



Agenda Item 9a

March 18, 2015

ITEM NAME: Precedential Decision – In the Matter of the Calculation of the Final Compensation of RANDY G. ADAMS, Respondent, and CITY OF BELL, Respondent, Case No. 2011-0788

PROGRAM: Customer Account Services Division

ITEM TYPE: Action

RECOMMENDATION

Staff recommends that the Board of Administration direct CalPERS' Legal Office staff to solicit written comments from the public regarding whether the Board's Decision in this matter should be designated as precedential, and that the Board consider whether to designate its Decision as precedential at a time to be determined.

EXECUTIVE SUMMARY

Pursuant to section 11425.60 of the California Administrative Procedure Act (APA), an agency is authorized to designate all or part of a quasi-judicial administrative Decision as precedential, if the Decision contains a significant legal or policy determination of general application that is likely to recur. An agency's designation of a Decision or part of a Decision, or failure to designate a Decision or part of a Decision, as a precedential Decision is not subject to judicial review. The Board's established policy regarding the designation of precedential Decisions calls for consideration of the following two questions:

- A. Does the Decision contain a significant legal or policy determination of general application that is likely to recur?
- B. Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made and how the law was applied?

From the staff's perspective, the answer to both these questions is "Yes."

BACKGROUND

On December 12, 2012, the CalPERS Board adopted the Proposed Decision in this matter. The Board's Decision became effective on January 16, 2013. The member initially petitioned for judicial review of the Proposed Decision, but on February 2, 2015, Respondent Adams dismissed this action with prejudice.

The case involves a dispute over the calculation of final compensation for Respondent Randy G. Adams (respondent Adams) while employed as the Chief of Police by the City of Bell. Respondent Adams retired from service effective November 4, 2010.

During a review by the final compensation review unit (the Program), CalPERS determined that respondent Adams' earnings from the City of Bell did not constitute "compensation earnable" under the California Public Employees' Retirement Law (PERL) because that payrate was not contained in a publicly available pay schedule. Respondent Adams appealed this determination. The appeal was submitted to an Administrative Law Judge (ALJ). The ALJ agreed with CalPERS' determination. After reviewing the legislative history underpinning the requirement for a publicly available pay schedule, the ALJ held that respondent Adams' earnings from the City of Bell were NOT paid pursuant to a publicly available pay schedule. Specifically, the ALJ held that a personal contract did not constitute a publicly available pay schedule because it was not readily available for public review; that it was not publicly available because there was a deliberate effort by the City of Bell officials to conceal the details of this employment agreement, including respondent Adams' payrate; and further, was not publicly available because the City Council never approved respondent Adams' employment agreement. Under these circumstances, the ALJ concluded that respondent Adams did not establish that his earnings from the City of Bell were made pursuant to a publicly available pay schedule. The ALJ's detailed analysis can be found on pages 20-21 of the attached Decision. Referring to the applicable legislative history, the ALJ specifically stated that in order to prevent unfunded liability and ensure that normal payrates are "stable and predictable among all members of a group or class," payrates must be "publicly noticed by the governing body."

ANALYSIS

In general, the effect of making a Board Decision precedential is to give it "precedential effect," which in this context means:

- The Decision may be officially cited in other administrative hearings, and also in court proceedings.
- The Decision is considered "case-made" law, comparable to agency rule-making in its legal effect, and may be applied broadly to other cases and the parties involved in other cases. The decision-maker in another administrative matter may expressly rely on the precedential Decision to decide the matter, that is, give the law or policy in the Decision binding effect in a case involving the same issue as it affects other parties, unless the other case can be factually or legally distinguished.¹

¹ See: 13 CCR 1290 (Office of Administrative Hearings regulation); official *Calif. Law Revision Comments* regarding APA section 11425.60, where it is stated that the statute "... recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking.",

A precedential Decision of the Board is not binding on the courts, which remain the final arbiters of the law; but a Board precedential Decision, as the Decision of the agency most knowledgeable and responsible for administering and making policy with respect to the PERL, is normally accorded great weight and given deference by the courts.² If a Board Decision is not designated as precedential, its effect is more limited. It may be referenced in other administrative matters or in briefing to a reviewing court to inform the judge regarding the Board's administration or interpretation of the PERL, but it has no precedential effect.³

The Board's established policy regarding the designation of precedential Decisions calls for consideration of the following two questions:

- A. Does the Decision contain a significant legal or policy determination of general application that is likely to recur?
- B. Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied?

A. Significant Legal or Policy Determination of General Application That Is Likely to Recur

The significant legal and policy determination presented in the *Adams* Decision is the specific and authoritative explanation of the statutory requirement for publicly available pay schedules. CalPERS has taken the position that in order to be "publicly available," a schedule must have been "exposed" publicly through a hearing process before or contemporaneously with its adoption and must clearly be presented as a schedule which provides for the payrate or range for each specific position. Opposing parties have argued that merely being available to the public through a Public Records Act request or by subpoena is enough to make the document in question "publicly available." They have also argued that if a payrate is merely contained within budget documents or individual contracts that the payrate is "publicly available."

The *Adams* Decision is the first and only Office of Administrative Hearings (OAH) Decision that supports CalPERS' position by stating and affirming the principles that CalPERS staff follows in making these determinations. There are numerous cases that will be coming to hearing in the future that will debate these points. Therefore, it would be very desirable to designate the *Adams* Decision as precedential, in order to

and "... is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision." Also see: *Pac. Legal Foundation v. Unemployment Insur. App. Board* (1991) 29 Cal.3d 101, 109; 21 *Jour. Nat. Ass'n Admin. Law Judges* 247 (2001), at pp. 265-267.

² *City of Oakland v. Pub. Employees' Ret. System* (2002) 98 Cal.App.4th 29, 39; *Hudson v. Board of Administration of the Calif. Pub. Ret. Sys.* (1997) 59 Cal.App.4th 1310, 1324-1325.

³ *City of Oakland, supra*, at p. 57.

provide analytical context for other ALJs considering these critical issues. The Program is also in favor of making this Decision precedential.

B. Clear and Complete Analysis Sufficient For an Understanding of Why the Finding of Facts Were Made and How the Law Was Applied

The factual findings in the *Adams* Decision are straightforward and easy to understand. The Decision follows a logical analysis of the statutes and regulations to explain the process for determining a publicly available pay schedule in the calculation of retirement benefits and provides guidance on the process for evaluating specific items claimed as “compensation earnable” by members and employers.

The Decision then moves on to conclusions of law, consisting of findings that:

11. The word “available” means “suitable or ready for use” and “readily obtainable.” (The Random House Dictionary of the English Language (2nd Ed.), p. 142) The word “publicly” modifies “available.” “Publicly means “in a public or open manner or place” and “in the name of the community” and “by public action or consent.” (The Random House Dictionary of the English Language (2nd Ed.), p. 1563.)

The Legislature intended that a public employee’s “payrate” be readily available to an interested person without reasonable difficulty. This concept does not apply to a situation in which a public employee’s payrate is buried in a carefully crafted agreement designed to prevent the easy calculation of that salary, that is set forth in an employment agreement that is privately maintained and is not based on a published pay schedule or approved in a public manner, and that is not subject to public disclosure except through a formal public records request, subpoena, or other legal process.

12. Assuming that there is some ambiguity in interpreting the phrase “publicly available” as Appellant maintains, then other construction aides should be considered including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy. (*Bernard v. City of Oakland, supra*, at 584-585.)

13. Official notice was taken of Senate Bill 53, which was introduced in 1992 and enacted in 1993. SB 53 was designed to curb “spiking,” the intentional inflation of a public employee’s final compensation, and to prevent unfunded pension fund liabilities. SB 53 payrates would be “stable and predictable among all members of a group or class” and “publicly noticed by the governing body.” The legislation was intended to restrict an employer’s ability to spike pension benefits for preferred

employees and to result in equal treatment of public employees.
(Senate File History Re: SB 53)

14. The reference to “publicly available pay schedules” set forth in Government Code section 20636, subdivision (b)(1), was added by the legislature in 2006. Legislative history confirms that “the change was a matter of clarification.” (*Prentice v. Board of Admin., California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 990, fn. 4.)

15. Using a broad interpretation of “pay schedule” based upon the inclusion of a salary disclosed only in a budget has the vice of permitting an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees. And, a written employment agreement with an individual employee should not be used to establish that employee’s “compensation earnable” because the employment agreement is not a labor policy or agreement within the meaning of an existing regulation and would not limit the compensation a local agency could provide to an individual employee by way of individual agreements for retirement purposes. (*Prentice v. Board of Admin., California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 994-995.)

16. The term “publicly available” has been determined to be consistent with “a published monthly payrate,” and a settlement payment that was not paid in accordance with a “publicly available pay schedule for services rendered on a full time basis during normal working hours” cannot be used to calculate the amount of a CalPERS retirement allowance. (*Molina v. Board of Admin., California Public Employees’ Retirement System* (2001) 200 Cal.App.4th 53, 66-67.)

The *Adams* Decision is therefore constructed logically and interprets Government Code section 20636 and related regulations found at California Code of Regulations, title 2, sections 570 and 571, in the context of final compensation analysis of public employees’ pay.

Staff therefore believes that the findings and legal conclusions of the *Adams* Decision, if the Decision is made precedential, will provide useful, specific rules both for staff and public entities.

BENEFITS/RISKS

The benefits to making the Decision in the Randy Adams case precedential have been described in detail in the above Analysis section. In summary, there are no other precedential Decisions of the Board that clarify the requirement of a publicly available pay schedule under current law. Since this issue recurs repeatedly in final

compensation litigation before the OAH, a precedential Decision regarding these matters would assist CalPERS staff in calculating final compensation and would assist contracting agencies and members in correctly reporting compensation earnable, so fewer disputes would occur.

Staff recommends that the Board of Administration direct CalPERS Legal Office staff to solicit written comments from the public regarding whether the Board's Decision in this matter should be designated as precedential, and that the Board consider the issue whether to designate its Decision as precedential at a time to be determined.

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