EXHIBIT A - 1

TRACK CHANGES – FINAL DECISION

(Encina Wastewater Authority)
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.

PROPOSED FINAL DECISION

This matter was initially heard by James Ahler, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on April 16, 2018, in San Diego, California.

At the hearing before the ALJ, 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
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.

The ALJ’s Proposed Decision, which was issued on July 5, 2018, found that the at-issue uniforms were not a ready substitute for personal attire, and that the uniforms were provided for no reason other than employee health and safety. Consequently, the ALJ found the monetary value for the purchase, rental and maintenance of the uniforms should not be reported to CalPERS as special compensation.

At its September 26, 2018, meeting, the CalPERS Board of Administration (Board) requested a Full Board Hearing on this case and on November 15, 2018, the Board conducted a Full Board Hearing. All parties received notice of the proceedings before the Board. At the November 15, 2018, hearing before the Board, EWA represented by Attorney Tracie E. Stender, John Shipley, Senior Attorney, represented CalPERS.

ISSUE

Should the monetary value related to the purchase, rental and maintenance of uniforms provided by Encina Wastewater Authority (EWA) to certain employees be reported to CalPERS as uniform allowance under Section 571 of Title 2 of the California Code of Regulations (Regulation 571)?

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 FINAL DECISION

EWA issues uniforms comprised of 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 are made from cotton and/or a polyester blend and, other than the logos they bear, are indistinguishable from everyday clothing. They are not made from any kind of specially designed protective fabric and do not provide greater protection than any other
cotton or polyester blend shirt or pair of pants. 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, EWA's employees may wear additional outer protective gear such as masks and heavy coats over the EWA uniforms. This outer protective gear, which provides a barrier between the employees' skin and materials that may be present in wastewater and raw sewage, is not a ready substitute for personal attire. The uniforms at issue were provided for no reason other than employee health and safety. On the other hand, the EWA uniforms at issue are not a ready substitute for personal attire an EWA employee might be required to acquire and maintain. The uniforms are not solely for the personal health and safety of EWA's employees.

EWA persuasively established a reasonable connection between its provision and maintenance of the uniforms at issue and employee health and safety. For these reasons, Under Regulation 571, EWA is not required to report its provision and maintenance of the monetary value for the purchase, rental and/or 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 Sewage 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 comprised of pants and shirts to certain employees. Whether the monetary value for the purchase, rental and maintenance of those uniforms must be reported to CalPERS as special compensation, a component of employee compensation earnable, 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 of 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 exquisitely 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 section 21752.5, which addresses 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.¹

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 Board promulgated California Code of Regulations, title 2, section 571 (hereafter Regulation 571).

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.
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 of the standards listed in subsection (b)."

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 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.) (emphasis in original).

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, educate state, and contracting public agencies, and school employers of the appellate court's decision in Rose, CalPERS issued a series of circular letters. CalPERS directed state, and contracting agencies, and school employers 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."^5

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^5:

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

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^5 This is the current language of the uniform allowance regulation. The language added in 2002 is emphasized.
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.

In 2002, CalPERS amended Regulation 571(a)(5) Uniform Allowance (the Uniform Allowance Regulation) to “expand the definition ... to include clothing from specially designed protective fabrics which is not solely for personal health and safety.” The Uniform Allowance Regulation was amended to ensure that firefighter uniforms, even those made out of specially designed protective fabrics, qualify as a pensionable item if the clothing is a ready substitute for personal attire. 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. The Uniform Allowance Regulation identifies “protective vests, pistols, bullets, and safety shoes” as examples of such items, consistent with the example of ammunition discussed in the Rose case as an item that would not need to be purchased but for the type of employment requiring ammunition. 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. In essence, an employee is not receiving an extra benefit from the employer by receiving such an item.

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 item 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.

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” 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.

Ms. Biggs testified that 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 waste water, 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.

Ms. Biggs further testified that 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 do not create a complete protective barrier between their bare skin and the toxic materials being treated and the dangerous substances used in the treatment process. Ms. Biggs testified that even long-sleeved shirts would not protect an individual from toxic materials, including bloodborne pathogens, if they soak through the clothing. Additional protective clothing is necessary when employees are performing dirtier work, which is why employees may be worn safety clothing as a second layer over the shirts and pants under certain circumstances.

She further testified that 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. Ms. Biggs also testified that the uniforms do not protect the employee from bloodborne pathogens if they soak through the clothing, which is why the employees who wear uniforms are required to wear EWA uniforms must showers 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. According to Ms. Biggs, 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 Eljio 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% 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.
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.

11.10. 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.

12.11. 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.

43.12. 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.

44.13. 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. The shirts and pants issued to EWA's employees are a ready substitute for personal attire. 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 the EWA uniforms at issue were not constructed of any kind of protective fabric and were not similar to protective vests, pistols, bullets, and safety shoes, which are excluded from reportable items of special compensation under specifically identified in Regulation 571. Rather, the protective gear that EWA's employees wear over their uniforms are examples of items that are solely issued for personal health and safety, and Mr. Walls did not believe the monetary value of these protective gear items should be reported as uniform allowance.

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 for purposes of the Uniform Allowance Regulation.

447 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 maintenance 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," would be reported as special compensation if it is a ready substitute for personal attire.

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 the items of clothing at issue in this case were a ready substitute for personal attire, and for this reason the monetary value of the uniforms should be reported to CalPERS as uniform allowance. 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). Mr. Camacho also testified that the protective gear EWA's employees wore as a second layer over their uniforms, the former which actually provided a protective barrier between the employees' skin and the materials they may contact, should not be reported as uniform allowance. Mr. Camacho testified that these are items that qualify as items issued solely for the personal health and safety of EWA's employees for purposes of the Uniform Allowance Regulation.

46.15 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. However, while EWA provided evidence regarding its purpose for requiring certain employees to wear the uniforms comprises of pants and shirts, the evidence established that the uniforms were, regardless of that purpose, ready substitutes for personal attire and thus a benefit to its employees. In turn, the evidence established that the pants and shirts provided by EWA to its employees do not qualify as items issued solely for the personal health and safety of its employees for purposes of the Uniform Allowance Regulation. 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.

The testimony of CalPERS’s witnesses focused on whether the uniforms were a ready substitute for personal attire and the restrictions on what properly could and could not be considered personal health and safety items apparel under the Uniform Allowance Regulation §74. The testimony of CalPERS’ witnesses emphasizing the Uniform Allowance Regulation’s §74 use of the terms “solely” and “personal,” observing that EWA uniforms were not constructed of special fabrics and that the uniforms did not provide a complete protective barrier between the employees and the materials they may encounter, and suggesting that pants and shirts at issue could not be considered safety gear excluded from special compensation as personal health and safety gear because the uniforms replaced the personal attire the employees would otherwise be required to acquire to wear to work and thus, provided a benefit to the employees. Their testimony was, to a great extent, in the nature of legal opinion, i.e., how Regulation §71 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.

While one CalPERS witness concurred acknowledged there was an 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, regardless of whether those uniforms also serve an ancillary protective purpose; second, there was no risk of skin-to-toxin contact at all times the employee was at work the uniforms do not solely serve the
personal health and safety of EWA’s employees and provide no greater protection than shirts and pants the employees would otherwise have to purchase to wear to work.

The other CalPERS witness stated shirts and pants were not specifically mentioned in Regulation 571 the Uniform Allowance Regulation and he had never heard of a public agency not being required to report uniforms consisting of pants or shirts as compensation when the pants or shirts are a ready substitute for personal attire.

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. In addition, EWA had the burden of establishing that the uniforms were solely for the personal health and safety of EWA’s employees who are provided the uniforms, within the meaning of the Uniform Allowance Regulation.

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. Wally'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' 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.

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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.
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.) The Board's interpretation of the PERL must be given "great weight unless clearly erroneous." (City of Sacramento v. Public Employees' Retirement System (1991) 229 Cal.App.3d 1470, 1478.)

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 ready substitute for the personal attire employees might otherwise wear to work, and whether the EWA uniforms were provided solely for the personal employee health and safety of the employees who wore the uniforms within the meaning of the Uniform Allowance Regulation. The resolution of these issues required a close examination of the facts when applying relevant statutes and Regulation 571, the Uniform Allowance Regulation.

Uniform Allowances as Special Compensation

5. Under the Uniform Allowance Regulation, 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 established that the monetary value for the purchase, rental, and/or maintenance of uniforms, even those made from specially designed protective fabrics, must be reported as special compensation if they are a ready substitute for personal attire, 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.

Items That Serve Personal Health and Safety Which Are Not Ready Substitutes for Personal Attire 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 overalls may be worn when these employees are not digging graves or having contact with the deceased.

The Uniform Allowance Regulation Regulation 571 should be interpreted in a reasonable fashion to exempt bona fide safety uniforms only those items that solely serve personal health and safety from having to be being reported as special compensation. To do so, the Uniform Allowance Regulation Regulation 571 was amend must be interpreted in a manner consistent with the uniform allowance identified in the Rose decision and the reasoning for the 2002 amendment to the Uniform Allowance Regulation adopted by the Board. The Rose decision and Regulation 571 the Uniform Allowance Regulation establish that if a uniform is a ready substitute for personal attire, regardless of whether it is made from specially designed protective fabrics, it must be reported as special compensation. This interpretation is consistent with the purpose of the uniform allowance explained in the Rose decision, namely that the "uniform substitutes for personal attire which the employee would otherwise be forced to acquire with personal resources" and thus provides a benefit to the employees. That benefit exists regardless of whether the uniform also provides some protective feature. The personal health and safety exclusion is limited and only applies to items that would not be needed but for a specific type of employment, 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 employees 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. In this case, the evidence established that the uniforms EWA provided its employees were a ready substitute for personal attire. The uniforms replace clothing the employees would otherwise wear while at work. The uniforms are a personal benefit to EWA's employees in that they replace clothing that they would otherwise have to purchase and/or spend resources to maintain.

In addition, the evidence established that the uniforms did not qualify as an item issued solely for the personal health and safety of EWA's employees. EWA's stated intent for providing the uniforms is not determinative in evaluating whether the Uniform Allowance Regulation, the uniforms are not "solely" for personal health and safety within the meaning of the Uniform Allowance Regulation. 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 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.

For these reasons, 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.

FINAL ORDER
Respondent Encina Wastewater Authority’s appeal is **denied**. 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

December 19, 2018

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearing