**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 32, Charging Party, v. BELLFLOWER UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5955-E PERB Decision No. 2544a March 24, 2022

Appearances: Andrew J. Kahn, Chief Counsel, and Alex S. Leenson, Staff Attorney, for California School Employees Association, Chapter 32; Law Offices of Eric Bathen, by Eric Bathen and Richard D. Brady, Attorneys, for Bellflower Unified School District.

Before Shiners, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by both parties to a proposed decision issued by an administrative law judge (ALJ) as part of ongoing compliance proceedings. In this decision, we summarize the relevant factual and procedural background, analyze the major compliance issues, and explain significant methods and calculations relevant to ascertaining monetary damages. Although we affirm most of the ALJ's determinations and incorporate substantial parts of the proposed decision and its appendix, we correct several errors and supplement the ALJ's analysis in response to the parties' exceptions and based on our de novo review.

BACKGROUND

Bellflower Unified School District is a "public school employer" within the meaning of section 3540.1, subdivision (k) of the Educational Employment Relations Act (EERA).[1] California School Employees Association, Chapter 32 (CSEA) is an "exclusive representative" within the meaning of Government Code section 3540.1, subdivision (e). The bargaining unit of District employees that CSEA represents includes the Bus Driver position.

I.   Drivers' Pre-Layoff Work During the School Year and Summer

Prior to the summer of 2014, the District employed 10 Bus Drivers: D.C., M.G., W.G., R.G., T.H., N.H., E.Q., E.V., D.W., and S.B.. Each driver worked during the 10-month school year (from September through June), and some drivers worked over the summer, as part of the District's Extended School Year (ESY) program. To transport students to ESY classes, the District assigned driving shifts using a seniority-based bidding process. Approximately half the drivers typically received ESY assignments in any given summer.

II.   The District's Subcontracting and CSEA's Resulting Unfair Practice Charge

In about February 2014, District Associate Superintendent of Business and Personnel Services Marcy Delgado notified CSEA that the District was considering contracting out its bus operations. The District began soliciting bids for the work. On May 1, 2014, the District sent its drivers a "Notification of Reasonable Assurance" that

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[1] EERA is codified at Government Code section 3540 et seq.

they would return to work the next school year, starting on September 4, 2014. However, on June 27, 2014, the District notified all 10 drivers that they were being laid off effective August 27, 2014. At the time of the layoff, each of the laid-off employees had been a District driver for at least 10 years, and each was a dues-paying member of CSEA. None of the drivers worked for the District in July 2014 or any time thereafter. The District has not offered to reinstate any drivers.

In the summer of 2014, the District contracted with a private bus company, American Logistics, to transport students to the ESY program. That agreement expired after the 2014 ESY, and there is no evidence that the District used American Logistics at any time thereafter. In summer of 2014, the District also began offering families $25 per day to transport students to and from the ESY program without using District bus services. The District has continued this practice since 2014.

Meanwhile, Hemet Unified School District (Hemet USD) bid to contract with the District for school year and summer transportation going forward. When it submitted its bid, Hemet USD already provided transportation services for approximately 20 other school districts. Like the District's drivers, Hemet USD's drivers are public school employees within the meaning of Government Code section 3540.1, subdivision (k). At all relevant times, CSEA Chapter 104 has represented Hemet USD's drivers.

The District finalized negotiations with Hemet USD in mid-June 2014, and the two districts entered into an agreement for bus services effective August 6, 2014 (the 2014 Transportation Agreement). This agreement covered the District's bus transportation needs, for both summers and school years, through June 30, 2019.

When the District subcontracted its bus services and laid off its drivers in the summer of 2014, it had no operative collective bargaining agreement (CBA) with CSEA because the parties' prior CBA had expired at the end of June 2010.

CSEA initiated this case on August 22, 2014, by filing an unfair practice charge against the District. The charge primarily alleged that the District subcontracted its bus services and laid off its drivers without affording CSEA adequate notice and an opportunity to meet and negotiate, thereby violating EERA.

III.   Liability Proceedings

PERB's Office of the General Counsel (OGC) investigated the charge and issued a complaint. The ALJ then held an evidentiary hearing and, after receiving post-hearing briefs from the parties, issued a proposed decision in CSEA's favor. The District filed exceptions with the Board itself, challenging both the ALJ's liability determinations and the ALJ's proposed remedy.

The Board resolved the District's exceptions in *Bellflower Unified School District* (2017) PERB Decision No. 2544 (*Bellflower I*). In holding that the District violated EERA when it subcontracted work without meeting and negotiating in good faith, the Board applied settled precedent to reach a critical conclusion: while the 2007-2010 CBA had permitted the District to subcontract if it provided CSEA with 45 days' notice and an opportunity to meet and consult in good faith before the District's Board of Education acted on a subcontracting proposal, that partial waiver of the right to full

bargaining was no longer effective once the CBA expired.[2] (*Id*., adopting proposed decision at pp. 27-31.) Thus, when the District subcontracted bus services in 2014, that decision was subject to full bargaining rather than the more limited meet and consult process in the expired CBA. (*Id*., adopting proposed decision at pp. 21-31.)

The Board's remedial order included two directives that are no longer at issue: requiring the District to post a notice and to provide CSEA with certain information. (*Bellflower I*, *supra*, PERB Decision No. 2544, pp. 12, 14.) Beyond those two fully satisfied requirements, Section A of the Board's order required the District to cease and desist from unilaterally implementing bargainable policies and interfering with protected rights, while Section B of the Board's order directed the District as follows:

> "B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

> > "1. As soon as is practical, but not later than the end of the school year in which this decision and order becomes final, rescind its contract for bus driver services to transport students to and from school during the regular school year.

> > "2. Upon completion of (B)(1), offer reinstatement to all bus drivers laid off in or around June 27, 2014.

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[2] Specifically, Article XV, Section A of the expired CBA provided as follows:

> "In the event that the District contemplates the contracting out of work which has been performed by unit members, and thereby adversely affecting the hours or continued employment of current unit members, it shall give notice to the Association and upon request meet and consult regarding the decision and its effects, and give good faith consideration to the Association's objectives, if any. In the absence of an emergency need, such notice shall be given not less than 45 days prior to the Board action."

(*Bellflower I*, *supra*, PERB Decision No. 2544, adopting proposed decision at p. 3.)

"3. Make whole for any financial losses suffered, including wages, benefit[s] and extra hours wages, all laid off bus drivers until they are either reinstated or refuse an offer of reinstatement. These amounts should be augmented by interest at a rate of 7 percent per annum.

"4. Remit to CSEA the sum equivalent of any dues or agency fees that CSEA would have received if the District did not unlawfully layoff its bus drivers until each laid off bus driver is either reinstated or refuses an offer of reinstatement. These amounts should be augmented by interest at a rate of 7 percent per annum.

"5. As soon as is practical, rescind the private contract for bus services to transport students to and from District schools during the [ESY] and cease offering parents $25 to transport their own students to and from school during the [ESY].

"6. Upon completion of (B)(5), reinstitute the bidding process used to assign [ESY] work to District bus drivers.

"7. Make whole for any financial losses any bus driver who lost [ESY] bus driving work, during the 2014 [ESY] and every subsequent [ESY], until the bidding assignment process is reinstated. These amounts should be augmented by interest at a rate of 7 percent per annum.

"8. Remit to CSEA the sum equivalent of any dues or agency fees that CSEA would have received if the District did not unilaterally assign [ESY] bus driver work to outside sources, until it reinstitutes the [ESY] bidding assignment process. These amounts should be augmented by interest at a rate of 7 percent per annum."

(*Bellflower I, supra*, PERB Decision No. 2544, pp. 12-14.)[3]

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[3] Neither *Bellflower I* nor this decision prevents the District from requiring reinstated drivers to have any government-mandated certifications. However, a valid reinstatement offer must include a reasonable timetable for acceptance (*Los Gatos Joint Union High School District* (1980) PERB Decision No. 120, p. 4), including a reasonable time for any necessary recertifications.

The District appealed *Bellflower I* by filing an extraordinary writ petition in the

California Court of Appeal. On July 9, 2018, the appellate court summarily denied the

District's petition. The District did not seek any further judicial review of *Bellflower I*,

and its factual and legal conclusions are therefore no longer subject to dispute.

IV.   The Parties' 2014-2017 and 2017-2020 CBAs

While the parties were litigating the merits of CSEA's charge, they reached two

new CBAs. First, the parties executed a CBA effective October 1, 2014, through

September 30, 2017. (*Bellflower I*, *supra*, PERB Decision No. 2544, adopting

proposed decision at p. 12.) The 2014-2017 CBA included the same subcontracting

provision as the 2007-2010 CBA (set forth above at footnote 2). The 2014-2017 CBA

also included three wage increases relevant to determining backpay: a 4 percent raise

(R1), retroactive to July 1, 2013; a 3 percent raise (R2), retroactive to July 1, 2014;

and a 3 percent raise (R3), effective July 1, 2015.

On or around June 28, 2018, the parties agreed to another CBA, with a term of

October 1, 2017, through June 30, 2020. The 2017-2020 CBA included a fourth wage

increase (R4), a 5.67 percent raise retroactive to January 1, 2018. The 2017-2020

CBA again included the same subcontracting provision found in the 2007-2010 CBA.

V.   Initial Compliance Proceedings and the District's Subsequent Contract with
      Hemet USD

On August 28, 2018, OGC initiated compliance proceedings. The District filed

its initial compliance statement on October 22, 2018. In that letter, the District asserted

that it intended to allow its 2014 Transportation Agreement with Hemet USD to expire

by its own terms on June 30, 2019. The letter further stated:

"Regarding the issue of reinstatement of bus drivers, the order states they are not entitled to reinstatement until the contract with Hemet is rescinded. Since the contract with Hemet will end on June 30, 2019, there will be no reinstatement offer until that date."

Article XI of the 2014 Transportation Agreement, entitled "INVOLUNTARY OR VOLUNTARY TERMINATION," provided:

"A.   Should a party to the Agreement refuse to abide by the conditions of the Agreement or an approved Amendment, then the Agreement may be involuntarily terminated.

"B.   Either District may withdraw from this Agreement at the end of any fiscal year by notifying the other member, District's Superintendent or designee in writing before December 31st of any fiscal year.[4]

"C.   Involuntary termination shall be effective at the end of the fiscal year, if possible or upon a minimum ninety (90) days written notice."

Delgado testified that either the District or Hemet USD could have terminated the 2014 Transportation Agreement early with three to four months' notice. Michael Fogerty, Hemet USD's Director of Transportation, also testified that either side could have terminated the 2014 Transportation Agreement early with advance written notice. However, neither the District nor Hemet USD took any steps to terminate the 2014 Transportation Agreement before its natural expiration date of June 30, 2019.

In response to OGC's inquiries in compliance proceedings, the District made no effort to establish that it had made any of the reimbursements to employees or to

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[4] Hemet USD, like the District, has a fiscal year that begins on July 1 and ends on June 30.

CSEA that the Board directed in paragraphs B.3, B.4, B.7, and B.8 of its order. The District instead asserted that it had not received any demands for such payments, even though the order required payment without any such demand.

On May 14, 2019, CSEA presented its initial calculations regarding backpay owed to the 10 laid-off drivers. The District demanded records supporting CSEA's calculations for the drivers, including Form W-2 Wage and Tax Statements (Form W-2s), Form 1099 Miscellaneous Income Statements (Form 1099s), and Form 1040 U.S. Individual Tax Returns (Form 1040s). CSEA subsequently furnished responsive records to PERB and to the District.

On May 23, 2019, CSEA filed a copy of a letter from the District dated May 20, 2019, stating that the District was contemplating renewing its bus service contract with Hemet USD on July 11, 2019. CSEA objected, contending that the District was violating the Board's remedial order. The District responded five days later, stating that the 2017-2020 CBA permitted its renewed subcontracting.

After the 2014 Transportation Agreement expired on June 30, 2019, Hemet USD continued to provide bus services to the District, including ESY bus services in July 2019. Delgado executed a new one-year transportation agreement with Hemet USD (the 2019 Transportation Agreement) on August 14, 2019, with a retroactive effective date of July 1, 2019.

According to Delgado's sworn declaration dated April 20, 2020:

> "The District did enter into a further agreement with Hemet
> commencing July 1, 2019 after giving timely notice to CSEA
> as the District did in February 2014. This notice pursuant to
> clear CBA language did not result in negotiations over the
> issue because the union did not timely request a meet and
> confer session."

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On July 8, 2019, OGC issued an administrative determination finding that the District had not complied with the Board's remedial order and that the District's conduct obstructed compliance with the order. The District timely appealed the administrative determination to the Board itself.

The Board resolved the District's appeal in *Bellflower Unified School District* (2019) PERB Order No. Ad-475 (*Bellflower II*). The Board partially granted the appeal and remanded the case to OGC for an expedited compliance hearing, repeatedly noting that the District bears the burden of establishing its compliance with the Board's order. (*Id*. at pp. 2, 9, 14.) OGC transferred the matter to PERB's Division of Administrative Law to conduct the hearing and issue a proposed decision, pursuant to PERB Regulation 32980, subdivisions (a) and (c).[5] PERB's Chief ALJ assigned the matter to the same ALJ who issued the proposed decision as to liability.

Meanwhile, the District filed a request for reconsideration of *Bellflower II*. CSEA opposed this request and moved for an attorney fee award for time spent responding to the reconsideration request. On November 12, 2019, the Board issued *Bellflower Unified School District* (2019) PERB Order No. Ad-475a (*Bellflower III*). The Board denied the District's request for reconsideration and ordered the District:

> "to pay all reasonable attorney fees incurred by [CSEA] related to the preparation and filing of its response to the

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[5] PERB Regulations are codified at California Code of Regulations, title 8, sections 31001 et seq. PERB Regulation 32980, subdivision (a) provides, in relevant part: "The General Counsel or his/her designate may conduct an inquiry, informal conference, investigation, or hearing, as appropriate, concerning any compliance matter." PERB Regulation 32980, subdivision (c) provides: "If a proposed decision based on a hearing is issued, the decision may be appealed to the Board itself pursuant to Chapter 1, Subchapter 4, Article 2 of these regulations."

> request for reconsideration. CSEA is to prepare and submit
> fee amounts to the assigned hearing officer. After the
> conclusion of the hearing, the hearing officer shall prepare
> a written order specifying the reasonable attorney fees and
> shall serve that order on the parties, together with all other
> proposed findings and conclusions necessary to determine
> the District's compliance in this matter, as described in
> PERB Order No. Ad-475."

(*Id*. at p. 6.)

VI.   Further Compliance Proceedings, the Proposed Decision, and the Exceptions

At a pre-hearing conference on December 2, 2019, the parties scheduled the

compliance hearing for 10 days in April and May 2020. CSEA agreed to produce

declarations from the drivers detailing their financial losses and their post-layoff

employment. The parties agreed to admit these declarations into evidence as part of

the compliance record. CSEA similarly agreed to produce declarations supporting its

lost membership dues. The parties agreed that the District had the right to call any of

the declarants to testify about their declarations or any other relevant subject.

CSEA filed its declarations on February 9, 2020. The declarations included

attachments supporting the employees' claimed losses. Many of the attachments were

the same, or of a similar nature, as the records CSEA provided during OGC's earlier

compliance investigation.

During a second pre-hearing conference on February 19, 2020, the District

objected to CSEA's declarations as "conditional" and lacking any final calculations of

lost wages. Considering the District's objections, the ALJ declined to hold the District

to its earlier agreement to accept the declarations into evidence but directed the

District to file declarations from its planned witnesses, as a form of reciprocity for the

benefit the District received when CSEA provided pre-hearing declarations from its witnesses. The District filed its witness declarations in April and May 2020.

Meanwhile, on March 4, 2020, Governor Gavin Newsom declared a state of emergency in response to the COVID-19 pandemic. During a third pre-hearing conference on March 16, 2020, the parties and the ALJ acknowledged that the pandemic had disrupted their ability to conduct the compliance hearing in April and May 2020. The ALJ rescheduled the hearing for June 2020 and established deadlines for producing subpoenas and filing motions relating to subpoenas.

On March 19, 2020, Governor Newsom issued Executive Order N-33-20, directing all residents in the State to stay at home, with limited exceptions.

On April 7, 2020, the ALJ directed the parties to file pre-hearing briefs listing planned witnesses and identifying any anticipated subpoenas or evidentiary disputes. Each party filed a pre-hearing brief on April 13, 2020.[6]

On May 6, 2020, the ALJ continued the hearing due to ongoing conditions surrounding the pandemic.

When the 2019 Transportation Agreement expired on June 30, 2020, the District and Hemet USD entered into another one-year agreement for fiscal year

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[6] In July 2020, CSEA filed a motion to enforce a subpoena against the District for personnel records regarding the 10 laid-off drivers. The District responded that it produced all responsive personnel records in its possession and that the remainder of the documents were maintained by the Los Angeles County Office of Education (LACOE), which administered the District's payroll prior to July 1, 2016. The District admitted it could request such prior payroll records from LACOE, but on July 29, 2020, the District notified the ALJ that it did not intend to introduce any payroll documents maintained by LACOE, because it did not consider those records to be relevant.

2020-2021 (the 2020 Transportation Agreement). The record contains no evidence as to whether the District provided CSEA with notice before entering into this agreement.

During a pre-hearing conference on July 27, 2020, the ALJ informed the parties that the hearing could not take place at PERB's Los Angeles Regional Office due to pandemic restrictions. The ALJ also discussed specifications related to a virtual hearing. The District objected to a virtual hearing, and the ALJ asked the parties to state their positions in writing. After receiving the parties' briefs on the issue, the ALJ overruled the District's objections and scheduled a virtual hearing.[7]

In December 2020, the ALJ held an eight-day hearing. At the hearing, the ALJ informed the parties that he was required to determine compliance with all aspects of the Board's remedial order, absent a motion to the Board based on a settlement.

The parties filed their initial post-hearing briefs in April 2021. CSEA's brief included attachments explaining its calculations of employee losses. The District objected to these attachments, claiming they were unauthenticated evidence. The ALJ ruled that he would consider the attachments only to the extent they summarized or analyzed evidence in the record. The ALJ stated that to the extent any attachment asserted facts not supported by record evidence or any reasonable inference from such evidence, he would reject such assertions. Over CSEA's objection, the ALJ granted the District's request to extend the parties' deadline for filing reply briefs.

The parties filed their reply briefs in May 2021, and the ALJ issued his proposed decision a month later. The heart of the ALJ's proposed order was his direction that

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[7] Neither party excepted to any of the ALJ's pre-hearing rulings, and they therefore are not before us.

the District reinstate the laid-off employees with backpay (plus interest), as well as the

ALJ's extensive calculations as to drivers' projected income had they remained District

employees through December 31, 2020, and certain offsetting amounts that the ALJ

deducted from their losses. The ALJ also calculated proposed amounts the District

owes CSEA for lost dues (plus interest) and for attorney fees the Board ordered in

Bellflower III. The ALJ noted that he was calculating lost earnings, lost dues, and

interest only through December 31, 2020, and the parties would need to litigate

post- 2020 damages and interest at a later stage.

Both parties timely excepted to the proposed decision.[8] While CSEA's

exceptions largely comply with PERB Regulation 32300 by citing to the record on

factual issues, the District's exceptions do not. The District has therefore waived

exceptions presenting factual issues. The District's exceptions also largely fail to cite

any legal authority to support its legal arguments, as required by PERB Regulation

32300. Nonetheless, we have thoroughly analyzed the record and applicable law to

ensure our order is well-supported.

<u>DISCUSSION</u>

The District has the burden of proving its compliance with each part of the

Board's order. (*Bellflower II*, *supra*, PERB Order No. Ad-475, p. 14.) Absent

extraordinary circumstances, the District cannot re-litigate any issue already resolved

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[8] In its exceptions, CSEA requests that we correct an error in paragraph 5 of
the ALJ's proposed order, which mistakenly suggests that the District has offered to
reinstate the laid-off bus drivers. The balance of the sentence makes clear, however,
that this was an inadvertent mistake, as it describes why damages and interest
continue to accrue. There is no dispute that the District has not offered to reinstate any
drivers. Our order, which supersedes the ALJ's proposed order, corrects this error.

in a prior decision that is no longer subject to appeal. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 14, 16-17 (*Pasadena*).)

Compliance proceedings should generally not lead to protracted litigation and should be commensurate to the scope of relief at issue. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, pp. 21-22.) In this case, even considering the significant damages at stake and certain delays outside the parties' control, compliance proceedings have been overly protracted, compounding the District's obligations while depriving the drivers and CSEA of their owed relief. Further delay helps no one, and we urge the parties to complete all litigation expeditiously.

Although the Board reviews exceptions to a proposed decision de novo, to the extent an ALJ assesses credibility based upon observing a witness in the act of testifying, we defer to such assessments unless the record warrants overturning them. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, pp. 8-9.) If a proposed decision adequately addressed issues raised by certain exceptions, the Board need not further analyze those exceptions. (*Id*. at p. 6.) The Board also need not address alleged errors that have no material impact on the outcome. (*Ibid*.)

The proposed decision in this case adequately addressed most material issues, though we supplement and adjust the ALJ's analysis in several areas. In Part I below, we address the District's obligations to rescind its unilateral change, reinstate the drivers, and cease and desist from unilaterally implementing policies within the scope of representation. Like the ALJ, we find the District has unlawfully failed to comply with these obligations. In Part II, we address overarching make-whole relief issues that impact the damages and interest the District owes drivers and CSEA. In Part III, we

address the District's obligation to reimburse CSEA for lost dues. In Part IV, we address the District's obligations under the attorney fee order we issued as a sanction in *Bellflower III*. Finally, in Part V, we explain the evidence and calculations underlying our driver-specific make-whole relief.[9]

I.   The District's Recission, Reinstatement, and Cease-and-Desist Obligations

In *Bellflower II*, *supra*, PERB Order No. Ad-475, we remanded this case for an expedited compliance hearing and noted the District would bear the burden of establishing compliance with each part of the Board's order. (*Id*. at pp. 2, 9, 14.) In its two post-hearing briefs to the ALJ, the District scarcely addressed its obligations to rescind its subcontracting arrangement, reinstate employees, and cease and desist from further similar violations; instead, it focused on monetary relief issues. While the District has therefore waived most arguments as to compliance with the recission, reinstatement, and cease-and-desist orders, we nonetheless address those compliance issues before turning to make-whole issues. For the following reasons, we conclude the District has failed to comply with the recission, reinstatement, and cease-and-desist orders.

A. The ALJ correctly concluded that it was practical for the District to stop subcontracting and reinstate drivers during the 2018-2019 school year.

Section B.1 of the remedial order in *Bellflower I*, *supra*, PERB Decision No. 2544 directed the District:

"As soon as is practical, but not later than the end of the school year in which this decision and order becomes final,

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[9] We also correct some minor mathematical and typographical errors in the calculations.

rescind its contract for bus driver services to transport
students to and from school during the regular school year."

(*Id*. at p. 12.) Section B.2 directed that reinstatement should coincide with recission

under Section B.1. (*Id*. at p. 13.) Sections B.5 and B.6, in turn, required the District to

stop subcontracting ESY work and reinstitute its prior process for assigning such work

"[a]s soon as is practical." (*Ibid*.)

The District has steadfastly misconstrued these obligations throughout

compliance proceedings. In its initial compliance statement of October 17, 2018, the

District argued that "June 30, 2019 is the date that the PERB order says that the

contract must be rescinded, but since it terminates pursuant to its own terms, no

action needs to be taken by the District." The District simply ignored the critical first

five words in the operative paragraphs of our remedial order—"[a]s soon as is

practical." By instead interpreting the Board's remedial order to establish an opportune

deadline of June 30, 2019, the District rendered superfluous the key initial phrase and

gave an unlikely, strained meaning to its timing obligation.[10]

On October 26, 2018, OGC wrote to the parties that the District had failed to

provide any information showing whether the "expiration date is the earliest practical

date for the District to rescind the contract." OGC pointed out the same problem with

respect to the District's failure to stop subcontracting for ESY transportation services

under the 2014 Transportation Agreement. Nonetheless, the District maintained its

position and refused to provide OGC with any information about whether it was

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[10] Notably, the District did not stop subcontracting with Hemet USD or reinstate the laid off drivers as of July 1, 2019.

practical to rescind the 2014 Transportation Agreement before it naturally expired on June 30, 2019. OGC's administrative determination noted the District's refusal to back up its claim and correctly concluded that the Board's order "*does not* state that 'June 30, 2019 is the date that the PERB order says that the contract must be rescinded.'" (Original italics.)

When the District appealed OGC's administrative determination to the Board itself, the District finally offered an explanation as to why it had allegedly not been practical to rescind the 2014 Transportation Agreement prior to its natural expiration date: "Unless Hemet were to consent to the recission, the District would need to file a lawsuit against Hemet." "Allowing the expiration per the terms of the contract," the District argued, "eliminated the potential for Hemet to successfully defend the District's required litigation for rescission, eliminated any potential damages against the District for breach of contract, and eliminated the costs for the litigation that was a certainty." (Emphasis supplied.) The District did not support its claim that litigation was likely, much less "required" and a "certainty." Indeed, while the District qualified its entire argument with the phrase "[u]nless Hemet were to consent to the recission . . .," there is no suggestion in the record that the District ever asked Hemet USD about ending the agreement before its expiration date.

In resolving the District's appeal by remanding for a compliance hearing, the Board reminded the District of its burden by stating that "the District will have to support its contention that it was not practical to rescind the unlawful contract before its natural expiration with evidence." (*Bellflower II*, *supra*, PERB Order No. Ad-475, p. 12.) The District failed to do so. As noted above, two witnesses testified as to early

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recission: a high-level District official (Delgado) and a high-level Hemet USD official (Fogerty). Both testified that the District had the ability to terminate the 2014 Transportation Agreement before its natural expiration date of June 30, 2019, based on advance written notice. Delgado testified that the amount of required notice would have been three or four months, thereby placing the practical recission date before the 2018-2019 winter break, given that the District stated it considered the Board's *Bellflower I* decision to have been final on July 9, 2018.

In its post-hearing briefs to the ALJ, the District did not address the practicality of rescinding its subcontracting arrangement and reinstating drivers prior to June 30, 2019. The District thus waived any further argument as to rescission and reinstatement during the 2018-2019 school year.

Despite the unequivocal evidence showing it was practical to rescind the subcontracting agreement and reinstate drivers by winter break 2018-2019, and notwithstanding the District's waiver by failing to brief the question to the ALJ, the District nonetheless returned to the practicality issue in its exceptions to the ALJ's proposed compliance decision, where it argued: "Logic in this case requires that the impact on both students and bus drivers to terminate the contract early would be very consequential."

