ATTACHMENT A

THE PROPOSED DECISION
BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES’ RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Appeal Regarding the Uniform Allowance of:

ENCINA WASTEWATER AUTHORITY,

Respondent.

CalPERS Case No. 2016-0356
OAH No. 2017070683

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on April 16, 2018.

John Shipley, Senior Staff Attorney, represented petitioner California Public Employees’ Retirement System (CalPERS), State of California.

Tracie E. Stender, Attorney at Law, represented respondent Encina Wastewater Authority (EWA).

On April 16, 2018, the evidentiary record was closed. The parties were given the opportunity to submit closing written argument on or before May 16, 2018.

On May 16, 2018, the parties submitted closing argument. Attached to respondent’s closing argument was Exhibit 44, which consisted of three CalPERS audit reports related to uniform allowances. In its closing argument, respondent contended Exhibit 44, which had not been admitted into evidence, rebutted and impeached portions of the testimony of two CalPERS witnesses and established that CalPERS routinely determined shirts, pants and items of apparel containing identifying features were health and safety items. CalPERS filed its closing argument and objected to consideration of Exhibit 44 on the basis that the documentation contained in Exhibit 44 lacked foundation, was hearsay, irrelevant, and did not rebut or impeach any testimony.

On May 31, 2018, the parties participated in a telephonic conference regarding Exhibit 44. CalPERS did not object to reopening the record to permit Exhibit 44 to be marked. Without conceding that Exhibit 44 was relevant and should be admitted, CalPERS stipulated that CalPERS staff prepared the documentation comprising Exhibit 44 and Exhibit 44 was comprised of business records. The parties agreed that in lieu of holding a noticed

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hearing concerning the admissibility of Exhibit 44, the parties would file written argument related to Exhibit 44’s admissibility no later than the close of business on June 15, 2018.

On June 15, 2018, the parties filed written argument concerning the admissibility and relevance of Exhibit 44. On June 18, 2018, the parties were notified of the ruling concerning the admissibility of Exhibit 44. Exhibit 44 was marked but was not admitted into evidence. The evidentiary ruling related to Exhibit 44 is set forth in Legal Conclusion 3.

On June 18, 2018, the record was closed and the matter was submitted.

ISSUE

Should the monetary value related to the purchase, rental and maintenance of uniforms provided by EWA to certain employees be reported to CalPERS as uniform allowance?

IMPACT OF THE RESOLUTION OF THE ISSUES

The resolution of the factual issue in this matter impacts EWA’s contribution to CalPERS and the amount of retirement compensation to which certain retired EWA employees may be entitled.

SUMMARY OF PROPOSED DECISION

EWA issues long pants and long sleeve shirts to employees who might be exposed to raw sewage, wastewater, and other toxic substances during the wastewater treatment process. Those employees must wear EWA uniforms throughout their shifts. The uniforms provide the employees with an effective protective barrier between their bare skin and toxic materials that may be present in wastewater and raw sewage, as well as caustic substances used in the treatment process. EWA employees provided with uniforms must leave their uniforms at the treatment facility before leaving work. EWA maintains the uniforms. The color of the uniforms, the logos contained on them, and the material from which the uniforms are made has no impact on the effectiveness of the uniforms in providing employee health and safety. It is not significant that EWA employees, in some instances, may wear additional protective gear such as masks and heavy coats. The uniforms at issue were provided for no reason other than employee health and safety; the uniforms are not a ready substitute for personal attire an EWA employee might be required to acquire and maintain.

EWA persuasively established a reasonable connection between its provision and maintenance of the uniforms at issue and employee health and safety. Under Regulation 571, EWA is not required to report its provision and maintenance of the uniforms at issue as special compensation in the form of a uniform allowance.
FACTUAL FINDINGS

Respondent Encina Wastewater Authority

1. Respondent EWA is a public agency located in Carlsbad, California. EWA provides wastewater treatment services to more than 400,000 residents living in northwestern San Diego County. EWA is owned by six public agencies and is governed by a joint powers agreement. Under that agreement, EWA’s owners cooperatively fund, operate and manage the Encina Joint Sewerage System, which includes the Encina Water Pollution Control Facility, the Encina Ocean Outfall, and the Agua Hedionda and Buena Vista Pump Stations. EWA’s operations are regulated under the Clean Water Act and other federal and state law.

EWA contracts with CalPERS for the provision of retirement benefits for eligible employees. The provisions of EWA’s contract with CalPERS are contained in and subject to the Public Employees’ Retirement Law (PERL).

EWA provides uniforms to certain employees. Whether the purchase, rental and maintenance of those uniforms must be reported to CalPERS as a component of employee compensation is at issue in this matter.

CalPERS Funding and Special Compensation

2. An overview of the legal framework at issue was recently provided in DiCarlo v. City of Monterey (2017) 12 Cal.App.5th 468, 480-482, which may be summarized as follows:

PERL established CalPERS, a retirement system for employees of the state and participating local public agencies. CalPERS operates and manages a prefunded, defined benefit plan which sets an employee’s retirement benefits based on the factors of retirement age, length of service, and final compensation. The amount of an employee’s retirement allowance is partially based upon an employee’s payrate. But, employee compensation is not simply the cash remuneration received; it is exactingly defined to include or exclude various employment benefits and other items of pay. The scope of compensation is critical in setting the amount of retirement contributions because CalPERS is funded by employer and employee contributions that are calculated as a percentage of employee compensation.

Compensation reported by the employer to CalPERS must not exceed compensation earnable, as defined in Government Code section 20636. Section 20636, subdivision (a), provides “compensation earnable” means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Internal Revenue Code compliance.

Government Code section 20636, subdivision (c), defines special compensation as follows: special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions; special
compensation is limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate; special compensation must be for services rendered during normal working hours and, when reported to the CalPERS Board of Administration (the board), the employer must identify the pay period in which the special compensation was earned.

Government Code section 20636, subdivision (c)(7), limits special compensation: special compensation does not include final settlement pay; payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise; and, other payments the board has not affirmatively determined to be special compensation.

3. Government Code section 20636 also directs the board to promulgate regulations that delineate more specifically and exclusively what constitutes “special compensation.” In 1994, pursuant to that statutory direction, the promulgated California Code of Regulations, title 2, section 571 (hereafter Regulation 571).

Regulation 571, subdivision (a), sets forth a list that identifies and defines items of special compensation that must be reported to CalPERS. Subdivision (c) emphasizes the exclusivity of the list: “Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all standards.”

Rose v. City of Hayward - Uniforms as Compensation

4. Rose v. City of Hayward (1981) 126 Cal.App.3d 926, was decided well before the board promulgated Regulation 571. That case held that CalPERS should include annual uniform allowances provided to police officers and fire fighters when calculating retirement compensation. CalPERS took the position before Rose was decided that the uniform allowance should be excluded from calculating pension benefits because uniforms were “for the convenience of the employer,” “a condition of employment,” and “not compensation for services.” In response to that position, the appellate court determined:

To say that the uniform allowance benefits the employer, however begs the question. The issue is whether or not the allowance provides an “advantage” to the employee. While it is accurate to say that uniformity of attire provides a benefit to the employer in that it makes these civil servants readily identifiable to the public, it is at the same time accurate to say that the uniform allowance provides a benefit to the employee in that the uniform substitutes for personal attire which the employee

1 Although not specifically mentioned in the DiCarlo decision, Government Code section 20636, subdivision (b)(6), requires a “uniform allowance” to be included as special compensation and appropriately defined by regulation.
would otherwise be forced to acquire with personal resources. Therefore, the uniform allowance must be included in the computation of pension benefits. (Ibid., at p. 943.)

In a footnote specific to that holding, the appellate court observed:

We note that our reasoning as to the uniform allowance in this case may not be applicable in all instances where an employer provides an employee with work-related attire, or with an allowance for work-related attire. For example, if a fire department provided its workers with specially-designed asbestos uniforms, these could hardly be characterized as a ready substitute for personal attire and could not fairly be added in the computation of pension benefits. (Ibid, at p. 943.)

On the issue of whether an ammunition allowance should be included when calculating a retired member’s pension, the appellate court reasoned:

[T]he ammunition allowance is not an “advantage” to the employee in the same sense as is a uniform allowance. The uniform allowance provides an employee with funds with which to purchase clothing, a good which the employee would have to purchase regardless of the nature of his occupational duties. Ammunition is simply not analogous. While it is true in one sense that the employee “benefits” from the ammunition in that it protects him, the employee would not need to purchase the ammunition but for his employment. Where an employee is provided with an allowance to acquire goods or services which mitigate a risk inherent in the employment, the “benefit” to the employee is not compensable for pension purposes. . . . (Ibid., at p. 944.)

In the years following the Rose decision, state and contracting public agencies remained confused about what kinds of uniforms and allowances had to be reported as special compensation. In an effort to implement the appellate court’s decision in Rose, CalPERS issued a series of circular letters. CalPERS directed state and contracting agencies to report uniforms and uniform allowances as compensation, whether purchased or rented, “if the employer absorbs the costs involved” whenever the uniform was “a ready substitute for personal attire the employees would otherwise have to acquire with their own personal resources.” But, CalPERS’s publications also stated, “Health and safety equipment are excluded from the uniform allowance that should be reported to PERS.”

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2 A CalPERS circular letter dated January 11, 1985, stated shirts, trousers and slacks were items of apparel that should be reported as special compensation, but badges, nametags, name plates, lab smocks, shop coats, and coveralls should not be reported. This circular
Regulation 571

5. The board promulgated California Code of Regulations, title 2, section 571, in 1994. Subdivision (a) states:

The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement . . .

Regulation 571 identifies five different categories of special compensation:
(1) INCENTIVE PAY; (2) EDUCATIONAL PAY; (3) PREMIUM PAY; (4) SPECIAL ASSIGNMENT PAY; and (5) STATUTORY ITEMS.

Under item (5) – STATUTORY ITEMS – the following appears:

Uniform Allowance - Compensation paid or the monetary value for the purchase, rental and/or maintenance of required clothing, including clothing made from specially designed protective fabrics, which is a ready substitute for personal attire the employee would otherwise have to acquire and maintain. This excludes items that are solely for personal health and safety such as protective vests, pistols, bullets, and safety shoes.

Regulation 571, subdivision (c), provides: “Only items listed in subsection (a) have been affirmatively determined to be special compensation. . . .”

Regulation 571, subdivision (d), provides: “If an items of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual.”

EWA’s Provision of Uniforms to Certain Employees

6. Of the approximate 70 persons employed at EWA, about 80 percent must wear uniforms provided and maintained by EWA. Those employees work almost all the time behind protective fencing that surrounds EWA’s treatment facilities. The uniforms at issue consist of long pants and long sleeve shirts, made of cotton or a polyester blend, that are distinctive in color.

letter stated coveralls provided to cemetery workers constituted “protective clothing” and orange shirts provided to employees working in public streets should be considered “safety equipment” and should not be reported as employee compensation, but an allowance to a school bus driver to purchase a uniform required to be worn during working hours needed to be reported as employee compensation.
7. Debra Biggs is EWA’s Director of Operations. She is a chemist who has been employed by EWA for more than 15 years. She was very familiar with EWA’s wastewater operations, including the treatment of raw sewage.

There are significant health hazards associated in the treatment of raw sewage. EWA line employees and their direct supervisors are exposed to bacteria, bloodborne pathogens, and caustic and corrosive chemicals in the treatment process. These employees are exposed to health hazards when cleaning bar screens containing raw sewage, working in and around the raw sewage as it is separated and treated, when sampling and testing solid materials and wastewater, and in cleaning and maintaining equipment. Reasonable safety measures include the need to prevent direct contact between an employee’s skin and the toxins inherent in the wastewater and sewage being treated and the substances used in their treatment.

Line employees who work with or in and around raw sewage must wear distinctive uniforms with name tags. The uniforms include long sleeve shirts and long pants. Direct supervisors of these line employees, who also work with or in and around raw sewage, wear different colored shirts. The shirts and pants provided by EWA to its employees create a protective barrier between their bare skin and the toxic materials being treated and the dangerous substances used in the treatment process. Additional protective clothing may be worn over the shirts and pants under certain circumstances.

EWA employees and their supervisors who have or may have contact with raw sewage wear their own clothing to work, change into required uniforms in a locker room before their shifts begin, and change out of their uniforms and back into their personal attire at the end of their shifts. They must leave their uniforms in the locker room at the conclusion of the workday; they are not permitted to wear or take the uniforms away from the worksite. Employees required to wear EWA uniforms must shower at the end of their shifts before leaving the facility to reduce the risk of harm associated with their exposure to wastewater, raw sewage and the treatment process. EWA maintains and cleans the uniforms provided to its employees.

EWA does not provide uniforms to administrators and others employed by EWA who are not exposed to risks of harm associated with exposure to wastewater, raw sewage and the treatment process. While there may be occasional contact between members of the public and a few EWA employees who wear EWA uniforms, such contact is very rare.

Ms. Biggs believed the uniforms provided by EWA to its employees were effective and necessary to comply with Occupational Health and Safety Administration (OSHA) regulations. She believed EWA uniforms were “the first level of protection” for employees exposed to hazardous worksite toxins and chemicals.

8. Jean Tobin has been EWA’s Safety and Training Manager for more than five years. She has been employed by San Elijo Joint Powers Authority (SEJPA) in the same capacity for the past year and one-half. Ms. Tobin is a chemical engineer who has much
experience in workers’ compensation loss control, OSHA compliance, and safety program development.

Ms. Tobin confirmed that EWA employees who have a risk of exposure to or contact with wastewater and raw sewage in the treatment process are subjected to significant health hazards, including bloodborne pathogens and caustic chemicals. She believed the uniforms worn by EWA employees and the frequent cleaning of those uniforms was an essential component of employee health and safety. She acknowledged the uniform pants and shirts worn by EWA employees were either made of 100 percent cotton or of a blend of cotton and polyester, and the composition of the uniforms was very similar to the composition of garments that could be purchased at retail outlets such as Macy’s. She believed EWA’s uniforms complied with OSHA protective uniform standards and EWA’s provision of uniforms to specified employees was mandated by OSHA.

9. Debbie Allen has been with EWA for more than five years. She serves as EWA’s Human Resources Manager.

EWA employees working in Operations, Maintenance, Source Control and Lab, i.e., those employees who work with or around wastewater and raw sewage, must wear EWA-supplied uniforms. EWA does not provide uniforms to employees working in the Administrative Department, who have no risk of exposure to raw sewage or wastewater; those employees are not required to wear any kind of uniform.

A portion of EWA’s Human Resources Policy Manual states:

Certain positions within EWA require uniforms to be worn during working hours in order to protect personal health and safety. Employees whose position requires a uniform cannot perform their job duties without wearing the required uniform. Uniforms should always be neat and clean. Uniforms are furnished by EWA and employees may not remove uniforms from the premises or wear them to or from work unless specifically authorized.

10. Ms. Bibbs, Ms. Tobin, and Ms. Allen’s testimony established a factual basis for EWA’s assertion that the uniforms EWA provides to specified employees and the cost of replacing, maintaining and cleaning those uniforms is solely related to an employee’s personal health and safety and, thus, does not need to be reported to CalPERS as special compensation.

11. CalPERS presented the testimony of Christopher Walls and Samuel Camacho, Jr., to support its claim that EWA’s provision of uniforms to specified employees was special compensation that should be reported.
12. Mr. Walls has been employed by CalPERS for approximately 13 years. He holds a bachelor’s degree in Political Science. He served as a CalPERS staff auditor for nine years and has been a Senior Audit Manager for the past three years.

Mr. Walls was CalPERS’s lead auditor in the EWA audit that was the basis of the following allegations in the Statement of Issues:

VI

On June 4, 2014, CalPERS’ Office of Audit Services (OFAS) completed a public agency review of EWA’s payroll and other relevant records regarding compensation reported to CalPERS for individuals in a test sample of employees over the service period from July 1, 2010, through June 30, 2013.

VII

On or about July 16, 2014, the CalPERS Audit Compliance & Resolution Unit received the Final Audit Report of the public agency review for the District. Finding 2B states:

The Agency did not report the monetary value of uniforms and uniform maintenance, a statutory item of compensation, for all employees who were provided with uniforms. . . .

