

ATTACHMENT C

RESPONDENT'S ARGUMENT

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Via: Facsimile: (916-795-3972)

Cheree Swedensky, Assistant to the Board
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JAN 27 2020

RE: In the Matter of the Appeal of Esmeralda Mondragon
Case No. 2018-0518
OAH No. 2019010651
Respondent's Argument

Dear Ms. Swedensky,

This office represents Dr. Esmeralda Mondragon, Respondent in the above matter, and this letter constitutes Dr. Mondragon's response to the proposed decision from Administrative Law Judge ("ALJ") Karen Reichmann which will be presented for review by the Appeals Committee at its meeting of February 19, 2020. For the reasons stated below, the proposed decision is legally and factually incorrect.

The Administrative Law Judge's Legal Conclusions: The Burden of Proof.

After first reciting, incorrectly, that the evidentiary burden of proof fell upon Dr. Mondragon to establish that CalPERS' final compensation calculation was erroneous, the ALJ arbitrarily decided there was not enough evidence that the API bonus, Off-Salary-Schedule-Pay, and the Refund qualify as payrate or special compensation and thus, could not be included in Mondragon's final compensation. (Proposed Decision, p. 12.)

On the burden issue, the ALJ cites two disability retirement cases to argue that Dr. Mondragon has the burden of proof. Dr. Mondragon agrees that a party claiming entitlement to retire for disability must prove they are in fact incapacitated from performing one's duties. (See Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689, 691.) However, where it is CalPERS, the Complainant, alleging there has been an overpayment of retirement benefits and is seeking to reduce Dr. Mondragon's, the Respondent's, final retirement compensation, the burden of proof lies with the complaining party, namely CalPERS.

In *Baxter v. State Teachers' Retirement System*, the Court held that the public retirement Agency commenced an action when it began reducing the teachers' monthly retirement payments, and the administrative proceeding was initiated when the Agency filed the statement of issues. (18 Cal.App.5th 340, 348.) *Baxter* further held:

In the context of satisfying a prescribed statute of limitations, the filing of a statement of issues to initiate administrative proceedings is the closest analogue to the filing of a civil complaint. Just as a plaintiff commences a civil action (including a special proceeding) by filing a complaint or a petition, an agency "initiates" (or "commences") an administrative adjudicatory proceeding by filing a statement of issues pursuant to Government Code section 11504. (*Id.* at 374-375.)

By parity of reasoning, by initiating the instant administrative process by the issuance of a Statement of Issues, CalPERS became the complainant in the case, and in so doing assumed the burden of proving what it declared to be the issues in the case. (See *In the Matter of Whether the Stanislaus County Office of Education Incorrectly Reported Compensation to CalSTRS*, Prec. Dec, No. 19-01, at page 9.)

The issue of burden of proof has particular significance in this matter, since CalPERS relied on inaccurate evidence, including obviously erroneous reports for which no foundation was established, to support its various claims, relied generally on the opinion of its own employees as "authority" for its contentions, and failed to produce any percipient witnesses to clarify apparent discrepancies in the evidence or explain inaccuracies arising out of its audit.

Dr. Mondragon's Final Monthly Compensation.

The ALJ ignored significant testimony and inconsistently held legal conclusions that are contrary to Dr. Mondragon's true assertions. On page nine of the ALJ's "Legal Conclusions", the ALJ erroneously stated that, "Respondent contends that her entire final monthly compensation" qualifies as compensation earnable.

In fact, Dr. Mondragon never stated that the entire final monthly compensation originally permitted from CalPERS should qualify as her final monthly compensation. Dr. Mondragon concedes that her Car Allowance/Expenses, Vacation Cashout, Health and Welfare Allocation, and any "alleged" overtime should not be counted towards her final compensation, in part because Dr. Mondragon did not qualify for overtime, as she, the Principals, and the Vice Principals at Calistoga Joint Unified School District ("CJUSD") were contracted salaried employees. Dr. Mondragon does contend that her Payrate increases, the Refund, and the Academic Performance Index are all creditable for retirement purposes and should be included as part of her final compensation calculation.

