

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Calculation of Final  
Compensation of:

CHRISTINE MONSEN,

Respondent,

and

ALAMEDA COUNTY TRANSPORTATION  
IMPROVEMENT AUTHORITY,

Respondent.

Agency Case No. 2012-0289

OAH No. 2014010471

**PROPOSED DECISION**

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter in San Jose on March 5, and Oakland, California, on June 13, 2014.

Cynthia Rodriguez, Senior Staff Counsel, represented Petitioner Karen DeFrank, Division Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS).

R. Zachary Wasserman, Attorney at Law, and Anagha Dandekar Clifford, Attorney at Law, Wendel, Rosen, Black and Dean, LLP, represented Respondent Christine Monsen (Respondent) and Respondent Alameda County Transportation Improvement Authority (ACTIA).

The record closed on June 13, 2014.

**ISSUE**

Whether Respondent's final compensation for pension purposes should be \$17,104.92 per month.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED July 11, 2014  
C. [Signature]

## FACTUAL FINDINGS

1. ACTIA was a public agency that contracted with CalPERS for retirement benefits for its eligible employees. The provisions of ACTIA's contract with CalPERS are contained in the Public Employees' Retirement Law (the PERL). (Gov. Code, § 20000 et seq.<sup>1</sup>) In 2010, ACTIA merged with the Alameda County Transportation Authority to form the Alameda County Transportation Commission (ACTC).

2. In 1995, ACTIA hired Respondent as Deputy Director for Special Projects. In 1998, she became Executive Director. On October 26, 2010, she signed an application for service retirement. Respondent retired for service effective December 31, 2010, with 26.641 years of service credit and has been receiving a retirement allowance since that date.

3. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions, and by interest and other earnings on those contributions. The amount of a member's contributions is determined by applying a fixed percentage to the member's compensation.

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

5. ACTIA reported to CalPERS that as of October 2007, Respondent's monthly payrate was \$17,104.92.

6. By letters dated October 28, 2011, Tomi Jimenez, Manager, Compensation & Employer Review, Customer Account Services Division, notified ACTIA and Respondent of the decision that \$20,500 would be removed from Respondent's yearly payrate for retirement benefit calculation purposes. Jimenez wrote

Compensation reported to CalPERS and information from the approved ACTIA salary schedule shows that in October of 2007, ACTIA increased the compensation for the Executive Director by adding deferred compensation in the amount of \$20,500 annually to your salary and reporting a monthly pay rate of \$17,104.92 which included \$1,708.34 for deferred compensation.

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<sup>1</sup> All statutory references are to the Government Code.

Jimenez further wrote that “deferred compensation does not meet the definition of reportable compensation under California Government Code (GC) § 20636” and “as defined in GC § 20630.” ACTIA and Respondent timely appealed, and this hearing followed.

7. At hearing, CalPERS raised an additional reason for refusal to accept the reported payrate as final compensation, asserting that the amount of Respondent’s salary was not “publically available” as required by the PERL.

8. Respondent’s compensation package with ACTIA was negotiated each year. In 2007, she requested an increase of six percent, based in part on a salary survey which revealed that her salary was on the low end of comparable positions. The ACTIA Board gave her a raise of three percent, and the additional amount of \$20,500, which was identified as deferred compensation. It represented the maximum annual amount Respondent could legally defer, but she retained the choice of whether to contribute that sum or any other amount, to her 457 account. In other words, if she chose, Respondent could contribute \$1,708.34 each month, or \$20,500 each year, to a deferred compensation plan. ACTIA did not deposit any amount directly into a deferred compensation plan on Respondent’s behalf. Respondent did so choose, deferring that amount and directing its deposit to a 457 account.

9. Respondent had no plans to retire in 2007, and there was no evidence that the raise was given in contemplation of retirement. She decided to retire in 2010, because the agency was merging with the Alameda County Transportation Authority and she did not wish to apply for the position of executive director of the newly constituted agency.

10. It was the policy and practice of ACTIA to post an agenda for each Board meeting and the minutes from that meeting on its website. The agenda, Board packet, minutes, and other documents were available on the website until 2013, when the website was taken down. The information is still available by request from the clerk of ACTC.

11. The issue of Respondent’s compensation was on the ACTIA Board’s publicly posted and available agenda for the July 2007 Board meeting. After the ACTIA Board decided Respondent’s salary matter in closed session, their decision was announced in open session. In addition to the 2007 and other regular postings, in 2008 the Board contracted with a consulting firm to conduct a salary compensation survey for all its employees, including the executive director position. An analysis was prepared and a schedule with the findings was published on the ACTIA website, in conjunction with a Board agenda item. The schedule included Respondent’s entire salary. There was no evidence of intent by anyone to hide the amount of Respondent’s salary from the public at any time.

## LEGAL CONCLUSIONS

1. The burden of proof in this appeal from CalPERS’s decision not to include a portion of Respondent’s salary as final compensation rests with Respondents.

2. As defined by section 20636, subdivision (b)(1), the “payrate” for a member who is not in a group or class of employees, such as the executive director of an agency,

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 . . . .

4. The Statement of Issues issued by CalPERS alleges that “CalPERS reviewed [Respondent’s] request to include deferred compensation and determined that deferred compensation is not eligible to be included in the calculation of final compensation.” This statement somewhat misstates the law.

It is correct that employer payments to a member’s deferred compensation account are excluded from payrate. (§ 20636, subd. (g)(4)(E).) Amounts that a member directs be diverted from salary for participation in a deferred compensation plan, however, are not considered “employer payments,” and *are* included in a member’s payrate. (§ 20636, subd. (b)(2)(A).)

5. At hearing, CalPERS alleged that the \$20,500 is properly excluded because Respondent’s salary in 2007 was not published and did not meet the definition of a publicly available pay schedule in CalPERS regulations. California Code of Regulations, title 2, section 570.5, states:

(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.

The evidence showed that Respondent's salary of \$17,104.92 per month was publically available as required by the PERL.

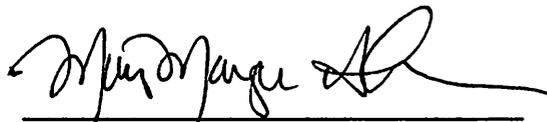
6. Complainant cites CalPERS Precedential Decision 12-01 (*Craig F. Woods, Respondent and Tahoe Truckee Sanitation Agency, Respondent*) as support for its position. The facts in that case, however, are very different from the facts here; the amounts in question were paid as an automobile allowance and as *employer paid* deferred compensation. In addition, in that case the agency's Board intended to include two portions of Woods's salary that they knew were disallowed, into his final base payrate.

7. As the evidence demonstrated that Respondent's salary of \$17,104.92 did not include deferred compensation paid by her employer and was publicly available, her appeal will be granted.

#### ORDER

The appeal of Respondents Christine Monsen and the Alameda County Transportation Improvement Authority is granted. Respondent's final compensation for pension purposes is \$17,104.92 per month.

DATED: June 30, 2014



MARY-MARGARET ANDERSON  
Administrative Law Judge  
Office of Administrative Hearings