

ATTACHMENT C

RESPONDENT'S ARGUMENT



February 3, 2025

Board Services Unit Coordinator
California Public Employees' Retirement System
PO Box 942701
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VIA EMAIL AND US MAIL
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**Re: Katherine Evelyn, Nurse Consultant III—Reciprocity Calculation
CalPERS Case No.: 2023-1065; OAH Case No.: 2024051075
Appeal of Administrative Law Judge's Proposed Decision**

To Whom it May Concern:

I write to provide this timely appeal on behalf of Katherine Evelyn, Nurse Consultant III, ("Mrs. Evelyn") regarding CalPERS' denial of her benefits calculation. Mrs. Evelyn's appeal of this benefit calculation was heard by Administrative Law Judge ("ALJ") Juliet E. Cox on December 3, 2024. On January 24, 2024, our office received a copy of the Proposed Decision.

ARGUMENT

Mrs. Evelyn is appealing a Statement of Issues that was filed by the California Public Employee's Retirement System (CalPERS) after they arbitrarily reduced her final *monthly* benefits by over \$4,000.00 at the conclusion of her 16-year career in service of the State. In doing so, CalPERS misapplied the rules for Public Employees' Pension Reform Act (PEPRA) members instead of the rules for Classic Members when calculating Respondent's benefits. This action deprives Mrs. Evelyn of retirement benefits she counted on resulting from her work as a nurse for both the Department of Industrial Relations and the City and County of San Francisco. CalPERS unilateral recalculation of her benefits results in a nearly 50% reduction in monthly benefits for the remainder of Respondent's life.

The core of CalPERS arguments in denying Mrs. Evelyn's appeal is Government Code §20355. This section extends the time frame for employment with a reciprocal system from 90 days to 6 months beginning in 1976. It is a general timeline extension for all reciprocity, and is not relevant here. Mrs. Evelyn was not eligible for reciprocity in 2010 as she was unemployed. Furthermore, if she had retired with reciprocity in 2010, she would not be eligible to re-retire with reciprocity as the reciprocity rules expressly state. Mrs. Evelyn retired *subsequent to reciprocity* in 2022 and retired from both systems on the same date.

A. CalPERS Erred in Applying PEPRA to Mrs. Evelyn's Final Retirement Benefits

A Classic CalPERS retiree who returns to active employment must formally reinstate their CalPERS membership. Upon reinstatement, their pension payments stop, and they begin accruing new service credit and contributions. If a Classic employee reinstates to the same employer, regardless of how long they were retired for, they can retain their Classic benefits, including their original retirement formula, final compensation rules, and benefit calculations.¹ However, if a Classic Member has a break in service for longer than six months and reinstates to a different

¹ See <https://www.calpers.ca.gov/page/about/laws-legislation-regulations/public-employees-pension-reform-act>.

employer, they would be considered a PEPRA (Public Employees' Pension Reform Act of 2013) member, which has a less generous pension formula.² PEPRA, at Government Code §20638, explains how compensation is calculated when a state employee retires concurrently with a county. It states in part:

The highest annual average compensation during any consecutive 12- or 36-month period of employment as a member of a county retirement system shall be considered compensation earnable by a member of this system for purpose of computing final compensation for the member provided:

(a)(1) entry into employment in which he or she became a member in one system occurred on or after October 1, 1957, **and** within 90 days³ of discontinuance of employment as a member of the other system.

...

[and] (b) He or she retires concurrently under both systems and is credited with the period of service under the county system at the time of retirement. [Emphasis added].

Because Ms. Evelyn retained her Classic Member status, her highest final compensation period will still be used for pension calculations, even across different reciprocal systems, provided that reciprocity is secured before returning to work. CalPERS claims that because Mrs. Evelyn did not move on from one agency to another after discontinuing CalPERS employment in 2010, her service period from July 1996 through July 2010 would not qualify for compensation exchange. However, this would only be the case if she was considered a new member under PEPRA.⁴ Here, Mrs. Evelyn reinstated to the same position with the same employer. She belonged to the same Service Employees International Union (SEIU) Bargaining Unit 17 Registered Nurses throughout the duration of her CalPERS membership. For these reasons, she cannot be a new PEPRA member.

Because she is a Classic Member, Mrs. Evelyn is entitled to a defined benefit plan. Her retirement final compensation does not exceed the 2022 final compensation limit of \$305,000. It is therefore not appropriate for CalPERS to say that they have no way to fund her retirement. CalPERS is therefore applying PEPRA rules inappropriately.

B. CalPERS' Own Publications Reflect Appellant's Interpretation of the Law

CalPERS publication 37⁵ includes a table to help explain to CalPERS beneficiaries the difference between Classic and PEPRA members and how their status is affected by reinstatement after retirement. It specifically states that when a Classic member reinstates to the same employer and has been separated for more than six months, they will stay Classic members.⁶ It also states that all State of California departments and schools are considered the same state employer.

² See <https://www.calpers.ca.gov/docs/forms-publications/reinstatement-retirement.pdf>.

³ Government Code Section 20355 states the period shall be six months rather than 90 days in Mrs. Evelyn's circumstances.

⁴ Govt. Code § 7522.04.

⁵ CalPERS Pub 37, Reinstatement From Retirement, p. 4.

⁶ See Exhibit A.

The same publication⁷ also includes a sample benefits calculation which outlines a scenario where a classic member retires for one year, then reinstates and works for another three years before re-retiring. The example shows that “Keith” was 59 when he first retired, then after one year of retirement, worked an additional three years and re-retired at the age of 63. Because he reinstated to the same employer, he maintained his classic member status and his final compensation is applied to all his years of service.⁸

Finally, the CalPERS Benefits Basics Handout, when explaining Classic and New Members, states the following:

State agencies, including California State University (CSU) are considered one single employer and all California schools including community colleges are considered one employer. ***If you move from one state agency or CSU to another or one school district to another, the 6-month break would not apply. You retain classic member status, and your CalPERS retirement benefits won't change.***⁹

Clearly, there is a giant disconnect between how CalPERS is interpreting the law in this case and how they present their rules and regulations to the public. In ruling on Mrs. Evelyn's estoppel argument, ALJ Cox neglected to consider that these publications are the primary way Mrs. Evelyn, and all CalPERS members, determine how CalPERS retirement works and how their benefits are determined. The above chart clearly states that if someone reinstates to the same employer after more than six months, as Mrs. Evelyn did, they retain their classic status.

C. CalPERS' Position Is Not Supported by the Facts

Clearly, Mrs. Evelyn is and always has been a classic member, and CalPERS does not dispute that. However, CalPERS argued, and ALJ Cox agreed, that Government Code section 20638 *now* applies, and effectively eliminates Mrs. Evelyn's first service period from her benefits calculation, even though that was not the case when she reinstated the first time. When Mrs. Evelyn first reinstated, she was never given any indication from CalPERS or anyone else that her reinstatement was not successful and that she would be able to use both service periods in calculating her final retirement benefits. Why would her seeking reciprocity from SFERS several years later invalidate that prior reinstatement? And if reinstatement after six months is not possible, then why include an example of it in their own publications, and why not mention that prior service credit would not apply to a subsequent benefit calculation? Nothing in the Government Code or presented by CalPERS has explained this.

CalPERS' expert Dionne Harris testified at hearing that Section 20355 applies to Mrs. Evelyn, invalidating her initial service period, but could not explain why. CalPERS also cited to the legislative history of AB 1369, which amended Section 20355 to extend the 90 period to six months. However, the language in the legislative history repeatedly references situations where an employee is moving from County to State retirement systems and vice-versa, not returning to the

⁷ *Id.*, at p. 13.

⁸ See Exhibit B.

⁹ See https://www.calpers.ca.gov/content/cec/member/class_materials/benefit_basics/benefit_basics_il.pdf, at p. 1.

same employer, as Mrs. Evelyn did here.¹⁰ This language, and Section 20355, clearly applies to PEPRAs members, not Classic members.

CalPERS' expert Dionne Harris admitted at hearing that the process for determining reciprocity is confusing. CalPERS has provided no clear-cut answer to the question of whether all of Mrs. Evelyn's service credit can go towards her benefit calculation. CalPERS' representatives repeatedly told Mrs. Evelyn that her situation was "unusual," but none of them ever told her that her plan would not work. Austin Uhri specifically told Mrs. Evelyn that all of her years of service would count, only to change his answer at the eleventh hour. Case law has established that PERS laws are to be interpreted in favor of the employee or beneficiary when a semantic ambiguity is presented by the statute at issue.¹¹

ALJ Cox makes several findings in her Proposed Decision that are not supported by the facts. At page 11 of the Proposed Decision, she states that Mrs. Evelyn is not eligible for reciprocity "with respect to her first period of state employment that ended July 1, 2010, because she began her employment with the City and County of San Francisco more than six months after ending her state employment." This is illogical, as Mrs. Evelyn successfully reinstated for her second period of employment, and then received reciprocity when she moved to SFERS. This finding does not address a question that was at issue in this hearing and misstates facts.

ALJ Cox claims that Mrs. Evelyn is asking for credit for continuous service from 1996 through 2017.¹² This is also untrue. Mrs. Evelyn is arguing that she successfully reinstated such that all her service years would count. She is not trying to gain credit for years she did not work. Finally, in that same finding, ALJ Cox claims that Government Code section 20638 states a requirement that a CalPERS member move within six months from CalPERS employment to reciprocal-system employment *specifically in terms of employment, not retirement system membership.*¹³ This bifurcation of the components of Classic membership is not supported by anything in ALJ Cox's decision, case law, or the statutory framework.

D. Excluding Appellant's Expert was an Abuse of Discretion

Mrs. Evelyn had retained the services of Arthur Kagan in order to provide his expert opinion on CalPERS regulations and her benefits calculation based on his understanding of CalPERS rules and actuarial tables. Mr. Kagan has been practicing as an actuary since 1967 and specializes in providing actuarial and pension services in California. A report with his findings was offered into evidence in addition to Mr. Kagan's testimony. Mr. Kagan was going to testify about both how and why CalPERS calculations of Mrs. Evelyn's benefits were incorrect. This included an explanation of the difference between classic and PEPRAs members and how that affected her ultimate benefit calculations. However, Judge Cox improperly excluded Mr. Kagan

¹⁰ See A154-155 of Administrative Hearing Transcript.

¹¹ *City of Oakland v. Public Employees' Retirement System*, 95 Cal. App. 4th 29, 39, citing *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal. App. 3d 1470, 1488; See, e.g., *Pearl v. Workers' Comp. Appeals Bd.* (2001) 26 Cal. 4th 189 [construing PERL to preclude application of Labor Code limit on psychiatric disabilities for PERS safety members].

¹² Proposed Decision, p. 11-12.

¹³ *Id.*, at 12.

and his report from the hearing. This was an abuse of discretion on Judge Cox's part and error we are confident a superior court will reverse.

In California, an abuse of discretion in the exclusion of expert testimony in administrative hearings is established when the ruling is "so irrational or arbitrary that no reasonable person could agree with it."¹⁴ The judge's role in ruling on evidentiary issues like this is to act as a gatekeeper to exclude speculative or irrelevant expert opinion, ensuring that the expert's opinion is based on matter that is reasonably relied upon by experts in the field and not on assumptions without evidentiary support.¹⁵

Additionally, in administrative hearings, the exclusion of expert testimony can be reviewed for abuse of discretion if it is found that the administrative proceeding was not conducted in the manner required by law, the decision is not supported by the findings, or the findings are not supported by substantial evidence in light of the whole record.¹⁶ This standard ensures that the administrative body provides a fair hearing and exercises its discretion appropriately.¹⁷

Here, Mr. Kagan was set to speak about where CalPERS went wrong in calculating Mrs. Evelyn's benefits. He would have been extremely helpful in explaining this convoluted benefits system to the ALJ and in providing support to Mrs. Evelyn's defense. However, his testimony and expert report were excluded from evidence. Not only was this relevant evidence excluded, but CalPERS own expert was still allowed to testify. This meant that Mrs. Evelyn was unable to provide meaningful rebuttal to Ms. Harris's testimony—a manifest abuse of discretion.

Similarly, ALJ Cox also wrongfully excluded Appellant's Exhibit F from evidence, which consisted of a copy of CalPERS 2022 PUB 37, entitled Reinstatement from Retirement. The exhibit was excluded because it was not the same version that Mrs. Evelyn would have had available to her at the time she first retired in 2017, even though Mrs. Evelyn testified that she has every version of this publication, including the 2014 and 2022 versions. The 2022 version is relevant to this case because it contains additional calculations based on Classic and/or PEPRA membership status that further explain how CalPERS interprets and enforces Public Employees' Retirement Law (PERL) in various circumstances. This evidence was offered not to show what Mrs. Evelyn's state of mind was at the time she retired in 2017, but to provide additional evidence as to how these rules and regulations are currently advertised and implemented by CalPERS. This exhibit was crucial to explaining to ALJ Cox how these benefit calculations work, and were clearly necessary, as she interpreted the law incorrectly in this case. In summary, ALJ Cox's decision to exclude these key pieces of evidence severely prejudiced Mrs. Evelyn's ability to present her case and constituted an abuse of discretion.

¹⁴ *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal. 4th 747; *Hewlett-Packard Co. v. Oracle Corp.*, 65 Cal. App. 5th 506).

¹⁵ *Sargon Enterprises, supra*, 55 Cal. 4th 747, *Richard v. Union Pacific Railroad Co.*, 105 Cal. App. 5th 1263.

¹⁶ *Pomona Valley Hospital Medical Center v. Superior Court*, 55 Cal. App. 4th 93; Code of Civil Procedure §1094.5).

¹⁷ *Pomona Valley Hospital, supra*, 55 Cal. App. 4th 93; *Sinaiko v. Superior Court*, 122 Cal. App. 4th 1133.

E. ALJ Cox's Decision to Exclude Expert Testimony is Reversible Error

The legal consequences of improperly excluding expert testimony in an administrative hearing can be significant and may warrant reversal of the decision. In California, it is considered prejudicial error to exclude relevant and material expert evidence where a proper foundation has been laid, and the proffered testimony is within the proper scope of expert opinion.¹⁸ The exclusion of essential expert testimony necessary to establish a party's theory of liability or defense can be deemed a structural error. This occurs when the error affects the framework within which the hearing proceeds and deprives the party of a fair trial, necessitating *per se* reversal because it is impossible to determine how the trial would have been resolved if the error had not occurred.¹⁹

ALJ Cox's decision to exclude Mr. Kagan's testimony and his expert report represent a clear abuse of discretion and reversible error as it unfairly limited Mrs. Evelyn's ability to present her case. ALJ Cox did not have the whole story, and therefore her decision is not supported by substantial evidence in light of the whole record.

CONCLUSION

The fact is, CalPERS is interpreting the law in a manner that does not comport with the legislative intent, the statutes referenced, or the materials published by CalPERS that interpret those statutes and are used in order to educate its member about how their retirement benefits are calculated. This is in effect an underground regulation and constitutes a due process violation against Mrs. Evelyn by interfering with a precious right, the result of which is a significant financial burden for her. Furthermore, ALJ Cox's decision to exclude expert testimony and Exhibit F constituted an abuse of discretion. Mrs. Evelyn therefore requests that this matter be reconsidered by the Board and her appeal be granted.

Sincerely,



Ryan M. Keever
Simas & Associates, Ltd.

RMK:ms
Enclosure

cc: Katherine Evelyn, NP (via email)
Steven L. Simas, Esq. (via email)
Sandra Stratman, Paralegal (via email)

¹⁸ *People ex rel. Dept. of Transportation v. Clauser / Wells Partnership*, 95 Cal. App. 4th 1066; *Kline v. Zimmer, Inc.*, 79 Cal. App. 5th 123.

¹⁹ *Kline v. Zimmer, Inc.*, 79 Cal. App. 5th 123; *Gordon v. Nissan Motor Co., Ltd.*, 170 Cal. App. 4th 1103.

EXHIBIT A

If you separated from your last employer as...	Then you reinstate with...	You will be a...
<p>a classic member only</p>	<ul style="list-style-type: none"> any employer, and have been separated for less than six months 	<p>classic member</p>
	<ul style="list-style-type: none"> any employer you previously worked for,* and have been separated for more than six months 	<p>classic member</p>
	<ul style="list-style-type: none"> an employer you have never worked for, and have been separated for more than six months 	<p>PEPRA member</p>
<p>a PEPRA member only</p>	<ul style="list-style-type: none"> any employer regardless of how long you have been separated 	<p>PEPRA member</p>

*All State of California departments, including California State Universities (CSU), are considered the same state employer. All school county offices and districts are considered the same school employer. Public agencies are considered different employers.

EXHIBIT B

Sample Calculation—Classic/Classic

Keith retired as a classic member and reinstated as a classic member.
 He earns three years of service credit and re-retires.

New retirement formula:	Classic 2% at 55 (state miscellaneous)
New salaries:	\$7,500
Age at second retirement:	63.00 years
Original retirement formula:	Classic 2% at 55 (state miscellaneous)
Original salaries:	\$5,000
Determined age:	63.00 - 4.00 = 59.00 years

Service Credit After Reinstatement	×	Benefit Factor on 2nd Retirement Date	=	% of Final Compensation	×	Final Compensation	=	Reinstatement Unmodified Allowance
3.00 years	×	2.500%	=	7.50%	×	\$7,500	=	\$562.50

Service Credit on Original Retirement	×	Determined Age Factor	=	% of Final Compensation	×	Final Compensation	=	Recalculated Original Unmodified Allowance
20.00 years	×	2.250%	=	45.00%	×	\$7,500	=	\$3,375.00

Keith's new benefit is \$562.50 + \$3,375.00 = **\$3,937.50***