

ATTACHMENT A

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:

GEORGE P. D'ABLAING, Respondent

and

SAN DIEGO ASSOCIATION OF GOVERNMENTS, Respondent

Case No. 2021-0524

OAH No. 2021090119

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter virtually on December 28, 2021, via the Microsoft Teams application.

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

George P. D'Ablaing, respondent¹, represented himself.

John Kirk, Attorney at Law, appeared on behalf of the San Diego Association of Governments (SANDAG).

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on December 28, 2021.

ISSUES

1. Does the item of compensation identified as bonus pay and reported by SANDAG on behalf of respondent D'Ablaing for the period of June 27, 2017, through September 15, 2019, constitute special compensation, and thus, compensation earnable, which may be included in respondent D'Ablaing's final compensation amount for purposes of calculating his monthly retirement allowance?

2. If so, is CalPERS entitled to correct SANDAG's error in reporting of respondent D'Ablaing's bonus pay as special compensation by reversing out those erroneous amounts and adjusting his final compensation to recalculate his monthly retirement allowance?

3. May CalPERS recover from respondent D'Ablaing the overpayment of \$8,136.41 that resulted from the bonus pay being erroneously included in respondent D'Ablaing's final compensation?

¹ Hereafter, "respondent" refers solely to respondent D'Ablaing.

SUMMARY

The bonus pay reported by SANDAG on behalf of respondent for the period of June 27, 2017, through September 15, 2019, does not constitute special compensation, and thus, is not compensation earnable. Therefore, it was improperly included in calculating the amount of respondent's final compensation, resulting in an inflated monthly retirement allowance. CalPERS is therefore required to correct the error and adjust respondent's monthly retirement allowance, and collect the overpayment of \$8,136.41.

FACTUAL FINDINGS

Background

1. Many public agencies in California contract with CalPERS to provide retirement benefits for their employees. Beginning on September 1, 1983, respondent worked for a public agency that contracted with CalPERS. He held multiple other positions over the years with public agencies that contracted with CalPERS. By virtue of his employment, respondent became a local miscellaneous CalPERS member on September 1, 1983.
2. SANDAG is a public agency that contracts with CalPERS. Respondent began working for SANDAG on October 13, 2003.
3. Respondent retired from SANDAG effective November 7, 2019. His last position held was Senior Transportation Engineer. Respondent has been receiving his monthly retirement allowance since that date.

4. A member's service retirement allowance is calculated by applying a formula that involves the member's age at retirement, the member's years of service with CalPERS, and the member's "final compensation," which is defined as "the remuneration paid out of funds controlled by the employer in payment of the member's services performed during normal working hours or for the time during which the member is excused. . . ." (Gov. Code, § 20630.) By statute, "final compensation" includes the employee's "payrate" and any "special compensation." (Gov. Code, § 20636.)

5. Prior to June 2020, CalPERS conducted an audit of 58 public agencies regarding their special compensation reporting. SANDAG was among those 58 agencies. The report noted that SANDAG was incorrectly including an item of compensation, bonus pay, as special compensation. This erroneous reporting inflated respondent's final compensation, which had been used to calculate his monthly retirement allowance when he retired in November 2019.

6. CalPERS began working with SANDAG to obtain additional information and investigate whom the reporting error affected and to what extent. CalPERS obtained several employee handbooks from SANDAG and had multiple exchanges with representatives of SANDAG. CalPERS also began working with SANDAG to identify affected employees, dates the bonus pay was paid, and applicable compensation amounts. A letter from SANDAG, written in response to the audit just prior to its completion, stated:

SANDAG staff will continue to cooperate with CalPERS regarding the compensation review activities. If it is

determined any special compensation amounts were improperly included in the retirement allowance of SANDAG retirees, SANDAG staff will support CalPERS in taking corrective actions pursuant to Government Code section 20160.

7. On July 2, 2020, Kevin Lau, a Compensation Compliance and Audit Resolution Manager at CalPERS, sent a letter to SANDAG regarding the ongoing cooperative investigation to bring SANDAG's reporting into compliance and also to identify which employees may have been affected by having the bonus pay erroneously reported to CalPERS as special compensation.

