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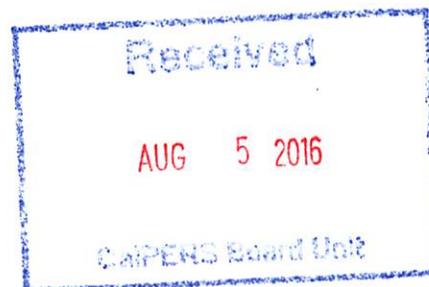
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August 5, 2016

Via U.S. Mail & Facsimile

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Re: Respondent Arguments; Jose A. Fernandez; Case No. 2015-0461 / OAH No. 2015071256; Our File No. MHA/15-0307

Dear Board of Administration:

CalPERS' determination of Mr. Fernandez's final compensation has been a challenging and complicated process. The agency repeatedly changed its position, even making new determinations for the first time on the stand during the hearing. The Proposed Decision corrects some of the agency's errors, but the Board of Administration should take further action.

The Board of Administration should modify the Proposed Decision in four ways. First, Mr. Fernandez's entire final compensation period should be calculated according to the January 14, 2014 publicly available pay schedule. Second, Mr. Fernandez's annual pay raises should be used to calculate his final compensation regardless of how they were mislabeled by the employer. Third, the decision should be modified to account for an additional 5% raise for certificated employees in the application of the (e)(2) limiting factors. Fourth, the Board should adjust the Proposed Decision to reflect all Mr. Fernandez's normal, full-time service as part of his payrate, not as overtime.

Introduction

CalPERS determines pensions accordingly to three variables: a member's formula, service credit, and "final compensation." There is no dispute about Mr. Fernandez's formula or his service credit. This case is about his final compensation. Final compensation is a member's highest "compensation earnable." In an ordinary case, CalPERS determines a member's compensation earnable in a fairly straightforward way, relying on data reported by the employer and the description of employees' compensation in a collective bargaining agreement applicable to a whole class of

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employees in a bargaining unit. But this is not an ordinary case.

The determination of Mr. Fernandez's "final compensation" is complicated because he was in a "class of one" as the superintendent of a school district. It is also complicated because the District paid Mr. Fernandez according to an individual employment contract. It is also complicated because his employer made mistakes about how it characterized compensation it reported to CalPERS and there was no union looking over the District's shoulders to double check what it was reporting for Mr. Fernandez. Thus, a CalPERS analyst had to make adjustments to his "final compensation" according to a complex series of interconnected statutes and regulations to determine what parts of his actual compensation count as "final compensation" for the purpose of determining his pension benefit.

Unfortunately, CalPERS made mistakes. Those mistakes incorrectly lowered Mr. Fernandez's pension significantly. CalPERS' first mistake was deciding Mr. Fernandez's rate of pay was not posted on a "salary schedule." As a result of that mistake, CalPERS started its analysis of his final compensation from the wrong place, substituting the pay of a lower-paid subordinate for Mr. Fernandez's pay. But Mr. Fernandez's rate of pay was posted on a salary schedule. The Proposed Decision partially corrects this error, but the Board of Administration should go further.

CalPERS' second mistake was excluding what it deemed "Longevity Pay" from Mr. Fernandez's final compensation. CalPERS analyzed this portion of Mr. Fernandez's pay through the prism of "special compensation," which is subject to a series of rules inapplicable to base pay. But, it was not special compensation; it was just an annual raise, part of his base pay that should count toward his final compensation.

CalPERS' third mistake was its incorrect application of the (e)(2) limiting factors to Mr. Fernandez's raises. Mr. Fernandez's year-to-year raises were more than those earned by other certificated employees during the same time period. Both sides acknowledge that for the purpose of calculating Mr. Fernandez's final compensation, his year-to-year raises in the three years preceding his retirement are capped by raises earned by other certificated employees. But CalPERS incorrectly excluded a five percent raise earned by these employees. Thus, CalPERS incorrectly drew the cap too low and incorrectly excluded a portion of Mr. Fernandez's compensation from its calculation of his pension.

CalPERS' fourth mistake was miscalculating the number of days in Mr. Fernandez's normal, full-time service, incorrectly casting his paid vacation, sick leave, and days he attended conferences for work as "overtime." This mistake incorrectly reduced his final compensation by excluding much of his normal full-time service.

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These errors have a significant impact on Mr. Fernandez's final compensation, and thus his retirement income. This body should find CalPERS must correct its errors and recalculate Mr. Fernandez's final compensation accordingly.

Mr. Fernandez's Entire Final Compensation Period Should Be Calculated According to the January 14, 2014 Publicly Available Pay Schedule

CalPERS miscalculated Mr. Fernandez's final compensation earnable because it started its analysis using a subordinate's payrate, not his. The CalPERS analyst did that because she thought Mr. Fernandez's payrate was not on a salary schedule. As a result, the agency's determination of his final compensation earnable was too low. But the District's January 14, 2014 salary schedule satisfied the statutory and regulatory requirements to establish Mr. Fernandez's payrate. Accordingly, this body should order CalPERS to recalculate Mr. Fernandez's final compensation.

For employees that are not in a group or a class, like Mr. Fernandez, the Code states:

"Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to **publicly available pay schedules**, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e). (Gov. Code § 20636(b)(1) (emphasis added).)

The regulations also contain a catch-all provision, permitting CalPERS to determine payrate by using four relevant guidelines "whenever an employer fails to meet the requirements of subdivision (a)." (2 CCR § 570.5(b).) Here, the District struggled to complete a publicly-available pay schedule, completing one on January 14, 2014. Mr. Fernandez should not be penalized for this delay. Indeed, the primary purpose of requiring publicly-available pay schedules - transparency - was already served as Mr. Fernandez's compensation was well known in the community and set out in a publicly available employment contract for the duration of the time in dispute. Thus, the Board should use its power under 2 CCR § 570.5(b) to modify the Proposed Decision and require Mr. Fernandez's entire final compensation period, not just part of it, be calculated according to the January 14, 2014 pay schedule.

Mr. Fernandez's Annual Pay Raises Should Be Used to Calculate His Final Compensation Regardless of How They Were Mislabeled by the Employer

The Board should modify the Proposed Decision to give Mr. Fernandez credit in the determination of his final compensation for the year-to-year raises he received, notwithstanding the

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District's failure to properly label them. Year-to-year raises are part of payrate. (See Gov. Code § 20636.1(b).)

The structure and organization of Mr. Fernandez's employment contract shows the "longevity pay salary adjustment" was a year-to-year raise, not a form a special compensation. (See, e.g., *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1155). Mr. Fernandez's employment contract is divided into ten sections enumerated with Roman numerals. Section II is titled "Salary." This section describes how his salary works. He starts at \$198,938 and then "Commencing July 1, 2009, the Superintendent shall be entitled to receive a longevity pay salary adjustment of nine percent (9%) per annum." It also explains his salary is to be "increased annually on July 1st of each year by an amount not less than the annual increase in the Consumer Price Index for Los Angeles County." These are annual increases to his base salary and are hence payrate, not special compensation.

The contract discusses "special compensation" in a different section. Section V "Benefits and Special Compensation" discusses features of Mr. Fernandez's compensation such as management incentives. The contract's distinction between salary and special compensation corresponds to the CalPERS distinction between payrate and special compensation and shows the parties understood Mr. Fernandez's 9% annual salary increases to be raises.

The District's salary schedule confirms the District intended the "longevity pay salary adjustment" as a year-to-year raise, not a form of special compensation. The January 14, 2014 pay schedule lists Mr. Fernandez's daily pay as \$1,519.98. This number corresponds to a 1/215th of Mr. Fernandez's pay in January 2014 according to the 9% raises and CPI adjustments he received starting in 2009. Thus, the actual practice of the District in calculating Fernandez's compensation shows it regarded the "longevity pay salary adjustment" as annual raise, not a form of special compensation.

CalPERS mistakenly analyzed these raises as though they were special compensation because the words "longevity pay" appear in 2 CCR § 571(a). Under these rules, "Longevity Pay" that acts as a form of "Incentive Pay" can be included as special compensation. Under that regulation, "Longevity Pay [is] Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years." (2 CCR § 571(a)(1).) As the analyst noted, special compensation is also subject to limitations in 2 CCR § 571(b) which do allow Mr. Fernandez's salary adjustment to be considered special compensation. But the analyst's analysis is a red herring because Mr. Fernandez's annual raises are part of his payrate, not special compensation. Thus, Mr. Fernandez's "longevity pay salary adjustment" is properly considered annual increases to his payrate.

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The Proposed Decision Should Be Modified to Account for an Additional 5% Raise and the (e)(2) Limiting Factors Should Not Apply Before 2012

Both parties acknowledge that the (e)(2) limiting factors apply to Mr. Fernandez's raises. Those factors limit the pensionability of year-to-year raises for employees in a "class of one" (typically senior management) to a percentage increase shared by other employees. CalPERS erred by leaving out a 5% raise at the end of the time period. Certificated employees received an additional 5% raise on July 1, 2014. This raise should be included in considering the application of the (e)(2) limiting factors.

Also, the (e)(2) limiting factors only apply during the final compensation period and two years preceding it, but the agency incorrectly applied the factors going back five years. The analyst mistakenly applied the (e)(2) limiting factors to all of Mr. Fernandez's years of service with the District. But section (e)(2) is expressly limited in application to "the final compensation period...as well as the two years immediately preceding the final compensation period." Thus, the (e)(2) limiting factors should only have been applied to Fernandez's last three (3) years of service. As a result, Mr. Fernandez's final compensation should go up accordingly.

The Board Should Adjust the Proposed Decision to Reflect All Mr. Fernandez's Normal, Full-Time Service as Part of His Payrate, Not as Overtime.

Under the PERL, a member with a daily rate of pay has his compensation earnable calculated by multiplying his daily rate of pay times the hours he worked which are "considered normal for employees on a full-time basis, and for which monetary compensation is paid." (Gov. Code § 20635.) The PERL considers work over that threshold to be "overtime" for the purposes of the PERL. Here, the central issue is whether Mr. Fernandez's normal full time service includes the time he took on paid vacation, took as paid sick leave, had paid holidays, and attended conferences. Even though these types of days count as part of the normal full-time service of nearly all salaried employees covered by CalPERS, in this case the agency has taken the position these days are overtime and should be excluded.

CalPERS and the Proposed Decision incorrectly found that the normal, full time service required for his position as superintendent was only 215 days a year. It claimed that other days such as vacation days, holidays, sick leave days, and conference days do not count as days worked for the purpose of calculating his normal, full-time service and thus his pension. As a result, CalPERS claimed compensation for these days could only be pensionable as special compensation called Bonus Pay, under which they do not qualify. But the special compensation analysis is again a red herring, because Mr. Fernandez's paid vacation days, paid holidays, sick leave days, and conference days are not special compensation, they are compensation for days worked during his normal,

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full-time service. CalPERS' position is incorrect for four reasons.

First, Mr. Fernandez's normal full-time service was the "work year" as extended by his contract. Mr. Fernandez's contract expressly adopted all CVUSHD Board Policies in Section VII of the contract. One of these policies, Board Policy 4313.3, provides that for management employees, such as Mr. Fernandez, "any days worked beyond the contracted work year shall extend the work year." The critical feature here is that per the policy, that work extends the work year, not merely provides for compensation on top of the work year. Thus the extended days are not akin to overtime, but are part of normal, full-time service and are thus pensionable.

Second, CalPERS' position disregards the Government Code's instructions about the pensionability of holidays, sick leave, and vacation. Government Code section 20630 states that under the PERL,

"compensation means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of any of the following:

- (1) Holidays
- (2) Sick leave...
- (4) Vacation."

Thus, the PERL recognizes paid holidays, sick leave, and paid vacation days as part of normal full-time service. The analyst's characterization of these days as "inflat[ing] the number of days worked..." is without merit. This body should direct the agency to recalculate Mr. Fernandez's pension counting each of these categories as part of his normal full-time service.

Third, Mr. Fernandez's position as superintendent was a year-round position that clearly required him to work more than 215 days a year. Throughout the year he was required to review and respond to correspondence received by his office, attend meetings with staff members including a weekly superintendent's cabinet meeting with assistant superintendents, and respond to board member inquiries. He was also responsible for ensuring the District made timely responses to all inquiries and made filings with various governmental agencies by the applicable deadlines. During summer months he was still required to prepare agendas for and attend District board meetings. This required him to review all staff proposals for the agenda, review items with District legal counsel, and meet with board members to brief them before meetings.

Mr. Fernandez was also required to work year-round on the District's many external relations. He was required to work on issues with the feeder elementary school districts and on the

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regional parcel tax, and to serve as president of the District's two charter schools and as the District's board representative on the City of Hawthorne redevelopment replacement agency. Additionally, the District had an ongoing construction program that required him to regularly meet with the construction firm, District directors, and the superintendent of business services. The construction program was more intense during the summer months and required more involvement, including regular visits to the construction sites. In sum, Mr. Fernandez's duties were so numerous and demanding that he could not have performed them by working only 215 days a year.

Fourth, CalPERS' error stems from the analyst's misunderstanding about how Mr. Fernandez's work schedule was constructed and his responsibilities as superintendent. CalPERS' determination that Mr. Fernandez's normal full-time work schedule was only 215 days rests on its misunderstanding of how his employment contract constructs his work obligations. For most employees, the number of days they must be at work can be calculated by taking the total number of workdays in a year and subtracting the number of days they are allowed to be away from work. For example, an employee who is required to work every day, Monday-Friday, would be required to work 260 days a year (52×5). But an employee is allowed to be away from work for many of those days. For example, an employee may be given 30 days vacation and up to 24 days for sick leave. In this example, the actual total number of days the employee must be at work would be 206 ($260 - 30 - 24 = 206$).

But Mr. Fernandez's contract calculates his number of required work days in the reverse. It starts with a minimum number of days he is required to be at work, 215. Then, it adds additional days, giving Mr. Fernandez 30 days annual paid vacation, 24 sick/personal business/personal necessity days, "conference days," and holidays.

The District's approach for calculating Mr. Fernandez's work days makes sense because he was the superintendent of a school district. With a typical employer, the work life revolves around when the employer is open for business. Thus, it makes sense for a typical employer to think of employees' work days as all weekdays unless there is an exception. But school districts are different. With school districts, the work life revolves around when children are in school. It makes sense for a school district to construct work year requirements in the reverse by establishing a minimum number of days that corresponds to the number of days school is open to children and then think of other days as being in addition to those days. Indeed, this is how the District articulates work schedules for some other employees as well.

Thus, this body should order CalPERS to consider Mr. Fernandez's used vacation days, sick days, paid holidays, and conference days as part of his normal full-time service and recalculate his pension accordingly.

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The Proposed Decision goes part of the way correcting the agency's errors in calculating Mr. Fernandez's final compensation period, but this body should go further and direct the agency to recalculate Mr. Fernandez's final compensation period as discussed herein.

Sincerely,

~~MASTAGNI HOLSTEDT, APC~~



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RE: Respondent Arguments; Jose A. Fernandez; Case No.
2015-0461 / OAH No. 2015071256; Out File No.
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FROM: Jeffrey R.A. Edwards, Esq.

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