ATTACHMENT B

STAFF’S ARGUMENT
STAFF’S ARGUMENT TO ADOPT THE PROPOSED DECISION AS MODIFIED

David V. Delay (Respondent) was employed by Respondent Big Bear City Community Services District (Respondent District) as a Battalion Chief.

On May 28, 2013, Respondent submitted to CalPERS an application for service retirement with an August 24, 2013, effective retirement date, and has been receiving his retirement allowance from that date.

In 2017, CalPERS’ Office of Audit Services (OFAS) conducted a review on special compensation reported to CalPERS for 67 agencies. During the course of this review, it was determined that Respondent District improperly reported special compensation for its Fire Chief. CalPERS later became aware that special compensation was improperly reported for other employees of Respondent District, including Respondent.

CalPERS reviewed the compensation reported by Respondent District for Respondent and determined that pay identified by Respondent District as “Fire Assignment Premium Pay,” but was actually “On-Call Duty Officer Pay,” is not eligible to be included when calculating his retirement allowance. CalPERS’ determination was based on the fact the On-Call Duty Officer Pay was “stand by pay” and is specifically prohibited by Government Code section 20636(g)(4) from being considered compensation earnable for purposes of calculating Respondent’s retirement allowance.

Based on CalPERS’ determination, Respondent’s final compensation was adjusted and his retirement allowance reduced. This resulted in an overpayment of benefits in the amount of $33,994.92. CalPERS determined that pursuant to Government Code section 20164, the amount it would seek to collect from Respondent was $28,341.48. Respondent has been making monthly payments to reimburse CalPERS the overpayment amount.

Respondent appealed the determination that “On-Call Duty Officer Pay” is not compensation earnable and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on July 25, 2018. Respondent represented himself at the hearing. Respondent District did not appear at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent’s questions and clarified how to obtain further information on the process.
CalPERS presented evidence regarding why Respondent’s On-Call Duty Officer Pay did not meet the statutory definition of compensation earnable, and in particular did not qualify as reportable special compensation under CCR section 571. CalPERS’ evidence established that the Duty Officer position was an on-call or stand by position and the $100 that Respondent received for each 24-hour period as Duty Officer was provided to Respondent for duties outside his normal working hours. For this reason, the Duty Officer pay must be treated as “stand by pay.” Consequently, CalPERS argued the On-Call Duty Officer Pay is not a reportable item of special compensation and could not be included in Respondent’s final compensation for purposes of determining his retirement allowance.

Respondent testified on his own behalf. Respondent testified that he did not believe the Duty Officer position to be “on-call,” it was not voluntary, and it was part of his regular duties as a Battalion Chief. Respondent also testified that the Duty Officer position was a 24-hour rotation, and that it overlapped with his regular working hours and was not considered overtime. Respondent contended that the Duty Officer pay should be considered special compensation because it required special skills, knowledge and abilities. Last, Respondent argued that it would be unfair for CalPERS to reduce his monthly retirement allowance after he was already retired and collecting retirement benefits, as well as require him to pay back benefits he previously received.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that the On-Call Duty Officer Pay was “stand by” or “on call” pay and did not constitute compensation earnable under the PERL.

The ALJ also determined that estoppel did not apply in this matter. The ALJ determined that CalPERS is required to collect the erroneous payments Respondent received until his retirement allowance was adjusted to include only those payments that qualified as compensation earnable under the PERL. CalPERS’ Staff (Staff) respectfully disagrees with the ALJ’s estoppel analysis. In particular, Staff disagrees that CalPERS was aware of the fact that Respondent’s retirement benefits were improperly calculated and that CalPERS intended Respondent to act in reliance on CalPERS’ mistake. CalPERS did not know that Respondent District improperly reported income that did not qualify as special compensation until OFAS’ review. CalPERS did not intend to make the mistake, and there is no evidence that CalPERS believed Respondent would act differently based on CalPERS’ calculating benefits that were improperly reported by Respondent District. For these reasons, CalPERS does not believe evidence supports a finding that these two estoppel elements were met. However, Staff agrees with the determination that estoppel does not apply in this case.

In the Proposed Decision, the ALJ concludes that CalPERS is statutorily prohibited from including Respondent’s On-Call Duty Officer Pay in calculating Respondent’s retirement allowance. In addition, the ALJ concludes that CalPERS is statutorily required to correct the mistake of improperly determining his retirement allowance to include this pay, and that this requires CalPERS to collect the overpayment amount.
Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to “make technical or other minor changes in the proposed decision.” In order to avoid ambiguity, staff recommends that the Board modify the Proposed Decision by changing the words “compensation earned” to “compensation earnable” on page three, paragraph eight, of the Proposed Decision, and by changing “compensable” to “compensation earnable” on page four, paragraph eleven of the Proposed Decision.

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

September 26, 2018

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JOHN SHIPLEY
Senior Attorney