

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Michael C. Glaze (Respondent) was employed by Respondent South Feather Water and Power Agency (Respondent SFWPA) as a General Manger since November 1982. SFWPA entered into a contract with CalPERS in June 2008 to provide its employees public pension benefits as are available under the Public Employee's Retirement Law (PERL).

Respondent had a pre-existing Employment Agreement with Respondent SFWPA when Respondent SFWPA entered into a contract with CalPERS in June 2008. In August 2008, Respondent entered into a new Employment Agreement with Respondent SFWPA. The 2008 Employment Agreement states the compensation to be paid to Respondent. While the SFWPA's Board discussed the 2008 Employment Agreement, the Employment Agreement was never part of the agenda item or produced to the public during any SFWPA Board meetings. Respondent's salary was also not listed in a publicly available pay schedule.

Respondent and Respondent SFWPA entered into another Employment Agreement in April 2014, increasing Respondent's compensation. Similar to the 2008 Employment Agreement, the 2014 Employment Agreement stated Respondent's salary, was not part of the agenda item and was not produced to the public during any SFWPA Board meetings. Respondent's new compensation was not listed under a publicly available pay schedule. Furthermore, the 2014 Employment Agreement was never approved by the SFWPA Board in open session.

Respondent SFWPA reported compensation that was paid to Respondent pursuant to the Employment Agreements. On November 23, 2016, Respondent submitted his service retirement application to CalPERS. In his application, Respondent requested that CalPERS use the amount received from Respondent SFWPA as his final compensation.

On August 31, 2017 CalPERS informed Respondents that the compensation reported by Respondent SFWPA does not meet the definition of "payrate" under section 20636(b)(1), because the rate of pay is not provided pursuant to a publicly available pay schedule and the payrate increases provided to Respondent were not available to other employees in the management group or class. Exercising its authority under California Code of Regulations, title 2, section 570.5 (b), CalPERS concluded a reasonable payrate for calculating Respondent's retirement would be based on Respondent's payrate prior to the 22.3 percent increase in August 2008 when SFWPA entered into contract with CalPERS and any cost of living adjustments or other across-the-board increases paid to the MPEU group/class.

Respondent and Respondent SFWPA appealed this determination and exercised their right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH).

During the course of discovery, CalPERS was provided additional information. CalPERS was provided publicly available pay schedules demonstrating MPEU received additional pay increases. CalPERS amended its determination to include the additional pay increases in Respondent's final compensation amount.

Final compensation is defined, in this case, as the highest average consecutive twelve months of "compensation earnable." (Gov. Code section 20042.) Compensation earnable is the compensation paid by the employer as "payrate" and "special compensation." (Gov. Code section 20636(a).) Payrate is defined under the PERL to be the 1) 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, 2) for services rendered during normal working hours, and 3) pursuant to a publicly available pay schedule. (Gov. Code section 20636(b)(1).)

To qualify as payrate, the rate of pay must be pursuant to a publicly available pay schedule. (Gov. Code section 20636(b)(1).) The Board has defined in regulation what may be considered a publicly available pay schedule. (Cal. Code Regs., Title 2, section 570.5; see also, CalPERS Precedential Decision *In re Randy Adams*, OAH case No. 10122030095 (*Adams* Precedential Decision).) Individual settlement agreements do not constitute publicly available pay schedules. (*Molina v. Board of Admin.* (2011) 200 Cal.App.4th 61, 66-67; *Adams* Precedential Decision.) What qualifies as payrate is not a subject of agreement by or between the employer and employee. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 201.)

The *Adams* Precedential Decision is affirmed in *Tanner v. CalPERS* (2016) 248 Cal.App.4th 743 (*Tanner*). In *Tanner*, the court held that a publicly available pay schedule is a "written or printed list, catalog, or inventory of the rate of pay or base pay of one or more employees who are members of CalPERS," and not an individual's employment agreement. (*Id.* 755.) The *Tanner* court held that an increase in an employee's payrate in his final contract with the City did not qualify as compensation earnable, because it was not a part of a publicly available pay schedule.

A hearing was held on September 26, 2019. Respondent was represented by counsel at the hearing. Respondent SFWPA was also represented by counsel at the hearing.

The Administrative Law Judge (ALJ) took documentary evidence relating to the facts of the case. Witness testimony was not presented because the facts relating to Respondent's compensation and the pay increases provided to Respondent and the MPEU were not at dispute. The parties submitted legal written arguments for the ALJ to consider.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondents' appeals. The ALJ found that the compensation paid to Respondent was not paid pursuant to a publicly available pay schedule. The ALJ noted that Respondent SFWPA merely produced the Employment Agreements for Respondent without producing any "statutory required [publicly] available pay schedule listing Respondent Glaze or the GM position."

Due to the absence of a publicly available pay schedule, the ALJ held that CalPERS was authorized under California Code of Regulations, title 2, section 570.5(b) to determine an amount that it considered to be payrate. The ALJ rejected Respondents' arguments that California Code of Regulations, title 2, section 570.5(b) did not apply to them. The ALJ explained that Respondents' argument lacked merit because California Code of Regulations, title 2, section 570.5(b) was adopted to clarify Government Code section 20636. The ALJ further noted that clarifying amendments have no retroactive effect because the true meaning of the statute remains the same.

The ALJ held that "[c]onsidering the evidence as a whole, CalPERS correctly calculated Respondent Glaze's compensation earnable, final compensation, and retirement allowance, using the payrate increases provided to the MPEU."

In the Proposed Decision, the ALJ concludes that CalPERS' "calculation of payrate, compensation earnable, and monthly retirement allowance for Respondent Glaze should be affirmed."

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

March 18, 2020

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