8. On February 22, 2021, Isabel Safie, an attorney for the law firm Best Best & Krieger that represents SANDAG, sent an e-mail to Vicki Shaw, an Associate Governmental Program Analyst at CalPERS, regarding the "SANDAG Audit Resolution." In the e-mail, Ms. Safie details the work SANDAG was doing to resolve the audit findings and also identify the affected employees. Ms. Safie provided a list of the affected employees, which included respondent. Ms. Safie further indicated that several of the affected employees had already retired, and SANDAG would appreciate the opportunity to notify those individuals of what was occurring before CalPERS sent any determination letters. Specifically, Ms. Safie wrote:

SANDAG intends to make the appropriate corrections in the myCalPERS system. However, before posting the corrections, SANDAG will be speaking with their impacted retirees to advise them of the situation and the pending determination letter that will be sent by CalPERS. As such, I would like to reiterate my request that the formal

determination letters to impacted retirees be held until SANDAG approves the corrections, after speaking with the retirees.

9. CalPERS appears to have permitted SANDAG the requested courtesy, and waited almost a month to send out a pre-determination letter, after discovery of the employees' names.

10. On March 22, 2021, CalPERS sent respondent a "pre-deprivation of retirement allowance" letter notifying him that as a result of the error the audit uncovered, his monthly retirement allowance would be reduced by \$432.22 per month, to \$10,454.82.

11. On that same date, CalPERS sent a letter to SANDAG's human resources department, identifying respondent's bonus pay compensation as having been improperly reported and that it would result in a reduction in his monthly retirement benefits. CalPERS noted in the letter that it wanted to give SANDAG the opportunity to submit any additional information that might be helpful before CalPERS made a final determination to process respondent's retirement adjustments.

12. Following receipt of additional information, CalPERS sent a letter to respondent on April 22, 2021, stating:

The bonus pay will be excluded within your final compensation. Using the adjusted final compensation per month, your benefit allowance will be adjusted retroactive to your retirement date resulting in a reduction to your monthly allowance of \$432.22 and an estimated

overpayment of \$7,261.29. Your new retirement allowance will be \$10,454.82. . . .

13. On April 21, 2021, just before he received the above letter, respondent wrote to CalPERS advising them additional information might be forthcoming from his employer.

14. On May 24, 2021, CalPERS notified respondent that it stood by its determination that the Bonus pay did not constitute special compensation, and that after review of the correct reports of his compensation earnable, his monthly retirement allowance would be reduced by \$437.55 per month, to \$10,583.41 (included a cost of living adjustment). CalPERS also notified respondent that, as a result of the error in reporting, respondent received approximately \$8,136.41 in overpayment, which would need to be recovered.

15. Respondent's monthly retirement benefit amount was recalculated after receipt of additional information in November 2021, which resulted in a final monthly retirement benefit allowance of in \$10,736.56.

16. Respondent paid the overpayment of \$8,136.41, and timely appealed the determination that the bonus pay did not constitute special compensation. This hearing followed.

SANDAG Bonus Pay

17. Associate Governmental Program Analyst Vicki Shaw testified on behalf of CalPERS. Ms. Shaw cited to California Code of Regulations, title 2, section 571, subdivisions (a) and (b), which exclusively identifies and defines special compensation items for members employed by contracting agencies. One of the requirements in that

regulation is that the purported item of special compensation be in a document approved by a board or governing body of the applicable employer. Here, it would be SANDAG's board. Ms. Shaw reviewed the 2017 and 2018 employee handbooks for SANDAG, and noted there was nothing like the type of bonus pay respondent received noted in the handbooks. Therefore, it did not qualify as special compensation.

18. The 2017 and 2018 employee handbooks were admitted as exhibits. Both employee handbooks include a description of a "performance bonus" as follows:

Regular and Limited-Term employees are eligible for bonus awards in recognition for superior performance as demonstrated by exceeding performance goals and objectives in their annual performance evaluation. Bonus awards must be authorized by the Executive Director and provided for in the annual budget.

Nowhere else in the document does it describe any kind of bonus pay.

19. The 2020 audit determined:

The SANDAG Employee Handbook (Handbook) contains a Bonus Plan, however the Handbook is not approved by the agency's governing body, the SANDAG Board of Directors, a requirement described in Government Code section 20636 and CCR section 571(a). As a result, the performance bonuses provided to the three sampled members is not considered special compensation.

20. SANDAG acknowledged in its response to CalPERS during the audit that the SANDAG Board of Directors does not approve the employee handbook or policies within, nor does the employee handbook specify the conditions or amount of any bonuses paid pursuant thereto. SANDAG resolved the audit by ceasing to report bonus pay as special compensation.

Respondent's Testimony

21. Respondent's testimony is summarized as follows: he spoke with "various individuals" at CalPERS and SANDAG prior to his retirement regarding whether his bonus pay would be included in his final compensation. He made his decision to retire based on the fact that it would be considered in calculating his final compensation. SANDAG could have made the adjustment when CalPERS found the error after the audit was completed on June 25, 2020, but CalPERS did not notify him until March 22, 2021. Therefore, CalPERS was not within the 6 month requirement to correct a mistake. Changing his retirement income two years after he retired is also a financial hardship.

LEGAL CONCLUSIONS

Applicable Law

1. The management and administration of CalPERS is vested in the Board of Administration (board). (Gov. Code, § 20120.)

2. Article XVI, section 17, subdivision (a), of the California Constitution provides in part:

The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will

assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

3. The board, subject to applicable law and regulations, shall determine and may modify benefits for service and disability retirement benefits. (Gov. Code, § 20123.)

4. 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 (cited with approval in *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 544.) 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." (*Ibid.*)

5. Members of CalPERS, once vested, participate in a defined benefit retirement plan that provides a monthly retirement allowance under a formula comprising factors such as final compensation, service credit (i.e., the credited years of employment), and a per-service-year multiplier. The retirement allowance consists of an annuity (funded by member contributions deducted from the member's paycheck and interest thereon) and a pension (funded by employer contributions and which must be sufficient, when added to the annuity, to satisfy the amount specified in the benefit formula). (*In re Marriage of Sonne* (2010) 185 Cal.App.4th 1564, 1568.) The

determination of what benefits and items of pay constitute compensation is crucial to the computation of an employee's ultimate pension benefits. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.)

6. "Under PERL, the determination of what benefits and items of pay constitute 'compensation' is crucial to the computation of an employee's ultimate pension benefits." (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.)

7. Government Code section 20160, provides:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

(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.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(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.

8. Government Code section 20163 provides:

(a) 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 any other errors in payments to or by the board, including adjustments of contributions, with interest, that are found to be erroneous as the result of corrections of dates of birth, may be made in the same manner. Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled. Losses or gains resulting from error in amounts within the limits set by the Department of General Services for automatic writeoff, and losses or gains in greater amounts specifically approved for writeoff by the Department of General Services, shall be debited or credited, as the case may be, to the reserve against deficiencies in interest earned in other years, losses under investments, and other contingencies.

No adjustment shall be made because less than the correct amount of normal contributions was paid by a member if the board finds that the error was not known to the member and was not the result of erroneous information provided by him or her to this system or to his or her employer. The failure to adjust shall not preclude action under Section 20160 correcting the date upon which the person became a member.

[11] . . . [12]

(c) The actuarial equivalent under this section shall be computed on the basis of the mortality tables and actuarial interest rate in effect under this system on December 1, 1970, for retirements effective through December 31, 1979. Commencing with retirements effective January 1, 1980, and at corresponding 10-year intervals thereafter, or more frequently at the board's discretion, the board shall change the basis for calculating actuarial equivalents under this article to agree with the interest rate and mortality tables in effect at the commencement of each 10-year or succeeding interval.

9. Government Code section 20164, subdivision (b), provides:

For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:

(1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.

(2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

10. 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:

(1) Holidays.

(2) Sick leave.

(3) Industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code, Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or Section 44043 or 87042 of the Education Code.

(4) Vacation.

(5) Compensatory time off.

(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.

11. 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.

(3) The computation for a leave without pay of a member shall be based on the compensation earnable by him or her at the beginning of the absence.

(4) The computation for time before entering state service shall be based on the compensation earnable by him or her in the position first held by him or her in state service.

(c)(1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

(2) Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e).

(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall do all of the following:

(A) Identify the pay period in which the special compensation was earned.

(B) Identify each item of special compensation and the category under which that item is listed, as described in regulations promulgated by the board pursuant to paragraph (6), for example, the item of Uniform Allowance would be reported under the category of Statutory Items.

(C) Report each item of special compensation separately from payrate.

(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

(5) The monetary value of a service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 and following of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

(7) Special compensation does not include any of the following:

(A) Final settlement pay.

(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

(C) Other payments the board has not affirmatively determined to be special compensation.

(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.

(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

(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. . . . [Emphasis added.]

12. California Code of Regulations, title 2, section 571, provides in part:

(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. [Emphasis added.]

Burden and Standard of Proof

13. Government Code section 20160, subdivision (d), provides that the party seeking to avail themselves of the correction provisions set forth in Section 20160 has the burden of showing right to a correction. It does not specify a standard of proof. In this matter, CalPERS seeks to use Section 20160 to change the retirement benefits being paid out to respondent and collect overpayment. Accordingly, CalPERS has the burden of proving the right to do so by a preponderance of the evidence. (Gov. Code, § 20160, subd. (d); Evid. Code, §§ 115, 500.)

Evaluation

THE REPORTING OF BONUS PAY AS SPECIAL COMPENSATION WAS AN ERROR

14. California Code of Regulations, title 2, section 571, subdivision (a)(1), does identify bonus pay as special compensation. It is defined as compensation to employees for superior performance such as "annual performance bonus" or "merit pay". In looking at SANDAG's employee handbooks, it appears SANDAG wanted to create a bonus pay program of that sort and did pay employees bonus. However, California Code of Regulations, title 2, section 571, subdivision (a)(1), also requires that the program in place identify specific performance goals and objectives. The employee handbook did not contain any performance goals or objectives.

Moreover, even if it did, the employee handbook is not a document approved by SANDAG's Board of Directors, as required by California Code of Regulations, title 2, section 571, subdivision (a)(1) and (b)(1). After review of the law and employee handbook, SANDAG therefore acknowledged that its bonus pay did not meet the criteria for special compensation and have since stopped reporting it to CalPERS.

Therefore, the bonus pay reported for respondent during the time period of June 27, 2017, through September 15, 2019, which inflated his final compensation and resulted in an overpayment of \$8,136.41, was an error. Therefore, respondent's monthly retirement benefit was properly reduced by \$437.55 per month as a result of that error.

CALPERS IS ENTITLED TO CORRECT THE ERROR

Arguments

15. Respondent argued that CalPERS "discovered" the error in how the bonus pay was reported on June 25, 2020, when the audit report was completed. Respondent argued that CalPERS therefore violated the provision of Government Code section 20160, subdivision (a)(1), which, in his view, does not permit the correction of mistakes to happen more than six months after discovery.

16. CalPERS argued that the six-month time limit found in Section 20160, subdivision (a)(1), does not apply to CalPERS seeking to correct error; rather, that provision applies to when a member requests to correct an error. CalPERS pointed out that under Section 20160, subdivision (b), all errors made by contracting agencies or CalPERS must be corrected, and that provision is not subject to any discovery rule or time limitation. Finally, CalPERS noted that the only statute of limitations that applies in this case has to do with the collection of the overpayment to respondent, which is subject to a three-year statute of limitations.

Discussion

17. 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.)

18. While interpretation of a statute or regulation is ultimately a question of law, an administrative agency's interpretation of a statute or regulation involving its area of expertise is entitled to great deference, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1567, citing *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, 1104.)

19. CalPERS relies on agencies to properly report compensation earnable for proper calculation of retirement benefits. Similarly, members rely on agencies to properly report compensation earnable for proper calculation of retirement benefits. Members go to CalPERS, prior to retirement, to obtain a calculation of expected retirement benefits. It is an estimation based on the compensation reported and service years of the member. Members make the decision to retire in reliance on that projected estimation.

The Legislature, by enacting Government Code section 20160, clearly contemplated that, on occasion, errors would be made in the calculation of retirement benefits. Consequently, it set forth a procedure for the correction of those errors, even after a member has retired in reliance on that calculation. Government Code section 20160, subdivision (a)(1), begins by stating "Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member" That provision then goes on to state the discovery rule, which states that a party seeking to make a correction must do so in a reasonable time after discovery of such right, which in no case shall exceed six months after that discovery. In other words, this subdivision confers *discretion* on the board to correct an error or omission committed by a *member*.

Section 20160, subdivision (b), however, is very different. This provision, which is separate from subdivision (a), *requires* the board to correct an error or omission made by a "*university, any contracting agency, any state agency or department, or this system.*" [Emphasis Added.] In other words, where the error or omission sought to be corrected was made by the employer or CalPERS, as opposed to a member, there is no discretion to correct the error. As long as CalPERS meets its burden to prove that it or the contracting agency committed an error or omission, the board must make the correction. Moreover, unlike subdivision (a), which contains a discovery clause/statute of limitations, subdivision (b) contains no such restriction.

Therefore, respondent's argument that CalPERS is barred from correcting the error in the bonus pay reporting as special compensation and adjusting his monthly retirement benefit allowance because of the six-month discovery rule contained in Government Code section 20160, subdivision (a), is rejected.

Conclusion

20. CalPERS conducted a thorough audit that resulted in a report on June 25, 2020, which concluded SANDAG had erroneously been reporting bonus pay as special compensation. CalPERS immediately began working with SANDAG by communicating with its representatives, obtaining additional documentation, and ultimately a list of employees affected in February 2021. CalPERS notified respondent of the error in March 2021. The error was made by SANDAG, a contracting employer, which falls under Section 20160, subdivision (b), which contains no statute of limitations. Accordingly, the board is required to make the correction.

CALPERS IS ENTITLED TO COLLECT THE OVERPAYMENT

21. As a result of the erroneous reporting of bonus pay as special compensation as compensation earnable, respondent's final compensation was improperly inflated, which resulted in an overpayment to him of \$8,136.41. CalPERS seeks to have affirmed its collection of that overpayment.

Unlike the mistake provisions in Section 20160, which contains no statute of limitations, there is a statute of limitations that applies to the collection of overpayments when an error has been made. Government Code section 20164, subdivision (b)(1), states that CalPERS's right to collect overpayment expires three years from the time of the payment. Respondent retired effective November 7, 2019. His first retirement payment would have been issued on or one month after that date. The statute of limitations for CalPERS to collect any overpayment as a result of that error therefore would start to run on or just after November 7, 2022. As that date has not yet passed, CalPERS was entitled to collect the \$8,136.41 in overpayment.

ORDER

1. The item of compensation identified as bonus pay and reported by SANDAG on behalf of respondent D'Ablaing for the period of June 27, 2017, through September 15, 2019, does not constitute special compensation, and thus, must be excluded from respondent D'Ablaing's final compensation for purposes of calculating his monthly retirement benefit allowance.

2. CalPERS is entitled to correct the mistake of SANDAG's reporting of respondent D'Ablaing's bonus pay as special compensation by reversing out those

erroneous amounts, adjusting his final compensation, and reducing his monthly retirement allowance by \$437.55 per month.

3. CalPERS is entitled to recover the \$8,136.41 in overpayment from respondent as a result of the error. However, as respondent has satisfied that amount in full, no further overpayment remains to be collected.

DATE: January 21, 2022

Kimberly J. Belvedere

KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings