ATTACHMENT A

THE PROPOSED DECISION

BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Calculation of the Final Compensation of: RANDY G. ADAMS, Applicant/Respondent, and CITY OF BELL, Public Entity/Respondent.	Agency Case No. 2011-0788 OAH No. 2012030095

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 19 and 20, 2012, in Orange, California.

Gregg McLean Adam, Attorney at Law, represented Applicant/Respondent Randy G. Adams, who was present throughout the administrative proceeding.

Stephen R. Onstot, Attorney at Law, represented Public Entity/Respondent City of Bell.

Wesley E. Kennedy, Senior Staff Counsel, represented Petitioner Marion Montez, Assistant Division Chief, Customer Account Services Division, California Public Employees' Retirement System, State of California.

The matter was submitted on September 28, 2012.

PRELIMINARY STATEMENT

Randy G. Adams enjoyed a long career in law enforcement. He served for many years as Chief of Police for the City of Simi Valley and as Chief of Police for the City of Glendale. On July 27, 2009, he began serving as the Chief of Police for the City of Bell.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Oct 17 2012
Barbara Moseman

Mr. Adams' last paid day of employment with the City of Bell was July 31, 2010. During his employment with the City of Bell, Mr. Adams earned "$17,577.00 per pay period" ($457,002.00 per year).

In December 2010, Mr. Adams applied to CalPERS for a service retirement based upon his many years of credited service. Mr. Adams contends that his service retirement allowance should be calculated on earnings reported to CalPERS by the City of Bell.

The City of Bell and CalPERS agree that Mr. Adams is entitled to a service retirement, but they assert that his retirement allowance should not be calculated upon earnings from the City of Bell because those earnings were not made pursuant to a publicly available pay schedule. In response, Mr. Adams claims that payment for his services was made pursuant to a legal employment agreement that was available to the public.

Mr. Adams did not establish by a preponderance of the evidence that his earnings from the City of Bell were made pursuant to a publicly available pay schedule. CalPERS correctly determined that Mr. Adams' earnings from the City of Bell did not constitute "compensation earnable" under the Public Employee Retirement Law. CalPERS correctly concluded that Mr. Adams' service retirement allowance should be based on his earnings from the City of Glendale and should include his year of service with the City of Bell.

FACTUAL FINDINGS

Background Information

1. The California Public Employees Retirement System (CalPERS) manages pension and health benefits for public employees, retirees, and their families. Retirement benefits are provided under defined benefit plans. 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 agency's payroll. Using certain actuarial assumptions, the Board of Administration sets employer contribution rates on an annual basis.

2. A member's service retirement allowance is calculated by applying a percentage figure, based upon the member's age on the date of his or her retirement, to the member's years of credited service and the member's "final compensation." CalPERS may review earnings reported by an employer to ensure that only those items allowed under the Public Employee Retirement Law (PERL) are included as "final compensation" for purposes of calculating a retirement allowance.

3. Randy G. Adams (Mr. Adams or Applicant) was employed by the City of Glendale as Chief of Police from January 31, 2003, through July 10, 2009. Mr. Adams' "compensation earnable" during that employment was $19,574.61 per month ($234,895.32 per year).

Mr. Adams submitted an application to CalPERS for a service retirement that was dated May 15, 2009, with an effective date of July 11, 2009. He briefly retired after filing that application.

4. On July 27, 2009, Mr. Adams submitted an application to CalPERS for reinstatement from retirement because he began employment as Chief of Police with the City of Bell. CalPERS approved and processed that application on September 17, 2009, with an effective date of reinstatement backdated to July 27, 2009.

5. The City of Bell is a public agency that contracted with CalPERS for the provision of retirement benefits to eligible employees under PERL.

6. Negotiations concerning Mr. Adams' employment with the City of Bell began in earnest in April 2009, shortly before Mr. Adams retired from employment with the City of Glendale. The negotiations resulted in the signing of an Agreement for Employment dated May 29, 2009.[1] Robert A. Rizzo (CAO Rizzo), Chief Administrative Officer, City of Bell, signed the agreement on behalf of the City of Bell. Some City Council members were aware of CAO Rizzo's decision to hire Mr. Adams as Chief of Police.

Payment to Mr. Adams under the May 29, 2009, employment agreement was not made pursuant to a publicly available pay schedule. Mr. Adams' employment agreement and the personnel action report related to his employment were not readily available for public review. The employment agreement was ultimately made available by the City of Bell in response to a formal public records request.

The May 29, 2009, employment agreement was for an unspecified term, with Mr. Adams' employment as Chief of Police to commence on July 27, 2009. Under the agreement, Mr. Adams' "basic salary" was "$17,577.00 per pay period."[2] The agreement stated that Mr. Adams' basic salary could be adjusted "by the CAO, in his sole discretion . . . in an amount commensurate with Employee's performance."

