ATTACHMENT B

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

The issue in this case is whether bonus payments made by Respondent Silicon Valley Clean Water (SVCW) to Respondent David Hall (Respondent Hall) should be considered in the determination of Respondent Hall’s final compensation for calculation of retirement benefits.

On February 11, 2015, Respondent Hall submitted his application for service retirement. He retired for service effective May 10, 2015, with approximately 30 years of service credit, and has been receiving his service retirement allowance from that date.

CalPERS reviewed the final compensation reported by SVCW on Respondent Hall’s behalf. CalPERS determined the special compensation classified as Performance Pay (Bonus) was not eligible to be included in the calculation of Respondent Hall’s final compensation.

Respondents SVCW and Hall appealed this determination and exercised their right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on July 10, 2017. After post-hearing briefs were submitted and considered, the case was final and submitted on September 29, 2017. Both Respondents were represented by counsel at hearing. Respondent SVCW appeared at hearing, and presented testimony from witnesses. Respondent Hall did not appear.

During the time period pertinent to evaluating Respondent Hall’s final compensation, management employees were evaluated annually using two somewhat overlapping documents. The first was a performance evaluation form, separated into two sections: Job Expectations and Objectives. Each section had five defined ratings: Exemplary, Fully Successful, Successful, Somewhat Successful and Unsuccessful. In his last full fiscal year before retirement, Respondent Hall’s overall rating in both sections was “Successful”.

The second overlapping document was a performance pay program. This program was initially introduced in 1988, and there were numerous revisions to it over the years. In 2006, the new Manager for SVCW wanted to create a more objective system for evaluating management employees. He overhauled the existing program, and created a new point based system, with those scoring at least 5.01 points (out of a possible 10) receiving an annual bonus. Generally, all management employees received a bonus. Respondent Hall received a bonus every year, except in 2010 when no employees received bonuses due to the economic downturn.

On June 16, 2014, CalPERS began inquiries regarding SVCW’s bonus plan. SVCW provided various documents, admitting that there is no one stand-alone document specifically outlining the bonus plan. CalPERS indicated that the documents “looked fine,” but criteria for payment was vague. CalPERS also quoted California Code of
Regulations §571 (CCR §571) criteria for reportable bonus, which is payable only for "Superior" performance.

According to testimony at hearing, SVCW's policies and Resolutions regarding the revised bonus program were available for inspection by the public if one came to the District office. However, the master spreadsheet in place since 2006 for calculation of performance pay for managers was not available for public scrutiny.

The ALJ found that Respondents have the burden of proof to establish a right to the bonus pay. All parties agreed that inclusion of the performance pay depends on whether it meets the requirements for "bonus," and all other restrictions applicable to special compensation set forth in CCR §571.

The ALJ correctly found that the performance pay in this case does not qualify as a bonus that may be considered as special compensation.

The first problem with Respondent Hall's performance pay is that it was not based on "Superior performance." Respondent's performance was rated as "Successful" for fiscal year 2013-2014 – merely an average score. He received no "Exemplary" rating, a score the ALJ found essentially the equivalent of "Superior."

Second, the ALJ found that none of the numerous policies and Resolutions regarding performance satisfied the "labor policy" requirement found in CCR §571(b)(1)(B), which provides that the labor policy must indicate "the conditions for payment of the item of special compensation, including eligibility for, and amount of, the special compensation." In this case, the only way to discern these elements is to access the master spreadsheet. The ALJ found that the master spreadsheet failed to meet the criteria because nothing in the record shows the SVCW actually voted to approve the program cryptically described as the Manager's "Spreadsheet." Even the spreadsheet itself does not explain how the performance pay is calculated. It does not convey the end number, provides a percentage increase of salary as performance pay, and does not include the very critical 5.01 point threshold for payment of any performance pay. Further, the ALJ found that a threshold score of 5.01 of a possible 10 points does not connote "Superior" performance.

Third, the ALJ found the entire performance pay scheme violative of CCR §571. Quoting from CalPERS' Precedential Decision In Re: Adams, the ALJ stated:

The Legislature intended that a public employee's 'payrate' be readily available to an interested person without unreasonable difficulty. This concept does not apply to a situation in which a public employee's payrate is buried in a carefully crafted agreement that is privately maintained and is not based on a published pay schedule or approved in a public manner, and that is not subject to public exposure except through a formal public records request, subpoena or other legal process.
Here, the ALJ reasoned that even if the spreadsheet were available for inspection (which it was not), it would be incomprehensible to any member of the public without a complicated explanation provided by SVCW. This does not satisfy the requirement that the performance pay program be “publicly available.”

The ALJ dismissed Respondents' arguments on the theory of equitable estoppel because the “statute and implementing regulation could not be clearer.” Only those items that meet the criteria for special compensation may be considered in the calculation of the member’s retirement. The performance pay did not comply with the specific requirements for reportable special compensation found in CCR §571. Therefore, including performance pay as special compensation would violate public policy, and exceed CalPERS' powers granted by the Legislature.

The ALJ also dismissed Respondents' arguments based on laches. Other than raising the issue, Respondents made no claim of prejudice in their ability to fully litigate their position regarding performance pay, by reason of any alleged delay on CalPERS' part. Thus, they failed to establish either of the two required elements of a laches defense, and the ALJ rejected that argument as well.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondents Hall and SVCW's appeals. The ALJ found that payments made by Respondent SVCW to Respondent Hall as performance pay (bonus) shall not be considered in the determination of Respondent Hall’s retirement benefits from CalPERS. Respondents’ appeals were denied.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

December 20, 2017.

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