

ATTACHMENT J
RESPONDENT'S POST HEARING BRIEF
AND REPLY BRIEF

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9 **BOARD OF ADMINISTRATION**
10 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
11

12 In the Matter of the Appeal Regarding Full-
Time Payrate Reporting of
13 TUSTIN UNIFIED SCHOOL DISTRICT,
14 Respondent.
15

OAH Case No. 2020090431
Agency Case No. 2020-0436
**TUSTIN UNIFIED SCHOOL DISTRICT'S
POST-HEARING BRIEF**
Hearing Dates: September 2 & 3, 2021
Location: Remote
16
17

18 Respondent, TUSTIN UNIFIED SCHOOL DISTRICT ("District"), hereby submits its Post
19 Hearing Brief following the administrative hearing before Administrative Law Judge ("ALJ")
20 Robert Walker on September 2 and 3, 2021.
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I. INTRODUCTION

The District is a public K-12 school district, governed by an elected Board of Education, and is a public agency, as defined in the California Public Employees' Retirement Law ("PERL") (Gov. Code, § 20056.) The District contracts with the California Public Employees' Retirement System ("CalPERS") to provide retirement benefits to its employees.

In December 2018, the CalPERS Office of Audit Services issued a final audit report ("the Audit") setting forth the results of a Payrate Increases Review conducted with regard to the District and 63 other public agencies. (CalPERS Exhibit 10, pp. A120-A356.) The purpose of the Payrate Increases Review was "to determine whether increases to member payrates were granted and reported in compliance with the PERL and the California Public Employees' Pension Reform Act of 2013 (PEPRA)." (CalPERS Exhibit 10, p. A123.)

The District timely appealed from Exception 4 of the Audit (CalPERS Exhibit 8, pp. A78, A88, A78-116), which specifically pertains to the District's reporting of payrate for a sampled individual classified employee who retired in January 2015. (CalPERS Exhibit 8, pp. A78-A116, A88.) The employee in question was subsequently identified as Alane Pelleriti ("Ms. Pelleriti"). (Transcript, v. 1, pp. 103:16-104:21.)

According to the Statement of Issues submitted by CalPERS, "[t]he appeal is limited to the issue of whether Respondent District incorrectly reported full-time pay rates to CalPERS." (CalPERS Exhibit, pp. A501-A512.) On September 29, 2020, the District timely filed a Notice of Defense and Request for Hearing. (District Exhibit 29, pp. B462-477.)

II. STATEMENT OF THE CASE

At issue in this proceeding is CalPERS's determination that the District failed to accurately report "payrate" for a monthly classified employee (Ms. Pelleriti) in accordance with the requirements of Government Code section 20636.1(b)(1).

Although Exception 4 directs the District to adjust its "payrate" reporting for Ms. Pelleriti, CalPERS Staff Service Manager II Kevin Lau ("Lau") affirmed in his testimony that CalPERS expects the District to make similar changes to "other similarly situated employees District-wide[,] . . . [potentially] includ[ing] all of the District's classified monthly employees." (Transcript, v. 2,

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1 pp. 155:9–156:24.) As such, Exception 4 could have broad implications for the District and its
2 employees (and retirees).

3 CalPERS specifically concluded in Exception 4, as follows:

4 The Agency did not correctly report full-time payrates for a sampled classified
5 employee who retired in January 2015. Specifically, the reported payrates were not
6 based on a 40-hour workweek for all months of a year as required by Government
7 Code section 20636.1. For example, the Agency reported a monthly payrate of
8 \$4,022 for the employee in the pay period ended August 31, 2012; however, the
9 reported monthly payrate should have been \$3,915.60. The payrates reported for
the retired sampled employee reflected a workweek of less than 40 hours and the
payrates were not based on all 12 months of the year. The incorrect reporting
resulted in decreases to the employees reported payrates that were not in
compliance with Government Code section 20636.1.

10 Exception 4 is unclear and confusing for two reasons. First, Exception 4 contains a
11 typographical error — \$4,022 was entered instead of \$4,002. (District Exhibit 1, p. B11;
12 CalPERS Exhibit 3, p. A41; Transcript, v. 1, p. 34:1-10; p.144:7-15.) Second, Exception 4 fails to
13 clarify an unrelated issue involving longevity pay. For the pay period (August 2012), the District
14 reported Ms. Pelleriti’s “payrate” as \$3,795 (her monthly salary) plus \$207 (her longevity), for a
15 sum total of \$4,002. (District Exhibit 1, p. B11; CalPERS Exhibit 3, p. A41; Transcript, v. 1,
16 p.144:7-15.) CalPERS separately determined, and the District does not dispute, that the longevity
17 pay should not have been included when reporting “payrate.” The District maintains that, for the
18 pay period (August 2012) it correctly reported Ms. Pelleriti’s monthly rate of pay (i.e. her monthly
19 salary of \$3,795 per month) as “payrate.” CalPERS instead contends that Ms. Pelleriti’s “payrate”
20 for the August 2012 pay period should have been reported as \$3,915.60. (CalPERS Exhibit 3, p.
21 A41; Transcript, v. 1, p. 192:7-13.) Thus, the dispute reduces to a difference between the \$3,795
22 monthly “payrate” reported by the District and the \$3,915.60 amount which CalPERS contends is
23 correct. (See, e.g., CalPERS Exhibit 8, pp. A109-A113, which confirms the various numbers set
24 forth in this paragraph.)

25 The difference in “payrate” amounts identified by the parties results from a difference in
26 interpretation of Government Code section 20636.1(b)(1), which defines “payrate” for school
27 members of CalPERS as the “normal monthly rate of pay . . .” As explained below, Ms. Pelleriti
28 was a full-time (40 hour) employee, who was employed on a monthly basis, and the District

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1 accurately reported her normal monthly rate of pay (i.e. \$3,795) as “payrate,” in accordance with
2 the plain language of Government Code section 20636.1(b)(1). CalPERS, in contrast, contends
3 that the phrase “normal monthly rate of pay” actually means the District’s hourly rate of pay for
4 hourly classified employees, multiplied by 173.33 to equal a monthly rate. (Transcript, v. 1,
5 p.112:3.)

6 As discussed below, the District’s interpretation of Government Code section
7 20636.1(b)(1) is consistent with the literal meaning of the statute. In contrast, CalPERS’s
8 insistence that the District determine “payrate” for monthly employees by using a formula that
9 starts with an hourly rate of pay, which is then multiplied by 173.33, finds no support in the PERL
10 or applicable regulation, but, rather, is an unlawful underground regulation, which cannot lawfully
11 be enforced.

12 **III. STATEMENT OF FACTS**

13 **A. The District Accurately Reported the Monthly Payrate for Ms. Pelleriti**

14 The evidence shows Ms. Pelleriti was a full-time (40 hour per week) classified employee
15 of the District employed on a monthly basis with a 10-month assignment. District Senior Director
16 of Business Services Nam Nguyen (“Nguyen”) testified that Ms. Pelleriti was employed as a full-
17 time (40 hour per week) employee. (Transcript, v. 2, pp. 117-119; District Exhibit 8, p. B110-
18 B113.) Specifically, Nguyen testified Ms. Pelleriti worked eight hours per day, five days a week,
19 totaling 40 hours a week. (Transcript, v. 2, p. 119:12-16.) CalPERS witnesses agreed that Ms.
20 Pelleriti worked 40 hours a week, and acknowledged they had no information to the contrary.
21 (Transcript, v. 1, pp. 103:16-104:18.)

22 Nguyen also testified that Ms. Pelleriti was employed and paid as a monthly employee.
23 (Transcript, v. 2, pp. 116:19-119:4; 119:12-16.) Nguyen explained that the District’s payroll form
24 for Ms. Pelleriti contains a “monthly” pay period designation, and a “CLMO” (classified monthly)
25 designation, both of which establish Ms. Pelleriti as a monthly employee. (Transcript, v.2, pp.
26 116:19-119:4; District Exhibit 8, pp. B109-B113.) Nguyen also testified that Ms. Pelleriti was a
27 “ten-month employee” with a total of 209 work days. (Transcript, v. 2, p. 119:12-16.)
28

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1 CalPERS's internal reporting data also reflects that Ms. Pelleriti's "payrate type" was
2 reported as "monthly" and the amount of payrate reported (excluding longevity) was \$3,795 per
3 month. (Transcript, v. 1, pp. 12:19-13:19; CalPERS Exhibit 20, p. A479.) Nguyen also testified
4 that Ms. Pelleriti, as a full-time employee, was paid the full monthly rate for each of her 10
5 months of service, regardless of the number of days in a given month (e.g., she received the same
6 amount in January as in February). (Transcript, v. 2, p. 132:18.) CalPERS witness Lau also
7 acknowledged in his testimony that "based on the information [provided to CalPERS], [Ms.
8 Pelleriti] was paid monthly, and the monthly amounts were identical even though February is
9 shorter than January . . ." (Transcript, v. 1, p. 15:1-12.) In short, CalPERS records, like those of
10 the District, reflect that Ms. Pelleriti was paid a fixed amount per month, meaning that she
11 received a monthly rate of pay.

12 CalPERS witness Lau implied in his direct testimony that Ms. Pelleriti might have been
13 employed over 11 months, but only paid for 10. (Transcript v. 2, pp. 34:13-35:5.) On cross-
14 examination, however, he acknowledged that an employee's 10-month assignment could stretch
15 over parts of 11 calendar months; and that he had no basis to "confirm or deny whether or not
16 she's being paid monthly." (Transcript v. 2, pp. 39:24-40:4.)

17 **B. The District Maintains Hourly and Monthly Classified Salary Schedules; Ms. Pelleriti**
18 **Was Paid On The Monthly Salary Schedule**

19 The District maintains hourly and monthly salary schedules for its classified (non-
20 teaching) employees. (Transcript, v. 2, p. 103:10-15.) The District's hourly salary schedules
21 include hourly rates of pay for classified employees who are employed on an hourly basis.
22 (Transcript, v. 2, p. 82:16-18; District Exhibit 7, pp. B86-B108.) The District's monthly salary
23 schedules include monthly rates of pay for classified employees who are employed on a monthly
24 basis. (Transcript, v. 2, p. 82:16-18; District Exhibit 7, pp. B86-B108.)

25 Nguyen testified that, as a monthly employee, Ms. Pelleriti was paid at Range 36, Step F of
26 the monthly classified salary schedule, which was \$3,795 during the 2012-2013 school year
27 (Transcript, v. 2, p. 119:20-24; District Exhibit 8, p. B110); \$3,909 during the 2013-2014 school
28

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1 year (Transcript, v. 2, p. 121:7; District Exhibit 8, pp. B111-B112); and \$4,046 during the 2014-
2 2015 school year (Transcript, v. 2, p. 121:18; District Exhibit 8, p. B113).

3 **C. CalPERS Has Never Required That School Districts Use A Specific Factor To Relate**
4 **Their Hourly And Monthly Pay Schedules**

5 As explained below, CalPERS asserts that school districts must use a factor of 173.33 to
6 relate their hourly and monthly rates of pay (i.e. the monthly rate of pay must be 173.33 times as
7 as large as the hourly rate of pay). However, this factor is not contained in any statute or
8 regulation; is not reduced to writing; and was never presented to the District or the Orange County
9 Department of Education (“OCDE”) as a requirement. OCDE is the office of the County
10 Superintendent of Schools for Orange County (Transcript, v. 2, pp. 112:17-113:11), and oversees
11 CalPERS reporting for schools in Orange County. Yet even OCDE testified that the 173.33 factor
12 has never been a requirement for school districts. (Transcript, v. 2, p. 51:3-7, 25; p. 52:1-9; p.
13 58:8-12; p. 76:20-22.) As a result, school districts in Orange County use a wide range of factors to
14 relate hourly and monthly rates of pay, with most, including the District, using a factor of 21 days
15 (168 hours). (District Exhibit 11, p. B264.)

16 **1. CalPERS Asserts — Without Documentation — That School Members Must**
17 **Use 173.33 As A Factor To Relate Their Hourly and Monthly Pay Schedules**

18 The position advanced by CalPERS in Exception 4 (and at hearing) is that the District’s
19 monthly and hourly rates of pay must be related by a factor of 173.33, and that hourly rates of pay
20 must be multiplied by 173.33 to generate monthly rates of pay. (Transcript v. 1, p. 112:3.)
21 Although the 173.33 factor is not specifically referenced in the Audit, and CalPERS introduced no
22 written evidence of this formula, there was clear testimonial evidence that CalPERS requires use
23 of the 173.33 factor. (Transcript, v. 1, p. 64:9-19; p. 194:18-22.)

24 The CalPERS 173.33 factor is an approximation based on a nominal 364-day year,
25 consisting of exactly 52 weeks¹ and 260 days (excluding weekends).² (Transcript, v. 1, p. 112:21-
26

27 ¹ 364 divided by 7 (days per week) = 52 weeks.

28 ² 52 weeks multiplied by 5 (workdays per week) = 260 days.

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1 25.)³ The CalPERS formula also assumes 8 work hours per day, which equates to 2080 hours per
2 year,⁴ which equates to an average of 173.33 hours per month.⁵ (Transcript, v. 1, p. 60:19-22.)
3 CalPERS witnesses testified their own formula is not precise or exact, but an average. (Transcript,
4 v. 1, pp. 69:24-70:13.)

5 The 173.33 factor is also explained in CalPERS correspondence dated December 18, 2019.
6 (District Exhibit 8, pp. A109-A113.) That correspondence explains that the \$3,915.60 “payrate”
7 amount stated in the Audit was calculated using the 173.33 factor, as follows:

8 Therefore, to calculate the monthly payrate for full-time employment, defined as
9 40-hours per week for classified school members under Gov. Code section
10 20636.1, the hourly base payrate of \$22.59 is multiplied by 40 hours per week, by
11 52 weeks per year, and the resulting product is divided by 12 months [footnote: 40
hours per week multiply by 52 weeks, then dividing the product by 12 months
equates to the 173 333 factor], which equals a monthly payrate of \$3,915.60, as
cited in the PAR.

12 (District Exhibit 8, p. A110.)

13 **2. The District Uses A Factor Of 168 To Relate Its Hourly And Monthly Rates Of**
14 **Pay**

15 The District’s hourly and monthly classified salary schedules are related by a factor of 168.
16 (Transcript, v. 2, p. 83:8-14.) This factor is an approximation based on a nominal month of 21
17 workdays, multiplied by 8 hours per day. (Transcript, v. 2, pp. 103:25-104:2.) More specifically,
18 each cell on the monthly salary schedule, when divided by 168, equals the value in the
19 corresponding cell on the hourly salary schedule. (District Exhibit 7, pp. B86-B108.) For
20 example, in 2012-13 Ms. Pelleriti was employed by the District as a monthly employee, and was
21 placed at Range 36, Column F on the District’s monthly salary schedule, and thus was paid at the
22 rate of \$3,795 per month. That monthly rate (i.e. \$3,795) divided by 168 equals \$22.58, which is
23 the value reflected in Range 36, Column F on the District’s hourly salary schedule for 2012-13.

24 (District Exhibit 7, pp. B89-B90.)

25 _____
26 ³ See District Exhibit 25, pp. B377-B386. Most years consist of 261 workdays. Some consist of
27 260 or 262.

28 ⁴ 260 days multiplied by 8 (hours) = 2080 hours.

⁵ 2080 hours divided by 12 (months) = 173.33 hours per month.

1 **3. Neither CalPERS Nor OCDE Have Required Use Of A 173.33 Factor; As A**
2 **Result, School Districts In Orange County Use A Wide Variety Of Factors To**
3 **Relate Their Hourly and Monthly Pay Schedules**

4 OCDE Executive Director of Support Services Gary Stine (“Stine”) testified that CalPERS
5 has never required — and has never informed OCDE of a requirement — that school districts in
6 Orange County use the 173.33 factor to establish a relationship between hourly and monthly rates
7 of pay. (Transcript, v. 2, p. 51:3-7, 25; p. 52:1-9; p. 58:8-12; p. 76:20-22.) As a result, OCDE has
8 never directed schools in Orange County that they are required to use the 173.33 factor.
9 (Transcript, v. 2, p. 88:10-14.) Nguyen likewise testified that OCDE never informed the District it
10 could not use the 21-day (168 hour) factor in calculating hourly pay. (Transcript, v. 2, p. 88:10-
11 14.)

12 Stine testified that he is aware of conference materials from the California Association of
13 School Business Officials (“CASBO”) statewide conference in 1999 and 2006 which reference the
14 173.33 factor, but these materials are not statutes or regulations, and, in any event, they identify
15 the 173.33 factor as a recommendation, not a requirement. (Transcript v.2 p. 76:20-22; District
16 Exhibit 9, pp. B115-B116 and Exhibit 10, p. B154.) Stine understood these materials to indicate
17 that a range of factors could be used by school districts to relate hourly and monthly rates of pay.
18 (Transcript, v. 2, p. 59:17-20; p. 61:12-15; p. 63:19-22; District Exhibit 9, pp. B115-B116 and
19 Exhibit 10, p. B154.)

20 As a result, school districts in Orange County use a wide variety of factors to establish a
21 relationship between hourly and monthly rates of pay, with a strong majority using the same
22 approach as the District. Stine testified that school districts in Orange County use many different
23 factors — including 21 days (i.e. 168 hours) — to establish a relationship between their daily and
24 hourly rate of pay. (Transcript, v. 2, pp. 57:25-58:4.)

25 More specifically, during the 2018-2019 school year, nine out of 20 school districts in
26 Orange County used the same 21-day factor as the District when calculating hourly pay, while
27 only one school district in Orange County used the 173.33 factor suggested by CalPERS. (District
28 Exhibit 11, p. B264; Transcript, v. 2, p. 58:4.) Other factors in use in Orange County include 22

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1 days and 21.75 days. (District Exhibit 11, p. B264.) Although data for 2018-19 post-dates the
2 2012-2017 audit period, Stine testified the factors used by school districts in Orange County to
3 calculate hourly pay are “fairly stagnant” and that he is not aware of changes even “in the distant
4 past,” and that districts typically “do not change their hours or days ever . . .” (Transcript, v. 2, p.
5 72:15-19.)

6 **D. OCDE (And By Extension CalPERS) Has Been Aware Of The District’s Use Of A 168**
7 **Factor Since At Least 2007 — Such Knowledge Is Attributable To CalPERS Prior to**
8 **the Audit, and the District and OCDE Were Not Apprised of Any Requirement to**
9 **Use CalPERS’s 173.33 Factor for Calculating Payrate**

10 OCDE — like all county superintendents of schools — serves as an agent of CalPERS
11 (and the California State Teachers’ Retirement System “CalSTRS”). (See *Baxter v. State*
12 *Teachers’ Retirement System* (2017) 18 Cal.App.5th 340, 366 [holding county office of education
13 was at minimum, the ostensible agent of CalSTRS and information imparted to the county office
14 was information CalSTRS was presumed to know]; see also *Blaser v. State Teachers’ Retirement*
15 *System* (2019) 37 Cal.App.5th 349, 361.)

16 Nguyen and District Chief Financial Officer, Anthony Soria, (on behalf of the District),
17 and Stine (on behalf of OCDE) all testified OCDE has a statutory role in reporting retirement
18 transactions to CalPERS, has oversight responsibility over the District in regard to CalPERS
19 reporting, acts as a liaison between the District and CalPERS, and provides ongoing education to
20 school districts, including the District, with regard to CalPERS issues. (Transcript, v. 2, pp.
21 47:19-48:11; p. 86:11-18; pp. 113:21-114:16.) Soria (on behalf of the District) and Stine (on
22 behalf of OCDE) also testified OCDE has been aware of the manner in which the District
23 calculates pay for hourly classified employees since at least 2007. (Transcript v. 2, p.66:20-24;
24 pp. 86:22-87:3; District Exhibit 12, p. B267.) Specifically, Soria (on behalf of the District) and
25 Stine (on behalf of OCDE) testified the District received a letter dated August 8, 2007, from
26 Sondra Dougherty, former OCDE Director, Support Services, wherein Ms. Dougherty directly
27 acknowledges the District’s use of 21-days when calculating the hourly rate of pay. (Transcript v.
28 2, p.66:20-24; pp. 86:22-87:3; District Exhibit 12, p. B267.)

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IV. LEGAL ANALYSIS

A. Burden of Proof

In administrative, as well as judicial adjudication, a party has the burden of proof as to each fact and the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting. (Evid. Code, § 500.) Except in cases involving discipline of a professional license, or as otherwise provided by law, the requisite degree of proof is a “preponderance of the evidence,” meaning more than a 50% probability. (Evid. Code, § 115.)

While the party against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476), the fact that CalPERS filed a statement of issues is not dispositive as to the burden of proof. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, the court considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found “the party asserting the affirmative at an administrative hearing has the burden of proof, including ... the burden of persuasion by a preponderance of the evidence.” (*Id.* at p. 1051, fn. 5; *citing So. Cal. Jockey Club v. Cal. etc. Racing Bd.* (1950) 36 Cal. 2d 167, 177 [“As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence.”].)

Here, CalPERS is the party asserting the affirmative, in that it is seeking to change the method in which the District reports payrate. Where a change in the status quo is sought, the party seeking the change has the burden of proving that the change is necessary. (Evid. Code, § 500.) Moreover, CalPERS is seeking to correct an error in reporting pursuant to Government Code section 20160. Under this provision, CalPERS, as the party seeking correction of an error, has “the burden of presenting documentation or other evidence to the board establishing the right to correction.” (Gov. Code, § 20160, subd. (d).) CalPERS’s standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

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1 **OCDE is an Agent of CalPERS, Which Had Inquiry Notice of the District's Method**
2 **for Calculating Hourly and Monthly Payrates**

3 In *Baxter v. State Teachers' Retirement System*, supra, 18 Cal.App.5th 340, the court held
4 the county office of education was at minimum, an ostensible agent of CalSTRS, where the county
5 office of education acted as a liaison between the school district and CalSTRS. Specifically,
6 CalSTRS's counselors met with school district teachers at the county office to access CalSTRS
7 information and discuss retirement, and the school district was instructed by CalSTRS to contact
8 the county office for questions on retirement issues. (*Id.* at pp. 365-366.) As CalSTRS's
9 ostensible agent, the county office of education received information regarding the school
10 district's misreporting of compensation. The court held although the misreporting information
11 was not provided directly to CalSTRS, CalSTRS had inquiry notice through the county office,
12 thus triggering the three-year statute of limitations period to adjust reporting errors. (*Id.* at pp.
13 367-368.) In a related case, the appellate court in *Blaser v. State Teachers' Retirement*
14 *System* (2019) 37 Cal.App.5th 349, 365, fn. 11, upheld the trial court's findings that CalSTRS had
15 constructive notice of misreporting based on the county office's knowledge of the misreporting
16 issues.

17 Like the county office in the *Baxter* and *Blaser* cases, OCDE is an agent to CalPERS for
18 the reasons stated in Section III(D), supra. The evidence establishes OCDE was aware of how the
19 District calculated hourly rates of pay for classified employees (i.e. by using the 21-day/168 hour
20 factor) at least as far back as 2007. (Transcript v. 2, p.66:20-24; pp. 86:22-87:3; District Exhibit
21 12, p. B267.) Thus, based on the holdings in *Baxter* and *Blaser*, CalPERS had at least
22 constructive notice of the manner in which the District calculated hourly pay at least since 2007.

23 The evidence also establishes OCDE was aware that at least half of the other school
24 districts in Orange County also use the same 21-day average as the District. (District Exhibit 11,
25 p. B264.) The District relies on OCDE, as CalPERS's agent, to answer questions and provide
26 education related to CalPERS reporting requirements. (Transcript, v. 2, pp. 47:19-48:11; p. 86:11-
27 18; pp. 113:21-114:16.) Prior to the December 2018 Audit, CalPERS had never informed OCDE
28 of the requirement that the District use the 173.33 factor when calculating hourly pay. (Transcript,

1 v. 2, p. 51:3-7.) Therefore, OCDE never informed school districts such as the District that it
2 needed to use 173.33 when calculating hourly pay. (Transcript, v. 2, p. 88:10-14.)

3 Based on *Baxter* and *Blaser*, CalPERS had at least inquiry notice since 2007 of the method
4 by which the District calculated monthly versus hourly rates and the manner in which it reported
5 those payrates to CalPERS. Yet, CalPERS has never notified OCDE of its interpretation that
6 school districts are bound to use the 173.33 factor, nor did CalPERS raise this issue to the District
7 prior the Audit.

8 The doctrine of equitable estoppel applies when four elements are met: (1) the party to be
9 estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or
10 must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the
11 other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his
12 injury. (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) A principal may be held
13 liable for the acts of an ostensible agent based on the doctrine of estoppel where a third party
14 detrimentally relies on representations made by the principal. (*Preis v. American Indemnity*
15 *Co.* (1990) 220 Cal.App.3d 752, 761.) Courts will not invoke principles of estoppel to contravene
16 any statutory or constitutional limitations on a public agency's authority. (*Longshore v. County of*
17 *Ventura* (1979) 25 Cal.3d 14, 28.)

18 Here, CalPERS was apprised of the District's method for calculating and reporting hourly
19 and monthly payrate since at least 2007, when OCDE, CalPERS's ostensible agent, became aware
20 of the method. CalPERS took no action to correct the District's method for calculating and
21 reporting hourly and monthly payrate, by either informing OCDE or the District. Because
22 CalPERS has not adopted any regulation that requires use of the 173.33 factor or that requires the
23 District to calculate hourly or monthly payrate in a different manner, the District was unaware of
24 any such requirement. The District relied on the lack of information from CalPERS and the
25 absence of any statutory or regulatory requirement, by continuing to calculate and report hourly
26 and monthly payrate in the same manner it had for years. Unlike the cases where courts found the
27 principle of estoppel did not apply to a public agency where doing so would contravene statutory
28

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1 or constitutional limitations on the agency's authority, CalPERS's assertions in the Audit go
2 beyond its own statutory authority and are based on an unlawful underground regulation.

3 **C. The PERL and CalPERS Regulations Do Not Contemplate, Let Alone Require, Use**
4 **of a 173.33 Factor To Relate Hourly and Monthly Rates Of Pay For Active School**
5 **Members**

6 **1. Payrate Is Exactly Defined in the PERL As The "Normal Monthly Rate Of**
7 **Pay"**

8 At issue in this proceeding is the PERL's definition of "payrate" for school members of
9 CalPERS, as set forth in Government Code section 20636.1. Both CalPERS and the California
10 courts have recognized that under the PERL, "compensation earnable" — which includes
11 "payrate" (see Gov. Code, § 20636.1(a)) — is "exactly defined to include or exclude various
12 employment benefits and items of pay." (*Oden v. Board of Administration* (1994) 23 Cal.App.4th
13 194, 198; *accord*, CalPERS Precedential Decision 17-01, *In the Matter of the Calculation of Final*
14 *Compensation of Kareemah M. Bradford and City of Compton.*) Because the PERL is so clearly
15 and specifically defined, the literal text of the PERL is of great significance.

16 Government Code section 20636.1(b)(1) defines "payrate" to mean "the normal monthly
17 rate of pay or base pay of the member paid in cash to similarly situated members of the same
18 group or class of employment for services rendered on a full-time basis during normal working
19 hours." (Gov. Code, § 20636.1(b)(1).) At issue herein is the opening phrase of this code section,
20 which, for monthly employees like Ms .Pelleriti, clearly defines "payrate" as the member's
21 "normal monthly rate of pay . . ."

22 "Payrate" is a key component of the CalPERS retirement formula for school members.
23 That formula establishes that retired school members receive a pension equal to 2% of the
24 member's "final compensation" multiplied by an adjustment factor based on the employee's age
25 and multiplied again by the employee's years of "service" in qualifying (e.g. school) employment.
26 (Gov. Code, § 21353.) CalPERS witness Lau testified to this formula, and noted that most school
27 members use a 2% at 55 formula (i.e. if they retire at age 55, they get 2% of final compensation
28 multiplied by years of service). (Transcript, v. 2, pp. 26:23-27:18.) For example, an employee

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1 retiring at age 55 after 30 years of service would receive 60% (30 multiplied by 2%) of their “final
2 compensation.” (*Ibid.*)

3 According to the PERL, a school member’s “final compensation” is defined to mean the
4 highest annual “compensation earnable” over a 12-month period. (Gov. Code, § 20035.5.)
5 Government Code section 20636.1 defines the “compensation earnable” of a “school member” of
6 CalPERS to include “payrate” and “special compensation.” (Gov. Code, § 20636.1(a).) Thus,
7 “payrate” is a key component of a school member’s “final compensation,” which directly impacts
8 the individual’s pension. As such, any reduction in “payrate” may serve to reduce the school
9 member’s retirement pension. In contrast, an increase in “payrate” would serve to increase the
10 school member’s retirement pension. Thus, the definition of “payrate” has a significant impact on
11 a CalPERS member’s retirement.

12 **2. CalPERS’s Interpretation of Government Code § 20636.1(b)(1) Is At Odds**
13 **With The Plain Meaning Of The Statute**

14 Government section 20636.1(b)(1) states clearly that “‘payrate’ means the normal monthly
15 rate of pay or base pay of the member . . .” As explained below, CalPERS’ interpretation of
16 Government Code section 20636.1(b)(1) — which posits that only an hourly rate of pay multiplied
17 by 173.33 can be reported as “payrate” — is inconsistent with the plain meaning of that statute. In
18 contrast, the District has interpreted and applied that code section as written — to require that the
19 normal monthly rate of pay be reported as “payrate.”

20 **a. Statutes Are Interpreted According To Plain Meaning; The Literal**
21 **Text Of The Statute Governs**

22 “In interpreting statutes, we follow the Legislature’s intent, as exhibited by the plain
23 meaning of the actual words of the law.” (*People v. Loewn* (1997) 17 Cal.4th 1.) “[T]he words the
24 Legislature chose are the best indicators of its intent. Absent ambiguity, we presume the
25 lawmakers meant what they said, and the plain meaning of the language governs.” (*In re Gilbert*
26 *R.* (2012) 211 Cal.App.4th 514.) Stated differently, a literal interpretation of a statute is required
27 unless it is repugnant to the obvious purpose. (*Duty v. Abex Corp.* (1989) 214 Cal.App.3d 742,
28 749.) In interpreting a statute, courts will “presume the Legislature meant what it said” and the

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1 plain, common sense meaning controls; only avoiding any statutory construction that would
2 produce unreasonable, impractical, or arbitrary results. (*Bonnell v. Med. Bd. of Cal.* (2003) 31
3 Cal.4th 1255, 1261; *Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1385.) Even
4 if there were ambiguity in the statute requiring statutory construction, it is well-established that the
5 statute must be construed so as to avoid an interpretation that would lead to absurd consequences.
6 (*People v. Coronado* (1995) 12 Cal.4th 145, 151; *Day v. City of Fontana* (2001) 25 Cal.4th 268,
7 272.)

8 **b. CalPERS's Definition of Payrate (Which Relies On The 173.33 Factor)**
9 **Is Not Found in the Plain Language of Government Code**
10 **§ 20636.1(b)(1)**

11 CalPERS's key witness regarding the statutory definition of "payrate" was Anthony Suine
12 ("Suine"), the CalPERS Deputy Executive Officer over the Customer Services and Support
13 Branch. (Transcript, v. 1, p. 55.) Suine has worked for CalPERS for 30 years; provides trainings
14 on implementation of Government Code section 20636.1; and affirmed he is "familiar with how
15 CalPERS has implemented [Government Code section] 20636.1 historically," including use of the
16 173.33 pay rate conversion. (Transcript, v. 1, pp. 57:14-20, 58:4-9.)

17 Suine testified CalPERS takes the position that the opening phrase of Government Code
18 section 20636.1(b)(1), which defines "payrate" to mean the "normal monthly rate of pay," must be
19 interpreted as stating, "'Payrate' means the hourly rate of pay multiplied by 173.33 to equal a
20 monthly rate." (Transcript, v. 1, pp. 111:23-112:3.) CalPERS thus interprets the statutory
21 language as follows:

22 (b)(1) "Payrate" means ~~the normal monthly rate of pay or base pay~~ **the hourly**
23 **rate of pay multiplied by 173.33 to equal a monthly rate** of the member paid in
24 cash to similarly situated members of the same group or class of employment for
services rendered on a full-time basis during normal working hours, pursuant to
publicly available pay schedules.

25 On cross-examination, Suine explained that CalPERS has applied this 173.33 factor for
26 many years, although it is not reflected in statute or regulation:

27 Q: Okay. So if I understand correctly, you are reading the first part of
28 20636.1(b)(1) to read, in essence, that pay rate is the hourly rate of pay multiplied
by 173.33 to equal a monthly rate. That is your position, correct?

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1 A: Correct.

2 . . .

3 Q: All right. This formula, this 173.33 formula, that was in place before you
4 joined CalPERS, correct?

5 A: Correct.

6 Q: All right. But it's not in 20636.1 of the Government Code; correct?

7 A: It's not.

8 Q: And it's also not in any of the regulations that applied to active school
9 employees, correct?

10 A: Not that I'm aware of.

(Transcript, v. 1, pp. 111:23-112:11.)

11 Suine also acknowledged that the 173.33 factor does not appear in CalPERS presentation
12 materials which were introduced into evidence. (Transcript, v. 1, p. 113:11-17; CalPERS Exhibit
13 19, pp. A416-A463.) Likewise, the number 173.33 does not appear in CalPERS Circulars⁶ which
14 were introduced into evidence during the hearing, though one Circular does refer to a reporting
15 code 173. (Transcript, v. 1, p. 117:17; p. 118:23; CalPERS Exhibit 15, pp. A388-A390; CalPERS
16 Exhibit 16, p. A392; CalPERS Exhibit 17, pp. A393-A396.) Nor did CalPERS introduce any
17 documents or other evidence whatsoever which referenced, let alone required, use of the 173.33
18 factor.

19 In short, the 173.33 factor is not found in any provision of law applicable to "payrate" for
20 active school employees.

21 **c. CalPERS's Insistence the Hourly Rate is the "True" Payrate Directly**
22 **Contradicts the Plain Language of Government Code § 20636(b)(1),**
23 **Which Refers Specifically to Monthly Rates Of Pay**

24 Although Government Code section 20636.1(b)(1) refers only to monthly — and not
25 hourly or daily — rates of pay, CalPERS argued at the hearing that monthly employees' "true"
26 rate of pay is an hourly rate (e.g. the amount on the hourly classified salary schedule), and their

27 _____
28 ⁶ Suine testified these are not statutes or regulations, and affirmed that circulars "are an attempt to describe the law; they are not the law." (Transcript, v. 1, pp. 115:16-22.)

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1 monthly rate must be derived from that hourly rate, using the 173.33 factor. (Transcript, v. 1, p.
2 204:3-17.) This contention, however, is not grounded in any statute or regulation, and is at odds
3 with the literal text of Government Code section 20636.1(b)(1), which states that “payrate” means
4 the “normal monthly rate of pay.”

5 **d. The District Interprets Payrate Based on the Literal Text of**
6 **Government Code § 20636.1(b)(1)**

7 The District applied Government Code section 20636.1(b)(1) according to its literal text.
8 For full-time monthly employees, the employee’s monthly rate of pay was reported as “payrate,”
9 exactly as stated in Government Code section 20636.1(b)(1). In particular, Nguyen testified that
10 Ms. Pelleriti — the employee sampled in the Audit — was employed on a monthly basis, worked
11 a full-time (40 hours per week) schedule, and was identified by the District as a monthly
12 employee. (Transcript, v. 2, pp. 117-119; District Exhibit 8, pp. B110-B113.) As such, Ms.
13 Pelleriti was paid at Range 36, Step F of the monthly classified salary schedule, which, during the
14 2012-2013 year, amounted to \$3,795 monthly and \$37,950 annually. (Transcript, v. 2, p. 119:20-
15 24.) This exact amount was reported to CalPERS as her “payrate” for that time period.
16 (Transcript, v. 2, pp. 119-121; District Exhibit 7, p. B87-B108 and Exhibit 8, p. B110-113.)

17 Here, the “payrate” reported by the District with respect to Ms. Pelleriti (a full-time 10-
18 month employee) was the employee’s exact “monthly rate of pay,” as stated on the District’s
19 salary schedule for monthly employees, i.e. \$3,795 per month (\$37,950 annually over a 10-month
20 period). This is precisely what the statute requires.

21 **3. The Legislature’s Use of 173.33 In Other Contexts — But Not In Government**
22 **Code § 20636.1(b)(1) — Demonstrates Legislative Intent Not To Require Use**
23 **Of The 173.33 Factor As Applied To Active School Members**

24 CalPERS’s argument is at odds with the only statute applicable to school members that
25 uses the 173.33 formula. Government Code section 21224 provides that when retired CalPERS
26 members opt to return to work without reinstating from retirement, they receive no benefits, and
27 instead receive only an hourly rate which cannot exceed the “maximum monthly base salary paid
28

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1 to other employees performing comparable duties as listed on a publicly available pay schedule
2 divided by 173.333 to equal an hourly rate.”

3 Although Government Code section 21224 applies only to retirees, and not to active
4 employees, it is nevertheless noteworthy that the formula in Government Code section 21224 uses
5 the monthly rate of pay as a starting point, and calculates an hourly rate of pay from the monthly
6 rate of pay, rather than the reverse as suggested by CalPERS in regard to this Audit.

7 It is also noteworthy that the Legislature clearly knows how to provide for use of a 173.33
8 pay factor when they want to — it is apparent they wanted to use such a factor in the retirement
9 context, but opted not to do so for active employees. “It is a settled rule of statutory construction
10 that where a statute, with reference to one subject contains a given provision, the omission of such
11 provision from a similar statute concerning a related subject is significant to show that a different
12 legislative intent existed with reference to the different statutes.” (*Hood v. Compton Community*
13 *College Dist.* (2005) 127 Cal.App.4th 954, 964–965; *In re Marriage of Corman* (1997) 59
14 Cal.App.4th 1492, 1499.) The absence of any reference to 173.33 outside of Government Code
15 section 21224, which applies only to retirees, shows the Legislature’s intent not to impose such a
16 requirement outside of the retiree context.

17 **D. CalPERS’s Interpretation Of Government Code § 20636.1 Conflicts With The PERL**
18 **And CalPERS Regulations**

19 Government Code section 20636.1(b)(1) defines “payrate” as the “monthly rate of pay . .
20 ..” Because “payrate” and “rate of pay” are statutorily linked in this manner, District witnesses
21 expressed concern at hearing that an increase in one might necessitate an increase in the other.
22 (Transcript, v. 2, p. 85:12-16.) In other words, if CalPERS requires the District to increase its
23 reported “payrate” this might also require an increase in pay. An across-the-board increase for
24 District employees — in an amount equal to the increase in “payrate” proposed by CalPERS —
25 would cost the District approximately \$5,000,000.00. (Transcript, v. 2, p.84:8-15.)

26 CalPERS witnesses responded to this concern by stating they are concerned only with
27 “payrate” and not with the amount actually paid to monthly employees (i.e. the monthly rate of
28 pay reflected in the salary schedule). (Transcript, v. 1, p. 193:2-8.) In other words, CalPERS

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1 seeks to require the District to report \$3,915.60 as “payrate,” but does not contend the District
2 must increase the amount actually paid to Ms. Pelleriti each month (i.e. \$3,795). In this manner,
3 CalPERS seeks to require reporting of “payrate” in an amount which is not reflected on any salary
4 schedule, and which is higher than the actual monthly “rate of pay” reflected on the monthly
5 salary schedule (e.g. \$3,795).

6 The CalPERS position is at odds with Government Code section 20636.1(b)(1) because it
7 would require the District to report a “payrate” for monthly employees which differs from the
8 “monthly rate of pay,” even though that statute defines “payrate” as the “monthly rate of pay.”

9 The CalPERS position is also at odds with Section 570.5 of Title 2 of the California Code
10 of Regulations. That regulation requires that “payrate” be included in a “publicly available pay
11 schedule.” That regulation further provides that “payrate shall be limited to the amount listed on a
12 pay schedule that [in part] . . . [i]ndicates the time base, including, but not limited to, whether the
13 time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually.” This regulation makes
14 clear that hourly and monthly “payrate” must be fixed amounts listed in salary schedules, whereas
15 here CalPERS contends the District must report a “payrate” amount which is not reflected on the
16 applicable salary schedule.

17 Moreover, it is the District’s right — not that of CalPERS — to fix and establish wages for
18 District employees. Although the 168 factor is not expressly mandated by law, school districts
19 have clear authority to fix and establish wages for school employees. (Educ. Code, §§ 45022 *et*
20 *seq.*, 45160 *et seq.*) School districts also have broad authority to “initiate and carry on any
21 program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent
22 with, or preempted by, any law, and which is not in conflict with the purposes for which school
23 districts are established.” (Educ. Code, § 35160.) Here, the District is well within its rights to
24 establish a compensation structure for classified employees which relates hourly and monthly
25 compensation by a factor of 168.

26 **E. CalPERS’s Position Renders “Payrate” Reporting For Monthly Employees Entirely**
27 **Dependent On The Existence And Structure Of Hourly Pay Schedules**

28 CalPERS’s position is that there must be an exact 173.33 relationship between hourly rates

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1 of pay and monthly “payrate” (See Section (III)(C)(1), *supra*). CalPERS asserts that, in order to
2 maintain this relationship, the District must increase its “payrate” for monthly classified
3 employees. However, it is apparent the 173.33 relationship could also be established by
4 decreasing the District’s hourly rate of pay.

5 In fact, CalPERS witnesses acknowledge that if there was no hourly pay schedule, no
6 adjustment to the District’s monthly “payrate” reporting would be required. (Transcript, v. 1, p.
7 127:10-16.) Likewise, CalPERS witnesses acknowledge that if the District reduced its hourly rate
8 of pay to exactly one-173.33 of the monthly rate of pay, no adjustment to the District’s monthly
9 “payrate” reporting would be required. (Transcript, v. 2, p. 160:13-22.)

10 Although the 173.33 relationship could be established by increasing monthly “payrate” or
11 by decreasing hourly rates of pay, CalPERS insists on the former rather than the latter, on grounds
12 that the District’s hourly rate of pay is (according to CalPERS) the “true” payrate, even for
13 monthly employees like Ms. Pelleriti. (Transcript, v. 1, p. 204:3-17.) In fact, as explained in
14 Section IV(C)(2)(c), *supra*, the contention that the hourly rate of pay is the only “true” payrate is
15 inconsistent with the text of Government Code section 20636.1(b)(1), which expressly refers to
16 monthly rates of pay when defining “payrate.”

17 For this reason, assuming, *arguendo*, that the 173.33 factor is required, and given that the
18 PERL does not establish hourly rates of pay as the “true” payrate, there is no basis for CalPERS to
19 conclude that monthly “payrate” must be increased, when another alternative (decreasing hourly
20 rates of pay) is equally viable. In other words, assuming, *arguendo*, the 173.33 factor is required,
21 either monthly employee payrates have been underreported, or hourly employee payrates have
22 been overreported, but CalPERS identifies no basis in statute or regulation to conclude which is the
23 case.

24 **F. Although the Audit Does Not Address Service Credit, CalPERS’s Proposal to**
25 **Decrease Service Credit and Artificially Increase Payrate Is At Odds With the PERL**

26 At hearing, CalPERS argued that the Audit and Statement of Issues also included a finding
27 related to “service credit.” (Transcript, v. 1, pp. 210:16-219:5.) The District objected that this
28 issue was not identified in the Audit or Statement of Issues, and the ALJ sustained the objection,

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1 ruling that “service credit isn’t at issue before me.” (Transcript, v. 1, p. 219:4-5.) As such, the
2 sole matter at issue in this proceeding is proper reporting of “payrate.” Nevertheless, it is
3 noteworthy that CalPERS’s argument with respect to “payrate” leads to a truly bizarre argument
4 on the topic of “service credit.”

5 CalPERS witness Lau testified that reporting a “higher payrate [through use of the 173.33
6 factor]. . . would technically yield to high retirement, and, at the same time, reporting the higher
7 payrate with the actual earnings, it would adjust the service credit downward just by a little bit . .
8 ..” (Transcript, v.2, pp. 20:16-21:10.) In essence, CalPERS proposes to artificially inflate
9 “payrate” through use of the 173.33 factor, and to then offset this increase by reducing the
10 employee’s service credit. CalPERS witness Lau explained that increasing “payrate” to \$3,915.60
11 “would drop the service credit just by a tad.” (Transcript v.2, pp. 21:13-22:12.)

12 Lau testified that monthly “service credit” for a monthly employee working a 10-month
13 assignment is calculated by dividing the employee’s earnings by the monthly payrate. (Transcript,
14 v. 2, pp. 25:8–26:13.) For example, if Ms. Pelleriti earns \$3,795 monthly, but the applicable
15 “payrate” is increased to \$3,915.60 (as CalPERS proposes), according to Lau, she would earn
16 .0969 years of service credit per month,⁷ equating to .969 years of service credit over the course of
17 her 10 months of service. In this manner, the increase in “payrate” leads directly to a drop in
18 “service credit.”

19 The formula described by Lau, however, is not how “service credit” is defined in the
20 PERL. Government Code section 20636.1(b)(1) defines “full-time employment” for school
21 members as “40 hours per week.” (Gov. Code, § 20636.1(b)(1).) Ms. Pelleriti worked 40 hours
22 per week, and was therefore, employed on a full-time basis. Government Code section 20898 also
23 states that service credit is granted for time “excused from working because of holidays, sick
24 leave, vacation, or leave of absence, with compensation . . .” Thus, Ms. Pelleriti receives service
25 credit for time worked and time off work due to holiday and other paid leave.

26
27
28 ⁷ (3,795 divided by 3,915.60 divided by 10.)

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1 According to the PERL, “service credit,” which is a component of the formula used to
2 calculate the member’s retirement allowance, is “granted for service rendered and compensated in
3 a fiscal year in full-time employment . . .” (Gov. Code, § 20962.) Government Code section
4 20962 states that CalPERS members can be employed on an hourly, monthly, annual or academic
5 year basis, and that a full year of service credit is awarded for any of the following:

6 . . .

7 **(2) Ten months of service for persons employed on a monthly basis.**

8 (3) Two hundred fifteen days of service . . . for persons employed on a daily basis.

9 ...

10 (4) One thousand seven hundred twenty hours of service...for persons employed on
11 an hourly basis. [Emphasis added.]

12 Here, because Ms. Pelleriti was employed as a monthly employee on a 10-month basis, her
13 10-month assignment generates a full year of service credit. There is no room in these provisions
14 of the PERL to deny a full-time 10-month employee a full year of service credit. Nevertheless,
15 CalPERS seems intent on doing just that by increasing Ms. Pelleriti’s “payrate” (which would tend
16 to increase her pension), while simultaneously decreasing her “service credit,” (which would tend
17 to decrease her pension) all based on factors and formulas that are not included in the PERL or the
18 CalPERS regulations. CalPERS has no authority to informally interpret the PERL so as to deny a
19 full year of “service credit” to full-time employees working a 10-month schedule.

20 In some cases, these machinations may have no impact on an employee’s pension. In other
21 cases, the employee may benefit, particularly if they generate enough additional service credit to
22 reach a full year of service credit. But some employees will be harmed, particularly those who
23 depart District service prior to their retirement, as they will suffer a permanent loss of service
24 credit, but will likely not benefit from a marginally higher payrate, as their “final compensation”
25 will in most cases be determined as a result of the compensation earned for their new employer.

26 ///

27 ///

28 ///

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1 **G. CalPERS’s 173.33 Factor Is Not The Only Possible Number That Could Be Used To**
2 **Establish A Relationship Between Hourly and Monthly Rates of Pay; The District’s**
3 **21 Day (168 Hour) Factor Is More Accurate For 10-Month School Employees (Like**
4 **Ms. Pelleriti)**

5 Section 570.5 of Title 2 of the California Code of Regulations, requires that “payrate” be
6 included in a “publicly available pay schedule.” That regulation further provides that “payrate
7 shall be limited to the amount listed on a pay schedule that [in part] . . . [i]ndicates the time base,
8 including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-
9 monthly, or annually.” This regulation makes clear that hourly and monthly rates of pay must be
10 fixed amounts listed in salary schedules.

11 School districts in Orange County use various factors to establish a relationship between
12 their hourly and monthly salary schedules, including 21 days (i.e. 168 hours) (9 districts), 21.6
13 days (4 districts), 22 days (3 districts), and 21.75 days (6 districts). (District Exhibit 11, p. B264.)

14 To the extent CalPERS contends that 173.33 is the only legally tenable factor, that is
15 plainly not the case. As explained above, the CalPERS 173.33 factor is based on an assumed 364-
16 day year, which does not exist in reality. It also assumes that every year consists of 260 days
17 (excluding weekends), which is rarely the case, as most years actually consist of 261 weekdays,
18 and some years consist of 262 weekdays. (District Exhibit 25, pp. B377-B386.) By way of
19 example, 2020 includes 262 weekdays. (*Ibid.*) Moreover, CalPERS witnesses admit their own
20 formula is not precise or exact, but an average. (Transcript, v. 1, pp. 69:24-70:13.)

21 Significantly, the District’s factor (21 days or 168 hours) is also far more precise than the
22 CalPERS factor (173.33), as applied to the actual employee whose hours and pay were audited.
23 For example, during the 2012-2013 school year, the sampled employee (Ms. Pelleriti) earned
24 \$37,950 as a 10-month employee, and during this time, worked 1,672 hours. (District Exhibit 8, p.
25 B110.) If Ms. Pelleriti was paid at the District’s rate of pay for hourly employees with the same
26 salary schedule placement (i.e. \$22.58),⁸ she would have earned \$37,753.76 (\$22.58 times 1,672

27 _____
28 ⁸ (Respondent Exhibit 7, pp. B89-B90.)

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1 hours) over the same period of time, only \$196.24 less than her actual earnings. In contrast, if she
2 was paid at an hourly rate based on the CalPERS 173.33 formula she would have earned
3 \$3,913.78 monthly (i.e. \$22.58 multiplied by 173.33 equals a monthly rate of \$3,913.78) which
4 equates to \$39,147.8 annually (over 10 months). This is \$1,187.8 more than the salary she
5 actually earned. The District's 168 factor, therefore, results in much closer alignment between
6 hourly and monthly rates of pay, as applied to the employee sampled in the Audit, than does the
7 CalPERS 173.33 factor.

8 **H. CalPERS's Insistence on the Use of the 173.33 Factor Is an Unlawful Underground**
9 **Regulation**

10 The Administrative Procedures Act ("APA") (Gov. Code, § 11340 *et seq.*), sets forth
11 procedures for the adoption, amendment, or repeal of regulations by California state agencies.
12 The APA provides that state agencies cannot issue or enforce regulatory requirements which have
13 not been formally adopted as regulations in the manner required by law:

14 No state agency shall issue, utilize, enforce, or attempt to enforce any guideline,
15 criterion, bulletin, manual, instruction, order, standard of general application, or
16 other rule, which is a regulation as defined in Section 11342.600, unless the
17 guideline, criterion, bulletin, manual, instruction, order, standard of general
18 application, or other rule has been adopted as a regulation and filed with the
19 Secretary of State pursuant to this chapter.

(Gov. Code, § 11340.5(a).)

19 The APA was designed in part to prevent the use by administrative agencies of
20 "underground" regulations. (*California Advocates for Nursing Home Reform v. Bonta* (2003) 106
21 Cal.App.4th 498, 506.) An agency's failure to follow the APA's procedures for finalizing a
22 regulation voids the regulation. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th
23 557, 572.) The term "regulation" is broadly defined as:

24 [E]very rule, regulation, order, or standard of general application or the
25 amendment, supplement, or revision of any rule, regulation, order, or standard
26 adopted by any state agency to implement, interpret, or make specific the law
27 enforced or administered by it, or to govern its procedure.

(Gov. Code, § 11342.600.)

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1 A regulation subject to the APA has two principal identifying characteristics: (1) the
2 agency must intend its rule to apply generally, and (2) the rule must implement, interpret, or make
3 specific the law enforced by the agency. (*California Grocers Assn. v. Department of Alcoholic*
4 *Beverage Control* (2013) 219 Cal.App.4th 1065, 1073.) As to the first test, a regulation subject to
5 the APA has been construed to apply “to all generally applicable administrative interpretations of
6 a statute,” including an advisory, whether or not the interpretation is in the form of a regulation
7 and whether or not it is a correct reading of the statute. (*Id.* at pp. 1073-74.) As to the second test,
8 an agency interpretation of a statute is not subject to the APA if it is “the only legally tenable
9 interpretation of a provision of law.” (Gov. Code, § 11340.9(f).) This exception to the application
10 of the APA has been construed to apply only “in situations where the law ‘can reasonably be read
11 only one way’ [citation omitted], such that the agency’s actions or decisions in applying the law
12 are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute’s
13 plain language.” (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 336–337.)

14 Here, there is no statute that requires public school employers to use the 173.33 factor
15 when calculating payrate and reporting such payrates to CalPERS. At hearing, CalPERS
16 witnesses testified they interpret Government Code section 20636.1’s reference to “monthly rate
17 of pay” to mean payrate is the “hourly rate of pay multiplied by 173.33 to equal a monthly rate of
18 pay.” (Transcript, v. 1, pp. 111:23-112:3.) CalPERS witnesses acknowledge that Government
19 Code section 20636.1 does not explicitly state employers must use the 173.33 factor. (Transcript,
20 v. 2, p.10:10-20.) CalPERS witnesses all testified the requirement to use the 173.33 factor for
21 determining payrate for school employees appears nowhere in statute or regulation. (Transcript, v.
22 1, p.113:5-10; p. 196:5-10; v. 2, p. 9:5-8.) Stine of OCDE, CalPERS’s agent, testified he is not
23 aware of any law or regulation that requires use of the 173.33 factor. (Transcript, v. 2, pp. 50:23-
24 51:1-2.)

25 CalPERS’s interpretation constitutes a regulation subject to the APA. CalPERS’s
26 interpretation is not “the only legally tenable interpretation” of Government Code section 20636.1.
27 Rather, for reasons discussed above, the plain meaning interpretation of section 20636.1 goes
28 against CalPERS’s position. Nor, as explained in Section IV(G), *supra*, is 173.33 the only

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1 possible factor that might be used to establish a relationship between hourly and monthly rates of
2 pay. CalPERS witnesses acknowledged the 173.33 factor is not precise or exact. (Transcript, v. 1,
3 pp. 69:24-70:13.)

4 Furthermore, CalPERS has generally applied its interpretation to other agencies beyond the
5 District, as it did in the Audit that pertained to 64 agencies. (CalPERS Exhibit 10, pp. A120-
6 A356.) Therefore, the basis for CalPERS's audit finding against the District constitutes a
7 regulation subject to APA procedures. CalPERS's failure to follow APA procedures in adopting
8 its interpretation voids the regulation.

9 **I. Following CalPERS's Underground Regulation Would Place The District At**
10 **Substantial Risk of Being Found Out of Compliance With the PERL**

11 Following CalPERS directives, which are not grounded in the text of the PERL and/or
12 applicable regulations, entails significant risk to the District. As an example, in CalSTRS
13 Precedential Decision No. 19-02, *In the Matter of the Statement of Issues Against Walnut Creek*
14 *School District*,⁹ CalSTRS issued a non-regulatory guidance document, entitled the Creditable
15 Compensation Guide, which provided reporting guidance to school districts. (*Id.* at p. 4, ¶15.)
16 Ultimately, after a number of years, CalSTRS withdrew the Creditable Compensation Guide,
17 having determined that it was inconsistent with the State Teachers Retirement Law. (*Id.* at p. 5,
18 ¶19.) CalSTRS then issued audit findings against school districts that had reported compensation
19 and service based on the Creditable Compensation Guide. (*Id.* at p. 4, ¶12.) The school district in
20 *Walnut Creek School District* argued, in part, that CalSTRS should be estopped to audit school
21 districts who had merely followed CalSTRS's own mistaken guidance. (*Id.* at pp. 6-7, ¶ 5.) The
22 ALJ rejected this argument, reasoning that school districts are bound to follow the law, and should
23 not follow non-regulatory directives from retirement agencies, particularly where those directives
24 are inconsistent with the law. (*Ibid.*)

25 Here, the District would risk liability in the future by implementing CalPERS's
26 interpretation of "payrate," given that interpretation is clearly at odds with the PERL's language.

27 _____
28 ⁹ (Respondent Exhibit 28, pp. B448-B461.)

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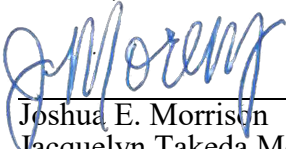
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V. CONCLUSION

Based on the foregoing, the District correctly reported Ms. Pelleriti's monthly rate of pay as her "payrate," and CalPERS's interpretation (i.e. that her "payrate" is an hourly rate of pay times 173.33) is an underground regulation, which cannot lawfully be enforced. As such, the District requests the ALJ uphold the District's appeal of the Audit.

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Dated: October 29, 2021

By: 
Joshua E. Morrison
Jacquelyn Takeda Morenz
Attorneys for Respondent
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PROOF OF SERVICE

(CODE CIV. PROC. § 1013A(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 20 Pacifica, Suite 1100, Irvine, California 92618-3371.

On October 29, 2021, I served the following document(s) described as **TUSTIN UNIFIED SCHOOL DISTRICT'S POST-HEARING BRIEF** on the interested parties in this action as follows:


Charles Glauberman
California Public Employees' Retirement System
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Telephone: (916) 795-3675
Facsimile: (916) 795-3659
Email: charles.glauberman@calpers.ca.gov

Attorneys for:
California Public Employees' Retirement System

- BY MAIL:** I placed a true and correct copy of the document(s) in a sealed envelope for collection and mailing following the firm's ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
- BY EMAIL:** My electronic service address is Gazale.Banyan@aalrr.com. Based on a written agreement of the parties pursuant to California Code of Civil Procedure § 1010.6 to accept service by electronic means, I sent such document(s) to the email address(es) listed above or on the attached Service List. Such document(s) was scanned and emailed to such recipient(s) and email confirmation(s) will be maintained with the original document in this office indicating the recipients' email address(es) and time of receipt pursuant to CCP § 1013(a).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 29, 2021, at Irvine, California.



Gazale Banyan

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9 BOARD OF ADMINISTRATION
10 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

12 In the Matter of the Appeal Regarding Full-
Time Payrate Reporting of
13 TUSTIN UNIFIED SCHOOL DISTRICT,
14 Respondent.

OAH Case No. 2020090431

Agency Case No. 2020-0436

**TUSTIN UNIFIED SCHOOL DISTRICT'S
REPLY BRIEF**

Hearing Dates: September 2 & 3, 2021
Location: Remote

18 Respondent, TUSTIN UNIFIED SCHOOL DISTRICT ("District"), hereby submits its
19 reply to the California Public Employees' Retirement System's ("CalPERS") Closing Brief.

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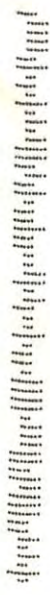


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I. INTRODUCTION

CalPERS' Closing Brief misrepresents the relevant facts (most notably by claiming the District is not reporting payrate for a full-time, 40-hour per week assignment) and fails to specifically address or cure the main deficiencies in its case, namely: (1) there is no legal requirement for the District to use the 173.33 factor when calculating or reporting "payrate"; (2) the District reported Alane Pelleriti's ("Pelleriti") monthly rate of pay as her "payrate," which is the correct payrate according to Government Code section 20636.1; (3) CalPERS' use of the 173.33 factor is inconsistent with the Public Employees' Retirement Law ("PERL") and applicable regulations, and leads to other absurd consequences; and (4) CalPERS fails to address the District's "underground regulation" argument.

As explained below, the law does not allow agencies, such as CalPERS, to enforce unlawful underground regulations that are contrary to existing law, merely out of convenience to the agency and at the detriment of those blindsided by the unlawful underground regulation.

II. ARGUMENT

A. CalPERS Falsely Suggests the Sampled Retiree Did Not Work 40-Hours a Week and Was Not a 10-Month Employee

CalPERS falsely — and repeatedly — states that the District did not report payrate for Pelleriti on the basis of a full-time, 40-hour workweek. To the contrary, the District clearly reported on the basis of a 40-hour workweek, **because the evidence is undisputed that Pelleriti worked a 40-hour workweek.** (District's Brief, Section III(A).) There is no evidence that she worked less than 40 hours per week, and CalPERS does not contend she actually worked less than 40 hours a week in real life. CalPERS witness Suine testified to the consequences which ensue when employers consider a 37.5 hour workweek to be full-time (Transcript, v. 1, pp. 66:1-69:3), but that testimony is not relevant here, because Pelleriti worked 40 hours per week, not 37.5.

CalPERS also falsely states that the District did not report payrate for Pelleriti on the basis of a 10-month work year. Government Code section 20962 states that a school member earns a full year of service credit by working 1720 hours, 215 days, or 10 months. Here, CalPERS contends Pelleriti did not work 1720 hours or 215 days, which, according to CalPERS means she

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1 did not work 10 months. (CalPERS Brief, p. 8.) However, Government Code section 29062
2 clearly states that a full year of service credit is granted for “10 months of service for persons
3 employed on a monthly basis.” There is no requirement that such persons also work 1720 hours
4 or 215 days, and, in any event, the Audit contains no finding relating to Pelleriti’s service credit.
5 The evidence, moreover, was undisputed that Pelleriti worked 10 full months of each year in real
6 life, and, as such, she was entitled to a full year of service credit. (Transcript, v. 2, p. 119:12-16.)

7 In any event, it bears noting that payrate is separate from service credit, as CalPERS has
8 acknowledged. (Transcript, v. 1, p. 75.) Payrate is defined as the “normal monthly rate of pay.”
9 (Gov. Code, § 20636.1(b)(1).) If CalPERS contends an employee did not perform a full year of
10 service — and there is no such finding here — that would influence the employee’s service credit,
11 not their payrate.

12 **B. The District Correctly Reported as Payrate Pelleriti’s Monthly Rate of Pay, Which Is**
13 **the Only Applicable Pay Rate for Her Full-Time, 10-Month Assignment**

14 CalPERS describes \$22.59 as Pelleriti’s “accurate hourly rate.” (CalPERS Brief, p. 3:10.)
15 This contradicts evidence presented at hearing that Pelleriti was not paid an hourly rate or
16 compensated on the hourly salary schedule, and was instead paid a monthly rate and compensated
17 on the monthly salary schedule. (Transcript, v. 2, pp. 117-119; District Exhibit 8, pp. B110-
18 B113.) At hearing, District witness Nam Nguyen (“Nguyen”) testified the monthly salary
19 schedule applied to employees, such as Pelleriti, who were employed on a monthly basis.
20 (Transcript, p. 132:14-21.)

21 Further, there is no evidence to support CalPERS’ contention that the hourly rate of pay is
22 the “true” or “accurate” rate of pay for monthly employees. This contention, moreover, defies
23 Government Code section 20636.1, which defines “payrate” as the “monthly rate of pay.” It also
24 contradicts Government Code section 21224, which establishes an hourly rate of pay for retired
25 school members who return to work without reinstating from retirement — and calculates that rate
26 by starting with the monthly rate of pay and dividing by 173.33 — which suggests the monthly
27 rate of pay is the appropriate starting point to calculate hourly rates of pay, rather than the reverse
28 as CalPERS suggests. Requiring the District to report a payrate (i.e. the hourly rate of pay

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1 multiplied by 173.33) not reflected in any salary schedule, and which is different from the monthly
2 rate of pay specified in the monthly salary schedule, also runs afoul of the requirements of Section
3 570.5 of Title 2 of the California Code of Regulations, which requires that “payrate” be included
4 in a “publicly available pay schedule.”

5 CalPERS contends District witness Nguyen agreed the hourly rate of pay is the “true” rate.
6 (CalPERS Brief, p. 12:14.) This is, of course, a legal question, not a factual question. But
7 CalPERS also mischaracterizes her testimony. Nguyen clearly testified the monthly rate of pay is
8 divided by 168 to get an hourly rate, and additionally testified full-time employees that work a set
9 amount of hours are monthly employees paid the fixed amount on the monthly salary schedule.
10 (Transcript, v. 2, pp. 103:25-104:2; 126:7-12.) Further, on re-direct examination, Nguyen clarified
11 Pelleriti was paid \$3,795, which was for her full-time, 40-hour a week assignment regardless of
12 the number of days in a given month, and that \$3,795 was Pelleriti’s base pay for her monthly
13 assignment. (Transcript, v. 2, p. 132:18-21.) Nguyen’s testimony in this regard is consistent with
14 the payroll data, which reflects that Pelleriti was paid a fixed amount per month (i.e. the normal
15 monthly rate of pay) and was not paid based on the hours in a given month. (District Exhibit 8,
16 pp. B109-B113.)

17 CalPERS also erroneously contends the District erred by reporting Pelleriti’s 10 months of
18 salary over 11 months. (CalPERS Closing Brief, pg. 10.) Pelleriti worked 10 months (i.e. from
19 mid-August to mid-June), which includes 9 full months and two partial months (i.e. part of August
20 and part of June). (District Exhibit 8, pp. B109-B113.) Because CalPERS requires salary to be
21 reported by calendar month, the District reported Pelleriti’s salary over 11 months, i.e. during 9
22 full months and 2 partial months. (District’s Exhibit 8, pp. B110-B113.) CalPERS witness Lau
23 acknowledged in his testimony that it is permissible to report 10 months of salary over 11 calendar
24 months, which is exactly what the District did. (Transcript, v. 2, p. 40:18.) Moreover, contrary to
25 CalPERS’ argument, this reporting does not involve any conversion — the District reported, over
26 the course of the year, the full annual payrate (i.e. \$37,950), which was earned over the course of
27 10 months (and 11 calendar months). (Transcript, v. 2, pp. 12:19-13:19; CalPERS Exhibit 20, p.
28 A479.)

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1 Moreover, the District’s reporting of Pelleriti’s payrate was consistent with Government
2 Code section 20035.5, which states that “final compensation” for pension purposes consists of
3 “the highest annual compensation that was earnable by the school member during any consecutive
4 12-month period of employment preceding the effective date of his or her retirement . . .” Here,
5 the highest compensation earnable by Pelleriti in her full-time position was the payrate for her 10
6 month position, i.e. \$37,950, which is the monthly rate of \$3,795 multiplied by 10 months. That is
7 exactly what the District reported.

8 **C. CalPERS’s Attempt to Impose an Unlawful Underground Regulations Creates More**
9 **Inconsistency**

10 CalPERS suggests the District is somehow gaming the system or preventing consistency in
11 reporting amongst school employers. (CalPERS Brief, Section VII(B).) To be clear, the
12 “consistency” CalPERS envisions is nonexistent, as the 173.33 factor is not contained in statute or
13 regulation, nor has it been communicated as a requirement to school employers, with the result
14 being that only one out of 20 school employers in Orange County uses the 173.33 factor. (District
15 Exhibit 11, p. B264; Transcript, v. 2, p. 58:4.)

16 To the contrary, there are several areas in which use of the CalPERS 173.33 factor is
17 inconsistent with the PERL. First, using the CalPERS 173.33 factor, monthly employees in the
18 District would have a payrate higher than the full-time annual compensation for their full-time 10-
19 month jobs (e.g., a payrate of \$39,156 as compared to a \$37,150), which is at odds with the
20 definition of “payrate” in Government Code section 20636.1 (which defines payrate as the
21 “monthly rate of pay”) and in Title 2, California Code of Regulations, Section 570.5 (which
22 requires that payrate is the amount specified in a publicly available pay schedule). Second, using
23 the CalPERS 173.33 factor, CalPERS offsets the increase in payrate by decreasing service credit,
24 such that monthly employees working a 10 month assignment would only get .9692 years of
25 service credit. (CalPERS Brief, p. 4:3-4.) As a result, employees would be shorted service credit,
26 potentially resulting in a smaller pension — particularly if the employee moves to another
27 employer prior to retiring. This, of course, is at odds with Government Code section 20962,
28 which states that a monthly employee working a 10-month assignment annually generates a full

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1 year of service credit. Third, monthly employees working a 10-month assignment plus an
2 additional assignment would likely generate additional service credit (up to 1.0), and would end
3 up with a higher pension than the PERL contemplates. This would subject the District to risk in
4 the event CalPERS subsequently determines (like CalSTRS did) that retirees were receiving
5 inflated pensions due to school district overreporting.

6 There is a level of consistency, however, which occurs regardless of the whether a 168 or
7 173.33 factor is used. As explained in the District's closing brief, the CalPERS retirement
8 formula multiplies payrate and service credit. (District's Brief, Section IV(C)(1).) Using
9 CalPERS' numbers for payrate (\$3,915.60)¹ and service credit (.9692),² the calculation is:
10 $(\$3,915.60 \times .9692) = \3795 . Using the District's numbers for payrate (\$3,795) and service credit
11 (1), the calculation is $(\$3,795 \times 1) = 3795$. These are the same amounts.

12 In other words, if employees avoid the causes for inconsistency noted above, i.e. by
13 avoiding work in excess of a 10-month assignment, and by never leaving District employment,
14 both the District and CalPERS factors (168 and 173.33) will lead to the same result. This results
15 from the fact that, while CalPERS' 173.33 formula both inflates payrate in a manner inconsistent
16 with Government Code section 20636.1, and deflates service credit in a manner inconsistent with
17 Government Code section 20962, the increase in payrate is offset by the decrease in service credit.
18 The District reporting method, in contrast, achieves the same result for employees working a 10-
19 month assignment, without violating the PERL by inflating payrate or decreasing service credit.

20 **D. CalPERS Fails to Show a Legal Requirement to Use the 173.33 Factor**

21 1. **The 173.33 Factor Is Not the Only Logical Extension of Section 20636.1's**
22 **Reference to a 40-Hour Workweek**

23 Although CalPERS makes multiple references to a 40-hour workweek, as stated in
24 Government Code section 20636.1, it fails to explain how Section 20636.1 requires the use of the
25 173.33 factor. CalPERS describes the 173.33 factor as a "logical extension" of the 40-hour
26

27 ¹ (CalPERS Exhibit 3, p. A41; Transcript, v. 1, p. 192:7-13.)

28 ² (Transcript, v. 2, pp. 25:8-26:13.)

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1 workweek (CalPERS Brief, p. 16:21), and describes how it internally reached the 173.33 factor
2 (i.e. by multiplying the 40-hour workweek by 52 weeks in a year to get 2080 hours in a year,
3 divided by 12 months) (CalPERS Brief, p.17:1-2.) However, CalPERS witness Anthony Suine
4 (“Suine”) acknowledged the 173.33 formula is not stated in Section 20636.1, or, indeed, any other
5 statute or regulation applicable to active school members. (Transcript, v. 1, pp. 111:23-112:11.)
6 Nor is the 173.33 factor the only possible factor; rather, as Suine acknowledged, the 173.33 factor
7 is based on a faulty premise that there are exactly 52 weeks (364 days in a year). (Transcript, v. 1,
8 pp. 69:24-70:13.) Moreover, as noted in the District’s Opening Brief, the District’s 168 factor
9 more accurately correlates the District’s hourly and monthly rates of pay than does the CalPERS
10 173.33 factor. (District’s Brief, Section IV(G).)

11 Absent any documentary or other evidence showing the 173.33 factor is required,
12 CalPERS attempts to rely on evidence submitted by the District at hearing. Specifically, CalPERS
13 refers to presentation materials from a California Association of School Business Officials
14 (“CASBO”) conference, which reference 173.33 as a recommended factor for calculating hourly
15 pay. (CalPERS Brief, p. 17:17.) However, the CASBO materials reference 173.33 as only a
16 recommendation, not a requirement, and include references to other possible factors to use in
17 calculating hourly pay. (Transcript v.2 p. 76:20-22; District Exhibit 9, pp. B115-B116 and Exhibit
18 10, p. B154.) Thus, the CASBO materials do not support CalPERS’s position that the 173.33
19 factor is a requirement or the only factor that can be used.

20 Furthermore, if the 173.33 factor was the only “logical extension” and was built into
21 Section 20636.1 by way of its reference to 40 hours, there would be no reason for the Legislature
22 to reference the 173.33 factor in another statute. For example, Government Code section 21224
23 provides for use of the 173.33 factor to establish an hourly rate (i.e. by dividing monthly rate by
24 173.33 to get an hourly rate) for use when retired CalPERS members return to work without
25 reinstating from retirement. If the 173.33 factor was “built-in” to the PERL, there would be no
26 need to include that formula in Government Code section 21224.

27 The Legislature knows how to provide for use of the 173.33 factor, as it did in Government
28 Code section 21224. The absence of any reference to 173.33 outside of Government Code section

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1 21224, which applies only to retirees, shows the Legislature's intent not to impose such a
2 requirement outside of the retiree context. An assumption the Legislature meant to build 173.33
3 into Section 20636.1, but did not specifically do so, violates well-settled rules of statutory
4 construction. (See, e.g., *Hood v. Compton Community College Dist.* (2005) 127 Cal.App.4th 954,
5 964-965.)

6 Likewise, agencies other than CalPERS have adopted regulations that specifically require
7 use of the 173.33 factor, albeit in different contexts than CalPERS is attempting here. For
8 example, the California Department of Human Resources has adopted a regulation for converting
9 monthly or hourly rates of pay from one to the other. (See Cal. Code Regs., tit. 2, § 599.670.) The
10 regulation specifically states a 40-hour week is equivalent to a 173.33-hour month. (*Ibid.*) As
11 another example, the State Personnel Board has adopted a regulation for calculating the amount of
12 time required to satisfy minimum qualifications for experience. (See Cal. Code Regs., tit. 2, §
13 171.1.) The State Personnel Board's regulation requires use of 173.33 hours per month when
14 calculating part-time equivalent experience toward satisfying the minimum amounts of full-time
15 experience. (*Ibid.*)

16 Agencies know how to provide for use of the 173.33 factor if they intend to require use of
17 that factor. If 173.33 was the only logical extension of a 40-hour workweek or one-month
18 average, there would not have been a need for the California Department of Human Resources or
19 State Personnel Board to specify the conversion in its regulations. If CalPERS wants to require
20 use of the 173.33 factor, it must arrange for the adoption of a new law or adopt a lawful regulation
21 like the California Department of Human Resources and State Personnel Board did.

22 **2. An Internal Business Rule Is Not a Lawful, Binding Regulation or Law**

23 CalPERS also suggests 173.33 is required by the law because, according to CalPERS, their
24 internal business rules use the 173.33 conversion. (CalPERS Brief, p. 6:14-19.) CalPERS
25 describes these internal business rules as "CalPERS laws and regulations built into CalPERS'
26 database for pension reporting and retirement purposes." (*Ibid.*) There is, of course, no exception
27 in the law that allows CalPERS or other state agencies to adopt "business rules" that are
28 inconsistent with the law. Nor is there any evidence that this "rule" has actually been adopted in

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1 any formal way, let alone communicated to school employers or applied by other school
2 employers when calculating pensions of school members. Rather, the evidence reflects this
3 173.33 factor was never communicated to the District or OCDE as a requirement, and has not been
4 adopted by school employers.

5 While CalPERS describes its *internal* use of the 173.33 factor, it cannot point to any
6 statute, regulation, or any other evidence that CalPERS has ever taken formal action to require use
7 of the 173.33 factor. (Transcript, v. 1, pp. 111:23-112:11; p. 113:11-17; p. 117:17; p. 118:23;
8 CalPERS Exhibit 19, pp. A416-A463; CalPERS Exhibit 15, pp. A388-A390; CalPERS Exhibit 16,
9 p. A392; CalPERS Exhibit 17, pp. A393-A396.) Nor did CalPERS provide evidence that they
10 have ever conducted an audit focused on this issue prior to the instant audit.

11 We can only speculate that CalPERS programmers found it more convenient to use the
12 173.33 factor than to follow the PERL — but this is not how law is established. The fact that it
13 may be easier for CalPERS to ignore the PERL does not obligate the District to make erroneous
14 reports of payrate or service credit.

15 **3. CalPERS Cannot Enforce an Internal Business Rule That Is Inconsistent With**
16 **the PERL**

17 CalPERS' attempt to impose an internal business rule on agencies is akin to what CalSTRS
18 did in CalSTRS Precedential Decision No. 19-02, *In the Matter of the Statement of Issues Against*
19 *Walnut Creek School District* ("Walnut Creek"). In *Walnut Creek*, CalSTRS issued a non-
20 regulatory guidance document, titled the Creditable Compensation Guide, which provided
21 reporting guidance to school districts. (*Id.* at p. 4, ¶15.) Ultimately, after a number of years,
22 CalSTRS withdrew the Creditable Compensation Guide, having determined that it was
23 inconsistent with the State Teachers Retirement Law. (*Id.* at p. 5, ¶19.) CalPERS' internal
24 business rule regarding the 173.33 factor, which is not a lawful regulation or specifically required
25 by Section 20636.1, is akin to the CalSTRS Creditable Compensation Guide. CalPERS could, like
26 CalSTRS, abandon its business rule at any time. The District, like the school district in *Walnut*
27 *Creek*, would then be at risk of being found out of compliance with the law.

28 CalPERS contends it has consistently required use of the 173.33 formula; however, outside

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1 of the Audit, there is no evidence CalPERS has required or applied the 173.33 formula to the
2 District, to school districts in Orange County, or to any other school district. (CalPERS Brief, p.
3 17: 4-5.) Indeed, CalPERS introduced no evidence containing any prior reference to the 173.33
4 factor. Rather, CalPERS is attempting to impose an unlawful underground regulation, which it
5 claims is necessary to standardize its reporting and conform to its internal business practices. To
6 the contrary, if CalPERS wishes to standardize reporting, they should sponsor legislation or adopt
7 a regulation rather than imposing penalties for noncompliance with secret rules that have never
8 before been applied to school employers.

9 **E. CalPERS' Internal Rule Is Not Entitled to Administrative Deference**

10 CalPERS incorrectly suggests that it is entitled to deference in whatever actions it takes.
11 (See CalPERS Brief, pp. 12-13.) Here, CalPERS seeks to enforce an internal rule (the 173.33
12 factor) which is inconsistent with statute and regulation, and without any evidence as to when this
13 rule was adopted, or, indeed, that it was adopted at all. Nor is there evidence this rule has ever
14 been enforced prior to the instant Audit.

15 A regulation found not to have been properly adopted under the Administrative Procedures
16 Act ("APA") is termed an "underground regulation." Under the Office of Administrative Law
17 ("OAL") regulations, "underground regulation" is defined as:

18 [A]ny guideline, criterion, bulletin, manual, instruction, order, standard of general
19 application, or other rule, including a rule governing a state agency procedure, that
20 is a regulation as defined in Section 11342.600 of the Government Code, but has
21 not been adopted as a regulation and filed with the Secretary of State pursuant to
22 the APA and is not subject to an express statutory exemption from adoption
23 pursuant to the APA.

24 (Cal. Code Regs., tit. 1, § 250(a).)

25 Under California law, a long-standing, consistent administrative construction of a statute
26 by those charged with its administration, particularly where interested parties have acquiesced in
27 the interpretation, is entitled to great weight, and should not be disturbed unless clearly erroneous;
28 this principle applies not only to formally promulgated regulations under the APA but also to
informal guidance contained in staff attorney opinions and other expressions, short of formal,

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1 quasi-regulative regulations. (*Louis v. McCormick & Schmick Restaurant Corp.* (C.D. Cal 2006)
2 460 F.Supp.2d 1153.)

3 However, “an agency’s interpretation of a statute that is found in an internal memorandum,
4 rather than in an administrative regulation that might be subject to the notice and hearing
5 requirements of proper administrative procedure, is entitled to very slight deference.” (*Campbell*
6 *v. Arco Marine* (1996) 42 Cal.App.4th 1850, 1860; citing *Jones v. Tracy School District* (1980) 27
7 Cal.3d 99, 107.) In addition, “a construction of a statute that is not contemporaneous with its
8 enactment, but is undertaken years after the fact, is not entitled to great weight.” (*Campbell,*
9 *supra*, 42 Cal.App.4th at 1860; citing *Department of Water & Power v. Energy Resources*
10 *Conservation & Development Com.* (1991) 2 Cal.App.4th 206, 220.)

11 Here, there is no evidence CalPERS ever adopted an administrative interpretation of
12 Government Code section 20636.1, nor, if they did, is there evidence to establish when this
13 interpretation was adopted. Nor is there evidence that CalPERS ever publicized or shared, let
14 alone enforced, its administrative interpretation with school employers, or anyone else, at any time
15 prior to issuing the Audit which is the subject of this proceeding. Where, as here, an
16 administrative interpretation is not reduced to writing, and there is no evidence as to when, where,
17 or how it was adopted, if it was at all, that interpretation is entitled to no deference at all. Stated
18 differently, a secret “business rule” that is not consistent with the law, and which has never
19 previously been enforced, is plainly not entitled to any deference.

20 **F. The Absence of a Determination From OAL Regarding CalPERS’s Underground**
21 **Regulations Does Not Preclude the ALJ or a Court From Making Its Own**
22 **Determination**

23 CalPERS appears to contend that a particular rule cannot be an “underground regulation”
24 until the Office of Administrative Law (“OAL”) says it is. CalPERS argues: “[u]nderground
25 regulations are not at issue here, and determinations on such issues are vested with the Office of
26 Administrative Law under Section 11340.5 and Title 1, California Code of Regulations, Section
27 260. Regardless, Section 20636.1 requires reporting be based on a 40-hour workweek, or 173.33
28 hours per month. An underground regulation analysis requires a finding in CalPERS’ favor.”

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1 (CalPERS Brief, p. 18.)

2 This argument is misguided. Although an OAL determination that a particular rule is an
3 underground regulation is entitled to deference by the courts, that determination is not binding.
4 Further, the lack of an OAL determination does not preclude a judicial determination that a
5 regulation is invalid because it was not adopted in substantial compliance with the procedures of
6 the APA. (*People v. Medina* (2009) 171, Cal.App.4th 805, 813-14; citing *Patterson Flying*
7 *Service v. Department of Pesticide Regulation* (2008) 161 Cal.App. 4th 411, 429.) Although
8 CalPERS states in conclusory fashion that “an underground regulation analysis requires a finding
9 in CalPERS favor,” CalPERS presents no such analysis, and has, therefore, waived any such
10 argument. (CalPERS Closing Brief, p. 18.)

11 The APA requires that every administrative agency guideline that qualifies as a
12 “regulation,” as defined by the APA, be adopted according to specific procedures. (Gov. Code §
13 11340.5, subd(a),(b).) A regulation is defined as “every rule, regulation, order, or standard of
14 general application or the amendment, supplement, or revision of any rule, regulation, order, or
15 standard adopted by any state agency to implement, interpret, or make specific the law enforced or
16 administered by it, or to govern its procedure. (Gov. Code, § 11342.600.) If a state agency issues,
17 utilizes, enforces, or attempts to enforce a rule without following the APA when it is required to,
18 the rule is called an “underground regulation.” State agencies are prohibited from enforcing
19 underground regulations. (Gov. Code, § 11340.5.) These requirements prevent CalPERS, a state
20 agency, from issuing, utilizing, enforcing or attempting to enforce its 173.33 factor unless the rule
21 has been adopted as a regulation and filed with the Secretary of State (Gov. Code § 11340.5(a)),
22 which has plainly not occurred.³

23 **III. CONCLUSION**

24 CalPERS’s insistence on the District’s use of the 173.33 formula constitutes an unlawful
25 underground regulation which conflicts with the PERL and applicable regulations. As the Audit
26

27 _____

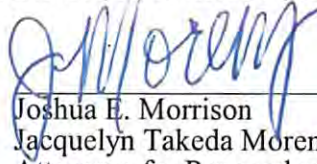
28 ³ In any event, for reasons discussed above, a regulation requiring the 173.33 factor would be inconsistent with the PERL.

1 finding is based solely on this unlawful underground regulation, the District's appeal must be
2 sustained.

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

3
4
5 Dated: November 12, 2021

6 By:



Joshua E. Morrison
Jacquelyn Takeda Morenz
Attorneys for Respondent
TUSTIN UNIFIED SCHOOL DISTRICT

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PROOF OF SERVICE

(CODE CIV. PROC. § 1013A(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 20 Pacifica, Suite 1100, Irvine, California 92618-3371.

On November 12, 2021, I served the following document(s) described as **TUSTIN UNIFIED SCHOOL DISTRICT'S REPLY BRIEF** on the interested parties in this action as follows:

Charles Glauberman
California Public Employees' Retirement System
Lincoln Plaza North
400 Q Street
Sacramento, CA 95811
Telephone: (916) 795-3675
Facsimile: (916) 795-3659
Email: charles.glauberman@calpers.ca.gov

Attorneys for:
California Public Employees' Retirement System

- BY MAIL:** I placed a true and correct copy of the document(s) in a sealed envelope for collection and mailing following the firm's ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
- BY EMAIL:** My electronic service address is Gazale.Banyan@aalrr.com. Based on a written agreement of the parties pursuant to California Code of Civil Procedure § 1010.6 to accept service by electronic means, I sent such document(s) to the email address(es) listed above or on the attached Service List. Such document(s) was scanned and emailed to such recipient(s) and email confirmation(s) will be maintained with the original document in this office indicating the recipients' email address(es) and time of receipt pursuant to CCP § 1013(a).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 12, 2021, at Irvine, California.


Gazale Banyan