

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Janine G. Tarkow (Respondent) established membership with CalPERS through employment with the San Diego County Office of Education - Grossmont-Cuyamaca Community College District (District) on October 1, 1989. The District contracts with CalPERS to provide benefits for its eligible employees. Respondent permanently separated from her employment with the District on or around September 16, 2000. She retained her CalPERS membership after separating from employment with the District.

Respondent established membership with the University of California Retirement System (UCRS) through employment with the University of California San Diego (UCSD).

CalPERS and UCRS are reciprocal retirement systems. Reciprocity is an agreement among public retirement systems to allow members to move from one public employer to another within a specific period of time without losing certain valuable retirement and related benefits. Respondent has reciprocity rights for concurrent retirement with CalPERS and UCRS.

On April 21, 2020, Respondent submitted an application for service retirement with CalPERS. She retired for service effective July 1, 2020 and has been receiving her service retirement allowance since November 1, 2020.

On April 22, 2020, CalPERS sent a Retirement Salary Request Form to UCRS to complete on behalf of Respondent. On August 19, 2020, UCRS sent the completed Retirement Salary Request Form to CalPERS showing Respondent's "Final Average Compensation" of \$10,760.17/month for the period from July 1, 2019 to June 30, 2020.

By email dated June 29, 2020, CalPERS requested that UCRS identify the kind of special pay Respondent received for the pay period of February 1, 2018 to June 29, 2020. UCRS informed CalPERS that Respondent "had an administrative stipend (t/c 0496) for her involvement in the UCPATH project." A reciprocal retirement calculation spreadsheet was also provided to CalPERS showing \$684.37, \$704.40, and \$751.10 for various months between February 1, 2018 to June 29, 2020, were for "Special Assignment - Project Pay."

On September 30, 2020, CalPERS notified Respondent that CalPERS excluded the "Special Assignment - Project Pay" from the calculation of her final compensation. This exclusion resulted in a reduction in Respondent's final compensation amount.

On October 10, 2020, Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on August 10, 2021. Respondent was represented by counsel at the hearing.

CalPERS presented evidence that the “Special Assignment - Project Pay” did not meet any of the definitions of “special compensation” found in California Code of Regulations (CCR) section 571(a). CalPERS also submitted evidence that the “Special Assignment - Project Pay” did not meet the requirements found in CCR section 571(b) because it was not contained in a labor agreement, there was no evidence this pay was available to the entire group or class to which Respondent belonged, and the duties for which Respondent received the pay did not appear to be part of her normal duties.

CalPERS also presented evidence through witness testimony disputing Respondent’s contention that the “Special Assignment - Project Pay” constituted premium pay because she was working in a temporary upgrade or classification. CalPERS’ witness testified that special compensation under the category of premium pay for a temporary assignment complies with the PERL when a member is working in a higher classification: in essence, a higher job than their normal pay for a certain duration of time - not just taking on additional duties. For these reasons, CalPERS’ witness testified that the “Special Assignment - Project Pay” Respondent received did not meet the definition of “Temporary Upgrade Pay,” an item of special compensation found in CCR section 571(a)(3). The ALJ found CalPERS’ witness’s testimony consistent, credible, and that he demonstrated thorough knowledge of how to determine whether a payroll item constitutes “special compensation.”

For these reasons, CalPERS argued Respondent’s additional compensation did not constitute “compensation earnable” under the Public Employees’ Retirement Law (PERL) and should not have been reported to CalPERS as final compensation for purposes of determining her monthly retirement allowance.

Respondent did not testify on her own behalf. Instead, she called Ms. Pearl Trinidad, the Executive Director of Business and Financial Services at UCSD, to testify on her behalf. Ms. Trinidad supervised Respondent during the last three years of Respondent’s employment at UCSD. She testified that the “special project” Respondent was assigned to during the time she received the administrative stipend was the UC Path project. Ms. Trinidad testified that Respondent’s duties under the UC Path project were much broader than her regular job.

Ms. Trinidad testified that Respondent was classified as an Organizational Consultant IV with UCSD and that this classification did not change while she worked on the UC Path project. Ms. Trinidad testified that she personally recommended Respondent receive a stipend to work on the UC Path project. Ms. Trinidad believes that an “administrative stipend” is considered “compensation” for those who are members in UCRS and “counts towards retirement.” Ms. Trinidad indicated that “policy” provides for

how a stipend must be recommended and calculated however, she could not present any written documentation discussing that policy.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent bore the burden of demonstrating that the compensation she seeks to have included in her final compensation qualifies under the PERL.

The ALJ found that "[n]o labor agreement, labor policy, or any other document used by UCSD to specify the payrate, special compensation, and benefits of represented and unrepresented employees was submitted as evidence." Although administrative stipend forms were submitted by Respondent at the hearing, the ALJ found no evidence that these personnel forms "constituted labor agreements that were duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws." The ALJ found no documentary evidence supporting "Ms. Trinidad's contention that the UC Path project position 'would have been approved' by UCSD administration and the UC Regents." Finally, the ALJ found that there was no documentary evidence supporting "Ms. Trinidad's contention that the administrative stipend respondent received 'is considered compensation' for those who work in the UC system to 'count towards retirement.'"

The ALJ held that Respondent did not meet her burden of proof: "Respondent's administrative stipend did not meet any of the exclusive criteria set forth in California Code of Regulations, title 2, section 571, subdivision (a), which defines what constitutes special compensation." The ALJ held that Respondent did not work in an "upgraded position or classification" and for this reason, she did not meet the definition of "Temporary Upgrade Pay" either.

The ALJ similarly held that the stipend reported as "Special Assignment - Project Pay" "was not included in a written *labor policy or agreement* as required by California Code of Regulations, title 2, section 571, subdivision (a) or (b), or Government Code section 20049." For this reason, the ALJ held that CalPERS' argument that the pay could not qualify as special compensation under the PERL is correct.

Finally, the ALJ found that because CalPERS was correct that the "Special Assignment - Project Pay" "was not contained in a written *labor policy or agreement* within the meaning of applicable law, it is unnecessary to address whether respondent meets any other criteria contained in California Code of Regulations, title 2, section 571, subdivision (b), since all must be met in order to constitute special compensation."

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. Based on the evidence and the law, the ALJ concluded that CalPERS correctly excluded the "Special Assignment - Project Pay" reported by UCRS because it does not qualify as compensation earnable under the PERL.

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

January 18, 2022

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