ATTACHMENT A

THE PROPOSED DECISION

Attachment A

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

In the Matter of the Statement of Issues Against: TOWN OF MAMMOTH LAKES Respondent.	OAH Case No. 2012120709

PROPOSED DECISION

This matter was heard before Marilyn A. Woollard, Administrative Law Judge (ALJ) for the Office of Administrative Hearings (OAH), State of California, on July 24, 2013, in Sacramento, California.

Rory J. Coffey, Senior Staff Counsel, represented complainant, California Public Employees' Retirement System (CalPERS). Also present on behalf of CalPERS was its Staff Services Manager 1, Terrance Rogers.

Roger K. Crawford, Attorney at Law, Best, Best & Krieger, represented respondent Town of Mammoth Lakes (respondent or Town).

Oral and documentary evidence was received. At the conclusion of the hearing, the record remained open for written closing arguments. On August 6 and 7, 2013, the parties filed their closing briefs which were marked for identification, respectively, as complainant's Exhibit 14 and respondent's Exhibit C. The record was then closed and the matter was submitted for decision on August 7, 2013.

ISSUES

1. Did CalPERS correctly determine that the five percent increase in salary paid by respondent to some of its employees in lieu of comprehensive leave (in lieu pay) was not "compensation earnable" within the meaning of Government Code section 20636, and was therefore not reportable to CalPERS?[1]

[1] Unless otherwise indicated, all undesignated statutory references are to the California Government Code.

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2. If so, did CalPERS properly require respondent to go back three fiscal years from the date of its audit report (from July 2007 to July 2004) and reverse the amount of in lieu pay reported for employees during this period?

FACTUAL FINDINGS

1. Respondent is a general law city in California and a "public agency" as defined by section 20056. As such, respondent has contracted with CalPERS to provide retirement benefits for its employees.[2]

The CalPERS retirement system is managed and controlled by the Board of Administration of the Public Employees' Retirement System (Board), which is charged with the duty of interpreting and applying the Public Employees' Retirement Law (PERL), sections 20000, et seq. (§§, 20021, 20120.)

2. *In Lieu Pay*: Respondent has entered into Memorandums of Understanding (MOUs) with its managerial and general employees, represented respectively, by the Mammoth Lakes Management Employee Association (MLMEA) and the Mammoth Lakes General Employees Association (MLGEA).

As indicated in the MOUs covering the contract period from 2003 - 2007, "comprehensive leave" replaced several types of leave formerly provided to unit members, including vacation leave, sick leave, personal leave and bereavement leave. Effective January 1, 2004, the MOUs authorized an optional increase in base pay in lieu of leave accrual. Respondent's MOU with MLMEA provided:

> Unit members who are at or beyond their two-year anniversary may permanently elect, in writing submitted to the Town Clerk/Personnel Officer, to receive a five percent (5%) increase in their base pay for a reduction of 8.6667 hours per month (resulting in an accrual rate of 10 hours per month for years 3-5, 12 hours per month in years 6-10, and 14 hours per month from year 11 on) in the comprehensive leave accrual rate. This election is not reversible once the unit member has chosen the base pay increase in lieu of the higher rate of comprehensive leave accrual.

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[2] "Public agency" means any city, county, district, other local authority or public body of or within this state. (§ 20056.) Any public agency may participate in and make all or part of its employees members of this system by contract entered into between its governing body and the Board. (§§ 20460, 20030.)

A similar provision was contained in the MOU governing MLGEA employees; however, these employees were required to have been at or beyond their fifth-year anniversary before becoming eligible to make the election.

Since July 1, 2007, both MLMEA and MLGEA employees may elect to receive in lieu pay after completing two years employment with respondent. Their respective MOUS with respondent maintain the in lieu pay option, but contain the additional language that "CalPERS shall be the deciding entity in the determination of whether the base pay increase counts towards PERS retirement."

3. *CalPERS's April 2007 Audit Report*: CalPERS Office of Audit Services conducted an audit of respondent sometime in 2006 and 2007. It then prepared a draft audit report which was provided to respondent for review and comment.

On April 9, 2007, CalPERS issued its final Audit Report (Audit) identifying areas where respondent was at risk of non-compliance with the Public Employees' Retirement Law (PERL), section 20000 et seq. Risk Finding Number 1 indicated that "the Town may not accurately report compensation to CalPERS." This finding was based upon a sample of twenty employees selected from respondent's employee labor groups and management for review, during two pay periods of "12/04-4 and 7/05-4." These reported earnings were reconciled with respondent's payroll records. Based on this review, the auditors noted instances where the various items of compensation were not properly reported. Of relevance to this appeal, the Audit provided:

> <u>In lieu pay</u>
>
> The Town and the Mammoth Lakes Management Employee Association agreed in the July 1, 2003 to June 30, 2007 Memorandum of Understanding (MOU), § 9.6 B, that, effective January 1, 2004 all unit members who were at or beyond their two-year anniversary could permanently elect in writing to receive a five percent increase in their base pay for a reduction of 8.6667 hours per month of comprehensive leave accrual rate. According to the MOU, this election is not reversible once the unit member has chosen the base pay increase in lieu of the higher rate of comprehensive leave accrual. Comprehensive leave includes vacation leave, sick leave, personal leave, and bereavement leave.
>
> The five percent increase in base pay in lieu of comprehensive leave option was available to all Town employees once they have worked with the Town for the time agreed upon in their respective MOU's.

> The Town incorrectly reported the optional increase in base pay in lieu of comprehensive leave to CalPERS as part of a sampled employee's salary. Specifically, we noticed that an employee elected the salary increase in lieu of comprehensive leave effective March 1, 2004. His payrate and earnings reported to CalPERS since his election date included the optional increase in base pay in lieu of comprehensive leave accrual rate. The Town maintains two separate salary schedules. The regular salary schedule does not include the five percent in lieu of comprehensive leave election; the other includes the five percent in lieu of comprehensive leave and is five percent higher than the regular schedule.[3]

The Audit concluded that "the optional increase to base pay in lieu of comprehensive leave included in the employee's salary and reported to CalPERS does not meet the definition of regular earnings" under section 20636, subdivision (b)(1), which defines "payrate" as "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. . ." The Audit also determined that the in lieu pay did not come within definition of "special compensation" outlined in California Code of Regulations, title 2 (2 CCR), section 571, which provides an exclusive list of special compensation items that "must be reported if they are contained in a written labor policy or agreement. In lieu of comprehensive leave is not identified on this list."[4]

The Audit recommended that respondent immediately stop reporting compensation paid in lieu of comprehensive leave to CalPERS, and that it work with CalPERS to make the appropriate adjustments from the incorrect reporting.

4. In its July 3, 2007 letter to CalPERS' Compensation Review Unit regarding this finding, respondent argued that the irrevocable five percent increase in lieu of leave election offered its employees fell within the definition of "payrate" and was properly reported as "compensation earnable." It noted that the MOU provided

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[3] Other than the reference to this single employee, no evidence was introduced to establish how many of respondent's employees have elected in lieu pay.

[4] As indicated in section 20636, subdivision (c), "special compensation" includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions. (§ 20636, (c)(1).) It is "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.*" (§ 20636, (c)(2).) (Italics supplied.)

"all similarly situated members of the same group and class with a choice . . . inextricably tied to the base rate. . . Since the choice is irrevocable, the fact that it is initially characterized as leave that can be converted to base pay is irrelevant and would be no different had the initial choice been characterized as base pay that could be reduced, at the option of the employee, and converted to leave." It argued that the fact that the choice was left to the employee (rather than being imposed on the entire class in a bargaining process) "should not fundamentally impact whether it is compensation earnable when included in base pay. . ." Respondent argued that the in lieu pay was not "special compensation, but rather was part of an employee's base rate" and consistent with "payrate" as defined by section 20636, subdivision (b)(1).[5]

5. On October 26, 2007, CalPERS Employer Services Division replied to respondent's concerns regarding the Audit, and reiterated the basis for its findings. Respondent was instructed to "discontinue reporting the "In Lieu Pay" in their employees (sic) base payment as this will cause retirement planning to be inaccurate by incorrectly inflating the retirement allowance available to the employees at retirement."

6. On November 5, 2007, respondent filed its written request with CalPERS for an appeal of the Audit.

7. On November 20, 2007, CalPERS acknowledged this request and advised respondent it would proceed with the administrative remedy process.

8. On March 8, 2013, CalPERS signed its Statement of Issues and set the matter for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq.

