

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

John F. Foley ("Respondent Foley") worked as the Manager for Sewer Authority Mid-Coast ("Respondent Agency") which contracts with CalPERS for retirement benefits. Respondent Foley submitted an application for service retirement on February 11, 2010, which led to a dispute with CalPERS over his pension benefit calculation.

Respondent Foley worked under an individual employment contract beginning on May 2, 2003. The contract was amended on December 20, 2004. Pursuant to his individual contract, he was paid a salary, an auto allowance, an amount for "Education, Registration, and License," employer-paid deferred compensation, and other benefits. Respondent Agency reported both the salary and three benefits all as "payrate."

On December 20, 2004, Respondent Agency amended its contract and paid Respondent Foley a salary plus \$1,000 a month in car allowance, \$1,000 a month for "Education, Registration and License," and an amount for deferred compensation which was one-twelfth of the maximum annual IRS authorized level each month for each month Foley was employed under the agreement.

Relevant sections of Respondent's December 20, 2004, contract are set forth below:

Under the heading, Section A. "**Salary**", the December 20, 2004, contract provided:

A. Salary. "Except as hereafter modified, Foley's salary shall be increased by \$650 per month. Foley's performance shall be reviewed by the Board each November, and provided after such review the Board of Directors (Board) determines Foley's performance has been satisfactory, his salary shall be increased at the discretion of the Board."

Under the sections entitled, "**Car Allowance, Deferred Compensation and Education, Registration and License**", the December 20, 2004, contract provided:

C. Car Allowance. SAM shall pay Foley in lieu of use of a SAM motor vehicle, a sum of \$1,000.00 monthly. This sum shall fully reimburse Foley for use of a private automobile in the performance of his duties pursuant to this Agreement.

D. Deferred Compensation. Foley will be eligible but shall not be required to participate in SAM-type 457 deferred compensation plan. SAM shall pay Foley one-twelfth of the maximum annual IRS authorized level each month for each month Foley is employed by SAM under this agreement, so long as SAM maintains its present retirement program of 2%/55 years PERS program. At some point in the future should the Board increase SAM retirement, the parties hereto agree that this clause shall be renegotiated such that the SAM payment to Foley's 457 account will be adjusted proportionately so as to maintain the same total retirement

contribution.

J. Education, Registration, and License. SAM shall pay Foley \$1,000.00 per month for each month Foley is employed by SAM under this Agreement for all professional education, license, registration, dues, and subscriptions in required professional organizations and associations.

During a routine compensation review process, CalPERS staff determined Respondent Agency had erroneously reported the three benefit items as "payrate" for Respondent Foley. These items, auto allowance, education registration and license allowance, and employer-paid deferred compensation, do not meet the definition of "compensation earnable" under Government Code section 20636 because they are not "payrate" or "special compensation."

In addition, Respondent Foley's pay was not listed on a "publicly available pay schedule" as required by Government Code section 20636. CalPERS approved a payrate of \$14,335.79 for the period of July 3, 2008 to December 4, 2009, and \$14,908.36 for the period of January 3, 2010 to May 4, 2010. Respondent Agency had reported a payrate of \$19,084.26 and \$19,658.35 respectively for these time frames. Respondent Foley and Respondent Agency originally appealed CalPERS determination. However, Respondent Agency withdrew its appeal on October 22, 2013, several weeks before the actual hearing was held.

After CalPERS issued its determination, Respondent Foley and Respondent Agency entered into a settlement agreement on November 11, 2011, in which they retroactively amended his contract back to December 20, 2004. Respondent Agency sent Amendment Number Two to CalPERS and presented it as part of Respondent Foley's individual employment contract. This amendment converted all payments to salary and deleted mention of auto allowance, education, registration, and license, and changed the language relating to deferred compensation. The amendment was part of a settlement between Respondent Foley and Respondent Agency and they characterized it as a reformation of the contract under Civil Code section 3399.

