

**ATTACHMENT A**

**FINAL DECISION OF THE BOARD**

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**BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

**In the Matter of the Appeal Regarding the  
Final Compensation Calculation of  
MARK L. WHEELER,  
Respondent,  
and  
LOS ANGELES COUNTY,  
Respondent.**

**AGENCY CASE NO.: 2016-1073  
OAH NO.: 2017100516 (LEAD)  
FINAL DECISION**

**In the Matter of the Appeal Regarding the  
Final Compensation Calculation of  
THOMAS R. VALDEZ,  
Respondent,  
and  
LOS ANGELES COUNTY,  
Respondent.**

**AGENCY CASE NO.: 2017-0275  
OAH NO.: 2017100518**

**In the Matter of the Appeal Regarding the  
Final Compensation Calculation of  
JOHN M. LOPEZ,  
Respondent,  
and  
LOS ANGELES COUNTY,  
Respondent.**

**AGENCY CASE NO.: 2017-0686  
OAH NO.: 2017100520**

1 In the Matter of the Appeal Regarding the  
2 Final Compensation Calculation of  
3 LARRY BLACKWELL,  
4 Respondent,  
5 and  
6 LOS ANGELES COUNTY,  
7 Respondent.

AGENCY CASE NO.: 2017-0986

OAH NO.: 2018020308

7 In the Matter of the Appeal Regarding the  
8 Final Compensation Calculation of  
9 GARRY G. COHOE,  
10 Respondent,  
11 and  
12 SAN BERNARDINO COUNTY  
13 TRANSPORTATION AUTHORITY,  
14 Respondent.

AGENCY CASE NO.: 2017-1217

OAH NO.: 2018020953

15 These consolidated matters were heard before the Board of Administration  
16 of the California Public Employees' Retirement System on February 20, 2019, at  
17 Sacramento, California, pursuant to the Board's determination at its meeting on  
18 November 15, 2018, to decide the matter itself rather than adopt the Corrected  
19 Proposed Decision of the Administrative Law Judge. After reviewing the entire  
20 record and considering the arguments, the Board of Administration made the  
21 following determination:

22 RESOLVED, that the Board of Administration of the California Public  
23 Employees' Retirement System hereby adopts Attachment B Final Decision  
24 concerning the appeal of Mark L. Wheeler, Thomas R. Valdez, John M. Lopez,

25 ///

1 Larry Blackwell, and Garry G. Cohoe; RESOLVED FURTHER that this Board Final  
2 Decision shall be effective immediately upon the Board's adoption.

3 \* \* \* \* \*

4 I hereby certify that on February 21, 2019, the Board of Administration,  
5 California Public Employees' Retirement System, made and adopted the foregoing  
6 Resolution, and I certify further that the attached copy of the Administrative Law  
7 Judge's Final Decision is a true copy of the Decision adopted by said Board of  
8 Administration in said matter.

9 BOARD OF ADMINISTRATION, CALIFORNIA  
10 PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
11 MARCIE FROST  
12 CHIEF EXECUTIVE OFFICER

13 Dated February 26, 2019:

14 BY   
15 DONNA RAME N LUM  
16 Deputy Executive Officer  
17 Customer Services and Support  
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**ATTACHMENT B**

**FINAL DECISION**

**BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

**In the Matter of the Appeal Regarding the  
Final Compensation Calculation of:**

**MARK L. WHEELER,**

**Respondent,**

**and**

**LOS ANGELES COUNTY,**

**Respondent.**

**Case No. 2016-1073**

**OAH Case No. 2017100516**

**In the Matter of the Appeal Regarding the  
Final Compensation Calculation of:**

**THOMAS R. VALDEZ,**

**Respondent,**

**and**

**LOS ANGELES COUNTY,**

**Respondent.**

**Case No. 2017-0275**

**OAH Case No. 2017100518**

**In the Matter of the Appeal Regarding the  
Final Compensation Calculation of:**

**JOHN M. LOPEZ,**

**Respondent,**

**and**

**LOS ANGELES COUNTY,**

**Respondent.**

**Case No. 2017-0686**

**OAH Case No. 2017100520**

**In the Matter of the Appeal Regarding the  
Final Compensation Calculation of:**

**LARRY D. BLACKWELL,**

**Respondent,**

**and**

**LOS ANGELES COUNTY,**

**Respondent.**

**Case No. 2017-0966**

**OAH Case No. 2018020308**

**In the Matter of the Appeal Regarding the  
Final Compensation Calculation of:**

**GARRY G. COHOE,**

**Respondent,**

**and**

**SAN BERNARDINO TRANSPORTATION  
AUTHORITY,**

**Respondent.**

**Case No. 2017-1217**

**OAH Case No. 2018020953**

### **FINAL DECISION**

**The hearing in this matter initially took place on April 11, 2018, at Los Angeles, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. At the hearing before the ALJ, the California Public Employees' Retirement System (CalPERS or PERS) was represented by John Shipley, Senior Attorney, and Respondents Mark L. Wheeler, John M. Lopez, Larry D. Blackwell, Gary G. Cohoe and Thomas Valdez (Respondents) were represented by Stephen Silver and Elizabeth S. Tourgeman, Lucia, Stem, St. Phalle & Silver, P.C. However, Thomas Valdez did not personally appear at the hearing.**

**There was no appearance by the other Respondents, Los Angeles County (LA County) or San Bernardino County Transportation Authority (SBCTA).**

The record was held open for production of a transcript, and for briefing by the parties. CalPERS' closing brief was received on June 4, 2018, and is identified as exhibit 77. Respondents' closing brief was received on June 4, 2018, and is identified as exhibit C.

Respondents submitted two binders containing material pertaining to legislative history. The first binder is identified as exhibit D, and the second as exhibit E.

Reply briefs were submitted in a timely manner by each party. CalPERS' reply brief is identified as exhibit 78, and Respondents' reply brief is identified as exhibit F.

Thereafter, the ALJ ordered the record reopened so that he could hear argument from counsel. A telephonic hearing was held on July 26, 2018.<sup>1</sup> The record was closed, and the matter was submitted for decision on July 26, 2018.

The ALJ issued a Proposed Decision on August 28, 2018. On September 11, 2018, it came to the ALJ's attention that the original Proposed Decision showed that the telephonic hearing mentioned above took place on June 26, 2018, with that day as the submission date. That was incorrect, as the telephonic hearing was held on July 26, 2018, and the matter again submitted on that date.

The ALJ's Corrected Proposed Decision (hereinafter, the Proposed Decision), which was issued on September 13, 2018, found that Government Code Section 20638, entitled, "Final Compensation- Concurrent Retirement with County Retirement System," creates a new definition of compensation earnable for purposes of county employees, which includes Respondents. The ALJ found that Section 20638 requires CalPERS to determine Respondents' final compensation based on definitions of compensation and compensation earnable contained in the County Employees Retirement Law of 1937 (CERL). Consequently, the ALJ granted Respondents' appeals and found that Respondents' CalPERS retirement benefits shall be based on the compensation figures provided to CalPERS by their respective county retirement systems, even though those figures contain items of pay that do not qualify under the Public Employees' Retirement Law's definitions of compensation and compensation earnable.

At its November 15, 2018, meeting, the CalPERS Board of Administration (Board) requested a Full Board Hearing on this case and on February 20, 2019, the Board conducted a Full Board Hearing. All parties received notice of the proceedings before the Board. At the February 20, 2019, hearing before the Board, Respondents were represented by Attorney Stephen Silver. John Shipley, Senior Attorney, represented CalPERS.

## INTRODUCTION AND SUMMARY OF THE CASE

This case involves two statutory schemes pertaining to retirement systems for public employees: The Public Employees' Retirement Law, Government Code section 20000 et seq., and

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<sup>1</sup> Pursuant to a stipulation made at the hearing, the further proceeding was conducted telephonically, and electronically recorded.

the County Employees Retirement Law of 1937, Government Code section 31450 et. seq.<sup>2</sup>

The Respondents were previously members of CalPERS, and each subsequently became members of a county retirement system. CalPERS and the county retirement systems entered into agreements to allow members of the reciprocal systems to enjoy reciprocal membership. How reciprocal membership affects Respondents' final compensations for purposes of determining their CalPERS retirement benefits must be determined in this case.

This matter is primarily a trial on the law, rather than on the facts. (Cf. Code Civ. Proc., § 588.) That is, the bulk of the facts are not disputed-many have been stipulated to-but the legal significance of those facts is very much in dispute. The parties agree that CalPERS and the two county retirement systems are reciprocal retirement systems. Respondents assert that when CalPERS calculates their CalPERS retirement payments it must make to them, CalPERS must utilize their final compensation as calculated by their county retirement systems and reported to CalPERS; that is, the CERL's rules must control. CalPERS asserts, on the other hand, that when calculating final compensation, the PERL's definitions for compensation (Section 20630) and compensation earnable (Section 20636) control, and that some items of pay made to Respondents by their respective county employers do not qualify as pensionable income under the PERL and cannot be included when determining Respondents' final compensations, effectively reducing the retirement benefits that they might otherwise receive from CalPERS.

The issue then becomes a question of which statute in the PERL controls how "compensation" and "compensation earnable" are defined for purposes of determining a reciprocal member's retirement benefits. CalPERS asserts that Sections 20630 and 20636 define compensation and compensation earnable for reciprocal members, and Respondents assert Section 20638 provides an alternative definition of compensation earnable for reciprocal members.

While the main part of the case pertains to which statutes define pensionable income, Respondent Cohoe, as a separate matter, claims that even if Section 20636 controls, the compensation he received from SBCTA in the form of Top of Range Merit pay should qualify as pensionable income under the PERL and be included in his final compensation for purposes of calculating his CalPERS retirement benefits. Likewise, Respondents Wheeler and Valdez claim that the compensation they received from LA County in the form of Longevity/Merit Bonus pay should qualify as pensionable income and be included in their final compensations for purposes of calculating their CalPERS retirement benefits.

#### *Issues*

1. Should CalPERS apply the PERL's definitions of "compensation" and "compensation earnable" when calculating Respondents' retirement benefits, or does Section 20638 provide an alternative definition of "compensation earnable" for purposes of reciprocal members, including Respondents, requiring CalPERS to use the figures provided by reciprocal system's under the CERL?

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<sup>2</sup> All further statutory citations are to the Government Code unless otherwise noted.

2. Does Respondents Wheeler and Valdez' Longevity/Merit Bonus pay qualify as compensation earnable under the PERL?
3. Does Respondent Cohoe's Top of Range Merit pay qualify as compensation earnable under the PERL?

***The Parties and Jurisdiction***

1. (A) Respondent Larry D. Blackwell (Blackwell) established membership in CalPERS on December 4, 2000, through employment with the City of Temple City (Temple City). Blackwell separated from Temple City on or about July 9, 2002, but he remained a member of CalPERS.

(B) Blackwell became an employee of the County of Los Angeles on or about July 10, 2002, and he established membership in the Los Angeles County Employees' Retirement Association (LACERA). He was last employed with the Los Angeles County Sheriff's Department as a lieutenant.

(C) Blackwell has reciprocity rights for concurrent retirement with both CalPERS and LACERA.

(D) Blackwell signed an application for service retirement with a retirement date of January 31, 2017. He has 1.714 years of service credit with CalPERS.

(E) CalPERS received a Retirement Salary Request form from LACERA dated February 13, 2017, along with other documents pertaining to Blackwell's final average compensation. LACERA reported as compensation several categories, including Pensionable Cafeteria Plan, Pensionable Sick Buyback, and Pensionable Vacation Buyback.

(F) CalPERS staff analyzed the aforementioned categories of compensation, and concluded that they do not meet the definition of "compensation earnable" within the meaning of the statutes and regulations that govern CalPERS. CalPERS gave Blackwell and LACERA notification of its determination, along with information about their appeal rights.

(G) Blackwell filed a timely appeal and this proceeding ensued. CalPERS filed a Statement of Issues (SOI), and Blackwell submitted a Notice of Defense. All jurisdictional requirements have been met.

2. (A) Respondent John M. Lopez (Lopez) established membership in CalPERS on September 27, 1982 through employment with the City of Alhambra (Alhambra). Lopez went to work for the City of Downey (Downey) on March 11, 1984, and remained in the employ of Downey through April 28, 1994, and he remained a member of CalPERS.

(B) Lopez became an employee of LA County on or about May 1, 1994, and he established membership in LACERA at that time.

(C) Lopez has reciprocity rights for concurrent retirement with both CalPERS and LACERA.

**(D) Lopez took steps to retire beginning on August 8, 2016, and he retired from service effective September 17, 2016, with 11.880 years of service credit with CalPERS.**

**(E) CalPERS received a Retirement Salary Request form from LACERA dated October 21, 2016, with other documents pertaining to Lopez's final average compensation. LACERA reported as compensation several categories, including Pensionable Cafeteria Plan, Pensionable Sick Buyback, and Pensionable Vacation Buyback.**

**(F) CalPERS staff analyzed the aforementioned categories of compensation, and concluded that they do not meet the definition of "compensation earnable" within the meaning of the statutes and regulations that govern CalPERS. In January 2017, CalPERS gave Lopez and LACERA notification of its determination, along with information about their appeal rights.**

**(G) Lopez filed a timely appeal and this proceeding ensued. CalPERS filed a SOI, and Lopez submitted a Notice of Defense. All jurisdictional requirements have been met.**

**3. (A) Respondent Thomas R. Valdez (Valdez) established membership in CalPERS effective December 6, 1978, through employment with the City of El Segundo (El Segundo). Valdez remained in the employ of El Segundo until August 22, 1982, and he then entered into employment with the City of Inglewood (Inglewood) on August 23, 1982. Valdez worked for Inglewood until May 8, 1986, remaining a member of CalPERS through that later date.**

**(B) Valdez became an employee of LA County on or about May 9, 1986, and he established membership in LACERA at that time.**

**(C) Valdez has reciprocity rights for concurrent retirement with both CalPERS and LACERA.**

**(D) Valdez retired from service effective March 31, 2016, with 7.679 years of service credit with CalPERS.**

**(E) CalPERS received a Retirement Salary Request form from LACERA on or about March 21, 2016, with other documents pertaining to Valdez's final average compensation. LACERA reported as compensation several categories, including Pensionable Cafeteria Plan, Pensionable Sick Buyback, and Pensionable Vacation Buyback.<sup>3</sup>**

**(F) CalPERS staff analyzed the aforementioned categories of compensation,**

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<sup>3</sup> LACERA did not initially identify Longevity/Merit Bonus pay as an item of compensation that Valdez received. CalPERS was first informed this was an item of pay he received after it issued its initial determination. As discussed in Paragraph 3(G), CalPERS issued an amended determination when it received documentation that the Longevity/Merit Bonus Pay provided to Valdez also did not comply with the PERL.

and concluded that they do not meet the definition of "compensation earnable" within the meaning of the statutes and regulations that govern CalPERS. Further, CalPERS was unable to verify if compensation identified by LACERA as Pensionable Holiday Buyback, and certain payments included in Scheduled Earnings or Regular Earnings should be included as final compensation. On July 5, 2016, CalPERS wrote Valdez and LACERA, giving them notice of its determination, along with information about their appeal rights.

(G) In July 2016, Valdez filed a timely appeal. Thereafter, CalPERS received further information from LA County and LACERA regarding compensation. CalPERS concluded that Pensionable Cafeteria Plan, Pensionable Sick Buyback; and Pensionable Vacation Buyback were not eligible for inclusion in the calculation of final compensation. Further communications between CalPERS and Valdez's attorney ensued, which focused on whether longevity pay was to be included in Valdez's final compensation. On March 9, 2017, CalPERS gave notice to Valdez that longevity pay would not be included in the calculation of final compensation.

(H) Valdez sought an appeal, and CalPERS filed a SOI. Valdez then submitted a Notice of Defense. This proceeding ensued, all jurisdictional requirements having been met.

4. (A) Respondent Mark L. Wheeler (Wheeler) established membership in CalPERS effective July 1, 1981, through employment with the City of La Habra (La Habra). Wheeler remained employed by La Habra until July 1, 2005, remaining a member of CalPERS through that later date.

(B) Wheeler became an employee of LA County on or about July 1, 2005, and he established membership in LACERA at that time.

(C) Wheeler has reciprocity rights for concurrent retirement with both CalPERS and LACERA.

(D) Wheeler retired from service effective March 31, 2016, with 24.014 years of service credit with CalPERS.

(E) CalPERS received a Retirement Salary Request form from LACERA on or about March 21, 2016, with other documents pertaining to Wheeler's final average compensation. LACERA reported as compensation several categories, including Pensionable Cafeteria Plan, Pensionable Sick Buyback, Pensionable Vacation Buyback, and Longevity/Merit Bonus pay.

(F) CalPERS staff analyzed the aforementioned categories of compensation, and concluded that they do not meet the definition of "compensation earnable" within the meaning of the statutes and regulations that govern CalPERS. In June 2016, CalPERS gave Wheeler and LACERA notification of its determination, along with information about their appeal rights.

(G) Wheeler filed a timely appeal, which led to CalPERS filing a SOI. Wheeler filed a notice of defense, and this proceeding ensued. All jurisdictional requirements

have been met.

5. (A) Respondent Garry G. Cohoe (Cohoe) established membership in CalPERS effective July 6, 1987, through employment with the City of Ontario (Ontario). Wheeler remained employed by Ontario until August 1, 1991. Cohoe then commenced employment with the California Department of Transportation (CalTrans), and he worked for CalTrans until January 26, 2003, remaining a member of CalPERS through that later date.

(B) Cohoe became an employee of the County of San Bernardino on or about January 27, 2003, and he established membership in the San Bernardino County Employees' Retirement Association (SBCERA) at that time.

(C) Cohoe has reciprocity rights for concurrent retirement with both CalPERS and SBCERA.

(D) Cohoe retired from service effective January 7, 2017, with 15.682 years of service credit with CalPERS.

(E) CalPERS received a Retirement Salary Request form from SBCERA on or about February 6, 2017, with other documents pertaining to Cohoe's final average compensation. SBCERA reported as compensation several categories of compensation, including Auto Allowance, Cell-Phone Contract, Cashout Admin-Earnable Comp, Cashout Vac-Earnable Comp, and Flex-Manual Pay.<sup>4</sup>

(F) CalPERS staff analyzed the aforementioned categories of compensation, and concluded that they do not meet the definition of "compensation earnable" within the meaning of the statutes and regulations that govern CalPERS. In April 2017, CalPERS gave Cohoe and SBCERA notification of its determination, along with information about their appeal rights.

(G) Cohoe responded to the April 2017 letter, asserting reasons that the compensation should remain in the calculation of his retirement benefits. After further consideration, CalPERS notified Cohoe and SBCERA that it did not find the payments should be part of his final compensation calculation, and that pay he had received as "Top of Range Merit" pay was not eligible for inclusion into his retirement benefit calculations. This was communicated by a letter dated June 30, 2017, addressed to Cohoe and SBCERA.

(H) Cohoe filed a timely appeal, which led CalPERS to file a SOI. Cohoe filed his notice of defense, and this proceeding ensued. All jurisdictional requirements have been met.

6. Each of the five SOI's were signed by Renee Ostrander in her capacity as

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<sup>4</sup> SBCERA did not initially identify Top of Range Merit pay as an item of pay that Cohoe received. After CalPERS received additional information from SBCERA, a supplemental determination was issued informing Cohoe that Top of Range Merit pay did not qualify as compensation earnable under the PERL and could not be included in the final compensation used when determining his CalPERS retirement benefits.

Chief of CalPERS' Employer Account Management Division.<sup>5</sup>

7. On October 11, 2017, CalPERS moved to consolidate the SOI's pertaining to Lopez, Valdez, and Wheeler for hearing, which motion was granted on December 15, 2017. Thereafter, CalPERS moved to consolidate the SOI's pertaining to Cohoe and Blackwell for hearing along with the other cases, which motion was granted.

8. LA County was named as a respondent in the cases involving Blackwell, Lopez, Valdez, and Wheeler, and it was served with the SOI's for those cases. Likewise, SBCTA was named in the action pertaining to Cohoe, and was served with the SOI. Neither LA County nor SBCTA appeared in this matter.

*The Parties' Stipulation*

9. Prior to the hearing in this matter, the parties entered into a written stipulation. (Exh. 74.) The salient terms of the stipulation are set out below, in their entirety.

1. CalPERS asserts that all retirement benefits paid by CalPERS to its members, including members who've established reciprocity between CalPERS and a Reciprocal Retirement System, such as the Los Angeles County Employees' Retirement Association (LACERA) and the San Bernardino County Employees' Retirement Association (SBCERA), are subject to the California Public Employees' Retirement Law (PERL). CalPERS takes the position that only those items of compensation that qualify as compensation earnable under the PERL will be included in the Final Average Compensation (FAC) or final compensation amount that's used to determine a CalPERS retirement allowance.

2. In the past, CalPERS did not have an automated process to review all reported final salary information provided by Reciprocal Retirement Systems. However, upon discovery that a reciprocal Retirement System possibly regarded as pensionable income and final compensation under the County Employee's Retirement Law (CERL) items of special compensation that don't qualify as compensation earnable under the PERL, CalPERS has and will conduct independent reviews.

3. Recently, CalPERS was made aware that Reciprocal Retirement Systems were routinely treating and reporting to CalPERS as pensionable income and final compensation under the CERL items of compensation that did not qualify as compensation earnable under the PERL. Consequently, CalPERS has dedicated additional resources to its Compensation Compliance Review Unit to ensure when using reciprocal salary information, only compensation that qualifies as compensation earnable under the PERL is used in the calculation of retirement benefits for the CalPERS portion of the reciprocal allowance. CalPERS does this by requiring Reciprocal Retirement Systems to provide greater details for

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<sup>5</sup> In one instance, another person signed the SOI on Ostrander's behalf.

items provided as part of the FAC under the CERL to CalPERS. In addition, CalPERS recently issued a Circular Letter to address and provide information regarding CalPERS' review and determination process for computation of the FAC or final compensation amount that CalPERS may use to calculate member benefits for the CalPERS portion of the reciprocal allowance.

4. With respect to Respondents Lopez, Valdez, Whseler and Blackwell, the following items of compensation earned by those individuals during their final compensation measurement period were reported to CalPERS by the County of Los Angeles and LACERA as compensation earnable, and therefore final compensation, under the CERL: Pensionable Sick Buyback, Pensionable Vacation Buyback, and Pensionable Cafeteria Plan. CalPERS does not have independent knowledge as to whether these items qualify as compensation earnable, and therefore final compensation, under the CERL. However, for the sole purpose of this consolidated hearing, CalPERS does not dispute that these items qualify as compensation earnable, and therefore final compensation, under the CERL. However, these items do not qualify as compensation earnable and/or final compensation under the PERL.

5. With respect to Respondent Cohoe, the following items of compensation earned by him during his final compensation measurement period were reported to CalPERS by the San Bernardino County Transportation Authority and SBCERA as compensation earnable, and therefore final compensation: Auto Allowance, Cell Phone-Contract, Cashout Admin-Earnable Comp, Cashout Vac-Earnable Comp and Flex-Manual Pay. CalPERS does not have independent knowledge as to whether these items qualify as compensation earnable, and therefore final compensation, under the CERL. However, for the sole purpose of this consolidated hearing, CalPERS does not dispute that these items qualify as compensation earnable, and therefore final compensation, under the CERL. However, these items do not qualify as compensation earnable and/or final compensation under the PERL.

#### *Testimony Offered by CalPERS*

10. Jennifer Sandness testified on behalf of CalPERS. She has been employed there for nearly 10 years, working for the last eight years in the Employer Account Management Division's compensation review unit.

11. Ms. Sandness took the position that various items of pay used by LACERA and SBCERA to determine Respondents pensionable income are not deemed items of pensionable compensation under the PERL. She also spoke to Respondent Cohoe's payrate, asserting that he received a payrate that was above the maximum amount on his employer's publicly available pay schedule.

12. Regarding Cohoe's pay, the information received from SBCERA indicated he was paid above the maximum amount of payrate set out on the publicly available pay schedule adopted by SBCTA covering his position, and under the PERL that excess could not be treated as payrate. Further inquiry to SBCERA led to information to the effect that

Cohoe's employer would sometimes pay employees in excess of the maximum payrate based on the employee's time at the top of the pay range and their performance. Ms. Sandness took the position that under the PERL the excess amount could not be defined as a performance bonus, and it did not meet the requirements of longevity pay. Ms. Sandness testified that the PERL, and case law interpreting the PERL, requires that an item of special compensation meet the specific definition of an item listed in California Code of Regulations (CCR), title 2, section 571 (CCR Section 571) to be pensionable. Ms. Sandness testified that CCR Section 571 contains a definition for "merit bonus," and separately a definition for "longevity." However, Ms. Sandness testified that Respondent's Top of Range Merit pay combines the requirement for both merit bonus and longevity, and the law does not allow an employer to combine two or more items listed in CCR Section 571 to create a reportable item of special compensation. Ms. Sandness also testified that the Top of Range Merit pay Cohoe received could not qualify as payrate because it was not the normal monthly rate of pay or base pay of Cohoe paid to similarly situated members. The Top of Range Merit pay was not the normal monthly rate of pay or base pay, but was pay that recognized Cohoe's longevity and excellent performance. Consequently, Ms. Sandness testified that it did not qualify as payrate, as that term is defined in Section 20636.

13. Ms. Sandness also testified that Respondent Wheeler and Valdez's longevity bonus did not qualify under the PERL because it required the employee to be at the top step of their pay range and because it also had a performance component. Ms. Sandness testified that, similar to Respondent Cohoe's Top of Range Merit pay, the law does not allow an employer to combine two or more items listed in CCR Section 571 to create a reportable item of special compensation. Because LA County's longevity bonus combines longevity, being on the top step of a salary range for a position, and performance, it is not recognized on the exclusive list for reportable items of special compensation found in CCR Section 571.

14. Ms. Sandness confirmed that for many years CalPERS accepted as the final compensation variable in computing the pension benefits the compensation forwarded to it by the reciprocal county retirement systems; however, Ms. Sandness testified that if CalPERS became aware of an instance where a reciprocal county retirement system reported compensation that did not qualify under the PERL, CalPERS took steps to ensure that the reciprocal member's final compensation was calculated to include only pensionable compensation as defined by the PERL. Ms. Sandness testified that in these instances CalPERS only paid retirement benefits on final compensation amounts that qualified under the definitions of compensation and compensation earnable found in Sections 20630 and 20636 of the PERL.

#### *Testimony of Respondent Cohoe*

15. Respondent Cohoe testified that he had been receiving Top of Range Merit pay, which was based on both longevity and performance, which is why his pay was in excess of the maximum payrate listed on SBCTA's publicly available pay schedule for his position. He had been receiving such pay for six to seven years before he retired in early 2017.

### ***Other Matters***

16. Respondent Cohoe's salary was set out on an SBCTA document entitled "Annual Salary Range by Class Title" for the fiscal year 2016-2017, effective July 1, 2016. (Ex. 68.) He, along with six other employees, was in salary range 40. It had a minimum pay of \$116,871, a mid-point pay of \$146,088, and a maximum pay of \$175,306 per year. The Salary Schedule notes that "Salary Ranges may be adjusted, as approved, by the Board of Directors." A fourth category, entitled "Top of Range Merit" set the salary at \$192,837. It should be noted that every position listed, from receptionist (the lowest paid) to the Deputy Executive Director (highest) had a Top of Range Merit category on the pay schedule. A double asterisk under the category "Top of Range Merit" led to a footnote that stated: "Policy 10107 outlines authority of the Executive Director to approve Top of Range advancement for staff at top of range for three years based on performance." Policy 10107.VIII.D. Top of Range provides "Employees who have been at or over the maximum of their salary range for 36 months or more will become eligible for advancement based upon work performance and supervisor's recommendation (Refer to Policy 10115). Such advancement must be approved by the Executive Director and may not exceed 5% in any year. At no time shall advancement exceed more than 10% above the maximum of the employee's salary range assignment."

17. Respondents Wheeler and Valdez each received compensation that was reported to CalPERS as a longevity bonus. Los Angeles County Code of Ordinance 6.10.100 provides the eligibility requirements for receiving the "longevity bonus." To be eligible for the "longevity bonus," Respondents Wheeler and Valdez had to complete "at least 10 years of aggregate service in such position" and also be "on the top step of the salary range of such position." (LA County Ordinance 6.10.100.A.1.) In addition, Respondents Wheeler and Valdez could only receive the "bonus...upon departmental certification that the employee's performance is 'competent' or better. (LA County Ordinance 6.10.100.C.)

## **LEGAL CONCLUSIONS AND DISCUSSION**

### ***On Reciprocity***

1. The parties' agreement that the county systems are in reciprocity with CalPERS on its own does little to advance the analysis, especially when CalPERS argues that the statute relied upon by respondents, section 20638, does not provide an alternative definition of "compensation" and "compensation earnable" for reciprocal members such as Respondents. Statutes pertinent to reciprocity are found in the PERL and in the CERL.

2. "Under PERS, reciprocity is governed by Government Code title 2, division 5, part 3, chapter 3, article 5.)" (*Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 109.) Included among the PERS reciprocity statutes is section 20351.

3. Section 20351, found in the aforementioned portion of the Government Code, states:

The provisions of this part extending rights to a member of this system, or subjecting him or her to any limitation by reason of his or her

membership in a county retirement system, shall apply in like manner and under like conditions to a member of this system by reason of his or her membership in any retirement system established under Chapter 2 (commencing with Section 45300) of Division 5 of Title 4 with respect to which an ordinance complying with Section 45310.5 has been filed with and accepted by the board or by reason of his or her membership in a retirement system established by or pursuant to the charter of a city or city and county or by any other public agency of this state and that system, in the opinion of the board, provides a similar modification of rights and benefits because of membership in this system and with respect to which the governing body of the city, city and county or public agency and the board have entered into agreement pursuant to this section. An agreement under this section shall provide that the governing body shall modify its retirement system to conform to any amendments to this part affecting a member's right because of membership in a county retirement system, and may contain other provisions consistent with this section as the board deems appropriate. This section shall apply only to a member whose termination and entry into employment resulting in a change in membership from this system to the other system or from the other system to this system occurred after the acceptance by the board or after the effective date specified in the agreement. However, provisions relating to computation of final compensation shall apply to any other member if the provision would have applied had the termination and entry into employment occurred after the acceptance or determination by the board.

4. Section 20353 states:

Any public agency that has pursuant to the provisions of Section 20351 entered into an agreement to establish a reciprocal retirement system with this system shall be deemed to have obtained the same rights and limitations with respect to all other public agencies who have entered into those agreements and established reciprocity as well as with respect to county retirement systems and under Chapter 2 (commencing with Section 45300) of Division 5 of Title 4 that have established reciprocity with this system pursuant to Section 20351.

5. Government Code section 31380, part of the CERL, states the legislative intent regarding reciprocity between county and other retirement systems, as follows:

The provisions of this article are intended to encourage career public service by granting reciprocal retirement benefits to members who are entitled to retirement rights or benefits from two or more retirement systems established under this chapter or from a retirement system established under this chapter and the Public Employees' Retirement System, the State Teachers' Retirement System, or a retirement system of any other public agency of the state that has established reciprocity with

the Public Employees' Retirement System subject to the conditions of section 31840.2, and to delineate the financial obligations of each system and related political entity so that no system or political entity shall be liable for more than its just financial obligation.

***Statutes and Regulations Relating to Compensation, Compensation Earnable, and Final Compensation***

6. (A) The PERL and the CERL each have their own definitions of the terms compensation and compensation earnable.

(B) "Compensation" within the PERL is defined at section 20630, and "compensation earnable" is defined at section 20636. However, "compensation earnable" is also defined at sections 20636.1, 20637, 20638, and 20639.

(C) Within the CERL, compensation is defined at section 31460. Several statutes define compensation earnable, depending on the circumstances; these include sections 31461, 31461.1, 31461.2, 31461.3, 31461.4, 31461.4S, and section 3146.1.6.

7. Section 20630 defines "compensation" as follows:

(a) As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of any of the following:

(1) Holidays.

(2) Sick leave.

(3) Industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code, Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or Section 44043 or 87042 of the Education Code.

(4) Vacation.

(5) Compensatory time off.

(6) Leave of absence.

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.

8. The CERL definition of compensation, found in section 31460, states:

"Compensation" means the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan established pursuant to Chapter 8 (commencing with Section 18310) of Part 1 of Division 5 of

**Title 2 or pursuant to Article 1.1 (commencing with Section 53212) of Chapter 2 of Part 1 of Division 2 of Title 5, but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member.**

**9. Section 20636 defines "compensation earnable" and provides in part:**

**(a) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.**

**(b) (1) "Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. "Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e).**

**(2) "Payrate" shall include an amount deducted from a member's salary for any of the following:**

**(A) Participation in a deferred compensation plan.**

**(B) Payment for participation in a retirement plan that meets the requirements of Section 401(k) of Title 26 of the United States Code.**

**(C) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of Title 26 of the United States Code.**

**(D) Participation in a flexible benefits program.**

**(3) The computation for a leave without pay of a member shall be based on the compensation earnable by him or her at the beginning of the absence.**

**(4) The computation for time prior to entering state service shall be based on the compensation earnable by him or her in the position first held by him or her in state service.**

**(e) (1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.**

**(2) Special compensation shall be 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. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e).**

**(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.**

**(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.**

**(5) The monetary value of a service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."**

**(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 et seq. of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.**

**(7) Special compensation does not include any of the following:**

**(A) Final settlement pay.**

**(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.**

**(C) Other payments the board has not affirmatively determined to be special compensation.**

**(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.**

**(e) (1) As used in this part, "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class.**

**(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.**

**(f) As used in this part, "final settlement pay" means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay. [§] . . . [§]**

**10. CCR Section 571 delineates more specifically and exclusively what constitutes**

**"special compensation" and provides, in part:**

**(a) 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:**

**(1) INCENTIVE PAY**

**Bonus – Compensation to employees for superior performance such as "annual performance bonus" and "merit pay. If provided only during a member's final compensation period, it shall be excluded from final compensation as "final settlement pay. A program or system must be in place to plan and identify performance goals and objectives.**

**[§] . . . [§]**

**Longevity Pay - Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.**

**11. "Final Compensation" for reciprocal members is separately defined in the PERL (Section 20638) and the CERL (Section 31835).**

**Section 20638, contained in the PERL, states, in pertinent part:**

**The highest annual average compensation during any consecutive 12-or 36-month period of as a member of a county retirement system shall be considered compensation earnable by a member of this system for purposes of computing final compensation for the member provided [¶]...[¶]**

**(b) He or she retires concurrently under both systems and is credited with the period of service under the county system at the time of retirement.**

**Section 31835, contained in the CERL, states in pertinent part:**

**The average compensation during any period of service as a member of the Public Employees' Retirement System, a member of the Judges' Retirement System or Judges' Retirement System II, a member of a retirement system established under this chapter in another county, a member of the State Teachers' Retirement System, or a member of a retirement system of any other public agency of the state that has established reciprocity with the Public Employees' Retirement System subject to the conditions of Section 31840.2, shall be considered compensation earnable or pensionable compensation pursuant to Section 7522.34, whichever is applicable, by a member for purposes of computing final compensation for that member provided [¶]...[¶]**

**(b) He or she retires concurrently under both systems and is credited with the period of service under that other system at the time of retirement.**

**The provisions of this section shall be applicable to all members and beneficiaries of the system.**

#### ***Applicability of Section 20351***

**12. Respondents argue that section 20351, cited by CalPERS in determination letters and the SOI's, does not control in this case. They point out that CalPERS did not quote the entire statute, leaving out the bulk of it, and the reference to the city-based retirement systems authorized by section 45300 et. seq. While all of the statute is not quoted below, the portion referenced by Respondents states:**

**The provisions of this part extending rights to a member of this system,**

or subjecting him or her to any limitation by reason of his or her membership in a county retirement system, shall apply in like manner and under like conditions to a member of this system by reason of his or her membership in any retirement system established under Chapter 2 (commencing with Section 45300) of Division 5 of Title 4 with respect to which an ordinance complying with Section 45310.5 has been filed with and accepted by the board or by reason of his or her membership in a retirement system established by or pursuant to the charter of a city or city and county or by any other public agency of this state and that system, in the opinion of the board, provides a similar modification of rights and benefits because of membership in this system and with respect to which the governing body of the city, city and county or public agency and the board have entered into agreement pursuant to this section....

13. Respondents asserted that section 20351 only applies to retirement systems established by cities and other localities in compliance with section 45300 et. seq. Respondents are mistaken. Section 20351 is applicable in this matter because it provides that cities and counties may enter into reciprocal agreements with PERS, provided that they give CalPERS the same reciprocity it gives them. (*Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 109.) Consequently, Section 20351 is applicable in this matter because it is the statute through which the Legislature allows public retirement systems, including LACERA and SBCERA, to enter into reciprocal agreements with CalPERS, provided these county systems give CalPERS the same reciprocal rights.

#### *Stare Decisis and Relevant Case Law*

14. Under the doctrine of stare decisis, "all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

15. The Court of Appeal in *Stillman v. Board of Retirement of Fresno County Employees' Retirement Assn.*, (2011) 198 Cal.App.4th 1355 (*Stillman*) is directly on point to the primary issue in this matter- whether CalPERS must use the FERL, or the CERL, in determining Respondents' final compensations for purposes of calculating their CalPERS retirement benefits. In *Stillman*, the Court was tasked with determining whether the Fresno County Employees' Retirement Association's Board (FCERA) "must determine the compensation upon which the retirement benefit is based from the Government Code definition of 'compensation' used by FCERA or, instead, whether the Board must use the different definition of "compensation" established by the retirement plan of San Luis Obispo County." (*Id.* at 1358.) In *Stillman*, the reciprocal member (*Stillman*) was attempting to force FCERA to use the definition of "compensation" used by a reciprocal retirement system, San Luis Obispo County Pension Trust (SLOCPT), because it would increase the benefits FCERA would have to pay *Stillman*. *Stillman's* pensionable income was different under the two systems because the amount San Luis Obispo County paid for a member's retirement contribution qualifies as pensionable income under SLOCPT's statutory scheme, while this item did not qualify as pensionable income under FCERA's statutory scheme (the CERL). *Stillman* argued that Section 31835 of the CERL created a unique definition of "compensation" and "compensation earnable" for reciprocal members and that FCERA was required to use the figure supplied by SLOCPT. (*Id.* at 1363.)

The Court of Appeal rejected Stillman's argument that Section 31835 created a new definition of "final compensation" that must be used by FCERA when calculating Stillman's retirement benefits. (*Ibid.*) In *Stillman*, the Court found that the "CERL defines 'compensation,' 'compensation earnable' and 'final compensation.' The definitions build upon each other, with final compensation ultimately providing the basis for calculation of retirement benefits." (*Id.* at 1361.)

The Court of Appeal recognized that "final compensation" looks to the time when the compensation was earned, and does not establish compensation earnable. (*Id.* at 1362.) In *Stillman*, the Court found that Section 31835 did not redefine "compensation" or "compensation earnable" for the purpose of calculating retirement benefits for a CERL employee who has been employed by a non-CERL reciprocal employer. (*Id.* at 1363.) The Court found that the "obvious purpose of section 31835 is to modify, under some circumstances, the temporal limitation of section 31462.1" which "permits the employee to select the year of compensation to be used as the basis for retirement calculations, but impliedly limits that year to one during which the employee was working for the employer that is providing the retirement benefit. Section 31835, when applicable, allows the employee to select a different year- a year during which the employee was working for a different (but reciprocal) employer. And that is all it does." (*Id.* at 1363.)

In *Stillman*, the Court concluded that Section 31835 "does not change the statutory definition of either 'compensation' or 'final compensation,' both of which provide the bedrock foundation upon which retirement benefits are calculated. Noncompensation does not become compensation just because it is paid by a reciprocal employer." (*Id.* at 1363.)

16. The Court of Appeal in *DiCarlo v. County of Monterey* (2017) 12 Cal.App.5th 468 analyzed whether a CalPERS member was entitled to include a longevity performance stipend as pensionable special compensation under the PERL. Essentially, the longevity performance stipend combined two separate items of special compensation that are allowed under the PERL: longevity pay and bonus. (See Regulation 571(a)(1).)

The Court in *DiCarlo* found that "only those items of compensation expressly identified in section 571, subdivision (a) constitute special compensation that must be reported to CalPERS and included in CalPERS calculation of retirement benefits." (*DiCarlo, supra*, 12 Cal.App.5th at 483.) The Court in *DiCarlo* found "[i]t is undisputed that a longevity performance stipend or bonus was not included in the section 571, subdivision (a) list of qualifying items of special compensation. Moreover, there is nothing in the language of section 571 or Government Code section 20636 that indicates that the Board of Administration affirmatively determined that a form of incentive pay combining longevity pay and bonus pay constitutes special compensation." (*Id.* at 484.) Consequently, the Court in *DiCarlo* held that "construing section 571 to authorize a local agency employer to combine two items of special compensation listed in section 571, subdivision (a) to form another item of special compensation would not be consistent with the clear language and purpose of section 571 and its authorizing statute, Government Code section 20636." (*Id.* at 485.)

***Issue 1: Section 20638 Does Not Provide An Alternative Definition of Compensation or Compensation Earnable for Reciprocal Members and All Pensionable Income For Reciprocal Members Must Qualify Under the PERL's Definitions of Compensation and Compensation Earnable***

17. Respondents' primary argument is that Section 20638 provides an alternative

definition for compensation and compensation earnable for reciprocal members, including the Respondents. However, the Court in *Stillman* rejected this argument while analyzing a statute analogous and nearly identical to Section 20638, and *Stillman* is binding precedent for this issue. Reciprocity only allows a member to utilize a time period, for purposes of determining their final compensation period, during which they work with a non-CalPERS employer, so long as certain requirements are met. Section 20638, as did Section 31835, modifies the temporal limitation contained in the PERL for purposes of determining the member's final compensation period. This limitation generally requires that a CalPERS member's final compensation period be during a period of time they were actively employed with an employer that provides benefits through CalPERS. Section 20638 allows reciprocal members to use as their final compensation period a 12 or 36-month period for which they worked for an employer covered by a reciprocal system. The Court's holding in *Stillman* requires a finding that compensation earned by a reciprocal member does not become pensionable income under the PERL, for purposes of calculating CalPERS benefits, simply because it is treated as pensionable compensation under the CERL, or any other public retirement system that has entered into a reciprocal agreement with CalPERS.

18. Finally, *Stillman* decisively rejected the analysis in *Block v. Orange County Employees' Retirement System* (2008) 161 Cal.App.4th 1297 because that case dealt with entirely different issues. (*Stillman, supra*, 198 Cal.App.4th at 1363-1364.) Furthermore, as *Stillman* highlights, the Court's ruling in *Block* does not actually support Respondents' position that CalPERS is required to utilize the final compensation amounts provided by Respondents' employers and/or reciprocal retirement systems (LACERA and SBCERA). (*Id.* at 1364.) The Court in *Block* did not analyze whether reciprocity impacts a reciprocal system's ability to independently calculate final compensation for purposes of determining retirement benefits. (*Ibid.*) Although *Block* did not directly address this issue, the Court recognized that *Block*'s final compensation amounts differed between CalPERS (\$6,793.42) and OCERA (\$7,021.15). (*Ibid.*) Consequently, the only reasonable inference from the Court's decision is that each system was allowed to independently determine *Block*'s "average monthly compensation" and arrived at different figures, with CalPERS' amount being less than the amount calculated by OCERA under the CERL. (*Ibid.*)

***Issue 2: Respondents Wheeler and Valdez's Longevity/Merit Bonus Pay Does Not Qualify as Compensation Earnable Under the PERL***

19. Respondents Wheeler and Valdez each received compensation in the form of a Longevity/Merit Bonus. Respondents Wheeler and Valdez argue that even if Sections 20630 and 20636, as well as CCR Section 571, determines what qualifies as pensionable income for their CalPERS retirement benefits, these payments should qualify. As discussed above, to qualify as pensionable income it must qualify under the PERL, and in particular Sections 20630 and 20636, as well as CCR Section 571. To receive Longevity/Merit Bonus pay, Respondents Wheeler and Valdez had to qualify under LA County Ordinance 6.10.100. The "longevity bonus" combines components of longevity (10 years in a position), being at the top step of a salary range, and merit. The definition of "bonus" in CCR Section 571(a) contains no requirement regarding longevity and/or being at the top step of a salary range. Likewise, the definition of "longevity" in CCR Section 571(a) does not contain a requirement for being at the top step of a salary range and/or merit. Essentially, "longevity bonus," as defined by LA County Ordinance 6.10.100 combines three items of special compensation and does not meet the

definition of any of the specific items listed in CCR Section 571. The Court of Appeal expressly ruled that the PERL does not allow an employer to combine two or more items of special compensation listed in CCR Section 571 to form an allowable item. (See *DiCarlo, supra*, 12 Cal.App.5th at 485.) *DiCarlo* addressed a nearly identical item of pay, compensation based on both longevity and merit, and ruled it does not qualify as pensionable income under the PERL.

Respondents' argument that an Administrative Law Judge is not bound by the Court's holding in *DiCarlo* is rejected. As discussed above, under the doctrine of stare decisis, "all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) For these reasons, Respondents Wheeler and Valdez's request to include compensation in the form of a Longevity/Merit Bonus as pensionable income must be rejected.

***Issue 3: Respondent Cohoe's Top of Range Merit Pay Does Not Qualify as Compensation Earnable Under the PERL***

20. Respondent Cohoe received Top of Range Merit pay as a result of being at the top of his salary range for 36 months or more and receiving his supervisor's recommendation based on Respondent Cohoe's superior work performance. Essentially, the Top of Range Merit pay was based on combining longevity, being at the top of a salary range, and merit. As discussed in paragraph 18, above, the law does not allow an employer to combine two or more items of special compensation listed in CCR Section 571 to form an allowable item. (See *DiCarlo, supra* 12 Cal.App.5th at 485.) Therefore, to qualify as pensionable income, Top of Range Merit pay must meet a definition of a specific item listed in CCR Section 571. It does not. Consequently, Top of Range Merit pay does not qualify as an item of pensionable special compensation under the PERL.

21. Respondent Cohoe argued, alternatively, that the Top of Range Merit pay qualifies as payrate. This argument is rejected. Payrate is the normal monthly rate of pay or base pay of a member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours. The publicly available pay schedule makes clear that the pay range for Cohoe normally performing his duties was \$166,871-175,306. Top of Range Merit pay is not pay for Cohoe normally performing his duties on a full-time basis. It is pay based on Cohoe being at the top of his salary range for 36-months and performing superior work in the eyes of his supervisor. This is supported by the definition of Top of Range Merit pay. It makes clear that there is a top of salary range (maximum payrate) and that Top of Range Merit pay is pay in excess of this amount. In addition, the evidence showed Cohoe received Top of Range Merit pay in excess of those members who were in his group or class. Cohoe received Top of Range Merit pay that equaled 15% of his maximum salary range. The other members of Cohoe's group received a 10% Top of Range Merit pay increase. Section 20636(b) limits payrate to compensation paid to similarly situated members of a group or class. The fact Cohoe received pay in excess of similarly situated members is additional grounds for denying his request to deem his Top of Range Merit pay as reportable payrate.

**ORDER**

**The Board, after considering the entire record as well as oral argument of counsel, denies the appeals of Mark L. Wheeler, Thomas R. Valdez, John M. Lopez, Larry Blackwell, and Garry G. Cohoe. CalPERS properly excluded compensation paid to Respondents by their employers that did not qualify as compensation and compensation earnable under the PERL.**

**February 21, 2019**