 3-4.) This argument refers to Government Code § 20636(g)(3)(B), which includes as special compensation, "[c]ompensation for performing normally required duties, such as . . . bonuses (for duties performed on regular work shift)." Under this statute, bonuses paid for work during a normal shift may be considered special compensation only if the bonuses were paid for "normally required duties." Here, Paxton's normal work duties were "90 cases reviewed for closure per week" (Proposed Decision, Item 11, pp. 5-6), and case reviews beyond this threshold were optional, not "required." Accordingly, the productivity payments were not for "normally required duties" and cannot be considered part of special compensation.

Fourth, Paxton argues CalPERS lacks authority to determine what constitutes "special compensation." (Paxton Petition, p. 2.) This is plain wrong and belied by statutory language. As the ALJ noted, the Legislature vested CalPERS with authority to "determine what other payments may be included or excluded as items of compensation earnable." (Proposed Decision, Item 45, p. 21.) For example, Government Code § 20636(g)(4)(L) provides: "[S]pecial compensation' for state members do[es] not include any of the following: . . . Other payments the board may determine are not . . . 'special compensation.'"

Finally, Paxton contends the ALJ erred in considering CalPERS budgeting of the bonuses. CalPERS Senior Pension Actuary Jean Fannjiang testified "[r]etirement pensions are prefunded and based on actuarial assumptions" and [w]here, [as here] there is no accounting for dramatic increases in a member's earnings and payment of a retirement allowance is greater than expected, the increase in service retirement results in an unfunded liability. (Proposed Decision, Item 47, p. 21.) In Paxton's case, his

requested final compensation was so high that it resulted in a retirement benefit exceeding the amount allowable under the Internal Revenue Code for CalPERS to “still qualify as tax exempt” and would have to be paid out of the State’s General Fund. (Proposed Decision, Item 48, p. 22.) The consideration of this evidence was no error; it is consistent with and explains CalPERS’ explanation why the productivity payments were not special compensation.

The ALJ agreed with CalPERS and found the productivity payments to Paxton were not “special compensation.” (Proposed Decision, Item 41, p.19.) Paxton’s recycled arguments do not alter that analysis, and his petition for reconsideration should be denied.

2. Dr. Lucila’s arguments are irrelevant and incorrect.

Lucila presents two arguments for reconsideration. First, he contends the productivity payments he received are incorrectly stated in the Proposed Decision. Second, he argues because his pension benefit was vested, the amount could not be changed. Both arguments were properly considered and rejected by the ALJ.

A. Lucila’s productivity payments are correctly stated but, in any event, are not relevant to the ALJ’s Proposed Decision.

Respondent Lucila argues the bonus amounts he earned are incorrectly cited in the Proposed Decision. (Lucila Petition, pp. 2-3.) The section of the decision he refers to is: “Dr. Lucila’s highest reported annual special compensation totaled \$35,802 for fiscal year 2008-2009. His highest documented monthly bonus of \$11,880 was received in May 2009. Dr. Lucila closed 440 cases that month above the threshold. He otherwise received on average just over \$2,000 per month in bonus payments for fiscal year 2008-2009.” (Proposed Decision, Item 23.c, p. 11.) These amounts are correct and are supported by Exhibit 11 from Lucila’s Exhibit Binder, which sets forth the amounts reported to CalPERS by DSS.

More importantly, however, the ALJ correctly noted that this case is “limited to the issue of whether CalPERS properly determined that the Medical Consultant Bonus pay did not qualify as compensation earnable under the PERL.” (Proposed Decision, Item No. 29, p. 12, Item No. 10, p. 25.) The exact amounts earned by Lucila have no bearing on this determination. The ALJ referred to the amounts earned by Lucila because they were relevant to the question of unfunded liabilities that CalPERS might face were the productivity payments included as an item of special compensation.

B. The ALJ's Proposed Decision Does Not Deprive Lucila of a Vested Pension Benefit.

Lucila contends the law precludes CalPERS from changing the amount of his pension benefit because it has vested. This simply is not the case and is incorrect as a matter of law.

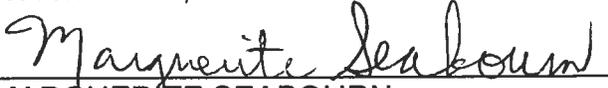
The ALJ recognized "[t]hat respondents have vested pension rights is undisputed"; "[h]owever, the amount of the pension may not always be ascertained until the last contingency has occurred, or may even be lost upon the occurrence of a condition subsequent such as a lawful termination from employment. (*Dickey v. Retirement Board of the City and County of San Francisco* (1976) 16 Cal.3d 745, 749-750.)" (Proposed Decision, Item 49, p. 22.)

The Proposed Decision does not divest Lucila of his pension benefit, but rather corrects the amount of it. The Legislature vested in CalPERS the authority and discretion to determine other payments that "are not 'payrate' or 'special compensation.'" (Gov. Code, § 20636, subd. (g)(4)(L).) Based on evidence and arguments submitted at the administrative hearing, the ALJ concluded, "CalPERS reasonably exercised its authority and discretion in determining that the medical consultant bonus payments are not items of special compensation" and, therefore, not includable as compensation earnable for purposes of calculating Lucila's pension benefit. (Proposed Decision, Item 50, p.22; Item 11.e, p. 27.) The Board properly adopted the Proposed Decision, and there is no basis for reconsideration of it.

3. Conclusion

The Board's Decision is well-supported by facts and law as explained above. Respondent Paxton's and Lucila's arguments are the same as those considered and rejected earlier. As such, their Petitions for Reconsideration should be denied.

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