[¶] . . . [¶]

XI

After review of the documentation provided by the (OFAS), CalPERS has determined that EWA requires certain employees to wear uniforms; EWA provides the employees with uniforms at no cost to the employees; EWA launders these uniforms and/or items of clothing at no cost to the employees and the uniforms are not solely for personal health and safety. Consequently, CalPERS determined that the monetary value of the purchase, rental and maintenance of the uniforms should have been reported by EWA as uniform allowance of all impacted employees as required by the PERL.

13. Mr. Walls conducted a standard audit of EWA. He contacted EWA, sent an engagement letter, conducted an entrance conference, engaged in field work, conducted an exit conference in which he discussed his findings and obtained EWA responses, prepared a draft report that was provided to EWA for comment, and prepared and caused a final audit
report to be issued. The final audit report mentioned several areas of incorrect reporting, one of which was EWA’s failure to “report the monetary value of uniforms and uniform maintenance. . . .”

EWA’s preliminary response to the draft audit report, which thanked Mr. Walls for his courtesy, did not constitute an admission that CalPERS’s determination that EWA failed to report a uniform allowance was correct.

14. Mr. Walls believed EWA’s provision and maintenance of uniforms to certain employees should have been reported as special compensation because invoices issued to EWA by an industrial supply service included charges for polyester polo shirts and pants and cotton work shirts and work pants. While he believed EWA’s provision of pants and shirts to specified employees may have provided employees with an element of personal safety, the uniforms were in fact more in the nature of a ready substitute for the personal attire an EWA employee would otherwise have had to acquire and maintain; he believed the uniforms at issue were not provided solely for an employee’s personal health and safety.

Mr. Walls believed that Ms. Allen’s memo, dated October 17, 2013, supported this conclusion. That memo stated in part:

> EWA rents uniforms for the use of our employees whose positions require them. Employees return the uniforms when they leave EWA employment, and we return them to the rental company. I believe this should be treated like any other equipment that we make available for employees to use (but not keep) in the course of their work here. . . .

Finally, Mr. Walls observed that EWA uniforms were not constructed of any kind of protective fabric and were not similar to protective vests, pistols, bullets, and safety shoes, items of special compensation specifically identified in Regulation 571.

Mr. Walls was present when Ms. Bibbs, Ms. Tobin, and Ms. Allen testified. Ms. Allen’s testimony was consistent with her memo and clarified information set forth in that memo. The sworn testimony of Ms. Bibbs, Ms. Tobin, and Ms. Allen did not result in Mr. Walls changing his previously developed opinion that EWA uniforms were essentially a substitute for personal attire and were not provided solely for an employee’s personal health and safety.

15. Samuel Camacho, Jr., has been employed by CalPERS for more than 12 years. He currently works in the Employer Account Management Division as a Retirement Program Specialist. His duties include reviewing the compensation reporting practices of public agencies.

Mr. Camacho did not participate in the EWA audit and was not involved in making the determination that EWA’s provision and maintenances of uniforms to specified
employees should be reported as employee compensation. He became involved in the EWA matter a few months before the hearing, and then solely for the purpose of reviewing several files and other documents in order to provide testimony in the hearing in this matter. He was present when Ms. Bibbs, Ms. Tobin, and Ms. Allen testified.

In reaching his opinion in this matter, Mr. Camacho reviewed CalPERS's files related to the EWA audit. He reviewed CalPERS's Rulemaking File related to Regulation 571 and the amendment to subdivision (a)(5), which added specific language excluding from special compensation uniforms “made from specially designed protective fabrics.”

Mr. Camacho opined that only those items of equipment or apparel used solely for an employee’s personal health and safety or those items of equipment or apparel specifically identified by statute or regulation were exempt from being reported, and all other items of equipment and apparel provided to employees had to be reported as special compensation. He had never known of shirts or pants qualifying for exclusion from reporting on the basis that such items of apparel constituted protective clothing, and he did not believe such an exclusion was possible unless the garment was made of a specially designed protective fabric. Mr. Camacho testified that boots provided by employers to employees did not need to be reported as special compensation, even though “boots” are not specifically mentioned in the regulation, because boots could be considered “safety shoes” under Regulation 571, subdivision (a)(5).

16. EWA’s witnesses had a monopoly of the expertise and technical knowledge related to wastewater treatment, the hazards related to the treatment of wastewater and raw sewage, and the most reasonable methods to protect employees from having skin-to-toxin contact. EWA established reasonable workplace rules that required specified employees to wear uniforms consisting of long pants, long sleeve shirts, and boots when working. EWA employees at risk of having contact with wastewater and raw sewage are prohibited from wearing shorts, tee shirts, flip flops or other commonly worn items of personal apparel when working. The color of the uniforms, the presence of identifying information on them, and the uniform’s fabric was not significant in reaching the conclusion that the pants and shirts EWA provided to employees were solely for the health and safety of the employees. Nor was it significant that in some instances additional protective gear, such as masks and heavy coats, might be worn over the uniforms. The uniforms were the first line of defense in preventing skin-to-toxin contact.

The testimony from EWA’s witnesses concerning the need, effectiveness, and value of the uniforms at issue persuasively established that EWA’s provision of uniforms was related to employee safety. No other reason for the provision and maintenance of those uniforms was established.

17. The testimony of CalPERS’s witnesses focused on restrictions on what properly could and could not be considered safety apparel under Regulation 571, emphasizing Regulation 571’s use of the terms “solely” and “personal,” observing that EWA uniforms were not constructed of special fabrics, and suggesting that pants and shirts
could not be considered safety gear. Their testimony was, to a great extent, in the nature of legal opinion, i.e., how Regulation 571 should be interpreted and how it should be applied. CalPERS’s witnesses claimed no expertise in the treatment of wastewater and raw sewage or in the prevention of dangers related to wastewater treatment.

One CalPERS witness conceded there was a component of safety involved in EWA’s provision of uniforms to specified employees, but he nevertheless believed the provision of the uniforms had to be reported as special compensation for two reasons: first, the uniforms were no more than a ready substitute for what an EWA employee would otherwise be required to wear to work; second, there was no risk of skin-to-toxin contact at all times the employee was at work.

The other CalPERS witness stated shirts and pants were not specifically mentioned in Regulation 571 and he had never heard of a public agency not being required to report uniforms consisting of pants or shirts as compensation.

LEGAL CONCLUSIONS

Burden of Proof and Burden of Persuasion

1. “Burden of proof” means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.) A party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. (Evid. Code, § 500.) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact. (Evid. Code, § 550, subd. (b).)

Initially, the burden of producing evidence as to a particular fact rests on the party with the burden of proof as to that fact. If that party fails to produce sufficient evidence to make a prima facie case, it risks an unfavorable determination. But once that party produces evidence sufficient to make its prima facie case, the burden of producing evidence shifts to the other party to refute the prima facie case. Even though the burden of producing evidence shifts to the other party, that party need not offer evidence in reply, but the failure to do so risks an adverse verdict. Once a prima facie showing is made, it is for the trier of fact to say whether or not the crucial and necessary facts have been established. (Sargent Fletcher, Inc. v. Able Corp. (2003) 110 Cal.App.4th 1658, 1667-1668.)

2. EWA had the burden of establishing by a preponderance of the evidence that its provision and maintenance of the uniforms at issue – consisting of cotton and polyester blend long pants and cotton and polyester blend long sleeve shirts – to specified employees were provided solely for employee health and safety and were not a ready substitute for personal attire.
Admissibility of Exhibit 44

3. EWA offered Exhibit 44, which included CalPERS’s audit reports for the City of Menlo Park, dated March 2007, the Town of Los Gatos, dated June 2007, and the City of San Marcos, dated July 2013. Counsel stipulated the documentation in Exhibit 44 was prepared by CalPERS’s staff in the ordinary course of business. CalPERS’s technical objection to the admissibility of Exhibit 44 on the grounds of lack of foundation is rejected.

As to CalPERS’s objection that Exhibit 44 is hearsay, Government Code section 11513, subsections (c) and (d), provide:

(c) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

The audit reports represent the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Exhibit 44 is admissible as administrative hearsay so long as it is relevant to some issue in this matter and supplements or explains other evidence.

Respondents claimed the three audits reports impeached Samuel Camacho’s testimony to the effect that he had never heard of CalPERS determining that shirts and pants were exempt health and safety items; impeached Chris Wall’s testimony that shirts containing identifying features could not be exempt as health and safety items; and, prove that “CalPERS routinely found the opposite.”