The City of Bell's City Council did not approve or ratify the May 29, 2009, employment agreement.

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[1] In addition to the May 29, 2009, employment agreement, two other signed employment agreements were produced that contained different contract dates, called for the provision of different services, and required separate payments that, when added together, totaled $17,577 per pay period. These contracts were drafted and signed after Mr. Adams began employment with the City of Bell, and they did not constitute the employment agreement under which Mr. Adams was employed.

[2] The term "pay period" was not defined, but common usage established that a "pay period" was every two weeks. Mr. Adams basic pay was $457,002 per year.

The City of Bell Scandal

7. In July 2010, two Los Angeles Times reporters wrote an article that claimed that City of Bell officials were receiving salaries that were among the highest in the nation. These and other articles led to widespread criticism and a demand that certain City of Bell officials resign. Mr. Adams' hiring and his earnings became a focus of concern.

8. On July 23, 2010, Mr. Adams received a telephone call advising him that the City Council had decided in a closed session to announce that Mr. Adams' had resigned as Chief of Police. Mr. Adams denied resigning from employment and offered to meet with City of Bell attorneys to discuss his separation. On August 20, 2010, Mr. Adams learned that the City of Bell had not direct deposited his paycheck for the period August 12, 2010, through August 14, 2010.[3]

The Application for a Service Retirement

9. Mr. Adams submitted an application for a CalPERS service retirement dated December 5, 2010. Mr. Adams represented that his highest final compensation was the last 12 months of his employment with the City of Bell. He represented that his last day on the City of Bell payroll was July 31, 2010, noting that his employment was "terminated by failure to pay on 8-20-10." Mr. Adams requested that his service retirement allowance be calculated using his compensation with the City of Bell in the amount of $38,083.50 per month.

CalPERS' Response to the Application

10. Following the receipt of Mr. Adams' application, CalPERS reviewed what the City of Bell reported it had paid to Mr. Adams. CalPERS concluded that Mr. Adams' earnings were not "compensation earnable" under PERL because those earnings were not set forth in publicly available pay schedules. CalPERS determined that Mr. Adams' earnings with the City of Glendale, another covered public agency, had been set forth in publicly available pay schedules. CalPERS determined that Mr. Adams' highest average 12 consecutive months of compensation with the City of Glendale was $19,574.61 per month ($234,895.32 per year); CalPERS used the City of Glendale earnings to calculate Mr. Adams' service retirement allowance.

11. By letter dated December 17, 2010, CalPERS advised Mr. Adams that the Office of Audit Services (OAS) completed a review of the City of Bell's payroll reporting and member enrollment processes; that the OAS review noted that the Office of the Attorney General had filed a civil action against various persons, including Mr. Adams; that the resolution of the civil action might result in an adjustment of Mr. Adams' "compensation

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[3] This Factual Findings simply provides context. It is drawn from the Claim in an Action for Money and Damages that was filed on Mr. Adams' behalf with the City of Bell on February 1, 2011.

earnable"; and that "CalPERS' calculation of retirement benefits will take into account only compensation paid that it determines was proper and authorized, pursuant to properly approved and publicly available valid contracts entered into prior to 2005, or pursuant to publicly available schedules that can be substantiated as meeting the definition of compensation earnable" pending resolution of the civil action. The letter stated that CalPERS would use compensation from the City of Glendale to calculate Mr. Adams' retirement allowance. The letter notified Mr. Adams of his appeal rights.

12. By letter dated February 15, 2011, Mr. Adams timely appealed from CalPERS' determinations and requested an administrative hearing.

13. On July 12, 2012, Petitioner Marion Montez, CalPERS' Assistant Division Chief, Customer Account Services Division, signed the Statement of Issues giving rise to this administrative proceeding.

Mr. Adams' Employment History

14. After working briefly for the Los Angeles County Schools, Mr. Adams began his law enforcement career in July 1972 with the City of Buenaventura Police Department. He worked there for 23 years, rising to the ranks of Lieutenant and serving on the Command Staff. Mr. Adams met Pier'Angela Spaccia (Ms. Spaccia) during his employment with the City of Ventura. Mr. Adams was employed as Chief of Police by the City of Simi Valley from September 1995 through January 2003. Mr. Adams was employed as Chief of Police by the City of Glendale from January 2003 through July 2009. Mr. Adams was employed as Chief of Police by the City of Bell from July 2009 through July 2010.[4]

Mr. Adams was credited with 38.562 years of credited CalPERS service as a result of his public employment.

The Negotiations with the City of Bell

15. Mr. Adams met Ms. Spaccia in 1980 when both of them were employed by the City of San Buenaventura. Ms. Spaccia left that employment around 1990. She did not keep in close contact with Mr. Adams after that.

In 2003, Ms. Spaccia began working full time for the City of Bell as an assistant to CAO Rizzo. The City of Bell employed several persons, including CAO Rizzo, Ms. Spaccia, and the (then) Chief of Police, pursuant to written employment agreements.

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[4] According to benefit calculations provided by a CalPERS' actuary, Mr. Adams was credited with 1.015 years of service with the City of Bell, 6.440 years of service with the City of Glendale, 7.406 years of service with the City of Simi Valley, 23.181 years of service with the City of San Buenaventura, and 0.52 years of service with the Los Angeles County Schools, totaling 38.562 years of CalPERS service.

Before 2009, Ms. Spaccia learned that Mr. Adams was being considered for a law enforcement position in Orange County. She knew Mr. Adams had served as the Chief of Police for the City of Simi Valley and was the Chief of Police for the City of Glendale. Ms. Spaccia told CAO Rizzo that she knew Mr. Adams personally and she spoke very highly of him. Mr. Adams did not get the position in Orange County and remained employed as the City of Glendale's Chief of Police

About a year later, sometime in 2009, CAO Rizzo announced, "We need a chief from outside." CAO Rizzo asked Ms. Spaccia about Mr. Adams. Ms. Spaccia said Mr. Adams enjoyed an impeccable reputation. CAO Rizzo asked Ms. Spaccia to make arrangements to meet with Mr. Adams. Ms. Spaccia agreed and made the arrangements.

Ms. Spaccia contacted Mr. Adams at his office in Glendale. She arranged for a series of meetings between Mr. Adams, CAO Rizzo, several City of Bell employees, and several City Council members. Ms. Spaccia attended some meetings and typed certain documents related to Mr. Adams' employment, but she was not involved directly in the negotiations that resulted in Mr. Adams becoming employed as the City of Bell's Chief of Police.

16. A review of the emails between Ms. Spaccia and Mr. Adams highlight the negotiations that took place. Some emails demonstrate a conscious effort to shield salaries paid to certain City of Bell employees, including Mr. Adams, from public view.[5]

On April 14, 2009, Mr. Adams sent Ms. Spaccia an email. An attachment to the email was addressed to CAO Rizzo. In the attachment, Mr. Adams thanked CAO Rizzo for the employment opportunity; he stated that his PERS compensation was projected to be $270,000 per year; that the Chief of Police for the City of Bell made $160,000 to $190,000 per year; and that he was requesting a starting salary of $370,000 per year "plus the deferred compensation package we have discussed." Mr. Adams wrote, "The big difference, and I certainly value this, is that what I earn in this position will be 'persalbe.'" Mr. Adams mentioned a deferred compensation plan of $69,000 per year, "most of which is 'persalbe.'" Mr. Adams requested that the City of Bell pay employee costs for his CalPERS retirement and provide him and his dependents with lifetime medical, dental and vision insurance. The attachment suggested that employment commence on September 1, 2009, and that it be renewable yearly, subject to 30 days notice of termination by either party.

On April 14, 2009, Ms. Spaccia sent Mr. Adams an email that stated: "By the way . . after our morning meeting tomorrow Bob [CAO Rizzo] would like us to go to the Starbuck's to meet with the POA President and Vice-President . . . then we will go get [City Councilman M] and have lunch . . . hope that will work."

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[5] Ms. Spaccia, who served as the City of Bell's Assistant Chief Administrative Officer at the time, was responsible for typing employment agreements for certain City of Bell management employees including CAO Rizzo, herself, Chiefs of Police and Directors. The task was not assigned to clerical staff. The assignment of this seemingly routine chore to Ms. Spaccia helped keep the salaries confidential.

On April 15, 2009, Mr. Adams sent Ms. Spaccia an email. He ended the email as follows: "I am looking forward to seeing you and taking all of Bell's money?! Okay . . . just a share of it!!"

On April 16, 2009, Ms. Spaccia sent an email to Mr. Adams that responded to the attachment to CAO Rizzo. The email stated:

> LOL . . . well you can take your share of the pie . . . just like us!!! We will all get fat together . . . Bob has an expression he likes to use on occasion . . .
>
> Pigs get Fat . . . Hogs get slaughtered!!!!! So long as we're not Hogs . . . all is well!
>
> Have a nice night . . . see you tomorrow . . . .

On April 22, 2009, Mr. Adams sent Ms. Spaccia an email, thanking her "for helping me with the amazing opportunity." A draft memorandum of understanding was attached that stated that the City of Bell was aware that Mr. Adams had suffered several injuries that prevented him from heavy lifting; that the injuries were the result of industrial incidents occurring during Mr. Adams' employment at Buenaventura, Simi Valley, and Glendale; that "the City of Bell recognizes that Mr. Adams qualifies for, and will be filing for, a medical disability retirement"; and that the "City of Bell agrees to support his retirement and agrees that a service/medical retirement is justified and appropriate."

On April 23, 2009, Ms. Spaccia advised Mr. Adams that several documents needed to be prepared including an employment contract, an independent contractor (consultant) letter, a medical retirement acceptance letter, and a vehicle indemnification letter. Ms. Spaccia wrote: "As you might have surmised already, there are very specific reasons why it would not all be addressed as one all-encompassing contract, but I want to meet and be sure that you are comfortable with it." The plan to have the agreements spread amongst several documents, rather than having them set forth in a single document, demonstrated a desire to maintain secrecy about the details of Mr. Adams' employment agreement.

Ms. Spaccia attached a proposed employment agreement to an email dated May 14, 2009, that stated: "Take a look and call me when you have a few minutes . . . no rush."

By email dated May 27, 2009, Mr. Adams returned the contract to which he had made several changes. In that email, Mr. Adams represented that his legal advisor informed him that a general law city must have a contract signed by the mayor of that city on behalf of the city council, unless an enabling document authorized the Chief Administrative Officer to act for the City Council. According to the email, "I told [the legal advisor] that was the case and that Bob [CAO Rizzo] was in total control in the City of Bell. He said that was great, but feels I should have a copy of the agreement that gives Bob that authority as an attachment to my contract." The email asked Ms. Spaccia whether "we should make the Worker's Comp

letter a separate matter of understanding that we just sign and keep separate?" Mr. Adams' comment about need to have the worker's compensation letter separate signified his desire to keep certain details of his employment agreement confidential.

By email dated May 27, 2009, Ms. Spaccia stated that the revisions Mr. Adams proposed "were fine with the following exceptions: . . . 2) Do not include the last sentence you added in Section 5.[6] We have crafted our Agreements carefully so we do not draw attention to our pay. The word Pay Period is used and not defined in order to protect you from someone taking the time to add up your salary." The email also stated that it was a shame Mr. Adams' legal advisor was "so unwilling to recognize what you (I think) already have. We have painstakingly and carefully, and with attorney assistance made sure of what authority Bob has vs. what the City Council has. So, for your attorney's information, Bob has the proper authority to enter into a contract with you, and we are not interested in educating him on how we did that. If you would like to meet separately or discuss on the phone we can do that."

Ms. Spaccia's comments demonstrated that certain City of Bell officials did not want attention drawn to their pay; that employment agreements were carefully drafted to prevent the easy computation of salaries; and that CAO Rizzo did not want to provide Mr. Adams' legal advisor with any written documents concerning his purported authority to contract on behalf of the City of Bell. Ms. Spaccia's testimony that the drafting of the employment agreement was not intended to hide Mr. Adams' salary from the public and that it was drafted in the fashion it was merely to keep the salary from an individual who sought the position of Chief of Police did not make a great deal of sense.

17. The May 29, 2009, agreement that Mr. Adams and CAO Rizzo signed was not prepared by or provided to Edward W. Lee (Attorney Lee), an attorney with Best, Best & Krieger, who served as the City Attorney for the City of Bell.

On Friday July 10, 2009, Attorney Lee sent an email to CAO Rizzo that asked: "Is there a contract you need me to work on for the Chief and will this be on the upcoming Council agenda?"

On Sunday, July 12, 2009, CAO Rizzo provided an email response to the questions posed by Attorney Lee concerning the "Police Chief Contract" as follows:

> The contract has been prepared and signed . . .
> Remember the City Council by resolution gave me the authorization to execute any and all contracts and agreements on their behalf. There is no need for the council to discuss it, unless they want to discuss my termination and severance package first . . . .

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[6] Section 5 of the written employment agreement provided, in part, "Employee shall be paid (hereinafter the "Basic Salary") $17,577.00 per pay period."

These email exchanges were significant: they established that the City Attorney was unaware that Mr. Adams' employment contract had been prepared and signed; further, the exchange implies that the City Attorney was unaware or had forgotten that there was no "need for the council to discuss" the employment agreement; finally, CAO Rizzo threatened to resign from employment if there was a discussion about the agreement. CAO Rizzo's email underscored his purported belief that city council approval of Mr. Adams' employment agreement was unnecessary.

