

ATTACHMENT B

FINAL 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

FINAL DECISION

The Board of Administration makes this Final Decision following its hearing of the case upon the record that was made when this matter was heard before Mary Margaret Anderson, Administrative Law Judge, Office of Administrative Hearings, State of California, in San Jose, California on March 5, 2014, and Oakland, California, on June 13, 2014.

Cynthia Rodriguez, Senior Attorney, 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 October 13, 2014.

ISSUE

Whether Respondent's final compensation for pension purposes should be \$17,104.92 per month, which would include an amount previously paid as a benefit in the form of employer paid deferred compensation.

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.¹) In 2010, ACTIA merged with the Alameda County Congestion Management Agency.

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 at 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 the 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.

¹ 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, after Respondents’ presented evidence of how and why the pay rate was calculated and reported to the public, CalPERS presented the law and requirements for final compensation which require that payrate be published in a publicly available pay schedule 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, as well as requesting that the ACTIA board include her employer paid deferred compensation in her payrate. The ACTIA Board agreed to a raise of three percent, and the additional amount of \$20,500, identified as her employer paid deferred compensation, being added to her payrate. Respondent continued to contribute \$1,708.34 each month, or \$20,500 each year, to a deferred compensation plan. ACTIA had previously deposited that amount directly into a deferred compensation plan on Respondent’s behalf.

9. Respondent introduced evidence that she had no plans to retire in 2007.. Respondents’ witness testified that Respondent Monsen requested that the ACTIA board give her the raise and the employer paid deferred compensation as salary to increase her CalPERS share. This evidence raised the issue of final settlement.

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. Sometime after 2008, the agenda, Board packet, 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 the new agency.

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, there was no evidence of public notice of her new increased payrate. In 2008 he ACTIA board contracted with a consulting firm to conduct a salary compensation survey for all its employees including the executive director position. That survey was publicly available in 2008, but was not approved by the ACTIA Board and is not a published pay schedule.

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 reference was clearly to employer paid deferred compensation.

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 meeting 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 not publicly available in a timely manner as required by the PERL, having first been published approximately one year after being set by the ACTIA board.

6. CalPERS Precedential Decision 12-01 (*Craig F. Woods, Respondent and Tahoe Truckee Sanitation Agency, Respondent*) is determinative in this case. The facts and language in that case clarified that a benefit cannot be included in final compensation if it is not compensation earnable and has not been included in pay rate except in contemplation of the effect on the CalPERS benefits alone. As this Board determined in the *Woods* case (at page 10, #13): "The restructuring of components of compensation does not alter the nature of the pay. The law does not respect form over substance. (Civil Code, Section 3528; *Dept. of Veterans Affairs v. Superior Court* (1999) 67 Cal.App.4th 743, 758)" Additionally, the Appellate court has firmly stated that

[P]ublic policy disfavors permitting a contracting employer, such as the City, to determine what elements of its compensation package should be considered compensation for retirement purposes. "[P]ublic agencies are not free to define their employee contributions as compensation or not compensation under PERL—the Legislature makes those determinations." (*Oden v. Board of Administration*, (1994) 23 Cal> App. 4th 194, 201).

Hudson v. Board of Administration of the California Public Employees' Retirement System (1997), 59 Cal.App.4th 1310, 1331.

7. The evidence presented at the hearing did not demonstrate that Respondent's salary of \$17,104.92 was paid pursuant to a publicly available pay schedule. Additionally, the evidence at hearing established without question that the salary increase at issue constitutes prohibited "final settlement pay" as it was paid "in connection with" and "in anticipation of : Respondent Monsen's retirement from ACTIA. Therefore, her appeal should be denied.

ORDER

The appeal of Respondents Christine Monsen and the Alameda County Transportation Improvement Authority is denied. Respondent's final compensation for pension purposes is \$15,996.58 per month.

DATED: November 19, 2014