

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Shairon A. Zingsheim (Respondent) became a CalPERS member on July 19, 1999, through her employment with the City of Morgan Hill. On September 29, 2009, Respondent began employment with Ohlone Community College District (District), as Associate Vice President of Human Resources. The District is a public agency that contracts with CalPERS for retirement benefits.

In 2018, Respondent was promoted to Vice President of Human Resources and Training (VPHRT). The VPHRT is an executive level administrator position under the direction of the Superintendent.

The District and Respondent entered into a two-year Employment Agreement effective July 1, 2019, through June 30, 2021 (2019 Employment Agreement). The 2019 Employment Agreement placed Respondent's salary at range 237, step F. Respondent's monthly salary was \$19,764.17, plus longevity pay.

The 2019 Employment Agreement included an optional retirement matching contribution provision in which the District would match up to \$433.54 per month in a deferred compensation plan. Respondent participated in the deferred compensation plan.

When the COVID-19 pandemic began in March 2020, the District's Superintendent assigned Respondent responsibility over the District's COVID-19 recovery program.

On June 1, 2021, Respondent and the District entered into a new one-year Employment Agreement, effective July 1, 2021, through June 30, 2022 (2021 Employment Agreement). The 2021 Employment Agreement raised Respondent's salary from range 237 to range 238, step F, with a corresponding raise in longevity pay.

The District processed the salary increase in a Personnel Action Form (PAF) dated June 10, 2021. The PAF, states that the increase in Respondent's salary from range 237 to 238 was, in part, related to the "additional responsibilities" for the COVID-19 recovery program. In a "comments" section of the PAF was written:

Employee receives \$833.33 per month paid directly into Deferred Compensation by the district. This action discontinues that monthly contribution to deferred compensation and instead places employee on Range 238/F on the management schedule effective July 1, 2021. Employee's new employment contract is effective July 1, 2021-June 30, 2022. Employee is Vice President of Human Resources with the additional responsibilities for overseeing the District's COVID-19 recovery. Employee will continue in both roles until June 30, 2022.

The District's "Management Classification Structure" document effective July 1, 2021, listed positions, and their salary range only, i.e., VPHRT range 237. The document does not include payrate or time base. The District's "Unrepresented Management Salary Schedule" showed the payrate for each salary range, but no positions associated with each range. To find the payrate for the VPHRT position, one must look at both documents.

The District's "Management Classification Structure" document and "Unrepresented Management Salary Schedule" showed Respondent as the only individual in the vice president level administrator positions to receive a salary increase to range 238. All other vice president level administrator positions remained at range 237.

On March 4, 2022, Respondent applied for service retirement with a requested retirement date of July 1, 2022.

CalPERS reviewed payroll reported by the District for Respondent and determined that Respondent's payrate increase to range 238, step F did not comply with the Public Employees' Retirement Law (PERL) because it was not based on a publicly available pay schedule, was not available to other members of the same group or class of employees, constituted "overtime" for her additional responsibilities related to COVID-19, and constituted "final settlement pay."

CalPERS adjusted Respondent's payrate from the reported \$22,022.92 to \$20,974.17, and adjusted longevity pay from the reported \$550.57 to \$524.35. The adjustment decreased Respondent's final compensation from \$22,573.49 to \$21,498.52 and decreased her monthly retirement benefit by \$612.23. CalPERS informed Respondent that she was required to return \$3,061.15 that she was overpaid.

CalPERS informed Respondent and the District of its determination and their right to appeal by letters dated April 5, 2023.

Respondent and the District appealed this determination and exercised their right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on August 14, 2024. Respondent represented herself at the hearing. Respondent District was represented by counsel at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet, answered Respondent's questions, and clarified how to obtain further information on the process.

Respondent testified at the hearing that the global pandemic required her to perform duties that were never performed before or expected to be performed. She testified that she believes she was the most senior executive with experience handling large-scale projects, she had access to employee records, and it was most appropriate for her to take on the role of COVID-19 recovery program oversight.

Respondent testified that she made the decision to retire in the summer of 2021. She had several reasons for the decision, including her husband's health and the additional stress from the COVID-19 duties. Respondent testified that she did not ask for a salary increase before the 2021 Employment Agreement was signed. She believes the District Superintendent wanted to recognize her additional work on the COVID-19 recovery program. She testified that at the time of the salary increase, she had not informed the District that she planned to retire.

The District called Vy Le to testify at the hearing. After Respondent retired, the District hired Ms. Le as the new VPHRT. Ms. Le's duties as VPHRT included the COVID-19 recovery program responsibilities. Ms. Le's salary level when hired was set at range 237. She testified at the hearing that she believed her lower salary was appropriate because Respondent, her predecessor, had more experience.

CalPERS presented testimony from a manager in the CalPERS Compensation Compliance Review Unit, who testified that the raise Respondent received in her final year was not given to any of the similarly situated vice president level employees. The person who filled the position behind Respondent received a lower salary at range 237. In addition, CalPERS was unable to find any publicly available pay schedule for the VPHRT position that complied with the CalPERS regulation, California Code of Regulations, title 2, section 570.5. The manager also testified that, because there was not a publicly available pay schedule, CalPERS used its discretion to determine the amount considered to be payrate, taking into consideration all relevant information including the factors set forth in the California Code of Regulations, title 2, section 570.5, subdivision (b). Based on these factors, CalPERS applied salary range 237 for Respondent's payrate.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent and Respondent District's appeal. In the Proposed Decision, the ALJ concludes that the District did not have a compliant publicly available pay schedule for the VPHRT position at range 238. The District's use of two documents to determine payrate violates the requirement in Code of Regulations, title 2, section 570.5, subdivision (a)(9) that the document not require reference to another document in lieu of disclosing the payrate. Also, at the hearing, the District's witness testified that neither document was expressly approved by the District's governing board.

The ALJ also concluded that Respondent's salary increase was overtime for additional duties. Respondent testified that the additional COVID-19 duties required her to work additional hours. The PAF dated June 10, 2021, stated that the increase in Respondent's salary from range 237 to 238 was, in part, related to the "additional responsibilities" for the COVID-19 recovery program.

The ALJ stated that the totality of the evidence supports CalPERS' conclusion that the District's decision to increase Respondent's salary to range 238 was in anticipation of her retirement. Respondent was previously on a two-year contract cycle. The July 2021 Employment Agreement changed to a one-year term to end June 30, 2022, which

coincided with her retirement date. The fact that Respondent's replacement was hired at range 237 also supports the conclusion that the District's decision to increase Respondent's salary to range 238 was a final-year spike of her salary. The ALJ also noted that removing the deferred compensation and adding it to Respondent's payrate had the effect of improperly converting non-reportable compensation to reportable for the purpose of including it in her retirement calculation.

The ALJ also found that CalPERS' decision to use salary range 237 complied with its discretionary requirements under California Code of Regulations, title 2, section 570.5. Salary range 237 was the previous payrate that Respondent received, was the same salary range given to other employees in the vice president class, and was the salary range for Respondent's replacement.

Finally, the ALJ concluded that CalPERS correctly calculated that it had overpaid Respondent \$3,061.15 and that Respondent is required to repay this amount to CalPERS.

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

January 13, 2025

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