ATTACHMENT A

THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Calculation of Final Compensation of: JULIA ERICKSON, Respondent, and CITY of VALLEJO, Respondent.	CalPERS Case No. 2014-0180 OAH No. 2014051049

PROPOSED DECISION

This matter was heard before Administrative Law Judge (ALJ) Ann Elizabeth Sarli, State of California, Office of Administrative Hearings, on February 10, 2015, in Sacramento, California.

Cynthia Rodriguez, Senior Attorney, represented the complainant Karen DeFrank, Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS).

Robert W. Nichelini, Attorney at Law, represented respondent Julie Erickson, who was present.

There was no appearance by or on behalf of respondent City of Vallejo (City).[1]

Evidence was received and the record remained open for parties to submit written closing arguments. On March 18, 2015, CalPERS filed its Closing Brief, which was marked for identification as Exhibit 12. On April 7, 2015, respondent filed her Closing Brief, which was marked for identification as Exhibit J.

On April 8, 2015, ALJ Sarli issued an Order for Additional Briefing. On April 16, 2015, CalPERS filed its Reply to Closing Argument, which was marked for identification as Exhibit 13. On April 21, 2015, respondent filed her Reply to Request for Additional

[1] The matter proceeded as a default against respondent City of Vallejo pursuant to Government Code section 11520.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED May 27 2015

Briefing, which was marked for identification as Exhibit K. The record closed on April 23, 2015, and the matter was submitted for decision.

FINDINGS

Background

1. The City contracted with the Board of Administration of the Public Employees' Retirement System (Board) to participate as a public agency member pursuant to Government Code section 20063. The provisions for local public agencies contracting with CalPERS are set forth in the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq. By virtue of her employment with the City, respondent is a member of CalPERS and subject to all provisions of the PERL.

2. Respondent became a temporary employee of the City on June 10, 1981. On January 4, 1982, she received permanent status. She initially held the positions of Intermediate Typist Clerk and Intermediate Stenographer Clerk. In 1990, she was promoted to the position of Secretary. In 1995, she was promoted to the position of Executive Assistant to the City Manager (Executive Assistant). Respondent retired from this position on October 5, 2012.

3. The qualifications and duties of the Executive Assistant are detailed in a job description entitled "Executive Assistant to the City Manager." The job description contains a "Definition" section which states as follows:

> To perform a variety of highly responsible, confidential and complex secretarial and administrative duties for the City Manager and City Counsel; and to provide general information and assistance to the public.

4. The job description notes, under a section entitled "Supervision Received and Exercised," that the occupant of the position "[r]eceives direction from the City Manager [and] [e]xercises direct supervision over secretarial and clerical staff."

The job description provides "Examples of Duties" including the following:

> Perform a wide variety of complex, responsible and confidential secretarial administrative duties for the City Manager and the City Counsel.
>
> Participate in the selection of clerical staff; provide or coordinate staff training; work with employees to correct deficiencies; implement discipline procedures.

Screen calls, visitors and mail; respond to sensitive requests for information and assistance; resolve citizen concerns and complaints.

Interpret City policies, procedures, laws and regulations in response to inquiries and complaints; refer to inquiries as appropriate.

Participate and assist in the administration of the City Manager's office; recommend organizational or procedural changes affecting support activities; assist in the preparation of the annual budget.

Independently respond to letters and general correspondence of a routine nature.

Make travel arrangements; maintain appointment schedules and calendars; arrange meetings, conferences and civic functions.

Take and transcribe minutes during various meetings.

Research, compile and analyze data for special projects in various reports.

Order and maintain office supplies; order stationery, business cards and supplies for administrative office staff.

Initiate and maintain a variety of files and records for information related to the City Manager's office; maintain manuals and update resource materials.

Perform related duties and responsibilities as required.

5. The job description lists the "Minimum Qualifications" for the position. The position requires "four years of increasingly responsible secretarial and clerical experience [and] training equivalent to completion of the 12th grade, supplemented by specialized secretarial training. College-level work in business administration, computer science, or a related field is desirable."

6. During the seven years respondent occupied the position of Executive Assistant she reported directly to the City Manager. She supervised one or two clerical employees. She served as a "resource for other City employees" and it was her responsibility to attend weekly management meetings where she kept everyone abreast of the latest news and changes that were being made by the City Manager's Office.

7. The City and respondent considered respondent a management employee when she assumed the position of Executive Assistant. She was classified as an exempt employee who served at the will of the City Manager. As an exempt employee, she was entitled to the City's "General-Flex Benefit" which allowed exempt employees to select either 120 hours of additional base pay or 120 hours additional leave, or some combination thereof. The City paid respondent and other exempt employees the General-Flex Benefit, and reported it to CalPERS as income which was subject to CalPERS retirement contributions.