Exhibit 44 is administrative hearsay; it is not admissible, by itself, to support a factual finding. The reports do not establish as a matter of fact that CalPERS “routinely” found shirts and pants to be exempt from reporting as health and safety items or that shirts with identifying features can never be exempt from being reported as special compensation. Nothing in the audit reports stated that was the case.

Exhibit 44 is administrative hearsay; as such, Exhibit 44 must supplement or explain other evidence. The audit reports lack sufficient factual detail to determine how or why
CalPERS staff determined orange shirts were provided for safety purposes (Menlo Park); why jeans should not be considered safety items (Menlo Park); why orange shirts with identifying logos were determined to be for safety purposes, but similar blue shirts were not (Los Gatos); or why jackets, overalls and safety vests provided to employees by a public entity were determined to be safety items despite the entity’s assertion those items were no more than a ready substitute for personal attire the employee would otherwise be required to provide (San Marcos). On those specific issues, there was a lack of foundation. Exhibit 44 did not supplement or explain in any meaningful way what factors or other reasons support a determination that employer-provided uniforms are exempt from being reported as special compensation.

Does Exhibit 44 impeach any witness?

A witness may be impeached, i.e., discredited, by two chief methods: (a) cross-examination of the witness; and (b) rebuttal, using other witnesses to impeach the witness or introducing other impeaching evidence. (3 Witkin, Cal. Evid. 5th (2018) Methods of Impeachment, § 270.)

It was not established that Mr. Camacho or Mr. Walls participated in the audits included in Exhibit 44. Nor was it established that either of them read, considered or even knew about the information, contents or conclusions contained in those audits. Thus, their impeachment on the basis of a prior inconsistent statement does not exist under Evidence Code section 780, subdivision (g).

It was not established that Mr. Camacho or Mr. Walls made any effort to review a representative body of CalPERS audit reports in forming their opinions related to uniform allowances. Mr. Walls’s testimony was limited to what he did during the audit at issue and his experience in conducting other audits. Mr. Camacho’s testimony was based on his interpretation of statutory and regulatory materials and his experience at CalPERS. Exhibit 44 did not impeach the testimony of either witness in that regard.

EWA was concerned that Mr. Camacho’s testimony to the effect that he had never heard of shirts and pants being anything other than having to be reported as special compensation might be misunderstood as a CalPERS policy, which could result in deference being given to CalPERS’s interpretation of the applicable statutes and regulation in this matter. But, Mr. Camacho’s testimony did not establish a CalPERS policy or reflect staff deliberations. In passing, it is worth noting that in response to respondent’s motion in limine concerning the admissibility of staff deliberations, CalPERS argued. “The physical and mental processes utilized by CalPERS’ staff in reaching the decision are simply not material to this issue. The decision reached by CalPERS was set forth in CalPERS’

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3 It may be that orange shirts were and are considered exempt because it is common to see persons working in public streets and roadways wearing orange shirts and vests, presumably because the color orange makes them more visible, but that reasoning was not provided in any CalPERS audit or circular letter.
determination letters and the audit. . .” Exhibit 44 does not include staff deliberations or an expression of formal CalPERS policy.

Exhibit 44 was not admitted. It was irrelevant to this proceeding. It did not establish as a matter of fact that CalPERS routinely determined that shirts and pants are considered health and safety items, nor did it establish the contrary. Exhibit 44 did not establish that shirts with identifying features cannot be health and safety items, nor did it establish the contrary. Exhibit 44 did not impeach or rebut the testimony of Mr. Walls or Mr. Camacho.

Interpretation of the Regulation

4. When interpreting regulations, the court seeks to ascertain the intent of the agency issuing the regulation by giving effect to the usual meaning of the language used so as to effectuate the purpose of the law, and by avoiding an interpretation which renders any language mere surplusage. (Diablo Valley Coll. Faculty Senate v. Contra Costa Cnty. Coll. Dist. (2007) 148 Cal.App.4th 1023, 1037.)

An agency’s interpretation of the meaning and legal effect of a statute or regulation is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to “make law,” and which, if authorized by the enabling legislation, bind courts as firmly as statutes themselves, the binding power of an agency’s interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation. (De La Torre v. California Horse Racing Bd. (2007) 7 Cal.App.5th 1058, 1065.)

Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. However, the admissibility of opinion evidence that embraces an ultimate issue does not bestow upon an expert carte blanche to express any opinion he or she wishes. There are limits to expert testimony, not the least of which is the prohibition against admission of an expert’s opinion on a question of law. (Summers v. A.L. Gilbert Co. (1999) 69 Cal.App.4th 1155, 1178.)

Within the context of this hearing, the question was whether the clothing at issue provided EWA employees with effective skin-to-toxin protection, whether that clothing was more than a mere substitute for the personal attire employees might wear to work, and whether the EWA uniforms were provided solely for employee health and safety. The resolution of these issues required a close examination of the facts when applying relevant statutes and Regulation 571.

Uniform Allowances as Special Compensation

5. Under Regulation 571, an employer participating in the CalPERS retirement system must report to CalPERS as special compensation:
Compensation paid or the monetary value for the purchase, rental and/or maintenance of required clothing, including clothing made from specially designed protective fabrics, which is a ready substitute for personal attire the employee would otherwise have to acquire and maintain. This excludes items that are solely for personal health and safety such as protective vests, pistols, bullets, and safety shoes.

6. The 2002 amendment to Regulation 571 added the phrase “including clothing made from specially designed protective fabrics” and the term “solely” to the existing regulation. The 2002 amendment, as it relates to “specially designed protective fabrics,” does not purport to limit what kinds of uniforms might qualify as non-reportable safety attire; nor does the use of the term “solely” require that a uniform provide an employee with safety during all working hours and for all tasks required at the worksite where the uniform is worn.

Safety Uniforms and Equipment Are Exempt from Being Reported to CalPERS as Special Compensation Under Appropriate Circumstances

7. As noted in a Circular Letter, CalPERS considers orange safety vests worn by street workers to be non-reportable items of clothing under the personal safety exemption, despite the fact the vests may not be made of a special fabric and may be worn by the employees when eating lunch, writing reports, or making phone calls.

As pointed out in a Circular Letter, CalPERS considers overalls worn by cemetery workers to be non-reportable items of clothing under the personal safety exemption, despite the fact that the coveralls may be worn when these employees are not digging graves or having contact with the deceased.

Regulation 571 should be interpreted in a reasonable fashion to exempt bona fide safety uniforms from having to be reported as special compensation; doing so provides contracting agencies with an added incentive to provide public employees with uniforms that protect their employees while they are at work.

In this case, EWA, the contracting agency, persuasively established a reasonable connection between its provision and maintenance of the uniforms at issue and employee health and safety. As EWA’s policy manual specifically states: “Certain positions within EWA require uniforms to be worn during working hours in order to protect personal health and safety. Employees whose position requires a uniform cannot perform their job duties without wearing the required uniform. Uniforms should always be neat and clean. Uniforms are furnished by EWA and employees may not remove uniforms from the premises or wear them to or from work unless specifically authorized.”

8. The persuasive testimony of EWA witnesses established the uniforms provided to specified employees afforded effective direct skin-to-toxin protection; all
employees at risk were required to wear the uniforms when at work and were not permitted to wear any other clothing at work; uniforms had to remain at the worksite after work and were regularly maintained to assure their effectiveness; and, uniforms were not provided to employees who were not at risk. The uniforms at issue were issued solely for safety reasons. They were not a mere substitute for the personal attire employees wore to work. There was no substantial evidence to the contrary.

This case does not involve an agency’s exploitation of the safety uniform exemption, such as might exist if it were claimed that Armani suits and Salvatore Ferragamo shoes were issued to an agency’s executive officers as a safety garments and were, thus, exempt from reporting. In this matter, reaching the conclusion that the uniforms at issue do not need to be reported as special compensation does not result in a windfall to any employee. Not requiring EWA to report the monetary value of the safety garments provided by EWA to certain employees does not create an unfunded liability above actuarial assumptions.

The monetary value for the purchase, rental and maintenance of uniforms at issue provided by EWA to certain employees should not be reported to CalPERS as uniform allowance.