The District's appeal to "logic" may ask us to infer drivers would have had to relearn their routes mid-year. Or the District may be asking us to consider the impact on the alternate set of drivers employed through Hemet USD. In any event, the District failed to carry its burden to adduce sufficient competent evidence to show that earlier recission and reinstatement dates were impractical. Consequently, even assuming for

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the sake of argument that we were inclined to set aside the District's waiver and ignore that the District did not follow through on its promise to reinstate drivers when the 2014 Transportation Agreement expired on July 1, 2019, the District's failure to establish impracticality through competent evidence would prevent us from finding in the District's favor.

B. <u>The 2019 Transportation Agreement violated the cease-and-desist order and did not alter the District's compliance obligations</u>.

In its opening post-hearing brief, CSEA anticipated that "the District will likely argue" that even if it violated the Board's remedial order initially, it eventually had no further duties under the order because it entered into the 2019 Transportation Agreement pursuant to the parties' 2017-2020 CBA. The District responded to this point in its reply brief, as follows:

> "As conceded by CSEA in its Opening Brief, the District had the right to subcontract out transportation services in the CBA in effect at the time of the expiration of the 2014 Hemet Agreement, so the District had a right to terminate the bus drivers under the new CBA. (See, CSEA's Opening Brief at Page 64.) The District does make the anticipated argument and would urge Judge Cu to consider that the effect of the deemed layoff ended no later than June 30, 2019."

In addition to wrongly claiming CSEA conceded the point, the District did not analyze the law or the facts and therefore waived any argument based on the 2019 Transportation Agreement.

Notwithstanding the District's waiver, the law and the facts do not support the District's argument. As noted above, the parties' 2017-2020 CBA included the following subcontracting language:

> "In the event that the District contemplates the contracting out of work which has been performed by unit members, and thereby adversely affecting the hours or continued employment of current unit members, it shall give notice to the Association and upon request meet and consult regarding the decision and its effects, and give good faith consideration to the Association's objectives, if any. In the absence of an emergency need, such notice shall be given not less than 45 days prior to the Board action."

We begin by assessing to what extent this language waived any of the District's compliance duties or CSEA's right to bargain. A waiver of a statutory right must be clear and unmistakable. (*County of Merced* (2020) PERB Decision No. 2740-M, p. 19 (*Merced*), citing *Los Angeles Unified School District* (2017) PERB Decision No. 2518, p. 39.) The 2017-2020 CBA could not have directly waived the District's duty to comply with *Bellflower I*. Its only potential relevance is that it authorized the District to subcontract CSEA bargaining unit work if and only if the District notified CSEA at least 45 days in advance of a proposed District Board of Education decision to subcontract and then met and consulted with CSEA in good faith upon request.

As a threshold matter, CSEA could not meet and consult with the District in good faith, both because the District unlawfully refused to restore the status quo by rescinding its subcontract during the 2018-2019 school year and because it took no steps to restore the status quo as of July 1, 2019. (See, e.g., *Merced*, *supra*, PERB Decision No. 2740-M, pp. 21-23 [failing to rescind a unilateral change creates a one-sided advantage for the employer and forces the union to negotiate back to a status quo that should already be in place].) The District's renewed subcontracting could not comply with the terms of the CBA without prior restoration of the status quo.

Furthermore, the District first informed CSEA of its plan to re-subcontract with

Hemet USD by letter dated May 20, 2019. According to that letter, the District planned

to seek the Board of Education's approval at a public meeting on July 11, 2019. But

while the District provided over 45 days' notice of potential Board action on July 11,

the District's letter dated May 20 did not provide 45 days' notice of renewed

subcontracting that was immediately effective on July 1, 2019. Rather than reinstate

drivers on July 1 and follow its seniority bidding process for ESY work that month, the

District simply continued to subcontract with Hemet USD. The District did so despite

its representations to OGC and CSEA that it would reinstate drivers when the 2014

Transportation Agreement expired on June 30, and despite its later representation that

the Board of Education would consider any renewed subcontracting at a public

meeting on July 11, 2019. There is no dispute that when the District continued

subcontracting with Hemet USD for bus service on July 1, 2019, this was less than 45

days from May 20.[11] These facts constitute additional reasons that the District's

decision to continue using Hemet USD for bus services effective July 1, 2019, violated

Article XV of the CBA and the Board's order.[12]

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[11] The District claims the ALJ showed bias in CSEA's favor when he considered whether the District gave CSEA proper notice of the decision to continue subcontracting. We disagree. As noted *ante*, the District made only an indirect argument that the CBA and the 2019 Transportation Agreement altered its compliance obligations. The ALJ need not have considered this waived argument. But once he did so, he had no choice but to consider whether the District had satisfied the CBA's 45-day notice requirement. The ALJ's consideration of the notice issue thus does not indicate bias.

[12] In addition to failing to comply with the contractual notice requirement before once again subcontracting CSEA bargaining unit work, the District did not notify CSEA

The District's hearing exhibits include a declaration from Delgado stating, in part, that the District gave "timely notice" to CSEA about its plans to renew its transportation agreement with Hemet USD in 2019, but that such notice "did not result in negotiations over the issue because [CSEA] did not timely request a meet and confer session." We agree with the ALJ that Delgado's declaration carries little weight, as Delgado did not explain in his declaration or testimony what he considered to be "timely notice" or a "timely request" to meet and consult. In any event, as discussed above, Delgado's testimony conflicts with the fact that the May 20 letter, by its terms, could not provide CSEA with the requisite 45-day notice of an action effective July 1, 2019, and there was no opportunity to meet and consult in good faith given the District's still-unremedied unfair practice violations. (*Merced*, *supra*, PERB Decision No. 2740-M, p. 23.)

Since the District made it impossible to meet and consult in good faith and violated the CBA by failing to provide 45 days' notice, the District cannot rely on its 2019 Transportation Agreement to cut short any of its compliance obligations. (See *Merced*, *supra*, PERB Decision No. 2740-M, pp. 21-23 [where employer implemented change after close of PERB formal hearing and argued that change cut off its duty to make employees whole and restore the status quo, Board rejected employer argument because employer had never restored status quo before implementing change].) Indeed, far from cutting off the District's recission, reinstatement, and make-whole obligations, the District's renewed subcontracting violated our order that the District

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that, contrary to its prior written representation, it had changed its plan and would not reinstate the drivers on July 1, 2019.

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cease and desist from unilaterally implementing bargainable policies, interfering with

employees' protected rights, and interfering with CSEA's protected rights. (*Bellflower I*,

supra, PERB Decision No. 2544, p. 12.)

For these reasons, we affirm the ALJ's conclusion that the 2017-2020 CBA and

2019 Transportation Agreement did not immunize the District from complying with our

order in *Bellflower I*. Additionally, we find the District violated our cease-and-desist

order by subcontracting bus driver work in a manner that did not comport with the

limited waiver in the 2017-2020 CBA. A cease-and-desist order draws its meaning

from the specific violation found in the context of the entire decision. (*William S. Hart*

Union High School District (2018) PERB Decision No. 2595, p. 13.) In *Bellflower I*, we

noted that subcontracting unit work is a mandatory subject of bargaining, and the

District therefore cannot unilaterally subcontract without an adequate defense. Thus,

the Board's cease-and-desist order disallows the renewed subcontracting, which the

District similarly undertook without an adequate defense.

C. The 2020 Transportation Agreement violated the cease-and-desist order
   and did not alter the District's compliance obligations.

While the 2019 Transportation Agreement lasted only through June 30, 2020,

the District and Hemet USD entered into another one-year agreement effective July 1,

2020. As of that date, the 2017-2020 CBA had expired, meaning the partial waiver

found in Article XV had also expired. (*Bellflower I*, *supra*, PERB Decision No. 2544,

p. 27.) Even were that not the case, the record contains little evidence concerning the

2020 Transportation Agreement and certainly no evidence that the District complied

with Article XV. For instance, the District's failure to remediate the outstanding unfair

practices precluded CSEA from engaging in a good faith meet and consult process.

Moreover, the record does not show that the District provided CSEA with any notice, much less 45 days' notice, regarding potential Board of Education approval of the 2020 Transportation Agreement. The 2020 Agreement therefore further violated our cease-and-desist order and, in any event, did not alter the District's compliance obligations.

D. <u>The District violated its obligations regarding ESY bus services</u>.

Sections B.5 and B.6 of our order in *Bellflower I*, which apply to ESY program transportation services, are akin to Sections B.1 and B.2 in that they required the District to stop subcontracting ESY work and reinstitute its prior process for assigning such work "as soon as practical." Section B.5 also required the District to cease offering families $25 per day to transport students to and from the ESY program.

The record provides no evidence that the District has complied with these requirements. Indeed, while the District used American Logistics to provide bus service during the 2014 ESY, thereafter the District folded ESY transportation services into its subcontracting arrangement with Hemet USD. Because the District failed to rescind the 2014 Transportation Agreement and resume using its own drivers as soon as practical after *Bellflower I* became final, the same is true for ESY work. Nor is there any evidence that the District has ceased offering families $25 per day to transport students to and from the ESY program.

For the foregoing reasons, the District has failed to demonstrate that it complied with its recission, reinstatement, and cease-and-desist obligations.

II.   <u>The District's Make-Whole Relief Obligations</u>

A "finding by the Board that an unfair labor practice was committed is presumptive proof that at least some backpay is owed." (*Bellflower II*, *supra*, PERB

Order No. Ad-475, p. 10.) Notwithstanding this presumption, in compliance proceedings the charging party bears the burden of proving damages caused by the respondent's unfair practice(s). (*Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 56.) The charging party, however, need not prove damages with precision. Rather, make-whole relief usually involves predictions and estimates, and thus an approximation of actual damages may be sufficient to meet the charging party's burden. (*Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 14.) We resolve uncertainties as to the amount owed against the wrongdoer. (*Id*. at p. 27; *City of Culver City* (2020) PERB Decision No. 2731-M, p. 26.) Moreover, provided that an estimate has a rational basis, and is not so excessive as to be punitive, it appropriately serves both a compensatory and deterrent function. (*Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13.)

Make-whole relief should expunge the consequences of an unfair practice and restore "the economic status quo that would have obtained but for the respondent's wrongful act." (*County of Kern and Kern County Hospital Authority* (2019) PERB Decision No. 2659-M, p. 26; *Pasadena, supra,* PERB Order No. Ad-406-M, p. 13.) Our task is therefore to "recreate the conditions and relationships that would have been had there been no unfair labor practice, even when doing so necessarily entails some degree of uncertainty as to the precise relationships." (*Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13.)

Parts III and IV of this decision explain the District's monetary obligations to CSEA, while Part V explains the District's monetary obligations to the drivers. First, however, in this Part II, we address five overarching make-whole relief issues.

A. The Compliance Record

The District has consistently declined to offer alternate damages-related evidence or calculations of its own, instead mounting broad attacks on the adequacy of the record. First, the District has objected to using Form W-2s, Form 1040s, and other wage and income records as evidence of employee losses, mitigation efforts, and interim earnings, arguing that those records are inaccurate and incomplete. For the following reasons, we disagree.

CSEA furnished much of its evidence during OGC's initial investigation. In *Bellflower II*, *supra*, PERB Order No. Ad-475, we held that such records are typically sufficient, and we further noted that the District was free to introduce evidence showing inaccuracies or gaps in such records. (*Id*. at p. 12.) CSEA updated the evidence through pre-hearing declarations from each driver. The District had the opportunity to produce evidence and argument as to how or why such records were inaccurate, unreliable, or might yield unreasonable results. But the District declined to subpoena additional records or otherwise seek to introduce impeachment evidence or supplemental records. As the ALJ noted, the District made this decision even though it knew what records CSEA intended to present and that such records were sufficient absent any contrary evidence. In fact, as noted above at footnote 6, the District even declined to investigate its own payroll records that an outside agency administered. Instead, the District stated that it did not consider such records to be relevant.

While declining to subpoena or introduce relevant evidence, the District nonetheless argued to the ALJ that certain Form W-2s were inaccurate or incomplete. For instance, the District argued that the 2014 Form W-2s for M.G. and E.Q.

showed income totals that differ from the year-to-date gross wages listed on their

District paychecks dated July 10, 2014. The ALJ reasonably noted that it was unclear

whether these paychecks were the last ones M.G. and E.Q. received from the District,

and that subsequent amendments or final paychecks may have resolved any

discrepancies. Furthermore, the drivers testified that the records upon which the ALJ

relied accurately showed their District wages. In contrast, no witnesses testified that

employees' final 2014 wage totals could best be determined from their paychecks

dated July 10, 2014. Indeed, the District neither asked employees that question nor

called any other witness to testify about employee pay. The ALJ, noting that the Form

W-2s and paychecks are District records, and the District had many opportunities to

clarify discrepancies or otherwise introduce competent evidence, reasonably relied on

the well-supported, largely unrebutted records CSEA introduced into evidence.

      Second, the District asked the ALJ to find fault with the fact that CSEA's closing

brief adjusted CSEA's initial calculations. As part of this adjustment, CSEA essentially

acknowledged that its first attempt had wrongly assumed drivers worked 12 months

per year.[13] The ALJ correctly found that this change in calculations drew new

conclusions from the compliance record but did not constitute new evidence, and the

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      [13] CSEA changed its approach as follows: while initially it assumed drivers would have worked 12 months per year, its revised calculations were based on drivers having worked 11 months per year. In this new approach, CSEA assumed each driver worked, on average, 10 months during the school year plus a full month during the ESY program. The ALJ rejected this assumption and instead based his calculation on 10.5 months of work, with each driver working an average of 0.5 months during the ESY program. CSEA does not challenge the ALJ's ruling on this issue. CSEA changed its approach in a second respect, as well: while CSEA initially calculated compound interest, it later switched to simple interest.

ALJ granted the District's request for additional time to file its reply brief given that CSEA had changed its calculations. It is frivolous for the District to suggest that the compliance record is inadequate merely because CSEA calculated new estimated damages without seeking to introduce new evidence, particularly given that the District has refused to attempt its own calculations. In any event, like the ALJ, we perform our own calculations, which differ from CSEA's.

B. <u>The Duty to Mitigate Damages</u>

While PERB affords unlawfully terminated employees a reasonable amount of time to collect themselves and recover from the initial shock of their termination, after that period elapses they have a duty to mitigate losses by taking steps consistent with the inclination to find new work and be self-supporting. (*County of Lassen* (2018) PERB Decision No. 2612-M, pp. 8-9 (*Lassen*).) A respondent that violated the law has the burden of establishing that an employee did not make a good faith effort to mitigate damages. (*Id*. at p. 8.) First, the respondent must show that: "(1) a number of positions were available that are substantially equivalent to the one previously held by the claimant; (2) the claimant would have qualified for one of these positions; and (3) the claimant did not apply for these positions." (*Fresno County Office of Education* (1996) PERB Decision No. 1171, adopting proposed decision at p. 4 (*Fresno*).)

If the respondent establishes each of these elements, the employee may still satisfy the duty to mitigate by showing other reasonable efforts. (*Id*., adopting proposed decision at pp. 4-5; *NLRB v. KSM Industries, Inc.* (7th Cir. 2012) 682 F.3d 537, 547 [once burden shifts to employee to show reasonable efforts, employee can satisfy that burden via testimony or other reliable evidence of good faith job hunting

efforts].)[14] As with other issues causing uncertainty in the amount of damages owed, we resolve uncertainty about mitigation against the wrongdoer. (*Bellflower II*, *supra*, PERB Order No. Ad-475, p. 10; *Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 27.)

The duty to mitigate damages is not a difficult hurdle. (*Bellflower II*, *supra*, PERB Order No. Ad-475, p. 10.) Efforts to mitigate damages need not be successful; employees must only undertake them in good faith. (*Lassen*, *supra*, PERB Decision No. 2612-M, p. 9.) Moreover, an employee who pursues an educational opportunity satisfies the duty to mitigate by combining school with job hunting or by reasonably deciding that additional education is the best path toward gainful employment. (*Id*. at p. 10.) Self-employment also satisfies the duty to mitigate. (*County of Riverside* (2013) PERB Decision No. 2336-M, adopting proposed decision at p. 19 (*Riverside*).)[15]

The ALJ, relying on private sector authorities, correctly determined that applying for or receiving retirement benefits does not mean an employee has left the workforce, so long as the employee is otherwise attempting to mitigate losses and willing to return to work. (*NLRB v. KSM Industries*, *supra*, 682 F.3d at p. 545; *Roman*

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[14] Although California public sector labor relations precedent frequently protects employee and union rights to a greater degree than does federal precedent governing private sector labor relations, we consider federal precedent for its potential persuasive value. (*Operating Engineers Local Union No. 3, AFL-CIO (Wagner, et al.)* (2021) PERB Decision No. 2782-M, p. 9, fn. 10.)

[15] We also affirm the ALJ's legal conclusion that employees need not seek work that is more onerous than their prior employment, need not confine themselves to looking for jobs earning the same level of compensation as they had previously earned, and need not remain in the same industry. Rather, as noted above, employees must show an inclination to be self-supporting. (*Lassen*, *supra*, PERB Decision No. 2612-M, p. 9.)

Iron Works (1989) 292 NLRB 1292, fn. 3; National Labor Relations Board (NLRB)

Casehandling Manual (Part 3) Compliance Proceedings (October 2020), § 10560.9

(NLRB Compliance Manual).) Indeed, as this case and others aptly demonstrate, an

employee may experience severe economic stress after a wrongful layoff or

termination. Here, multiple employees had to tap retirement benefits to make ends

meet. This did not, by itself, reflect a decision to stop working. Nonetheless, if an

employee who begins drawing retirement income also stops mitigation efforts, the

latter decision appropriately affects the employee's backpay award going forward.

      Each driver also applied for unemployment benefits and received such benefits

from California's Employment Development Department (EDD). The ALJ, relying on

private sector authorities, correctly concluded that while unemployment benefits are

not interim earnings that offset employee damages, receipt of such benefits is at least

relevant evidence on the issue of efforts to mitigate. (NLRB Compliance Manual,

supra, § 10554.1; *NLRB v. Gullett Gin Co*. (1951) 340 U.S. 361, 364 [unemployment

benefits reflect a "policy of social betterment," and it effectuates labor policy to refrain

from giving a wrongdoer an offset based on collateral benefits]; *NLRB v. KSM

Industries*, *supra*, 682 F.3d at p. 548 [complying with job search requirements to

receive unemployment benefits is prima facie evidence of a reasonable search for

interim employment].) As the ALJ noted and the record in this case reflects, to receive

benefits, unemployment applicants must apply for new jobs or engage in a reasonable

education or training program.

      The District argues that the drivers should receive no backpay because they

allegedly failed to mitigate damages. We disagree. In *Bellflower II*, *supra*, PERB Order

No. Ad-475, we held that during OGC's initial compliance proceedings, CSEA produced records showing that all drivers searched for and obtained interim employment within a reasonable time after their layoffs. (*Id*. at p. 11.) The compliance record further supports that finding, and we affirm the ALJ's conclusion that the drivers thereafter continued efforts to mitigate the damages, as summarized in Part V.

The District primarily argues that to comply with the duty to mitigate damages, the drivers had to apply to work at Hemet USD, but only two did so. Specifically, E.V. successfully applied, while Hemet USD did not process D.C.'s application because she did not submit a résumé. The District also points to evidence that Whittier Union High School District (where M.G. had earlier tried and failed to obtain a job) was hiring bus drivers in 2018, as well as uncorroborated hearsay as to job openings at three other employers.

Under *Fresno*, *supra*, PERB Decision No. 1171, mitigation analysis has more facets than the District acknowledges. Indeed, even if the District could show that Hemet USD or another employer more likely than not would have hired the drivers had they applied, the law and the record support the ALJ's finding that drivers nonetheless satisfied their duty to mitigate damages by showing other reasonable mitigation efforts. (*Id*., adopting proposed decision at pp. 4-5.) The ALJ, relying in part on section 10558.3 of the NLRB Compliance Manual, correctly noted that resolving whether an employee made reasonable efforts does not turn on any single category of potential job applications, much less any one application. (*Id*. ["The presence or absence of any particular search activity does not determine mitigation"].) Based on the drivers' extensive mitigation efforts detailed in Part V, we affirm the ALJ's conclusion that they

made reasonable efforts during all periods in which they claimed losses, other than

E.V. during the last four months of 2020.[16]

C. Methods for Calculating Drivers' Net Losses

1. Wages

To estimate net lost wages (before interest), it is proper to project the annual

wages a driver would have received if still working for the District, and then to subtract

wages earned from alternative jobs the driver could not have held while employed with

the District. If an employee's offsetting wages equal or exceed the driver's projected

District wages in any year, then the employee's net lost wages for that year are zero.

The ALJ, relying in part on sections 10552.4 and 10564.3 of the NLRB Compliance

Manual, correctly determined that excess offset income from one year neither offsets

losses in a different year nor offsets benefits-related losses.

2. Medical Benefits

If an employee must pay more for medical, dental, and/or vision insurance, then

PERB will calculate the difference either on an annual basis or across any reasonable

timeframe. If an employee has no access to one or more types of health insurance

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[16] The ALJ found that E.V. stopped all mitigation efforts effective September 1, 2020, when she retired from Hemet USD. The ALJ also found that M.G. claimed no losses for 2020 and the last two months of 2019, while N.H. claimed no losses for 2019 and 2020. CSEA did not except to those findings, and we therefore express no opinion on them. Nonetheless, these findings do not alter the standards that will apply to any losses they claim for periods after 2020. Such claims may or may not be valid, depending on what the evidence shows. Similarly, and particularly given that "back pay and reinstatement are two separate remedies" (*Riverside*, *supra*, PERB Decision No. 2336-M, p. 16), E.V., N.H., and M.G. have not waived reinstatement. Upon receipt of reinstatement offers, they may—like the other drivers—decide if they wish to resume working for the District.

offered previously, or the employee declines higher cost insurance available through an interim employer or otherwise, the employee may instead seek reimbursement for out-of-pocket costs of uncovered care. At times, it is proper to use a combination of methods. This can be the case, for instance, if an employee pays a higher monthly premium but ends up with inferior insurance and therefore must pay higher copays or incurs uncovered care that the employee's prior insurance had covered. A combination of methods may also be appropriate if the employee obtains coverage for incomplete periods of time, a subset of previously covered family members, or a subset of previously covered types of care.

3. Retirement Benefits

Losses related to post-employment benefits are also compensable. (*Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M, p. 58; *City of San Diego* (2015) PERB Decision No. 2464-M, p. 45, affirmed *sub nom. Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 920 (*San Diego*).) Here, because CSEA has claimed neither retiree health benefit losses nor defined contribution plan losses, we do not analyze potential methods for estimating such losses.[17] Instead, we assess CSEA's claim that four drivers suffered losses related to the California Public Employees Retirement System (CalPERS) defined benefit plan.

Making employees whole for defined benefit losses normally requires an offending employer to remit contributions to the pension plan to ensure that the

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[17] In each instance in which we note that CSEA has not claimed a category of damages for one or more drivers, we mean only through December 31, 2020. We do not predict what damages drivers may have incurred, nor limit what damages drivers may wish to seek, for dates after December 31, 2020.

employees receive service credit for the backpay period, thereby placing them in the same situation as if the unfair practice had not occurred. (See, e.g., *City of Glendale* (2020) PERB Decision No. 2694-M, p. 74; Gov. Code, § 20969.3.)[18] Any interest owed to the pension plan, on either party's contributions, is the employer's responsibility. (*City of Glendale*, *supra*, PERB Decision No. 2694-M, p. 74.) Such arrangements may become more complicated if an employee began withdrawing retirement benefits during the backpay period. Such an employee can choose to "unretire" (which may involve paying back distributions already received, with the goal of a more valuable retirement benefit later) or to choose an alternate means of estimating retirement benefit losses. (*Id*. at p. 73; Gov. Code, § 21198.)

Here, CSEA claimed retirement-related losses for only four drivers and did not seek to recover lost CalPERS service credit even for these four drivers.[19] At CSEA's request, the ALJ employed an alternative means to calculate retirement losses. Specifically, the ALJ directed the District to pay the four drivers the dollar amounts the District would have contributed to the defined benefit pension plan on their behalf (less any contributions they received from an interim employer), plus interest. The drivers thereby receive no back service credit but gain a cash payment instead. This

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[18] Government Code section 20969.3, which applies to terminations occurring on or after January 1, 2017, requires CalPERS to restore service credit to reinstated employees upon receipt of contributions. In November 2017, the CalPERS Board issued a precedential decision finding that even under prior law it was proper to restore service credit to reinstated employees upon receipt of contributions. (*Matter of Kareemah M. Bradford* (2017) CalPERS Board Decision No. 17-01.)

[19] Nothing herein limits any driver's independent right to purchase service credit directly from CalPERS.

approach may fall short of making employees whole, particularly given that individual

investment decisions do not necessarily match the efficiency of a defined benefit plan

in supplying retirement income. (See, e.g., William Fornia & Dan Donnan, *A Better

Bang for the Buck 3.0* (National Institute on Retirement Security, 2022)

https://www.nirsonline.org/wp-content/uploads/2022/01/Better-Bang-for-the-Buck-3.0-

F11.pdf, last accessed Mar. 18, 2022 [defined benefit plans, on average, supply a

higher level of retirement income than defined contribution plans, assuming an equal

level of contributions].)[20] Nonetheless, the ALJ's approach was not reversible error in

these circumstances because charging party advocated for it.

However, we reverse the ALJ's decision to offset against four drivers' lost

wages the CalPERS pension distributions they began receiving during the backpay

period, as the drivers had earned this deferred compensation entirely during their

pre-layoff work for the District. (See *Miller v. State of California* (1977) 18 Cal.3d 808,

814 [pensions "are deferred compensation earned immediately upon the performance of

services"].) We explain.

The ALJ found that pension distributions received during the backpay period

offset an employee's net backpay award. But that is true only if an employee earned

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[20] This publicly available research report helps to illustrate why service credit is the preferred make-whole remedy, but it does not constitute record evidence as to any issue in dispute. (*County of Santa Clara*, *supra*, PERB Decision No. 2629-M, p. 6, fn. 5.) While merely directing an employer to pay employees lost employer contributions does not necessarily make employees whole, an alternative that more closely approximates service credit would be a payment based on expert actuarial analysis calculating "the value of lost pension benefits" less the value of any alternative benefit earned. (*San Diego*, *supra*, PERB Decision No. 2464-M, p. 45.)

the pension via work during the backpay period. The ALJ misconstrued *United Enviro Systems, Inc.* (1997) 323 NLRB 83, which held that "proper deductions from net backpay [include] distributions from an interim employer's pension plan that [an employee], on termination of that interim employment, has the option of either receiving directly in cash or rolling over into a [tax-deferred retirement] plan." (*Id*. at p. 84.) The NLRB therefore reduced an employee's backpay by the $2,400 distribution he received from his interim employer's pension plan. (*Ibid*.) Thus, *United Enviro Systems, Inc.* held only that retirement income from an interim employer earned during the backpay period offsets losses. In contrast, the NLRB does not treat deferred compensation earned before the backpay period as an offset against earnings lost during the backpay period. (*Id*. at p. 84; *Reliable Electric Company* (2000) 330 NLRB 714, 726; NLRB Compliance Manual, §§ 10544.3, 10552.4.)

PERB precedent is in accord. In *Fresno*, *supra*, PERB Decision No. 1171, a laid-off teacher began receiving pension distributions during the backpay period. (*Id*., adopting proposed decision at p. 8, fn. 9.) The teacher also searched for work, albeit unsuccessfully. (*Id*., adopting proposed decision at pp. 8-9.) The Board held that she made sufficient mitigation efforts (*id*., adopting proposed decision at p. 9) and that her pension distributions, which she had earned before her layoff, did not offset lost earnings during the backpay period (*id*., adopting proposed decision at p. 8, fn. 9). We reaffirm that *Fresno* established the correct approach.

At the parties' request, we have reviewed precedent arising under federal anti-discrimination statutes. These decisions fall into two main categories, one of which supports our approach and one of which does not. However, we find neither category

persuasive. There is no need to analogize to income sources such as unemployment insurance, as multiple federal decisions do. Rather, previously earned deferred compensation stands in stark contrast because there is no question as to when an employee earned it or what purpose it serves. The drivers earned 100 percent of the deferred compensation at issue as compensation for their pre-layoff work on behalf of the District. The drivers' entitlement to it existed prior to, and independent of, their layoffs. Thus, to treat such compensation as an offset against losses during the backpay period is no more supportable than treating drivers' pre-layoff wages as an offset; to do so contravenes the entire purpose of make-whole relief.

A contrary rule would exacerbate employee losses. After termination, an employee may be hard-pressed to make ends meet and may therefore begin drawing retirement benefits earlier than planned. (*Fresno*, *supra*, PERB Decision No. 1171, adopting proposed decision at pp. 8-9.) An employee may also have little choice but to retire early to make use of earned retiree health benefits. (See, e.g., CalPERS State Health Benefits Guide, pp. 22, 87, 89 & 103 [https://www.calpers.ca.gov/docs/forms-publications/state-health-guide.pdf] last accessed Mar. 18, 2022 [to be eligible for CalPERS retiree health benefits, employee must retire within 120 days of separation].)[21] Early retirement typically decreases the value of an employee's

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[21] Publications issued by a state agency are subject to administrative notice. (*State of California* (2011) PERB Decision No. 2178-S, p. 3.) While taking administrative notice is not equivalent to accepting the truth of all statements in the publication (*Merced*, *supra*, PERB Decision No. 2740-M, p. 7, fn. 5), here no holding turns on the publication's truth. Moreover, irrespective of the publication's accuracy, it tends to influence laid-off employees to consider retiring for CalPERS purposes within 120 days of their separation from employment.

pension benefit. This is true because of the age factor in most pension formulas, as well as because an employee retiring early has less service credit and often a lower salary factor than if the employee had remained employed. The approach reflected in the ALJ's proposed decision, far from remedying this loss, would exacerbate the loss by fictitiously treating deferred compensation as if it were instead new income from alternative work.[22]

In sum, previously earned retirement benefits are not alternative income earned from work during the backpay period. Accordingly, in Part V we correct the ALJ's error for the four drivers who, while continuing to work during the backpay period, began drawing retirement benefits earned during their years working for the District.

4. Consequential Damages, Including Search-for-Work Expenses and Interim Employment Expenses

The NLRB recently noted that for more than 80 years, it "has awarded two remedies as part of its make-whole relief that may be characterized as consequential damages, specifically reasonable search-for-work and interim employment expenses." (*Thryv, Inc.* (2021) 371 NLRB No. 37, p. 1.) The NLRB summarized these principles as part of its order inviting parties and interested amici to brief five specified questions concerning whether the NLRB should begin directing respondents to reimburse additional categories of consequential damages that are a direct and foreseeable

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[22] Drawing retirement benefits does not, however, count as mitigation efforts. Thus, to the extent an employee who begins drawing retirement income also stops mitigation efforts, the latter decision affects the employee's backpay award going forward. If the employee instead draws retirement benefits while continuing to work or seek employment, then there is no windfall in allowing the employee to keep drawing deferred compensation fully earned before the respondent's wrongdoing while also receiving reimbursement for income lost during the backpay period.

result of the respondent's violation. (*Id*. at pp. 1-2.) Here, CSEA has not asked to recover search-for-work expenses. CSEA also has not asked for any of the potentially broad consequential damages that parties and amici have addressed in their briefs to the NLRB in *Thryv, Inc.*, *supra*, 371 NLRB No. 37. (See https://www.nlrb.gov/case/20-CA-251105.) We therefore have no cause in this case to reconsider PERB precedent on most aspects of consequential damages.

The ALJ, however, did address interim employment expenses for those drivers who worked as independent contractors during the backpay period. Specifically, the ALJ subtracted such expenses from interim employment income to find a net income amount that the ALJ then offset against lost pay. This method was consistent with NLRB practice prior to 2016, as well as with *Otay Water District* (2004) PERB Decision No. 1634-M. (See *id*., adopting proposed decision at p. 9 ["This mitigation may in turn be reduced by any necessary and reasonable expenses incurred by the discriminatee in searching for and obtaining interim employment, e.g., transportation and moving expenses, expenses commuting to the new job"].) It is not, however, consistent with current NLRB practice. In *King Soopers, Inc.* (2016) 364 NLRB 1153, the NLRB held that interim employment expenses are recoverable in full and do not offset interim employment earnings for purposes of calculating net backpay. (*Id*. at pp. 1157-1158.) The NLRB noted that in many cases its prior practice resulted in employees not recouping the full amount of their interim expenses. (*Id*. at p. 1157.) And when interim expenses exceeded interim earnings, the employee would recoup none of the expenses. (*Ibid*.) By awarding such expenses (with interest) separately from backpay, the NLRB aligned its treatment of interim employment expenses with how it treats

other expenses, including medical expenses, thereby ensuring that all expenses resulting from the respondent's unlawful conduct are fully recoverable. (*Id*. at pp. 1157-1158.)

Although the ALJ applied the method rejected in *King Soopers, Inc.*, *supra*, 364 NLRB 1153, CSEA did not except to this approach, and we therefore do not disturb it for damages calculations through December 31, 2020. Nonetheless, we find the NLRB's rationale in *King Soopers, Inc.* persuasive and hold that in future cases (including further proceedings in this case), the compliance officer shall award interim employment expenses, with interest, regardless of an employee's interim employment earnings. We overrule *Otay Water District*, *supra*, PERB Decision No. 1634-M to the extent it is inconsistent with this decision.

D. Interest

In this case, the remedial orders direct the District to pay 7 percent interest on all amounts owed, without specifying whether such interest is simple or compound. The proposed decision notes the parties' eventual agreement to use simple interest, and neither party has asked us to consider that issue.[23]

In cases like this one where the backpay period spans more than one year, it is typically necessary to perform multiple separate interest calculations for each affected employee. Part V illustrates this approach, separately analyzing whether each driver

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[23] While we decline to consider the issue in this case given the parties' agreement, we note that in 2010 the NLRB began including daily compound interest in all monetary relief. (*Kentucky River Medical Center* (2010) 356 NLRB 6.)

lost wages or benefits during each year of the backpay period and then separately

calculating interest for each category of losses a driver experienced each year.[24]

Interest may be calculated on a spreadsheet, or interest calculators are readily

available. (See, e.g., https://www.calculatorsoup.com/calculators/financial/index-

interest-apr-calculators.php [last accessed Mar. 18, 2022].) Using an interest

calculator to compute interest on a year's wage or benefit loss, one must first input the

dollar amount for that category of annual net losses. One then inputs the interest

rate.[25] Finally, one must input the interest accrual duration, or certain calculators

simplify that variable by asking the user to input the beginning and ending accrual

dates.[26] The ALJ used the following formula to express how he calculated simple

interest on each annual wage or benefit loss: [net loss amount] × 7% × [#] [years]) =

[interest amount].

Although neither party took exception to the ALJ's interest duration calculations,

and we therefore do not disturb his approach to determining the interest accrual period

for drivers' damages through December 31, 2020, we nonetheless analyze the ALJ's

approach to guide Board agents and parties in future compliance proceedings. First,

the ending accrual date is normally the date on which an employee resumes work

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[24] We endorse the ALJ's decision to perform separate interest calculations on lost wages and lost benefits, though that is not the only permissible method.

[25] If calculating compound interest, one must input the compounding frequency.

[26] For example, if the beginning date is July 1, 2018, and the end date is April 15, 2022, the duration (including the first and last date) is 1385 days. (See, e.g., https://www.timeanddate.com/date/durationresult.html [last accessed Mar. 18, 2022].) Dividing that figure by 365 days per year yields a duration of 3.79 years.

after accepting a reinstatement offer or declines reinstatement. Here, given that the District's continuing refusal to reinstate the drivers has led to multi-stage compliance proceedings, we find no fault in the ALJ's decision to calculate initial damages and interest only through December 31, 2020, leaving final calculations for a later stage.

Second, the ALJ used January 1 of each year as the beginning interest accrual date for all losses incurred in that year. Although neither party excepted to this approach, we do not endorse it for future compliance matters. Taking year 2020 losses as an example, the ALJ assumed that as of December 31, 2020, a full 7 percent interest had accrued on every dollar of 2020 losses, including losses incurred during January 2020 as well as losses incurred during December 2020. In fact, however, as of December 31, 2020, a year's interest had accrued on losses incurred in early January 2020, but virtually no interest had accrued on losses incurred in late December 2020. If an employee tends to steadily incur losses between January and December, it is normally proper to use an average accrual date of July 1, 2020, meaning that only a half year's interest would accrue on 2020 losses by December 31, 2020. In other words, one can average losses over the course of the year by assuming that approximately 1/12 of the year's losses occur each month. This allows one to input a fair average starting date for duration calculations.[27]

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[27] Certain factual scenarios require a different approach. For instance, the drivers lost a small amount of income—which the ALJ labeled "2013 wages"— because the District did not pay them a lump sum wage increase, retroactive to July 1, 2013, that the drivers would have received if they continued to serve as District employees in fall 2014. As the ALJ noted, interest on this loss did not begin accruing in 2013. Rather, it began accruing on the date in 2014 when the drivers would have received the lump sum payment had the District not laid them off. Drivers' 2014 losses, incurred post-layoff and therefore exclusively in the second half of the year,

In the absence of exceptions, we do not disturb the ALJ's approach to interest duration for calculating interest on drivers' damages accruing through December 31, 2020. However, future compliance calculations should be consistent with this decision.

E. Tax Neutralization

CSEA has asked for make-whole relief to cover the potential increased tax liability drivers may incur from a lump sum backpay award that artificially moves earnings from multiple tax years into a single tax year, thereby making large parts of such income taxable at a higher rate. As we noted in *County of Ventura* (2021) PERB Decision No. 2758-M, p. 56, fn. 23 (*Ventura*), the Legislature vested PERB with sufficiently broad remedial authority to order such relief, which is known as tax neutralization. While the ALJ wrote without the benefit of *Ventura*, he correctly concluded that tax neutralization is an allowable form of make-whole relief, relying in part on NLRB precedent favoring such relief. (See, e.g., *Tortillas Don Chavas* (2014) 361 NLRB 101, reaff'g. *Latino Express, Inc.* (2012) 359 NLRB 518.)[28]

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supply another illustrative example. When an employee incurs losses only between July 1 and December 31, it is most commonly proper to use October 1 as an average accrual date. We offer these examples by way of illustration only, as neither party excepted to any of the ALJ's interest calculations.

[28] The ALJ correctly noted that in *Otay Water District*, *supra*, PERB Decision No. 1634-M, the Board adopted a proposed decision that found the arguments in favor of tax neutralization "persuasive" but ordered no such remedy given the highly unusual procedural posture. (*Id.*, adopting proposed decision at p. 8.) Specifically, neither the Board nor any PERB ALJ had issued findings or conclusions as to liability or remedy; instead, the ALJ had merely approved and adopted a stipulated order in which the employer admitted liability and the parties stipulated to a discrete category of damages. (*Id.*, adopting proposed decision at p. 2.) Thus, *Otay Water District* is consistent with *Ventura*, *supra*, PERB Decision No. 2758-M.

Having found tax neutralization generally allowable, the ALJ disallowed such relief in this case because CSEA failed to introduce evidence regarding projected tax losses and the ALJ considered that to be a waiver. The ALJ's reasoning would be sound had this case, like most, involved only a single stage of compliance proceedings. In that more common instance, even though a charging party has not yet incurred the tax liability warranting neutralization, the charging party has the burden to estimate likely tax consequences. Whether the charging party engages a professional or relies on tax software or an online tax calculator, the charging party must detail the basis for its estimate, thereby allowing the respondent a chance to contest the estimate and the compliance officer to assess what level of tax neutralization, if any, is appropriate based on a preponderance of the evidence.

This case is an exception. At the time of the compliance hearing and post-hearing briefs, CSEA was aware of the District's continued failure to reinstate drivers or pay any of the ordered make-whole relief. Because the current compliance stage involves determining the District's monetary obligation to drivers over a seven-year period, and a later compliance stage will be necessary given the District's failure to reinstate drivers to date, CSEA can be more exact in its tax neutralization evidence. Specifically, in the next compliance stage, the parties will have better information regarding: (1) the exact amounts each driver is owed for damages and interest accrued through December 31, 2020; (2) in which tax year drivers are receiving these amount; (3) what federal and state tax brackets, rates, and rules apply in that year;

and (4) the drivers' other income, deductions, and filing status at that time.[29] These facts will improve the basis for both parties to enhance their tax neutralization estimates. If any drivers have already submitted tax returns based on the lump sum amounts, the parties will have an even more accurate basis for their estimates. In this instance, CSEA therefore was correct in waiting to introduce tax neutralization evidence, as such evidence will be more concrete when introduced later.

Fault for the multi-stage compliance proceedings lies with the District, which has persistently refused to take any steps toward complying with its most central obligations. Failing to award tax neutralization relief would give the District the benefit of evading compliance. The prolonged proceedings negatively impact the drivers, and we do not fault CSEA for recognizing this reality and deciding it was premature to estimate tax neutralization relief given that damages and interest continue to accrue, thereby increasing the eventual lump sum payment and risking ever-larger tax consequences. However, the parties must expedite remaining compliance proceedings as much as possible. We therefore direct that in the next compliance stage, CSEA must provide competent evidence, estimates, and argument regarding all tax neutralization relief that it seeks in this case.

III.   The District's Obligation to Reimburse CSEA's Lost Dues

The remedial order in *Bellflower I*, *supra*, PERB Decision No. 2544, at Sections B.4 and B.8, requires the District to compensate CSEA for dues it lost by virtue of the

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[29] The parties can also consider the retroactive pay increases in the 2014-2017 CBA, which, in the absence of a layoff, would have generated a small lump sum payment sometime after October 1, 2014.

District's subcontracting, plus 7 percent annual interest. (*Id*. at p. 13.) Although the

District has not argued that PERB should deduct this dues obligation from employee

backpay, we nonetheless provide further explanation as to why that approach would

constitute error. An employer's obligation to reimburse dues does not allow it to

reduce its backpay payments to employees by an equivalent amount. (*Regents of the

University of California* (2014) PERB Decision No. 2398-H, p. 37 [explaining that "it is

not appropriate to penalize employees for the employer's unfair practice by requiring

that they remit back dues"]; see also *Regents of the University of California (Berkeley)*

(2018) PERB Decision No. 2610-H, pp. 96-97; *City of Sacramento* (2013) PERB

Decision No. 2351-M, pp. 49-50.) Thus, it is not incumbent upon employees to remedy

the collateral injury to the exclusive representative—diminution of the bargaining unit

and the corresponding diminution in both bargaining power and dues—caused by an

employer's unilateral change.[30]

   We join the ALJ in declining to eliminate or reduce the District's obligation to

reimburse lost dues based on the argument that the drivers could have obtained jobs

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   [30] An unlawful layoff that shrinks the size of a bargaining unit tends to reduce a union's dues income on an ongoing basis irrespective of which employees may retire or leave for other jobs. For instance, absent a layoff, employees who retire or resign to take a higher paying job would leave the union's dues stream roughly intact, as the employer would backfill the vacancies. As this case shows, because terminated employees often find higher paying jobs eventually, and in such timeframes they receive no backpay, in those years there is no damages amount from which one could deduct dues. This case also shows another example with similar repercussions: at a certain age, employees may decide to retire from work, but as the employer fills such vacancies, the union can continue receiving dues in the absence of a layoff. It is therefore impractical and unfair to make laid off employees responsible for the union's dues losses.

with Hemet USD and paid dues to a different CSEA chapter. As discussed above, the drivers' failure to apply to Hemet USD did not extinguish the District's backpay liability to the drivers arising from the unlawful layoff. For the same reason, their failure to apply to Hemet USD also did not extinguish the District's liability for dues CSEA would have received from the drivers (or their replacements) absent the layoff.[31]

Furthermore, the ALJ correctly rejected the District's claim that the amount it owes CSEA for lost dues should be offset by the fact that the District did not disrupt the flow of dues from employees to CSEA during the four-year gap between the 2007-2010 CBA and the 2014-2017 CBA. This argument is frivolous for two reasons. First, EERA required the District to continue remitting dues payments to CSEA during that period, and the District would have committed an unfair practice had it violated that duty. (Gov. Code, § 3543.1, subd. (d); Ed. Code, § 45168, subd. (a)(1).) Second, even if this were not the law, any such continuation of union members' ability to pay their dues via payroll deduction could not create a credit owed from CSEA to the District, much less a credit that PERB could honor in remedying an unfair practice.

The ALJ properly relied on information from CSEA's membership dues database, all of which was information the District had provided to CSEA. The ALJ specifically relied on the dues figure that each driver paid CSEA in June 2014, just before the layoff, implicitly concluding that it was a sufficiently representative amount.

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[31] While we find no reason to disturb the ALJ's alternate conclusion that CSEA Chapters 32 and 104 are not the same employee organization, the issue is irrelevant given that the drivers were under no obligation to apply to work at Hemet USD.

Neither party has challenged that conclusion. Nor has CSEA sought any changes to lost dues calculations based on negotiated wage increases.

The ALJ estimated the dues CSEA lost from each driver's layoff for each year, using the following formula: [driver's June 2014 dues] × [#] [work months] = [lost dues, full year]. We do not disturb the ALJ's decision to assume drivers paid dues during the average 10.5 months per year they worked, but not during the average 1.5 months per year they did not work; no record evidence undercuts this reasonable assumption. However, the ALJ improperly reduced the number of work months below 10.5 months if a driver ceased mitigation efforts, ceased working, or did not submit a claim for lost wages. This was error because, had no layoff occurred, CSEA would have continued to receive dues from the ten bus driver positions. This is so even if certain drivers might have eventually stopped working for the District or retired, as the District would have filled such vacancies. Just as it is not fair for employees to bear the burden of reimbursing CSEA for lost dues, it also is unfair to reduce CSEA's lost dues recovery because of any individual employee's independent decision to cease mitigating losses caused by the unlawful layoff.

Given that it is impossible to know which drivers may have retired or left for other jobs were they not laid off, we use a monthly dues figure of $34.75 per driver, which is the average amount the 10 drivers paid in June 2014. We apply no escalator for wage increases, as CSEA did not ask us to do so. Multiplying $34.75 by 10.5 months and 10 drivers, shows that CSEA lost about $3,648.75 per year. The current compliance stage covers a 6.5-year period from July 1, 2014, through December 31, 2020, meaning that CSEA lost approximately $23,716.88 before interest. In

recalculating the back dues owed, we use a corrected interest accrual period rather than using the ALJ's improper approach. Because losses were steady throughout the 6.5-year period, we need not perform an annual interest calculation. Instead, we can assume that the average accrual date for the entire amount of lost dues was halfway through the 6.5-year period, or October 1, 2017, leading to an interest accrual period of 3.25 years. Applying a simple interest rate of 7 percent per year, the total interest is 22.75 percent. Therefore, CSEA's losses and interest through December 31, 2020, are $23,716.88 x 1.2275 = $29,112.47.

IV.   The District's Obligation to Reimburse CSEA for Opposing a Frivolous Motion

In assessing whether to award legal expenses for sanctionable litigation conduct, PERB applies a standard akin to Rule 11 of the Federal Rules of Civil Procedure. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 11 (*Sacramento*).) In *Bellflower III*, *supra*, PERB Order No. Ad-475a, the Board found that the District filed a reconsideration request in bad faith, failed to comply with the basic requirements of PERB's regulation governing such requests, ignored controlling precedent, and had no serious or colorable argument for prevailing under existing law or for modifying existing law or establishing new law. (*Id*. at p. 5.) The Board further noted that, in a prior PERB compliance matter, the California Court of Appeal found the District engaged in similar dilatory tactics, such as: (1) forcing the Board to go to court to enforce a final order, and then appealing the trial court's resulting order "for no discernible purpose other than to delay" (*Public Employment Relations Bd. v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927, 941); (2) asserting waived arguments (*ibid*.); and (3) arguing for an "absurd" interpretation of

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governing regulations (*id*. at p. 942, fn. 12). For these reasons, the Board directed the District to "reimburse CSEA for reasonable attorney fees for the preparation and filing of its response to the request for reconsideration, the amount to be determined on remand along with all other outstanding compliance matters." (*Bellflower III*, *supra*, PERB Order No. Ad-475a, pp. 5-6.)[32]

Reviewing attorney time records, verified by declaration, is an accepted method for assessing the reasonableness of the number of hours spent litigating a matter. (See *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 396-397 (*Horsford*) [it is appropriate to rely on verified declarations of time records, absent a clear indication that the records are erroneous].) The goal is to ensure that the award is consistent with the prevailing market rate for professionals at a private law firm with a similar degree of experience. (*Sacramento*, *supra*, PERB Decision No. 2749, p. 16.) This also provides an orderly system for resolving fee disputes that does not require protracted litigation into the appropriateness of a fee demand. (*Id*. at p. 20, citing *Serrano v. Unruh* (1982) 32 Cal.3d 621, 642.)

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[32] *Sacramento*, *supra*, PERB Decision No. 2749 also explained that standard make-whole principles warrant awarding a charging party reasonable legal expenses it incurred in a separate proceeding to "remedy, lessen or stave off the impacts of the other party's unfair practice." (*Id*. at p. 11.) In that instance, the charging party need not establish the Rule 11-type factors. (*Ibid*.) For example, when a respondent either declines to appeal a Board order or exhausts all available appeals, but nonetheless fails or refuses to comply with the final Board order and thereby necessitates ancillary court litigation such as the enforcement proceedings in *Public Employment Relations Bd. v. Bellflower Unified School Dist.*, *supra*, 29 Cal.App.5th 927, a charging party may seek reimbursement for reasonable expenses it incurred as real party in interest in the ancillary litigation.

In declarations submitted to the ALJ, CSEA sought $5,680 for time three attorneys spent responding to the District's reconsideration request, plus $7,625 for time two attorneys spent preparing the attorney fee motion and accompanying declarations. We address each request in turn.

A. Fees Incurred Responding to the District's Reconsideration Request

When PERB awards legal expenses, either as make-whole relief or as a sanction like in this case, a party may seek reimbursement for "virtually any item for which a law firm customarily bills a client, including, inter alia, billable professional services (meaning attorney and law clerk services and certain 'paralegal' services that may be performed by legal assistants with or without a paralegal license), as well as incidental costs such as filing fees, electronic research fees, or fees for service of process." (*Sacramento*, *supra*, PERB Decision No. 2749, pp. 14-15.) PERB also awards pre-judgment and post-judgment interest on legal expenses. (*Id*. at p. 19.)

The ALJ correctly noted that the appropriate method for determining professional fees is generally the lodestar method, which involves multiplying a reasonable number of hours spent on a matter by a reasonable hourly rate for private legal professionals with similar experience. (*Sacramento*, *supra*, PERB Decision No. 2749, pp. 15-16.) PERB may adjust the resulting fee calculation upward or downward, thereby allowing some flexibility in assessing the fair market value of the legal services performed. (*Ibid*.) It is not appropriate, as the ALJ correctly noted, to reduce a lodestar award merely because some or all the legal professionals work for a nonprofit, government agency, or in-house legal department, or otherwise are paid a flat salary and do not bill clients for their time. (*Id*. at pp. 16-19 & fn. 10.)

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CSEA submitted declarations from three attorneys who worked on its response to the District's reconsideration request: CSEA Chief Counsel Andrew Kahn, CSEA Deputy Chief Counsel Christina Bleuler, and CSEA Lead Staff Attorney Sonja Woodward. CSEA did not request compensation for time spent by legal assistants, nor did CSEA seek ancillary litigation costs.

Woodward had been practicing law for 27 years at the time of her declaration. While she works primarily on matters arising under the Education Code, she also has PERB experience. Woodward has served as the principal attorney in numerous matters, including appellate work leading to published court opinions and PERB work leading to precedential Board decisions. CSEA argues that this experience justifies at least $425 per hour for her services. Woodward spent approximately 10 hours drafting CSEA's opposition to the District's reconsideration request. CSEA accordingly requests $4,250 for her work preparing the opposition.

Bleuler had been practicing law for 42 years at the time of her declaration. Bleuler's law practice involves topic areas akin to Woodward's, though Bleuler serves as a higher-level attorney and has practiced for more years. CSEA argues this experience justifies at least $525 per hour for her services. Bleuler spent approximately two hours revising CSEA's opposition to the District's reconsideration request. CSEA accordingly requests $1,050 for her work preparing the opposition.

Kahn had been practicing law for approximately 33 years at the time of his declaration. He served as a judicial law clerk for the chief judge for the Ninth Circuit Court of Appeals for one year and has been practicing labor law on behalf of unions since his clerkship. A San Francisco Superior Court judge found that $595 per hour

was a reasonable market rate for Kahn's work, though in this matter CSEA sought

only a discounted rate of $475 per hour for Kahn's services in his work on the brief in

question. Kahn spent four-fifths of an hour reviewing CSEA's opposition to the

District's reconsideration request. Accordingly, CSEA requests $380 for his work

preparing the opposition.

We agree with the ALJ that the requested rates are comparable to or less than

market rates charged by attorneys with similar experience. The District points to no

evidence or argument to the contrary, and we affirm the ALJ's conclusion that CSEA

has requested reasonable hourly rates.

