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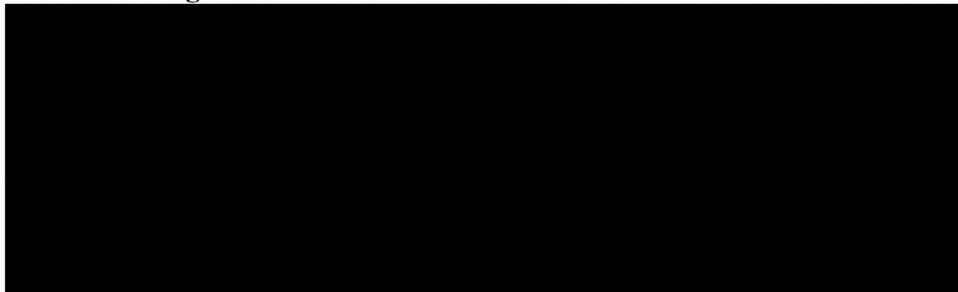
September 27, 2019

Via U.S. Mail and Electronic Transmission
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Re: County of Placer [CalPERS Agency ID: 4088970465] – Longevity Pay
CalPERS Legal Office – Ref. No. 2019-0542



CalPERS Participant – All Placer County Employees and Retirees

NOTICE OF APPEAL OF CALPERS' DENIAL OF REPORTED COMPENSATION

Dear Ms. Ostrander:

This letter shall serve as the County of Placer's Eighth Notice of Appeal regarding CalPERS' decision to exclude longevity pay in the calculation of compensation earnable as it relates to the

Renee Ostrander

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above CalPERS' participants and all other County of Placer employees and County of Placer retirees. [Gov. Code § 20134 and 2 CCR §§ 555-555.4]

The County of Placer appeals CalPERS' decision denying reported compensation to the above individuals and on behalf of all employees and retirees. As the issues are the same, the County of Placer herein asserts, as if fully set forth herein, all of the arguments made in its Notice of Appeal dated February 13, 2019, Notice of Appeal dated March 15, 2019, Notice of Appeal dated April 16, 2019, Notice of Appeal dated April 19, 2019, Notice of Appeal dated June 21, 2019 and Notice of Appeal dated July 22, 2019 and Notice of Appeal dated August 23, 2019. [See prior appeals previously served for text of issues and arguments.] The County further requests that this appeal be joined with the seven prior appeals for hearing purposes as the legal issues are identical and sent to the Office of Administrative Hearings or submitted directly to the Trial Court for resolution of the issues set forth herein.

INTRODUCTION:

For each of the above employees, CalPERS' has denied reported compensation on the following ground:

“The County’s “Longevity Pay” does not meet the PERL’s exclusive definition of Longevity Pay and is not available to the group or class because it is limited to employees at the top step of the pay range. Accordingly, we excluded this pay from the calculation of your retirement benefits.”

PARTIES:

The parties are the same as identified in the seven prior appeals.

STATEMENT OF FACTS:

The County adopts, as if stated in full herein, the statement of facts presented in the seven prior appeals.

STATEMENT OF LAW:

The County adopts, as if stated in full herein, the statement of law presented in the seven prior appeals.

ANALYSIS:

The County incorporates Issues One through Seven of the seven prior appeals as if fully set forth herein. The issues as previously set forth were as follows:

Issue No. One: The County of Placer’s Contract with the Board Requires that “Final Compensation” be in Accordance with Public Employees’ Retirement Law.

Issue No. Two: Placer County’s Longevity Pay Ordinance Meets CalPERS’ definition of Longevity Pay.

Issue No. Three: Placer County’s Longevity Pay Ordinance applies to all similarly situated employees.

Issue No. Four: The County of Placer has the Exclusive Authority to Create, Define and Set the Parameters of the “Group or Class of Employment.”

Issue No. Five: CalPERS’ New Interpretation of the County’s Longevity Pay Provision Impermissibly Redefines the County’s Group or Class.

Issue No. Six: CalPERS’ Past Circular Letter Broadly Defines “Group or Class of Employment” and supports the County’s Position.

Issue No. Seven: Equitable Estoppel bars CalPERS from redefining the County’s Longevity Pay to Exclude if from Compensation Earnable.

In addition to the above issues and arguments in support thereof, the County adds the following issue in support of its appeal to CalPERS’ decision denying the County’s longevity pay.

ISSUE NUMBER EIGHT

CalPERS’ New Interpretation of the County’s Longevity Pay Provision is an Impermissible Underground Regulation that Was Not Adopted Pursuant to Gov. Code § 11340.5.

Government Code § 11340.5(a) provides that “No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard or general application, or other rule . . . unless [it] has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter. [Gov. Code § 11340.5(a)] The requirements for adoption of a valid regulation include providing an adequate notice and public comment period and an initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. [Gov. Code § 11346.2]

Gov. Code §11342.600 defines “Regulation” to means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. An unwritten agency interpretation that applies generally and interprets the law is a “regulation” and is invalid if not adopted in compliance with the Administrative Procedures Act. [*Morning Star Co. v. State Bd. Of Equalization* (2006) 38 Cal.4th 324, 332-336;

Here, the County’s Memorandum of Understanding with the Placer Public Employees Organization sets forth the longevity provision in question as follows:

6.05 – LONGEVITY

- a. Each permanent employee who has been at Step 5 of his or her salary grade for ten thousand and four hundred (10,400) paid hours (five years’ full-time paid service) with Placer County shall receive a one-time five percent (5%) increase in his or her current base hourly rate. The 10,400 hour period shall be calculated from the date the employee begins service at Step 5 in that salary grade.

The above agreement is memorialized in Placer County Code §3.12.060, and it is applied to PPEO employees, as well as Management, Confidential and Unclassified Nonmanagement Employees.

The following table depicts a random selection of employees that are in the County’s group or class:

Classification	Master Auto Mechanic	Animal Control Officer	Client Services Program Supervisor	Administrative Services Manager	County Counsel
Longevity Pay 10,400 hours	Longevity Pay 10,400 hours	Longevity Pay 10,400 hours			
Step 5	Step 5	Step 5	Step 5	Step 5	Step 5
Step 4	Step 4	Step 4	Step 4	Step 4	Step 4
Step 3	Step 3	Step 3	Step 3	Step 3	Step 3
Step 2	Step 2	Step 2	Step 2	Step 2	Step 2
Step 1	Step 1	Step 1	Step 1	Step 1	Step 1

As stated previously, the County’s group or class is a logical work-related class. It is not based on an individual’s specific classification or an individual’s level of performance. It is based on the number of hours worked (i.e. longevity of the employee). All individual’s that work the required number of hours get longevity pay without regard to performance.

As presented in the resolution of the Placer County Board of Supervisors, the County’s longevity pay is a logical work-related group or class because:

- a. The longevity pay policy incentivizes employees to continue working for Placer County even though the employee is at the top of his or her pay scale and would not be eligible for any further pay increase.

- b. The longevity pay policy rewards employees that are dedicated to Placer County as reflected by the completion of the necessary time period required to earn longevity pay.
- c. The longevity pay policy helps maintain the pool of experienced employees at Placer County and avoid the loss of historical knowledge.
- d. The longevity pay policy improves employee morale and promotes a positive work environment as the County is perceived as fairly treating all employees because longevity pay is earned regardless of the performance of the individual employee.
- e. The longevity pay policy rewards employees that have completed the necessary paid hours at step 5 and that did not include persons receive pay increases through promotion or job transfers.
- f. The longevity pay policy is not based on a specified job classification but based on only time worked.
- g. The longevity pay policy creates a group or class where everyone that completes the necessary time period of paid hours receives longevity pay.
- h. The longevity pay policy does not create a group or class of one individual.
[County of Placer Resolution No. 2019-158]

CalPERS' has denied the final compensation calculation of the above individuals on the basis that:

“The County’s “Longevity Pay” does not meet the PERL’s exclusive definition of Longevity Pay and is not available to the group or class because it is limited to employees at the top step of the pay range. Accordingly, we excluded this pay from the calculation of your retirement benefits.”

CalPERS' defines “Longevity Pay” as:

“(1) INCENTIVE PAY . . . Longevity Pay – Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years. . . .”

CalPERS' longevity pay definition, when broken down to its individual components requires: (1) Additional Compensation; (2) paid to employees; (3) who have been with an employer; (4) or who have been in a specified job classification; (5) for a certain minimum period of time; and (6) the minimum period of time must exceed five years.

CalPERS' longevity pay definition does not specify how long the certain minimum period of time must be, just as long as it exceeds five years or when the time period is to begin. Thus, public agencies can specify any period of time, as long as it exceeds five years, and begin the calculation of

the time period at any time during an employee’s career, as long as the time worked or the time in a classification exceeds five years.

As previously stated, the County of Placer begins counting the five year period once an employee reaches Step 5 in his or her career. It is not based on a subjective determination of an employee’s performance which is prohibited. [*DiCarlo et al. v. County of Monterey* (2017) 12 Cal.App.5th 468 or *In Re Huasha L. Liu* (2018) OAH No. 2018100124] The fact that a person must reach Step 5 to start the five year period is simply a parameter of when the clock starts for the calculation of longevity pay.

CalPERS second issue is that longevity pay is not “available to all members in the group or class.” [2 CCR § 571(b)(2)] Of course, this conclusion can only be reached if CalPERS redefines the County’s logical work-related group or class. [Gov. Code § 20636(e)(1)] Visually, CalPERS now defines the County’s group or class of individuals that receive longevity pay as depicted below:

Classification	Master Auto Mechanic	Animal Control Officer	Client Services Program Supervisor	Administrative Services Manager	County Counsel
Longevity Pay 10,400 hours	Longevity Pay 10,400 hours	Longevity Pay 10,400 hours			
Step 5	Step 5	Step 5	Step 5	Step 5	Step 5
Step 4	Step 4	Step 4	Step 4	Step 4	Step 4
Step 3	Step 3	Step 3	Step 3	Step 3	Step 3
Step 2	Step 2	Step 2	Step 2	Step 2	Step 2
Step 1	Step 1	Step 1	Step 1	Step 1	Step 1

CalPERS’ new interpretation of the County’s longevity pay provision is a new underground regulation. Without following the requirements of the APA, CalPERS’ new interpretation changes CalPERS’ own definition of longevity pay. It gives effect only to the words “or in a specified job classification.” It necessarily deletes the words “who have been with an employer.”

CalPERS’ new interpretation also defines group or class in reference to a specific classification which is in conflict with Government Code §20636(e)(1). The Legislature clearly intended broad discretion to public entities when it defined “group or class of employment” to mean any “logical work-related grouping.” CalPERS’ new interpretation would impermissibly delete this part of the statute.

CONCLUSION:

If CalPERS wants to change the definition of longevity pay, it must follow the requirements of the APA. The County believes that CalPERS failed to distinguish the longevity pay provision in Placer County with the longevity pay provision in the *DiCarlo* case. In essence, the new interpretation constitutes a new regulation.

For the reasons previously stated in the seven prior appeals, the County of Placer respectfully submits that CalPERS' denial of reported compensation herein is incorrect. The County of Placer requests that CalPERS' reconsider its position.

Very truly yours,

OFFICE OF THE PLACER COUNTY COUNSEL

By: 
Brett D. Holt
Chief Deputy County Counsel

BDH/bhs

Cc:

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