

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Esmerelda Mondragon (Respondent) was employed with the Calistoga Joint Unified School District (Respondent District) as its Superintendent from 2009 until 2017. By virtue of her employment, Respondent was a school miscellaneous member of CalPERS. Respondent submitted her retirement application on May 6, 2017, seeking an effective service retirement date of August 3, 2017.

Upon receipt of Respondent's retirement application, CalPERS referred it to CalPERS' Compensation Compliance and Review Unit for review. CalPERS determined that some of the compensation reported by Respondent District did not comply with the Public Employees' Retirement Law (PERL) and therefore could not be used as final compensation for purposes of calculating Respondent's retirement benefit.

Respondent's Pay History

In 2009, Respondent entered into a contract (2009 Contract) with Respondent District to serve as its Superintendent. The term of the contract was from July 1, 2009 through June 30, 2012. The contract provided a salary of \$172,500 per year, a \$400 monthly car allowance (Car Allowance), and a \$631 monthly health care allowance (Health Allowance).

The 2009 Contract also provided for up to a 3% pay increase to Respondent's annual salary if Respondent District's schools "meet or exceed" certain standards of the California Annual Performance Index (API Bonus). The schools met the API standards through 2013. Respondent District increased Respondent's salary each year accordingly.

In June 2011, Respondent District adopted an addendum (2011 Addendum) to the 2009 Contract, which provided for a one-time 1.75% off-salary-schedule payment. The 1.75% off-salary-schedule payment was offered to all employee groups for Respondent District.

Following the 2011 Addendum, Respondent received salary increases through additional addendums to her 2009 Contract, which included: 1) a 2% increase in 2012; 2) a 2013 addendum that provided Respondent a 3% increase, a "me-too" type of raise that provided Respondent a 4.09% increase, and an increase to Respondent's Car Allowance; and 3) a 2014 addendum that included a 3% pay raise.

On December 8, 2014, Respondent and Respondent District entered into a new three-year employment contract (2014 Contract). The 2014 Contract increased Respondent's yearly salary to \$235,168 (\$19,597.33/month) retroactive to July 1, 2014. The 2014 Contract did not include provisions for either the Car Allowance or Health Allowance.

In June 2015, Respondent entered into an addendum (2015 Addendum), which provided Respondent with a 3% salary increase effective July 1, 2015.

On May 9, 2016, Respondent District approved a 1.67% salary increase for all employees, retroactive to July 1, 2015. Respondent District also approved a 4.67% salary increase for all employees effective July 1, 2016.

When there is no publicly available pay schedule, Regulation 570.5(b) requires CalPERS to use discretion in determining a member's final compensation for retirement purposes.

To determine Respondent's appropriate payrate under Regulation 570.5, CalPERS obtained and considered information and documents from Respondent District's Director of Human Resources and Payroll, and from the Director of Fiscal Services for the Napa County Office of Education. Ultimately, CalPERS determined Respondent's final compensation to be \$17,042.25 per month. To reach the \$17,042.25 figure, CalPERS began with Respondent's initial 2009 salary, and then all increases allowable by the PERL were added to that 2009 salary to reach the final compensation amount.

Additionally, the following irregularities were identified during the review:

- 1) The API Bonus was not compliant with the PERL and regulations because it was not available to everyone in Respondent's group or class, was not included in a labor policy or agreement, and was not paid for superior performance. The API Bonus was rolled into Respondent's base salary, so it also impermissibly compounded all of Respondent's future pay increases.
- 2) Although the 2014 Contract did not include provisions for the Car Allowance or Health Allowance, Respondent District's documentation showed that both allowances continued to be included, and reported, in Respondent's salary. Following the 2014 Contract, Respondent received \$7,572.00 with her salary as a Health Allowance, and \$7,800 with her salary as a Car Allowance. Neither of these types of allowances are reportable because they are not included on the list that exclusively identifies and defines special compensation within Title 2, California Code of Regulations, section 571 (Regulation 571).
- 3) Respondent received a \$500 refund from her Flexible Spending Account (FSA Refund) that was included in her compensation reported to CalPERS. This item of pay was not reportable because distributions from Flexible Spending Accounts are not reportable as special compensation under Regulation 571.
- 4) The 2011 off-salary-schedule payment was not reported separately as special compensation by Respondent District to CalPERS as required by section 20636.1(c)(3)(C).

Following its review, CalPERS determined that the compensation reported to CalPERS by Respondent District during Respondent's employment included items not reportable as compensation earnable under sections 20630, 20636.1, and Regulation 571. Respondent's final compensation was thus computed to be \$17,042.25 per month.

Respondent appealed this determination, claiming that her monthly final compensation should be \$21,540.83, her final total monthly salary, and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH).

The Hearing

A hearing was held on May 20, 2019. Respondent was represented by counsel at the hearing. Respondent District did not appear at the hearing.

CalPERS Staff testified at the hearing in support of the determination and explained why certain portions of Respondent's pay were not reportable to CalPERS under the PERL. Section 20636.1(b)(1) and Regulation 570.5(a) require payrate to be included on a publicly available pay schedule, and section 20636.1(c)(3)(C) requires payrate and special compensation to be reported separately. Staff then explained that Regulation 571 contains an exclusive list of reportable items of special compensation, which requires each specific item of special compensation to be contained in a labor policy or agreement and must be available to all members of a group or class. (See Regulation 571(b).)

Because Respondent's salary from the 2014 Contract was not paid according to a publicly available pay schedule, and included items not reportable under the PERL, Staff testified that CalPERS was required to work forward from Respondent's 2009 Contract to determine which components were PERL compliant. The review required CalPERS to review each individual item paid to Respondent by Respondent District. CalPERS also had to determine Respondent's group or class as part of its review. The information provided to CalPERS by Respondent District indicated that Respondent was part of the Classified Management group.

Staff testified that CalPERS excluded the API Bonus because it violated section 20636.1 and Regulation 570. The API Bonus in the 2011 Contract did not require "superior" performance as required by Regulation 571(a) and instead only required Respondent to meet the API standards. Further, the availability of the API Bonus to all members of Respondent's group or class was not established through a written labor policy or agreement. Moreover, the API Bonus was not reported separately from Respondent's payrate as required by the PERL and was instead rolled into her salary and compounded every increase Respondent ever received.

Staff also testified that the Car Allowance, the Health Allowance, and the \$500 FSA refund are not included in Regulation 571's exclusive list of special compensation. Therefore, CalPERS was required to exclude each item.

As explained by staff, the 2011 Addendum's off-salary-schedule payment was also excluded because it was not reported separately from Respondent's payrate as required by section 20636.1(c)(3)(C).

Respondent testified on her own behalf at the hearing and alleged that her final compensation should be based upon what she earned during her final year of employment with Respondent District (\$21,540.83). Respondent also called four witnesses to testify. Respondent and her witnesses testified that Respondent was part of the Certificated Management Group, and that all members of the Certificated Management Group received the API Bonus. Respondent also introduced documentary evidence.

The Proposed Decision Correctly Denied Respondent's Appeal

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ held that not all compensation paid to a member qualifies as compensation earnable. The ALJ found that CalPERS did not abuse its discretion when it found Respondent's final compensation to be \$17,042.25 per month. The ALJ explained that since there was no publicly available pay schedule, CalPERS was required to use its discretion to determine Respondent's payrate. The ALJ also held that CalPERS appropriately exercised its discretion as to the following items:

- 1) During the compensation review process, Respondent District never asserted that Respondent belonged to the Certificated Management Group, so CalPERS appropriately grouped Respondent with Classified Management.
- 2) CalPERS properly excluded the Car Allowance, Health Allowance, and FSA Refund.
- 3) The API Bonus did not comply with Regulation 571 because there was no publicly available labor policy or agreement outlining its availability to the entire group or class. The API Bonus was also impermissibly converted into Respondent's base salary, compounding each pay increase.
- 4) The off-salary-schedule payment was properly excluded because Respondent District did not report it as special compensation separate from payrate.

Conclusion

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes in the proposed decision." In order to avoid ambiguity, staff recommends that the words "the District" in the first line of paragraph five on page four be changed to "CalPERS".

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

February 20, 2020

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Senior Attorney