The District argues that CSEA claims an unreasonable number of hours. To the

contrary, CSEA's attorneys were strikingly efficient in spending only 12.8 hours

opposing the District's reconsideration request. Though the District's reconsideration

request was frivolous, the length of the record, number of issues, and importance of

the matters at stake were all unusually high. CSEA's opposition to the reconsideration

request reflects high-level lawyering in a short amount of time.[33]

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[33] The ALJ found that CSEA should have provided more detail regarding the
hours it spent opposing the District's reconsideration request. The ALJ therefore
reduced CSEA's fee award by 10 percent, from $5,680 to $5,112. We do not endorse
the ALJ's 10 percent reduction, because: (1) the declarations in question covered a
discrete category of work carried out in a low number of hours; (2) the amount of time
claimed was not integrated with other, non-compensable work and was manifestly
reasonable for the work product produced; and (3) requiring greater efforts to prove
the value of an attorney fee award lowers the value of the award and therefore runs
contrary to *Sacramento, supra*, PERB Decision No. 2749, p. 20. However, CSEA took
no exception to the ALJ's 10 percent reduction, and we decline to exercise our
discretion to reverse it sua sponte.

Lastly, the ALJ correctly cited *Sacramento*, *supra*, PERB Decision No. 2749, for the proposition that interest accrues on litigation expenses. (*Id*. at p. 19.) The ALJ shall determine the amount of interest owed in the next compliance stage.

B. Fees Incurred Preparing the Attorney Fee Motion

Kahn spent 15 hours preparing CSEA's attorney fee motion. CSEA accordingly asked the ALJ to award it $7,125 for Kahn's work on the motion, plus an additional $500 for another attorney's small contribution to the motion.

In *Sacramento*, *supra*, PERB Decision No. 2749, we held as follows:

> "If disputes over the value of reimbursable legal expenses extend to such a degree that the Association is required to perform work beyond drafting an initial set of declarations and supporting briefing, then any additional, reasonable time the Association spends effectuating its legal expenses award is compensable as part of the make-whole remedy. (See, e.g., *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 580 [work on establishing amount of reasonable attorney's fees must be compensable in order to ensure that lengthy proceedings on that topic do not dissipate the value of order awarding legal expenses].) Normally, however, compliance proceedings to establish estimated reasonable legal expenses should involve review of sworn declarations and should not lead to protracted litigation."

(*Id*. at pp. 19-20.)

Applying these principles, the ALJ found that CSEA had not yet had to perform work beyond drafting an initial set of declarations and supporting briefing. The ALJ therefore declined CSEA's request to award it "fees on fees," viz., to reimburse CSEA for time spent on its attorney fee motion. The ALJ added, however, that if "CSEA is

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required to expend additional attorney time and resources to recover its attorneys' fees under the order in *Bellflower III*, additional sanctions may become appropriate."

CSEA excepted to the ALJ's conclusion, mainly arguing that: (a) it offered the District a stipulation about its fee calculations that would have avoided the need for filing a motion; (b) it proposed this stipulation without prejudice to any right the District had to seek judicial review of the Board's attorney fee order itself; and (c) preparing the motion was therefore a time expenditure caused by the District's obstinance. The District continues to disagree with the underlying fee award but urges in the alternative that the ALJ correctly declined to award CSEA fees on fees.

We affirm the ALJ's decision to deny fees on fees through June 17, 2021, the date of the proposed decision. At that time, CSEA attorneys had only performed the level of work that is non-compensable under *Sacramento*, *supra*, PERB Decision No. 2749, pp. 19-20, viz., drafting an initial set of declarations and supporting briefing.[34] However, we also affirm the ALJ's correct suggestion that CSEA's entitlement to fees on fees began to the extent it has had to expend further time to secure its award since June 17, 2021. CSEA shall recover fees and interest for all hours its attorneys reasonably have spent and will spend to secure the litigation expenses award from then until the District pays the award. (*Ibid*.) This includes, for example, time spent responding to the District's exceptions regarding attorney fee

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[34] The ALJ found CSEA had not yet had to engage in lengthy proceedings to secure its attorney fee award, but the ALJ simultaneously reduced CSEA's award for failing to perform additional work by providing more detail regarding its claimed 12.8 attorney hours. While these rulings are in tension with one another, the error, as discussed above, was in the ALJ's conclusion that CSEA did not sufficiently explain how its attorneys spent their claimed 12.8 hours.

issues. Otherwise, as we warned in *Sacramento*, lengthy proceedings requiring

substantial additional attorney hours will "dissipate the value" of the award. (*Id*. at

p. 19, citing *Graham*, *supra*, 34 Cal.4th at p. 580.)

V.   Calculating Drivers' Damages and Interest Through December 31, 2020

As noted above, CSEA argued to the ALJ that each driver would have worked

11 months per year, representing the employees' standard 10-month work year plus

one additional month during the ESY period. However, CSEA no longer challenges the

ALJ's contrary findings that: the District assigned ESY work using a seniority-based

bidding procedure (see *Bellflower I*, *supra*, PERB Decision No. 2544, adopting

proposed decision at p. 33); District witnesses credibly testified that the District

needed between four and six drivers for approximately one month of ESY work each

July; and therefore, on average, each driver would work one-half month during the

ESY program. We find no basis to disturb the ALJ's estimate that each driver would

have worked 10.5 months per year.

To determine drivers' average monthly wages, the ALJ looked at pre-layoff

wage information. Although CSEA asked the ALJ to calculate a monthly average using

only the drivers' wages in the first six months of 2014 (before the layoff), CSEA did not

except to the ALJ's decision to calculate an average using both 2013 and 2014 data,

given that the record reflects some annual variation in drivers' hours.[35] Calculating

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[35] The ALJ noted that for one driver, S.B., it was necessary to calculate average monthly wages using only 2014 data, since S.B. had been an Interim Manager from January to August 2013. The ALJ excluded S.B.'s 2013 wages from any calculations, thereby bringing the calculation closer to S.B.'s likely wages going forward. Thus, for every driver except S.B., the ALJ calculated 2013 average monthly income by dividing the employee's 2013 total gross wages by 10.5. The ALJ calculated each employee's

such reasonable approximations or averages is appropriate. (*San Jacinto Unified School District* (1994) PERB Decision No. 1078, p. 4 & adopting proposed decision at pp. 38-39.) Moreover, the ALJ's decision to calculate a monthly average in this manner adequately addressed the District's concern that employee hours fluctuated due to changes in the District's overtime needs or for other reasons.

It is standard to incorporate wage increases into backpay calculations, and the District offered no contrary argument or evidence. We affirm the ALJ's decision to incorporate four negotiated wage increases: a 4 percent raise retroactive to July 1, 2013 (R1); a 3 percent raise retroactive to July 1, 2014 (R2); a 3 percent raise effective July 1, 2015 (R3); and a 5.67 percent raise effective January 1, 2018 (R4).

Using these assumptions, we affirm the following formulas the ALJ explained for calculating projected wages through December 31, 2020.

2013 Projected Gross Lost Wages: Although the District did not lay off its drivers until six months into 2014, the drivers nonetheless incurred a loss the ALJ labeled as "2013 lost wages," as they did not receive the 4 percent R1 raise that the District ultimately implemented retroactive to July 1, 2013. The ALJ estimated the 2013 loss by taking 4 percent of average 2013 monthly wages for 4.5 months, corresponding to the average amount of time they worked from July through

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2014 average monthly income by dividing the employee's 2014 actual earnings by the six months worked prior to the July 1 layoff. The ALJ then calculated the average of the 2013 and 2014 monthly averages, except in S.B.'s case the ALJ used only the 2014 monthly average.

December 2013.[36] For all employees other than S.B., the ALJ used this formula: [2013 average monthly earnings] × 4% × 4.5 [months] = [2013 total gross lost wages].

2014 Projected Gross Lost Wages: The ALJ split 2014 into halves. In the first six months of the year, drivers' only loss was, once again, that they did not receive the 4 percent retroactive R1 raise. Thus, the ALJ augmented employees' actual District wages for the first half of 2014 by 4 percent as follows: [2014 actual earnings] × 4% = [2014 gross lost wages, first half].

For the last six months of 2014, the ALJ took three steps to project lost wages. First, the ALJ increased each driver's average monthly earnings by 4 percent to account for the R1 raise. The ALJ next increased that monthly figure by another 3 percent to account for the R2 raise that took effect retroactive to July 1, 2014. The ALJ lastly multiplied the resulting monthly average by the number of months the employee was working or seeking work (up to 4.5, corresponding to the average amount of time drivers would have worked from July through December 2014), as follows: [estimated monthly earnings (R1-R2)] × [#] [months] = [2014 gross lost wages, second half]. In the formula, (R1-R2) denotes that the estimated monthly earnings incorporated the first two wage increases.

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[36] For periods of time after July 1, 2014, the ALJ had no choice but to estimate hours that drivers would likely have worked. For the brief period before the layoff, when drivers lost only retroactive wage increases, the ALJ could have looked at actual hours worked, but neither party objected to the ALJ using the same approach for that timeframe, and in any event, it led to a reasonable approximation. The parties similarly do not dispute the ALJ's slightly modified approach for S.B.'s 2013 losses, which reasonably dealt with the fact that S.B. worked as an Interim Manager and earned a higher wage from January through August of 2013.

The sum of an employee's 2014 first half lost wages and 2014 projected second half gross lost wages results in that employee's 2014 total projected gross lost wages.

2015 Projected Gross Lost Wages: For 2015, it is again proper to project gross lost wages in halves, because of the 3 percent R3 raise that took effect on July 1, 2015. For the first half of the year, the ALJ calculated projected gross lost wages by multiplying estimated monthly earnings (R1-R2) by the number of months the employee was working or seeking work (up to 6, as drivers would be expected to work throughout the months of January through June 2015), as follows: [estimated monthly earnings (R1-R2)] × [#] [months] = [2015 projected gross lost wages, first half].

For the second half of the year, the ALJ augmented the estimated monthly earnings (R1-R2) by 3 percent to incorporate the R3 raise for the latter half of the year. The ALJ then multiplied this new estimated monthly average (R1-R3) by the number of months the employee was working or seeking work (up to 4.5, corresponding to the average amount of time they would have worked from July through December 2015), as follows: [estimated monthly earnings (R1-R3)] × [#] [months] = [2015 projected gross lost wages, second half].

The sum of an employee's 2015 projected first half lost wages and 2015 projected second half lost wages is that employee's 2015 total gross lost wages.

2016 and 2017 Projected Gross Lost Wages: There were no pay rate adjustments in 2016. Therefore, to calculate each driver's 2016 projected gross lost wages, the ALJ multiplied estimated monthly earnings (R1-R3) by the number of months the driver worked or sought work, with a maximum of 10.5 months, as follows: [estimated monthly earnings (R1-R3)] × [#] [months] = [2016 projected gross lost

wages]. Since there were also no pay rate changes in 2017, the same formula yields each employee's 2017 projected gross lost wages.

2018 Projected Gross Lost Wages: The 2018 lost wages projection must account for the 5.67 percent R4 raise that took effect on January 1, 2018. The ALJ therefore augmented each employee's estimated monthly earnings (R1-R3) by 5.67 percent. The ALJ then multiplied the resulting new monthly average (R1-R4) by the number of months each employee was working or seeking work, with a maximum of 10.5 months, as follows: [estimated monthly earnings (R1-R4)] × [#] [months] = [2018 projected gross lost wages].

2019 Projected Gross Lost Wages: There were no pay rate adjustments in 2019. Therefore, the ALJ calculated each driver's 2019 projected gross lost wages by multiplying the driver's estimated monthly earnings (R1-R4) by the number of months the driver was working or seeking work, with a maximum of 10.5 months, as follows: [estimated monthly earnings (R1-R4)] × [#] [months] = [2019 projected gross lost wages]. The District contends that its backpay liability under Sections B.2 and B.6 of the Board's Order in *Bellflower I* ended on July 1, 2019, the effective date of the 2019 Transportation Agreement. As explained above, however, the District did not establish that its renewed subcontracting cut off further liability. The ALJ therefore correctly found that the 2019 Transportation Agreement did not excuse the District's obligations to make employees whole for losses sustained after June 30, 2019.

2020 Projected Gross Lost Wages: There were no pay rate adjustments in 2020. Therefore, the ALJ calculated 2020 projected gross lost wages by multiplying a driver's estimated monthly earnings (R1-R4) by the number of months the driver was

working or seeking work, with a maximum of 10.5 months, as follows: [estimated

monthly earnings (R1-R4)] × [#] [months] = [2020 projected gross lost wages]. The

District contends that its backpay liability under Sections B.2 and B.6 of the Board's

Order in *Bellflower I* ended on July 1, 2020, the effective date of the 2020

Transportation Agreement. As explained above, however, the District did not establish

that its renewed subcontracting cut off any further liability. The ALJ therefore correctly

found that the 2020 Transportation Agreement did not excuse the District's obligations

to make employees whole for losses sustained after June 30, 2020.

The ALJ also correctly found that the District did not introduce evidence

demonstrating that the COVID-19 pandemic would have caused the drivers to suffer

reduced pay had they remained District employees. Fogerty, Hemet USD's Director of

Transportation, testified that Hemet USD employees continued driving for the District,

but primarily transported food rather than students. He did not testify that the

pandemic led to a reduction of hours or pay cuts of any kind.

Projected Benefit Losses: The ALJ calculated medical benefit losses as the

difference between a driver's post-layoff and pre-layoff benefit costs, as follows:

[actual post-layoff benefit cost] – [pre-layoff benefit cost] = [net benefit cost]. The ALJ

explained that for drivers whose medical costs varied month-to-month, it was

necessary to tabulate costs monthly. Neither party excepted to the ALJ's calculations.

The ALJ estimated retirement-related losses using two formulas. First, the ALJ

calculated that [2014 total District contributions] ÷ 6 = [pre-layoff average monthly

contribution]. Second, the ALJ calculated retirement-related losses as: ([pre-layoff

average monthly contribution] – [alternative monthly contribution]) × [#] [months] = [net

lost contribution]. None of the drivers claimed lost contributions for any period in which they earned alternative retirement benefits. Accordingly, the alternative monthly contribution variable is zero for each driver.

We proceed to detail for each driver: (1) pre-layoff employment history; (2) post-layoff mitigation efforts and subsequent employment (including unemployment benefits received, which is relevant to mitigation, as noted above in Part II(B)); (3) gross lost wages through December 31, 2020; (4) net lost wages (gross lost wages minus offsets) and interest accrued through December 31, 2020; (5) lost medical and/or retirement benefits and interest through December 31, 2020; and (6) total net damages and interest through December 31, 2020. Except as noted in this decision, we affirm and adopt the ALJ's calculations.

A. D.C.

1. Pre-Layoff Employment History

D.C. worked as a District Bus Driver for approximately 14 years. The District paid D.C. $40,518.29 in 2013 and $22,769.17 in 2014. She worked for the District 35 to 40 hours per week in 2014.

2. Post-Layoff Mitigation Efforts and Subsequent Employment

After her layoff, D.C. applied for unemployment benefits. She received $11,000 in 2014 unemployment benefits.

D.C. applied for bus driver positions at multiple school districts, including ABC Unified School District, Anaheim Union High School District (Anaheim UHSD), Bassett Unified School District (Bassett USD), Downey Unified School District (Downey USD),

Hemet USD, and Norwalk-La Mirada Unified School District. She did not receive offers in 2014 and did work for any employer other than the District that year.

D.C. heard about the Hemet USD job opening from E.V. in about September 2014. Hemet USD rejected D.C.'s application because she did not include a résumé, which she did not have at the time. She then contacted E.V., who told her that the starting wage at Hemet USD was approximately $17 per hour. By that point, D.C. believed that she could earn $23 per hour working at Anaheim UHSD.

Anaheim UHSD hired D.C., and she started working there on January 7, 2015. D.C. worked there continuously until at least the date she testified at the compliance hearing. There is no reason to believe that D.C. stopped working at Anaheim UHSD before the end of 2020. Anaheim UHSD paid D.C. $22,465.64 in 2015 wages. She testified that she only worked 20 hours per week during her probationary period, and her hours increased to 35 per week in 2016. Anaheim UHSD paid D.C. $35,697.06 in 2016 wages, $39,505.05 in 2017 wages, $39,095.99 in 2018 wages, and $43,922.18 in 2019 wages. In 2019, D.C. also started working for Lux Bus America, a private charter bus company. D.C.'s 2019 gross wages from Lux Bus were $14,768.90 according to her Lux Bus Form W-2 that year.

At the start of 2020, D.C. worked an average of 35 hours per week at Anaheim UHSD at a pay rate of $27.68 per hour. Due to COVID-19, Anaheim UHSD reduced her average hours to approximately 25 per week.

Before the pandemic, D.C. worked an average of 20 hours per week for Lux Bus America at a rate of $19 per hour. After the pandemic began, Lux Bus America

reduced D.C.'s hours to approximately 16 per week, until about October 9, 2020, when she stopped receiving any assignments for the remainder of 2020.

We affirm the ALJ's conclusion that D.C. at all times acted consistently with the inclination to work and be self-supporting, thereby satisfying her duty to mitigate damages from the time of the layoff until at least the end of 2020.

The ALJ also resolved a dispute about what portion (if any) of D.C.'s earnings at Lux Bus should offset her projected lost earnings. CSEA argued that earnings from hours worked beyond what D.C. would have worked at the District should not count. The ALJ, citing *NLRB v. Community Health Services* (10th Cir. 2016) 812 F.3d 768, 777, correctly noted that when an unlawfully laid-off employee takes on a primary replacement job but also a second job that he or she could have taken even absent the layoff, such extra wages do not normally offset lost wages.[37] The ALJ also noted, however, that Anaheim UHSD reduced D.C.'s hours by 10 hours per week after the onset of COVID-19. The ALJ therefore found that the first 10 hours D.C. worked for Lux Bus stood in for the 10 hours she lost from Anaheim UHSD, meaning these 10 weekly hours do offset her lost earnings for the 27-week period beginning April 1, 2020, and ending on October 9, 2020, when Lux Bus stopped providing D.C. with work. At 10 hours per week, for 27 weeks, and $19 per hour, the ALJ thus calculated

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[37] The ALJ referred to this policy as covering income from "moonlighting." This reference is correct to the extent that "moonlighting" means having more than one job at the same time, but incorrect if it suggests that a secondary job necessarily involves fewer work hours than a primary job. We use the word "primary" only to mean that a job occupies approximately the same hours as the employee's job before layoff.

D.C.'s 2020 offsetting income from Lux Bus as $5,130. CSEA does not dispute this determination.

3. Gross Lost Wages Through December 31, 2020

Estimated Monthly Earnings: The ALJ estimated monthly earnings according to the following three formulas: (1) [2013 actual earnings] ÷ 10.5 [months] = [2013 average monthly earnings]; (2) [2014 actual earnings] ÷ 6 [months] = [2014 average monthly earnings]; and (3) ([2013 average monthly earnings] + [2014 average monthly earnings]) ÷ 2 [years] = [estimated monthly earnings]. Applying these formulas to the evidence yields the following results: (1) $40,518.29 ÷ 10.5 = $3,858.88 [2013 average monthly earnings]; (2) $22,769.17 ÷ 6 = $3,794.86 [2014 average monthly earnings]; and (3) ($3,858.88 + $3,794.86) ÷ 2 [years] = $3,826.87 [estimated monthly earnings].

2013 Estimated Lost Wages: The ALJ estimated gross lost wages in 2013 according to the following formula: [2013 average monthly earnings] × 4% × 4.5 [months] = [2013 total gross lost wages]. Applying this formula to the evidence yields the following result: $3,858.88 × 4% × 4.5 = $694.60.

2014 Projected Gross Lost Wages:

2014 First Half Losses: The ALJ estimated gross lost wages for the first half of 2014 using the following formula: [2014 actual earnings] × 4% = [2014 lost wages, first half]. Applying this formula to the evidence yields the following result: $22,769.17 × 4% = $910.77 [2014 lost wages, first half].

2014 Second Half Losses: The ALJ estimated gross lost wages for the second half of 2014 using the following three formulas: (1) [estimated monthly earnings] + (4% × [estimated monthly earnings]) = [estimated monthly earnings (R1)]; (2) [estimated

monthly earnings (R1)] + (3% × [estimated monthly earnings (R1)]) = [estimated monthly earnings (R1-R2)]; and (3) [estimated monthly earnings (R1-R2)] × [#] [months] = [2014 gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $3,826.87 + (4% × $3,826.87) = $3,979.94 [estimated monthly earnings (R1)]; (2) $3,979.94 + (3% × $3,979.94) = $4,099.34 [estimated monthly earnings (R1-R2)]; and (3) $4,099.34 × 4.5 [months] = $18,447.03 [2014 projected gross lost wages, second half].

2014 Total Projected Gross Lost Wages: $910.77 + $18,447.03 = $19,357.80 [2014 total projected gross lost wages].

2015 Projected Gross Lost Wages:

2015 First Half Losses: The ALJ estimated gross lost wages in the first half of 2015 using the following formula: [estimated monthly earnings (R1-R2)] × [#] [months] = [2015 projected gross lost wages, first half]. Applying this formula to the evidence yields the following result: $4,099.34 × 6 [months] = $24,596.04 [2015 projected gross lost wages, first half].

2015 Second Half Losses: The ALJ estimated gross lost wages in the second half of 2015 using the following two formulas: (1) [estimated monthly earnings (R1-R2)] + (3% × [estimated monthly earnings (R1-R2)]) = [estimated monthly earnings (R1-R3)]; and (2) [estimated monthly earnings (R1-R3)] × [#] [months] = [2015 projected gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $4,099.34 + (3% × $4,099.34) = $4,222.32; and (2) $4,222.32 × 4.5 = $19,000.44 [2015 projected gross lost wages, second half].

2015 Total Projected Gross Lost Wages: $24,596.04 + $19,000.44 =

$43,596.48 [2015 total projected gross lost wages].

2016 Projected Gross Lost Wages: The ALJ estimated lost wages in 2016 using

the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2016

projected gross lost wages]. Applying this formula to the evidence yields the following

result: $4,222.32 × 10.5 [months] = $44,334.36 [2016 projected gross lost wages].

2017 Projected Gross Lost Wages: The ALJ estimated lost wages in 2017 using

the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2017

projected gross lost wages]. Applying this formula to the evidence yields the following

result: $4,222.32 × 10.5 [months] = $44,334.36 [2017 projected gross lost wages].

2018 Projected Gross Lost Wages: The ALJ estimated lost wages in 2018 using

the following two formulas: (1) [estimated monthly earnings (R1-R3)] + (5.67% ×

[estimated monthly earnings (R1-R3)]) = [estimated monthly earnings (R1- R4)]; and

(2) [estimated monthly earnings (R1-R4)] × [#] [months] = [2018 projected gross lost

wages]. Applying these formulas to the evidence yields the following results: (1)

$4,222.32 + (5.67% × $4,222.32) = $4,461.73 [estimated monthly earnings (R1- R4)];

and (2) $4,461.73 × 10.5 [months] = $46,848.12 [2018 projected gross lost wages].

2019 Projected Gross Lost Wages: The ALJ estimated lost wages in 2019 using

the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2019

projected gross lost wages]. Applying this formula to the evidence yields the following

result: $4,461.73 × 10.5 [months] = $46,848.12 [2019 projected gross lost wages].

2020 Projected Gross Lost Wages: The ALJ estimated 2020 gross lost wages

as follows: [estimated monthly earnings (R1-R4)] × [#] [months] = [2020 projected

gross lost wages]. Applying this formula to the evidence yields the following result:

$4,461.73 × 10.5 [months] = $46,848.12 [2020 projected gross lost wages].

4. Net Lost Wages and Interest Through December 31, 2020

The following chart shows D.C.'s projected gross lost wages, her income from subsequent employment, and the resulting net difference between those two amounts, from 2013 through 2020.

Year:	Projected Gross Lost Wages:	Alternative Income:	Net Lost Wages:
2013	$694.60	N/A[38]	$694.60
2014	$19,357.80	No offset income	$19,357.80
2015	$43,596.48	$22,465.64 (Anaheim UHSD)	$21,130.84
2016	$44,334.36	$35,697.06 (Anaheim UHSD)	$8.637.30
2017	$44,334.36	$39,505.05 (Anaheim UHSD)	$4,829.31
2018	$46,848.12	$39,095.99 (Anaheim UHSD)	$7,752.13
2019	$46,848.12	$43,922.18 (Anaheim UHSD)	$2,925.94
2020[39]	$46,848.12	$34,949.43 (Anaheim UHSD) + $5,130 (Lux Bus) = $40,079.43	$6,768.69

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[38] The 2013 losses come from missing a unit-wide wage increase that was retroactive to July 1, 2013, but paid out to the bargaining unit in 2014, after the layoff. Hence, none of the drivers were able to mitigate that loss.

[39] The record includes less evidence regarding D.C.'s 2020 income compared to other years, which is unsurprising given that the compliance hearing took place in 2020. The ALJ reasonably estimated her 2020 income from Anaheim UHSD. First, the ALJ looked at the prior year's earnings and applied this formula: [2019 earnings] ÷ 10.5 [months] = [2019 average monthly wages]. Thus, the ALJ calculated D.C.'s 2019 income from Anaheim UHSD as $43,922.18 ÷ 10.5 [months] = $4,183.06. The ALJ next multiplied the 2019 monthly figure by three months to determine her estimated wages from January through March 2020, before Anaheim UHSD reduced her hours due to the pandemic. This calculation is as follows: $4,183.06 × 3 [months] = $12,549.18 [estimated 2020 income (January to March)]. In March 2020, Anaheim UHSD reduced D.C.'s weekly hours by 28.6 percent, from 35 to 25 hours. To calculate wages after that time, the ALJ first reduced D.C.'s monthly average wages by 28.6 percent and then multiplied this reduced average by the 7.5 months remaining in the estimated work year, as follows: (1) $4,183.06 – (28.6% × $4,183.06) = $2,986.70;

Applying the ALJ's interest method yields the following chart showing interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2013	$694.60	7	$340.35	$1,034.95
2014	$19,357.80	7	$9,485.32	$28,843.12
2015	$21,130.84	6	$8,874.95	$30,005.79
2016	$8,637.30	5	$3,023.05	$11,660.35
2017	$4,829.31	4	$1,352.21	$6,181.52
2018	$7,752.13	3	$1,627.95	$9,380.08
2019	$2,925.94	2	$409.63	$3,335.57
2020	$6,768.69	1	$473.81	$7,242.50
Total	$72,096.61		$25,587.27	$97,683.88

5. <u>Lost Benefits</u>

Neither party challenged the ALJ's conclusion that D.C. has not claimed any lost benefits.

6. <u>Total Net Damages and Interest Through December 31, 2020</u>

D.C.'s total net damages and interest through December 31, 2020, equals $97,683.88.

B. <u>M.G.</u>

1. <u>Pre-Layoff Employment History</u>

M.G. worked as a District Bus Driver for approximately 10 years. The District paid M.G. $35,957.05 in 2013 and $20,592.14 in 2014. She worked between 35 to 40 hours per week at the District in 2014.

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and (2) $2,986.70 × 7.5 [months] = $22,400.25. Finally, adding $12,549.18 + $22,400.25, the ALJ arrived at $34,949.43 as a reasonable estimate of D.C.'s offsetting 2020 wages from Anaheim UHSD.

2. Post-Layoff Mitigation Efforts and Subsequent Employment

M.G. applied for unemployment benefits after receiving her layoff notice in June 2014. M.G. received $10,296 in unemployment benefits in 2014.[40]

In 2014, M.G. worked as an independent contractor for A-C Motorcoach, a private bus company. That year, M.G. earned $8,897.50, according to her 2014 A-C Motorcoach Form 1099-MISC. M.G. also worked as an independent contractor for Star-Dust Tours in 2014, earning $1,701 according to her Star-Dust Tours Form 1099- MISC. Neither of these entities made pension contributions on her behalf.

M.G. did not continue driving for either A-C Motorcoach or Star-Dust Tours in 2015. According to her 2015 Form 1099-G from EDD, M.G. received $858 in 2015 unemployment benefits. That year, Tobinworld hired her as a school bus driver, and Tobinworld paid her $7,085.82 in 2015 gross wages, according to her Form W-2. M.G. also worked as an independent contractor for Uber and Lyft that year. She earned $1,732.38 from Uber in 2015, according to a Form 1099-K from an Uber subsidiary. She received $2,095.45 from Lyft, according to information from her Lyft app. None of these entities made pension contributions on her behalf.

M.G. injured herself while working for Tobinworld in late May 2015, and she was unable to work for the rest of the year and for all of 2016. CSEA does not claim any lost wages for M.G. during this time, and we express no opinion on that issue. M.G. filed a claim for workers' compensation benefits and received $13,681.43 in disability benefits from December 2015 to November 2016.

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[40] Records from EDD bear the name "M.A." due to a change in M.G.'s marital status. It is undisputed that these documents refer to M.G..

In 2017, M.G. applied for driver positions at Whittier Union High School District and Long Beach Transit. In 2018, she applied for positions at Los Angeles Unified School District, Torrance Unified School District, and Newport-Mesa Unified School District. She did not receive an offer for any of those positions.

Starting in or around March 2017, M.G. worked as an independent contractor providing caregiver services to a client. She transported her client to hospital trips and other appointments. She also ran errands and otherwise assisted her client. In 2017, M.G. earned $18,399 as a caregiver, according to her testimony and the Form 1099- MISC her client sent her. In 2018, M.G. earned $19,337.50 as a caregiver according to her testimony and the Form 1099-MISC from her client that year. M.G. continued working as a caregiver until the end of October 2019. In 2019, M.G. earned $7,274 working as a caregiver, as reported on her 2019 Form 1040. M.G.'s client did not contribute to any pension on her behalf. M.G. did not work in 2020.

In October 2019, M.G. retired for purposes of CalPERS so that she could supplement her income with pension distributions. She received a $9,079.84 gross distribution in 2019 according to a CalPERS Form 1099-R that year.

We affirm the ALJ's conclusion that M.G. acted consistently with the inclination to work and be self-supporting through the end of October 2019, thereby satisfying her duty to mitigate damages from the time of the layoff through October 2019.[41] CSEA

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[41] As the ALJ pointed out, M.G. was under no obligation to remain in the same industry when searching for work and, in any event, she took a caregiver position after failing to obtain bus driver positions. Lack of job search success does not diminish backpay. (*Bellflower II*, *supra*, PERB Order No. Ad-475, p. 10.)

does not claim that M.G. suffered damages from November 2019 through December 2020.

    3. <u>Gross Lost Wages Through December 31, 2020</u>

<u>Estimated Monthly Earnings</u>: The ALJ estimated monthly earnings using the following three formulas: (1) [2013 actual earnings] ÷ 10.5 [months] = [2013 average monthly earnings]; (2) [2014 actual earnings] ÷ 6 [months] = [2014 average monthly earnings]; and (3) ([2013 average monthly earnings] + [2014 average monthly earnings]) ÷ 2 [years] = [estimated monthly earnings]. Applying these formulas to the evidence yields the following results: (1) $35,957.05 ÷ 10.5 = $3,424.48 [2013 average monthly earnings]; (2) $20,592.14 ÷ 6 = $3,432.02 [2014 average monthly earnings]; and (3) ($3,424.48 + $3,432.02) ÷ 2 [years] = $3,428.25 [estimated monthly earnings].

<u>2013 Estimated Lost Wages</u>: The ALJ calculated gross lost wages in 2013 using the following formula: [2013 average monthly earnings] × 4% × 4.5 [months] = [2013 total gross lost wages]. Applying this formula to the evidence yields the following result: $3,424.48 × 4% × 4.5 = $616.41.

<u>2014 Projected Gross Lost Wages</u>:

<u>2014 First Half Losses</u>: The ALJ estimated lost wages for the first half of 2014 using this formula: [2014 actual earnings] × 4% = [2014 gross lost wages, first half]. Applying this formula to the evidence yields this result: $20,592.14 × 4% = $823.69.

<u>2014 Second Half Losses</u>: The ALJ estimated gross lost wages for the second half of 2014 using the following three formulas: (1) [estimated monthly earnings] + (4% × [estimated monthly earnings]) = [estimated monthly earnings (R1)]; (2) [estimated monthly earnings (R1)] + (3% × [estimated monthly earnings (R1)]) = [estimated

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monthly earnings (R1-R2)]; and (3) [estimated monthly earnings (R1-R2)] × [#]

[months] = [2014 gross lost wages, second half]. Applying these formulas to the

evidence yields the following results: (1) $3,428.25 + (4% × $3,428.25) = $3,565.38;

(2) $3,565.38 + (3% × $3,565.38) = $3,672.34 [estimated monthly earnings (R1-R2)];

and (3) $3,672.34 × 4.5 = $16,525.53 [2014 projected gross lost wages, second half].

2014 Total Projected Gross Lost Wages: $823.69 + $16,525.53 = $17,349.22.

2015 Projected Gross Lost Wages: For most employees, the ALJ projected

gross lost wages in 2015 in halves. However, M.G. has not claimed any lost earnings

for the final seven months of 2015. Thus, the ALJ projected her gross lost wages

using the following formula: [estimated monthly earnings (R1-R2)] × 5 [months] =

[2015 total projected gross lost wages]. Applying this formula to the evidence yields

the following result, which CSEA does not challenge: $3,672.34 × 5 = $18,361.70.

2016 Projected Lost Wages: M.G. does not claim any lost income in 2016.

2017 Projected Gross Lost Wages: The ALJ estimated gross lost wages in

2017 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months]

= [2017 projected gross lost wages].[42] Applying this formula to the evidence yields the

following result: $3,782.51 × 10.5 = $39,716.36.

2018 Projected Gross Lost Wages: The ALJ estimated 2018 gross lost wages

using the following two formulas: (1) [estimated monthly earnings (R1-R3)] + (5.67% ×

[estimated monthly earnings (R1-R3)]) = [estimated monthly earnings (R1- R4)]; and

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[42] Because M.G. did not claim losses in the final seven months of 2015 or any
of 2016, the ALJ had to update her 2017 projected wages in a slightly different manner
than the other drivers. Neither party excepted to the ALJ using the following formula:
$3,672.34 + (3% × $3,672.34) = $3,782.51 [estimated monthly earnings (R1-R3)].

(2) [estimated monthly earnings (R1-R4)] × [#] [months] = [2018 projected gross lost wages]. Applying these formulas to the evidence yields the following results: (1) $3,782.51 + (5.67% × $3,782.51) = $3,996.98 [estimated monthly earnings (R1-R4)]; and (2) $3,996.98 × 10.5 = $41,968.29 [2018 projected gross lost wages].

2019 Projected Gross Lost Wages: The ALJ estimated 2019 lost wages using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2019 projected gross lost wages]. M.G. worked until the end of October 2019, when she ceased all attempts to mitigate damages. Thus, she was only in the labor force for 8.5 months that year, yielding the following result: $3,996.98 × 8.5 = $33,974.33.

2020 Projected Lost Wages: M.G. does not claim lost income in 2020.

4. Net Lost Wages and Interest Through December 31, 2020

The following chart shows M.G.'s projected gross lost wages, her income from subsequent employment,[43] and the resulting net difference between those two amounts, from 2013 through 2020.

Year:	Projected Gross Lost Wages:	Alternative Income:	Net Lost Wages:
2013	$616.41	N/A	$616.41
2014	$17,349.22	$1,701 (Star-Dust) + $8,897.50 (A-C Motorcoach) = $10,598.50	$6,750.72
2015	$18,361.70 (From January to May only. No claim for losses from June-December)	$7,085.82 (Tobinworld) + $1,732.38 (Uber) + $2,095.45 (Lyft) = $10,913.65	$7,448.05
2016	No claim for losses	(did not work)	$0.00
2017	$39,716.36	$18,399 (Caregiver)	$21,317.66
2018	$41,968.29	$19,337.50 (Caregiver)	$22,630.79

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[43] The ALJ wrongly included in M.G.'s offset income the 2019 pension distributions that she had earned through her District employment before the 2014 layoff. (See Part II(C).) We have corrected this error.

2019	$33,974.33 (Jan. to Oct. No claim for Nov.-Dec.)	$7,274 (Caregiver)	$26,700.33
2020	No claim for losses	(did not work)	$0.00

Applying the ALJ's interest method yields the following chart showing interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2013	$616.41	7	$302.04	$918.45
2014	$6,750.72	7	$3,307.85	$10,058.57
2015	$7,448.05	6	$3,128.18	$10,576.23
2016	$0.00	5	$0.00	$0.00
2017	$21,317.66	4	$5,968.94	$27,286.60
2018	$22,630.79	3	$4,752.47	$27,383.25
2019	$26,700.33	2	$3,738.05	$30,438.38
2020	$0.00	1	$0.00	$0.00
Total	$85,463.96		$21,197.53	$106,661.48

5. Lost Benefits

M.G. makes no claim for lost medical benefits, but she does claim retirement benefit losses. While M.G. was employed at the District, the District made CalPERS pension contributions on her behalf. The District contributed $2,383.15 to M.G.'s CalPERS plan in 2014 according to her District paycheck dated July 10, 2014. Her subsequent employers did not contribute to a pension on her behalf.

The ALJ estimated lost CalPERS contributions via two steps. First, the ALJ determined an average 2014 monthly contribution amount using this formula: [2014 total District contributions] ÷ 6 [months] = [average 2014 monthly contribution]. Applying this formula, the District's average 2014 monthly contribution on M.G.'s behalf was: $2,383.15 ÷ 6 = $397.19 [average 2014 monthly contribution]. Next, the ALJ estimated lost contributions for each year as follows: ([average 2014 monthly contribution] – [alternative monthly contribution made on employee's behalf, if any]) ×

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[#] [months] = [net lost contribution]. Although this formula undercounts contributions because it does not account for wage growth and other factors leading to increased contributions over time, CSEA has not challenged the formula. The following chart shows the ALJ's estimates for 2014-2020, using the above formula.

Year:	Lost Monthly Contribution Amount:	Offset Contributions:	Estimated Months Worked:	Net Lost Contributions:
2014	$397.19	$0.00	4.5	$1,787.36
2015	$397.19	$0.00	5	$1,985.95
2016	No loss incurred	$0.00	0	$0.00
2017	$397.19	$0.00	10.5	$4,170.50
2018	$397.19	$0.00	10.5	$4,170.50
2019	$397.19	$0.00	8.5	$3,376.12
2020	No loss incurred	$0.00	0	$0.00

Applying the same interest method used for wages, the following chart shows M.G.'s 2014-2020 lost CalPERS contributions with interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2014	$1,787.36	7	$875.81	$2,663.17
2015	$1,985.95	6	$834.10	$2,820.05
2016	$0.00	5	$0.00	$0.00
2017	$4,170.50	4	$1,167.74	$5,338.24
2018	$4,170.50	3	$875.80	$5,046.30
2019	$3,376.12	2	$472.66	$3,848.78
2020	$0.00	1	$0.00	$0.00
Total:	$15,490.43		$4,226.11	$19,716.54

6. Total Net Damages and Interest Through December 31, 2020

M.G.'s total net damages and interest through December 31, 2020, equals $106,661.48 + $19,716.54 = $126,378.02.

C. W.G.

1. Pre-Layoff Employment History

W.G. worked as a District Bus Driver for approximately 21 years. The District paid W.G. $44,238.35 in 2013 and $27,978.46 in 2014. He worked for the District 35 to 40 hours per week in 2014.

2. Post-Layoff Mitigation Efforts and Subsequent Employment

After his layoff, W.G. applied for unemployment benefits. According to W.G.'s 2014 1099-G from EDD, he received $6,531 in unemployment benefits.

W.G. began working as an independent contractor for a private charter bus company, Finish Line Charter. In 2014, W.G.'s income from Finish Line was $2,583.75. W.G. also worked as truck driver at Rallie Logistics in 2014, earning $5,092.98 that year.

W.G. continued working for Rallie Logistics in 2015, earning $16,834.08 according to his testimony and the year-to-date gross wages section of his Rallie Logistics paycheck dated December 17, 2015. In April 2015, City of Long Beach hired W.G. as a garbage truck driver. W.G. earned $28,427.80 in gross wages there according to his testimony and his City of Long Beach Form W-2 that year.[44]

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[44] It appears that during part of 2015, W.G. worked for City of Long Beach and Rallie Logistics at the same time. If the record allowed us to estimate which part of his Rallie Logistics income was a second job that he could have held while still a District employee, we would not count that income as an offset. (*NLRB v. Community Health Services*, *supra*, 812 F.3d at p. 777.) However, because the record does not allow us to determine W.G.'s average monthly salary at Rallie Logistics, we cannot allocate part of his Rallie Logistics earnings to the period in 2015 after he began working for City of Long Beach. Accordingly, the full amount of W.G.'s Rallie Logistics and City of Long Beach earnings for 2015 will offset gross backpay.

In 2016, W.G. continued working for City of Long Beach, which paid him $48,439.34 that year. W.G. also worked for Rallie Logistics in 2016. Since W.G.'s City of Long Beach position occupied approximately the same hours as he would have worked for the District, the Rallie Logistics wages do not offset gross backpay for 2016. (*NLRB v. Community Health Services*, *supra*, 812 F.3d at p. 777.)

In 2017, W.G. continued working for City of Long Beach, but not Rallie Logistics. City of Long Beach paid him $59,972.23 that year.

W.G. continued working for City of Long Beach in 2018 but stopped working there in July 2018 to work as a City of Los Angeles bus driver. In 2018, City of Long Beach paid him $37,495.95, while City of Los Angeles paid him $28,245.60.

In 2019, City of Los Angeles paid W.G. $106,435.43 in gross wages according to a Form W-2.

W.G. continued working for City of Los Angeles until at least December 8, 2020, the date he testified at the compliance hearing. There is no reason to believe that W.G. stopped working there before the end of 2020. In 2020, W.G. earned $62,540.89 in gross wages as of October 24, 2020, according to the year-to-date earnings section of his City of Los Angeles paycheck dated November 4, 2020.

We affirm the ALJ's conclusion that W.G. at all times acted consistently with the inclination to work and be self-supporting, thereby satisfying his duty to mitigate damages from the time of the layoff until at least the end of 2020.

3. <u>Gross Lost Wages Through December 31, 2020</u>

<u>Estimated Monthly Earnings</u>: The ALJ estimated monthly earnings using the following three formulas: (1) [2013 actual earnings] ÷ 10.5 [months] = [2013 average

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monthly earnings]; (2) [2014 actual earnings] ÷ 6 [months] = [2014 average monthly earnings]; and (3) ([2013 average monthly earnings] + [2014 average monthly earnings]) ÷ 2 [years] = [estimated monthly earnings]. Applying these formulas to the evidence yields the following results: (1) $44,238.35 ÷ 10.5 = $4,213.18 [2013 average monthly earnings]; (2) $27,978.46 ÷ 6 = $4,663.08 [2014 average monthly earnings]; and (3) ($4,213.18 + $4,663.08) ÷ 2 [years] = $4,438.13 [estimated monthly earnings].

2013 Estimated Lost Wages: The ALJ calculated gross lost wages in 2013 using the following formula: [2013 average monthly earnings] × 4% × 4.5 [months] = [2013 total gross lost wages]. Applying this formula to the evidence yields the following result: $4,213.18 × 4% × 4.5 = $758.37.

2014 Projected Gross Lost Wages:

2014 First Half Losses: The ALJ estimated gross lost wages for the first half of 2014 using the following formula: [2014 actual earnings] × 4% = [2014 lost wages, first half]. Applying this formula to the evidence yields the following result: $27,978.46 × 4% = $1,119.14.

2014 Second Half Losses: The ALJ estimated gross lost wages for the second half of 2014 using the following three formulas: (1) [estimated monthly earnings] + (4% × [estimated monthly earnings]) = [estimated monthly earnings (R1)]; (2) [estimated monthly earnings (R1)] + (3% × [estimated monthly earnings (R1)]) = [estimated monthly earnings (R1-R2)]; and (3) [estimated monthly earnings (R1-R2)] × [#] [months] = [2014 gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $4,438.13 + (4% × $4,438.13) = $4,615.66;

(2) $4,615.66 + (3% × $4,615.66) = $4,754.13 [estimated monthly earnings (R1-R2)];

and (3) $4,754.13 × 4.5 = $21,393.59 [2014 projected gross lost wages, second half].

2014 Total Projected Gross Lost Wages: $1,119.14 + $21,393.59 = $22,512.7.

2015 Projected Gross Lost Wages:

2015 First Half Losses: The ALJ estimated gross lost wages in the first half of
2015 using the following formula: [estimated monthly earnings (R1-R2)] × [#] [months]
= [2015 projected gross lost wages, first half]. Applying this formula to the evidence
yields the following result: $4,754.13 × 6 = $28,524.78.

2015 Second Half Losses: The ALJ estimated gross lost wages in the second
half of 2015 using the following two formulas: (1) [estimated monthly earnings
(R1- R2)] + (3% × [estimated monthly earnings (R1-R2)]) = [estimated monthly
earnings (R1-R3)]; and (2) [estimated monthly earnings (R1-R3)] × [#] [months] =
[2015 projected gross lost wages, second half]. Applying these formulas to the
evidence yields the following results: (1) $4,754.13 + (3% × $4,754.13) = $4,896.75;
and (2) $4,896.75 × 4.5 = $22,035.38 [2015 projected gross lost wages, second half].

2015 Total Projected Gross Lost Wages: $28,524.78 + $22,035.38 =
$50,560.16.

2016 Projected Gross Lost Wages: The ALJ estimated gross lost wages in
2016 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months]
= [2016 projected gross lost wages]. Applying this formula to the evidence yields the
following result: $4,896.75 × 10.5 [months] = $51,415.88.

2017 Projected Gross Lost Wages: The ALJ estimated gross lost wages in
2017 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months]

= [2017 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,896.75 × 10.5 [months] = $51,415.88.

2018 Projected Gross Lost Wages: The ALJ estimated 2018 gross lost wages using the following two formulas: (1) [estimated monthly earnings (R1-R3)] + (5.67% × [estimated monthly earnings (R1-R3)]) = [estimated monthly earnings (R1- R4)]; and (2) [estimated monthly earnings (R1-R4)] × [#] [months] = [2018 projected gross lost wages]. Applying these formulas to the evidence yields the following results: (1) $4,896.75 + (5.67% × $4,896.75) = $5,174.40 [estimated monthly earnings (R1-R4)]; and (2) $5,174.40 × 10.5 = $54,331.20 [2018 projected gross lost wages].

2019 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2019 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2019 projected gross lost wages]. Applying this formula to the evidence yields the following result: $5,174.40 × 10.5 = $54,331.20.

2020 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2020 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2020 projected gross lost wages]. Applying this formula to the evidence yields the following result: $5,174.40 × 10.5 = $54,331.20.

4. Net Lost Wages and Interest Through December 31, 2020

The following chart shows W.G.'s projected gross lost wages, his income from subsequent employment, and the resulting net difference between those two amounts, from 2013 through 2020.

Year:	Projected Gross Lost Wages:	Alternative Income:	Net Lost Wages:
2013	$758.37	N/A	$758.37
2014	$22,512.73	$2,583.75 (Finish Line) + $5,092.98 (Rallie) = $7,676.73	$14,836
2015	$50,560.16	$28,427.80 (Long Beach) + $16,834.08 (Rallie) = $45,261.88	$5,298.28
2016	$51,415.88	$48,439.34 (City of Long Beach)	$2,976.54
2017	$51,415.88	$59,972.23 (City of Long Beach)	$0.00 (Subsequent earnings exceed projected lost wages)
2018	$54,331.20	$37,495.95 (City of Long Beach) + $28,245.60 (City of Los Angeles) = $65,741.55	$0.00 (Subsequent earnings exceed projected lost wages)
2019	$54,331.20	$106,435.43 (City of Los Angeles)	$0.00 (Subsequent earnings exceed projected lost wages)
2020	$54,331.20	$62,540.89 (City of Los Angeles as of 10/24/20)[45]	$0.00 (Subsequent earnings exceed projected lost wages)

Applying the ALJ's interest method yields the following chart showing interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2013	$758.37	7	$371.60	$1,129.97
2014	$14,836	7	$7,269.64	$22,105.64
2015	$5,298.28	6	$2,225.28	$7,523.56
2016	$2,976.54	5	$1,041.79	$4,018.330.00
2017	$0.00	4	$0.00	$0.00
2018	$0.00	3	$0.00	$0.00
2019	$0.00	2	$0.00	$0.00
2020	$0.00	1	$0.00	$0.00
Total:	$20,892.65		$9,866.52	$34,777.50

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[45] By the time W.G. received his paycheck dated October 24, 2020, he already had earned sufficient 2020 income to exceed his projected District income that year. It is therefore unnecessary to estimate W.G.'s full 2020 income.

5. Lost Benefits

a. Medical Benefit Losses

After the layoff, W.G. enrolled into the Consolidated Omnibus Budget Reconciliation Act (COBRA) program to maintain the health benefits coverage he had while employed at the District. W.G. enrolled in COBRA when his regular District insurance would have run out.

While employed at the District, W.G.'s share of his medical premiums was only $14.50 per two-week pay period. To keep approximately the same level of benefits after the layoff, W.G. had to pay $534.34 per month between September 23, 2014, and May 5, 2015—when his medical benefits coverage from City of Long Beach took effect. However, for reasons the record does not reveal, W.G. makes no claim based on any COBRA premium cost corresponding to February 2015. W.G. therefore has a valid claim for medical benefit losses for eight of the nine months between September 2014 and May 2015. As shown in the following chart, the ALJ estimated his loss each month as the cost of his COBRA benefit less the cost he would have paid for medical benefits had he remained employed.

Year:	Medical Benefit Cost (COBRA):	Cost of District Benefit:	Estimated Months Worked:	Net Cost Increase:
2014	$535.34	$29	4	$2,025.36
2015	$535.34	$29	4	$2,025.36

Applying the same interest method used for wages, the following chart shows W.G.'s 2014-15 medical benefit losses, with interest through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2014	$2,025.36	7	$992.43	$3,017.79
2015	$2,025.36	6	$850.65	$2,876.01
Total:	$4,050.72		$1,843.08	$5,893.80

b. <u>Retirement Benefit Losses</u>

While W.G. was employed at the District, the District made CalPERS pension contributions on his behalf. The District contributed $2,422.70 into W.G.'s CalPERS pension plan in 2014 according to his testimony and his District paycheck dated June 10, 2014. Starting in April 2015, City of Long Beach began contributing to CalPERS on his behalf.

The ALJ estimated lost CalPERS contributions via two steps. First, the ALJ determined an average 2014 monthly contribution amount using this formula: [2014 total District contributions] ÷ 6 [months] = [average 2014 monthly contribution]. Applying this formula, the District's average 2014 monthly contribution on W.G.'s behalf was: $2,422.70 ÷ 6 = $403.78 [average monthly contribution]. Next, the ALJ estimated lost contributions for each year as follows: ([average 2014 monthly contribution] − [alternative monthly contribution made on employee's behalf, if any]) × [#] [months] = [net lost contribution]. Although this formula undercounts contributions because it does not account for wage growth and other factors leading to increased contributions over time, CSEA has not challenged the formula.

Here, CSEA has only claimed that W.G. lost retirement benefits for the second half of 2014 and the first three months of 2015, before he began working at City of Long Beach. Although this approach likely undercounts losses because it does not account for factors that would make the benefit less valuable at City of Long Beach (including lesser pay in 2015 and 2016), CSEA accedes to this approach, and we therefore do not disturb it. The following chart shows the ALJ's estimates for the second half of 2014 and first three months of 2015, using the above formula.

Year:	Lost Monthly Contribution Amount:	Offset Contributions:	Estimated Months Worked:	Net Lost Contributions:
2014	$403.78	$0.00	4.5	$1,817.01
2015	$403.78	$0.00	3	$1,211.34

Applying the same interest method used for wages, the following chart shows

W.G.'s 2014-15 retirement losses, with interest through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2014	$1,817.01	7	$890.33	$2,707.34
2015	$1,211.34	6	$508.76	$1,720.10
Total:	$3,028.35		$1,399.09	$4,427.44

6. Total Net Damages and Interest Through December 31, 2020

W.G.'s total net damages and interest through December 31, 2020, equals

$34,777.50 + $5,893.80 + $4,427.44 = $45,098.74.

D. R.G.

1. Pre-Layoff Employment History

R.G. worked as a District Bus Driver for approximately 11 years. The District

paid R.G. $31,577 in 2013 and $22,202 in 2014. She worked for the District

approximately 35 hours per week in 2014.[46]

2. Post-Layoff Mitigation Efforts and Subsequent Employment

After the District laid her off, R.G. applied for unemployment benefits. She

reported receiving $2,352 in unemployment benefits on her 2014 Form 1040.

R.G. applied for bus driving jobs at multiple employers, including City of

Commerce, Baldwin Park Unified School District, Bassett USD, Hacienda La Puente

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[46] R.G. had $5,614 in 2014 rental income. Because she had the rental property when she worked for the District, this income does not offset her losses.

Unified School District, Walnut Valley Unified School District, and West Covina School District. City of Commerce hired her in August 2014. R.G. also worked as an independent contractor for a charter bus company called Transit Systems in 2014, and on December 1, 2014, Bassett USD hired R.G. as a bus driver. R.G. earned $14,680 in 2014 gross wages from City of Commerce and $3,191 in 2014 income from Transit Systems, as she reported on her 2014 Form 1040 and confirmed in her testimony. R.G. earned $2,620.46 in 2014 wages from Bassett USD.[47]

R.G. continued working for both City of Commerce and Bassett USD from 2015 through most of 2019. She earned $21,033 in 2015 wages from City of Commerce, while Bassett USD paid her $46,107.99 in 2015 wages. In 2016, City of Commerce paid R.G. $21,612.22 in gross wages, while Bassett USD paid her $45,677.27. In 2017, City of Commerce paid R.G. $14,583.10 in gross wages, while Bassett USD paid her $49,447.85. In 2018, R.G. earned $12,730.05 in gross wages from City of Commerce, while Bassett USD paid her $61,075.55 in gross wages. In 2019, R.G. earned $13,602.85 in gross wages from City of Commerce, while Bassett USD paid her $71,490.17 in gross wages. R.G. resigned from City of Commerce around November 2019.

R.G. continued working for Bassett USD for part of 2020. She earned $18,591.25 there in 2020, according to her testimony and the year-to-date earnings section of her Bassett USD paycheck dated March 10, 2020. She left Bassett USD to

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[47] The findings as to R.G.'s income from Bassett USD and City of Commerce comes from those employers' pay records, as well as from R.G.'s testimony and her tax returns.

work for Centralia Unified School District (Centralia USD) that year. Centralia USD

paid R.G. $50,268.69 in gross 2020 wages as of October 31, 2020, according to her

testimony and her Centralia USD paycheck dated November 10, 2020.

We affirm the ALJ's conclusion that R.G. at all times acted consistently with the

inclination to work and be self-supporting, thereby satisfying her duty to mitigate

damages from the time of the layoff until at least the end of 2020.

3. Gross Lost Wages Through December 31, 2020

Estimated Monthly Earnings: The ALJ estimated monthly earnings using the

following three formulas: (1) [2013 actual earnings] ÷ 10.5 [months] = [2013 average

monthly earnings]; (2) [2014 actual earnings] ÷ 6 [months] = [2014 average monthly

earnings]; and (3) ([2013 average monthly earnings] + [2014 average monthly

earnings]) ÷ 2 [years] = [estimated monthly earnings]. Applying these formulas to the

evidence yields the following results: (1) $31,577 ÷ 10.5 = $3,007.33 [2013 average

monthly earnings]; (2) $22,202 ÷ 6 = $3,700.33 [2014 average monthly earnings]; and

(3) ($3,007.33 + $3,700.33) ÷ 2 [years] = $3,353.83 [estimated monthly earnings].

2013 Estimated Lost Wages: The ALJ calculated gross lost wages in 2013

using the following formula: [2013 average monthly earnings] × 4% × 4.5 [months] =

[2013 total gross lost wages]. Applying this formula to the evidence yields the following

result: $3,007.33 × 4% × 4.5 = $541.32.

2014 Projected Gross Lost Wages:

2014 First Half Losses: The ALJ estimated gross lost wages for the first half of

2014 using the following formula: [2014 actual earnings] × 4% = [2014 gross lost

wages, first half]. Applying this formula to the evidence yields the following result: $22,202 × 4% = $888.08 [2014 gross lost wages, first half].

2014 Second Half Losses: The ALJ estimated gross lost wages for the second half of 2014 using the following three formulas: (1) [estimated monthly earnings] + (4% × [estimated monthly earnings]) = [estimated monthly earnings (R1)]; (2) [estimated monthly earnings (R1)] + (3% × [estimated monthly earnings (R1)]) = [estimated monthly earnings (R1-R2)]; and (3) [estimated monthly earnings (R1-R2)] × [#] [months] = [2014 gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $3,353.83 + (4% × $3,353.83) = $3,487.98; (2) $3,487.98 + (3% × $3,487.98) = $3,592.62 [estimated monthly earnings (R1-R2)]; and (3) $3,592.62 × 4.5 = $16,166.79 [2014 projected gross lost wages, second half].

2014 Total Projected Gross Lost Wages: $888.08 + $16,166.79 = $17,054.87.

2015 Projected Gross Lost Wages:

2015 First Half Losses: The ALJ estimated gross lost wages in the first half of 2015 using the following formula: [estimated monthly earnings (R1-R2)] × [#] [months] = [2015 projected gross lost wages, first half]. Applying this formula to the evidence yields the following result: $3,592.62 × 6 = $21,555.72.

2015 Second Half Losses: The ALJ estimated gross lost wages in the second half of 2015 using the following two formulas: (1) [estimated monthly earnings (R1- R2)] + (3% × [estimated monthly earnings (R1-R2)]) = [estimated monthly earnings (R1-R3)]; and (2) [estimated monthly earnings (R1-R3)] × [#] [months] = [2015 projected gross lost wages, second half]. Applying these formulas to the

evidence yields the following results: (1) $3,592.62 + (3% × $3,592.62) = $3,700.40; and (2) $3,700.40 × 4.5 = $16,651.80 [2015 projected gross lost wages, second half].

2015 Total Projected Gross Lost Wages: $21,555.72 + $16,651.80 = $38,207.52.

2016 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2016 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2016 projected gross lost wages]. Applying this formula to the evidence yields the following result: $3,700.40 × 10.5 = $38,854.20.

2017 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2017 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2017 projected gross lost wages]. Applying this formula to the evidence yields the following result: $3,700.40 × 10.5 = $38,854.20.

2018 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2018 using the following two formulas: (1) [estimated monthly earnings (R1-R3)] + (5.67% × [estimated monthly earnings (R1-R3)]) = [estimated monthly earnings (R1- R4)]; and (2) [estimated monthly earnings (R1-R4)] × [#] [months] = [2018 projected gross lost wages]. Applying these formulas to the evidence yields the following results: (1) $3,700.40 + (5.67% × $3,700.40) = $3,910.21 [estimated monthly earnings (R1-R4)]; and (2) $3,910.21 × 10.5 = $41,057.21 [2018 projected gross lost wages].

2019 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2019 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months]

= [2019 projected gross lost wages]. Applying this formula to the evidence yields the following result: $3,910.21 × 10.5 = $41,057.21.

2020 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2020 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2020 projected gross lost wages]. Applying this formula to the evidence yields the following result: $3,910.21 × 10.5 = $41,057.21.

4. Net Lost Wages and Interest Through December 31, 2020

The following chart shows R.G.'s projected gross lost wages, her income from subsequent employment, and the resulting net difference between those two amounts, from 2013 through 2020.

Year:	Projected Gross Lost Wages:	Alternative Income:	Net Lost Wages:
2013	$541.32	N/A	$541.32
2014	$17,054.87	$14,680 (City of Commerce) + $3,191 (Transit Systems) + $2,620.46 (Bassett USD) = $20,491.46	$0.00 (Subsequent earnings exceed projected lost wages)
2015	$38,207.52	$21,033 (City of Commerce) + $46,107.99 (Bassett USD) = $67,140.99	$0.00 (Subsequent earnings exceed projected lost wages)
2016	$38,854.20	$21,612.22 (City of Commerce) + $45,677.27 (Bassett USD) = $67,289.49	$0.00 (Subsequent earnings exceed projected lost wages)
2017	$38,854.20	$14,583.10 (City of Commerce) + $49,447.85 (Bassett USD) = $64,030.95	$0.00 (Subsequent earnings exceed projected lost wages)
2018	$41,057.21	$12,730.05 (City of Commerce) + $61,075.55 (Bassett USD) = $73,805.60	$0.00 (Subsequent earnings exceed projected lost wages)
2019	$41,057.21	$13,602.85 (City of Commerce) + $71,490.17 (Bassett USD) = $85,093.02	$0.00 (Subsequent earnings exceed projected lost wages)

| 2020 | $41,057.21 | $18,591.25 (Bassett USD as of 3/10/2020) + $50,268.69 (Centralia USD as of 10/31/2020) = $68,859.94[48] | $0.00 (Subsequent earnings exceed projected lost wages) |

Applying the ALJ's interest method yields the following chart showing interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2013	$541.32	7	$265.25	$806.57

5. Lost Benefits

R.G. makes no claim for lost retirement benefits, but she does claim medical benefit losses. While M.G. was employed at the District, she paid $30 for medical, dental, and vision benefits for herself and her family every two weeks. After the layoff, R.G. paid for medical benefits for herself and her family while she was employed at Basset USD and Centralia USD. Her medical benefits at those employers were like her benefits while she worked at the District, but at a higher cost. She had the same benefits provider at all three employers.

R.G.'s medical benefit costs while she worked for Bassett USD varied from month to month and from year to year. She requested and received a statement of her costs over the course of her employment. According to that statement, R.G. paid $566.16 for medical benefits in 2014. In 2015, she paid $3,642.65 for medical, dental, and vision benefits. In 2016, she paid $3,084.55 for medical, dental, and vision

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[48] By the time R.G. received her paycheck dated October 31, 2020, she already had earned sufficient 2020 income to exceed her projected District income that year. It is therefore unnecessary to estimate R.G.'s full 2020 income.

benefits. In 2017, she paid $3,703.31 for medical, dental, and vision benefits. In 2018, she paid $2,861.48 for medical, dental, and vision benefits.

At Centralia USD, R.G. had to pay $373.30 per month for medical benefits over the course of approximately seven months.

The ALJ found that R.G. incurred medical benefit losses each year except 2019, as shown on the following chart.

Year:	Medical Benefit Cost (Bassett/Centralia):	Projected Cost of District Benefit:	Estimated Months Worked:	Net Cost Increase:
2014	$566.16 (Bassett USD)	$60	1	$506.16
2015	$3,642.65 (Bassett USD)	$600	10	$3,042.65
2016	$3,084.55 (Bassett USD)	$600	10	$2,484.55
2017	$3,703.31 (Bassett USD)	$600	10	$3,103.31
2018	$2,861.48 (Bassett USD)	$420	7	$2,441.48
2019	$0.00	N/A	N/A	$0.00
2020	$2,565.87 (Centralia USD)	$420	7	$2,145.87

Applying the same interest method used for wages, the following chart shows R.G.'s 2014-2020 medical benefit losses with interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2014	$506.16	7	$248.02	$754.18
2015	$3,042.65	6	$1,277.91	$4,320.56
2016	$2,484.55	5	$869.59	$3,354.14
2017	$3,103.31	4	$868.93	$3,972.24
2018	$2,441.48	3	$512.71	$2,954.19
2019	$0.00	2	$0.00	$0.00
2020	$2,145.87	1	$150.21	$2,296.08
Total:	$13,724.02		$3,927.37	$17,651.39

6. Total Net Damages and Interest Through December 31, 2020

R.G.'s total net damages and interest through December 31, 2020, equals $806.57 + $17,651.39 = $18,457.96.

E. T.H.

1. Pre-Layoff Employment History

T.H. worked as a District Bus Driver for approximately 11 years. The District paid T.H. $30,710 in 2013 and $21,577.28 in 2014. She worked for the District approximately 30 hours per week in 2014.

2. Post-Layoff Mitigation Efforts and Subsequent Employment

T.H. applied for unemployment benefits after receiving the layoff notice. She reported $2,877 in unemployment benefits on her 2014 Form 1040.

T.H. applied for bus driver positions at multiple employers, including Bassett USD, Fullerton Unified School District (Fullerton USD), Hacienda La Puente Unified School District, Los Angeles Unified School District, Long Beach Transit, and Los Alamitos Unified School District. Fullerton USD hired T.H. as a bus driver in August 2014. T.H. did not separately report her wages from Fullerton USD on her 2014 Form 1040, but she did report total gross wages in the amount of $27,509. She confirmed in her testimony that this amount was her total gross earnings from both the District and Fullerton USD. Subtracting her 2014 District gross wages ($21,577.28) from this total, the ALJ calculated that her Fullerton USD gross wages were $5,931.72

that year. T.H. also worked as an independent contractor for Finish Line Charter. Her 2014 net income there was $6,258 according to her 2014 Form 1040.[49]

T.H. continued working for Fullerton USD in 2015 but resigned in March to take a bus driver position at Bassett USD. She reported $35,300 in total 2015 gross wages on her 2015 Form 1040. She testified that this represented her total earnings from both Fullerton USD and Bassett USD. T.H. also worked as an independent contractor for Finish Line Charter in 2015. Her net income there was $2,829 according to her testimony and her 2015 Form 1040.[50] Bassett USD released T.H. while she was still on probation. T.H. again applied for unemployment benefits and reported $1,323 in benefits on her 2015 Form 1040.

In February 2016, Downey USD hired T.H. for a full-time bus driver position. She earned $22,513 in 2016 gross wages from Downey USD.[51] She also received $1,399 in 2016 net income as an independent contractor for Finish Line Charter and $5,164 in 2016 unemployment benefits.[52]

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[49] Because the record does not show when in 2014 T.H. performed work for Finish Line Charter nor whether she worked approximately the same number of hours per week at Fullerton USD as she did at the District, the full amount of T.H.'s Finish Line Charter earnings for 2014 will offset gross backpay.

[50] Because the record does not show when in 2015 T.H. performed work for Finish Line Charter nor whether she worked approximately the same number of hours per week at Fullerton USD or Bassett USD as she did at the District, the full amount of T.H.'s Finish Line Charter earnings for 2015 will offset gross backpay.

[51] All findings as to Downey USD income comes from Downey USD records.

[52] Because the record does not show whether T.H.'s 2016 work for Finish Line Charter overlapped with her full-time employment at Downey USD, the full amount of T.H.'s Finish Line Charter earnings for 2016 will offset gross backpay.

T.H. continued working for Downey USD in 2017, earning $33,037 in gross wages. T.H. also worked as an independent contractor in 2017, for Finish Line Charter, Lyft, and Uber Eats, earning $7,081 in gross independent contractor income, which she reported on her 2017 Form 1040 and confirmed through her testimony. However, because the Downey USD employment was full time, T.H.'s independent contractor income does not offset gross backpay for 2017. (*NLRB v. Community Health Services*, *supra*, 812 F.3d at p. 777.)

T.H. continued working for Downey USD in 2018, earning $39,320.18. T.H. also worked for Finish Line Charter, Lyft, Uber Eats, and Postmates in 2018, earning $8,725 in gross income from these sources. Because she worked for Downey USD full time, T.H.'s independent contractor income does not offset gross backpay for 2018. (*NLRB v. Community Health Services*, *supra*, 812 F.3d at p. 777.)

T.H. continued working for Downey USD in 2019, earning $42,724.59. Because her Downey USD income exceeded what she would have earned at the District, T.H. suffered no net loss in 2019 income.[53]

T.H. continued working for Downey USD in 2020, earning $36,776 in gross wages as of November 16, 2020, according to her testimony and the year-to-date earnings section of her paycheck dated November 24, 2020. CSEA's calculations

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[53] T.H. continued driving for Lyft and Uber Eats as an independent contractor in 2019. She received $2,856.58 from Lyft and $2,342.77 from Uber Eats. This 2019 independent contractor income is immaterial because T.H.'s 2019 income from Downey USD exceeded what she would have earned at the District that year. In any event, T.H. earned the independent contractor income for work beyond her full-time schedule at Downey USD, meaning it would not offset backpay. (*NLRB v. Community Health Services*, *supra*, 812 F.3d at p. 777.)

show additional 2020 income of $3,988.65 for the remainder of 2020. This means that T.H. suffered no net loss in 2020 income.

We affirm the ALJ's conclusion that T.H. at all times acted consistently with the inclination to work and be self-supporting, thereby satisfying her duty to mitigate damages from the time of the layoff until at least the end of 2020.

3. Gross Lost Wages Through December 31, 2020

Estimated Monthly Earnings: The ALJ estimated monthly earnings using the following three formulas: (1) [2013 actual earnings] ÷ 10.5 [months] = [2013 average monthly earnings]; (2) [2014 actual earnings] ÷ 6 [months] = [2014 average monthly earnings]; and (3) ([2013 average monthly earnings] + [2014 average monthly earnings]) ÷ 2 [years] = [estimated monthly earnings]. Applying these formulas to the evidence yields the following results: (1) $30,710 ÷ 10.5 = $2,924.76 [2013 average monthly earnings]; (2) $21,577.28 ÷ 6 = $3,596.21 [2014 average monthly earnings]; and (3) (2,924.76 + $3,596.21) ÷ 2 [years] = $3,260.49 [estimated monthly earnings].

2013 Estimated Lost Wages: The ALJ calculated gross lost wages in 2013 using the following formula: [2013 average monthly earnings] × 4% × 4.5 [months] = [2013 total gross lost wages]. Applying this formula to the evidence yields the following result: $2,924.76 × 4% × 4.5 = $526.46.

2014 Projected Gross Lost Wages:

2014 First Half Losses: The ALJ estimated gross lost wages for the first half of 2014 using the following formula: [2014 actual earnings] × 4% = [2014 lost wages, first half]. Applying this formula to the evidence yields the following result: $21,577.28 × 4% = $863.09.

2014 Second Half Losses: The ALJ estimated gross lost wages for the second half of 2014 using the following three formulas: (1) [estimated monthly earnings] + (4% × [estimated monthly earnings]) = [estimated monthly earnings (R1)]; (2) [estimated monthly earnings (R1)] + (3% × [estimated monthly earnings (R1)]) = [estimated monthly earnings (R1-R2)]; and (3) [estimated monthly earnings (R1-R2)] × [#] [months] = [2014 gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $3,260.49 + (4% × $3,260.49) = $3,390.91; (2) $3,390.91 + (3% × $3,390.91) = $3,492.64 [estimated monthly earnings (R1-R2)]; and (3) $3,492.64 × 4.5 = $15,716.88 [2014 projected gross lost wages, second half].

2014 Total Projected Gross Lost Wages: $863.09 + $15,716.88 = $16,579.97.

2015 Projected Gross Lost Wages:

2015 First Half Losses: The ALJ estimated gross lost wages in the first half of 2015 using the following formula: [estimated monthly earnings (R1-R2)] × [#] [months] = [2015 projected gross lost wages, first half]. Applying this formula to the evidence yields the following result: $3,492.64 × 6 = $20,955.84.

2015 Second Half Losses: The ALJ estimated gross lost wages in the second half of 2015 using the following two formulas: (1) [estimated monthly earnings (R1- R2)] + (3% × [estimated monthly earnings (R1-R2)]) = [estimated monthly earnings (R1-R3)]; and (2) [estimated monthly earnings (R1-R3)] × [#] [months] = [2015 projected gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $3,492.64 + (3% × $3,492.64) = $3,597.42; and (2) $3,597.42 × 4.5 = $16,188.39 [2015 projected gross lost wages, second half].

2015 Total Projected Gross Lost Wages: $20,955.84 + $16,188.39 = $37,144.23.

2016 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2016 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2016 projected gross lost wages]. Applying this formula to the evidence yields the following result: $3,597.42 × 10.5 = $37,772.91.

2017 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2017 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2017 projected gross lost wages]. Applying this formula to the evidence yields the following result: $3,597.42 × 10.5 = $37,772.91.

2018 Projected Gross Lost Wages: The ALJ estimated 2018 gross lost wages using the following two formulas: (1) [estimated monthly earnings (R1-R3)] + (5.67% × [estimated monthly earnings (R1-R3)]) = [estimated monthly earnings (R1- R4)]; and (2) [estimated monthly earnings (R1-R4)] × [#] [months] = [2018 projected gross lost wages]. Applying these formulas to the evidence yields the following results: (1) $3,597.42 + (5.67% × $3,597.42) = $3,801.39 [estimated monthly earnings (R1-R4)]; and (2) $3,801.39 × 10.5 = $39,914.60 [2018 projected gross lost wages].

2019 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2019 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2019 projected gross lost wages]. Applying this formula to the evidence yields the following result: $3,801.39 × 10.5 = $39,914.60.

2020 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2020 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months]

= [2020 projected gross lost wages]. Applying this formula to the evidence yields the following result: $3,801.39 × 10.5 = $39,914.60.

4. <u>Net Lost Wages and Interest Through December 31, 2020</u>

The following chart shows T.H.'s projected gross lost wages, her income from subsequent employment, and the resulting net difference between those two amounts, from 2013 through 2020.

Year:	Projected Gross Lost Wages:	Alternative Income:	Net Lost Wages:
2013	$526.46	N/A	$526.46
2014	$16,579.97	$5,931.72 (Fullerton USD) + $6,258 (Finish Line) = $12,189.72	$4,390.25
2015	$37,144.23	$35,300 (Fullerton USD and Bassett USD combined) + $2,829 (Finish Line) = $38,129	$0.00 (Subsequent earnings exceed projected lost wages)
2016	$37,772.91	$22,513 (Downey USD) + $1,399 (Finish Line) = 23,912	$13,860.91
2017	$37,772.91	$33,037 (Downey USD)	$ 4,735.91
2018	$39,914.60	$39,320.18 (Downey USD)	$ 594.42
2019	$39,914.60	$42,724.59 (Downey USD)	$0.00 (Subsequent earnings exceed projected lost wages)
2020	$39,914.60	$36,776.00 (Downey USD as of 11/16/20) + $3,988.65 (additional income per CSEA) = $40,764.65	$0.00 (Subsequent earnings exceed projected lost wages)

Applying the ALJ's interest method yields the following chart showing interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2013	$526.46	7	$257.97	$784.43
2014	$4,390.25	7	$2,151.20	$6,541.47
2015	$0.00	6	$0.00	$0.00
2016	$13,860.91	5	$4,851.32	$18,712.23
2017	$4,735.91	4	$1,326.05	$6,061.96
2018	$594.42	3	$124.83	$719.25
2019	$0.00	2	$0.00	$0.00
2020	$0.00	1	$0.00	$0.00
Total:	$24,107.95		$8,711.37	$32,819.34

5. Lost Benefits

T.H. makes no claim for lost retirement benefits, but she does claim medical benefit losses. While employed by the District, T.H. contributed $30 per half-month period toward her medical, dental, and vision benefits plan for herself and her family. Downey USD similarly provided medical benefits for T.H. and her family. Neither party excepts to the following ALJ findings: (1) T.H.'s medical benefits provider was the same at Downey USD as it had been at the District, but T.H. had to pay more for medical benefits at Downey USD; (2) in 2016, T.H. paid $1,305.64 over seven months, and in 2017 the cost was $1,659.78 over nine months; (3) T.H. paid $1,668.96 in 2018, and $1,683.48 in 2019, both over 9 months; and (4) in 2020, T.H. paid $1,300.05 over 7.5 months. The ALJ thus found that T.H. incurred medical benefit losses each year from 2016-2020, as shown in the following chart.

Year:	Medical Benefit Cost (Downey USD):	Projected Cost of District Benefit:	Estimated Months Worked:	Net Cost Increase:
2016	$1,305.64	$420	7	$885.64
2017	$1,659.78	$540	9	$1,119.78
2018	$1,668.96	$540	9	$1,128.96
2019	$1,683.48	$540	9	$1,143.48
2020	$1,300.05	$450	7.5	$850.05

Applying the same interest method used for wages, the following chart shows T.H.'s 2016-2020 medical benefit losses with interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2016	$885.64	5	$309.97	$1,195.61
2017	$1,119.78	4	$313.54	$1,433.32
2018	$1,128.96	3	$237.08	$1,366.04
2019	$1,143.48	2	$160.09	$1,303.57
2020	$850.05	1	$59.50	$909.55
Total:	$5,127.91		$1,080.18	$6,208.09

6. Total Net Damages and Interest Through December 31, 2020

T.H.'s total net damages and interest through December 31, 2020, equals $32,819.34 + $6,208.09 = $39,027.43.

F. N.H.

1. Pre-Layoff Employment History

N.H. worked as a District Bus Driver for approximately 26 years. The District paid her $39,377.85 in 2013 and $28,053.49 in 2014. N.H. worked for the District approximately 40 hours per week in 2014.

2. Post-Layoff Mitigation Efforts and Subsequent Employment

After her layoff, N.H. applied for unemployment benefits. Her 2014 Form 1099-G from EDD shows that she received $11,250 in unemployment benefits.

In 2014, N.H. applied for work at City of Lakewood, First Transit, and Ladd Corporation. She began driving a bus as an independent contractor for Ladd Corporation in late 2014. However, she only performed work for one day in 2014 and received income at Ladd Corporation's daily rate of $110.

N.H. continued working as an independent contractor for Ladd Corporation in 2015. She received $21,850 from the Ladd Corporation that year according to her 2015 Ladd Corporation Form 1099-MISC. That year, N.H. also began working as an independent contractor for A-C Motorcoach. She received $936.50 from A-C Motorcoach according to her A-C Motorcoach 2015 Form 1099-MISC. N.H. reported $6,867 in expenses on her 2015 Form 1040, resulting in net income of $15,919.50 as an independent contractor.[54] According to her 2015 Form 1099-G from EDD, N.H. received an additional $450 in unemployment benefits that year.

N.H. also retired for purposes of CalPERS in 2015, so that she could supplement her income with pension distributions. She testified that she did not plan to retire from CalPERS at that time and would not have done so had she remained employed by the District. N.H. received a $13,877.79 gross distribution that year, according to her testimony and her 2015 Form 1099-R from CalPERS.

N.H. continued working as an independent contractor for Ladd Corporation in 2016. She received $22,127.49 from the Ladd that year according to her 2016 Ladd Corporation Form 1099-MISC. N.H. reported $7,176 in expenses that year,

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[54] As noted in Part II(C)(4), neither party excepted to the ALJ's approach to interim employment expenses, and we accordingly do not disturb the ALJ's resulting calculations. Nonetheless, consistent with *King Soopers, Inc.*, *supra*, 364 NLRB 1153, in future cases (including further proceedings in this case), compliance officers shall award interim employment expenses in full, with interest, regardless of an employee's interim employment earnings. For example, under this approach, N.H. would recover $6,867 in interim employment expenses for 2015, plus interest, while $15,919.50 in independent contractor earnings would offset her backpay for that year.

resulting in $14,951 in net income. N.H. received a $16,441.20 gross CalPERS distribution that year according to a Form 1099-R from CalPERS.

N.H. continued working as an independent contractor for Ladd Corporation in 2017. She received $17,716 from Ladd that year according to a Form 1099-MISC. In her 2017 Form 1040, N.H. reported incurring $7,440 in operating expenses, resulting in a net income of $10,276. N.H. also received a $16,579.28 pension distribution according to a 2017 CalPERS Form 1099-R.