ORDER

Respondent Encina Wastewater Authority’s appeal is granted. Respondent Encina Wastewater Authority need not report to CalPERS the monetary value of the uniforms at issue as special compensation in the form of a uniform allowance.

DATED: June 29, 2018

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings
BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Appeal Regarding the Uniform Allowance of:
SAN ELIJO JOINT POWERS AUTHORITY,
Respondent.

Case No. 2016-0354
OAH No. 2017070687

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on April 16, 2018.

John Shipley, Senior Staff Attorney, represented petitioner California Public Employees' Retirement System (CalPERS), State of California.

Tracie E. Stender, Attorney at Law, represented respondent San Elijo Joint Power Authority (SEJPA).

On April 16, 2018, the evidentiary record was closed. The parties were given the opportunity to submit closing written argument on or before May 16, 2018.

On May 16, 2018, the parties submitted closing argument. Attached to respondent's closing argument was Exhibit 44, which consisted of three CalPERS audit reports related to uniform allowances. In its closing argument, respondent contended Exhibit 44, which had not been offered into evidence, rebutted and impeached portions of the testimony of two CalPERS witnesses and established that CalPERS routinely determined shirts, pants and items of apparel containing identifying features were health and safety items. CalPERS filed its closing argument and objected to consideration of Exhibit 44 on the basis that Exhibit 44 had not been offered and the documentation contained in Exhibit 44 lacked foundation, was hearsay, irrelevant, and did not rebut or impeach any testimony.

On May 31, 2018, the parties participated in a telephonic conference regarding Exhibit 44. CalPERS did not object to reopening the record to permit Exhibit 44 to be marked. Without conceding that Exhibit 44 was relevant and should be admitted, CalPERS
stipulated that CalPERS’s staff prepared the documentation included in Exhibit 44 and that Exhibit 44 comprised business records. The parties agreed that in lieu of holding a noticed hearing concerning the admissibility of Exhibit 44, the parties would file written argument related to Exhibit 44’s admissibility no later than the close of business on June 15, 2018.

On June 15, 2018, the parties filed written argument concerning the admissibility and relevance of Exhibit 44. On June 18, 2018, the parties were notified of the ruling concerning the admissibility of Exhibit 44. Exhibit 44 was marked, but was not admitted into evidence. The evidentiary ruling related to Exhibit 44 is set forth in Legal Conclusion 3.

On June 18, 2018, the record was closed and the matter was submitted.

ISSUE

Should the monetary value related to the purchase, rental, and maintenance of uniforms provided by SEJPA to certain SEJPA employees be reported to CalPERS as a uniform allowance?

IMPACT OF THE RESOLUTION OF THE ISSUES

The resolution of the factual issue in this matter impacts SEJPA’s and employees’ contributions to CalPERS and the amount of retirement compensation to which certain retired SEJPA employees may be entitled.

SUMMARY OF PROPOSED DECISION

SEJPA issues pants and shirts to employees who might be exposed to raw sewage, wastewater and other toxic substances during the wastewater treatment process. Those employees must wear SEJPA uniforms throughout their shifts. The uniforms provide the employees with an effective protective barrier between their bare skin and toxic materials that may be present in wastewater and raw sewage, as well as caustic substances used in the treatment process. SEJPA employees provided with uniforms must leave their uniforms at the treatment facility before leaving work. SEJPA maintains the uniforms. The color of the uniforms, the logos contained on them, and the material from which the uniforms are made has no impact on the effectiveness of the uniforms in providing employee health and safety. It is not significant that SEJPA employees, in some instances, may wear additional protective gear such as masks and heavy coats. The uniforms at issue were provided for no reason other than employee health and safety; the uniforms are not a ready substitute for personal attire an SEJPA employee might be required to acquire and maintain.

SEJPA persuasively established a reasonable connection between its provision and maintenance of the uniforms at issue and employee health and safety. Under Regulation 571,
SEJPA is not required to report its provision and maintenance of the uniforms at issue as special compensation in the form of a uniform allowance.

FACTUAL FINDINGS

Respondent San Elijo Joint Powers Authority

1. Many years ago, wastewater generated in Solana Beach and Cardiff was collected in private septic tanks or privately discharged into the surf. In 1950, Solana Beach and Cardiff collection systems were constructed; due to the mounting water quality concerns in the San Elijo Lagoon, the San Elijo Water Pollution Control Facility (now the San Elijo Water Reclamation Facility or SEWRF) was constructed and placed in service. The SEWRF was operated by the County of San Diego. As flows increased and the Clean Water Act loomed, the plant converted to advanced primary treatment in 1981.

In 1986, the cities of Solana Beach and Encinitas were incorporated and ownership of SEWRF was transferred from the County to SEJPA. Major facility improvements were completed in 1992, which included secondary treatment facilities and other upgrades. In 2000, the agency completed construction of its recycled water utility. This system creates locally produced drought resistant, water for irrigation and industrial uses in Encinitas, Solana Beach, and Del Mar. The recycled water utility includes treatment (both traditional sand filtration and micro filtration/reverse osmosis), disinfection, distribution, and storage. SEJPA sells recycled water to San Dieguito Water District, Santa Fe Irrigation District, Olivenhain Municipal Water District, and the City of Del Mar for resale to their customers.

SEJPA governs the operations of SEWRF. SEJPA is similar to public utilities that supply drinking water, natural gas, or electricity. Operation and maintenance revenues come from member agencies sanitation funds, outside services, and the sale of recycled water.

2. SEJPA contracts with CalPERS for the provision of retirement benefits for eligible employees. The provisions of SEJPA’s contract with CalPERS are contained in and subject to the Public Employees’ Retirement Law (PERL).

3. SEJPA provides uniforms to certain employees. Whether the purchase, rental and maintenance of those uniforms must be reported to CalPERS as a component of employee compensation is at issue in this matter.

CalPERS Funding and Special Compensation

4. An overview of the legal framework at issue was recently provided in DiCarlo v. City of Monterey (2017) 12 Cal.App.5th 468, 480-482, which may be summarized as follows:
PERL established CalPERS, a retirement system for employees of the state and participating local public agencies. CalPERS operates and manages a prefunded, defined benefit plan which sets an employee’s retirement benefits based on the factors of retirement age, length of service, and final compensation. The amount of an employee’s retirement allowance is partially based upon an employee’s payrate. But employee compensation is not simply the cash remuneration received; it is exactingly defined to include or exclude various employment benefits and other items of pay. The scope of compensation is critical in setting the amount of retirement contributions because CalPERS is funded by employer and employee contributions calculated as a percentage of employee compensation.

Compensation reported by the employer to CalPERS must not exceed compensation earnable, as defined in Government Code section 20636. Section 20636, subdivision (a), provides “compensation earnable” is the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Internal Revenue Code compliance.

Under Government Code section 20636, subdivision (c), special compensation includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions; it is limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate; it must be for services rendered during normal working hours and, when reported to the CalPERS Board of Administration (the board), the employer must identify the pay period in which the special compensation was earned.

Government Code section 20636, subdivision (c)(7), limits special compensation: special compensation does not include final settlement pay; payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise; and, other payments the board has not affirmatively determined to be special compensation.

5. Government Code section 20636 directs the board to promulgate regulations that delineate more specifically and exclusively what constitutes “special compensation.” In 1994, pursuant to that statutory direction, the board promulgated California Code of Regulations, title 2, section 571 (hereafter Regulation 571). Regulation 571, subdivision (a), sets forth a list that identifies and defines items of special compensation that must be reported to CalPERS. Subdivision (c) emphasizes the exclusivity of the list: “Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all standards.”

1 Although not mentioned in the DiCarlo decision, Government Code section 20636, subdivision (b)(6), requires a “uniform allowance” to be included as special compensation and appropriately defined by regulation.
Rose v. City of Hayward - Uniforms as Compensation

6. Rose v. City of Hayward (1981) 126 Cal.App.3d 926, was decided well before the board promulgated Regulation 571. That case held that CalPERS should include annual uniform allowances provided to police officers and fire fighters when calculating their retirement compensation. CalPERS took the position before Rose was decided that the uniform allowance should be excluded when calculating pension benefits because uniforms were “for the convenience of the employer,” “a condition of employment,” and “not compensation for services.” In response to that position, the appellate court determined:

To say that the uniform allowance benefits the employer, however begs the question. The issue is whether or not the allowance provides an “advantage” to the employee. While it is accurate to say that uniformity of attire provides a benefit to the employer in that it makes these civil servants readily identifiable to the public, it is at the same time accurate to say that the uniform allowance provides a benefit to the employee in that the uniform substitutes for personal attire which the employee would otherwise be forced to acquire with personal resources. Therefore, the uniform allowance must be included in the computation of pension benefits. (Id., at p. 943.)

