

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Calculation of the Final
Compensation of:

JOHN W. HEEREN,

Respondent,

and

CALIFORNIA STATE UNIVERSITY, SAN
BERNARDINO,

Respondent.

Case No. 9571

OAH No. 2013030304

PROPOSED DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Orange, California, on December 3, 2013, and August 19, 2014.

Rory J. Coffey, Senior Staff Counsel, represented the petitioner, Karen De Frank, Division Chief, Customer Account Services and Division, California Public Employees' Retirement System, State of California (CalPERS).

John W. Heeren (respondent) represented himself.

Cesar Portillo, Associate Vice President, Human Resources represented respondent California State University, San Bernardino (CSU).

ISSUES

1. Did CalPERS correctly determine respondent's service retirement allowance?
2. Did CSU correctly report respondent's final year of service compensation to CalPERS?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 9/19/2014
C. Bodily

3. If the answer to No. 2 is “No,” what remedies are available in this proceeding?

HISTORY OF THE PROCEEDINGS

4. Hearing in this matter was held on December 3, 2013. Representatives from CSU did not appear at the hearing. Evidence was received on behalf of petitioner and from respondent.

5. By order dated January 10, 2014, the record was reopened for the taking of additional evidence. CSU was ordered to show cause why it should not be ordered “to amend and correct its records to reflect that during the 2006-2007 school year, respondent worked at only one job and that CSU paid him for working at only one job.”

6. The reopened hearing was held on August 19, 2014.

FACTUAL FINDINGS

CalPERS Functions

7. 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.

8. A member’s service retirement allowance is calculated based on the member’s age on the date of retirement, 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.

Respondent’s Employment at CSU

9. Respondent was employed with CSU for 35 years; he retired on July 1, 2007. With the exception of his final twelve months of employment with CSU, respondent was classified as a faculty member at the San Bernardino campus, and his job duties included teaching classes in the sociology department. Respondent took an approved sabbatical leave for one quarter - from April 1, 2006, through June 30, 2006. In accordance with the terms of the memorandum of understanding (MOU) between CSU and its faculty, respondent received his full salary during his sabbatical.

10. The MOU, in the chapter entitled "Sabbatical Leaves," Section 6, Conditions, provides: "A faculty/librarian member shall render service to the University upon return from a sabbatical leave at the rate of one (1) term of service for each term of leave." The interpretation and application of this sentence (Service Requirement) is at the heart of this case. The purpose of the Service Requirement is to ensure that sabbatical leave, funded by the university, is not used by the individual on sabbatical leave to seek other employment.

11. In late 2005, prior to taking his sabbatical leave, respondent was asked to serve as the Associate Dean of the College of Social and Behavioral Sciences after he returned from sabbatical leave. He was told that his salary as Associate Dean would be \$107,000.00 per year. Respondent agreed.

12. Respondent completed the Fall 2005 quarter as a faculty member, and he performed some duties as an Associate Dean.

13. Respondent was on sabbatical leave for the Spring 2006 quarter – from April 1 to June 30, 2006.

Respondent returns from Sabbatical Leave

14. When he returned from sabbatical leave, respondent was relieved of all teaching responsibilities and served as a full-time Associate Dean of the College of Social and Behavioral Sciences until his retirement on June 30, 2007.

15. After respondent accepted the position of Associate Dean, at an annual payrate of \$107,000.00, CSU staff determined that the Service Requirement required CSU to compensate respondent on a faculty pay scale following his return from sabbatical leave despite the fact that he no longer had any teaching duties and was no longer considered faculty. None of the CSU personnel who determined how the Service Requirement applied to respondent are current employees of CSU.

16. The highest monthly payrate for a faculty position was less than the monthly payrate promised to respondent when he accepted the Associate Dean position. To achieve the \$107,000.00 per year salary promised to respondent, and work around the Service Requirement as interpreted by CSU staff, CSU appointed respondent to a full-time and a part-time faculty position for the period of July 1 through December 31, 2006.¹ CSU reported these appointments to CalPERS. The classification of respondent's position as a full-time and part-time faculty position was entirely fictional. From July 1, 2006, respondent had only the job responsibilities and duties of an Associate Dean.

¹ A CSU Faculty Personnel Transaction Form (PTF) was prepared that appointed respondent to a half time faculty position effective July 1, 2006. A second PTF appointed respondent to a full time faculty position effective August 1, 2006.

17. From July through December 2006, respondent received two paychecks; one for the purported full time faculty position and one for the purported part-time faculty position. CalPERS collected respondent's retirement contributions from both paychecks. Respondent asked CSU's human resource personnel if there would be any negative impact on his retirement benefits by being paid as though he were in two faculty positions. Human Resource employee, Margery Callahan, told respondent that she had spoken with CalPERS and was assured that, so long as contributions were deducted from his pay, the income from both positions would be included in calculating his retirement benefits.

Calculation of Respondent's Retirement Benefit

18. On June 1, 2007, respondent completed a Service Retirement Election Application which advised CalPERS of his intention to retire on July 1, 2007. True to his intent, respondent retired on July 1, 2007.

19. By letter dated January 25, 2008, CalPERS advised respondent that his retirement benefit was based upon an average monthly compensation of \$8,524.00 (\$102,288.00 for 12 months).² This amount represented a monthly pay rate of \$8,131.00 for July through December 2006 and a pay rate of \$8,917.00 for January through June 2007.

20. In a letter CalPERS received on April 21, 2008, respondent appealed CalPERS's calculation of his retirement benefit and asserted that his final compensation for his last twelve months of employment was \$108,722.50.³ This amount represented six months of income for the combined full-time and part-time faculty positions and six months of income as an Associate Dean. Respondent's letter contained a detailed explanation of why his pay was calculated the way it was, including that the full-time and part-time positions were created to circumvent the belief that respondent was required to return to CSU in a faculty position after his sabbatical leave.

Respondent's letter to CalPERS enclosed a letter dated April 9, 2008, from John A. Conley, Retired Dean of the College of Social and Behavioral Sciences at CSU. Dr. Conley wrote:

From July 1, 2006 until June 30, 2007, Dr. Heeren was employed . . . as Associate Dean in a [management] status. The salary agreed upon between Dr. Heeren and Dean Conley was \$107,000 for that 12-month period."

² This calculation was revised from a prior letter advising respondent that his retirement benefit was based upon an average monthly compensation of \$8,405.50 (\$100,866.00 for 12 months.)

³ The increase from \$107,000.00 resulted from pay enhancements obtained through contract negotiations.

[¶] . . . [¶]

In summary, Dr. Heeren earned approximately \$107,000 during the 12-month period from July, 2006 to June 2007. That salary was for working full-time as Associate Dean of our College. However, the method of paying him was somewhat unusual, due to the returning-from-sabbatical issue.

Respondent's letter also included a page of notations from the budget officer who worked out the method respondent would be paid so that he would receive compensation within the salary schedule for an Associate Dean.

21. CalPERS responded to respondent's April 2008 letter in September 2008 and asserted that its calculations were correct. CalPERS wrote, "*until additional payroll information is received from your employer, we cannot provide you with the change you request.*" (Emphasis in original.) In a letter CalPERS received on November 14, 2008, respondent notified CalPERS that he intended to further appeal its decision.

22. By letter dated December 23, 2008, CalPERS advised respondent that it had received additional information and that his retirement benefit had been recalculated based on an average monthly compensation of \$8,589.50 (\$103,074.00 for 12 months). This was still less than the \$107,000 CSU paid respondent.

23. By letter dated April 1, 2009, almost two years after respondent had retired, CalPERS advised him, "because you are [sec] employed on a full time basis with the CSU, San Bernardino Assistant [sec] Dean Position your part time position with the CSU, San Bernardino Faculty Position is an overtime position and not subject to retirement deductions by Government Code section 20635." CalPERS further advised him that it had instructed CSU to "reverse all earnings and contributions reported in error to our system from July 1, 2006 through August 1, 2006."

24. A letter from CalPERS to respondent's then-attorney dated April 6, 2009,⁴ detailed the calculation of respondent's retirement benefit. It recited that respondent was on sabbatical leave with full pay from April 3 through August 2, 2006. Because he was also appointed to a half time faculty position for one month, from July 1 through August 2006, the faculty position was overtime and "not reportable to CalPERS for retirement purposes." The letter concluded that the average monthly payrate used to calculate respondent's retirement benefit was \$8,524.00 (\$102,288.00 for 12 months), which was the same as the amount stated in CalPERS's January 15, 2008 letter. No mention was made of the December 23, 2008, letter that advised respondent that its calculations were based upon an increased monthly average compensation of \$8,589.50.

⁴ CalPERS's letter was in response to a February 2009 letter from respondent's attorney, Dale M. Fiola, Esq. Mr. Fiola's letter was not submitted at the hearing.

Although CalPERS's letter indicated it was considering only one month of the half-time position to be non-reportable, other CalPERS documents show that CalPERS considered the entire six months of the half-time position to be non-reportable. It calculated respondent's retirement benefit based solely upon his six month appointment to a full-time faculty position (\$8,131.00 per month) and his six month appointment to the position of Associate Dean (\$8,917.00 per month).

25. By a letter dated June 1, 2009, respondent, through his then-attorney, appealed from CalPERS's decision to deny his request for an increase in the calculation of his retirement benefits. The letter of appeal included seven grounds on which the appeal was based.

26. On November 20, 2013, four and one-half years after respondent's appeal letter, CalPERS served a Notice of Hearing "of the Statement of Issues" on respondent and CSU. The Statement of Issues was not served with the Notice of Hearing or at any time prior.

27. December 2, 2013⁵, the day before the noticed hearing, a Statement of Issues in Case No. 9571 was signed on behalf of petitioner. The Statement of Issues narrowly defined the scope of the hearing as limited to whether CalPERS properly applied PERL to the information provided by respondent and CSU to calculate respondent's service retirement allowance. The hearing went forward despite the late notice.

Evidence at the December 2013 Hearing

CALPERS EMPLOYEES' TESTIMONY

28. Samuel Camacho, Jr., Retirement Program Specialist in CalPERS's Compensation Review Unit, and Sheila Arndt, Retirement Program Specialist in CalPERS's Membership Review Unit, two highly qualified employees, testified at the hearing. Neither was involved with respondent's case when he retired in 2007 or when his retirement benefit was calculated. Mr. Camacho was asked to testify at the hearing on respondent's appeal in September 2013. Ms. Arndt was asked to testify two weeks prior to the hearing.

Mr. Camacho stated that his job duties as a Retirement Program Specialist include reviewing CalPERS members' payroll histories to make sure that the reported payrates are in compliance with PERL. He also reviews public records that are available, and he contacts the member's employer by telephone when needed.

Mr. Camacho reviewed respondent's file. He stated that CalPERS relies on the member's employer to accurately report compensation information. In accordance with PERL, because CSU reported that respondent's compensation from July 1 to December 2006

⁵ No explanation was given for the four and one-half year delay between respondent's notice of appeal and the filing of a Statement of Issues.

was based on respondent concurrently holding a full-time and a part-time position, the calculation of his retirement benefit considered only the compensation he earned in the full time position. Mr. Camacho stated that retirement contributions should not have been taken from the compensation for the part-time position. Mr. Camacho opined that CalPERS's calculation of respondent's retirement benefit was based on how CSU reported his compensation and, as such, was correct.

Ms. Arndt also reviewed documents maintained by CalPERS relating to respondent back to 2009. She agreed that, as reported by CSU, respondent's final year compensation calculation would not include the amounts attributable to the part-time position.

RESPONDENT'S TESTIMONY

29. Respondent testified at the hearing. He explained the circumstances regarding the unconventional compensation agreement he had with CSU, which became complicated by his assuming the position of Associate Dean after returning from sabbatical. He stated that it was intended by CSU and himself that he would assume the full-time duties of an Associate Dean on July 1, 2006 and receive compensation based upon CSU's published salary schedule for an Administrator III. He described how CSU created the fictional full and part-time faculty positions to reach the compensation of an Associate Dean because CSU believed the MOU required him to be on a faculty pay schedule when he returned from sabbatical. Because the highest payrate for a faculty member was less than that for an Associate Dean, CSU created the fictitious full and part-time positions. Respondent's testimony on this issue was credible.

Respondent testified that he spoke to Ms. Callahan, CSU Human Resources/Benefits Department, to ensure that the "creative solution" devised by CSU to pay him as an Associate Dean would not negatively impact a retirement calculation. He stated that Ms. Callahan told him she had spoken with CalPERS and was advised that so long as deductions were made and reported to CalPERS, the income would be considered in retirement benefit calculations. Respondent's testimony on this issue was credible.

Respondent testified that, had he known CalPERS would not consider a portion of his Associate Dean's compensation as income in calculating his retirement benefit, he would not have retired when he did, but he would have waited for another six months when the sabbatical issue was no longer a factor. Respondent's testimony on this point was credible.

Evidence at the August 2014 Re-Opened Hearing

30. Cesar Portillo, Associate Vice President of Human Resources, and Rebecca Christopher, Manager, Employment and Retirement, of CSU testified at the re-opened hearing. Neither Mr. Portillo nor Ms. Christopher was involved in any issues or decisions made concerning respondent's compensation or entitlement to retirement benefits.

Ms. Christopher verified that, beginning July 1, 2006, respondent was a full-time Associate Dean; he did not have any teaching responsibilities. She confirmed that there are no written interpretations of the Service Requirement that is contained in the MOU. She testified that “campus practices” dictated that an individual returning from sabbatical leave must serve an equal amount of time in the same position he or she occupied before taking sabbatical leave. Ms. Christopher, however, was not aware of any other situation in which an individual returning from sabbatical leave was asked to render service to CSU in another capacity. Because this is the first time the Service Requirement was applied to an individual who returned from sabbatical and was appointed to another position, no “campus practice” is applicable.

Mr. Portillo and Ms. Christopher confirmed that the sole purpose of the concurrent full and part-time positions “created” for respondent was to compensate respondent as an Associate Dean and in an amount provided by CSU’s salary schedule for that position. Ms. Christopher stated, without objection, that she spoke with Dr. Paul Vicknair, former Associate Provost, who confirmed that CSU created the fictional positions to compensate respondent for his position as Associate Dean. Ms. Christopher felt it was reasonable for respondent to believe that the created part-time position would constitute earned income for retirement purposes because CalPERS contributions were taken from his pay.

Ms. Christopher’s supervisor told her that, because CSU’s payroll went through the state controller’s office, CSU could not go back more than three years to make corrections to salary it reported to CalPERS.

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. “A retirement board’s duty to its participants and their beneficiaries shall take precedence over any other duty.” California Constitution, article XVI, section 17, subdivision (b).

3. “The Constitution imposes on PERS a duty to “ensure the rights of members and retirees to their full, earned benefits.” (*City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 544, [parallel citation omitted.][quoting *City of Oakland, supra*,

95 Cal.App.4th at p. 46, [parallel citation omitted.]). But the statutory scheme governs the scope of the benefits earned. [Citation.] ‘Pension provisions should be broadly construed in favor of those who were intended to be benefited thereby [citations], but they cannot be construed so as to confer benefits on persons not entitled thereto.’ (*Stamper v. City of Los Angeles* (1947) 80 Cal.App.2d 242, 244, [parallel citation omitted.])” (*Chaidez v. Board of Administration of Public Employees’ Retirement System*, (2014) 223 Cal. App.4th 1425, 1430.)

4. 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

5. 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.

6. A party seeking to obtain a recalculation of a retirement benefit has the initial burden to establish the amount of the retirement allowance he or she is entitled to receive. (Evid. Code, § 500; Evid. Code, § 550.) The standard of proof is a “preponderance of the evidence.” (Evid. Code, § 115.)

Compensation Earnable

7. Government Code section 20630 provides:

(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

[¶] . . . [¶]

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

8. Government Code section 20635 provides:

When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service. . . .

If a member concurrently renders service in two or more positions, one or more of which is full-time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full-time, the position with the highest payrate or base pay shall be reported to this system. This provision shall apply only to service rendered on or after July 1, 1994.

9. 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.

(2) Special compensation shall be 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. If an individual is not part of a group or

class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e).

[¶] . . . [¶]

(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.

10. Government Code section 20133 provides, in part: “The board may, in its discretion, hold a hearing for the purpose of determining any question presented to it involving any right, benefit, or obligation of a person under this part.”

11. The management and control of the CalPERS system is vested in the board. (Gov’t Code § 20120.)

12. “The board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.” (Gov’t Code § 20125.)

13. “Notwithstanding any other provision of law, the board may require a member or beneficiary 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.” (Gov’t Code § 20128.)

14. “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.’ (§§ 20023, 20024.01). While there is clearly an intent not to treat members within the same class and at the same pay dissimilarly, there is no intent to grant parity between employees of different classes and rates of pay, such as salaried and nonsalaried employees. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1492.)

Evaluation

15. This is a unique case in which an unusual situation gave birth to a creative solution that had an unintended and significant detrimental impact on respondent. The facts in this case are not likely to recur. The following facts are uncontroverted:

From July 1, 2006, through June 30, 2007, respondent held only one job – that of full-time Associate Dean of the College of Social and Behavioral Sciences; he had no responsibilities or job duties as a faculty member.

CSU intended that respondent receive \$107,000.00 per year as compensation for fulfilling the job duties and responsibilities of Associate Dean.

CSU believed, without evidence to support its belief, that it needed to create a fictional compensation scheme to get around a provision in the MOU.

The salary agreed on by respondent and CSU was within the published CSU Salary Schedule for all employees who were appointed as an Associate Dean (Administrator III).

Respondent inquired about whether his unorthodox method of payment would negatively impact his retirement. He was advised by Ms. Callahan, CSU Human Resources, that she had spoken with CalPERS personnel and that it would not.

Respondent would have remained in his position as Associate Dean for an additional 6 months had he been aware that the method of payment from July 1 to December 30, 2006 would reduce his monthly retirement benefit.

CalPERS received retirement contributions from respondent's paychecks for both fictional positions and did not advise respondent that this was error until April 2009, almost two years after respondent had retired.

CalPERS Must Correct the Payrate Reported by CSU

16. CalPERS has the authority to challenge or correct erroneous reports of income by employers. For example, CalPERS has acted to disallow "spiking," the intentional inflation of a public employee's final compensation, when it has reason to believe it occurred. In *Hudson. v. Board of Administration* (1997) 59 Cal. App. 4th 1310, a city passed a resolution that permitted its employees to convert employer-paid benefits to salary increases if they agreed to retire within twelve months. The result of the resolution was that the salaries of the employees who exercised this option were artificially inflated in the employee's last year of employment, which increased their retirement benefit. CalPERS's refusal to include these amounts in calculating retirement benefits was upheld by the appellate court.

CalPERS has investigated whether certain employees were properly classified and has reclassified them when it determined, after evaluating the employee's job duties, that the employees were improperly classified. (*Crumpler v. Board of Administration* (1973) 32 Cal. App. 3d 567.) CalPERS has also determined that standby pay for public safety employees was improperly reported as compensation for retirement purposes, and CalPERS disallowed including that pay in retirement calculations. (*City of Pleasanton v. Board of Administration* (2012) 211 Cal. App. 4th 522.)

Thus, CalPERS has acted when it discovered improperly reported compensation.

In the same way that CalPERS has acted to correct improper overpayment of retirement benefits, its fiduciary duty requires it to act to correct improper underpayment of retirement benefits. In this case, CSU admittedly created a fictional scheme designed to accurately pay respondent on an established scale for an Associate Dean. The idea that CSU was required to do that because of a provision in the MOU, is not persuasive. There was no impediment to elevating respondent to the position of Associate Dean upon his return from sabbatical leave so long as he rendered service to CSU in an amount of time equal to his sabbatical. Indeed, if, CSU had been prohibited from appointing respondent to the Associate Dean position, the fictional creation of two faculty positions, while respondent admittedly had no teaching responsibilities, would have been a violation of the MOU. The uncontroverted fact is that CSU created the fictional, concurrent, faculty positions so that respondent would be correctly paid under the established salary schedule for the job he was performing. Had CSU correctly reported respondent's position and salary, respondent would be entitled to an increase in retirement benefits. CalPERS has a fiduciary duty to look beyond the well-intentioned, but erroneous, reporting by CSU and correct this situation.

17. Requiring CalPERS to correct the reported compensation does not give respondent a benefit to which he would not otherwise be entitled. Correcting the compensation payrate reported by CSU satisfies Government Code section 20636 because respondent will be assigned the payrate that is paid to similarly situated Associate Deans. It also does not create an unfunded liability for CalPERS. Retirement contributions for respondent's full-time faculty position and full salary as Associate Dean were fully paid.

CalPERS Shall Instruct CSU to Correct the Pay rate it Reported

18. It is uncontroverted that CSU erroneously reported respondent's pay rate to CalPERS. CalPERS is required to ensure that the reported pay rate is corrected. CalPERS is directed to instruct CSU to correct the pay rate it reported to reflect that respondent was appointed as a full-time Associate Dean and that he earned a minimum of \$107,000.00 per year.

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Equitable Estoppel

CORRECTION OF COMPENSATION RECORDS

19. Equitable estoppel may be asserted against the government in some circumstances. The requisite elements for equitable estoppel against a private party are: (1) the party to be estopped was apprised of the facts; (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended; (3) the party asserting estoppel was ignorant of the facts; and (4) the party asserting estoppel suffered injury in reliance on the conduct. The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel. (*Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 868-869.)

20. Respondent proved all of the elements necessary to establish an estoppel against CalPERS on the issue of correcting respondent's records to accurately reflect his final compensation. As of April 2008, CalPERS was apprised of the true facts of respondent's classification and compensation. CalPERS retained retirement deductions from the reported part-time position and failed to advise respondent that those deductions were made in error until two years after he retired. Respondent was ignorant of the true facts and relied on CalPERS's conduct to his prejudice. In conjunction with the inordinate delay in bringing the matter to hearing, respondent was unable to marshal evidence from those who were involved in the decision-making when respondent's compensation scheme was created. CalPERS must be estopped from refusing to correct respondent's records. It must instruct CSU to make the corrections and re-calculate respondent's retirement benefits based on the corrected information. If CSU does not make the corrections, CalPERS must recalculate respondent's retirement benefits based upon a final compensation of \$107,000.00.

ESTOPPEL TO DENY LIABILITY

21. CalPERS asserted that if respondent has a remedy, it is against CSU. Representatives from CSU, however, stated that they could not go beyond three years to correct salary information. Respondent proved all of the elements necessary to establish an estoppel against CalPERS on the issue of asserting that respondent's remedy, if any, must be obtained from CSU.

Respondent was prejudiced by the inordinate amount of time that elapsed between respondent's appeal and the filing of a Statement of Issues by CalPERS. Respondent first notified CalPERS of a miscalculation of his retirement benefits in April 2008. He provided a comprehensive explanation of his unusual situation and included a letter from Dean Conley and notations from the budget officer who worked out the method respondent would be paid so that he would receive compensation within the salary schedule for an Associate Dean.

Respondent's letter was written an entire year before CalPERS informed him that it was denying him an increase in his retirement benefits because CSU reported his position as consisting of a full-time and part-time faculty position. By this time respondent had been retired for almost two years.

Correspondence was exchanged between respondent's attorney and CalPERS until a detailed appeal letter was filed by respondent's attorney on June 1, 2009. From that point until November 2013, when respondent was served with a Notice of Hearing (although a Statement of Issues had not yet been filed) there was no communication with respondent. CalPERS's acts induced respondent to reasonably believe that the matter was progressing within CalPERS – he had no reason to believe that CalPERS would deny all liability and put the burden on respondent to obtain some unspecified remedy from CSU. Further, according to Ms. Christopher, the lengthy delay resulted in an inability of CSU to correct the payrate erroneously reported.

Mr. Camacho testified that if he sees unusual things he will telephone the employer. No one from CalPERS contacted CSU to determine the true facts of respondent's employment after respondent's 2008 letter or the 2009 appeal letter, at a time when those involved in the decisions about respondent's compensation would have been assessable, to ascertain the true facts and ensure that respondent received the retirement benefits to which he was entitled.

Had CalPERS not delayed this matter for an unreasonable time, the necessary corrections could have been made by CSU. Having delayed this matter beyond the time in which corrections could have been made, CalPERS cannot now assert that respondent's remedy lies with another entity. CalPERS must instruct CSU to correct the pay rate it reported to CalPERS. To the extent CSU can correct the compensable pay rate reported to CalPERS, it should do so. However, if corrections cannot be made by CSU, they must be made by CalPERS.

ORDER

1. CalPERS shall recalculate John W. Heeren's compensation earnable based upon his employment as an Associate Dean earning a yearly salary of no less than \$107,000.00, for the period July 1, 2006 to June 30, 2007.

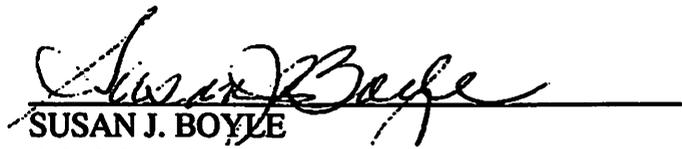
2. CalPERS will instruct California State University, San Bernardino, to correct, to the extent possible, the classification and pay rate concerning John W. Heeren to reflect his pay rate and classification of Associate Dean for the period July 1, 2006 to June 30, 2007.

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3. If it is determined that John W. Heeren did not fully pay employee contributions that should have been paid to CalPERS based upon his employment as an Associate Dean for the period July 1 to December 2006, he must pay the unpaid amount to CalPERS. The amount determined to be owed by John W. Heeren, if any, may be used by CalPERS as a set-off for amounts owed to John W. Heeren for the underpayment of retirement benefits.

DATED: September 17, 2014


SUSAN J. BOYLE
Administrative Law Judge
Office of Administrative Hearings