N.H. continued working as an independent contractor for Ladd Corporation for part of 2018. She received $8,644.33 from Ladd that year according to a Form 1099-MISC. She incurred $4,572 in expenses as reported on her 2018 Form 1040, Schedule C-EZ, resulting in a $4,072 net income. N.H. also received a $16,885.04 CalPERS distribution that year according to a 2018 CalPERS Form 1099-R.

N.H. stopped performing work for Ladd Corporation on May 31, 2018. N.H. was unable to continue driving a school bus because her school bus driver's license expired, and she lacked the resources to renew it. N.H. testified that it would have cost her $2,000 to hire an instructor for the training component of the licensing process, which she could not afford. In addition, drivers must supply their own buses during the driving examination component of the licensing process. Ladd Corporation declined N.H.'s request to use one of their buses for the examination.[55]

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[55] Before the layoff, the District provided its Bus Drivers with the training and equipment needed to maintain their bus driver's licenses.

N.H. applied for other jobs in 2018 including at City of Lakewood, Walmart, WinCo, and Target. She searched for listings on the CalJOBS website as well as Indeed.com. She did not receive an offer for any positions in 2018.

We affirm the ALJ's conclusion that N.H. acted consistently with the inclination to work and be self-supporting, thereby satisfying her duty to mitigate damages, through 2018. N.H. does not claim losses in 2019 or 2020.

3. <u>Gross Lost Wages Through December 31, 2020</u>

<u>Estimated Monthly Earnings</u>: The ALJ estimated monthly earnings using the following three formulas: (1) [2013 actual earnings] ÷ 10.5 [months] = [2013 average monthly earnings]; (2) [2014 actual earnings] ÷ 6 [months] = [2014 average monthly earnings]; and (3) ([2013 average monthly earnings] + [2014 average monthly earnings]) ÷ 2 [years] = [estimated monthly earnings]. Applying these formulas to the evidence yields the following results: (1) $39,377.85 ÷ 10.5 = $3,750.27 [2013 average monthly earnings]; (2) $28,053.49 ÷ 6 = $4,675.58 [2014 average monthly earnings]; and (3) ($3,750.27 + $4,675.58) ÷ 2 [years] = $4,212.93 [estimated monthly earnings].

<u>2013 Estimated Lost Wages</u>: The ALJ calculated gross lost wages in 2013 using the following formula: [2013 average monthly earnings] × 4% × 4.5 [months] = [2013 total gross lost wages]. Applying this formula to the evidence yields the following result: $3,750.27 × 4% × 4.5 = $675.05.

<u>2014 Projected Gross Lost Wages</u>:

<u>2014 First Half Losses</u>: The ALJ estimated gross lost wages for the first half of 2014 as follows: [2014 actual earnings] × 4% = [2014 lost wages, first half]. Applying this formula to the evidence yields the following result: $28,053.49 × 4% = $1,122.14.

2014 Second Half Losses: The ALJ estimated gross lost wages for the second half of 2014 using the following three formulas: (1) [estimated monthly earnings] + (4% × [estimated monthly earnings]) = [estimated monthly earnings (R1)]; (2) [estimated monthly earnings (R1)] + (3% × [estimated monthly earnings (R1)]) = [estimated monthly earnings (R1-R2)]; and (3) [estimated monthly earnings (R1-R2)] × [#] [months] = [2014 gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $4,212.93 + (4% × $4,212.93) = $4,381.45; (2) $4,381.45 + (3% × $4,381.45) = $4,512.89 [estimated monthly earnings (R1-R2)]; and (3) $4,512.89 × 4.5 = $20,308 [2014 projected second half gross lost wages].

2014 Total Projected Gross Lost Wages: $1,122.14 + $20,308 = $21,430.14.

2015 Projected Gross Lost Wages:

2015 First Half Losses: The ALJ estimated gross lost wages in the first half of 2015 using the following formula: [estimated monthly earnings (R1-R2)] × [#] [months] = [2015 projected gross lost wages, first half]. Applying this formula to the evidence yields the following result: $4,512.89 × 6 = $27,077.34.

2015 Second Half Losses: The ALJ estimated gross lost wages in the second half of 2015 using the following two formulas: (1) [estimated monthly earnings (R1- R2)] + (3% × [estimated monthly earnings (R1-R2)]) = [estimated monthly earnings (R1-R3)]; and (2) [estimated monthly earnings (R1-R3)] × [#] [months] = [2015 projected gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $4,512.89 + (3% × $4,512.89) = $4,648.28; and (2) $4,648.28 × 4.5] = $20,917.26 [2015 projected gross lost wages, second half].

2015 Total Projected Lost Wages: $27,077.34 + $20,917.26 = $47,994.60.

2016 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2016 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2016 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,648.28 × 10.5 = $48,806.94.

2017 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2017 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2017 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,648.28 × 10.5 = $48,806.94.

2018 Projected Gross Lost Wages: The ALJ estimated 2018 gross lost wages using the following two formulas: (1) [estimated monthly earnings (R1-R3)] + (5.67% × [estimated monthly earnings (R1-R3)]) = [estimated monthly earnings (R1- R4)]; and (2) [estimated monthly earnings (R1-R4)] × [#] [months] = [2018 projected gross lost wages]. Applying these formulas to the evidence yields the following results: (1) $4,648.28 + (5.67% × $4,648.28) = $4,911.84 [estimated monthly earnings (R1-R4)]; and (2) $4,911.84 × 10.5 = $51,574.32 [2018 projected gross lost wages].

4. Net Lost Wages and Interest Through December 31, 2020

The following chart shows N.H.'s projected gross lost wages, her income from subsequent employment,[56] and the resulting net difference between those two amounts, from 2013 through 2020.

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[56] The ALJ wrongly included in N.H.'s offset income the 2015-2018 pension distributions that she had earned through her District employment before the 2014 layoff. (See Part II(C).) We have corrected this error.

Year:	Projected Gross Lost Wages:	Alternative Income:	Net Lost Wages:
2013	$675.05	N/A	$675.05
2014	$21,430.14	$110 (Ladd Corp.)	$21,320.14
2015	$47,994.60	($21,850 (Ladd Corp.) + $936.50 (A-C Motorcoach)) - $6,867 (expenses) = $15,919.50	$32,075.10
2016	$48,806.94	$22,127.49 (Ladd Corp.) - $7,176 (expenses) = $14,951.49	$33,855.45
2017	$48,806.94	$17,716 (Ladd Corp.) - $7,440 (expenses) = $10,276	$38,539.94
2018	$51,574.32	$8,644.33 (Ladd Corp.) - $4,572 (expenses) = $4,072.33	$47.501.99
2019	No loss claimed	$0.00	$0.00
2020	No loss claimed	$0.00	$0.00

Applying the ALJ's interest method yields the following chart showing interest calculations through December 31, 2020.

Year:	Net Loss:	Years Since Loss:	7% Interest:	Net Loss + 7% Interest:
2013	$675.05	7	$330.77	$1,005.82
2014	$21,320.14	7	$10,446.87	$31,767.01
2015	$32,075.10	6	$13,471.54	$45,546.64
2016	$33,855.45	5	$11,849.41	$45,704.86
2017	$38,539.94	4	$10,791.18	$49,331.12
2018	$47,501.99	3	$9,975.42	$57,477.41
2019	$0.00	2	$0.00	$0.00
2020	$0.00	1	$0.00	$0.00
Total	$173,967.67		$56,865.19	$230,832.86

5. Lost Benefits

N.H. makes no claim for lost medical benefits, but she does claim retirement benefit losses. While N.H. was employed at the District, the District contributed to her CalPERS pension. The District contributed $2,634 towards N.H.'s CalPERS

plan in 2014 according to her paycheck dated June 25, 2014. Neither Ladd

Corporation nor A-C Motorcoach made pension contributions on N.H.'s behalf.

The ALJ estimated lost CalPERS contributions via two steps. First, the ALJ

determined an average 2014 monthly contribution amount using this formula: [2014

total District contributions] ÷ 6 [months] = [average 2014 monthly contribution].

Applying this formula, the District's average 2014 monthly contribution on N.H.'s

behalf was: $2,634.35 ÷ 6 = $439.06 [average 2014 monthly contribution]. Next, the

ALJ estimated lost contributions for each year as follows: ([average 2014 monthly

contribution] – [alternative monthly contribution made on employee's behalf, if any]) ×

[#] [months] = [net lost contribution]. Although this formula undercounts contributions

because it does not account for wage growth and other factors leading to increased

contributions over time, CSEA has not challenged the formula. The following chart

shows the ALJ's estimates for 2014-2018, using the above formula.

Year:	Lost Monthly Contribution Amount:	Offset Contributions:	Estimated Months Worked:	Net Lost Contributions:
2014	$439.06	$0.00	4.5	$1,975.77
2015	$439.06	$0.00	10.5	$4,610.13
2016	$439.06	$0.00	10.5	$4,610.13
2017	$439.06	$0.00	10.5	$4,610.13
2018	$439.06	$0.00	10.5	$4,610.13

Applying the same interest method used for wages, the following chart shows

N.H.'s 2014-2020 lost CalPERS contributions with interest calculations through

December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2014	$1,975.77	7	$968.13	$2,943.90
2015	$4,610.13	6	$1,936.25	$6,546.38

2016	$4,610.13	5	$1,613.55	$6,223.68
2017	$4,610.13	4	$1,290.84	$5,900.97
2018	$4,610.13	3	$968.13	$5,578.26
Total:	$20,416.29		$6,776.90	$27,193.19

6. Total Net Damages and Interest Through December 31, 2020

N.H.'s total net damages and interest through December 31, 2020, equals:

$230,832.86 + $27,193.19 = $258,026.05.

G. E.Q.

1. Pre-Layoff Employment History

E.Q. worked as a District Bus Driver for approximately 13 years. The District

paid E.Q. $45,058.07 in 2013 and $20,886.95 in 2014. He worked for the District 35 to

40 hours per week in 2014.

2. Post-Layoff Mitigation Efforts and Subsequent Employment

After his layoff E.Q. applied for unemployment. According to his Form 1099-R

from EDD, E.Q. received $10,608 in unemployment benefits in 2014.

E.Q. applied for multiple driver jobs in 2014. Employers he applied to included:

Upland Unified School District (Upland USD), Ontario-Montclair Unified School District

(Ontario-Montclair USD), Saladino's Food Service, Shamrock Food Service, First

Transit, MV Transportation, Domino's Pizza Distribution Center, Coca- Cola,

Omnitrans, City of Ontario, FedEx Freight, and UPS. He did not receive an offer for

any of those positions in 2014.

E.Q. continued receiving unemployment benefits in 2015. According to his 2015

From 1099-G from EDD, he received $3,792 in 2015 unemployment benefits.

To supplement his income, E.Q. made an emergency withdrawal from the

CalPERS pension he earned working for the District. E.Q. testified that he needed

those funds to prevent his lender from foreclosing on the mortgage of his house. He further testified that he would not have done so if the District had not laid him off. He received a $57,290.16 distribution according to his 2015 CalPERS Form 1099-R.

E.Q. continued looking for work in 2015, including applying for jobs at Upland USD and Ontario-Montclair USD. He did not receive an offer for either position, or for any of the other positions he applied for in 2015.

E.Q. continued searching for work in 2016. He applied for driver positions at MV Transportation, Students First Transportation, Coca-Cola, Domino's, FedEx Freight, San Bernardino Community Action, CalTrans, Saladino's Food Services, Shamrock Food Service, CDL Recruiting, Mt. San Antonio Community College District, and Lollicup. In November 2016, Lollicup hired E.Q. as a driver. However, he only worked there for two weeks before Lollicup released him. E.Q. earned $1,619.46 in gross wages according to his 2016 Lollicup Form W-2. Later in 2016, E.Q. worked at Domino's, where he earned $4,738.28 according to his 2016 Domino's Form W-2.

Tropicale Foods hired E.Q. as a truck driver in late 2016, and E.Q. worked there continuously from January 2017 through at least the date he testified at the compliance hearing. There is no reason to believe that E.Q. stopped working at Tropicale before the end of 2020. Tropicale paid E.Q. $48,380.75 in 2017 wages, $59,004.97 in 2018 wages, and $67,770.86 in 2019 wages. In 2020, Tropicale paid E.Q. $54,893.22 as of October 24, 2020, according to the year-to-date gross wages section of his paycheck dated October 30, 2020.

We affirm the ALJ's conclusion that E.Q. at all times acted consistently with the inclination to work and be self-supporting even though he remained unemployed

until November 2016. E.Q. thereby satisfied his duty to mitigate damages from the time of the layoff until at least the end of 2020.

3. Gross Lost Wages Through December 31, 2020

Estimated Monthly Earnings: The ALJ estimated monthly earnings using the following three formulas: (1) [2013 actual earnings] ÷ 10.5 [months] = [2013 average monthly earnings]; (2) [2014 actual earnings] ÷ 6 [months] = [2014 average monthly earnings]; and (3) ([2013 average monthly earnings] + [2014 average monthly earnings]) ÷ 2 [years] = [estimated monthly earnings]. Applying these formulas to the evidence yields the following results: (1) $45,058.07 ÷ 10.5 [months] = $4,291.24 [2013 average monthly earnings]; (2) $20,866.95 ÷ 6 [months] = $3,477.83 [2014 average monthly earnings]; and (3) ($4,291.24 + 3,477.83) ÷ 2 [years] = $3,884.54 [estimated monthly earnings].

2013 Estimated Lost Wages: The ALJ calculated gross lost wages in 2013 using the following formula: [2013 average monthly earnings] × 4% × 4.5 [months] = [2013 total gross lost wages]. Applying this formula to the evidence yields the following result: $4,291.24 × 4% × 4.5 = $722.42.

2014 Projected Gross Lost Wages:

2014 First Half Losses: The ALJ estimated gross lost wages for the first half of 2014 as follows: [2014 actual earnings] × 4% = [2014 lost wages, first half]. Applying this formula to the evidence yields the following result: $20,866.95 × 4% = $834.68.

2014 Second Half Losses: The ALJ estimated gross lost wages for the second half of 2014 using the following three formulas: (1) [estimated monthly earnings] + (4% × [estimated monthly earnings]) = [estimated monthly earnings (R1)]; (2) [estimated

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monthly earnings (R1)] + (3% × [estimated monthly earnings (R1)]) = [estimated

monthly earnings (R1-R2)]; and (3) [estimated monthly earnings (R1-R2)] × [#]

[months] = [2014 gross lost wages, second half]. Applying these formulas to the

evidence yields the following results: (1) $3,884.54 + (4% × 3,884.54) = $4,039.92;

(2) $4,039.92 + (3% × $4,039.92) = $4,161.12 [estimated monthly earnings (R1-R2)];

and (3) $4,161.12 × 4.5 = $18,725.04 [2014 projected gross lost wages, second half].

2014 Total Projected Gross Lost Wages: $834.68 + $18,725.04 = $19,559.72.

2015 Projected Gross Lost Wages:

2015 First Half Losses: The ALJ estimated gross lost wages in the first half of

2015 using the following formula: [estimated monthly earnings (R1-R2)] × [#] [months]

= [2015 projected gross lost wages, first half]. Applying this formula to the evidence

yields the following result: $4,161.12 × 6 = $24,966.72.

2015 Second Half Losses: The ALJ estimated gross lost wages in the second

half of 2015 using the following two formulas: (1) [estimated monthly earnings

(R1- R2)] + (3% × [estimated monthly earnings (R1-R2)]) = [estimated monthly

earnings (R1-R3)]; and (2) [estimated monthly earnings (R1-R3)] × [#] [months] =

[2015 projected gross lost wages, second half]. Applying these formulas to the

evidence yields the following results: (1) $4,161.12 + (3% × $4,161.12) = $4,285.95;

and (2) $4,285.95 × 4.5 = $19,286.78 [2015 projected gross lost wages, second half].

2015 Total Projected Gross Lost Wages: $24,966.72 + $19,286.78 =

$44,253.50.

2016 Projected Gross Lost Wages: The ALJ estimated gross lost wages in

2016 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months]

= [2016 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,285.95 × 10.5 = $45,002.48.

2017 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2017 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2017 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,285.95 × 10.5 = $45,002.48.

2018 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2018 using the following two formulas: (1) [estimated monthly earnings (R1-R3)] + (5.67% × [estimated monthly earnings (R1-R3)]) = [estimated monthly earnings (R1- R4)]; and (2) [estimated monthly earnings (R1-R4)] × [#] [months] = [2018 projected gross lost wages]. Applying these formulas to the evidence yields the following results: (1) $4,285.95 + (5.67% × $4,285.95) = $4,528.96 [estimated monthly earnings (R1-R4)]; and (2) $4,528.96 × 10.5 = $47,554.08 [2018 projected gross lost wages].

2019 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2019 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2019 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,528.96 × 10.5 = $47,554.08.

2020 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2020 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2020 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,528.96 × 10.5 = $47,554.08.

4. Net Lost Wages and Interest Through December 31, 2020

The following chart shows E.Q.'s projected gross lost wages, his income from subsequent employment,[57] and the resulting net difference between those two amounts, from 2013 through 2020.

Year:	Projected Gross Lost Wages:	Alternative Income:	Net Lost Wages:
2013	$722.42	N/A	$722.42
2014	$19,559.72	$0.00	$19,559.72
2015	$44,253.50	$0.00	$44,253.50
2016	$45,002.48	$4,738.28 (Domino's) + $1,619.46 (Lollicup) = $6,357.74	$38,644.74
2017	$45,002.48	$48,380.75 (Tropicale Foods)	$0.00 (Subsequent earnings exceed projected lost wages)
2018	$47,554.08	$59,004.97 (Tropicale Foods)	$0.00 (Subsequent earnings exceed projected lost wages)
2019	$47,554.08	$67,770.86 (Tropicale Foods)	$0.00 (Subsequent earnings exceed projected lost wages)
2020	$47,554.08	$54,893.22 (Tropicale Foods as of 10/24/20)[58]	$0.00 (Subsequent earnings exceed projected lost wages)

Applying the ALJ's interest method yields the following chart showing interest calculations through December 31, 2020.

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[57] The ALJ wrongly included in E.Q.'s offset income the 2015 emergency pension distribution that he had earned through his District employment before the 2014 layoff. (See Part II(C).) We have corrected this error.

[58] By the time E.Q. received his paycheck dated October 24, 2020, he already had earned sufficient 2020 income to exceed his projected District income that year. It is therefore unnecessary to estimate his full 2020 income.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2013	$722.42	7	$353.99	$1,076.41
2014	$19,559.72	7	$9,584.26	$29,143.98
2015	$44,253.50	6	$18,586.47	$62,839.97
2016	$38,644.74	5	$13,525.66	$52,170.40
2017	$0.00	4	$0.00	$0.00
2018	$0.00	3	$0.00	$0.00
2019	$0.00	2	$0.00	$0.00
2020	$0.00	1	$0.00	$0.00
Total:	$103,180.38		$42,050.38	$145,230.76

5. Lost Benefits

a. Medical Benefit Losses

While he was working for the District, E.Q. contributed $30 per two-week pay period for medical benefits for himself and his family. Tropicale Foods, in contrast, charged E.Q. $263.54 per two-week pay period or $527.08 per month. E.Q. paid this amount for 11 months between 2017 and 2018, but he stopped paying for medical benefits after that because he could not afford it. CSEA does not challenge the ALJ's conclusion that E.Q. incurred medical benefit losses only in those 11 months, as shown on the following chart.

Year:	Medical Benefit Cost (Tropicale):	Projected Cost of District Benefit:	Estimated Months Worked:	Net Cost Increase:
2017	$527.08	$60	7	$3,269.56
2018	$527.08	$60	4	$1,868.32

Applying the same interest method used for wages, the following chart shows E.Q.'s 2017-2018 medical benefit losses with interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2017	$3,269.56	4	$915.48	$4,185.04

2018	$1,868.32	3	$392.35	$2,260.67
Total:	$5,137.88		$1,307.83	$6,445.71

    b. <u>Retirement Benefit Losses</u>

While E.Q. was employed at the District, the District made CalPERS pension contributions on his behalf. The District contributed $2,368.04 into E.Q. 's CalPERS pension plan in 2014 according to his District paycheck dated July 10, 2014. None of E.Q.'s subsequent employers made contributions into any pension plan.

The ALJ estimated lost CalPERS contributions via two steps. First, the ALJ determined an average 2014 monthly contribution amount using this formula: [2014 total District contributions] ÷ 6 [months] = [average 2014 monthly contribution]. Applying this formula, the District's average 2014 monthly contribution on E.Q. behalf was: $2,368.04 ÷ 6 = $394.67 [average monthly contribution]. Next, the ALJ estimated lost contributions for each year as follows: ([average 2014 monthly contribution] – [alternative monthly contribution made on employee's behalf, if any]) × [#] [months] = [net lost contribution]. Although this formula undercounts contributions because it does not account for wage growth and other factors leading to increased contributions over time, CSEA has not challenged the formula. The following chart shows the ALJ's estimates for 2014-2020, using the above formula.

Year:	Lost Monthly Contribution Amount:	Offset Contributions:	Estimated Months Worked:	Net Lost Contributions:
2014	$394.67	$0.00	4.5	$1,776.02
2015	$394.67	$0.00	10.5	$4,144.04
2016	$394.67	$0.00	10.5	$4,144.04
2017	$394.67	$0.00	10.5	$4,144.04
2018	$394.67	$0.00	10.5	$4,144.04
2019	$394.67	$0.00	10.5	$4,144.04

| 2020 | $394.67 | $0.00 | 10.5 | $4,144.04 |

Applying the same interest method used for wages, the following chart shows E.Q.'s 2017-2018 medical benefit losses with interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2014	$1,776.02	7	$870.25	$2,646.27
2015	$4,144.04	6	$1,740.50	$5,884.54
2016	$4,144.04	5	$1,450.41	$5,594.45
2017	$4,144.04	4	$1,160.33	$5,304.37
2018	$4,144.04	3	$870.25	$5,014.29
2019	$4,144.04	2	$580.17	$4,724.21
2020	$4,144.04	1	$290.08	$4,434.12
Total:	$26,640.26		$6,961.99	$33,602.25

6. Total Net Damages and Interest Through December 31, 2020

E.Q.'s total net damages and interest through December 31, 2021, equals $145,230.76 + $6,445.71 + $33,602.25 = $185,278.72.

H. E.V.

1. Pre-Layoff Employment History

E.V. worked as a District Bus Driver for approximately 10 years. E.V.'s 2013 District gross wages were $33,048 according to her 2013 Form 1040. According to the year-to-date taxable balances section of E.V.'s paycheck from the District dated June 25, 2014, she earned $22,340.50 working for the District in 2014. She worked for the District 35 to 40 hours per week at in 2014.

2. Post-Layoff Mitigation Efforts and Subsequent Employment

After her layoff, E.V. applied for unemployment benefits. E.V. reported receiving $2,909 in unemployment compensation on her 2014 Form 1040.

In about August 2014, District Transportation Director Mark Toti told E.V. that Hemet USD was hiring bus drivers, and he suggested that she apply. After E.V. did so, Hemet USD hired her. Hemet USD paid E.V. $15,184.65 in 2014 according to her Hemet USD paycheck dated December 30, 2014.[59]

E.V. continued working for Hemet USD until September 1, 2020. Hemet USD paid E.V. $51,131.43 in 2015 wages, $42,957.70 in 2016 wages, $44,689.03 in 2017 wages, $48,110.01 in 2018 wages, and $60,881.51 in 2019 wages. CSEA does not except to the ALJ's finding that E.V. ceased all attempts to mitigate damages after August 30, 2020. Her gross wages were $28,244.76 through that date according to the year-to-date earnings section of her Hemet USD paycheck dated September 30, 2020.

We affirm the ALJ's conclusion that E.V. acted consistently with the inclination to work and be self-supporting though the end of August 2020, thereby satisfying her duty to mitigate damages from the time of the layoff through August 2020. As noted above, CSEA did not except to the ALJ's determination that E.V. did not seek to mitigate damages in the final four months of 2020.

3. Gross Lost Wages Through December 31, 2020

Estimated Monthly Earnings: The ALJ estimated monthly earnings using the following three formulas: (1) [2013 actual earnings] ÷ 10.5 [months] = [2013 average monthly earnings]; (2) [2014 actual earnings] ÷ 6 [months] = [2014 average

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[59] E.V. also worked as an independent contractor for Star-Dust Tours in 2014 (earning $3,687) and 2015 (earning $319). However, as reported on her tax return, E.V. had worked for Star-Dust Tours in 2013 as well (earning $5,371), while also fulfilling her duties for the District. Therefore, her 2014-2015 Star-Dust Tours income does not offset her projected lost wages.

monthly earnings]; and (3) ([2013 average monthly earnings] + [2014 average monthly earnings]) ÷ 2 [years] = [estimated monthly earnings]. Applying these formulas to the evidence yields the following results: (1) $33,048 ÷ 10.5 = $3,147.43 [2013 average monthly earnings]; (2) $22,340.50 ÷ 6 = $3,723.42 [2014 average monthly earnings]; and (3) ($3,147.43 + $3,723.42) ÷ 2 [years] = $3,435.43 [estimated monthly earnings].

2013 Estimated Lost Wages: The ALJ calculated gross lost wages in 2013 using the following formula: [2013 average monthly earnings] × 4% × 4.5 [months] = [2013 total gross lost wages]. Applying this formula to the evidence yields the following result: $3,147.43 × 4% × 4.5 = $566.54.

2014 Projected Gross Lost Wages:

2014 First Half Losses: The ALJ estimated gross lost wages for the first half of 2014 using the following formula: [2014 actual earnings] × 4% = [2014 lost wages, first half]. Applying this formula to the evidence yields the following result: $22,340.50 × 4% = $893.62.

2014 Second Half Losses: The ALJ estimated gross lost wages for the second half of 2014 using the following three formulas: (1) [estimated monthly earnings] + (4% × [estimated monthly earnings]) = [estimated monthly earnings (R1)]; (2) [estimated monthly earnings (R1)] + (3% × [estimated monthly earnings (R1)]) = [estimated monthly earnings (R1-R2)]; and (3) [estimated monthly earnings (R1-R2)] × [#] [months] = [2014 gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $3,435.43 + (4% × $3,435.43) = $3,572.85;

(2) $3,572.85 + (3% × $3,572.85) = $3,680.04 [estimated monthly earnings (R1-R2)];

and (3) $3,680.04 × 4.5 = $16,560.18 [2014 projected gross lost wages, second half].

2014 Total Projected Gross Lost Wages: $893.62 + $16,560.18 = $17,453.80.

2015 Projected Gross Lost Wages:

2015 First Half Losses: The ALJ estimated gross lost wages in the first half of 2015 using the following formula: [estimated monthly earnings (R1-R2)] × [#] [months] = [2015 projected gross lost wages, first half]. Applying this formula to the evidence yields the following result: $3,680.04 × 6 = $22,080.24.

2015 Second Half Losses: The ALJ estimated gross lost wages in the second half of 2015 using the following two formulas: (1) [estimated monthly earnings (R1- R2)] + (3% × [estimated monthly earnings (R1-R2)]) = [estimated monthly earnings (R1-R3)]; and (2) [estimated monthly earnings (R1-R3)] × [#] [months] = [2015 projected gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $3,680.04 + (3% × $3,680.04) = $3,790.44; and (2) $3,790.44 × 4.5 = $17,056.98 [2015 projected gross lost wages, second half].

2015 Total Projected Gross Lost Wages: $22,080.24 + $17,056.98 = $39,137.22.

2016 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2016 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2016 projected gross lost wages]. Applying this formula to the evidence yields the following result: $3,790.44 × 10.5 = $39,799.62.

2017 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2017 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months]

= [2017 projected gross lost wages]. Applying this formula to the evidence yields the following result: $3,790.44 × 10.5 = $39,799.62.

2018 Projected Gross Lost Wages: The ALJ estimated lost wages in 2018 using the following two formulas: (1) [estimated monthly earnings (R1-R3)] + (5.67% × [estimated monthly earnings (R1-R3)]) = [estimated monthly earnings (R1- R4)]; and (2) [estimated monthly earnings (R1-R4)] × [#] [months] = [2018 projected gross lost wages]. Applying these formulas to the evidence yields the following results: (1) $3,790.44 + (5.67% × $3,790.44) = $4,005.36 [estimated monthly earnings (R1-R4)]; and (2) $4,005.36 × 10.5 = $42,056.28 [2018 projected gross lost wages].

2019 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2019 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2019 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,005.36 × 10.5 = $42,056.28.

2020 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2020 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2020 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,005.36 × 6.5 = $26,034.84.

4. Net Lost Wages and Interest Through December 31, 2020

The following chart shows E.V.'s projected gross lost wages, her income from subsequent employment, and the resulting net difference between those two amounts, from 2013 through 2020.

Year:	Projected Gross Lost Wages:	Alternative Income:	Net Lost Wages:
2013	$566.54	N/A	$566.54
2014	$17,453.80	$15,184.65 (Hemet USD)	$2,269.15

2015	$39,137.22	$51,131.43 (Hemet USD)	$0.00 (Subsequent earnings exceed projected lost wages)
2016	$39,799.62	$42,957.70 (Hemet USD)	$0.00 (Subsequent earnings exceed projected lost wages)
2017	$39,799.62	$44,689.03 (Hemet USD)	$0.00 (Subsequent earnings exceed projected lost wages)
2018	$42,056.28	$48,110.01 (Hemet USD)	$0.00 (Subsequent earnings exceed projected lost wages)
2019	$42,056.18	$60,881.51 (Hemet USD)	$0.00 (Subsequent earnings exceed projected lost wages)
2020	$26,034.84 (Mitigation efforts stopped 9/1/20)	$28,244.76 (Hemet USD)	$0.00 (Subsequent earnings exceed projected lost wages)

Applying the ALJ's interest method yields the following chart showing interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2013	$566.54	7	$277.60	$844.14
2014	$2,269.15	7	$1,111.88	$3,381.03
2015	$0.00	6	$0.00	$0.00
2016	$0.00	5	$0.00	$0.00
2017	$0.00	4	$0.00	$0.00
2018	$0.00	3	$0.00	$0.00
2019	$0.00	2	$0.00	$0.00
2020	$0.00	1	$0.00	$0.00
Total:	$2,835.69		$1,389.48	$4,225.17

5. Lost Benefits

Neither party challenged the ALJ's conclusion that E.V. has not claimed any lost benefits.

6. Total Net Damages and Interest Through December 31, 2020

E.V.'s total net damages and interest through December 31, 2020, equals

$4,225.17.

I. D.W.

1. Pre-Layoff Employment History

D.W. worked as a District Bus Driver for approximately 17 years. The District

paid her $38,543.99 in 2013 and $23,689.28 in 2014. She worked for the District

approximately 40 hours per week in 2014.

2. Post-Layoff Mitigation Efforts and Subsequent Employment

After receiving her layoff notice, D.W. applied for unemployment benefits. She

reported $3,281 in unemployment benefits on her 2014 Form 1040.

D.W. applied for bus driver jobs at Los Angeles International Airport, as well as

Long Beach Transit, which hired her in October 2014. D.W. earned $8,219.31 in gross

wages according to her 2014 Long Beach Transit Form W-2.

D.W. continued working for Long Beach Transit from 2015 through at least the

date she testified at the compliance hearing. There is no reason to believe that D.W.

stopped working at Long Beach Transit before the end of 2020. Long Beach Transit

paid D.W. $30,132.84 in 2015 wages, $31,483.95 in 2016 wages, $34,870.16 in 2017

wages, $42,405.34 in 2018 wages, and $50,194.84 in 2019 wages. D.W. earned

$50,524.88 in 2020 wages as of October 30, 2020, according to her Long Beach

Transit paycheck bearing that date.

We affirm the ALJ's conclusion that D.W. at all times acted consistently with the inclination to work and be self-supporting, thereby satisfying her duty to mitigate damages from the time of the layoff until at least the end of 2020.

3. Gross Lost Wages Through December 31, 2020

Estimated Monthly Earnings: The ALJ estimated monthly earnings using the following three formulas: (1) [2013 actual earnings] ÷ 10.5 [months] = [2013 average monthly earnings]; (2) [2014 actual earnings] ÷ 6 [months] = [2014 average monthly earnings]; and (3) ([2013 average monthly earnings] + [2014 average monthly earnings]) ÷ 2 [years] = [estimated monthly earnings]. Applying these formulas to the evidence yields the following results: (1) $38,543.99 ÷ 10.5 = $3,670.86 [2013 average monthly earnings]; (2) $23,689.28 ÷ 6 = $3,948.21 [2014 average monthly earnings]; and (3) ($3,670.86 + $3,948.21) ÷ 2 [years] = $3,809.54 [estimated monthly earnings].

2013 Estimated Lost Wages: The ALJ calculated gross lost wages in 2013 using the following formula: [2013 average monthly earnings] × 4% × 4.5 [months] = [2013 total gross lost wages]. Applying this formula to the evidence yields the following result: $3,670.86 × 4% × 4.5 = $660.75.

2014 Projected Gross Lost Wages:

2014 First Half Losses: The ALJ estimated gross lost wages for the first half of 2014 using the following formula: [2014 actual earnings] × 4% = [2014 lost wages, first half]. Applying this formula to the evidence yields the following result: $23,689.28 × 4% = $947.57.

2014 Second Half Losses: The ALJ estimated gross lost wages for the second half of 2014 using the following three formulas: (1) [estimated monthly earnings] + (4%

× [estimated monthly earnings]) = [estimated monthly earnings (R1)]; (2) [estimated monthly earnings (R1)] + (3% × [estimated monthly earnings (R1)]) = [estimated monthly earnings (R1-R2)]; and (3) [estimated monthly earnings (R1-R2)] × [#] [months] = [2014 gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $3,809.54 + (4% × 3,809.54) = $3,961.92; (2) $3,961.92 + (3% × $3,961.92) = $4,080.78 [estimated monthly earnings (R1-R2)]; and (3) $4,080.78 × 4.5 = $18,363.51 [2014 projected gross lost wages, second half].

2014 Total Projected Gross Lost Wages: $947.57 + $18,363.51 = $19,311.08.

2015 Projected Gross Lost Wages:

2015 First Half Losses: The ALJ estimated gross lost wages in the first half of 2015 using the following formula: [estimated monthly earnings (R1-R2)] × [#] [months] = [2015 projected gross lost wages, first half]. Applying this formula to the evidence yields the following result: $4,080.78 × 6 = $24,484.68.

2015 Second Half Losses: The ALJ estimated gross lost wages in the second half of 2015 using the following two formulas: (1) [estimated monthly earnings (R1- R2)] + (3% × [estimated monthly earnings (R1-R2)]) = [estimated monthly earnings (R1-R3)]; and (2) [estimated monthly earnings (R1-R3)] × [#] [months] = [2015 projected gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $4,080.78 + (3% × $4,080.78) = $4,203.20; and (2) $4,203.20 × 4.5 = $18,914.40 [2015 projected gross lost wages, second half].

2015 Total Projected Gross Lost Wages: $24,484.68 + $18,914.40 = $43,399.08.

2016 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2016 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2016 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,203.20 × 10.5 = $44,133.60.

2017 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2017 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2017 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,203.20 × 10.5 = $44,133.60.

2018 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2018 using the following two formulas: (1) [estimated monthly earnings (R1-R3)] + (5.67% × [estimated monthly earnings (R1-R3)]) = [estimated monthly earnings (R1- R4)]; and (2) [estimated monthly earnings (R1-R4)] × [#] [months] = [2018 projected gross lost wages]. Applying these formulas to the evidence yields the following results: (1) $4,203.20 + (5.67% × $4,203.20) = $4,441.52 [estimated monthly earnings (R1-R4)]; and (2) $4,441.52 × 10.5 = $46,635.96 [2018 projected gross lost wages].

2019 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2019 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2019 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,441.52 × 10.5 = $46,635.96.

2020 Projected Gross Lost Wages: The ALJ estimated gross lost wages in 2020 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months]

= [2020 projected gross lost wages]. Applying this formula to the evidence yields the following result: $4,441.52 × 10.5 = $46,635.96.

4. Net Lost Wages and Interest Through December 31, 2020

The following chart shows D.W.'s projected gross lost wages, her income from subsequent employment, and the resulting net difference between those two amounts, from 2013 through 2020.

Year:	Projected Gross Lost Wages:	Alternative Income:	Net Lost Wages:
2013	$660.75	N/A	$660.75
2014	$19,311.08	$8,219.31 (Long Beach Transit)	$11,091.77
2015	$43,399.08	$30,132.84 (Long Beach Transit)	$13,266.24
2016	$44,133.60	$31,483.95 (Long Beach Transit)	$12,649.65
2017	$44,133.60	$34,870.16 (Long Beach Transit)	$9,263.44
2018	$46,635.96	$42,405.34 (Long Beach Transit)	$4,230.62
2019	$46,635.96	$50,194.84 (Long Beach Transit)	$0.00 (Subsequent earnings exceed projected lost wages)
2020	$46,635.96	$50,524.88 (Long Beach Transit as of 10/30/20)[60]	$0.00 (Subsequent earnings exceed projected lost wages)

Applying the ALJ's interest method yields the following chart showing interest calculations through December 31, 2020.

Year:	Net Loss:	Years:	7% Interest:	Net Loss + 7% Interest:
2013	$660.75	7	$323.77	$984.54
2014	$11,091.77	7	$5,434.97	$16,526.74
2015	$13,266.24	6	$5,571.82	$18,838.06
2016	$12,649.65	5	$4,427.38	$17,077.03
2017	$9,263.44	4	$2,593.76	$11,857.20

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[60] By the time D.W. received her paycheck dated October 30, 2020, she already had earned sufficient 2020 income to exceed her projected District income that year. It is therefore unnecessary to estimate D.W.'s full 2020 income.

2018	$4,230.62	3	$888.43	$5,119.05
2019	$0.00	2	$0.00	$0.00
2020	$0.00	1	$0.00	$0.00
Total:	$51,162.47		$19,240.13	$70,402.62

5. Lost Benefits

Neither party challenged the ALJ's conclusion that D.W. has not claimed any lost benefits.

6. Total Net Damages and Interest Through December 31, 2020

D.W.'s total net damages and interest through December 31, 2020, equals $70,402.62.

J. S.B.

1. Pre-Layoff Employment History

S.B. worked as a district Bus Driver for approximately 29 years. Her 2013 District gross wages were $62,366.58 according to her District Form W-2 that year. This includes time she spent from about January to August 2013 working as an Interim Manager with an increase in pay over other drivers. Her 2014 District gross wages were $29,732.42, according to her District Form W-2 that year. She worked for the District approximately 40 hours per week in 2014.

2. Post-Layoff Mitigation Efforts and Subsequent Employment

After her layoff, S.B. applied for unemployment benefits. She reported on her 2014 Form 1040 that she received $6,179 in unemployment benefits in 2014.

In the summer of 2014, S.B. began working as an independent contractor for a charter bus company called Transit Systems. She testified that she worked three days per week for seven and one-half weeks. She further testified that she worked eight hours per workday at a rate of $12 per hour. This equates to $2,160 in income.

Long Beach Transit hired S.B. as a bus driver in October 2014, and she worked there continuously until at least December 8, 2020, the date she testified at the compliance hearing. There is no reason to believe that S.B. stopped working at Long Beach Transit before the end of 2020. Long Beach Transit paid S.B. $4,005.50 in 2014 wages, $31,668.36 in 2015 wages, $32,909.27 in 2016 wages, $33,444 in 2017 wages, $43,464.88 in 2018 wages, and $51,017.92 in 2019 wages. In 2020, Long Beach Transit paid S.B. $54,592.80 in wages as of November 13, 2020, according to the year-to-date statement on her paycheck bearing that date.

In February 2016, S.B. retired for purposes of CalPERS so that she could supplement her income with pension distributions. S.B. received a $33,692 distribution from CalPERS in 2016, a $34,002 distribution from CalPERS in 2017, and distributions of $34,002 from CalPERS in both 2018 and 2019. She did not testify about whether she received or expected a CalPERS distribution in 2020, but neither party challenged the ALJ's conclusion that she likely received such a distribution.

We affirm the ALJ's conclusion that S.B. at all times acted consistently with the inclination to work and be self-supporting, thereby satisfying her duty to mitigate damages from the time of the layoff until at least the end of 2020.

3. Gross Lost Wages Through December 31, 2020

Estimated Monthly Earnings: As discussed above, given the complexities of S.B.'s calculation (since she worked part of 2013 as an Interim Manager), the ALJ calculated S.B.'s estimated monthly earnings according to the following formula: [2014 actual earnings] ÷ 6 [months] = [estimated monthly earnings]. Applying this formula to S.B.'s earnings yields the following result: $29,732.42 ÷ 6 = $4,955.40.

2013 Estimated Lost Wages: Neither party excepted to the ALJ's determination to use the following four formulas because S.B. worked part of 2013 as an Interim Manager: (1) [2013 actual earnings] ÷ 10.5 = [2013 average monthly earnings]; (2) [2013 average monthly earnings] × 4% × 0.5 [months] = [2013 ESY lost wages]; (3) [estimated monthly earnings] × 4% × 4 [months] = [2013 lost wages, September to December]; and (4) [2013 ESY gross lost wages] + [2013 lost wages, September to December] = [2013 total gross lost wages]. Applying these formulas to S.B.'s earnings yields the following results: (1) $62,366.58 ÷ 10.5 = $5,939.67 [2013 average monthly earnings]; (2) $5,939.67 × 4% × 0.5 = $118.79 [2013 ESY gross lost wages]; (3) $4,955.40 × 4% × 4 = $792.86 [2013 lost wages September to December]; and (4) $118.79 + $792.86 = $911.65 [2013 total gross lost wages].

2014 Projected Gross Lost Wages: As noted above, the ALJ estimated 2014 lost wages in two parts.

2014 First Half Losses: The ALJ estimated gross lost wages for the first half of 2014 using the following formula: [2014 actual earnings] × 4% = [2014 gross lost wages, first half]. Applying this formula to the evidence yields the following result: $29,732.42 × 4% = $1,189.30.

2014 Second Half Losses: The ALJ estimated gross lost wages for the second half of 2014 using the following three formulas: (1) [estimated monthly earnings] + (4% × [estimated monthly earnings]) = [estimated monthly earnings (R1)]; (2) [estimated monthly earnings (R1)] + (3% × [estimated monthly earnings (R1)]) = [estimated monthly earnings (R1-R2)]; (3) [estimated monthly earnings (R1-R2)] × [#] [months] = [2014 gross lost wages, second half]. Applying these formulas to the evidence yields

the following results: (1) $4,955.40 + (4% × $4,955.40) = $5,153.62; (2) $5,153.62 + (3% × $5,153.62) = $5,308.23 [estimated monthly earnings (R1-R2)]; (3) $5,308.23 × 4.5 = $23,887.04 [2014 projected gross lost wages, second half].

2014 Total Projected Gross Lost Wages: $1,189.30 + $23,887.04 = $25,076.34.

2015 Projected Gross Lost Wages: As noted above, the ALJ estimated 2015 lost wages in two parts.

2015 First Half Losses: The ALJ estimated gross lost wages for the first half of 2015 using the following formula: [estimated monthly earnings (R1-R2)] × [#] [months] = [2015 projected gross lost wages, first half]. Applying this formula to S.B.'s earnings evidence yielded the following results: $5,308.23 × 6 = $31,849.38.

2015 Second Half Losses: The ALJ estimated gross lost wages for the second half of 2015 using the following three formulas: (1) [estimated monthly earnings (R1- R2)] + (3% × [estimated monthly earnings (R1-R2)]) = [estimated monthly earnings (R1-R3)]; and (2) [estimated monthly earnings (R1-R3)] × [#] [months] = [2015 projected gross lost wages, second half]. Applying these formulas to the evidence yields the following results: (1) $5,308.23 + (3% × $5,308.23) = $5,467.48; and (2) $5,467.48 × 4.5 = $24,603.66 [2015 projected gross lost wages, second half].

2015 Total Projected Gross Lost Wages: $31,849.38 + $24,603.66 = $56,453.04.

2016 Projected Gross Lost Wages: The ALJ estimated gross lost wages for 2016 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2016 projected gross lost wages]. Applying this formula to the evidence yields the following result: $5,467.48 × 10.5 = $57,408.54.

2017 Projected Gross Lost Wages: The ALJ estimated gross lost wages for 2017 using the following formula: [estimated monthly earnings (R1-R3)] × [#] [months] = [2017 projected gross lost wages]. Applying this formula to the evidence yields the following result: $5,467.48 × 10.5 = $57,408.54.

2018 Projected Gross Lost Wages: The ALJ estimated gross lost wages for 2018 using the following two formulas: (1) [estimated monthly earnings (R1-R3)] + (5.67% × [estimated monthly earnings (R1-R3)]) = [estimated monthly earnings (R1- R4)]; and (2) [estimated monthly earnings (R1-R4)] × [#] [months] = [2018 projected gross lost wages]. Applying these formulas to the evidence yields the following results: (1) $5,467.48 + (5.67% × $5,467.48) = $5,777.49; and (2) $5,777.49 × 10.5 = $60,663.65 [2018 projected gross lost wages].

2019 Projected Gross Lost Wages The ALJ estimated gross lost wages for 2019 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2019 projected gross lost wages]. Applying this formula to the evidence yields the following result: $5,777.49 × 10.5 = $60,663.65.

2020 Projected Gross Lost Wages: The ALJ estimated gross lost wages for 2020 using the following formula: [estimated monthly earnings (R1-R4)] × [#] [months] = [2020 projected gross lost wages]. Applying this formula to the evidence yields the following result: $5,777.49 × 10.5 = $60,663.65.

4. Net Lost Wages and Interest Through December 31, 2020

The following chart shows S.B.'s projected gross lost wages, her income from subsequent employment,[61] and the resulting net difference between those two amounts, from 2013 through 2020.

Year:	Projected Gross Lost Wages:	Alternative Income:	Projected Net Lost Wages:
2013	$911.65	N/A	$911.65
2014	$25,076.34	$2,160 (Transit Systems) + $4,005.50 (Long Beach Transit) = $6,165.50	$18,910.84
2015	$56,453.04	$31,668.36 (Long Beach Transit)	$24,784.68
2016	$57,408.54	$32,909.27 (Long Beach Transit)	$24,499.27
2017	$57,408.54	$33,444 (Long Beach Transit)	$23,964.54
2018	$60,663.65	$43,464.88 (Long Beach Transit)	$17,198.77
2019	$60,663.65	$51,017.92 (Long Beach Transit)	$9,645.73
2020	$60,663.65	$54,592.80 (Long Beach Transit as of 11/13/20) + $5,538.00 (approximate Long Beach Transit wages for remainder of 2020)[62] = $60,130.80	$532.85

Applying the ALJ's interest method yields the following chart showing interest calculations through December 31, 2020.

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[61] The ALJ wrongly included in S.B.'s offset income the 2016-2020 pension distributions that she had earned through her District employment before the 2014 layoff. (See Part II(C).) We have corrected this error.

[62] The ALJ did not estimate S.B.'s approximate wages for the remainder of 2020, explaining that S.B.'s alternative income already exceeded what she would have earned from the District in 2020. Because we have reversed the ALJ's decision to offset CalPERS distributions from previously earned service credit, we have filled the gap in the ALJ's calculations. At 40 hours per week, for 5 weeks, and $27.69 per hour, we estimate that S.B. likely earned approximately $5,538.00 in additional gross wages from Long Beach Transit during the remainder of 2020.

Year:	Net Wage Loss:	Years Since Loss:	7% Interest:	Net Loss + 7% Interest:
2013	$911.65	7	$446.71	$1,358.36
2014	$18,910.84	7	$9,266.31	$28,177.15
2015	$24,784.68	6	$10,409.57	$35,194.25
2016	$24,499.27	5	$8,574.74	$33,074.01
2017	$23,964.54	4	$6,710.07	$30,674.61
2018	$17,198.77	3	$3,611.74	$20,810.51
2019	$9,645.73	2	$1,350.40	$10,996.13
2020	$532.85	1	$37.30	$570.15
Total	$120,448.33		$40,406.84	$160,855.17

5. Lost Benefits

Neither party challenged the ALJ's conclusion that S.B. has not claimed any

lost benefits.

6. Total Net Damages and Interest Through December 31, 2020

S.B.'s total net damages and interest through December 31, 2020, equals

$160,855.17.

ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire

record in the case, we conclude that Bellflower Unified School District has not

complied with Sections A.2, A.3, A.4, B.1, B.2, B.3, B.4, B.5, B.6, B.7, and B.8 of the

Board's Order in *Bellflower Unified School District* (2017) PERB Decision No. 2544,

pp. 12-14. We further conclude that the District has not complied with the Board's

order to reimburse California School Employees Association, Chapter 32 (CSEA) for

time spent opposing a frivolous reconsideration request, as set forth in *Bellflower*

Unified School District (2019) PERB Order No. Ad-475a, p. 6.

Pursuant to Government Code section 3541.3, subdivisions (i) and (n), and section 3541.5, subdivision (c), IT IS HEREBY ORDERED THAT:

A.   This decision is a "final decision or order of the board in an unfair practice case" within the meaning of Government Code section 3542, subdivision (b). Within 10 days after this decision becomes final by virtue of the District having declined to seek judicial review or having exhausted the judicial review process, the District shall send to CSEA's office at 2045 Lundy Avenue, San Jose, California, 95131 (or any substitute address that CSEA may designate), by overnight mail, checks or money orders as specified below:

1.   A payment to CSEA in the amount of $34,224.47, reflecting the sum of (a) $29,112.47 as reimbursement for CSEA's lost dues and interest through December 31, 2020; and (b) $5,112, reflecting payment of the sanction award ordered in *Bellflower Unified School District* (2019) PERB Order No. Ad-475a.

2.   Separate payments to D.C., M.G., W.G., R.G., T.H., N.H., E.Q., E.V., D.W., and S.B. in the following amounts, reflecting net lost wages, benefits, and interest through December 31, 2020:

      a.   D.C.: $97,683.88

      b.   M.G.: $126,378.02

      c.   W.G.: $45,098.74

      d.   R.G.: $18,457.96

      e.   T.H.: $39,027.43

      f.   N.H.: $258,026.05

g. E.Q.: $185,278.72

h. E.V.: $4,225.17

i. D.W.: $70,402.62

j. S.B.: $160,855.17

B. The payments identified in paragraph A.2 shall be distributed as follows:

1. CSEA shall make diligent efforts to provide the payments identified in paragraph A.2 to the specified employees or their assignees, designated representatives, heirs, or estates. If such efforts are unsuccessful after 12 months, CSEA shall contact the California State Controller's Office and make diligent efforts to report the payments as unclaimed property and eventually deliver the payments to the Controller's Office.

2. Should any check or other payment expire before it is cashed, the District shall re-issue such payments if requested to do so at any time in the first two years after the date this order becomes final.

C. The payments ordered in paragraphs A.1 and A.2 do not fully satisfy the District's obligations under the Board's orders in *Bellflower Unified School District* (2017) PERB Decision No. 2544 and *Bellflower Unified School District* (2019) PERB Order No. Ad-475a. Absent a settlement, the ALJ shall convene further compliance proceedings and develop a record as to the following topics:

1. What amount of further make-whole relief, plus interest, the District owes CSEA and drivers for any losses incurred after December 31, 2020.

2.	The amount of make-whole relief, if any, needed to provide tax neutralization relief consistent with this decision, plus interest at 7 percent per year on such amounts, beginning on the estimated dates of any such increased tax payments.

3.	The additional litigation expenses, plus interest at 7 percent per year, that the District must pay CSEA for work reasonably performed since June 17, 2021, to secure payment of the sanction award ordered in *Bellflower Unified School District* (2019) PERB Order No. Ad-475a.

4.	The additional interest owed that has not yet been calculated, including (a) interest owed on the District's obligation to reimburse CSEA $5,112 in attorney fees, accruing at 7 percent annually since CSEA filed its opposition to the District's reconsideration request on October 21, 2019; and (b) additional interest owed to CSEA and drivers, reflecting interest accruing after December 31, 2020, on damages CSEA and the drivers incurred through December 31, 2020.

5.	What other obligations, if any, remain unfulfilled from the Board's Order in *Bellflower Unified School District* (2017) PERB Decision No. 2544, pp. 12-14, including but not limited to: (a) whether, at any time after December 31, 2020, any of the District's duties were curtailed due to a lawful exercise of any rights not in conflict with the extant orders in this case or any other subsequent events sufficient to curtail such duties; (b) what reinstatement obligation, if any, the District continues to owe to D.C., M.G., W.G., R.G., T.H., N.H., E.Q., E.V., D.W., and S.B.; and (c) what obligations, if any, the District continues to owe regarding assigning drivers Extended

School Year (ESY) work and ceasing to offer families $25 per day to transport

students to and from the ESY program.

       D.   Unless the Board directs otherwise, the ALJ shall issue a further

proposed compliance order as to the topics identified in paragraphs C.1 through C.5.

Members Shiners and Paulson joined in this Decision.