In a footnote specific to that holding, the appellate court observed:

We note that our reasoning as to the uniform allowance in this case may not be applicable in all instances where an employer provides an employee with work-related attire, or with an allowance for work-related attire. For example, if a fire department provided its workers with specially-designed asbestos uniforms, these could hardly be characterized as a ready substitute for personal attire and could not fairly be added in the computation of pension benefits. (Ibid, at p. 943.)

On the issue of whether an ammunition allowance should be included when calculating a retired member’s pension, the appellate court reasoned:

[T]he ammunition allowance is not an “advantage” to the employee in the same sense as is a uniform allowance. The uniform allowance provides an employee with funds with which to purchase clothing, a good which the employee would have to purchase regardless of the nature of his occupational duties. Ammunition is simply not analogous. While it is true in one sense that the employee “benefits” from the ammunition in that it protects him, the employee would not need to purchase the ammunition but for his employment. Where an employee is provided with an allowance to acquire goods or services which mitigate a risk inherent in the employment, the “benefit” to the employee is not compensable for pension purposes. . . . (Id., at p. 944.)
In the years following the *Rose* decision, state and contracting public agencies remained confused about what kinds of uniforms and allowances should be reported as special compensation. In an effort to implement the appellate court's decision in *Rose*, CalPERS issued a series of circular letters. CalPERS directed state and contracting agencies to report uniforms and uniform allowances as special compensation, whether purchased or rented, "if the employer absorbs the costs involved" whenever the uniform was "a ready substitute for personal attire the employees would otherwise have to acquire with their own personal resources." But, CalPERS publications also stated, "Health and safety equipment are excluded from the uniform allowance that should be reported to PERS."\(^2\)

**Regulation 571**

7. The board promulgated California Code of Regulations, title 2, section 571, in 1994. Subdivision (a) states:

> The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement . . .

Regulation 571 identifies five different categories of special compensation:

(1) INCENTIVE PAY; (2) EDUCATIONAL PAY; (3) PREMIUM PAY; (4) SPECIAL ASSIGNMENT PAY; and (5) STATUTORY ITEMS.

Under item (5) – STATUTORY ITEMS – the following appears:

Uniform Allowance - Compensation paid or the monetary value for the purchase, rental and/or maintenance of required clothing, including clothing made from specially designed protective fabrics, which is a ready substitute for personal attire the employee would otherwise have to acquire and maintain. This excludes items that are solely for personal health and safety such as protective vests, pistols, bullets, and safety shoes.

Regulation 571, subdivision (c), provides: "Only items listed in subsection (a) have been affirmatively determined to be special compensation . . ." Regulation 571, subdivision (d), provides: "If an items of special compensation is not listed in subsection (a), or is out of

\(^2\) A CalPERS circular letter dated January 11, 1985, stated shirts, trousers, and slacks were items of apparel that should be reported as special compensation, but badges, nametags, name plates, lab smocks, shop coats, and coveralls should not be reported. This circular letter stated coveralls provided to cemetery workers constituted "protective clothing" and orange shirts provided to employees working in public streets should be considered "safety equipment" that not be reported as special compensation, but an allowance to a school bus driver to purchase a uniform required to be worn during working hours needed to be reported as special compensation.
compliance with any of the standards in subsection (b) as reported for an individual, then it
shall not be used to calculate final compensation for that individual."

**SEJPA’s Provision of Uniforms to Certain Employees**

8. There are significant health hazards associated with the treatment of wastewater and raw sewage. SEJPA line employees and their direct supervisors are exposed to bacteria, bloodborne pathogens, and caustic and corrosive chemicals in the treatment process.

A dozen of the approximately 20 persons employed by SEJPA must wear uniforms provided and maintained by SEJPA. Those employees work almost all the time at pump stations not open to the public. The uniforms at issue consist of cotton pants and shirts. The employees also wear gloves issued by SEJPA. Line workers wear blue shirts. Their supervisors wear white shirts. On occasion, other more protective clothing may be worn, such as Tyvek suits.

Employees exposed to the risk of contact with wastewater, raw sewage, and chemicals used in the treatment process must change into SEJPA-issued uniforms from their personal attire when they arrive at work. If these employees have contact with wastewater, raw sewage, or chemicals used in the treatment process, they must immediately shower and change into clean uniforms. At the end of their shifts, all employees wearing SEJPA-issued uniforms must take the uniforms off, change back into their personal attire, and leave their uniforms in the locker room. SEJPA launders and maintains the uniforms it issues.

Employees in the lab, who also may be exposed to wastewater, raw sewage, and chemicals used in the treatment process, must wear cotton lab coats over their regular clothing. They are required to follow the same procedures as those employees working in the pump stations.

9. Christopher Trees is SEJPA’s Director of Operations. He holds a bachelor’s degree in Mechanical Engineering. He has been involved in wastewater treatment since 1999. He was very familiar with SEJPA’s wastewater operations and described SEJPA’s wastewater treatment process and how employees are exposed to risks of harm in that process. He also provided information related to SEJPA’s policy related to obligation of certain employees to wear SEJPA-issued uniforms while at work. He described the uniforms as “personal protective equipment.”

Mr. Trees identified SEJPA Resolution No 98-7, which was enacted in 1998. It requires persons working the laboratory to wear lab coats over street clothing for protection, as well as gloves and goggles or safety glasses when indicated. The resolution also requires persons working in wastewater reclamation operations to wear cotton uniforms within the “flash protection boundary” and performing work on energized equipment or systems, as well as other supplemental gear in more hazardous operations. The resolution requires
persons working in electronics and maintenance to wear cotton uniforms and other protective equipment as well.

A provision in the SEJPA employee handbook states, in part:

Certain employees within SEJPA require a uniform to be worn during working hours to protect personal health and safety. Employees whose position requires a uniform may not perform their job duties without wearing the required uniform. Uniforms should always be neat and clean. SEJPA provides uniforms to its employees which may not be removed from the premises or worn to or from work unless reporting on call-back duty or specifically authorized by a supervisor.

The employee handbook warns that failure to adhere to this policy may result in disciplinary action including, but not limited to, termination of employment.

10. Jean Tobin has been SEJPA’s Safety and Training Manager for more than one and one half years. She has been employed by Encina Water Authority (EWA) in the same capacity for more than six years. Ms. Tobin is a chemical engineer who has much experience in workers’ compensation loss control, OSHA compliance, and safety program development.

Ms. Tobin confirmed that SEJPA employees who have a risk of exposure to or contact with wastewater and raw sewage in the treatment process are subjected to significant health hazards, including bloodborne pathogens and caustic chemicals. She believed the uniforms worn by SEJPA employees and the frequent cleaning of those uniforms was an essential component of employee health and safety. She acknowledged that the pants and shirts similar to the uniforms worn by SEJPA employees could be purchased at retail outlets such as Macy’s. She believed SEJPA’s uniforms complied with OSHA protective uniform standards and SEJPA’s provision of uniforms to specified employees was mandated by OSHA.

11. Mr. Trees and Ms. Tobin’s testimony established a factual basis for SEJPA’s assertion that the uniforms SEJPA provides to specified employees and the cost of replacing, maintaining, and cleaning those uniforms is solely related to an employee’s personal health and safety and, thus, does not need to be reported to CalPERS as special compensation.

12. CalPERS presented the testimony of Christopher Walls and Samuel Camacho, Jr., to support its claim that SEJPA’s provision of uniforms to specified employees was “special compensation” that should be reported.

13. Mr. Walls has been employed by CalPERS for approximately 13 years. He holds a bachelor’s degree in Political Science. He served as a CalPERS staff auditor for nine years and has been a Senior Audit Manager for the past three years.
Mr. Walls was CalPERS's lead auditor in the SEJPA audit that was the basis of the following allegations in the Statement of Issues:

VI

On July 28, 2014, CalPERS' Office of Audit Services (OFAS) completed a public agency review of SEJPA's payroll and other relevant records regarding compensation reported to CalPERS for individuals in a test sample of employees over the service period from July 1, 2010, through June 30, 2013.

VII

On or about July 28, 2014, the CalPERS Audit Compliance & Resolution Unit received the Final Audit Report of the public agency review for the District. Finding 2 states in part:

The Agency did not report the monetary value of the rental and maintenance of uniforms for employees required to wear uniforms . . . .

[XIV]

After review of the documentation provided by the OFAS, CalPERS has determined that SEJPA requires certain employees to wear uniforms and/or items of clothing; SEJPA provides the employees with uniforms and/or items of clothing at no cost to the employee; SEJPA launders the uniforms and/or items of clothing at no cost to the employees and that the uniforms are not solely for personal health and safety. Consequently, CalPERS determined that the monetary value of the purchase, rental and maintenance of the uniforms should have been reported by SEJPA as uniform allowance of all impacted employees as required by the PERL.

14. Mr. Walls conducted a standard audit of SEJPA. He contacted SEJPA, sent an engagement letter, conducted an entrance conference, engaged in field work, conducted an exit conference in which he discussed his findings and obtained SEJPA responses, prepared a draft report that was provided to SEJPA for comment, and prepared and caused a final audit report to be issued. The final audit report mentioned several areas of incorrect reporting, one of which was the failure to report the monetary value of uniforms and uniform maintenance.

15. Mr. Walls believed SEJPA's provision and maintenance of uniforms to certain employees should have been reported as special compensation because invoices issued to SEJPA by an industrial supply service included charges for cotton shirts, pants and lab coats. While he believed SEJPA’s provision of the items of apparel to specified employees may
have provided employees with an element of personal safety, the uniforms were in fact more in the nature of a ready substitute for the personal attire an SEJPA employee would otherwise have had to acquire and maintain; he believed the uniforms at issue were not provided solely for an employee's personal health and safety.

Finally, Mr. Walls observed that SEJPA uniforms were not constructed of any kind of protective fabric and were not similar to protective vests, pistols, bullets, and safety shoes, items of special compensation specifically identified in Regulation 571.

Mr. Walls was present when Mr. Trees, Ms. Tobin, and witnesses testified. Their sworn testimony did not result in Mr. Walls changing his previously developed opinion that SEJPA uniforms were essentially a substitute for personal attire and were not provided solely for an employee's personal health and safety.

16. Samuel Camacho, Jr., has been employed by CalPERS for more than 12 years. He currently works in the Employer Account Management Division as a Retirement Program Specialist. His duties include reviewing the compensation reporting practices of public agencies.

Mr. Camacho did not participate in the SEJPA audit and was not involved in making the determination that SEJPA's provision and maintenances of uniforms to specified employees should be reported as employee compensation. He became involved in the SEJPA matter a few months before the hearing, and then solely for the purpose of reviewing several files and other documents in order to provide testimony in the hearing in this matter. He was present when Mr. Walls, Ms. Tobin, and other witnesses familiar with the protection of employees from the hazards of contact with wastewater, raw sewage, and the chemicals used in the treatment process testified.

In reaching his opinion in this matter, Mr. Camacho reviewed CalPERS's files related to the SEJPA audit. He reviewed CalPERS's Rulemaking File related to Regulation 571 and the amendment to subdivision (a)(5), which added specific language excluding from special compensation uniforms "made from specially designed protective fabrics."

Mr. Camacho opined that only those items of equipment or apparel used solely for an employee's personal health and safety or those items of equipment or apparel specifically identified by statute or regulation qualified to be exempt from being reported, and all other items of equipment and apparel provided to employees must be reported as special compensation. He had never known of shirts or pants qualifying for exclusion from reporting on the basis that such items of apparel constituted protective clothing, and he did not believe such an exclusion was possible unless the garment was made of a specially designed protective fabric.

17. SEJPA's witnesses had a monopoly of expertise and technical knowledge related to wastewater treatment, the hazards related to the treatment of wastewater and raw
sewage, and the most reasonable methods to protect employees from having skin-to-toxin contact. SEJPA established reasonable workplace rules that required specified employees to wear uniforms consisting of cotton pants, shirts, and lab coats when working with wastewater and raw sewage. SEJPA employees at risk of having contact with wastewater and raw sewage are prohibited from wearing shorts, tee shirts, flip flops or other commonly worn items of personal apparel when working. The color of the uniforms, the presence of identifying information on them, and the uniform’s fabric was not significant in reaching the conclusion that the cotton shirts and pants, and lab coats SEJPA provided to employees were solely for the health and safety of the employees. Nor was it significant that in some instances additional protective gear, such as masks and heavy coats, might be worn over the uniforms. The uniforms were the first line of defense in preventing skin-to-toxin contact.

The testimony from SEJPA’s witnesses concerning the need, effectiveness, and value of the uniforms at issue persuasively established that SEJPA’s provision of those uniforms was related to employee safety. It was also established that SEJPA’s policy related to uniforms provided a measure of safety to employee family members and the general public. No other reason for the provision and maintenance of those uniforms other than safety was established.

18. The testimony of CalPERS’s witnesses focused on the restrictions on what properly could and could not be considered safety apparel under Regulation 571, not on employee safety in treating wastewater, emphasizing Regulation 571’s use of the terms “solely” and “personal.” They observed that SEJPA uniforms were not constructed of special fabrics and suggested that cotton pants and shirts could not be considered safety gear. Their testimony was, to a great extent, in the nature of legal opinion, i.e., how Regulation 571 should be interpreted and how it should be applied. CalPERS’s witnesses claimed no expertise in the treatment of wastewater and raw sewage or in the prevention of dangers related to wastewater treatment.

One CalPERS witness conceded there was a component of safety involved in SEJPA’s provision of uniforms to specified employees, but he nevertheless believed the provision of the uniforms had to be reported as special compensation for two reasons: first, the uniforms were no more than a ready substitute for what an SEJPA employee would otherwise be required to wear to work; second, there was no risk of skin-to-toxin contact at all times the employee was at work.

The other CalPERS witness stated shirts and pants were not specifically mentioned in Regulation 571, and he had never heard of a public agency not being required to report uniforms consisting of pants or shirts as compensation.
LEGAL CONCLUSIONS

Burden of Proof and Burden of Persuasion

1. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.) A party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. (Evid. Code, § 500.) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact. (Evid. Code, § 550, subd. (b).)

If that party fails to produce sufficient evidence to make a prima facie case, it risks an unfavorable determination. But once that party produces evidence sufficient to make its prima facie case, the burden of producing evidence shifts to the other party to refute the prima facie case. Even though the burden of producing evidence shifts to the other party, that party need not offer evidence in reply, but the failure to do so risks an adverse verdict. Once a prima facie showing is made, it is for the trier of fact to say whether or not the crucial and necessary facts have been established. (Sargent Fletcher, Inc. v. Able Corp. (2003) 110 Cal.App.4th 1658, 1667-1668.)

2. SEJPA had the burden of establishing by a preponderance of the evidence that its provision and maintenance of the uniforms at issue – consisting of cotton pants, shirts and lab coats – to specified employees were provided solely for employee health and safety and were not a ready substitute for personal attire.

Admissibility of Exhibit 44

3. SEJPA offered Exhibit 44, which included CalPERS's audit reports for the City of Menlo Park, dated March 2007, the Town of Los Gatos, dated June 2007, and the City of San Marcos, dated July 2013. Counsel stipulated the documentation in Exhibit 44 was prepared by CalPERS's staff in the ordinary course of business. CalPERS's technical objection to the admissibility of Exhibit 44 on the grounds of lack of foundation is rejected.

As to CalPERS's objection that Exhibit 44 was hearsay, Government Code section 11513, subsections (c) and (d), provide:

(c) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in
itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

The audit reports represent the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Exhibit 44 is admissible as administrative hearsay so long as it is relevant to some issue in this matter and supplements or explains other evidence.

Respondents claimed the three audit reports impeached Samuel Camacho’s testimony to the effect that he had never heard of CalPERS determining that shirts and pants were exempt health and safety items; impeached Chris Walls’s testimony that shirts containing identifying features could qualify for exemption as health and safety items; and proves that “CalPERS routinely found the opposite.”