9. At the July 24, 2013 hearing, the parties offered documentary evidence and CalPERS called its Staff Services Manager Terrance Rogers as a witness. Respondent called no witnesses. The parties agreed that the dispute was over the interpretation of "payrate" under section 20636, subdivision (b)(1), and that "special compensation" was not an issue.

10. *Testimony of Terrance Rodgers*: Mr. Rogers has been employed by CalPERS for the past seven years and is currently a Staff Services Manager I in the Compensation and Employer Review Unit (Unit), within the Customer Account Services Division (Division). The Unit is responsible for reviewing compensation reported by contracting public agencies to ensure that what is reported satisfies

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[5] Respondent made identical arguments in its March 20, 2007 letter to CalPERS Office of Audit Service after receipt of preliminary audit findings.

PERL's definition of "compensation earnable."[6] The Unit also is involved as an "escalation liaison" with public agencies following audits performed by the Office of Audit Services. Where an audit results in a finding that the compensation reported does not comport with the PERL, the unit works with the employer to find a resolution.

Mr. Rogers is familiar with respondent's appeal, and reviewed the audit findings and all related documents in preparation for hearing. Based on this review, he testified that respondent's in lieu pay does not come within the meaning of "payrate" as defined in section 20636 for two reasons. First, because the in lieu pay occurs only at the election of individual employees, the increased pay is not paid to a group or class of similarly situated employees. Respondent's in lieu pay provision authorizes an individual exchange of comprehensive leave benefits for more salary, and is not paid to a group or class as required by the statute. This is concerning because CalPERS' actuaries rely on the normal rates of pay to the same group or class to determine employer rates.

Second, Mr. Rogers testified that there is potential for harm in considering this additional salary as compensation earnable because employees could wait until the end of their careers to make this election. A delayed election of this nature could create an unfunded liability for CalPERS where a retirement benefit is calculated on a higher compensation amount in the last several years before retirement. Even if the actual amount of unfunded liability is not great, payment of this amount would result in unfairness and may also constitute "final settlement pay," which is expressly excluded from "special compensation."[7] On cross-examination, Mr. Rogers acknowledged that other parts of the PERL are designed to avoid "spiking" and that there was no indication in the Audit that any of respondent's employees who elected in lieu pay had waited until the end of their careers to make this conversion.

11. *Base Annual Salary and Comprehensive Leave under Respondent's MOUs*: Under the 2003 through 2007 MOUs, respondent's management and general employees receive their salaries pursuant to an existing seven-step (MLMEA § 20.1) or eight-step (MLGEA § 22.1) salary scale. Base annual salaries are subject to negotiated increases that go into effect according to a timed implementation schedule. (MLMEA § 20.2; MLGEA § 22.2.)

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[6] Over the years, CalPERS has provided guidelines to public agencies describing what items are properly reported as compensation. Such information is provided via brochures and is also available on its website.

[7] Section 20636, subdivision (f), defines "final settlement pay" as "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."

Regardless of whether they elect in lieu pay, respondent's employees accrue comprehensive leave based upon their length of continuous service pursuant to an itemized accrual schedule. Employees who elect the in lieu option receive a five percent increase in their base pay in exchange for a reduction of 8.6667 hours of comprehensive leave each month. (MLMEA § 9.6B; MLGEA § 10.6).

Respondent's management and general employees are required to cash out their accumulated comprehensive leave in excess of 1040 hours each fiscal year, at their current regular time rate, unless authorized by the Town manager. (MLMEA §§ 9.5, 9.6; MLGEA § 10.5) Employees who leave respondent's service with accrued comprehensive leave shall be paid the amount of such accrued leave to the date of termination, at their current rate of pay. (MLMEA § 9.3; MLGEA § 10.3.)

LEGAL CONCLUSIONS

1. *Burden of Proof:* "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence...." (*McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044; Evid. Code, § 500.) In this matter, respondent bears the burden of establishing that CalPERS' interpretation of section 20636, subdivision (b)(1), as it applies to the in lieu pay provisions of respondent's MOUs and its subsequent reporting of in lieu pay as compensation is not correct under the PERL.

2. *Parties' Contentions*: CalPERS argues that the Board is not bound by labor agreements entered into between public agencies and its employees. Benefits under the PERL are entirely statutory in origin. As the executive department charged with administering the retirement system, CalPERS' statutory constructions are entitled to great weight and substantial deference. Since 2007 when it issued the Audit Report, and in subsequent correspondence, CalPERS has consistently interpreted section 20636, subdivision (b)(1) ("payrate"), as excluding respondent's in lieu pay from compensation earnable. The testimony of CalPERS' witness at hearing was uncontradicted, and respondent failed to meet its burden of proof.

Respondent argues that the in lieu pay is reportable compensation for retirement purposes because it is properly considered part of an employee's "payrate" under the section 20636. In respondent's view, employees eligible to elect in lieu pay simply choose how to receive a portion of their existing base pay – i.e., as additional salary or as normal comprehensive leave accrual. Those who elect a salary increase take a reduction of their monthly leave accrual. In this manner, the increased compensation is part of the employee's normal monthly rate of pay. In addition, respondent argues that the increase is paid to all "similarly situated" employees in that bargaining unit; "that is, those who have made the Election [of in lieu pay]." Further,

respondent argues that the increased pay is in exchange for the "additional services" rendered as a result of a lower comprehensive leave accrual rate.

3. *Compensation*: "Compensation" is defined in section 20630, subdivision (a) [formerly section 20022], as "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" due to holidays, sick leave, industrial disability leave, vacation, compensatory time off or leave of absence. When an employer reports compensation 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." (§ 20630, subd. (b).) (Italics supplied.)

4. *Compensation Earnable*: Section 20636, subdivision (a), defines "compensation earnable" as "the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5..." [8] Section 20636, subdivision (g), pertains to "state members" as defined in section 20370, subdivision (b). As such, it is not applicable to local miscellaneous members (defined in section 20383) like respondent's employees.

The parties agree that dispute is whether the in lieu pay comes within the definition of "payrate" and that "special compensation" is not at issue.

5. *Payrate*: Section 20636, subdivision (b)(1), defines "payrate" as follows:

> (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).[9]

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[8] Section 21752.5 involves annual compensation limits under Title 26 United States Code (26 U.S.C.), section 401, subdivision (1)(17). These limits are not relevant to this appeal.

[9] Section 20636, subdivision (b)(2), provides that "payrate" shall include amounts deducted from a member's salary for any of the following: participation in a

Discussion

6. The principles of statutory construction are well established. As articulated by the Supreme Court in *Bonnell v. Medical Board of California* (2003) 31 Cal. 4th 1255, 1261:

> We begin our discussion with the oft-repeated rule that when interpreting a statute we must discover the intent of the Legislature to give effect to its purpose, being careful to give the statute's words their plain, commonsense meaning." [Citation.] In undertaking this task, we adhere to the guideline that "[i]f the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Ibid.*) When the statutory language is unambiguous, " 'we presume the Legislature meant what it said and the plain meaning of the statute governs.' " [Citation.] Statutory language is not considered in isolation. Rather, we "instead interpret the statute as a whole, so as to make sense of the entire statutory scheme." [Citation.]

This seemingly straightforward analytical framework can be challenging to apply. Regarding the "plain meaning rule," the California Supreme Court in *Flannery v. Prentice* (2001) 26 Cal.4th 572, 577-578, noted that "any [plain meaning] construction that would produce absurd consequences" is to be avoided. Similarly, in *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, the Court noted that:

> ...the "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that

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deferred compensation plan; payment for participation in a retirement plan that meets the requirements of 26 U.S.C. section 401(k); payment into a money purchase pension plan and trust that meets the requirements of 26 U.S.C. section 401(a); and participation in a flexible benefits program.

> renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]. . .

Similarly, the Court has long recognized that, "where possible, all parts of a statute should be read together and construed to achieve harmony between seemingly conflicting provisions rather than holding that there is an irreconcilable inconsistency. [Citations.]" (*Estate of McDill* (1975) 14 Cal.3d 831, 837.)

7. The Board is charged with the duty of interpreting and applying the PERL, a complex statutory scheme. The Board's interpretation of a statute under the PERL is entitled to deference. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.) With exceptions not applicable in this case, it "is presumed that official duty has been regularly performed." (Evid. Code, § 664.) This presumption holds "in the absence of evidence to the contrary . . ." (*Roelfsema v. Department of Motor Vehicles*(1995) 41 Cal. App.4th 871, 879-880.)

