ATTACHMENT C

RESPONDENTS' ARGUMENT
September 11, 2018

Re: Respondents’ Argument In Support of ALJ’s Proposed Decisions

In the Matter of the Statement of Issues Against San Elijo Joint Powers Authority, Case No. 2016-0354, OAH No. 2017070687

In the Matter of the Statement of Issues Against Encina Wastewater Authority, Case No. 2016-0356, OAH No. 2017070683

Dear Board Members:

The following argument is respectfully submitted by and on behalf of Respondents Encina Wastewater Authority and San Elijo Joint Powers Authority (collectively “Respondents”), in support of the Administrative Law Judge’s (“ALJ”) Proposed Decisions to unequivocally grant Respondents’ appeals of the California Public Employees’ Retirement System’s (“CalPERS”) erroneous determination that uniforms provided by Respondents constitute reportable special compensation under California Code of Regulations, title 2, section 571(a)(5) (“Section 571(a)(5)”).

We and other member agencies which operate wastewater treatment facilities are at a loss. We provide our employees who work in and around raw sewage with uniforms solely to protect them against potentially deadly contaminants. The Proposed Decisions concur, finding that Respondents’ “witnesses had a monopoly of the expertise and technical knowledge” of potential threats and of “the most reasonable methods to protect employees,” and that CalPERS staff had no expertise and presented “no substantial evidence” to support their findings. Yet CalPERS staff disregard the undisputed evidence, seek to substitute their speculation for expert judgment, and advance an interpretation of Section 571(a)(5) that is arbitrary, impractical, and plainly inconsistent with the language and intent of the regulation.

For the reasons set forth herein, we urge you to adopt the Proposed Decisions and designate them as precedent. In doing so you will set a practical, common sense standard for the many sanitation agencies whose efforts to protect employee health and safety are presently being undermined and disincentivized by CalPERS staff (see the supporting statements of the Goleta Sanitary District and California Association of Sanitation Agencies on pages 5-6, which are hereby incorporated by reference).
I. The Facts Are Undisputed: Uniforms Are Provided Solely to Protect Health and Safety and Are Not a Ready Substitute for Personal Attire

The Proposed Decisions correctly find: “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.” No evidence on the record and no amount of de novo hearings and appeals can change this inevitable outcome.

The evidence shows that as a part of their job duties, Respondents’ uniformed employees are routinely exposed to a host of health and safety hazards: they risk being splashed with fecal matter, they must clean used tampon applicators and condoms off of equipment, and they are exposed to bacteria and viruses like Hepatitis, HIV and Ebola. These risks are present everywhere that uniformed employees work: they are present within Respondents’ gated facilities and when certain employees occasionally leave to conduct sampling. These risks are illustrated by the following photos from Exhibits 42 and 43:

Respondents’ witnesses testified that as a result of these risks, and in order to comply with their obligation to provide a safe workplace under California Occupational Health and Safety Administration regulations, Respondents provide employees with a variety of personal protective equipment, including pants, shirts and coats. Although simple, these uniforms act as an effective barrier between employees’ skin and exposure to the potentially deadly bloodborne pathogens they are exposed to daily as part of their job duties. Because

San Elijo Joint Powers Authority, Agency Case No. 2016-0354; OAH No. 2017070687
Encina Wastewater Authority, Agency Case No. 2016-0356; OAH No. 2017070683
contamination is an ever-present risk, employees cannot substitute their uniforms for clothing they would otherwise wear; instead, uniforms must be left on-site to be laundered by a professional service that cleans and sanitizes them in a controlled environment. Employees wear their regular attire to and from work.

The Proposed Decisions are unequivocal that “[n]o other reason for the provision and maintenance of those uniforms other than health and safety was established.” (Emphasis added.) So while CalPERS staff acknowledged a safety “component” to Respondents’ uniforms, they offered no actual evidence of any other, non-safety component: no evidence that uniforms are provided for identification (in fact, witnesses testified that uniforms do not serve this purpose), convenience or any other reason.

II. The Law Is Clear: CalPERS Staff’s Application of Section 571(a)(5) Is Inconsistent and Arbitrary

In the absence of evidence, CalPERS staff offered a hodge-podge of justifications as to why Respondents’ uniforms constitute reportable special compensation. The Proposed Decisions rightly dismiss these equally unpersuading arguments out of hand.

Staff argued that Respondents uniforms are a ready substitute for personal attire because they’re made of cotton and look like something that could be purchased from Walmart. First, the evidence unequivocally shows that uniforms are not a ready substitute for personal attire: employees cannot wear uniforms to and from work. If something cannot be worn as personal attire, it cannot be a ready substitute for personal attire. This is common sense. Second, safety shoes are expressly identified as exempt under Section 571(a)(5), but they too are available for purchase at retail stores and are worn in lieu of shoes that employees would otherwise wear. Thus, if staff’s reasoning was sound, the regulation itself would be incorrect. Third, the rulemaking file for Section 571(a)(5) establishes that uniform material is irrelevant (Ex. 38, pp. 56-58); so the fact that Respondents’ uniforms are cotton is irrelevant. Fourth, even if uniforms were personal attire, they can still be exempt as an item provided solely for personal health and safety (these factors are separate and distinct; staff’s logic is circular and unsound).

