

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 by:**

**PAMELA J. HULLINGER, and UNIVERSITY OF CALIFORNIA,
DAVIS, Respondents**

Agency Case No. 2021-0086

OAH No. 2021050613

PROPOSED DECISION

Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter via telephone and video conference on December 7, 2021, from Sacramento, California.

Charles Glauberman, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Pamela J. Hullinger represented herself.

There was no appearance by or on behalf of the University of California (UC), Davis. CalPERS established that it served UC Davis with a Notice of Hearing.

Consequently, this matter proceeded as a default hearing against UC Davis pursuant to Government Code section 11520, subdivision (a).

Oral and documentary evidence was received. The record was held open to allow respondent to submit an additional document. The record closed and the matter was submitted for decision on December 10, 2021.

ISSUE

Whether respondent established her final annual compensation was the amount reported to CalPERS in February 2020.

FACTUAL FINDINGS

Background and Jurisdictional Matters

1. On September 16, 1996, by virtue of her employment with the State of California, Department of Food and Agriculture, respondent became a member of CalPERS. On January 17, 2006, respondent established membership with UC Retirement System (UCRS) through her employment with UC Davis.

2. CalPERS and UCRS are reciprocal retirement systems. Reciprocity is an agreement among public retirement systems to allow members to move from one public employer to another public employer within a specific amount of time without losing valuable retirement and related benefit rights. Respondent has reciprocity rights for concurrent retirement with CalPERS and UCRS. She established reciprocity between CalPERS and UCRS effective January 17, 2006.

3. On November 13, 2019, respondent applied for service retirement with CalPERS, with an effective retirement date of January 3, 2020. At the time of her retirement, she was an "Academic Administrator VII" for UC Davis. She began receiving her retirement allowance on or around April 1, 2020.

4. As part of the retirement process, UC Office of the President (UCOP) submitted reports of respondent's compensation to CalPERS, and CalPERS reviewed the documentation to determine what final compensation amount it would use to calculate respondent's monthly service retirement benefit. On February 4, 2020, UCOP affirmed respondent's final average compensation of \$19,918.66 per month and checked the "no" box to indicate the salary did not include "special compensation."

5. CalPERS attempted to verify the compensation, but the only publicly available pay scale for an Academic Administrator VII showed the top monthly compensation as \$13,449.83. UC Davis was unable to provide information that would verify respondent's \$19,918.66 monthly compensation was pensionable under the legal requirements in the Public Employees' Retirement Law (PERL). CalPERS sent a letter to respondent dated April 9, 2020, informing her it had reviewed her account and attempted to verify her compensation. Because her compensation exceeded the publicly available pay scale and the excess amount did not fit within CalPERS's definition of pensionable "special compensation," it was excluded. The letter also informed her of her appeal rights.

6. Respondent appealed CalPERS's determination and requested an administrative hearing. On May 17, 2021, Renee Ostrander, Chief of CalPERS's Employer Account Management Division, signed and thereafter filed a Statement of Issues against respondent seeking to confirm respondent's final average compensation. The matter was set for an evidentiary hearing before an Administrative

Law Judge of OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

CalPERS's Evidence

7. José Martin is an Associate Government Program Analyst with CalPERS's Compensation Review Unit. He reviews payroll information for CalPERS members when they retire to ensure all compensation complies with applicable laws and regulations.

8. When a member retires for reciprocal service, she must retire simultaneously with CalPERS and, in this case, UCRS. She receives a retirement benefit amount from CalPERS and a separate amount from UCRS. Reciprocal entities apply their own rules to calculate the member's retirement benefit, but those rules do not apply to CalPERS. CalPERS is bound by its own statutes and regulations.

9. Mr. Martin's department reviews the compensation employers report against verifiable data in a publicly available pay schedule. Mr. Martin and his team are bound by the statutory and regulatory definitions of "compensation earnable" and "special compensation." Compensation earnable is the payrate found in a publicly available pay schedule and special compensation must fit within the statutory list that "exclusively identifies" the types of payments that can and should be included in the member's final average compensation.

10. UCRS provided CalPERS with respondent's salary information. Respondent's final 12-month average compensation was \$19,918.66. CalPERS attempted to confirm respondent's salary on a publicly available pay schedule but was unable to do so. Rather, the top rate of pay for an Academic Administrator VII was \$13,449.83. Consequently, CalPERS inquired with UCRS regarding the discrepancy.

11. In response, UCOP forwarded information to CalPERS regarding respondent's pay scale. UCOP explained Academic Administrator VIIs are paid "above scale" because these individuals have the academic and professional record to be "faculty" in the UC system, which has a different (and higher) pay scale. The position, however, comes with such a high amount of administrative and program management duties, it cannot be considered in the professorial salary scale. For the UC to successfully hire into these positions and offer competitive salaries, it must hire "off scale," which is an amount significantly higher than the published salaries for high-level Academic Administrators.