8. For in lieu pay to be classified as "payrate" under section 20636, subdivision (b)(1), it must be: (1) the normal monthly rate of pay or base pay of the member paid in cash; (2) to similarly situated members of the same group or class of employment; (3) for services rendered on a full-time basis during normal working hours, (4) pursuant to publicly available pay schedules.

9. Neither party has argued that the language of this subsection is ambiguous or requires reference to external sources to interpret. On its face, the statutory language is clear. The parties dispute the application of this language to the facts of this case.

10. *Normal Monthly Rate of Pay or Base Pay of the Member Paid in Cash*: It is undisputed that the in lieu pay respondent reported to CalPERS is included within the total monthly salary paid to employees who have made this election and that it is not identified separately from their monthly income. Respondent contends that, once the employee makes the irrevocable election, the increase becomes part of his/her monthly paid cash compensation.

This argument is not persuasive. The fact that the in lieu pay election results in an increase in monthly take home pay denominated "salary" is not dispositive. For example, in *Hudson v. Board of Administration of the Public Employees' Retirement System (Hudson)* (1997) 59 Cal. App. 4th 1310, at 1321, appellants argued that because their benefits were converted to salary, the additional amounts paid could not be considered as "in excess of salary" in the context of final settlement pay. Rejecting this analysis, the *Hudson* Court noted that "the fact the increased amounts

were nominally characterized as salary should not, in our view, end the inquiry. Otherwise, many, if not all, of the exclusions in former section 20022 could be avoided at will, merely by re-characterizing amounts attributable to the excluded items as 'salary' . . ."

As discussed below, respondent's MOUs established the normal monthly rate of pay or base pay for members in the same group or class of employment. Comprehensive leave benefits are the source of the increase in monthly base pay only for those employees who make the election. Such benefits provide the basis for the increased salary on an ongoing basis. While comprehensive leave benefits are part of an employee's total compensation package, these benefits are not paid in cash on a monthly basis. Absent an in lieu election, comprehensive leave benefits are not part of the monthly rate of pay or base pay paid to employees in cash. Rather, as indicated in Factual Finding 11, these accrued comprehensive benefits can only be cashed out when the total leave accruals exceed 1040 hours or when the employee's employment is terminated. These cash outs are not properly characterized as "compensation earnable." The re-characterization of these benefits as salary following an in lieu election does not mandate a conclusion that they are properly reportable as "compensation earnable."

11. *To Similarly Situated Members of the Same Group or Class of Employment.* In CalPERS' view, all members of the relevant group or class must elect the in lieu pay option for it to be "paid in cash to similarly situated members of the same group or class of employment..." The mere "availability" of the election to all members of the group or class does not satisfy the statutory requirement that they be paid in cash. Unless all members make the election, members of the same group or class would have different monthly rates of pay or base pay. Because individual employees make this election, their additional in lieu pay cannot meet the definition of "payrate" and it is not reportable as "compensation earnable."

Respondent counters that CalPERS' interpretation would lead to absurd consequences because it does not take into consideration that "payrates within a bargaining unit often vary for numerous reasons, including position, skills, seniority, work history, and satisfactory performance evaluations." In respondent's view, the appropriate "group or class of employment" is the bargaining unit that has the in lieu election *available* to its members. (Italics supplied.) "Within that group, all members may opt to take the Election. However, only those members who actually take the Election receive the one-off five percent (5%) increase in base pay." Respondent argues that the focus should be on similarly situated members of this subgroup of the bargaining unit. Specifically, because "[t]hey all opted to take the Election, they all received a five percent (5%) increase in base pay, and they all earn 8.6667 less hours of comprehensive leave per month," it is the members who elect in lieu pay who are the "similarly situated members of the same group or class of employment."

CalPERS argument is persuasive. The fact that the in lieu election is available

to all employees in these bargaining units after they have worked with respondent for a certain time does not establish that they are similarly situated within the meaning of section 20636, subdivision (b). Once some employees make the in lieu election, they no longer receive the monthly rate of pay or base pay as is paid in cash to similarly situated members of the same group or class of employment. If mere availability of additional pay was part of the "monthly rate of pay or base pay," the statute would not have required that this be paid "in cash." In this regard, it is noteworthy that the regulation governing "special compensation" expressly provides that all items of special compensation are, *inter alia*, "available to all members in the group or class." (2 CCR, § 571, subd. (b)(2).) There is no similar "availability" provision governing the definition of "payrate."

