STAFF’S ARGUMENT TO DECLINE TO ADOPT THE PROPOSED DECISION

CalPERS staff requests the Board decline to adopt the Proposed Decisions, in favor of its own Decision, after conducting a Full Board Hearing in accordance with its policies. Staff’s argument is based on the following:

1. CalPERS members are improperly being denied benefits they are entitled to receive;
2. The evidence does not support the Proposed Decisions’ factual findings;
3. The Proposed Decisions did not properly apply the Uniform Allowance Regulation that was adopted by the Board; and,
4. The Proposed Decision’s application of the Uniform Allowance Regulation, if followed, would result in inconsistent treatment of CalPERS members among CalPERS agencies.

Legal and Factual Background

Encina Wastewater Authority (Encina) and San Elijo Joint Powers Authority (San Elijo) are public agencies that contract with CalPERS for retirement benefits for their eligible employees. Encina and San Elijo (collectively, Respondents) operate wastewater facilities in San Diego County.

Respondents provide uniforms to certain employees. The uniforms in this matter consisted of short-sleeve and long-sleeve shirts and pants. The shirts and pants were typically 100% cotton clothing, or in the case Encina cotton or a polyester blend, and were not made from a specially designed protective fabric. Respondents’ employees who were provided uniforms were required to change out of their personal clothing when they arrived to work, change into the uniforms, and then before leaving were required to change back into their personal clothing.

On June 14, 2014, CalPERS’ Office of Audit Services (OFAS) issued a Public Agency Review that found Encina was not properly reporting to CalPERS the monetary value of uniforms and maintenance of uniforms it required certain employees to wear. On July 28, 2014, OFAS issued a Public Agency Review that found San Elijo was not properly reporting to CalPERS the monetary value of uniforms and maintenance of uniforms it required certain employees to wear.

Uniform allowance became a reportable item of compensation under the Public Employees Retirement Law (PERL) in 1981 after the Court of Appeal found a uniform provides a benefit to the employee in that the uniform substitutes for personal attire which the employee would otherwise be required to purchase themselves. (Rose v. City of Hayward (1981) 126 Cal.App.3d 926, 943.) In Rose, the Court distinguished between uniforms that provide a monetary benefit to the employee, because the uniforms replace personal attire that the employees would have been forced to acquire,
and uniforms that could “hardly be characterized as a ready substitute for personal attire.” After Rose, uniform allowance became an item of compensation earnable under the PERL, and was added as a statutory item of special compensation under California Code of Regulations (CCR) Section 571(a)(5) (Uniform Allowance Regulation) when Section 571 of Title 2 of the California Code of Regulations was adopted in 1994.

In 2002, at the request of associations representing certain CalPERS members, the Uniform Allowance Regulation was amended to “expand the definition … to include clothing from specially designed protective fabrics which is not solely for personal health and safety.” The request to amend the regulation was due to perceived inequities in the reporting of certain items of clothing, and in particular the reporting of firefighter uniforms. Prior to 2002, some firefighters were being issued uniforms that were made of nomex, a material that has fire retardant properties. Some firefighters were issued uniforms that were not made of nomex. At that time, based on the prior version of the Uniform Allowance Regulation, CalPERS determined that uniforms made of the specially designed materials, that were being used for safety purposes, fell under the exclusion. The non-nomex uniforms should be reported, creating a situation where some members’ final compensation would be different than their colleagues depending on the type of material used in the uniforms they wore.

The Uniform Allowance Regulation currently provides as follows:

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. (Emphasis added.)

The amendments to the Uniform Allowance Regulation are underlined. The Uniform Allowance Regulation makes clear that if a uniform is a ready substitute for personal attire, it must be reported as special compensation to CalPERS, even if made of specially designed protective fabrics. This is because the uniforms provide a benefit to the employees in that they do not have to purchase clothing for work.

The Uniform Allowance Regulation does not require the reporting of items that “solely” serve a personal health and safety purpose. An item that solely serves a personal health and safety purpose for purposes of the Uniform Allowance Regulation is one that both (1) is not a ready substitute for personal attire the employee would otherwise have to acquire and maintain, and (2) serves a personal health and safety purpose. The Uniform Allowance Regulation identifies “protective vests, pistols, bullets, and safety shoes” as examples of such items. These items do not need to be reported because, unlike personal attire, employees would not need to purchase these items but for their specific type of employment.

OFAS performed audits of Respondents and found that the uniforms Respondents provide their employees are a ready substitute of personal attire, and thus were not
solely for personal health and safety for purposes. Consequently, CalPERS determined that Respondents should be reporting as special compensation the monetary value of the uniforms. CalPERS’ determination would increase the members’ reportable compensation, which would require Respondents and their impacted employees to pay member/employer contributions to CalPERS. In turn, the members’ final compensation would be increased which would increase their retirement benefits.

On January 22, 2016, CalPERS separately issued its formal determination letters to Respondents.

Respondents appealed the determinations and exercised their rights to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). The matter was consolidated because the facts and legal analysis for both appeals was identical. In addition, Respondents shared certain employees, and were represented by the same counsel. A consolidated hearing was held on April 16, 2018. Respondents were represented by the same counsel at the hearing.

The Proposed Decisions

The ALJ issued two Proposed Decisions; however, the relevant facts and legal analysis are identical. For this reason, CalPERS generally refers to the facts and legal analysis of the Proposed Decisions in the singular.

The ALJ found that Respondents’ employees who are provided uniforms change out of their personal clothes when they arrive at work, and change back into their personal clothes when going home. In addition, the ALJ found that the uniforms are not made of a specially designed fabric, but are the type of clothing that can be purchased at any retail outlet. Despite this finding, the ALJ found that the uniforms were not a ready substitute for personal attire.

The ALJ found that the material from which the uniforms are made has no impact on the effectiveness of the uniforms in providing employee health and safety. In contradiction to this finding, the ALJ recognized, based on testimony from Respondents’ witnesses, that the employees were required to wear additional safety gear when the situation called for it. Despite these findings, the ALJ concluded that the uniforms provided an effective barrier between the employees’ bare skin and toxic materials that may be present in wastewater and raw sewage.

The ALJ analyzed these findings under the Uniform Allowance Regulation and concluded that the uniforms “were provided for no reason other than employee health and safety” and that they “are not a ready substitute for personal attire an employee might be required to acquire and maintain.” These conclusions are in conflict with the amendment to the Uniform Allowance Regulation wherein the Board expanded what should be reported as special compensation as well as the Rose Court’s analysis and basis for what should be excluded under the Uniform Allowance Regulation, namely those items that would not be purchased by the employee but for the job.
As a result, based upon a flawed application of the Uniform Allowance Regulation, the ALJ granted Respondents’ appeal and ordered that Respondents should not report to CalPERS the monetary value related to the purchase, rental, and maintenance of uniforms provided to Respondents’ employees. In turn, the ALJ is denying Respondents’ employees the right to include as special compensation the monetary value of these uniforms.

Why the Proposed Decisions Should Be Rejected

1. The Members are Improperly Being Denied Benefits

The purpose of the Uniform Allowance Regulation is to recognize that members receive compensation when they receive a uniform allowance, whether it be a uniform stipend, or through the monetary value associated with uniforms being provided by the employer. Here, Respondents’ employees are provided uniforms which are a benefit to these employees. They replace attire they otherwise would be required to purchase for work. By concluding the uniforms should not be reported, the ALJ is not recognizing a component of pensionable compensation that the members are entitled under the law to receive. In turn, the ALJ is denying the members the full amount of the retirement benefits they are entitled to receive under the PERL.

2. The Evidence Does Not Support the Proposed Decisions’ Factual Findings.

The Proposed Decisions contain three primary errors through which the evidence does not support the factual findings.

First, the ALJ found 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. However, the evidence showed that the 100% cotton or polyester blend shirts and pants were not an effective barrier. The testimony by Respondents’ witnesses was that if the employees were going to be in contact with wastewater and raw sewage they would wear additional protective gear. The evidence established that the uniforms did not prevent wastewater and raw sewage from coming into contact with the employees’ skin. This is particularly true because some of the employees were issued short-sleeve shirts, which afford little to no protection of the employees’ arms. The evidence also showed that clothing that was contaminated had to be changed, because it did not protect the skin from the wastewater and sewage. In short, the overwhelming evidence established the uniforms did not create a protective barrier between bare skin and toxic materials.

