

ATTACHMENT B

STAFF'S ARGUMENT

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

Marc I. Hershman (Respondent) has worked in various capacities for the City of Millbrae (City), County of San Mateo (County) and the California state legislature. The issue on appeal is whether CalPERS correctly calculated Respondent's final compensation for his 9.901 years of service with the City, and correctly limited his compensation during the time he was a City Council official.

In November 1997, Respondent was elected to serve on the City Council. He was re-elected for two four-year terms, earning 9.901 years of service credit. He left the City Council on December 2007. Respondent earned a City salary of \$300 per month from November 1997 to November 1999. From December 1999 through December 2007, he received \$345 per month. Respondent left the City Council on December 12, 2007. At that time, he had earned 9.901 years of service credit with the City. Respondent also worked full-time as an attorney for a law firm while he served on the City Council. His law firm salary was between \$80,000 and \$110,000/year.

Due to term limits, Respondent had to step down from the City Council in December 2007. In October 2007, Respondent considered his future employment options. He could have stayed with his law firm and sought partnership. Respondent also learned of a position with the County working as a Chief Legislative Aide.

Respondent spoke to Jeff Killian, Assistant City Manager about whether the County had reciprocity with CalPERS. Reciprocity is an agreement between CalPERS and certain other retirement systems that allows an employee to move from one retirement system to another without losing retirement and related benefits.

On October 25, 2007, Mr. Killian informed Respondent that CalPERS had confirmed the County had reciprocity with CalPERS. Mr. Killian explained that he needed additional information about vesting and the County's retirement formula before asking CalPERS to confirm whether the information he provided to Respondent was correct. There is no evidence that Mr. Killian ever followed up to obtain additional information or to confirm that the information he relayed to Respondent was correct.

In December 2007, Respondent accepted the Chief Legislative Aide position with the County. He believed that he could establish reciprocity with CalPERS and receive service credit for his 9.901 years of service with the City at the highest salary he earned whether at the City or the County. Other than Mr. Killian, Respondent never discussed CalPERS retirement benefits with anyone else prior to accepting his new position. Respondent worked for the County for approximately one year.

In December 2008, Respondent was employed as a District Director, a CalPERS covered position classified as a California Legislative Employee. He was District

Director from December 2008 until he retired in February 2021. His highest final compensation for his state legislature employment was \$11,956.67 per month.

CalPERS provides employers and members information concerning calculation of their retirement benefits through several sources including Annual Member Statements and retirement estimates. Beginning in 1998, Respondent received an Annual Member Statement which provided information concerning his retirement benefits including a simple formula for calculating his retirement allowance: Years of Service Credit x Benefit Factor x Final Compensation = Unmodified Allowance (highest monthly pension). None of the Annual Statements referenced Government Code section 20039, which applies to local elected officials. All the Annual Statements included the following disclaimer: "While every effort has been made to ensure the accuracy of this Report, it should be understood that it does not have the force and effect of law, rule or regulation governing the payment of benefits. Should any difference or error occur, the law will take precedence."

CalPERS members may request an estimate of future retirement benefit amounts. Respondent submitted a "Retirement Allowance Estimate Request" form to CalPERS in August 2015 and July 2016. CalPERS provided estimates to Respondent in September 2015 and July 2016. The estimates did not apply Government Code section 20039, resulting in erroneous calculations.

On or about December 30, 2020, Respondent submitted a Service Retirement Election Application (application) to CalPERS with an effective retirement date of February 28, 2021. CalPERS completed a formal compensation review of his final compensation, which included analysis of Government Code section 20039.

Government Code section 20039 states:

Notwithstanding any other provision of this part, "final compensation" of a local member for the purpose of determining any pension or benefit resulting from state service as an elective or appointed officer on a city council . . . shall be based on the highest average annual compensation earnable by the member during the period of state service in each elective or appointed office. Where that elective or appointed service is a consideration in the computation of any pension or benefit, the member may have more than one final compensation.

This section shall apply to a local member first elected or appointed to a city council or a county board of supervisors on or after July 1, 1994

According to Government Code section 20039, Respondent's City Council time of 9.901 years must be calculated at his monthly salary of \$300 and \$345 per month, not at his final salary earned as District Director of \$11,956.67 per month.

By letter dated March 4, 2021, CalPERS informed Respondent his application was processed, and the amount of his monthly service retirement allowance was \$3,393.29.

Respondent was provided an account detail information sheet showing how his retirement allowance was calculated.

On March 9, 2021, Respondent contacted CalPERS to dispute his service retirement allowance. Respondent explained that the retirement estimates he received from CalPERS in 2015 and 2016 indicated his retirement allowance would be based on his highest final pay multiplied by all years of service credit, including the 9.901 years with the City.

By letter dated March 15, 2021, CalPERS informed Respondent that the official retirement estimates he received in 2015 and 2016 were incorrect. The letter explained that:

Your service with the City of Millbrae is subject to Government Code section 20039 which means the final compensation used to compute the portion of your retirement allowance attributable to the City of Millbrae is limited to the highest average one-year compensation earnable during your city council time. When we calculated your retirement estimates, we incorrectly applied your State of California compensation for all your service.

CalPERS informed Respondent he was receiving the correct retirement allowance and there was no legal authority to change the calculation of his allowance.

On November 15, 2021, CalPERS sent Respondent a final determination letter which again explained to Respondent that the service credit accrued during his time on the City Council is subject to Government Code section 20039. The letter explains in part:

You were elected to the City of Millbrae city council after July 1, 1994; therefore, your service with the City of Millbrae is subject to section 20039. Accordingly, your final compensation of \$345.00 is the correct amount to use in calculating the 9.901 years of service credit with the City of Millbrae.

CalPERS further explained there was no authority to calculate his final compensation in a different manner or pay him a higher retirement benefit amount than the law allows. Respondent was informed of his right to appeal CalPERS's determination.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). Two days of hearing were completed on November 15 and December 20, 2022. Respondent was represented by counsel at the hearing.

Respondent testified on his own behalf that he relied on information in the Annual Statements, Estimates and general information that his retirement allowance would be based on his highest final compensation. Respondent relied on his conversation with Assistant City Manager Mr. Killian when he decided to move to County employment in 2007. Respondent admits that Government Code section 20039 applies to his final compensation, but argued that he should be exempt from its application based on information included in his Annual Statements and his conversation with Mr. Killian.

CalPERS staff testified that both Annual Statements and Estimates are the best estimate of future benefits, but final calculation of retirement benefits is not completed until a person retires. CalPERS did not intend for Respondent to rely on Annual Statements, Estimates or other general publications as definitive. All his Annual Statements and Estimates included disclaimers stating that, "retirement benefits were based on statute and in the event of a conflict, the law would take preference." CalPERS also cited to a similar Court of Appeals case which directly addressed application of Government Code section 20039, denying enhanced final compensation calculation to a former City Council member when calculating his pension benefits. CalPERS argued that calculating Respondent's final compensation as he wishes would directly contravene statutory limitations found in Government Code section 20039.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent had the burden of proof, and that he did not meet his burden. The ALJ agreed with CalPERS that case law previously addressed and rejected Respondent's arguments. Equitable estoppel is not available here in relation to Government Code section 20039 because it would directly contravene legislative intent and statutory limitations. The ALJ found that CalPERS correctly calculated Respondent's retirement allowance and has no authority to provide Respondent with an incorrect allowance. Moreover, the ALJ found that even if equitable estoppel was available to Respondent, there was no evidence that CalPERS intended that he rely on the retirement allowance estimates provided to him. The ALJ noted it is unreasonable to rely on an estimate as an actual and final determination of his retirement allowance, especially when a specific disclaimer is included.

Pursuant to Government Code section 11517, subdivision (c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." To avoid ambiguity, staff recommends changing the word "system" to "systems" on page 7, paragraph 14, changing the word "provide" to "provides" on page 9, paragraph 17, and adding the word "of" after the word "amount" on page 13, paragraph 28 of the Proposed Decision.

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

June 20, 2023

Austa Wakily
Senior Attorney