A hearing was held on December 10, 2013. Respondent Foley was represented by counsel. Respondent Foley's individual employment contract and amendments were introduced and admitted as evidence. At hearing, Respondent Foley and Board Member Scott Thomas Boyd testified about the second amendment to the contract which occurred after CalPERS had rendered its determination. The parties claimed they were converting all three benefits to salary to fulfill their original intention that it all be included in Respondent Foley's retirement benefit calculation. No other employee received this conversion or these benefits. Respondent Foley also testified that his agency-provided automobile allowance, education, registration and license payment and employer-paid deferred compensation were "payrate," and, under a reformation of the contract pursuant to Civil Code section 3399 (due to a mutual mistake by Foley and Agency), that CalPERS had to use the November 2011 contract language in its analysis. Further

at hearing, they claimed CalPERS had to follow that reformed contract even though it was reformed after Respondent Foley had retired.

Government Code section 20636 subdivision (b) (1) defines "payrate" as follows:

(b)(1) "**Payrate**"¹ 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. "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). *(Emphasis added)*

At hearing, a CalPERS staff member explained why the benefits at issue could not qualify as "payrate" nor "special compensation," and therefore could not be "compensation earnable." She also explained why the documents submitted by Respondent Agency to CalPERS did not meet the requirements for a "publicly available pay schedule," as required under the law. This staff member also discussed the anti-spiking purpose behind the requirement of a "publicly available pay schedule." The testimony of the Supervisor of Administrative Services for the Respondent Agency supported CalPERS' position that there was no "publicly available pay schedule."

In addition, CalPERS staff testified that the conversion of these benefit amounts to "salary" or "pay" as part of the "reformation" of the contract under Civil Code section 3399 would make it "final settlement pay." The regulations define "final settlement pay" as follows:

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

.....
Final settlement pay may take the form of any item of special compensation not listed in Section 571. **It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.** *(Emphasis added)*

¹ The bolding of certain words or phrases hereinafter has been added for emphasis.

The parties submitted extensive briefing in the matter and the Administrative Law Judge (ALJ) took official notice of the legislative history for Government Code section 20636 offered by CalPERS which was amended in 1993 to prevent "spiking."

The ALJ found that there was no publicly available pay schedule for Respondent Foley's position. He explained that while Respondent Agency had the right to determine its employees' compensation, such compensation must be included in a "publicly available pay schedule" and Respondent Agency "cannot calculate retirement benefits based on compensation when compensation does not qualify as 'final compensation' under the applicable statutes and regulations."

The ALJ further explained that, in this case, Respondents "attempted to manipulate the characterization of benefits and gratuities paid to Respondent Foley...Among the manipulations was their effort to represent that the November 2011 Amendment Number Two to the 2004 contract of employment did not constitute a scheme to spike the retirement benefit (pension) payable by CalPERS...The evidence, however, led to a determination that spiking was inherent in the later 2011 final settlement agreement that resulted in the November 2011 Contract Amendment Number Two."

The ALJ explained that in the event of a conflict between an employer's view of an employee's "payrate" and the calculation of CalPERS, the statutes comprising the Public Employees Retirement Law supersede all employment contracts, agreements, resolutions, policies and Memoranda of Understanding as promulgated by an employer.

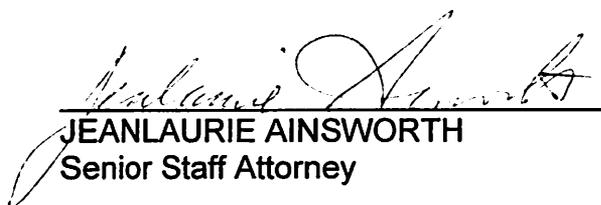
The ALJ also addressed the reformation of a written contract under the authority of equitable relief which is permitted by Civil Code section 3366. He explained "that the party must make a showing of fraud, mutual mistake of the parties or mistake by one party where the mistake was suspected or known by the other party." He found there was not "clear and convincing evidence of a mistake" at the time the contract was drafted in 2004. And as a result, it did not meet the requirements for reformation under Civil Code section 3399. He also cited the inequities of increasing Respondent Foley's retirement benefits at the expense of Respondent Agency's other employees and CalPERS.

The ALJ cited as his "*Ultimate Determination*" that "CalPERS lawfully and properly excluded from payrate categories of money; namely, deferred compensation, car allowance and non-reportable education incentive money paid to Respondent Foley under the contract beginning 2003 and amended in November 2011, and those categories or items or remuneration cannot be included in the calculation used to determine the retirement pay (pension) that is to be disbursed by CalPERS to respondent Foley, or his spouse, for their remaining respective lifetime."

The ALJ concluded that Respondent's appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board should adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

June 18, 2014


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