

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Respondent Virgilio Chua (Respondent) was employed by Respondent San Francisco City and County Housing Authority (Respondent Authority) from 1986 until he retired on December 31, 2013, with 28.774 years of service. Respondent held various positions, the last of which was Accounting Manager.

On December 10, 2004, Respondent Authority assigned Respondent to a temporary "Unclassified Acting Assignment" to perform job duties formerly performed by its Deputy Finance Department Director. Respondent was given a 7.5% increase in compensation to reflect the additional duties.

On September 28, 2007, Respondent's Acting Assignment was extended for one year. However, on July 7, 2008, Respondent Authority informed Respondent in writing that he was to return to his prior classification, and resume the Accounting Manager duties and responsibilities. His compensation was reduced by the 7.5%.

On July 16, 2008, Respondent filed a grievance with his labor union, complaining of the demotion and reduced salary. On October 28, 2008, the grievance was settled. Pursuant to the terms of the Settlement Agreement, Respondent Authority agreed to retain Respondent's salary at the increased amount, including the 7.5% pay increase.

From March 2011 to December 2013, Respondent Authority reported a monthly payrate for Respondent in the amount of \$8,703.50, which included the 7.5% increase.

On December 31, 2013, Respondent retired. He has been receiving his service retirement allowance since that date.

On September 15, 2015, CalPERS determined that the payrate reported by Respondent Authority was in error because it included the 7.5% increase. CalPERS notified both Respondent and Respondent Authority in writing that the "reported monthly payrate of \$8,703.50 exceeds the maximum of \$7,685 listed for the Accounting Manager position. Therefore the reported monthly payrate will not be used for purposes of calculating your retirement benefit." CalPERS' letter also notes, "In addition, . . . the 7.5% increase you received was not given to other employees in the same membership classification. CalPERS considers the increase in compensation to be 'Final Settlement Pay.'"

Respondent appealed, and requested an administrative hearing. Hearing was completed on November 29, 2016. Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

The Administrative Law Judge (ALJ) agreed with CalPERS that Respondent did not establish that the 7.5% increase fell within any statutory or regulatory definition of payrate, or that it could be classified as special compensation. Since the increase was not paid "pursuant to publicly available pay schedules," it did not qualify as payrate. Government Code section 20636. Nor did it qualify as special compensation. Because

it was paid pursuant to a Settlement Agreement, it specifically fell into excluded Final Settlement Pay as defined in Government Code section 20636. The ALJ reasoned that there are rigid rules that prevent any local agency from artificially increasing the retirement benefits for a preferred employee such as Respondent, by enabling him to be granted greater compensation increases, not made available to other similarly situated employees.

Respondent Chua argued that he had provided excellent services to Respondent Authority over the years. CalPERS did not dispute his claim, and did not dispute Respondent Authority's right to determine how its employees are to be compensated. However, CalPERS argued and the ALJ agreed, that "if such payrate is to be the basis of a retirement allowance, namely monthly pension payments, it must be included in a publicly available pay schedule."

The ALJ also found equitable estoppel was inappropriate. Citing the Precedential Decision *In Re: Henderson*, the ALJ found:

The Board has a primary obligation to protect the retirement fund for the benefit of all its beneficiaries and to minimize the employer's cost of producing benefits. To allow Respondent to have a lifetime higher allowance than permitted by the statutory formula would result in an unfunded liability and would have a direct impact on Respondent Authority, against whose reserves his lifetime allowance would be drawn. The unfunded liability would pass to the employer in the form of increased contributions and higher future contribution rates to fund its members' account. This would be a windfall to Respondent, or in equivalent legal terms, unjust enrichment.

Citing statutes, regulations, case law and precedential decisions, the ALJ concluded that CalPERS lawfully and properly excluded the 7.5% increase in compensation. The ALJ also found that CalPERS properly determined the correct compensation earnable received by Respondent was the payrate for Accounting Manager as set out in Respondent Authority's publicly available salary schedule.

The ALJ concluded that Respondent's appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

February 15, 2017

  
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