Exhibit 44 is administrative hearsay; it is not admissible, by itself, to support a factual finding. The reports do not establish as a matter of fact that CalPERS “routinely” found shirts and pants to be exempt from reporting as health and safety items or that shirts with identifying features could not be exempt from being reported as special compensation. Nothing in the audit reports stated that was the case.

Exhibit 44 is administrative hearsay; as such, Exhibit 44 must supplement or explain other evidence or impeach witness testimony.

The audit reports lack sufficient factual detail to determine how or why CalPERS staff determined orange shirts were provided for safety purposes (Menlo Park); the reason jeans should not be considered safety items (Menlo Park); the reason orange shirts with identifying logos were determined to be for safety purposes, but similar blue shirts were not (Los Gatos); or why jackets, overalls and safety vests provided to employees by a public entity were determined to be safety items despite the entity’s assertion that those items were nothing more than a ready substitute for personal attire the employee would otherwise be required to provide (San Marcos). On those specific issues, there was a lack of foundation to conclude that Exhibit 44 supplemented or explained the evidence presented in this matter.

Did Exhibit 44 impeach any witness?

A witness may be impeached, i.e., discredited, by two chief methods: (a) cross-examination of the witness; and (b) rebuttal, using other witnesses to impeach the witness or introducing other impeaching evidence. (3 Witkin, Cal. Evid. 5th (2018) Methods of Impeachment, § 270.)

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3 It may be that orange shirts were and are considered exempt because it is common to see persons working in public streets and roadways wearing orange shirts and vests, presumably because the color orange makes them more visible, but that reasoning was not provided in any CalPERS audit or circular letter.
It was not established that Mr. Camacho or Mr. Walls participated in the audits included in Exhibit 44. Nor was it established that either of them read, considered or even knew about the information, contents or conclusions contained in those audits. Thus, their impeachment on the basis of a prior inconsistent statement does not exist under Evidence Code section 780, subdivision (g).

It was not established that Mr. Camacho or Mr. Walls made any effort to review a representative body of CalPERS audit reports to form their opinions in this matter related to uniform allowances. Mr. Walls’s testimony was limited to what he did during the audit at issue and his experience in conducting other audits. Mr. Camacho’s testimony was based on his interpretation of statutory and regulatory materials and his experience at CalPERS. Exhibit 44 did not impeach the testimony of either witness in that regard.

SEJPA was concerned that Mr. Camacho’s testimony that he had never heard of shirts and pants being anything other than having to be reported as special compensation might be misunderstood as a CalPERS policy, which could result in deference being given to CalPERS’s interpretation and application of the statutes and regulation in this matter. But, Mr. Camacho’s testimony did not establish any CalPERS policy or reflect staff deliberations. In passing, it is worth noting that in response to respondent’s motion in limine concerning the inadmissibility of staff deliberations, CalPERS argued, “The physical and mental processes utilized by CalPERS’ staff in reaching the decision are simply not material to this issue. The decision reached by CalPERS was set forth in CalPERS’ determination letters and the audit. . .” Exhibit 44 does not include staff deliberations or an expression of formal CalPERS policy.

Exhibit 44 was not admitted. It was irrelevant to this proceeding. Exhibit 44 did not impeach or rebut the testimony of Mr. Walls or Mr. Camacho.

Interpretation of the Regulation

4. When interpreting regulations, the court seeks to ascertain the intent of the agency issuing the regulation by giving effect to the usual meaning of the language used so as to effectuate the purpose of the law, and by avoiding an interpretation which renders any language mere surplusage. (Diablo Valley Coll. Faculty Senate v. Contra Costa Cnty. Coll. Dist. (2007) 148 Cal.App.4th 1023, 1037.)

An agency’s interpretation of the meaning and legal effect of a statute or regulation is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to “make law,” and which, if authorized by the enabling legislation, bind courts as firmly as statutes themselves, the binding power of an agency’s interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation. (De La Torre v. California Horse Racing Bd. (2007) 7 Cal.App.5th 1058, 1065.)
Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. However, the admissibility of opinion evidence that embraces an ultimate issue does not bestow upon an expert carte blanche to express any opinion he or she wishes. There are limits to expert testimony, not the least of which is the prohibition against admission of an expert’s opinion on a question of law. (Summers v. A.L. Gilbert Co. (1999) 69 Cal.App.4th 1155, 1178.)

Within the context of this hearing, the question was whether the clothing at issue provided SEJPA employees with effective skin-to-toxin protection, whether that clothing was more than a mere substitute for the personal attire SEJPA employees might wear when working, and whether the SEJPA-issued uniforms were provided solely for employee health and safety.

**Uniform Allowances as Special Compensation**

5. Under Regulation 571, an employer participating in the CalPERS retirement system must report to CalPERS as special compensation:

Compensation paid or the monetary value for the purchase, rental and/or maintenance of required clothing, including clothing made from specially designed protective fabrics, which is a ready substitute for personal attire the employee would otherwise have to acquire and maintain. This excludes items that are solely for personal health and safety such as protective vests, pistols, bullets, and safety shoes.

6. The 2002 amendment to Regulation 571 added the phrase “including clothing made from specially designed protective fabrics” and the term “solely” to the existing regulation. The 2002 amendment, as it relates to “specially designed protective fabrics,” does not purport to limit what kinds of uniforms might qualify as non-reportable safety attire; nor does the use of the term “solely” require that a uniform provide an employee with safety during all working hours and for all tasks required at the worksite where the uniform is worn.

**Safety Uniforms and Equipment Are Exempt from Being Reported to CalPERS as Special Compensation Under Appropriate Circumstances**

7. As noted in a Circular Letter, CalPERS considers orange safety vests worn by street workers to be non-reportable items of clothing under the personal safety exemption, despite the fact the vests may not be made of a special fabric and may be worn by the employees when eating lunch, writing reports, making phone calls, or engaging in other activities not occurring in streets or highways.

As pointed out in a Circular Letter, CalPERS considers overalls worn by cemetery workers to be non-reportable items of clothing under the personal safety exemption, despite the fact that the coveralls may be worn when these employees are not digging graves or having contact with the deceased.
Regulation 571 should be interpreted in a reasonable fashion to exempt bona fide safety uniforms from having to be reported as special compensation; doing so provides contracting agencies with an added incentive to provide public employees with uniforms that protect employees from recognized dangers and hazards while they are at work.

In this case, SEJPA, the contracting agency, persuasively established a reasonable connection between its provision and maintenance of the uniforms at issue and employee health and safety in the wastewater treatment process. As SEJPA’s policy manual specifically states: “Certain employees within SEJPA require a uniform to be worn during working hours to protect personal health and safety. Employees whose position requires a uniform may not perform their job duties without wearing the required uniform. . . SEJPA provides uniforms to its employees which may not be removed from the premises or worn to or from work unless reporting on call-back duty or specifically authorized by a supervisor.”

8. The persuasive testimony of SEJPA witnesses established the uniforms at issue afforded effective direct skin-to-toxin protection; all employees at risk were required to wear the uniforms when at work and were not permitted to wear any other clothing at work; uniforms had to remain at the worksite and were regularly maintained to assure their effectiveness; and, uniforms were not provided to employees who were not at risk. The uniforms at issue were issued solely for personal safety reasons. They were not a mere substitute for the personal attire employees wore to work. There was no substantial evidence to the contrary.

This case does not involve an agency’s exploitation of the safety uniform exemption, such as might exist if it were claimed that Armani suits and Salvatore Ferragamo shoes were issued to an agency’s executive officers as safety garments and were, thus, exempt from reporting. In this matter, reaching the conclusion that the uniforms at issue do not need to be reported as special compensation does not result in any windfall to any employee. Not requiring SEJPA to report the monetary value of the safety garments provided to certain employees does not create an unfunded liability above actuarial assumptions and promotes employee safety.

The monetary value for the purchase, rental and maintenance of uniforms at issue provided by SEJPA to certain employees should not be reported to CalPERS as uniform allowance.
ORDER

Respondent San Elijo Joint Powers Authority’s appeal is granted. Respondent San Elijo Joint Powers Authority need not report to CalPERS the monetary value of the uniforms at issue as special compensation in the form of a uniform allowance.

DATED: July 5, 2018

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings