

ATTACHMENT D

STAFF'S ARGUMENT

STAFF'S ARGUMENT IN SUPPORT OF DESIGNATION OF FEBRUARY 21, 2019, FINAL DECISION AS PRECEDENTIAL

On February 21, 2019, after conducting a full board hearing, the Board adopted the Final Decision *In the Matter of the Appeal Regarding the Final Compensation Calculation of MARK L. WHEELER, THOMAS R. VALDEZ, JOHN M. LOPEZ, LARRY D. BLACKWELL, GARRY G. COHOE, Respondents, LOS ANGELES COUNTY, Respondent., and SAN BERNARDINO COUNTY TRANSPORTATION AUTHORITY, Respondent.* The Decision¹ of the Board became effective on February 21, 2019. For the reasons discussed below, staff argues the Board should designate the *Wheeler* Decision as precedential.

The *Wheeler* Decision determined that CalPERS, when determining CalPERS retirement benefits for a reciprocal member, should only include as final compensation those payments that qualify as compensation and compensation earnable under the Public Employees' Retirement Law (PERL).

Under Government Code section 20351, city and county retirement systems can enter into reciprocal agreements with CalPERS. Under Government Code section 20638, the reciprocal member can use as his or her final compensation period the time he or she was an active member of a reciprocal retirement system. The law requires that each reciprocal system apply their own definitions of compensation and compensation earnable when calculating the benefits each system pays its reciprocal members. (*Stillman v. Board of Retirement of Fresno County Employees' Retirement Association* (2011) 198 Cal. App. 4th 1355, here after "*Stillman*".)

Respondents Mark L. Wheeler (Wheeler), John M. Lopez (Lopez), Larry D. Blackwell (Blackwell), Garry G. Cohoe (Cohoe) and Thomas Valdez (Valdez) (collectively Respondents) are reciprocal members who established membership with CalPERS through employment with the State and/or public agencies that contract with CalPERS. Each Respondent later became a member of a county retirement system that had entered into a reciprocity agreement with CalPERS. At the time each Respondent retired, he met all necessary conditions to concurrently retire with CalPERS and the county system.

Prior to the hearing, Respondents stipulated that the following items of pay did not qualify as compensation and compensation earnable under the PERL: Pensionable Cafeteria Plan, Pensionable Sick Buyback and Pensionable Vacation Buyback paid to Respondents Blackwell, Lopez, Wheeler and Valdez; and Auto Allowance, Cell Phone Allowance, Cashout-Admin Earnable Compensation, Cashout-Vacation Earnable Compensation and Flex-Manual Pay paid to Respondent Cohoe. Respondents took the

¹ The appeal of Mark L. Wheeler was designated the lead case in this matter. For this reason, the Board's Decision will be referred to as the *Wheeler* Decision

position that CalPERS is required to use the final compensation amounts reported to it by the reciprocal employer and/or reciprocal system, regardless of whether the payments the Respondents received qualifies as compensation and compensation earnable under the PERL. Respondents Wheeler, Valdez and Cohoe also argued that certain items of pay they received (Longevity/Merit Bonus for Respondents Wheeler and Valdez and Top of Range Merit Pay for Respondent Cohoe) qualify as compensation earnable under the PERL.

The *Wheeler* Decision finds that CalPERS correctly determined that when determining a reciprocal member's retirement benefits, only those payments that qualify as compensation and compensation earnable under the PERL can be used when calculating his or her final compensation amount. The *Wheeler* Decision finds that CalPERS correctly rejected those items of pay reported by the reciprocal employers and/or reciprocal systems that do not comply with the PERL. The *Wheeler* Decision also finds that CalPERS correctly determined that the Longevity/Merit Bonus paid to Respondents Wheeler and Valdez and the Top of Range Merit Pay paid to Respondent Cohoe do not qualify as compensation earnable under the PERL.

Currently, there is no precedential decision of the Board that comprehensively addresses the issues related to determining what items of pay, and more importantly what statutory scheme, should be utilized when determining the amount of CalPERS retirement benefits a reciprocal member should receive.

1. The Board is Authorized to Designate Certain Decisions as Precedential

Pursuant to Government Code section 11425.60 in the California Administrative Procedure Act (APA), the Board is authorized to designate all or part of a quasi-judicial administrative decision of the Board as precedential:

(a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review. (Emphasis added.)

(c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997. (Emphasis added.)

2. The Precedential Effect Should Minimize Future Litigation on These Issues

In general, the effect of making a Board decision precedential is to give it “precedential effect,” which in this context means:

- The decision may be officially cited in other administrative hearings, and also in court proceedings.
- The decision is considered “case-made” law, comparable to agency rule-making in its legal effect, and may be applied broadly to other cases and the parties involved in other cases. The decision-maker in another administrative matter may expressly rely on the precedential decision to decide the matter, that is, give the law or policy in the decision binding effect in a case involving the same issue as it affects other parties, unless the other case can be factually or legally distinguished.²

A precedential decision of the Board is not binding on the courts, which remain the final arbiters of the law; but a Board precedential decision, as the decision of the agency most knowledgeable and responsible for administering and making policy with respect to the California Public Employees’ Retirement Law (PERL), is normally accorded great weight or given deference by the courts.³

If a Board decision is not designated as precedential, its effect is more limited. It may be referenced in other administrative matters or to a reviewing court to inform the judge regarding the Board’s administration or interpretation of the PERL, but it has no precedential effect.⁴

Designating the *Wheeler* Decision precedential should reduce litigation on these issues in the future.

² See: 13 CCR 1290 (Office of Administrative Hearings regulation); official *Calif. Law Revision Comments* regarding APA section 11425.60, where it is stated that the statute “[r]ecognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking,” and “[i]s intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision.” Also see: *Pac. Legal Foundation v. Unemployment Insur. App. Board* (1991) 29 Cal.3d 101,109; 21 *Jour. Nat. Ass’n Admin. Law Judges* 247 (2001), 265-267.

³ *City of Oakland v. Pub. Employees’ Ret. System* (2002) 98 Cal.App.4th 29, 39; *Hudson v. Board of Administration of the Calif. Pub. Ret. Sys.* (1997) 59 Cal.App.4th 1310, 1324-1325.

⁴ *City of Oakland, supra*, 57.

The Board's precedential decisions are published in compliance with subdivision (c) of section 11425.60 and are listed in a special on-line index on the Board's website, at:

<https://www.calpers.ca.gov/page/about/board/precedential-decisions-appeals-hearings>

3. Consideration Under the Board's Policy Supports a Precedential Designation

The Board's established policy regarding the designation of precedential decisions is based on subdivision (b) of Government Code section 11425.60 and calls for consideration of the following two questions:

- Does the decision contain a significant legal or policy determination of general application that is likely to recur?
- Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied?

From the staff's perspective, the answer to both these questions is "Yes."

A. This involves a "Significant Legal or Policy Determination of General Application That is Likely to Recur"

The significant legal and policy determination presented in the *Wheeler* Decision is the explanation and application of the PERL's definitions of compensation and compensation earnable on reciprocal members when CalPERS determines the final compensation amount used to calculate CalPERS retirement benefits. The *Wheeler* Decision details the applicable analysis to be performed when determining which payments made to a reciprocal member by a reciprocal employer qualify as compensation and compensation earnable in connection with determining the amount of retirement benefits a reciprocal member receives from CalPERS. Importantly, the *Wheeler* Decision provides definitive guidance that a reciprocal member can use as a final compensation period the time they are a member of a reciprocal system; however, only those payments that qualify as compensation and compensation earnable under the PERL can be included when determining final compensation for purposes of calculating the reciprocal member's CalPERS retirement benefits.

The issue addressed in the *Wheeler* Decision is one that continuously recurs. CalPERS staff repeatedly make determinations that the full amount of final compensation reported by reciprocal employers and/or reciprocal retirement systems does not qualify as compensation and compensation earnable under the PERL. Those determinations often involve CalPERS explaining that the amount reported by the reciprocal employer and/or reciprocal system may qualify under the statutes governing the reciprocal system, but that they do not qualify under the PERL. Reciprocal members are often under the impression that CalPERS must use the final compensation amount reported by the reciprocal system. As a result, CalPERS repeatedly litigates the issue of whether

CalPERS must utilize the amount of final compensation reported by the reciprocal employer and/or reciprocal system.

Currently, there is no Precedential Decision relating to these issues to provide full guidance to CalPERS staff, members, employers, and reciprocal systems. Therefore, a Precedential Decision definitively stating which definitions of compensation and compensation earnable will be applied when calculating a reciprocal member's retirement benefits will provide members, employers and reciprocal systems with guidance and reduce the amount of future litigation.

B. The *Wheeler* Decision Includes a "Clear and Complete Analysis Sufficient for an Understanding of Why the Finding of Facts Were Made and How the Law Was Applied"

The factual findings in the *Wheeler* Decision are straightforward and easy to understand. The Decision describes how reciprocal membership works and how a reciprocal member's final compensation period is determined. Then the *Wheeler* Decision applies the law, as stated in *Stillman*, to the underlying facts. Specifically, the *Wheeler* Decision sets forth that, under *Stillman*, CalPERS must apply the definitions of compensation and compensation earnable that are found in the PERL to the income reported by reciprocal employers and/or reciprocal retirement systems. The *Wheeler* Decision, like *Stillman*, rejects the contention that Government Code section 20638 creates a new and unique definition of compensation and compensation earnable that applies only to reciprocal members. The *Wheeler* Decision rejects the contention that CalPERS is required to utilize the final compensation amount reported by reciprocal employers and/or reciprocal retirement systems when calculating CalPERS retirement benefits for a reciprocal member.

The *Wheeler* Decision finds that retirement benefits for reciprocal members are to be calculated in the exact same manner as every other CalPERS member, the sole distinction being that a reciprocal member can use for his or her final compensation period the period of time the reciprocal member worked under a reciprocal retirement system. The *Wheeler* Decision also finds that, under *DiCarlo v. County of Monterey* (2017) 12 Cal.App.5th 468, to qualify as special compensation under the PERL the item of pay cannot combine two or more items of special compensation listed in California Code of Regulations Section 571.

As described, the *Wheeler* Decision is therefore constructed logically and properly explains how final compensation is to be determined for reciprocal members receiving CalPERS retirement benefits, as articulated by the Court of Appeal in *Stillman*.

Staff therefore believes that the findings and legal conclusions of the *Wheeler* Decision, if the Decision is made precedential, will provide useful, specific rules for staff, members, employers and reciprocal retirement systems. Accordingly, staff recommends the *Wheeler* Decision be adopted as a Precedential Decision.

C. Public Comment Supports Adoption of the *Wheeler* Decision as Precedential

On June 25, 2019, a letter was mailed to over 1,600 public agencies, 338 state entities, 63 school districts, and the Respondents in this case, asking for comments on whether the Final Decision in *In the Matter of the Appeal Regarding the Final Compensation Calculation of MARK L. WHEELER, THOMAS R. VALDEZ, JOHN M. LOPEZ, LARRY D. BLACKWELL, GARRY G. COHOE, Respondents, LOS ANGELES COUNTY, Respondent, and SAN BERNARDINO COUNTY TRANSPORTATION AUTHORITY, Respondent*, should be designated as precedential.

Staff received one call from a staff counsel with the California Department of Human Resources who chose not to provide comments and essentially asked questions regarding the process of the decision. Staff received only one written comment.

The Marin County Employees' Retirement Association (MCERA) submitted a comment in support of the proposed action. MCERA provided that "how reciprocal members' final compensation determinations are to be made...is important to the proper functioning" of retirement systems. MCERA adopted a policy regarding the reciprocal member final compensation determinations "to implement the *Stillman* principles that the *Wheeler* Decision upholds." MCERA also noted that "the *Wheeler* Decision includes a clear and complete analysis of the issues in sufficient detail that MCERA can understand why the findings of fact were made and the law was applied as set forth therein." MCERA also noted that if the *Wheeler* Decision is deemed precedential, it would be able to rely on it in the future should its Reciprocal Final Compensation policy be challenged.

Conclusion

For the reasons stated above, staff argues that the Decision in *In the Matter of the Appeal Regarding the Final Compensation Calculation of MARK L. WHEELER, THOMAS R. VALDEZ, JOHN M. LOPEZ, LARRY D. BLACKWELL, GARRY G. COHOE, Respondents, LOS ANGELES COUNTY, Respondent., and SAN BERNARDINO COUNTY TRANSPORTATION AUTHORITY, Respondent* should be designated as precedential.

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