ATTACHMENT B

STAFF'S ARGUMENT

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STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Mark E. Bills (Respondent Bills) and Judi L. Cutaia (Respondent Cutaia) petition the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Amended Proposed Decision dated July 24, 2019. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent Mark E. Bills was employed by Respondent City of Davis (Respondent City) as a Firefighter II. By virtue of his employment, Respondent Bills was a local safety member of CalPERS.

Respondent Judi L. Cutaia was employed by Respondent City as a Fire Captain. By virtue of her employment, Respondent Cutaia was a local safety member of CalPERS.

On October 7, 2013, Respondent Bills signed an application for service retirement. Respondent Bills retired for service effective February 11, 2014, with 29.522 years of service credit and has been receiving his retirement allowance from that date.

Respondent Cutaia signed an application for service retirement on October 10, 2012, with a service retirement date of December 21, 2012. Respondent Cutaia retired for service effective December 21, 2012, with 29.406 years of service credit and has been receiving her retirement allowance from that date.

In 2009, Respondent City and the Davis Professional Firefighters' Association negotiated a Memorandum of Understanding (MOU) for the period of December 16, 2009 through June 30, 2012. The MOU included a provision that allowed members with at least 25 years of service to convert 80 percent of their unused "cafeteria cash out" to "longevity pay." Respondents Bills and Cutaia had each opted to convert their cafeteria cash out amounts to longevity pay once they accumulated 25 years of service.

CalPERS' Office of Audit Services conducted a public agency review of Respondent City in October 2016, to determine its compliance with applicable sections of the Public Employees' Retirement Law. The review period was July 1, 2011 through June 30, 2014.

CalPERS issued its final audit report on October 20, 2016. CalPERS determined that payments reported as "longevity pay" did not meet the statutory criteria for special compensation and should not have been reported to CalPERS.

Respondent City agreed to make payroll adjustments reversing the cafeteria cash outs as reportable income. Respondent City provided CalPERS with a list of affected employees, including Respondents Bills and Cutaia (collectively Respondents.)

CalPERS notified Respondents, by letters, in May 2017, of its determinations regarding the cafeteria cash outs. CalPERS also notified them of the overpayments and adjustments to their retirement allowances due to the determinations.

Respondents appealed the determinations and exercised their right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH.) A hearing was held on July 19, 2018. Respondents were represented by counsel at the hearing. Respondent City did not appear at the hearing.

Respondents testified on their own behalves regarding their job histories and their retirements. CalPERS presented the testimony of a CalPERS Audit Team member regarding the 2016 audit and CalPERS' determination regarding longevity pay.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondents' appeals. The ALJ found that Respondent City erroneously labeled cafeteria cash out as longevity pay on behalf of Respondents Bills and Cutaia. The ALJ found that the payments did not meet the definition of longevity pay under California Code of Regulations, title 2, section 571.

The ALJ also considered Respondents' affirmative defenses of laches and equitable estoppel with respect to CalPERS' right to collect overpayments. The ALJ concluded that Respondents failed to meet their burden of proof in establishing these defenses.

In the Proposed Decision, the ALJ concluded that the cafeteria cash outs, reported by Respondent City on behalf of Respondents Bills and Cutaia, did not qualify as longevity pay or any other authorized type of special compensation. The ALJ further concluded that CalPERS is entitled to recoup the overpayments to Respondents Bills and Cutaia subject to the three-year statutory limitation.

The CalPERS Board of Administration (Board) ordered that this matter be remanded to OAH for the taking of additional evidence. Specifically, the Board requested that the ALJ receive additional evidence to determine whether the following paragraph in the Proposed Decision is accurate:

> 6. CalPERS promulgated a regulation more specifically defining "special compensation" and the requirements for consideration of such payments as such. Under the heading "INCENTIVE," in subdivision (a)(1) of California Code of Regulations, title 2, section 571, is the definition of 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." Subdivision (b) of the implementing regulation lists the requirements for all special compensation. Those pertinent to **respondent Hall's performance pay** are that such bonus payments be: (1) contained in a written labor policy or

> agreement that is duly approved and adopted by the entity's governing body; (2) that such document indicate the conditions for payment of the bonus, including eligibility for, and the amount of, the special compensation; (3) that the document does not reference another document to satisfy these conditions; (4) that the compensation is available to all members of the group of class, and (5) that the payment is historically consistent with prior payments for the job classification. Subdivisions (c) and (d) of the regulation clarify that only items listed in the regulation and complying with the requirements of subdivision (b) qualify as special compensation for calculation of "final compensation" for retirement purposes. (emphasis added.)

On June 16, 2019, OAH received a written stipulation by CalPERS and Respondents stating that they agreed that the issue raised by the Board could be resolved without an additional hearing and without additional evidence. The stipulation requested that the ALJ determine whether the references to Respondent "Hall" and "performance pay" in paragraph 6 of the Proposed Decision were made intentionally or were unintentional typographical errors and whether the analysis, as initially worded, applied to Respondents' appeals.

Upon review of “Legal Conclusion 6” in the original Legal Conclusions, the ALJ determined the references to Respondent “Hall” and “performance pay” were typographical errors. The ALJ issued an “Amended Proposed Decision” on July 24, 2019, correcting the typographical errors.

The ALJ found that Respondents could not convert their unused “cafeteria cash out” to “longevity pay” to increase their final compensation benefits. The ALJ also rejected Respondents’ equitable estoppel argument.

Respondents argued at the hearing, and again in their Petition for Reconsideration, that CalPERS should be estopped from enforcing the provisions in the Public Employees’ Retirement Law (PERL) and its implementing regulations that exclude “cafeteria cash out” as an item of special compensation. The ALJ explained that equitable estoppel can be applied when the following basic elements are met: (1) the party to be estopped was apprised of the facts; (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended; (3) the party asserting estoppel was ignorant of the facts; and (4) the party asserting estoppel suffered injury in reliance on the conduct.

The ALJ considered Respondents’ argument as well as the facts reiterated in the Petition for Reconsideration and found that the Respondents did not establish the elements required for equitable estoppel. Specifically, the ALJ found that CalPERS was not aware that Respondent City was improperly reporting cafeteria cash out as longevity pay until 2016 – after Respondents retired. The ALJ also found that the Respondents

understood that Respondent City was reporting their cafeteria cash out as longevity pay, *i.e.,* they were apprised that cafeteria cash out was not being reported as such.

The ALJ further explained, that in applying equitable estoppel against a government agency such as CalPERS, the equitable remedy cannot be used to provide a benefit to a member to which he or she is not otherwise statutorily authorized because public employee benefits are wholly statutory. See (*Hudson v. Posey* (1967) 255 Cal.App.2d 89.) The ALJ concluded that even if Respondents could have established all four elements of equitable estoppel, including the "cafeteria cash outs" as special compensation would violate public policy and exceed the powers accorded CalPERS by the Legislature. The recited statute and implementing regulation could not be clearer: only those items that meet the criteria for special compensation may be considered in the calculation of a member's retirement. The ALJ properly rejected Respondents argument that they should receive greater retirement benefits under the doctrine of equitable estoppel.

Finally, Respondents argue that CalPERS should apply equitable estoppel and allow them to keep money to which they are not entitled under the PERL. As explained by the ALJ, Respondents' retirement benefits are statutory in nature and cannot be enhanced under equitable principles. In this case, allowing Respondents to keep money that they are not lawfully entitled to would provide them with benefits beyond those authorized in the PERL.

The Petition for Reconsideration fails to raise any new issues. Instead, it merely summarizes the facts and legal defenses were raised and considered by the ALJ and this Board on two prior occasions. The Amended Proposed Decision that was adopted by the Board at the September 18, 2019 meeting was well reasoned and based on the credible evidence presented at hearing. Therefore, the Petition for Reconsideration should be denied.

November 20, 2019

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AUSTA WAKILY
Senior Attorney