ATTACHMENT B

STAFF’S ARGUMENT
STAFF’S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Huasha L. Liu (Respondent Liu) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge’s (ALJ) Proposed Decision dated May 9, 2019. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

The issue in this case is whether bonus payments made by Respondent Southern California Association of Governments (SCAG) to Respondent Liu should be considered in the determination of Respondent Liu’s final compensation for calculation of retirement benefits.

On February 15, 2017, Respondent Liu submitted her application for service retirement. She retired for service effective March 22, 2017, with 18.337 years of service credit, and has been receiving her service retirement allowance from that date.

CalPERS reviewed the final compensation reported by SCAG on Respondent Liu’s behalf. CalPERS determined the special compensation classified as Bonus Pay was not eligible to be included in the calculation of her final compensation.

Respondent Liu appealed this determination and exercised her right to a hearing before an ALJ with the Office of Administrative Hearings. A hearing was held on April 2, 2019. Respondent Liu was present at hearing and represented herself. Respondent SCAG did not appear. After post-hearing briefs were submitted and considered, the case was final and submitted on April 10, 2019.

Prior to the hearing, CalPERS explained the hearing process to Respondent Liu and the need to support her case with witnesses and documents. CalPERS provided her with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Liu’s questions and clarified how to obtain further information on the process.

Respondent Liu received a bonus of $10,378.58 in a lump sum payment during her last year of employment. She was already at the top of her salary schedule, so the bonus was reported as special compensation. Respondent SCAG provided documents to CalPERS which confirmed that Respondent Liu qualified for a 5% merit pay increase, and she was being paid an “amount over top of range.” CalPERS determined that once Respondent Liu reached the top of her salary range, any additional compensation she received could not be “payrate” because it was over and above the maximum provided in the pay schedule. Thus, CalPERS reviewed the bonus pay as special compensation.

At the hearing, CalPERS argued the bonus was not special compensation because it (1) was not paid for “superior performance” as required by California Code of Regulations (CCR) section 571(a); and (2) was not available to “all members in the group or class” as required by CCR section 571(b)(2). First, CalPERS argued that bonus pay only qualifies as special compensation if it is paid for “superior performance.” (CCR section 571(a)). After reviewing Respondent’s Employee Annual Evaluation Forms, CalPERS found Respondent Liu’s performance was rated “3” out of “5” which was not superior. Numerous narrative comments provided in the evaluation forms bolstered CalPERS’
determination that Respondent Liu did not provide superior performance. Further, Respondent Liu's evaluation forms showed that her performance evaluation scores had dropped from the prior year.

CalPERS also argued that a bonus plan only qualifies as special compensation if it is available to “all members in the group or class” (CCR section 571(b)(2)). The SCAG bonus program provided that if an employee was not yet at the top of his/her salary range, then his/her bonus was reported as a raise in payrate (Gov. Code section 20636). However, if the employee was already at the top of his/her salary range (as Respondent Liu was), then the bonus was reported as special compensation and reviewed under CCR section 571. This resulted in disparate treatment of the compensation. Since the bonus was not equally available to all members in the group or class, it was violative of CCR section 571(b)(2).

Respondent Liu first argued that she did provide “superior performance” to Respondent SCAG. The ALJ dismissed her arguments, reasoning that CalPERS is the agency responsible for enforcing the PERL, so its interpretations of the PERL are afforded “great weight and deference.” CalPERS’ determination that Respondent Liu did not provide “superior performance” was based on a review of her job ratings and narrative comments set forth in her performance evaluations and correlated to the overall evaluation ratings and percentage of merit increase set forth in Respondent SCAG’s Bonus Pay Policy. The ALJ found CalPERS’ analysis “was reasonable,” and then held that if Respondent Liu did not provide “superior performance,” her bonus did not qualify as special compensation under CCR section 571(a).

Second, Respondent Liu argued CalPERS’ changed interpretation of SCAG’s bonus program from 2006 to 2017 was not allowed. The ALJ dismissed her arguments citing to CalPERS’ recent Court of Appeals case on bonus payments which states, “CalPERS is allowed to change its interpretation of the law” and “an administrative agency may change its interpretation of a statute, rejecting an old construction and adopting a new.” (DiCarlo v. Co. of Monterey (2017) 12 Cal.App.5th 468, 487.)

Third, Respondent Liu argued that CalPERS mischaracterized the bonus pay program as only available to employees at the top of the salary schedule. The ALJ found that her contention “misses the point.” Respondent SCAG had confirmed that employees not yet at the top of their salary range received a bonus in form of a base salary adjustment, which is a raise, not a bonus. A raise is evaluated as payrate under PERL section 20636, and a bonus is evaluated as special compensation under CCR section 571(a) and (b). This disparate treatment resulted in a program where the bonus was “not available to all members in the group or class” (violating CCR section 571(b)(2)).

The ALJ found that Respondent Liu had the burden of proof by a preponderance of evidence that she is entitled to a retirement benefit based on a final compensation amount including the enhanced $10,378.58 bonus pay.

The ALJ found that Respondent Liu did not meet her burden, holding that the bonus pay does not qualify as special compensation, and that CalPERS’ determination was amply supported by the applicable law and evidence. The ALJ found that Respondent Liu's
bonus pay of $10,378.58 was properly excluded from the calculation of Respondent Liu’s retirement benefits because it did not comply with applicable requirements of CCR section 571 (a) and (b). The ALJ was not persuaded by Respondent Liu’s arguments because they were not supported by the applicable laws and evidence. After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent Liu’s appeal. The ALJ found that payments made by Respondent SCAG to Respondent Liu should not be considered in the determination of her retirement benefits from CalPERS. Respondent Liu’s appeal was denied.

The Proposed Decision was placed before the Board of Administration at its June 19, 2019 meeting. The Board adopted the Proposed Decision. Respondent Liu was notified of the Board’s decision on June 25, 2019.

On July 15, 2019, Respondent Liu submitted a Petition for Reconsideration. She gave no reasons for her request for reconsideration, only referring to the document she already submitted for consideration at the June 2019 meeting. No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the June 21, 2019 meeting was well reasoned and based on the credible evidence presented at hearing.

For all the foregoing reasons, the staff recommends that Respondent’s Petition for Reconsideration be denied.

August 21, 2019.

ELIZABETH YELLAND
Senior Attorney