12. The UCOP explained respondent's position as the Director of the California Animal Health and Food Safety (CAHFS) Laboratory, which works in partnership with the California Department of Food and Agriculture, is vital to the health of California's livestock and poultry. Given the importance of the position, a significant increase over the salary schedule is required.

13. After two national searches for the position, respondent was hired and served for more than three years. The UCOP's email explained "all new recruits" get a "required \$39,800 off scale," as well as a "stipend for the administrative workload of at least \$20,000." During her tenure, respondent also received a merit salary increase.

Respondent's Evidence

BIRINDAR SINGH, ED.D.'S TESTIMONY

14. Birindar Singh, Ed.D., has been the Assistant Vice Provost of Academic Affairs at UC Davis for nine years. She is the lead in this field for all of UC Davis, including the School of Veterinary Medicine and the Medical Center. She has worked

in the broader field of human resources for over 30 years. She testified on respondent's behalf.

15. Dr. Singh explained the publicly available pay scales for high-level administrator positions are not competitive enough for the UC system to attract the caliber of executives and academics needed in a "world-class university." When a UC makes an offer to a potential employee, they offer a "market salary rate," to reflect the position duties and the market regardless of the pay scale.

16. When UC Davis initiated a search and ultimately made an employment offer to respondent, the offer was intended to account for her academic and administrative experience. Respondent was stepping into a leadership role, so to make a competitive offer, UC Davis compared salaries of other academic institutions' salaries for similar positions.

17. Once the offer amounts are determined, the provost's office must approve them. There is no schedule that lists what off-scale salaries are, because each discipline is unique. The UC System has no position identical to respondent's because UC Davis has the only veterinary teaching hospital.

18. Dr. Singh also explained the UC's Academic Personnel Manual provides parameters for using off-scale salaries. The primary reason for off-scale is to meet market conditions. Neither UC nor UCRS considers off-scale salaries to be "special pay." Rather, they are "regular compensation." As a public university, the UC maintains a website that lists the compensation of its employees to remain fiscally transparent. That site shows respondent's "total compensation," and does not separate her "regular compensation" from the off-scale amount she received.

19. Dr. Singh stated she was “not aware of changes” made to reciprocity rules and she only recently became aware of “publicly available pay schedules.” Many of the UC’s academics and administrators receive off-scale salary offers when negotiating employment. In preparing for hearing, Dr. Singh reviewed the salaries of UC Davis academics and found that in the last 10 years, 95 percent received an off-scale salary. For the entire UC system, the percentage is closer to 90. The off-scale salaries do not impact UC retirement benefits because UCRS does not have laws and regulations that distinguish between a publicly available pay scale and other compensation. Dr. Singh acknowledged that its pay scales are inaccurate and “an issue” that could be addressed. But she emphasized there was “no way for [respondent] to know” CalPERS’s reciprocity agreement would not recognize her off-scale salary.

RESPONDENT’S TESTIMONY

20. Respondent confirmed she established membership with CalPERS in 1996 and properly applied for reciprocity when she changed employment to a UCRS-covered entity. She remained in UCRS when she accepted a position at UC Davis. Respondent was aware that when she intended to retire, concurrent retirement was required.

21. In 2019, respondent began the retirement process. She confirmed her eligibility in both CalPERS and UCRS. UCOP sent CalPERS information to verify her last 12 months’ salary. CalPERS informed respondent more than four months after she retired that it could not confirm her salary because the publicly available pay scale was significantly lower than what UCOP reported.

22. When respondent accepted UC Davis's job and salary offer, there was no indication the salary was anything but the amount offered. No one told respondent the offer exceeded a publicly available pay schedule. In fact, her salary was consistently less throughout her tenure than that of her predecessor. Additionally, her salary is "publicly available" on the UCOP website. She believes the entire amount is pensionable.

23. Respondent made the decision to retire based on her number of years in each retirement system and her salary, which determined her retirement benefit. She has now made a final decision to retire, one she cannot undo. Her retirement benefit is approximately \$1,200 less than she anticipated.

PRINCIPLES OF LAW

Burden of Proof

24. Except as otherwise provided by law, a party has the burden of proof "as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) The standard of proof is proof by a preponderance of the evidence. (Evid. Code, § 115.) Accordingly, in this case, respondent has the burden to prove by a preponderance of the evidence that her entire off-scale salary should be included in her final compensation calculation.

Applicable Laws

25. 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 rate to the payroll of the agency. Using actuarial assumptions specified by law, the CalPERS Board of Administration sets the employer contribution rate on an annual basis.