Respondent's employees who have made the in lieu election are not similarly situated to members of the same group or class of employment. Respondent's argument to the contrary is not persuasive. Section 20636, subdivision (e)(1), defines "group or class of employment" as follows:

> (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. One employee may not be considered a group or class.

An appropriate group or class of employment may well be smaller than the entire bargaining unit; however, the focus of that group or class must be on similarities in the statutorily itemized areas (job duties, work location, collective bargaining unit or other "logical work-related grouping"). The definition in section 20636, subdivision (e)(1), does not encompass a subgroup that has an option to elect certain contract benefits, and an interpretation to that effect does not comport with the plain language of the statutory definition. Rather, an appropriate group or class of employment can easily and logically be determined from the MOUs without absurd results. For example, as indicated in Factual Finding 11, the relevant MOUs provide a list of represented positions, and all management and general employees from the represented positions receive their salaries pursuant to an existing seven-step or eight-step salary scale. These employees are subject to the base annual salaries reflected in these salary scales, which are further subject to negotiated future percentage salary increases according to a timed implementation schedule. While respondent suggests that there are wide differences in pay among bargaining unit members that would render this interpretation absurd, it offered no evidentiary support for this proposition, or to establish that the examples offered would not be accounted for by the salary steps outlined in the MOUs.

12. *For Services Rendered on a Full-Time Basis During Normal Working Hours*: Respondent argues that the additional monthly in lieu pay received by electing

employees is for full-time services they rendered during normal working hours, as a consequence of electing a lower leave accrual rate. Respondent further asserts that, as a result of making the in lieu election, "an employee works more hours in the average month, because they accrue less leave. The increased compensation the employee receives is a direct result of increase services rendered."

The record supports a finding that respondent's employees who make the in lieu election accrue less comprehensive leave each month than their non-electing coworkers. However, the evidentiary record does not support respondent's blanket assertion that all electing employees actually work more hours a month than their non-electing coworkers and that therefore the additional in lieu payment is rendered for full-time services. [10]

13. *Pursuant To Publicly Available Pay Schedules*: CalPERS' regulation, at 2 CCR section 570.5, outlines the requirements for a "publicly available pay schedule" to be used for the purpose of determining the amount of "compensation earnable" pursuant to sections 20630, 20636 and 20636.1. While the Audit represented that respondent maintained two separate salary schedules – one with and one without the five percent in lieu pay, it did not establish that these salary schedules were publicly available within the meaning of the regulation. Respondent offered no evidence on this issue.

14. In summary, CalPERS' interpretation of section 20636, subdivision (b)(1), is persuasive. The five percent additional monthly compensation received by respondent's employees who elected the in lieu option was not properly reported as "compensation earnable." The additional amount paid in cash each month did not satisfy the definition of "payrate" set forth in section 20636, subdivision (b)(1), because it was not the normal monthly rate of pay or base pay paid to similarly situated members of the same group or class of employment. Further, there was insufficient evidence to establish whether these payments were made for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules.

Finally, respondent's argument that CalPERS' spiking concerns are elsewhere addressed by the PERL does not alter the interpretation of section 20626, subdivision (b)(1). It is true that the "special compensation" provisions of section 20636 provide mechanisms to ensure that "spiking" or inflation of salary prior to retirement does not occur. (See, section 20636, subdivision (c)(7)(A).) However, this provision is distinct from the "payrate" requirements discussed above. The special compensation provision addresses some of CalPERS' concerns, but it does not address those distinct

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[10] It may be true that some electing employees who have fewer accrued comprehensive leave hours may have to work during times they might otherwise enjoy as leave.

"payrate" requirements articulated by the Legislature in subdivision (b)(1), which are used to determine employer rates.

15. Respondent raised no argument or objection to the remedy outlined in Issue Number 2. Because CalPERS' statutory interpretation prevailed, respondent shall reverse the amount of in lieu pay reported to CalPERS for those of its employees who made the in lieu election during the period from July 2004 through July 2007.

ORDER

1. The appeal of respondent Town of Mammoth is DENIED.

2. Within 30 days of the effective date of the final decision in this matter, respondent shall reverse the amount of additional compensation it reported to CalPERS for the period from July 2004 through July 2007, for those of its employees who elected the five percent salary increase in lieu of comprehensive leave option, and respondent shall submit an amended report of the corrected compensation to CalPERS.

DATED: September 12, 2013

MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings