

**ATTACHMENT E**

**THE PROPOSED DECISION**

**BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

**In the Matter of the Appeal Regarding Final Compensation  
Calculation of:**

**BRITT W. WILSON, Respondent**

**and**

**CITY OF RANCHO MIRAGE,**

**Respondent**

**Agency Case No. 2020-1262**

**OAH No. 2021030302**

**PROPOSED DECISION**

Marion J. Vomhof, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by video and tele-conference on July 8, 2021, due to the ongoing COVID-19 pandemic.

Charles H. Glauberman, Senior Attorney, represented complainant, Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS), State of California.

Britt W. Wilson, respondent, represented himself.

City of Rancho Mirage (the City), respondent, was represented by Danny Y. Yoo, Attorney at Law.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on July 8, 2021.

## **ISSUE**

The appeal is limited to the issue of whether the additional compensation reported by the City on behalf of Britt Wilson in the form of payrate from February 28, 2019, through June 22, 2019, can be included in the calculation of respondent Wilson's final compensation. If the compensation at issue was reported in error, CalPERS is required to collect the \$7,180.99 from respondent Mr. Wilson.

## **FACTUAL FINDINGS**

### **Background**

1. Mr. Wilson was employed with the City of Highland, the City of La Quinta, the City of Ranch Cucamonga, and, most recently, the City of Rancho Mirage (respondent City). By virtue of his employment, Mr. Wilson is a local miscellaneous member of CalPERS.

2. The City is a public agency contracting with CalPERS for retirement benefits for its eligible employees. The provisions of the City's contract with CalPERS

are contained in the California Public Employees' Retirement Law (PERL). (Gov. Code § 20000 et seq.)

3. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions and by interest and other earnings on those contributions. A member's contribution is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a contribution rate to the payroll of the agency. Using certain actuarial assumptions specified by law, the CalPERS Board of Administration sets the employer contribution rate on an annual basis.

4. On February 28, 2019, the City and Mr. Wilson entered into a Retirement Agreement and Comprehensive Release of Claims which provided, in pertinent part:

This RETIREMENT AGREEMENT AND COMPREHENSIVE RELEASE OF CLAIMS (hereinafter, the "Agreement") is entered into this 28th day of February 2019, by and between the City of Rancho Mirage, a municipal corporation located in the County of Riverside, State of California, and its affiliated agencies, the State of California, and its affiliated agencies, . . . (collectively, "City"), and Britt Wilson ("Wilson"), Wilson's representatives, successors in interest and assigns as a complete, final and binding settlement of all claims and potential claims, if any, with respect to their employment relationship, with the City and Wilson together sometimes referred to as the "Parties" and individually as "Party."

## RECITALS

WHEREAS, Wilson commenced regular, full-time employment with the City on or about January 3, 2011, and most recently served as a Management Analyst; and

WHEREAS, Wilson desires to retire from his position as an employee of the City, effective upon the close of the business day on June 22, 2019, with his official Retirement Date being set at June 23, 2019, subject to the terms and conditions set forth in this Agreement; and

WHEREAS, the City offered to place Wilson on paid administrative leave commencing upon the Effective Date of this Agreement, as defined herein below, through the close of the business day on June 22, 2019, at an hourly rate of Fifty Dollars and Sixty-Four point Six-Two Cents (\$50.6462), which Wilson has accepted; and

**WHEREAS, the City offered to pay Wilson on the Effective Date of this Agreement, as defined herein below, the total sum of the difference between Wilson's current hourly rate of pay of Forty-Five Dollars and Forty-Eight Cents (\$45.48) and Fifty Dollars and Sixty-Four point Six-Two Cents (\$50.6462), for the period commencing June 18, 2018, through the commencement of the time Wilson is placed on paid administrative leave, which shall be paid to Wilson in one lump sum, subject to any requisite deductions and**

withholdings required or permitted by law, which Wilson has accepted; and [1] . . . [1] (Emphasis in original.)