CalPERS staff also argued that uniforms cannot be provided solely for health and safety if there is not a health and safety risk present 100% of the time. This standard is not supported by the plain language of Section 571(a)(5), which dictates that a protective vest is provided solely for health and safety regardless of whether someone shoots at the wearer, and that safety shoes are provided solely for health and safety even if worn during breaks where no hazards are present. Similarly, a sanitation worker’s shirt, pants and coat continue to be provided solely for health and safety even if they are not at risk of being splashed with feces 100% of the day. The standard staff advocates is impossibly burdensome and subjective. Agencies would be forced to surveil employees and speculate about whether their work ever stops posing a safety risk such that the uniform – in that moment – is not providing a safety function. Under this standard a uniform’s reportable status would change by the day or even the hour, resulting in the type of inconsistency and inequity the CalPERS Board has historically sought to avoid. (See, Ex. 38, pp. 56-58.)
As the Proposed Decision repeatedly points out, not only are staff’s findings unsupported by any evidence, their reasoning is inconsistent with the law and CalPERS’ own published guidance. In the case that started it all, Rose v. City of Hayward (1981) 126 Cal.App.3d 926, 944, the court clearly stated: “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....” Following this case, CalPERS circular letters acknowledge that orange shirts, safety vests, and overalls worn by cemetery workers, are all non-reportable items of clothing under the personal safety exemption, despite the fact that these items may not be made of special fabric, may be commonly available, and may be worn by employees when engaging in activities that pose no threat to health and safety. It is simply arbitrary to distinguish Respondents’ safety shirts, pants and coats in this case.

The evidence also shows that CalPERS staff have applied Section 571(a)(5) inconsistently to Respondents and other agencies. In 2014 CalPERS staff advised: “It has been determined that Uniforms are provided for safety purposes therefore the amounts do not need to be reported.” (See Ex. 15.) Then, less than two years later, without any changed facts or circumstances, CalPERS staff reversed course without explanation and found the opposite. (See Ex. 3.) As a matter of good policy, the Board should also consider that staff have repeatedly found that shirts and jackets provided by other members are solely for health and safety and should not be reported as special compensation, as evidenced by documents produced by CalPERS during these appeals. (See, CalPERS Public Agency Review City of Menlo Park, March 2007, p. 8 [City “appropriately did not report the value of orange colored shirts”]; CalPERS Public Agency Review Town of Los Gatos, June 2007, pp. 28-29 [orange colored shirts with town logo are “safety attire and their value was correctly not reported”]; CalPERS Public Agency Review City of San Marcos, July 2013, p. 55 [jackets were personal health and safety item and were not reportable].)

III. Conclusion

As the ALJ found: “This case does not involve an agency’s exploitation of the safety uniform exemption... 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... [and] does not create an unfunded liability above actuarial assumptions.” These Proposed Decisions (totaling 34 pages) contain a clear and complete analysis based upon a full day’s worth of hearings that included 43 exhibits, live testimony from six witnesses, and briefing by all parties. Given that the evidence and law unequivocally support the ALJ’s detailed findings, and given that many other sanitation agencies are affected by this issue, the Proposed Decisions should be adopted and set as precedent.

Respectfully,

Tracie E. Stender
To: CalPERS Board of Administration:

We write in support of the Administrative Law Judge’s (ALJ) decision in the Encina & San Elijo cases before you. Goleta is similarly calendared for an appeal hearing in February 2019. Goleta’s policies and procedures on the protection of its employees’ health and safety through provision and maintenance of personal protective equipment such as uniforms do not differ in material respects from those found persuasive by the ALJ. Goleta furnishes and cleans our workers’ uniforms for the express, and only, reason, to protect them. To reject the ALJ decision and conduct a Board de novo hearing, reaching a contrary result, would place CalPERS in a flagrantly untenable position that uniforms are discretionary for sanitation workers exposed to dangerous bloodborne pathogens and, contrary to well-settled occupational health guidance, are not required to protect our workers. We face these contaminants daily; your staff do not, and have not.

Question: Does your staff report concede that over recent years CalPERS auditors have reached contradictory findings on the reportability of safety-related uniforms across agencies? This Board should not reject the ALJ’s decision without knowing an accurate factual record of your staff’s inconsistencies on the reportability of uniforms.

The ALJ correctly concluded that CalPERS Circular Letters have been contradictory as to how health and safety equipment are reported or excluded from compensation. Encina, p. 5 and n.2; p. 16 para. 7. It is indisputable that there are significant health hazards associated in the treatment of raw sewage. Federal and California laws are in place to protect sanitation facility workers whom risk exposure to or contact with wastewater and raw sewage and their significant health hazards, including bloodborne pathogens and caustic chemicals. Yet the language of Section 571(a)(5) reflects the ambiguity in defining “safety” uniforms that has resulted in seven (7) calendared appeal hearings before this same ALJ: “...This excludes items that are solely for personal health and safety such as protective vests, pistols, bullets, and safety shoes.” “Solely” and “such as” are vague, undefined, and encourage your staff to make arbitrary, inconsistent audit findings. The responsible and prudent decision today is to adopt the ALJ’s decisions and to direct your staff to amend the regulatory language, pursuant to the Administrative Procedure Act’s (“APA”) notice and public comment requirements, to make it more precise. This is the Board’s power under Govt. Code Sec. 20125.

