

**ATTACHMENT C**

**RESPONDENT'S ARGUMENT**

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**Re:    *Respondent Ohlone Community College District's Argument***  
***OAH No. 2024040226***  
**Client-Matter: OH020/011**

To Whom It May Concern:

The Ohlone Community College District (“District”) submits this argument requesting that the California Public Employees’ Retirement System (“CalPERS”) Board of Administration (“Board”) reject the Proposed Decision issued by the Administrative Law Judge (“ALJ”) in the above-referenced matter.

**I.     INTRODUCTION**

This matter involves CalPERS’ decision to limit Shairon Zinghseim’s reported payrate and longevity pay from July 1, 2021 to June 30, 2022, following Ms. Zingsheim’s retirement from the District as the Vice President of Human Resources and Training (“Vice President”). CalPERS asserted that it limited Ms. Zingshiem’s payrate and longevity pay because the salary increase Ms. Zingshiem received in July 2021 did not comply with the Public Employees Retirement Law (“PERL”). However, CalPERS failed to demonstrate that the salary increase Ms. Zingsheim received in July 2021 was excluded from her compensation earnable for purposes of calculating her retirement benefits under the PERL. Instead of offering a cogent rationale for its position, CalPERS offered a series of shifting ad hoc justifications for its decision, including unsupported claims that the salary increase was for overtime duties or a form of final settlement pay. Further, the ALJ simply accepted CalPERS’ determination, despite the evidence demonstrating that CalPERS’ assertions were based on erroneous interpretations of the relevant statutes and regulations. Accordingly, the District requests that the Board reject the ALJ’s Proposed Decision.

## **II. FACTUAL BACKGROUND**

Ms. Zingsheim began her employment with the District in September 2009 and retired in July 2022, after more than 12 years of service to the District. (Proposed Decision [PD], p. 3, ¶ 1.) Prior to her retirement, Ms. Zingsheim served as the Vice President of Human Resources and Training from 2018 to 2022.

From the initial outbreak of the COVID-19 pandemic in March 2020, Ms. Zingsheim was responsible for overseeing the District's entire recovery program. (PD, p. 5, ¶ 11.) Ms. Zingsheim's broad duties related to COVID-19 included: ensuring that employees properly sheltered in place at home and were then safely brought back to campus; implementing COVID-19 contact tracing; implementing vaccine-tracking systems; preparing classrooms for students to return; preparing spaces for employees to return to provide in-person services; and working with unions to ensure that the District provided a safe environment for employees. (*Id.*)

Ms. Zingsheim testified that when the pandemic first started, she spent approximately 70% percent of her time focused on COVID-19 programming and recovery. (PD, p. 6, ¶ 12.) This focus continued until approximately 2022, when her COVID-19 duties reduced to approximately 50% of her workload. (*Id.*) The District considered Ms. Zingsheim as the COVID-19 Recovery Project Director for the COVID-related duties that she performed, which became incorporated into her regular and ongoing duties as the Vice President. (*Id.*)

In July 2021, Ms. Zingsheim entered into a one-year contract with the District, continuing her employment as the Vice President. (PD, p. 6, ¶¶ 13,14.) In this contract, Ms. Zingsheim received a salary increase from Range 237 Step F to Range 238 Step F. (PD, p. 6, ¶ 15.) Ms. Zingsheim did not ask anyone at the District for this salary increase. The District's President/Superintendent has the discretion to determine salary increases for executive management employees, which are based on a number of factors, including experience and retention.

Ms. Zingsheim first shared her decision to retire with the District in September 2021 and officially notified the Board of Trustees of her decision in October 2021. (PD, p. 8, ¶ 20.) Ms. Zingsheim's decision to retire was based on several factors, including her husband's health, the stress that she had endured during the COVID-19 pandemic as a Human Resources professional, and the fact that she had spent over twenty years serving in the public sector. (PD, p. 7, ¶ 19.) Ms. Zingsheim never told anyone at the District that she intended to retire prior to receiving her salary increase. (PD, p. 7, ¶ 18.)

Prior to retiring on June 30, 2022, Ms. Zingsheim had at least two meetings with CalPERS representatives to ensure that everything was in order for her retirement. On November 28, 2022, nearly five months after Ms. Zingsheim's retirement, CalPERS informed Ms. Zingsheim that some of her compensation did not comply with the PERL and that as a result it was decreasing her final compensation from \$22,573.49 to \$21,498.52 and decreasing her monthly retirement benefit by \$612.23. (PD, p. 3-4, ¶ 4.) CalPERS also informed Ms.

Zingsheim that she had been overpaid by \$3,061.15. (*Id.*) CalPERS provided no reason for the reported reductions or for the requested overpayment. On April 5, 2023, Ms. Zingsheim received a final determination letter from CalPERS claiming the same retirement allowance reductions as noted in the November 28, 2022 letter. The only clear rationale that CalPERS provided for the reductions was that the COVID-19 duties that Ms. Zingsheim performed should have been considered non-reportable overtime. Other than the brief assertion regarding overtime, the final determination letter simply provided various definitions from the Government Code and California Code of Regulations, without offering any additional context. The District filed an appeal to CalPERS final determination on May 30, 2023.

### **III. LEGAL ARGUMENT**

The ALJ's Proposed Decision should be rejected because it erroneously accepted CalPERS' incorrect determinations that: (1) Ms. Zingsheim worked overtime when performing her COVID-19 related duties; (2) Ms. Zingsheim's salary increase in 2021 constituted final settlement pay; and (3) Ms. Zingsheim's payrate was properly reduced to Salary Range 237, despite the evidence to the contrary.

#### **A. MS. ZINGSHEIM'S COVID-19 RELATED DUTIES WERE NOT CONSIDERED OVERTIME**

The ALJ incorrectly accepted CalPERS' assertion that Ms. Zingsheim's salary increase was the result of overtime duties she performed. In support of this conclusion, the Proposed Decision simply states that: (1) Ms. Zingsheim testified that her COVID-19 related duties required her to work additional hours, and (2) that a Personnel Action form from June 2021 noted that Ms. Zingsheim's salary increase was based, in part, on her additional responsibilities for the COVID-19 recovery program. (PD, p. 15-16, ¶¶ 18.) These assertions fail to demonstrate that Ms. Zingsheim's COVID-19 related duties were overtime and must be excluded from the calculation of her retirement allowance and would appear to mean that a public agency cannot increase compensation when it increases responsibilities and duties for a given position or classification.

First, the ALJ's conclusion contradicts CalPERS' precedence. Specifically, in *Roy T. Ramirez v. City of Indio*, (CalPERS Precedential Decision No. 00-06, December 20, 2000, Case No. 2640, OAH No. L-2000050022, the CalPERS' Board of Administration examined a matter in which the Chief of Police for the City of Indio, Roy Ramirez, took on additional duties of the interim City Manager during his final year of employment with the City while still serving as the Chief of Police. CalPERS held that Ramirez's extra pay for performing duties as the interim City Manager could not be considered part of his final compensation because it qualified as overtime. In reaching its decision, CalPERS held that "serving as the interim City Manager was not a part of Ramirez' normally required job duties as the Chief of Police." (*Id.*, p. 8.) CalPERS also held that Ramirez's additional duties were not included in calculating his retirement benefits because Ramirez was appointed as an interim to the existing position of City Manager. CalPERS

noted, “[t]he City Council did not establish a permanent position of City Manager/Chief of Police. It did not set a payrate for the position of City Manager/Chief of Police.” (*Id.*, p. 15.)

Here, the District and Ms. Zingsheim’s undisputed testimony demonstrates that the COVID-19 related duties that Ms. Zingsheim performed were incorporated into the regular duties of the Vice President. The Proposed Decision even acknowledges this fact. (PD, p. 6, ¶ 12.) Unlike in the *Ramirez* decision where the employee performed additional duties of an existing position, here, the COVID-19 Recovery Project Director is *not* a separate job classification within the District. This was further supported by the testimony that the COVID-19 related duties carried over to the new Vice President of Human Resources and Training after Ms. Zingsheim’s retirement. To accept the rationale from CalPERS, employers would be prohibited from adding duties to existing positions without CalPERS considering the additional duties as “overtime.” This rationale is illogical and at odds with the authority granted to community college districts under California law.

Therefore, the District properly exercised its right of amending the Vice President of Human Resources’ regular duties during the COVID-19 pandemic, to include oversight of its COVID-19 response protocols. During the hearing, Jennifer Sandness, CalPERS Representative, attempted to revive CalPERS’ assertion that Ms. Zingsheim’s COVID-19 duties were “overtime” by arguing that the District should have received board approval before changing the Vice President’s job descriptions. However, Ms. Sandness eventually acknowledged this assertion was not supported by any regulations or published guidance. Accordingly, CalPERS was unable to point to any statutes, regulations, or published guidance to support its assertion that Ms. Zingsheim’s COVID-19 related duties were considered “overtime” as opposed to tasks added to the Vice President’s regular duties. The ALJ’s Proposed Decision that simply accepts CalPERS’ arbitrary creation and enforcement of unpublished and legally unsupported underground rules must be rejected.

**B. THERE IS NO EVIDENCE THAT MS. ZINGSHEIM’S SALARY INCREASE WAS FINAL SETTLEMENT PAY**

The ALJ erroneously accepted CalPERS’ assertion that Ms. Zingsheim’s salary increase constituted final settlement pay, despite a lack of any credible evidence that supports such a finding. In support of this conclusion, the Proposed Decision stated that Ms. Zingsheim testified that she made the decision to retire in the summer of 2021 and informed the District of that decision in September 2021. (PD, p. 16, ¶ 21.) The Proposed Decision then goes on to vaguely assert that “[o]ther evidence supported CalPER’s conclusion that the district’s decision to increase her salary range to 238 was in anticipation of her retirement.” (*Id.*) Then, the Proposed Decision simply asserts that Ms. Zingsheim’s July 2021 employment agreement changed from a two-year contract to a one-year contract and that Ms. Zingsheim’s replacement, Ms. Vy Le, was hired at the 237 salary range. However, the evidence from the hearing and CalPERS’ own admissions demonstrate that these arguments do not support the assertion that the District provided Ms. Zingsheim with final settlement pay.

First, the timeline acknowledged by the ALJ, namely that Ms. Zingsheim did not inform the District of her decision to retire until September 2021 – after she had already signed the July 2021 employment agreement – demonstrates that the District had no knowledge of Ms. Zingsheim's decision to retire at the time she entered into the employment agreement. Further, CalPERS' representative, Ms. Sandness, admitted that she did not review any documents stating that Ms. Zingsheim decided to retire before July 2021, or that the District gave Ms. Zingsheim the salary increase in contemplation or anticipation of her retirement. Additionally, Ms. Zingsheim credibly testified that she never requested a salary increase from anyone at the District due to her upcoming retirement nor did anyone at the District ever tell her that the District was going to give her a salary increase because she intended to retire or as a means of increasing her pension benefits. Rather, Ms. Zingsheim's salary increase merely followed a career trajectory based, in large part, on her experience, relevant work during the COVID-19 pandemic, and as the most senior administrator employed by the District at the time. Moreover, Ms. Sandness also acknowledged that Government Code section 20042 specifically provides for a one-year final compensation period and that no regulations prevent an employee from retiring one year after receiving a pay increase. In fact, the final compensation period is well-known when it comes to public sector employees timing their decision to retire and CalPERS' own administrative guidance discusses, with examples, how to time retirement to maximize the impact of salary increases on final compensation.

Second, Ms. Sandness acknowledged that there is no statute or CalPERS guidance stating that when an employee retires at a certain Range/Step, their predecessor must start at the same exact salary level. It is not uncommon for less experienced new hires to start at a lower range on the salary schedule than an experienced employee who held the position for years. Accordingly, CalPERS' assertion that Ms. Le's lower salary range supports its determination is unfounded. Despite all of the uncontroverted evidence discussed above, the ALJ followed CalPERS' assertions, which the record and CalPERS' own admissions demonstrate was based on, at best, unsupported speculation.

The ALJ's Proposed Decision on this issue must be rejected because CalPERS failed to offer any competent evidence to rebut the District and Ms. Zingsheim's uncontroverted testimony or to demonstrate how Ms. Zingsheim's salary increase constituted final settlement pay.

### **C. THE DISTRICT'S PAY SCHEDULE IS IN SUBSTANTIAL COMPLIANCE WITH THE REGULATIONS**

The ALJ's conclusions regarding the District's pay schedules must be rejected because the District should be allowed to correct any minor errors to its pay schedule on a prospective basis without any impact to Zinsheim's retirement allowance. First, prior to the hearing on this matter, CalPERS' never indicated to the District that its pay schedules were non-compliant or that the pay schedule was the basis for the exclusion. Rather, CalPERS chose to focus on this issue at the hearing as part of its series of shifting ad hoc justifications for its decision, after the District already addressed its other purported rationales for reducing Ms. Zingsheim's

compensation earnable in the written appeal filed in response to CalPERS' final determination on the matter.

Additionally, as the District testified at the hearing, the publicly available salary schedules are intended to be ready together as a single document and all across the board changes to the salary schedule are approved by the Board of Trustees. Further, as Ms. Sandness acknowledged, the Salary Range/Step that Ms. Zingsheim was placed at for the 2021-2022 year, Range 238 Step F, was the next available Range/Step that provided any salary increase from her previous placement at Range 237 Step.

To punish Ms. Zingsheim for the District's minor errors involving the publicly available pay schedule would not be construing the statutes of the Public Employment Retirement Law liberally in favor of the pensioner, as is required under California law. (*Hudson v. Board of Admin, of Public Employees' Retirement System* (1997) 59 Cal.App.4th 1310, 1324; *Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 459.) Similarly, such a decision would also violate CalPERS' obligation to provide its highest fiduciary duty to members of the pension system. (Cal. Const., art. XVI, § 17(a).) CalPERS has not cited the salary schedule as a basis to exclude any other employees' compensation.

#### **IV. CONCLUSION**

Based on the above, the District requests that the CalPERS' Board reject the Proposed Decision from the ALJ, grant the appeal, and find that the salary increase Ms. Zingsheim received in the 2021-2022 year is included her compensation earnable for the purposes of calculating her retirement allowance.

Very truly yours,

LIEBERT CASSIDY WHITMORE



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