Dr. Mondragon's Final Compensation should not be Reduced by \$500.

The ALJ provided no reasoning as to why she held Dr. Mondragon did not establish that "the \$500 FSA refund should be included in the calculation of [Dr. Mondragon's] final compensation." The records shows that Dr. Mondragon would set aside a certain amount of her yearly compensation to put into a Flexible Spending Account, as directed by the District. In 2015,

Dr. Mondragon set aside \$500 more than was needed and this amount was “refunded” to her and added back into her salary.

Dr. Mondragon’s Status as a Certificated Employee.

The ALJ and CalPERS abused its discretion by concluding Dr. Mondragon is a Classified Employee, when CJUSD consistently classified Dr. Mondragon as a Certificated Employee. Dr. Mondragon’s duties as the Superintendent most similarly related to the duties of the Principals and Vice Principals at CJUSD, as they were all in management positions and categorized as certificated management employees. Further, they were the only employees that had individual contracts with CJUSD as salaried employees.

The ALJ states in her Proposed Decision, page 10, that it was the District which did not assert that Dr. Mondragon should have been considered a member of the Certificated Management group. However, emails show that CalPERS was adamant that Dr. Mondragon be categorized as a “classified employee.” Manpreet Dulai, a CalPERS employee, whom CalPERS specifically chose not to call, initially stated Dr. Mondragon was a classified employee, but Dulai’s emails show that CalPERS never even inquired about Dr. Mondragon’s duties. There was no proof or basis for Dulai’s determination, and it is clearly evident that Dulai had no clue about the duties Dr. Mondragon performed at CJUSD. Examples of classified employees are: cafeteria workers, maintenance workers and technicians, instructional aides, bus drivers, and computer system technicians. (Exhibit 17, 26.)

In the ALJ’s Proposed Decision, the ALJ erroneously held in her “Factual Findings” on page 8, that “[t]here were no written labor policies or agreements pertaining to the Certificated Management group entered into evidence.” The ALJ clearly did not review the documents Dr. Mondragon entered into evidence, as Exhibit 7, a Tentative Agreement between CJUSD and Calistoga Associated Teachers (“CAT”) (CAT members are classified as Certificated Employees), dated March 2011; Exhibit 18, a second Tentative Agreement between CJUSD and CAT settling negotiations for the 2012-2013 school year; and Exhibit 29, yet another Tentative Agreement between CJUSD and CAT which states changes to the collective bargaining agreement. Because Dr. Mondragon’s duties most closely resemble Principals’ and Vice Principals’ managerial duties, Dr. Mondragon must be categorized as a Certificated Management Employee for retirement purposes, and the ALJ’s Proposed Decision must not be upheld.

Despite the ALJ’s contrary finding, evidence of Dr. Mondragon’s 2009 and 2014 Employment Agreements was presented during the administrative hearing, in which those agreements state that Dr. Mondragon is a Certificated Employee. Under Dr. Mondragon’s Employment Agreement’s in 2009 and 2014, section 6, subsection (c), titled “Termination of Status as a Certificated Employee,” it stated, “The Superintendent’s status as a permanent or probationary certificated employee of the District may be terminated in accordance with the applicable provisions of law.” (Exhibit 1, 37.)

Further, The ALJ failed to acknowledge, or chose to ignore, Dr. Mondragon’s 2012-13 and 2013-14 Notice of Assignment (Exhibit 55, 56) and the 2014-15, 2015-16, 2016-17 Employee Position and Compensation Data (Exhibit 57, 58, 59). These documents were created by the District and signed by Dr. Mondragon, and in 2014 John Mauro, the Director of Human Resources and Payroll, signed Dr. Mondragon’s salary and benefit notice. These documents further state and

signify that Dr. Mondragon was categorized as a Certificated Management Superintendent while employed with CJUSD.

Dr. Mondragon's Annual Performance Index Bonus.

During the administrative hearing, Dr. Mondragon, Martin Hunt, a former CJUSD Board President, and Teri Malvino, the former CJUSD Director of Business Services, all stated that Dr. Mondragon was categorized as a Certificated employee, and that the certificated employees all received the Annual Performance Index ("API") bonuses. Jane Bunting, the Vice Principal for five (5) years at the CJUSD elementary school, further testified that she, herself, was a Certificated employee, and that she received the API bonuses.

The ALJ correctly stated that the API can be considered a bonus, creditable for retirement purposes; however, she incorrectly concluded that there was no evidence of an "agreement" establishing the availability of the API award to a group or class. Because no other employee at CJUSD performed the same duties as Dr. Mondragon, Dr. Mondragon was in a class of her own. Dr. Mondragon's 2009 individual employment agreement provided for the API Bonus and was publically available for inspection. A former Board president testified that Dr. Mondragon's 2009 employment agreement was available for public inspection, was part of the meeting minutes, and was posted on-line and/or available in the District Office.

Dr. Mondragon's 2009 Employment Agreement provided a maximum three percent (3%) (contrary to the ALJ's factual findings in the "Proposed Decision" stating 2%) yearly increase if both of the CJUSD Schools were to meet or exceed certain standards of the California API.

Dr. Mondragon received the API bonus for the 2010-11, 2011-12, 2012-13, and the 2013-14 fiscal school years. Again, the ALJ was factually incorrect when she stated in her Proposed Decision, page 12, that, the API payments "were not reported to CalPERS separately as special compensation, in violation of Government Code section 20636.1, subdivision (c)(3)(C)." CalPERS' Exhibit 120, clearly shows the API payments were reported separately from compensation, on 7/31/2009 for the 2010-11 school year, on 6/30/2011 for the 2011-12 school year and, during the 2012-13 school year, there are twelve (12) different "Retroactive Salary Adjustments" reported separately from payrate for the 2012-13 school year.

Further, CalPERS' own Exhibits 121 and 131 clearly show that these API bonuses were reported separately from Dr. Mondragon's pay rate and calculated independently from her yearly salary.

Dr. Mondragon's Increases in Salary.

When CJUSD failed to create or provide CalPERS with a valid payrate schedule pursuant to California Code of Regulations ("CCR") 570.5(a) to determine Dr. Mondragon's final payrate, the Code states that CCR 570.5(b) must be used when determining Dr. Mondragon's final compensation earnable.

The ALJ and CalPERS abused their discretion by not considering the countless Board documents and testimony stating that all employees at CJUSD received the highest negotiated salary percentage increase, regardless of bargaining unit. (Malvino testimony) In the absence of a valid payrate schedule, CalPERS has the duty to take into consideration all "[d]ocuments approved

by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer." CCR 570.5 (b)(1). Dr. Mondragon provided evidence that her salary increases were maintained by the employer, calendared and agendized, and approved. While CalPERS does have the discretion to determine an amount to be considered payrate, that discretion must not be abused. Dr. Mondragon paid higher taxes each year pursuant to the increase in salary and for each year that she received an increase in salary, Dr. Mondragon contributed an increased amount to the CalPERS retirement plan.

Dr. Mondragon's Off Salary Schedule Pay.

2 CCR section 571(a)(1) defines special compensation for Off Salary Schedule Pay creditable for retirement purposes as, in pertinent part:

... Compensation in addition to base salary paid in similar lump-sum amounts to a group or class of employees. These payments are routinely negotiated through collective bargaining in lieu of increases to the salary schedule. These payments are based on a similar percent of scheduled salary not to exceed six percent (6%) per fiscal year. The contracting agency or school employer may adopt similar action for non-represented groups or classes of employment as were negotiated through collective bargaining.

The ALJ cited Government Code section 20636.1 subdivision (c)(3)(C) and *blamed the district* for failing to report Dr. Mondragon's 1.75% salary increase as "off salary schedule pay." Government Code section 20636.1 subdivision (c)(3)(C) states that "Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall" ... "Report each item of special compensation separately from payrate." Nowhere in this section does it state that the employer must report off salary schedule pay as "off salary schedule pay." On June 1, 2011, CJUSD reported the off salary schedule pay as "special compensation," separately from any payroll or retroactive salary adjustment entry. (Exhibit 120.)

CalPERS further relied on a salary chart which clearly shows this salary adjustment was reported separately as "off schedule". (Exhibit 121, 131.) It is absurd that the ALJ found the 1.75% off salary schedule pay was not creditable to Dr. Mondragon's final salary compensation. There was evidence presented that each member at CJUSD received this 1.75% and that there was no other increases in salary for that year because the district was unsure if it could support a continued salary increase. (See Exhibits 7, 8, 9, 11, 12, 127; see also Proposed Decision page 5.)

By contrast, in supporting CalPERS' position, the ALJ and CalPERS rely on hearsay emails to defend the argument that Dr. Mondragon's Off-Schedule-Salary-Pay was not publically available, put on the agendas, voted on, and provided a separate addendum. "If evidence ... has insufficient probative value to sustain the proposition for which it is offered ... it will not support a finding." (*Martin v. State Personnel Bd.* (1972) 26 Cal.App.3d 573, 583; citing *Kitchel v. Acree* (1963) 216 Cal.App.2d 119, 124.) "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (*Id.* at 579.) Besides emails, CalPERS failed to provide any witnesses or documentation supporting its argument.

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Dr. Mondragon's Salary Increases for the 2012-13, 2013-14, 2014-15 School Years.

The ALJ and CalPERS failed to credit Dr. Mondragon with a 2.5% salary increase despite the documented evidence for the 2012-13 school year. The ALJ disregarded Exhibits 20. and 22, Board Minutes approving Dr. Mondragon's 2.5% salary increase.

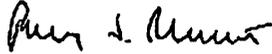
Dr. Mondragon's Addendums to her Employment Agreements for the years 2013-14, and 2014-15, specifically provided that if "another bargaining unit negotiated a higher compensation increase than three percent (3.0%), such additional increase will be applied to the Superintendent's salary retroactive to July 1," 2013 and again for the 2014-15 school year. (Exhibit 23, 35.)

CalPERS misunderstands the circumstance, in that, regardless of the classification of employee, all employees received the same percentage increase for each year. The ALJ ignored the witness's testimony and the evidence supporting their testimony. The ALJ's finding that Dr. Mondragon's payrate should not include the off schedule salary pay for the 2010-11 school year, salary increases in the 2011-12, 2012-13, 2013-14, 2014-15, 2016 and 2017 school years should not be upheld, as there is substantial evidence showing Dr. Mondragon received these increases, and that CalPERS would have included those increases into Dr. Mondragon's final compensation calculation had a competent employee processed her final retirement compensation plan.

Thank you for your attention to this matter.

Very Truly Yours,

LAW OFFICES OF BENNETT, SHARPE & BENNETT, INC.,



BARRY J. BENNETT

C: Esmeralda Mondragon (by email)

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Bennett, Sharpe & Bennett, Inc., 2444 Main Street, Suite 150, Fresno, California 93721. On January 27, 2020, I served the within document(s):

RESPONDENT'S ARGUMENT

X **Facsimile:** By facsimile transmission. The names and facsimile numbers of the person(s) served are as set forth below:

Cheree Swendensky - 916-795-3972

X **Mail:** By placing the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Fresno, California addressed as set forth below.

Cheree Swendensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
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I am readily familiar with the firm's practice of collecting and processing correspondence for mailing and for shipping via overnight courier. Under the practice it would be deposited with the U.S. Postal Service or if an overnight shipment, deposited in an overnight pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct. Executed on January 27, 2020, at Fresno, California.


MESCHELE SCHOOFIELD