

ATTACHMENT C
RESPONDENT'S ARGUMENT



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January 29, 2016
Via Facsimile, Priority Mail

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
PO Box 942701
Sacramento, CA 94229-2701

Re: CALPERS Ref. No. 2014-1023
Nicholas G. Rodriguez

Ms. Cheree Swedensky:

Enclosed please Respondent Nicholas Rodriguez's
Argument Against Proposed Decision.

Sincerely,

GRONEMEIER & ASSOCIATES, P.C.

By Dale Gronemeier, Esq.
Attorneys for Nicholas G. Rodriguez



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9 Before
10 BOARD OF ADMINISTRATION
11 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
12

13 In the matter of the calculation of final
14 compensation of:)
15 NICHOLAS G. RODRIGUEZ,
16 Respondent,
17 CITY OF VERNON,
18 Respondent,
19 and
20 CITY OF PASADENA,
21 Respondent.
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Agency # 2014-1023
OAH # 2015301212
**Respondent's Argument
Against the Proposed Decision**

Board Hearing
Date: 02/18/16

1 **1. Introduction – The Proposed Decision sanctions a staff**
2 **usurpation of the Board’s rule-making authority.**

3 Respondent Nicholas G. Rodriguez respectfully asks the CalPERS Board to
4 reject the Proposed Decision which gives no reasoned basis to ignore the
5 unambiguous language of Government Code §20037, when Government Code
6 §20042's 1-year final compensation is substituted into it. §20037/§20042 allows only
7 one final compensation for a retiring employee, not a a blended mix-and-match final
8 compensation of multiple final compensations. By deferring to an unofficial staff
9 interpretation, the Proposed Decisions sanctions the CalPERS staff usurping the
10 CalPERS Board’s role as rule maker – and impermissibly defers to a purported
11 informal agency determination that is inconsistent with the governing statutes.

12 The City of Vernon’s contract with CalPERS opted for Government Code
13 §20042's 1 year final compensation, and Vernon’s contract with Mr. Rodriguez
14 contained that 1 year final compensation requirement as the basis for his pension
15 award. But because the majority of Mr. Rodriguez’ qualified service was with the City
16 of Pasadena, CalPERS staff ignored the requirement that his award be based on his
17 final year’s compensation from Vernon and instead created an approach to an
18 unusual pension situation that was not approved by this CalPERS Board under its
19 regulatory powers and was inconsistent with the statutory provisions that govern
20 CalPERS. That contrived approach was a mix and match formula of multiple final
21 compensations that does not appear in the statute nor in any duly adopted CalPERS
22 regulation nor in any staff reasoned statement of a policy. Rather, it was just *ipse*
23 *dixit* informally developed by some staff. There is not in evidence so much as one
24 piece of paper adopting the formula used by CalPERS staff, but the Proposed Decision
25 nonetheless defers to an ad hoc practice by CalPERS staff. This practice represents
26 an unbridled use of power by staff to apply, or not apply as it wishes, any formula
27 without having paid due regard to the fact that the CalPERS Board has the authority
28 to adopt regulations and formulas, not staff. What strikes one CalPERS staff member
as fair one day may be different from what another CalPERS staff member feels is fair
another day, and the absence of a duly adopted regulation and formula makes the
action under review arbitrary. More important, the formula applied does not conform
to state legislation, because the statutes governing CalPERS provide for only a single

1 final compensation and do not allow for mix and match approaches of multiple final
2 compensations such as the staff practice, as set out more fully in §3, *infra*.

3 This matter concerns the admirable public policy goals of (1) “smoothing” a
4 spike in pension caused by a legitimate, market based salary increase and the switch
5 from a three highest year system to a one highest year pension contract, and (2)
6 providing additional scrutiny to a city which had generated more than its share of
7 controversy. Respondent supports these goals, when pursued according to the law.
8 However, CalPERS staff’s solution was arbitrary.

8 **2. The Proposed Decision ignores the CalPERS’ staff failure to
9 equitably adjust pursuant to the reform legislation.**

10 In addition, while providing undue deference to the CalPERS staff, the
11 Proposed Decision benevolently fails to mention another issue which was fully briefed
12 – *i.e.*, the fact that CalPERS staff admittedly failed to apply the reform legislation
13 Government Code §20791 pursuant to which CalPERS should allocate the cost of the
14 pension increase to the City which created it. This is an important public policy
15 failure by CalPERS staff which the CalPERS Board should address. In Mr.
16 Rodriguez’ case, instead of allocating the increased pension cost to Vernon as the
17 reform legislation envisioned, CalPERS staff is sticking Pasadena with a part of
18 increased pension costs from Vernon’s salary decisions. This may be a large problem
19 for CalPERS system-wide if staff is generally failing to properly allocate pension costs.

20 The appropriate solution here is to order recalculation of Mr. Rodriguez’s
21 pension according to the one year contract in effect, to allocate the increased cost to
22 Vernon, and to duly adopt a regulation setting forth formulas for similar situations
23 in the future which is consistent with state legislation and, if necessary, to ask the
24 state legislature for a change in the law and, finally, to insure that CalPERS staff is
25 allocating pension costs as the State legislature has directed.

24 **3. §20037, after substituting §20042's 1-year, require a 1-year final
25 compensation, not multiple final compensations that are
26 blended.**

26 As the Proposed Decision recognizes, “[t]he issue in this appeal is the propriety
27 of CalPERS’ calculation of respondent’s retirement benefit by the use and combining
28

1 of two final compensation amounts from his jobs with two public agencies.”¹ The
2 Proposed Decision does not provide a reasoned answer to this question but rather just
3 defers to the purported staff interpretation. When Government Code §20037 has 1-
4 year substituted into it because Vernon bought its 1-year option, the revised §20037
5 plainly provides for a single year’s “final compensation.”² The final sentence of the
6 revised §20037 clearly allows service from other agencies to make up the 1-year if
7 necessary. The statute unambiguously provides only one “final compensation.”

8 Even if there were ambiguity as to whether there is one final compensation or
9 multiple ones that have to be blended, the fact that the legislature expressly specified
10 multiple “Final Compensations” when it intended to do so but did not do so for
11 §20037/§20042 disambiguates the statute to preclude the staff interpretation
12 sanctioned by the Proposed Decision. The legislature has twice provided for multiple
13 final consultations in other statutes while not doing so for §20037/§20042: (1)
14 §20039 expressly provides for a CalPERS member who qualifies under that section
15 that “the member may have more than one Final Compensation” and (2) §20041,
16 repealed in 2009, expressly provided that a CalPERS member who qualified under
17 that section “may have more than one Final Compensation.” In this circumstance, the
18 doctrine *inclusio unius, exclusio alterius* precludes implying multiple final

19 ¹Proposed Decision, Factual Finding #5 at p.3.

20 ²When the 3-year period specified in §20037 is changed to the 1-year period
21 specified by §20042, the statute reads as follows:

22 For a state member, or for a local member who is an employee of a contracting
23 agency that is subject to this section, “final compensation” means the highest
24 annual compensation earnable by a member during the one year of
25 employment immediately preceding the effective date of his or her retirement
26 or the date of his or her last separation from state service if earlier or during
27 any other period of one year during his or her membership in this system
28 which he or she designates in his or her application for retirement, including
any or all of the period or periods of (a) service required for qualification for
membership, or (b) prior service which qualifies for credit under this system,
if any, immediately preceding membership, or (c) time prior to entering state
service at the compensation earnable by him or her in the position first held
by him or her in that service, as may be necessary to complete one year.

1 compensations.³

2
3 **4. The Proposed Opinion errs by giving deference to a phantom**
4 **ad hoc staff interpretation that circumvents this Board's rule-**
5 **making authority.**

6 The Proposed Decision provides no reasoned basis to ignore the unambiguous
7 language of §§20042/20037; rather, it just ignores providing a reasoned analysis and
8 defers to a purported CalPERS interpretations. But the CalPERS Board has never
9 interpreted the relevant statutes, and the evidence of an interpretation by CalPERS
10 staff is somewhere between tenuous to non-existent. The only documentary evidence
11 submitted by CalPERS in support of its interpretation contrary to the statutory
12 language – Exh.8 – is a training document which does not even directly address this
13 issue; there is no supporting regulation, administrative determination nor any piece
14 of paper setting forth the complex mix-and-match formula which CalPERS staff uses.
15 Neither of CalPERS witnesses ever referred to a CalPERS Board policy; their
16 testimony at best could be described as hearsay evidence of a staff practice. CalPERS
17 staff stumbling through the fog to implement an ad hoc practice does not rise to the
18 level of a CalPERS determination.

19 The Proposed Decision's deference to the paltry evidence of the staff mix-and-
20 match policy does not warrant such deference. In *Jones*,⁴ the California Supreme
21 Court declined to give such deference to a lower level staff decision that was even
22 more substantial than the evidence in this case because it was just an internal policy
23 memorandum rather than a determination by the agency's board. In this case, there
24 is no internal staff policy memorandum but rather fragments of evidence showing
25 that the staff blended multiple final compensations; in other words, the Supreme
26 Court did not allow deference to a staff determination that was much more fully

27 ³*Barnhart v. Peabody Coal Co.* (2003) 537 U.S. 149, 169; *Parsley v. Sup. Ct.*
28 (1973) 9 Cal. 3rd 934, 938-939; *Wildlife Alive v. Chickering* (1976) 18 Cal. 3d 190,
196; *City of Sacramento v. PERS* (1994) 22 Cal. App. 4th 786, 794.

⁴*Jones v. Tracy School Dist.* (1980) 27 Cal. 3d 99, 107.

1 reasoned and substantial than the evidence of CalPERS' staff interpretation in this
2 case. In *Yamaha*,⁵ the California Supreme Court set the following standard for
3 whether there should be deference to an agency determination:

4 The deference due an agency interpretation—including the Board's annotations
5 at issue here—turns on a legally informed, commonsense assessment of their
6 contextual merit. "The weight of such a judgment in a particular case," to
7 borrow again from Justice Jackson's opinion in *Skidmore*,⁶ "will depend on the
8 thoroughness evident in its consideration, the validity of its reasoning, its
9 consistency with earlier and later pronouncements, and all those factors which
10 give it power to persuade, if lacking power to control.

11 The evidence presented at the administrative hearing was not even close to the
12 required standard for deference as there was no evidence of any thoroughness,
13 reasoning, nor anything that would persuade that it is a reasonable interpretation.
14 The CalPERS staff ignored the deliberative process of this Board's interpretations and
15 instead just adopted an ad hoc interpretation that had no relationship to the statute.
16 But even if the staff had referred the issue to the Board and the Board had adopted
17 the staff's policy after appropriate notice, hearing, and reasoned development of a
18 persuasive policy, it still would not be a policy that would warrant deference because
19 an agency's determination that it is at odds with the statute's plain language is entitled
20 to little or no deference.⁷

21 DATED: January 29, 2016

GRONEMEIER & ASSOCIATES, P.C.

22 By 
23 Dale L. Gronemeier
24 Attorneys for Respondent
25 Nicholas G. Rodriguez

26 ⁵*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1,
27 14-15.

28 ⁶*Citing Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140.

⁷*Louis Stores, Inc. v. Dept. of Alcoholic Beverage Control* (1962) 57 Cal. 2nd
749, 759; *Henson v. C. Overaa & Co.* (2015) 238 Cal.App.4th 184,198.