26. The amount of a member's service retirement allowance is calculated by applying a percentage figure based upon the member's age on the date of retirement to the member's years of service and the member's "final compensation." In computing a member's retirement allowance, CalPERS may review the salary the employer reported for the member to ensure that only those items allowed under the PERL will be included in the member's "final compensation" for purposes of calculating the monthly retirement allowance.

27. Under Government Code section 20636, the following definitions apply:

(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).

[¶] . . . [¶]

(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:

[¶] . . . [¶]

(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.

[¶] . . . [¶]

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. [...]

(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.

[¶] . . . [¶]

(7) Notwithstanding subdivision (c), a state employer shall, when reporting payrate and special compensation, do all of the following:

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

(B) Identify each item of special compensation, as permitted pursuant to paragraphs (3) and (5).

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

(h) This section does not apply to a new member, as defined in Section 7522.04.

28. The CalPERS Board has adopted regulations to further define special compensation. California Code of Regulations, title 2, section 571 provides, in pertinent part:

(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:

(1) INCENTIVE PAY

[¶] . . . [¶]

Off-Salary-Schedule Pay - Compensation in addition to base salary paid in similar lump-sum amounts to a group or class of employees. These payments are routinely negotiated through collective bargaining in lieu of increases to the salary schedule. These payments are based on a similar percent of scheduled salary not to exceed six percent (6%) per fiscal year. The contracting agency or

school employer may adopt similar action for non-represented groups or classes of employment as were negotiated through collective bargaining.

[¶] . . . [¶]

Government Agency Required Licenses - Compensation to employees receiving and maintaining a license required by government or regulatory agencies to perform their duties.

[¶] . . . [¶]

(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 items [sic] 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.

29. California Code of Regulations, title 2, section 570.5 also provides a limiting definition of "compensation earnable" as follows:

(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.

ANALYSIS

30. The essential facts in this matter are not in dispute. Respondent is a reciprocal member of CalPERS and is entitled to use her UC Davis pay to establish her CalPERS retirement benefit. UCRS reported respondent's "final average compensation" for her last 12 months working at UC Davis was \$19,918.66. Dr. Singh candidly testified that this amount is "off-scale" and significantly higher than the publicly available salary schedule for an Academic Administrator VII.

31. Dr. Singh also explained that 95 percent of UC Davis's academic administrators are paid salaries that significantly exceed the pay schedule for their positions. If UC Davis paid the salaries on the pay schedule, it would not be able to attract the caliber of academics required of a world-renowned institution.

32. Respondent argued her final average compensation is "compensation earnable" under CalPERS's definition. In the alternative, she argued the difference between the amount on the publicly available salary schedule and her off-scale salary

is "special compensation" under the regulatory definition and should be included to determine her retirement benefit.

33. Respondent's arguments must fail. First, "compensation earnable" is not simply the amount an employee is paid. Compensation earnable includes the employee's payrate plus special compensation. (Gov. Code, § 20636, subd. (a).) Under California Code of Regulations, title 2, section 570.5, subdivision (a), "payrate shall be limited to the amount listed on a pay schedule," that meets the enumerated requirements. The requirements include, inter alia, that the pay schedule has been adopted by the employer's governing body at a public meeting.

34. The publicly available pay schedule for respondent's position meets those requirements. Her off-scale salary that is available on the UCOP website does not because it was not approved by "the employer's governing body." Dr. Singh confirmed respondent's salary is inconsistent with the pay schedule for the position. Through no fault of respondent's, UC Davis's publicly available pay schedule for her position is woefully inadequate. Although UCRS may be able to pay respondent's retirement benefit based on her off-scale salary, CalPERS cannot.

35. Second, "special compensation" is specifically defined by the "exclusive" list in California Code of Regulations, title 2, section 571, subdivision (a). All items of special compensation so listed are, among other things, "[c]ontained in a written labor policy or agreement . . . that . . . [h]as been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws." (Cal. Code Regs., tit. 2, § 571, subd. (b)(1)(A).) Although respondent's compensation was approved by the UC Davis provost, it is not contained in a labor policy or agreement adopted by the governing body in a public meeting. It therefore does not meet the definition of "special compensation."

LEGAL CONCLUSION

Without evidence of respondent's salary being approved by the employer's governing body, not simply by the provost, CalPERS must, as a matter of law, exclude the amount of respondent's salary that is above the publicly available pay schedule. Respondent's appeal of CalPERS's determination regarding her retirement benefit must be denied.

ORDER

Pamela J. Hullinger's appeal of CalPERS's determination not to include her off-scale salary in her CalPERS retirement benefit is denied.

DATE: January 6, 2022

Heather M. Rowan

Heather M. Rowan (Jan 6, 2022 13:17 PST)

HEATHER M. ROWAN

Administrative Law Judge

Office of Administrative Hearings