ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)
Dear Ms. Swedensky:

Please find attached the captioned document, which has been calendared for consideration by the Board of Administration (Board) of the California Public Employees' Retirement System (CalPERS) at its meeting on September 20, 2017.

Thank You,

Burt Hirschfeld
SUBJECT: In the Matter of the Calculation of Final Compensation of BURT S. HIRSCHFELD, Respondent, and JUDICIAL COUNCIL OF CALIFORNIA, Respondent

Respondent Burt Hirschfeld's argument against Proposed Decision of the Administrative Law Judge in the above-named matter

To the Board of Administration (Board) of the California Public Employees' Retirement System (CalPERS)

Dear Members of the Board:

Thank you for the opportunity to submit this written argument concerning the Proposed Decision in the above-captioned matter. Unfortunately, I did not have legal representation at the hearing of my appeal, nor the education or experience to adequately present and defend my position. Though representation in writing would also serve my interests in this regard, that option is not within my reach at this time. That said, I hope I'm able to convey the points I was not prepared to fully communicate at the hearing.

CalPERS correctly established the retirement benefits to which I am entitled as reported to me by my employer at the time, the Judicial Council of California (JCC). The subsequent determinations rendered by CalPERS were in conflict with JCC policy, the Separation Agreement and Release of Claims (Agreement) referenced in the Proposed Decision, relevant statutes and the retirement webcasts and publications produced by CalPERS.

There are six central points corresponding to CalPERS determination and the Proposed Decision of the Administrative Law Judge in this matter:

1. Statutes on Compensation and Settlement Pay
2. Annual Leave
3. Statute on Errors and Omissions
4. Service Credit
5. Responsibility of the Employer

I. STATUTES ON COMPENSATION AND SETTLEMENT PAY

The assertion has been made that compensation I received while taking annual leave - paid leave - was not considered compensation earnable. That assertion references GC 20630, which reads, in part:

“(C)ompensation” 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.
(3) Industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code, Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or Section 44043 or 87042 of the Education Code.
(4) Vacation.
(5) Compensatory time off.
(6) Leave of absence.

**GC 20636** defines “Compensation earnable” as “the payrate and special compensation of the member…” and that “payrate” for state members means the average monthly remuneration... in payment for the member’s services or for time during which the member is excused from work because of holidays, sick leave, vacation, compensating time off, or leave of absence.

The code section also defines “Final settlement pay” to mean “any pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment.

Salary paid during the period of annual leave

1. is compensation earnable because it is payment for time during which I was an employee excused from work to take earned annual leave;

2. is not final settlement pay because there was no grant or award of any sort in excess of compensation earnable.

II. ANNUAL LEAVE

CalPERS staff has described salary received during Annual Leave, up until the point of separation, as final settlement pay. However, this characterization conflicts with report of the Legislative Analyst’s Office on state workers’ leave balances and the retirement benefits webcasts produced by CalPERS.

From page 6 of the “LAO Report After Furloughs: State Workers Leave Balances (March 14, 2013):

*After Furloughs: State Workers’ Leave Balances*

Leave Can Be ‘Banked,’ ‘Cashed Out,’ or ‘Burned Off.’

Different rules apply to the different types of leave. As shown in Figure 3, most paid days off—as well as leave days provided under the furlough programs or earned by working on holidays or overtime—may be banked and used in future years. In addition, most leave may be burned off, a term that means that the employee collects a salary and benefits while not working in the period just before he or she separates from state service.

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1 Another term for “Run Time.”
Burned leave is an election, not a “golden parachute” or a quid pro quo. An employee on annual leave is still an employee and a CalPERS member. When circumstances indicate the potential for claims against the JC, agreements are often made which allow an employee to resign in exchange for a release and indemnification of claims against the JCC. The employee's decision to burn off time or cash out, and the last date of employment determined by that decision, is always indicated on separation documents.

P. 11: "We note that employees also have a personal financial incentive to use furlough days before vacation/annual leave. This is because separating employees have the option of burning off or cashing out unused vacation/annual leave. Just as it is for separating state employees in general, Judicial Council employees may either burn-off leave ("run time") or cash out."

**III. STATUTE ON ERRORS AND OMISSIONS**

In her June 10, 2016 letter to the JCC and me, Michelle Balzouman of CalPERS offered an analysis of the reasons why CalPERS determined my retirement benefit, as initially reported by CalPERS, was determined incorrectly. On August 29, 2016, I was notified by CalPERS' Compensation Review unit that a determination had been made which, this time, denied a period of service credit I earned, resulting in a correction in my years of service from 16.850 to 16.329 years.
In the letter and notification, CalPERS advised that GC 20160 allowed the correction of prior mistakes and errors provided defines a relevant error or omission as one that was the result of a

"mistake, inadvertence, surprise, or excusable neglect."

as each of those terms is used in Section 473 of the Code of Civil Procedure. The conclusions reached by CalPERS were clearly not in response to a mistake, inadvertence, surprise, or excusable neglect; they were analytical assessments of decades-old JCC policy and the conclusion that those policies do not align with the intent of PERL.

IV. SERVICE CREDIT

The determination that a portion of my employment did not constitute service credit also stands in contrast to the Retirement Calculation Formula defined by CalPERS. The pension benefit is the result of calculating three factors, one of which is Service Credit. CalPERS defines Service Credit as:

**The total years of employment with a CalPERS employer.**

I was employed by a CalPERS employer from June 15, 2004, to February 29, 2016, a total of 11.850 years. By CalPERS definition, my service credit cannot be reduced because my employment cannot be reduced.

V. RESPONSIBILITY OF THE EMPLOYER

The Administrative Law Judge concludes her Proposed Decision with this perspective:

"(A)t the heart of this matter is the JCC's apparent misunderstanding of its ability to bind CalPERS in a settlement agreement with an employee. This led to an unfortunate result for Respondent, who seemingly relied on his employer to have the relevant knowledge and information. But the PERL governs CalPERS, which makes its own determinations in calculating retirement allowances in accordance with relevant statutes and regulations.

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2 Not including a service credit purchase of 5 years.
CalPERS, on the other hand, provides a perspective with a very distinct emphasis in the publication “Vested Rights of CalPERS Members: Protecting the pension promises made to public employees” (July 2011), the Introduction to which reads:

“CalPERS has prepared this paper for two purposes:

• To articulate the current state of California law regarding the nature of its members’ pension rights and the extent to which such rights have become “vested” and may not be impaired; and

• To explain the role of CalPERS in ensuring that its members’ vested rights are honored.”

The section “Overview: Member Benefits and Contributions” states:

“California law clearly establishes that public employee retirement benefits are a form of deferred compensation and part of the employment contract. Rights to this deferred compensation are earned when the employee provides service to the public employer.

Directly to the judge’s point, CalPERS goes on to say:

By statute and contract, public employers, not CalPERS, decide how much of an employee’s compensation will be paid currently and how much will be deferred and paid in the future. Simply put, employers grant the benefits owed to CalPERS’ members.

Lastly, in the section “Overview: Employer Funding Obligations,” CalPERS points out that:

The California Supreme Court long ago established that a promise of a pension made by a public employer to its employees is a promise the employer must keep. In other words, public employers in California are legally required to honor promises to current and former employees regardless of how much money they have set aside for that purpose.

Unfortunately, without the means to obtain legal representation at the hearing on this matter, I found myself ill-prepared to engage with CalPERS counsel in a competent manner. Without relevant arguments to make or points to defend, the Proposed Decision of the Administrative Law Judge would have no reason to appear less than a natural legal conclusion from the hearing and evidence. My hope is that this written argument provides the facts needed to give the Board a basis from which to make an informed decision. I am not approaching this process with the notion that I have “nothing to lose” by appealing the Proposed Decision. I am providing the Board with what I trust is the information needed to make the right decision and use its considerable authority to do what is fair and just.