On Monday, July 13, 2009, CAO Rizzo expanded his response in an email to Attorney Lee that stated in part:

> Ed
>
> I have never been asked by the city Council to show, review, discuss, or anything else with any other Department head contracts since the Charter became effective, here is the list.
>
> 1. Spaccia
> 2. Lourdes
> 3. Eric
> 4. Luis Ramirez
> 5. Annette Pertez
> 6. The two Chiefs before Andy Probst
> 7. Andy Probst
> 8 The three Deputy Chiefs
> 9. Assistant Chief Chevez
> 10. The last three captains, and
> 11. The last four lieutenants' contracts
>
> [¶] . . . [¶]
>
> Ed – with our 15 years of working together and the City of Bell's continuing with you at BBK [Best, Best & Krieger] just because of our relationship. I wish you would have told [City Councilman M] you would look into it and get back with him; then discuss it with me so I could have warned you prior to your making suggestions which were nothing more than you falling into a political trap and now making me place my job on the line because of internal politics.
>
> [¶] . . . [¶]

your pal,

Bob

Other Employment Documents

18. Two other agreements related to Mr. Adams' employment with the City of Bell were produced following the public records request. The first, an employment agreement dated April 28, 2009, claimed to employ Mr. Adams as "Special Police Counsel to CAO" commencing July 27, 2009, at a basic salary of $9,844.68 per pay period. The second, an employment agreement dated April 28, 2009, claimed to employ Mr. Adams as "Chief of Police" commencing July 27, 2009, at a basic salary of $4,692.31 per pay period.

19. These two agreements were not mentioned in the email exchanges between Ms. Spaccia and Mr. Adams. Ms. Spaccia testified that she did not prepare the agreements and had no knowledge about them. This testimony was credible.

20. Rebecca Valdez, the City Clerk for the City of Bell, certified that the two agreements referred to in Factual Finding 18 were true and correct copies of employments agreements "in file in the official records of the City of Bell, California." However, the certification was not accurate. Ms. Valdez testified in this proceeding that the agreements containing the certifications were not maintained in any file for which she was responsible and that those documents were provided to her by CAO Rizzo.

21. Mr. Adams' employment agreement and the personnel action report related to his employment as Chief of Police were not available for public review without a public records request or some other demand, such as a subpoena, first being filed with the City of Bell.

It took the City of Bell staff about three weeks and a review by counsel before Mr. Adams' employment agreements were produced in response to the public records request. It was not established that the personnel action report related to Mr. Adams' employment, which was maintained in a confidential personnel file, was provided in response to a public records request, although it may have been.

The Absence of Publicly Available Pay Schedules and City Council Approval

22. The City of Bell had no pay schedule that set forth a salary or salary range for Chief of Police that was in effect when Mr. Adams signed the employment agreement.

Margaret Junker (Ms. Junker), a Chief Auditor with CalPERS, was in charge of the 2010 CalPERS audit of the City of Bell. That audit was, in part, initiated by the Los Angeles Times articles, the City of Bell scandal, and the filing of the Attorney General's civil action. The audit went back 17 years.

Ms. Junker testified that several City of Bell police chiefs had served under written employment agreements since 2006, including Mr. Adams. In the audit, CalPERS requested that the City of Bell provide evidence to establish that payment to Mr. Adams was made pursuant to publicly available pay schedules or that the employment agreement(s) was approved by City Council as required by law. No evidence was produced to establish those matters.[7]

23. Applicant's counsel suggested, through Ms. Spaccia's testimony and through the introduction of Resolution No. 2006-42[8], that CAO Rizzo possessed the legal authority to

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[7] It is irrelevant to the determination in this proceeding that CalPERS did not adjust the retirement allowances of several police chiefs employed by the City of Bell who served under employment agreements for which there was no public pay schedule or City Council approval in a public meeting.

[8] Resolution No. 2006-42 provided:

> Whereas, the second paragraph of Section 519 of the City's Charter allows the Bell City Council to authorize by resolution the Chief Administrative officer to bind the City, with or without written consent, for the acquisition of . . . labor, services or other items included within the budget approved by the City Council;
>
> Whereas, the City Council has determined that it is in the interest of efficient administration for the City to authorize the Chief Administrative Officer to bind the City with a written contract for the acquisition of labor or services;
>
> Now, therefore, the City Council of the City of Bell does resolve as follows:
>
> 1. Pursuant to the second paragraph of Section 519 of the City's Charger, the Bell City Council hereby authorizes the Chief Administrative Officer to bind the City by written contract for the acquisition of labor or services included within the budget approved by the Bell city Council.
>
> [¶] . . . [¶]
>
> 3. The authority granted by this resolution shall not apply to any written contract for services rendered by

enter into a binding employment agreement with Mr. Adams on behalf of the City of Bell because the agreement involved "the acquisition of . . . labor, services or other items included within the budget approved by the City Council." To support this argument, Applicant argued that the City Council adopted a five-year budget plan on May 2, 2005, that included "Police Services." The Police Services budget did not set forth the salary that was to be paid to the Chief of Police.

While it might be established elsewhere that the employment agreement signed by CAO Rizzo was valid and binding upon the City of Bell, that conclusion need not be reached in this proceeding. Even if it were determined that the contract signed by CAO Rizzo was binding on the City, that determination would not be the equivalent of public notice and formal approval of the employment agreement by the City Council.

24. The fact that Mr. Adams met with several City Council members (but never more than two at a time) before he signed the employment agreement did not establish City Council approval of Mr. Adams' employment contract.

26. Ms. Valdez, the City Clerk, testified that the City Council did not set Mr. Adams' salary or approve his employment agreement. There was no evidence to the contrary.

27. Lourdes Garcia (Ms. Garcia), who was employed by the City of Bell as the Director of Administrative Services, testified that CAO Rizzo directed her to prepare the contracts indentified in Factual Finding 18. Ms. Garcia provided the unsigned agreements to CAO Rizzo; she had no idea what happened to them after that.

28. Ms. Valdez and Ms. Garcia testified that Mr. Adams' salary seemed to be much greater than salaries previously paid to persons serving as City of Bell police chiefs.

Expert Testimony

29. Kung-Pei Hwang (Mr. Hwang) is a Senior Pension Actuary with CalPERS.

Mr. Hwang determined that the total length of time Mr. Adams worked for CalPERS agencies including the Los Angeles County Schools, the City of San Buenaventura, the City of Simi Valley, the City of Glendale, and the City of Bell, comprised Mr. Adams' 38.562 years of credited CalPERS service.

Using earnings from the City of Glendale as a basis for computation, Mr. Hwang determined that Mr. Adams's service retirement benefit calculation (option 3) was $22,347.94 per month ($258,175.28 per year).

> any person in the employ of the City at a regular salary . . . .

Using earnings from the City of Bell as a basis for computation, Mr. Hwang determined that Mr. Adams service retirement benefit calculation (option 3) was $42,522.55 per month ($510,270.60 per year).

Mr. Hwang's testimony had no relevance to the issue of whether there was payment under a publicly available pay schedule. It showed, however, that dramatically increasing the amount of a public employee's salary in the last year of employment will have a significant impact. In Mr. Adams' case, using his earnings with the City of Bell as a basis for calculating a service retirement almost would have doubled the amount of his service retirement allowance and it would have resulted in an unfunded liability having a present value of $3,182,706, according to Mr. Hwang.

30. Terrance Rodgers (Mr. Rodgers) is a CalPERS Staff Services Manager with CalPERS' Compensation Review unit. He and his staff are involved in determining a member's "compensation earnable." Mr. Rodgers testified that in order for a member's earnings from a public agency to constitute "compensation earnable," the earnings must be paid by the public entity under publicly available pay schedules. Mr. Rodgers testified that California Code of Regulations, title 2, section 570.5, became operative on August 10, 2011.

California Code of Regulations, Title 2, Section 570.5

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

> (a) For purposes of determining the amount of "compensation earnable" . . . 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.

32. Section 570.5 was sponsored by CalPERS and approved by the Office of Administrative Law on July 11, 2011. The regulation became effective on August 10, 2011.

33. The Notice of Proposed Regulatory Action related to section 570.5 stated that the regulation "will ensure consistency between CalPERS employers as well as enhance disclosure and transparency of public employee compensation . . . This proposed regulatory action clarifies and makes specific requirements for publicly available pay schedule and labor policy or agreement . . . "

The informative digest portion of that notice stated in part:

> Generally the law requires that a member's payrate be shown on a publicly available pay schedule, that special compensation be limited to items included in a labor policy or agreement, and that all records establishing and documenting payrate and special compensation be available for public scrutiny. Employers have not uniformly adhered to these requirements . . . .

The Arguments

34. Applicant argued that CalPERS' theories evolved since the publication of CalPERS' determination letter, which alleged only "over-reporting"; that the City of Bell never "over-reported" Mr. Adams' salary; that the May 29, 2009, employment agreement was the only agreement at issue in this matter; that the May 29, 2009, agreement constituted a "publicly available pay schedule" under legal standards that existed when Mr. Adams filed his application for retirement; that the May 29, 2009, employment agreement was "voluntarily" produced following a public records act request; and that the claim of "spiking" does not justify the retroactive application of the newly enacted pay schedule regulation.

35. The City of Bell argued that CAO Rizzo was not authorized to enter into an employment agreement with Mr. Adams on behalf of the City of Bell; that the City Council for the City of Bell never approved or ratified the May 29, 2009, employment agreement; that a Chief of Police salary of $457,000 per year was not included in the City of Bell's 2009 budget; that the May 29, 2009, employment agreement was not publicly available; that Mr. Adams remuneration from the City of Bell was not "compensation earnable" for CalPERS retirement purposes; and that Mr. Adams had no right to claim any retirement benefits from his arrangement with CAO Rizzo because Mr. Adams was not a City of Bell employee.

36. CalPERS argued that "compensation earnable" 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; that payrates must be stable and predictable among all members of a group or class and must be publicly noticed; that Mr. Adams's payrate was not "normal and he was not paid pursuant to a publicly available pay schedule; that payment to Mr. Adams did not involve City Council approval at a public meeting following notice; that California Code of Regulations, title 2, section 570.5 clarified existing law and did not impose new standards; and that Mr. Adams' salary with the City of Bell involved "final settlement pay" which is excluded his earnings from "payrate" and "special compensation."

Factual Conclusions

37. Mr. Adams was employed as Chief of Police by the City of Bell for approximately one year. His earnings from the City of Bell were not paid pursuant to a

publicly available pay schedule. His employment contract did not constitute a publicly available pay schedule. His employment contract was not approved or ratified by the City Council and it was not readily available for public review. There was a deliberate effort by CAO Rizzo and others to conceal Mr. Adams' employment agreement and payrate.

CalPERS correctly determined that payment to Mr. Adams by the City of Bell was not "compensation earnable" under PERL and that Mr. Adams was entitled to approximately one year of credited service for his service with the City of Bell. CalPERS properly used Mr. Adams' highest earnings with the City of Glendale to compute the amount of Mr. Adams' service retirement allowance.

LEGAL CONCLUSIONS

The Constitutional Mandate

1. Article XVI, section 17 of the California Constitution provides as follows:

> The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purpose of providing benefits to participants . . . and defraying reasonable expense of administering the system.

Administration of the Retirement Fund

2. The CalPERS retirement fund was established as a trust, to be administered in accordance with the provisions of the Public Employees Retirement Law solely for the benefit of the participants. (Gov. Code, § 20170.) Management and control of the retirement system is vested in the Board of Administration. (Gov. Code, § 20123). The Board of Administration has the exclusive control of the administration and investment of the retirement fund. (Gov. Code, § 20171.)

Burden and Standard of Proof

3. Government Code section 20128 provides in part:

> . . . [T]he board may require a member . . . to provide information it deems necessary to determine this system's liability with respect to, and an individual's entitlement to, benefits prescribed by this part.

4. Applicant has the initial burden to establish that he was entitled to a CalPERS service retirement and the amount of the retirement allowance. (Evid. Code, § 500; Evid.

Code, § 550.) The standard of proof is a "preponderance of the evidence." (Evid. Code, § 115.)[9]

5. Once Applicant introduces prima facie evidence sufficient to establish that he is entitled to a service retirement in some amount, the burden shifts to CalPERS and the City of Bell to refute the evidence that was offered or to explain why no reply to the prima facie evidence is necessary.

As explained in *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1667-1668:

> The terms burden of proof and burden of persuasion are synonymous. [Citations.] Because the California usage is "burden of proof," we use that term here.
>
> "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.) To prevail, the party bearing the burden of proof on the issue must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence). (Evid. Code, §§ 115, 520.) The burden of proof does not shift during trial - it remains with the party who originally bears it. [Citations.]
>
> Historically in California, the burden of producing evidence or burden of production also has been known as the "burden of going forward" with the evidence." [Citations.] Here, we use "burden of producing evidence" as that is the California code usage. (Evid. Code, § 110.)
>
> Unlike the burden of proof, the burden of producing evidence may shift between plaintiff and defendant throughout the trial. (See Evid. Code, § 550; [Citations].) Initially, the burden of producing evidence as to a particular fact rests on the party with the burden of proof as to that fact. (Evid. Code, § 550, subd. (b); [Citations].) . . . But once that party produces evidence sufficient to make its prima facie case, the burden of producing evidence shifts to the other party to refute the prima facie case

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[9] Pension legislation must be liberally construed, resolving all ambiguities in favor of the applicant. However, liberal construction cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

> . . . [Citations.] Even though the burden of producing evidence shifts to the other party, that party need not offer evidence in reply, but failure to do so risks an adverse verdict. [Citation.] Once a prima facie showing is made, it is for the trier of fact to say whether or not the crucial and necessary facts have been established . . . .

Determination of Service Benefits

6. A CalPERS member's retirement benefit is based upon the factors of retirement age, length of service, and final compensation. Compensation is not simply the cash remuneration received, but is exactingly defined to include or exclude various employment benefits and items of pay. The scope of compensation is critical to setting the amount of retirement contributions for reasons related to employer funding. Statutory definitions delineating the scope of compensation cannot be qualified by bargaining agreements. Nor can the Board of Administration characterize contributions as compensation or not compensation under the PERL, as those determinations are for the Legislature. (*Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App4th 578, 584-585.)

Compensation Earnable

7. Government Code section 20630 provides in part:

> (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 . . .
>
> (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 . . . and shall not exceed compensation earnable, as defined in Section 20636.

8. Government Code section 20636 provides in part:

(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 . . . .

Regulatory Authority

9. California Code of Regulations, title 2, section 570.5 – relating to publicly available pay schedules - is set forth in Factual Finding 31.

The proper application of the phrase "publicly available pay schedules" can be reached in this matter without reference to California Code of Regulations, title 2, section 570.5.

Statutory Interpretation - "Publicly Available" Pay Schedules

10. Under well-established rules of statutory construction, courts must ascertain the intent of the drafters to effectuate the purpose of the law. Because statutory language is generally the most reliable indicator of legislative intent, the words of a statute are first examined, giving them their usual and ordinary meaning and construing them in context. When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. Thus, if the language is unambiguous, the plain meaning governs and it is unnecessary to resort to extrinsic sources to determine legislative intent. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1560-1561.)

11. The word "available" means "suitable or ready for use" and "readily obtainable." (*The Random House Dictionary of the English Language* (2nd Ed.), p. 142.) The word "publicly" modifies "available." "Publicly" means "in a public or open manner or place" and "in the name of the community" and "by public action or consent." (*The Random House Dictionary of the English Language* (2nd Ed.), p. 1563.)

The Legislature intended that a public employee's "payrate" be readily available to an interested person without unreasonable difficulty. This concept does not apply to a situation in which a public employee's payrate is buried in a carefully crafted agreement designed to prevent the easy calculation of that salary, that is set forth in an employment agreement that is privately maintained and is not based on a published pay schedule or approved in a public manner, and that is not subject to public disclosure except through a formal public records request, subpoena, or other legal process.

12. Assuming that there is some ambiguity in interpreting the phrase "publicly available" as Appellant maintains, then other construction aides should be considered including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy. (*Bernard v. City of Oakland*, *supra*, at 584-585.)

13. Official notice was taken of Senate Bill 53, which was introduced in 1992 and enacted in 1993. SB 53 was designed to curb "spiking," the intentional inflation of a public employee's final compensation, and to prevent unfunded pension fund liabilities. SB 53 defined "compensation earnable" in terms of normal payrate, rate of pay, or base pay so payrates would be "stable and predictable among all members of a group or class" and "publically noticed by the governing body." The legislation was intended to restrict an employer's ability to spike pension benefits for preferred employees and to result in equal treatment of public employees. (Senate File History Re: SB 53)

14. The reference to "publicly available pay schedules" set forth in Government Code section 20636, subdivision (b)(1), was added by the Legislature in 2006. Legislative history confirms that "the change was a matter of clarification." (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 990, fn. 4.)

15. Using a broad interpretation of "pay schedule" based upon the inclusion of a salary disclosed only in a budget has the vice of permitting an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees. And, a written employment agreement with an individual employee should not be used to establish that employee's "compensation earnable" because the employment agreement is not a labor policy or agreement within the meaning of an existing regulation and would not limit on the compensation a local agency could provide to an individual employee by way of individual agreements for retirement purposes. (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 994-995.)

16. The term "publicly available" has been determined to be consistent with "a published monthly payrate," and a settlement payment that was not paid in accordance with a "publicly available pay schedule for services rendered on a full time basis during normal working hours" cannot be used to calculate the amount of a CalPERS retirement allowance. (*Molina v. Board of Admin., California Public Employees' Retirement System* (2001) 200 Cal.App.4th 53, 66-67.)

17. The PERS system, via its definitions of "compensation earnable" and "final compensation," contemplates equality in benefits between members of the "same group or class of employment and at the same rate of pay." There is clearly an intent not to treat members within the same class and at the same pay dissimilarly, although there is no intent to grant parity between employees of different classes and rates of pay. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1492.)

18. Mr. Adams' earnings from the City of Bell were not paid pursuant to a publicly available pay schedule; his contract dated May 29, 2009, did not constitute a publicly available pay schedule; his contract dated May 29, 2009, was not readily available for public review; there was a deliberate effort by City of Bell officials to conceal the details of Mr. Adams' employment agreement as Chief of Police, including his payrate; the City Council for the City of Bell did not approve Mr. Adams' employment agreement. Under these circumstances, it is concluded that Mr. Adams did not it established that his earnings from the City of Bell were made pursuant to a publicly available pay schedule.

Cause Exists to Affirm CalPERS Determinations

19. Mr. Adams did not establish by a preponderance of the evidence that his earnings with the City of Bell constituted "compensation earnable" and should be used in the calculation of his service retirement allowance. It was not established by a preponderance of the evidence that Mr. Adams' earnings with the City of Bell were pursuant to a publicly available pay schedule.

20. A preponderance of the evidence established that it was appropriate for CalPERS to include Mr. Adams' length of service as Chief of Police with the City of Bell in retirement calculations and to use Mr. Adams' highest 12 months of compensation with the City of Glendale in the calculation of his service retirement allowance.

ORDER

CalPERS' calculation of the service retirement allowance to which Randy G. Adams is entitled is affirmed.

Dated: October 4, 2012

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings