

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Kathryn A. Gerck (Respondent) was employed by Respondent City of Richmond (Respondent City) as the Emergency Services Manager. By virtue of her employment, Respondent is a state miscellaneous member of CalPERS.

On October 11, 2016, Respondent submitted to CalPERS an application for service retirement with a December 31, 2016, retirement date.

In 2017, CalPERS' Office of Audit Services conducted a compliance review of 67 public agencies, including Respondent City, to determine whether "special compensation" was being reported to CalPERS in compliance with the Public Employees' Retirement Law (PERL). As part of the audit, CalPERS determined that compensation reported by Respondent City as Off-Salary-Schedule Pay was not in compliance with the PERL. The Off-Salary-Schedule Pay was a pay differential provided to certain employees as a result of the employee performing additional duties. CalPERS worked with Respondent City to determine which employees received this item of pay that was not in compliance with the PERL. Respondent City identified Respondent as an employee who received the at-issue pay differential.

Respondent received the pay differential, an amount equal to 10% of her regular salary, from March 2014, to February 2016. Respondent City reported the pay differential to CalPERS as pensionable special compensation.

Based on the Audit's findings, CalPERS reviewed the compensation reported by Respondent City for Respondent and determined that the Off-Salary-Schedule Pay is not eligible to be included when calculating her retirement allowance. CalPERS' determination was based on the fact the pay differential did not meet the definition of Off-Salary-Schedule Pay found in California Code of Regulations (CCR) (section 571(a)(1).) The pay equaled 10% of her base salary, and Off-Salary-Schedule Pay is limited to 6% of the base salary. In addition, the Off-Salary-Schedule Pay was in violation of section 571(b) because it was not contained in a written labor policy or agreement (section 571(b)(1)), was not available to all members in the group of class (section 571(b)(2)), and potentially created an unfunded liability (section 571(b)(9)). For these reasons, CalPERS determined the pay differential Respondent received from March 2014, through February 2016, should not be included in Respondent's final compensation for purposes of calculating her retirement allowance.

In addition, CalPERS determined that as a result of Respondent City incorrectly reporting to CalPERS the pay differential as reportable compensation, Respondent received retirement benefits that she was not entitled to receive under the PERL. Consequently, CalPERS determined that it must collect the overpayment of benefits in an amount equal to \$12,144.01, the retirement allowance she received in excess of what is allowed under the PERL.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. A hearing was held on July 10, 2019. Respondent was represented by counsel at the hearing. Respondent City did not appear at the hearing.

CalPERS presented evidence regarding why Respondent's pay differential did not meet the statutory definition of "compensation earnable," and in particular did not qualify as reportable special compensation under section 571. CalPERS' evidence established that the pay differential was not provided to Respondent pursuant to a written labor policy or agreement. CalPERS' evidence established that the Memorandum of Understanding (MOU) governing Respondent's employment with Respondent City did not provide for the payment of Off-Salary-Schedule Pay. In addition, CalPERS' evidence established that the pay differential did not meet the definition of any other item of special compensation under CCR section 571(a), and did not meet the definition of any of the items of pay contained in the MOU.

CalPERS also presented evidence to establish that the pay differential did not qualify as reportable payrate under the PERL. In particular, CalPERS presented evidence establishing Respondent's base salary was the maximum amount listed on Respondent City's publicly available pay schedule; therefore, the pay differential was in excess of the maximum amount that could be reported as payrate.

CalPERS also presented evidence that the inclusion of the pay differential in Respondent's final compensation resulted in her receiving benefits to which she was not entitled to under the PERL. In particular, CalPERS presented evidence establishing that including the pay differential resulted in Respondent's retirement allowance being greater than that allowed under the PERL, and that Respondent was overpaid \$12,144.04. CalPERS argued that it is required under Government Code section 20160 to collect the overpayment amount that Respondent received.

Respondent testified on her own behalf. Respondent testified that the pay differential was provided to her while Respondent City analyzed whether her base salary should be increased. Respondent testified that her job duties greatly expanded during the time she worked for Respondent City, and that she was not being paid a salary commensurate with other Emergency Service Managers for similarly-sized cities in the Bay Area. Respondent testified that the additional pay was originally a "short-term fix," that Respondent City extended the pay differential for approximately two (2) years, but that Respondent City eventually discontinued paying her the pay differential and did not change the publicly available pay schedule to increase the maximum payrate for the Emergency Service Manager's position.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that CalPERS correctly determined that the pay differential did not qualify as compensation earnable under the PERL. The ALJ found that the pay differential did not qualify as any item of reportable special compensation under section 571, and was not included in the MOU. In addition, the ALJ determined that the pay differential could not qualify as reportable payrate because

Respondent received the maximum amount on Respondent City's publicly available pay schedule for Respondent's position.

Last, the ALJ rejected Respondent's argument that CalPERS is time-barred from correcting the error i.e. Respondent City incorrectly reporting compensation that did not qualify under the PERL. The ALJ found that CalPERS is required to correct mistakes pursuant to Government Code section 20160, and that CalPERS' collection of the overpayment amount was timely under Government Code section 20164.

In the Proposed Decision, the ALJ concludes that "CalPERS' determination that the 10% off-salary-schedule pay must be excluded from the calculation of respondent's final compensation is correct" and that CalPERS is "entitled...to collect the amount overpaid to respondent...in accordance with Government Code sections 20160 and 20164."

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

September 18, 2019

JOHN SHIPLEY
Senior Attorney