Second, the ALJ found that the material from which the uniforms are made has no impact on the effectiveness of the uniforms in protecting employee health and safety. However, the testimony by Respondents’ witnesses was that the type of material directly impacts the effectiveness in protecting employee health and safety. For example, Respondents’ witnesses testified that in certain situations the employee would wear different items of clothing that were non-porous to ensure wastewater and sewage could not come into contact with bare skin. In addition, Respondents’ witnesses testified that uniforms made from nomex provide a greater level of protection of safety than the
uniforms provided by Respondents. Clearly, the material from which the material is made greatly impacts the effectiveness in protecting employees from hazardous materials. Only when employees did not come into contact with these materials did they wear only their uniforms with no additional protective layer.

Third, the ALJ found that the uniforms are not a ready substitute for personal attire. However, the uniforms were nothing but a ready substitute for the employees’ personal attire. The employees came to work in clothes, put on the uniforms (shirts and pants) and then performed their work. When their work was completed for the day, they would change out of their uniforms and put on their personal attire. The cotton and polyester blend shirts and pants provided to Respondents’ employees qualify as a “ready substitute for personal attire” under a reasonable definition of that term.

3. The Proposed Decision Did Not Properly Apply the Uniform Allowance Regulation That Was Adopted by the Board.

The Uniform Allowance Regulation, as currently written, makes clear that if a uniform is a ready substitute for personal attire it must be reported, even if made of specially designed protective fabrics. Here, the uncontroverted evidence established that the uniforms were not made from specially designed fabrics. Rather, they were made from 100% cotton or a polyester blend. In addition, the uncontroverted evidence established that the uniforms were a ready substitute for personal attire. For these reasons, the Uniform Allowance Regulation requires that Respondents report the monetary value of the uniforms as special compensation.

Accordingly, Respondents have failed to establish that the items fall under the “solely for personal health and safety” exclusion. The Uniform Allowance Regulation provides examples of items that qualify for this exclusion: protective vests, pistols, bullets, and safety shoes. The reason these items qualify under the reporting exclusion is that these items would not be needed if not for a particular kind of job. For example, a police officer would not need a protective vest, pistol and bullets if not for his or her job as a police officer. The cotton shirts and pants Respondents provide their employees simply do not meet the type of items that qualify under the exclusion. Presumably, Respondents’ employees would need to wear shirts and pants at work, regardless of their job. The fact they do not have to purchase shirts and pants to perform their job is a benefit to them. The Court of Appeal in Rose, and CalPERS through amending and adopting the Uniform Allowance Regulation, recognizes that this benefit should be part of the employees’ reportable compensation.

In the Proposed Decisions, the ALJ ignored not only the language of the Uniform Allowance Regulation, but also the intent behind it, when determining these items qualify under the exclusion. The ALJ interpreted the Uniform Allowance Regulation as requiring Respondents to show “a reasonable connection between its provision and maintenance of the uniforms at issue and employee health and safety.” However, the Uniform Allowance Regulation requires more than a “reasonable connection” between the uniforms and health and safety; the uniforms must be “solely for personal health and safety.”
CalPERS does not contest there may a safety component to the uniforms. However, the uniforms are a ready substitute for personal attire, which means they cannot qualify as an item provided solely for the personal health and safety of the employees. For this reason, they are not excluded from being reported.


As previously discussed, the Uniform Allowance Regulation was amended in 2002 to expand what should to be reported. The amended Uniform Allowance Regulation makes clear that uniforms should be reported, regardless if made from specially designed protective fabrics, if they are a ready substitute for personal attire. In addition, the amendments made clear that the items must “solely” be for personal health and safety to not be reportable under the exclusion.

The evidence at the hearing established that the nomex uniforms, worn by firefighters and which are reported to CalPERS, provide a greater level of safety than the uniforms provided by Respondents. Nonetheless, the ALJ found the uniforms provided by Respondents, which are normal attire or a ready substitute, should not be reported under the safety exclusion.

If the ALJ’s analysis is followed, the safety exclusion essentially swallows the rule. If everyday cotton shirts and pants are not considered a ready substitute for personal attire, what is? If cotton shirts and pants qualify as items “solely for personal health and safety” because they provide a barrier between what’s in the environment and skin, all clothing would qualify under the safety exclusion. This interpretation would result in no members being entitled to claim as a benefit the uniform allowance they receive. This result is contrary to the law (Rose) and is contrary to the Uniform Allowance Regulation adopted by this Board.

Proposed Board Action.

For all the above reasons, staff argues that the Proposed Decisions should be rejected, and that the Board should decide the case upon the record produced before the ALJ and arguments that are presented by the parties before the Board.

September 26, 2018