ATTACHMENT B

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

Burt S. Hirschfeld (Respondent) was employed by Respondent Judicial Council of California (Respondent JCC) as an Assistant Division Director.

On August 21, 2015, Respondent JCC issued a memorandum to its employees announcing the implementation of a new compensation structure. Pursuant to the memorandum, Respondent's position and salary was to change.

On September 23, 2015, Respondent JCC placed Respondent on paid administrative leave for 28 days. Eventually, Respondent and Respondent JCC entered into an agreement to separate Respondent from his employment with Respondent JCC. The terms of the separation were memorialized in a Separation Agreement and Release of All Claims Amended November 21, 2015 (“Separation Agreement”). The Separation Agreement allowed Respondent to run out his leave time as well as to accrue additional leave time (80 hours) and holidays (8 days).

During the time he was on administrative leave (September 23, 2015, through October 21, 2015) and the time he ran out his accrued leave and holidays (October 22, 2015, through March 26, 2016), Respondent was expressly relieved of all of his duties and was prohibited from being in his former workplace without written authorization.

On February 9, 2016, Respondent submitted an application for service retirement with an effective retirement date of March 26, 2016.

CalPERS reviewed the compensation reported by Respondent JCC and determined that the payments associated with the Separation Agreement did not qualify as compensation earnable under the Public Employees' Retirement Law (PERL) and should not have been reported to CalPERS. In addition, CalPERS reviewed the amount of service credit that Respondent JCC reported on behalf of Respondent. CalPERS determined that Respondent was not entitled to earn service credit for the time he was compensated pursuant to the terms of the Separation Agreement because this compensation was not for work performed and was not in compliance with the PERL. Consequently, CalPERS reduced Respondent's monthly retirement allowance and sought to collect the overpayment that resulted from CalPERS initially using the final compensation and service credit figures provided by Respondent JCC.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on June 19, 2017. Respondent represented himself at the hearing. Respondent JCC appeared at the hearing for the limited purpose of moving to strike a subpoena served on one of its employees.

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.

CalPERS presented evidence at the hearing regarding why the compensation Respondent received pursuant to the Settlement Agreement did not comply with the PERL. Specifically, CalPERS presented evidence that established the compensation Respondent received pursuant to the Settlement Agreement was final settlement pay and did not meet the statutory definition of compensation earnable. CalPERS argued that the compensation was specifically excluded as a type of special compensation pursuant to Government Code section 20636(c)(7)(A).

CalPERS also presented evidence that Respondent did not work during the time he was on paid administrative leave and allowed to run out his accrued leave and holidays. In fact, CalPERS presented evidence that established Respondent was prohibited from working during this time. Consequently, CalPERS argued that Respondent was not entitled to earn service credit for time in which no services were rendered.

Respondent did not testify on his own behalf. However, Respondent did call Evelyn Ramos to testify on his behalf. Ms. Ramos works in Respondent JCC’s Human Resources department. Ms. Ramos testified regarding the Settlement Agreement and Respondent JCC’s understanding as to whether the compensation Respondent received pursuant to the Settlement Agreement would qualify as compensation earnable under the PERL. It was generally Ms. Ramos’ testimony that CalPERS was ultimately responsible for making the determination as to whether compensation qualifies as compensation earnable under the PERL; however, at the time the Settlement Agreement was entered into, Ms. Ramos testified that Respondent JCC had no reason to believe the compensation was not reportable to CalPERS as compensation earnable.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that the pay Respondent received from September 23, 2015, through his effective retirement date was paid in connection with the Settlement Agreement that severed his employment relationship with Respondent JCC. The ALJ found that Respondent did not work, and was in fact prohibited from working, during this time and that the Settlement Agreement was negotiated in lieu of Respondent JCC terminating Respondent’s employment. Consequently, the ALJ found that the pay and benefits received by Respondent pursuant to the Settlement Agreement constituted final settlement pay and did not qualify as compensation earnable.

The ALJ also found that the Respondent is not entitled to service credit for the time he was paid pursuant to the terms of the Settlement Agreement. The ALJ found the pay was not for services rendered, but instead, in exchange for Respondent resigning his employment.
In the Proposed Decision the ALJ concluded that CalPERS correctly determined that compensation pursuant to the Settlement Agreement, as well as service credit associated with this compensation, should not be used in calculating Respondent's retirement allowance. For this reason, the ALJ also concluded that CalPERS properly adjusted Respondent's retirement allowance and appropriately collected the overpayment mistakenly paid to Respondent prior to this adjustment.

For these reasons, staff argues that the Board of Administration should adopt the Proposed Decision.

September 20, 2017

[Signature]

JOHN SHIPLEY
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