5. On February 28, 2019, CalPERS received Mr. Wilson's application for service retirement, with a requested retirement date of June 23, 2019. Mr. Wilson retired for service effective June 23, 2019, with a total service credit of 21.940 years, and has been receiving his retirement allowance since July 1, 2019.

### **Public Agency Review Audit**

6. On June 4, 2020, CalPERS Office of Audit Services (OFAS) completed a public audit review of the City to determine whether its publicly available pay schedules (pay schedules) complied with the PERL and whether the payrates contained in the pay schedules included any additional types of compensation. The audit period covered sampled employees' earnings for the period July 1, 2017, through August 31, 2019.

Finding 2 states:

The Employer reported a payrate that included additional compensation for a sampled retired employee. Specifically, the Employer entered into a retirement agreement with the employee on February 28, 2019 and placed the employee on paid administrative leave from February 28, 2019 through June 22, 2019. Under the terms of the agreement the Employer also increased the employee's payrate from \$45.45 to \$50.65 per hour. As a result, the reported payrate of \$50.65 per hour exceeded the maximum payrate listed for the employee's position in the Employer's pay schedule

and was in fact Final Settlement Pay as defined in Government Code section 20636 and CCR section 570. The employee retired on June 23, 2019. Government Code section 20636 states "final settlement pay" means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. CCR section 570 states Final Settlement Pay is excluded from payroll reporting to CalPERS, in either payrate or compensation earnable. The Employer was not aware that this was considered Final Settlement Pay.

7. On June 16, 2020, CalPERS's Audit Compliance & Resolution Unit staff notified Kofi Antobam, Administrative Services Director for the City, of the audit findings. After determining the payroll corrections and retirement allowance adjustments that needed to be made, the City asked CalPERS to "proceed with making the adjustment....."

### **Notification to Mr. Wilson and the City of the Audit Findings**

8. On August 7, 2020, CalPERS wrote letters to Mr. Wilson and the City. Mr. Wilson was notified that an audit of the City identified compensation reported on Mr. Wilson's behalf that did not comply with the PERL. He was advised that compensation adjustments may require a reduction in his retirement allowance of \$470.37 per month, with a new monthly benefit of \$4,242.33. The letters cited the Government Code sections 20636, 20160, and 20163, as well as California Code of Regulations title

2 section 571. Mr. Wilson and the City were invited to provide any additional information before CalPERS made a final determination.

9. In response to CalPERS letter, Mr. Wilson wrote to explain that in February 2019, he told the City Manager that his duties “had drastically changed over the years” and he was seeking a promotion. Mr. Wilson wrote in part:

The City Manager asked me what I wanted and I said ‘a promotion’. He agreed to that and our conversation continued; he . . . sensed my disappointment for my current position and duties and asked now that I had the promotion why not just retire so I did. I know it is a fine nuance of what happened, **but I was given a promotion then retired** .....[Emphasis in original.]

10. CalPERS reviewed the audit finding, PERL, and information provided by the City, and determined that the additional compensation reported by City on behalf of Mr. Wilson as a payrate for the period February 28, 2019, through June 22, 2019, is non-reportable Final Settlement Pay and cannot be included in the calculation of Mr. Wilson’s final compensation.

11. On September 10, 2020, CalPERS sent letters to Mr. Antobam and to Mr. Wilson, notifying them of CalPERS’s formal determination of the retirement allowance. The letters stated that the final settlement pay did not meet the definition of “compensation earnable” as provided in Government Code section 20636 and California Code of Regulations, title 2, (CCR) section 571, and these payments will be excluded from the final compensation period. The letters stated if either party wished to appeal, the appeal must be requested within 30 days.



12. On September 16, 2020, CalPERS wrote to Mr. Wilson and confirmed that the adjustment had been processed, which decreased his final compensation from \$8,754.03 to \$7,880.30. The letter stated in part:

This adjustment is effective from the date of your retirement through September 30, 2020. It has resulted in a decrease of \$470.37 to your present monthly allowance and a total overpayment of \$7,180.99. Your allowance will be reduced on the November 1, 2020, retirement check, and your new allowance will be \$4,242.33.

13. On October 9, 2020, Mr. Wilson appealed the final determination by CalPERS.

14. On March 8, 2021, Renee Ostrander, Chief of the Employer Account Management Division of CalPERS, signed the statement of issues on behalf of the Board of Administration CalPERS. The statement of issues listed one issue on appeal: whether the additional compensation reported by the City on behalf of Mr. Wilson in the form of payrate from February 28, 2019, through June 22, 2019, can be included in the calculation of Mr. Wilson's final compensation. If the compensation at issue was reported in error, CalPERS is required to collect the \$7,180.99 from Mr. Wilson.

## **Evidence Regarding Mr. Wilson's Compensation and Calculation of Retirement Benefits**

### **KEVIN LAU, CALPERS**

15. Kevin Lau is the Audit Compliance & Resolution Section Manager for CalPERS. Mr. Lau is not part of the CalPERS audit team but he works with agencies on

“audit resolution” after an audit has been conducted. Mr. Lau testified at hearing about the findings of the audit and the application of those findings to Mr. Wilson’s retirement allowance.

The City considered Mr. Wilson’s settlement to be his final pay, which included his pay raise retroactive to June 2018. Government Code section 20636, subdivision (b), requires that the agency list all schedules and pay rates (monthly/hours) to let the public know pay rates of City staff. CalPERS uses this information to determine what is reportable salary to determine “compensation earnable.” CalPERS confirmed that the reported payrate of \$50.65 per hour exceeded, by \$5.17 per hour, the maximum payrate listed for the Mr. Wilson's position in the City’s pay schedule and was in fact Final Settlement Pay as defined in Government Code section 20636 and CCR section 570.

Mr. Lau reviewed the February 4, 2019, Settlement and Release agreement. Mr. Wilson was promoted, the promotion and pay increase were retroactive to June 2018, and Mr. Wilson was immediately put on paid administrative leave. Per CCR 570, “general compensation” is for services rendered. Mr. Wilson never performed work as a senior management analyst, The non-reportable portion of the final settlement pay, \$5.17 per hour, was not earned but rather was paid in anticipation of retirement, and this pay cannot be included as final payrate. The final compensation rate is \$45.48 rather than \$50.65.

Mr. Lau confirmed that Mr. Wilson’s retirement allowance had been adjusted and Mr. Wilson had refunded \$7,180.99 to CalPERS.

## **KOFI ANTOBAM, CITY**

16. In his position as Administrative Services Director for the City, Mr. Antobam manages several departments, including Human Resources, Benefits, and Finance. Mr. Antobam testified and prepared a declaration, which was consistent with his testimony. In February 2019, Mr. Wilson was promoted to a Senior Management Analyst, retroactive to June 18, 2018. Two weeks later Mr. Wilson informed the City Manager that he planned to retire in June 2019. Due to his pending retirement, the City entered in an agreement with Mr. Wilson and he was put on administrative leave until his retirement in June 2019. The City's decision to enter into the retirement agreement was independent of his promotion.

## **MR. WILSON**

17. Mr. Wilson prepared a statement of facts dated April 1, 2021, and testified at the hearing. From the time he started working for the City in 2011, Mr. Wilson observed that others who were given increased (out of class) duties were given promotions to reflect the increased responsibility. He was never given a promotion which led him to initiate an "out of class" action against the City in 2016. The City had the option of giving him a pay increase or taking away the additional duties away; the City took away the additional duties. In 2017 he pursued a "formal out of class action" which was denied by the City Manager. In the summer of 2018, there were "massive duty changes for me from 2016/17."

Mr. Wilson met with the City Manager in late February 2019. The City Manager asked him what he wanted and Mr. Wilson said "promotion." Mr. Wilson said, "He agreed . . . and then said . . . why not just retire so I did." Mr. Wilson asserted that because the manager first approved the promotion, and then told him to think about

retiring, the two were not related. Mr. Wilson asserted that he was told by the City Manager that he would get a higher retirement. This statement is administrative hearsay and is considered only to the extent it supplements or explains other evidence.

Mr. Wilson stated that "the City documented my promotion incorrectly (in the retirement agreement) but subsequently corrected it with the PAF." Mr. Wilson had a "rocky relationship" with the City and initiated two "out of class actions," so the retirement agreement "protected them."

Mr. Wilson previously reimbursed CalPERS the \$7,180.99.

## **LEGAL CONCLUSIONS**

### **General Principles Relating to CalPERS's Functions**

1. The Constitution imposes on CalPERS a duty to "ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland v. Public Employees' Retirement System* (2002), 95 Cal.App.4th 29, 46.) But, "[CalPERS's] fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. [CalPERS] has a duty to follow the law." (*City of Pleasanton v. Bd. of Administration* (2012) 211 Cal.App.4th 522, 544.)

2. Pension legislation should be liberally construed and all ambiguities should be resolved in favor of the pensioner. (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 473.) "However, this rule of liberal construction is applied for the purpose of effectuating obvious legislative intent and should not blindly be followed

so as to eradicate the clear language and purpose of the statute." (*Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1603.)

### **Burden and Standard of Proof**

3. While the party against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476), the fact that CalPERS filed a statement of issues is not dispositive as to the burden of proof. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, the court considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found "the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence." (*Id.* at p. 1051, fn. 5.) Here, CalPERS is the party asserting the affirmative, in that it is seeking to change the level of retirement benefits it has been paying to Mr. Wilson since he retired in June 2019 and to recoup overpayments. Where a change in the status quo is sought, the party seeking the change has the burden of proving that the change is necessary. (Evid. Code, § 500.) Moreover, CalPERS is seeking to correct an error in reporting pursuant to Section 20160. Under this provision, CalPERS, as the party seeking correction of an error, has "the burden of presenting documentation or other evidence to the board establishing the right to correction." (Gov. Code, § 20160, subd. (d).) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

### **Relevant Statutory and Regulatory Authority**

4. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Bd. of Administration* (1994) 23 Cal.App.4th 194, 198.) The formula for determining a

member's retirement benefit considers: the years of service, a percentage figure based on the age on the date of retirement; and "final compensation." (Gov. Code, §§ 20037, 21350, 21352 and 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)

5. "Compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work for specified reasons. (Gov. Code, § 20630, subd (a).)

6. "Final Compensation" means the highest annual average compensation earnable by a member during any consecutive 36-month period of employment preceding the effective date of his or her retirement. (Gov. Code, § 20037.)

7. Government Code section 20160 provides:

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

[¶] . . . [¶]

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations

of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

6. Government Code section 20163, subdivision (a), provides:

If more or less than the correct amount of contribution required of members, the state, or any contracting agency, is paid, proper adjustment shall be made in connection with subsequent payments, or the adjustments may be made by direct cash payments between the member, state, or

contracting agency concerned and the board or by adjustment of the employer's rate of contribution . . .

Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person . . . will receive the actuarial equivalent of the allowance to which the member is entitled. . . .

7. Government Code section 20630 provides:

(a) As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of any of the following:

[¶] . . . [¶]

(6) Leave of absence.

[¶] ..... [¶]

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.

8. Government Code section 20631 provides:



A contracting agency may report an amount for each member that is equal to a uniformly applied percentage of salary in lieu of computing and reporting the actual compensation attributable to each individual member . . . if the contracting agency has agreed in a memorandum of understanding reached pursuant to Chapter 10 (commencing with Section 3500 ) of Division 4 of Title 1 that the aggregate amount to be reported by the contracting agency for all members within a membership classification bears a reasonable relation to the aggregate amount that would otherwise be required to be reported pursuant to Section 20636.

9. Government Code section 20636 provides:

(a) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b)(1) "Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. "Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay

schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e).

(2) "Payrate" shall include an amount deducted from a member's salary for any of the following:

(A) Participation in a deferred compensation plan.

(B) Payment for participation in a retirement plan that meets the requirements of Section 401(k) of Title 26 of the United States Code.

(C) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of Title 26 of the United States Code.

(D) Participation in a flexible benefits program.

[¶] . . . [¶]

(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.

(e)(1) As used in this part, "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location,

collective bargaining unit, or other logical work-related grouping. A single employee is not a group or class.

[¶] . . . [¶]

(f) As used in this part, "final settlement pay" means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay.

(g)(1) Notwithstanding subdivision (a), "compensation earnable" for state members means the average monthly compensation, as determined by the board, upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay, and is composed of the payrate and special compensation of the member . . . .

(2) Notwithstanding subdivision (b), "payrate" for state members means the average monthly remuneration paid in cash out of funds paid by the employer to similarly situated members of the same group or class of employment, in payment for the member's services or for time during which the member is excused from work because of holidays, sick

leave, vacation, compensating time off, or leave of absence.

“Payrate” for state members shall include:

(A) An amount deducted from a member's salary for any of the following:

(i) Participation in a deferred compensation plan established pursuant to Chapter 4 (commencing with Section 19993) of Part 2.6.

(ii) Payment for participation in a retirement plan that meets the requirements of Section 401(k) of Title 26 of the United States Code.

(iii) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of Title 26 of the United States Code.

(iv) Participation in a flexible benefits program.

(B) A payment in cash by the member's employer to one other than an employee for the purpose of purchasing an annuity contract for a member under an annuity plan that meets the requirements of Section 403(b) of Title 26 of the United States Code.

[¶] . . . [¶]

(F) Other payments the board may determine to be within “payrate.”

(3) Notwithstanding subdivision (c), "special compensation" for state members shall mean all of the following:

(A) The monetary value, as determined by the board, of living quarters, board, lodging, fuel, laundry, and other advantages of any nature furnished to a member by his or her employer in payment for the member's services.

(B) Compensation for performing normally required duties, such as holiday pay, bonuses (for duties performed on regular work shift), educational incentive pay, maintenance and noncash payments, out-of-class pay, . . .

[¶] . . . [¶]

(4) "Payrate" and "special compensation" for state members do not include any of the following:

[¶] . . . [¶]

(F) Payments for unused vacation, annual leave, personal leave, sick leave, or compensating time off, whether paid in lump sum or otherwise.

(G) Final settlement pay.

[¶] . . . [¶]

(L) Other payments the board may determine are not "payrate" or "special compensation."

[¶] . . . [¶]

(6)(A) Subparagraph (B) of paragraph (3) prescribes that compensation earnable includes compensation for performing normally required duties, such as holiday pay, bonuses (for duties performed on regular work shift), educational incentive pay, maintenance and noncash payments, out-of-class pay, . . .

[¶] . . . [¶]

8. California Code of Regulations, title 2, section 570, provides:

“Final settlement pay” means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

For example, final settlement pay may consist of severance pay or so-called “golden parachutes”. It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate,

conversion of special compensation to payrate, or any other method of payroll reported to PERS.

9. California Code of Regulations, title 2, section 570.5, provides:

(a) For purposes of determining the amount of "compensation earnable" pursuant to Government Code Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

(1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

(2) Identifies the position title for every employee position;

(3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

(4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;

(5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

(6) Indicates an effective date and date of any revisions;

(7) Is retained by the employer and available for public inspection for not less than five years; and

(8) Does not reference another document in lieu of disclosing the payrate.

(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:

(1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;

(2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;

(3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;

(4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that



conforms with the requirements of subdivision (a) of a former CalPERS employer.

9. California Code of Regulations, title 2, section 571, provides:

(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement: policy or agreement:

[¶] . . . [¶]

(b) The Board has determined that all items of special compensation listed in subsection (a) are:

(1) Contained in a written labor policy or agreement as defined at Government Code section 20049, provided that the document:

(A) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

(B) Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;

(C) Is posted at the office of the employer or immediately accessible and available for public review from the

employer during normal business hours or posted on the employer's internet website;

(D) Indicates an effective date and date of any revisions;

(E) Is retained by the employer and available for public inspection for not less than five years; and

(F) Does not reference another document in lieu of disclosing the item of special compensation;

(2) Available to all members in the group or class;

(3) Part of normally required duties;

(4) Performed during normal hours of employment;

(5) Paid periodically as earned;

(6) Historically consistent with prior payments for the job classification;

(7) Not paid exclusively in the final compensation period;

(8) Not final settlement pay; and

(9) Not creating an unfunded liability over and above PERS' actuarial assumptions.

(c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be

subject to review for continued conformity with all of the standards listed in subsection (b).

(d) If an item of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual.

## **Evaluation**

10. The retirement agreement stated that on the effective date of the agreement, February 28, 2019, Mr. Wilson's payrate would increase from \$45.48 to \$50.65, and he would be paid at the \$50.65 hourly rate through June 22, 2019, the date of his retirement. This payrate increase also covered the period June 18, 2018, through February 28, 2019, the date Mr. Wilson was placed on paid administrative leave. Mr. Wilson was to be paid a lump sum payment consisting of the difference between the \$50.65 payrate and his current \$45.48 payrate.

Government Code section 20636 states that payrate is the normal monthly rate of pay that is paid to other similarly situated employees of the same group or class for services rendered, pursuant to publicly available pay schedules. The payrate of \$50.65 was higher than the rates provided in the City's applicable pay schedules. Mr. Wilson was on administrative leave from February 28, 2019, through June 22, 2019, and never performed services as a Senior Administrative Manager at the payrate of \$50.65.

Compensation earnable is the average monthly compensation paid to members of the same group or class of employment and at the same rate of pay, in accordance

with the publicly available payrate schedules provided by the City. The payrate of \$50.65 was in excess of the payrate provided in the applicable schedules.

Per CCR section 570, final settlement pay is pay in excess of compensation earnable, which is granted in anticipation of separation from employment. The retirement agreement provided that, effective as of the date of the agreement, Mr. Wilson's payrate increased from \$45.48 to \$50.65 per hour through the date of his retirement. Mr. Wilson's final settlement pay provided to CalPERS by the City was calculated at the \$50.65 per hour payrate. However, his compensation earnable was at a payrate of \$45.48, with an amount in excess of \$5.17 per hour.

Government Code section 20636 and CCR section 570 provide that this additional compensation or final settlement pay is excluded from payroll reporting to CalPERS, in either payrate or compensation earnable. This final settlement pay cannot be included in Mr. Wilson's final compensation.

Mr. Wilson acknowledged that in February 2019, the City Manager asked him what he wanted and Mr. Wilson said "promotion." Mr. Wilson said, "He agreed . . . and then said . . . why not just retire so I did." A preponderance of the evidence established that the payrate increase to \$50.65 per hour was given or awarded in anticipation of retirement, and therefore final settlement pay.

Mr. Wilson argued that because the promotion was agreed to before he resigned, the two were separate issues. However, the retirement agreement included the administrative leave, the payrate increase, the resignation, and final payment as part of the settlement.

Once the error in reporting was discovered, CalPERS had the duty to correct the error. Under Government Code section 20160, subdivision (e), CalPERS was required to

make a correction that returned the parties to the status they would have occupied but for the error.

The additional compensation reported by the City on behalf of Mr. Wilson in the form of payrate from February 28, 2019, through June 22, 2019, cannot be included in the calculation of Mr. Wilson's final compensation. This additional compensation was reported in error and CalPERS is required to collect the \$7,180.99 from Mr. Wilson.

## **ORDER**

The appeal by respondents Britt Wilson and the City of Rancho Mirage is denied. CalPERS's decision to reduce the retirement benefit payable to Mr. Wilson and collect the overpayment is affirmed.

DATE: August 10, 2021

*Marion J. Vomhof*

MARION J. VOMHOF

Administrative Law Judge

Office of Administrative Hearings