

ATTACHMENT D  
STAFF ARGUMENT

**STAFF'S ARGUMENT IN SUPPORT OF DESIGNATION OF  
FEBRUARY 15, 2012, FINAL DECISION AS PRECEDENTIAL**

On December 12, 2012, the Board adopted the Proposed Decision *In the Matter of the Appeal Regarding Calculation of Final Compensation of: Randy G. Adams, Respondent (In Re: Randy Adams)* as the Board's final decision (Decision). The Decision of the Board became effective on January 16, 2013.

In the Proposed Decision, the Administrative Law Judge (ALJ) explains in great detail the statutory authority for and interpretation of the term "publicly available" pay schedule, as that term is used under Government Code section 20636 for establishing a member's payrate for the purpose of determining "compensation earnable"<sup>1</sup> and "final compensation."

The issues resolved by the ALJ in *In Re: Randy Adams* occur repeatedly in final compensation litigation which is presented before the Office of Administrative Hearings (OAH). Presently, the Board has no precedential decision specifically holding that (1) a document intended to be a "publicly available" pay schedule must be publicly noticed by the governing body; and (2) the mere fact that such a document may be available through other legal process does not render it a "publicly available" pay schedule as intended under the Government Code. As a result, staff is asking the Board to designate the Decision of the Board *In Re: Randy Adams* as precedential, in order to prevent re-litigation of these issues.

1. Statutory Authority

Pursuant to Government Code section 11425.60 in the California Administrative Procedure Act (APA), the Board is authorized to designate all or part of a quasi-judicial administrative decision of the Board as precedential:

(a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a

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<sup>1</sup> Pursuant to Government Code section 20630, "final compensation" cannot exceed a member's "compensation earnable," as that term is defined in Government Code section 20636 as follows:

(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. (*Emphasis added.*)

decision or part of a decision, as a precedent decision is not subject to judicial review.

(c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997. (Emphasis added.)

## 2. Precedential Effect

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.<sup>2</sup>

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 California Public Employees’ Retirement Law (PERL), is normally accorded great weight or given deference by the courts.<sup>3</sup>

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<sup>2</sup> 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.”, 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.

<sup>3</sup> *City of Oakland v. Pub. Employees’ Ret. System* (2002) 98 Cal.App.4<sup>th</sup> 29, 39; *Hudson v. Board of Administration of the Calif. Pub. Ret. Sys.* (1997) 59 Cal.App.4<sup>th</sup> 1310, 1324-1325.

If a Board decision is not designated as precedential, its effect is more limited. It may be referenced in other administrative matters or to a reviewing court to inform the judge regarding the Board's administration or interpretation of the PERL, but it has no precedential effect.<sup>4</sup>

The Board's precedential decisions are published in compliance with subdivision (c) of section 11425.60 and are listed in a special on-line index on the Board's website, at:

<http://www.calpers.ca.gov/index.jsp?bc=/about/leg-reg-statutes/board-decisions/current-prec-bd-dec.xml>

### 3. Board Policy

The Board's established policy regarding the designation of precedential decisions is based on subdivision (b) of Government Code section 11425.60 and calls for consideration of the following two questions:

- Does the decision contain a significant legal or policy determination of general application that is likely to recur?
- 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."

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

The significant legal and policy determination presented in *In Re: Randy Adams* is the discussion and explanation of the statutory meaning of the phrase "publicly available" as used to describe the requirement for establishing a salary schedule that employers and CalPERS staff can use in calculating a member's payrate for the purpose of determining his or her final compensation.

Frequently, for higher ranking employees, public agency employers will either use an individual employment agreement, often adopted in closed session, or private negotiations, to establish a pay schedule. This Decision makes clear that the legislative history and the plain language of Government Code section 20636 requires as a threshold condition that a salary schedule for a position must be publicly noticed and approved in order to be used to establish a member's payrate.

In addition, local public agencies and members often assert that if a document containing a salary may be obtained through a process such as a Public Records

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<sup>4</sup> *City of Oakland, supra, at p. 57.*

Act request or a subpoena, it is "publicly available." This Decision makes clear that merely because a document may be obtained or identified by the public through such a process, that fact does not render it "publicly available" as that phrase is used under the PERL.

A precedential decision analyzing the law pertaining to these issues will provide members and employers much-needed guidance, and reduce the amount of future litigation.

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 *In Re: Randy Adams* decision are straightforward and easy to understand. The Decision first follows a logical analysis of the statutes and regulations to explain the process for determining "compensation earnable" in the calculation of retirement benefits and provides guidance on the process for evaluating specific documents claimed to be "publicly available" pay schedules by members and employers.

The Decision then moves to conclusions of law, including:

*Statutory Interpretation - "Publicly Available" Pay Schedules*

1. Under well-established rules of statutory construction, courts must ascertain the intent of the drafters to effectuate the purpose of the law. Because statutory language is generally the most reliable indicator of legislative intent, the words of a statute are first examined, giving them their usual and ordinary meaning and construing them in context. When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. Thus, if the language is unambiguous, the plain meaning governs and it is unnecessary to resort to extrinsic sources to determine legislative intent. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1560-1561.)

2. 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 unreasonable 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 Act request, subpoena, or other legal process.

3. Assuming that there is some ambiguity in interpreting the phrase "publicly available" as Respondent Adams 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.)

4. 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 defined "compensation earnable" in terms of normal payrate, rate of pay, or base pay so 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.)

5. 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.)

6. 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.)

7. 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* (2011) 200 Cal.App.4th 53, 66-67.)

8. 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." There is clearly an intent not to treat members within the same class and at the same pay dissimilarly, although there is no intent to grant parity between employees of different classes and rates of pay. (*City of Sacramento v. Public Employees' Retirement System*) (1991) 229 Cal.App.3d 1470, 1492.)

As described, the *In Re: Randy Adams* decision is constructed logically and interprets Government Code section 20636 in the context of final compensation analysis for local public agency employee's payrate.

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

Pursuant to Government Code section 11425.6:

(a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency. As a result, the current board decision may be used as persuasive authority and the Administrative Law Judge can at his or her discretion use the decision or not. If the decision is designated as precedential, then the judge would be bound to follow the holding.

(b) An agency may designate as a precedent decision a decision or part of a decision that 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 precedent decision is not subject to judicial review.

C. Results of the Requests for Public Comments.

On April 8, 2015, a letter was mailed to over 1600 public agencies, 338 state entities, 63 school districts and the respondent in the case asking for comments on whether to designate the Decision in *In Re: Randy Adams* as a precedential decision.

Staff received three calls from local agencies who chose not to provide comments and essentially asked questions regarding the process of the decision. Staff received only two written comments. The City of Signal Hill submitted a comment in support of the proposed action and concluded that improved transparency is good for local government. City of Avenal opposed the proposal stating that requiring public notice and consent in the process of establishing a pay schedule for public employees would serve no purpose and abolish the need for the City Manager/Human Resources Department to deal with salaries.

Conclusion

For the reasons stated above, staff argues that the Decision in *In Re: Randy Adams* be designated as precedential.

June 17, 2015

  
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