Until such time as this Board, in a properly defined regulation, sets forth to CalPERS employers and individual members a cogent and defensible definition of “personal health and safety,” this Board’s rejection of the ALJ’s decisions constitutes an unlawful standard of general application. The APA prohibits a penalty if based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule unless it has been adopted as a regulation. Govt. Code §11425.50(e); Morning Star Co. v. State Bd. of Equalization (2006) 38 Cal.4th 324, 334-335.

Sincerely,

Steve Majoevsky
Governing Board President

Steve D. Wagner, P.E.
General Manager/District Engineer

One William Moffett Place, Goleta CA 93117
(805) 967-4519 office (805) 964-3583 fax
www.GoletaSanitary.org
September 10, 2018

CalPERS Board of Administration

Re: Support for ALJ Decision in In the Matter of San Elijo Joint Powers Authority (Case No. 2016-0354) and Encina Wastewater Authority (Case No. 2016-0356)

Dear Board Members:

On behalf of the California Association of Sanitation Agencies (CASA), I write in support of the administrative law judge (ALJ) decision in the above referenced matters. For 60 years, CASA has been the leading voice for public wastewater agencies on regulatory, legislative, and legal issues. Many of our members participate in CalPERS, and a number of them provide uniforms to their employees in the same manner and within the same factual circumstances presented in these cases. Based on information we have received from our member agencies concerning the uniform reporting issue presently before the Board, we urge you to adopt the proposed decisions and designate them as precedent for the reasons set forth by the Respondents.

The ALJ decision is founded on a clear understanding of the wastewater industry. First and foremost, the uniforms provided to wastewater agency employees are intended to protect employees’ health and safety against potentially deadly contaminants and significant hazards inherent in employment at a wastewater collection and treatment agency. Wastewater agency employees are routinely exposed to a host of potential health and safety hazards. Because of this risk, uniforms must generally be left on-site to be sanitized by a professional service. These risks and safety practices are common across wastewater agencies.

A patchwork of decisions and practices conflict regarding whether sanitation agencies must include the value of uniforms in employee compensation when calculating CalPERS contributions. CalPERS opinions in the form of circular letters and past decisions have taken contradictory positions over the years without any change in underlying facts or circumstances. Even now, within different regions and audits of similarly situated agencies, CalPERS determinations on this issue vary. This “ad hoc” decision making by CalPERS on an issue where the underlying circumstances are generally consistent across sanitation agencies has led to arbitrary outcomes and confusion for CASA’s members. Broad and generally applicable clarification is needed, or this issue will continue to be resolved on an agency by agency basis through multiple costly and time-consuming adjudicatory proceedings brought by individual agencies.

The issue of how agencies treat uniforms is a health and safety issue of statewide concern, and the ramifications of these decisions extend beyond the individual agencies named in these matters. A significant number of our local wastewater agencies are confronting this same issue. We are aware of a number of agencies that have disputed this issue with CalPERS over the last year, while others have capitulated and changed their practices at substantial administrative effort. This lack of clarity is not in the interest of our agencies nor CalPERS.

We urge the Board’s to adopt the ALJ decision as precedent in these matters and appreciate your consideration of the statewide perspective on this issue.

Sincerely,

Adam Link
Director of Operations

San Elijo Joint Powers Authority, Agency Case No. 2016-0354; OAH No. 2017070687
Encina Wastewater Authority, Agency Case No. 2016-0356; OAH No. 2017070683
PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 B Street, Suite 2200, San Diego, CA 92101. On September 11, 2018, I served the within documents:

RESPONDENTS' ARGUMENT IN SUPPORT OF ALJ'S PROPOSED DECISIONS, IN THE MATTER OF THE STATEMENT OF ISSUES AGAINST SAN EILIO JOINT POWERS AUTHORITY, CASE NO. 2016-0354, OAH NO. 2017070687
IN THE MATTER OF THE STATEMENT OF ISSUES AGAINST ENCINA WASTEWATER AUTHORITY, CASE NO. 2016-0356, OAH NO. 2017070683

✓ VIA OVERNIGHT PRIORITY MAIL EXPRESS:
I caused such document(s) to be sent via Overnight Priority Mail Express in a sealed envelope or package designated by the express courier addressed to the person(s) below on whom it is to be served.

✓ VIA FACSIMILE:
By transmitting via facsimile number (619) 398-0158 the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmission confirmation report is attached hereto.

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701
Fax: (916) 795-3972

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 11, 2018, at San Diego, California.

BRIANNA RHEA