8. In 1997, CalPERS notified the City that the General-Flex Benefit would not be considered "compensation earnable" for computation of retirement allowances if "cash" or "non-cash" alternatives were permitted. In response, the City eliminated the additional vacation alternatives and all management employees became entitled to 120 hours of additional base pay, payable in equal installments in the employee's regular paycheck, as "Management Incentive Pay." CalPERS, through employee Michael Dutil, wrote a letter to the City dated October 31, 1997, in which it accepted the City's Management Incentive Pay as an item of special compensation. Mr. Dutil wrote: "the Management Incentive Pay which was set forth in section 16 of the City's Confidential, Administrative, Managerial and Professional (CAMP) contract could be reasonably construed as conforming with the definition of Management Incentive Pay in California Code of Regulations, section 571, subdivision (a) (1)." He wrote that payroll reporting of the Management Incentive Pay benefit was "in accordance with CalPERS regulations ...assuming all the standards in the California Code of Regulations are met."

9. The City commenced reporting respondent's Management Incentive Pay to CalPERS in addition to her base pay. Respondent made contributions to the CalPERS system based on her base pay as well as her Management Incentive Pay.

10. After respondent retired on October 5, 2012, she began receiving retirement checks that were based upon the compensation the City reported, including base pay and Management Incentive Pay. The CalPERS Office of Audit Services conducted an audit and determined that the City incorrectly reported respondent's Management Incentive Pay as reportable compensation. The Audit Report found in pertinent part:

> The City's Confidential, Administrative, Managerial, and Professional (CAMP) MOU includes a provision for management incentive pay for eligible employees. California Code of Regulations [CCR, title 2] Section 571, provides an exclusive list of items that are reportable to CalPERS as special compensation. Management incentive pay is listed as a reportable special compensation item that is granted to management employees. OAS [Office of Audit Services] identified one sampled employee [respondent] for whom the City was paying and reporting management incentive pay. However, the employee held the position of Executive Assistant

> to the City Manager which was not a management position. Although the Executive Assistant to the City Manager position may be considered a supervisory position as it may exercise direct supervision over secretarial and clerical staff, the position is not a management position as the position's duties do not include management duties, such as planning, directing, and coordinating the activities of a city function. OAS found these management duties on other City management job descriptions, but not on the Executive Assistant to the City Manager job description.... Therefore, the management incentive pay should not have been reportable to CalPERS for the non-management employee....

11. The City responded to the Audit Report on July 23, 2012. The Acting Human Resources Director, Mary Neilan, wrote that Management Incentive Pay was reported correctly for respondent. "The position of Executive Assistant to the City Manager has supervisory responsibility and acts independently on behalf of the City Manager. She is considered a management employee and as such her Management Incentive Pay has been correctly reported as special compensation."

CalPERS Determination and Respondent's Appeal

12. On November 28, 2012, CalPERS, through Toni Jiminez, Manager, wrote to the City and respondent with its determination that respondent's compensation does not comply with the PERL, because it improperly included Management Incentive Pay. Ms. Jiminez referenced CCR, title 2, section 571, subdivision (a)(1), which "exclusively identifies and defines special compensation for members employed by a contracting agency, that must be reported to CalPERS if they are contained in a written labor policy or agreement" [e.g. CAMP]. Ms. Jiminez noted that CCR, title 2, section 571, subdivision (a)(1), defines "Management Incentive Pay" as "Compensation granted to *management employees* in the form of additional time off for extra pay due to the unique nature of their job..." (Italics in letter.)

13. Ms. Jiminez wrote that the Management Incentive Pay provided by the City was "eligible to all employees represented in the CAMP Agreement without regard to holding management positions. Ms. Erickson's position title at retirement from the City was Executive Assistant to City Manager which does not appear to be a management position. Therefore, CalPERS has excluded the Management Incentive Pay that was reported on Ms. Erickson's behalf from the calculation of her retirement benefit."

14. Respondent appealed the CalPERS decision to exclude her Management Incentive Pay from the calculation of her retirement benefit. Karen DeFrank, Chief Customer Account Services Division, CalPERS, in her official capacity, made the Statement of Issues, on May 16, 2014, and caused it to be filed thereafter. The matter was set for

hearing before the Office of Administrative Hearings, an independent adjudicative body, pursuant to Government Code section 11500 et seq.

Issues

15. CalPERS maintains that respondent was not a management employee and was thus not entitled to have Management Incentive Pay included as part of her compensation reported to CalPERS. Respondent maintains that she was a management employee and that it is the City, not CalPERS, which determines whether an employee is a management employee. Additionally, respondent claims that CalPERS approved her inclusion as a management employee in 1997 when CalPERS approved the City's proposal for Management Incentive Pay. She also maintains that CalPERS should have challenged her inclusion at the time Management Incentive Pay was approved, rather than after her retirement. She points out that she has made contributions to CalPERS based on her Management Incentive Pay for 17 years, without challenge. Finally, respondent argues that if she is not eligible for Management Incentive Pay, she is eligible to have the Management Incentive Pay she received included in her final compensation as special compensation, because the benefit was actually a general benefit, such as a General-Flex Benefit.

Determination of Issues

16. *Management Incentive Pay*: The initial issue is whether respondent was a management employee eligible for Management Incentive Pay, as that term is defined by the PERL and other applicable law. Respondent bears the burden of proof by a preponderance of the evidence that she was a management employee.[2]

17. Respondent maintains that the City has the right to determine whether an employee is a management employee eligible for special compensation under the PERL, and that CalPERS is bound by the City's determination. Respondent cites no persuasive authority for this proposition. The PERL provides statutory mandates which must be met in order to administer the public employee retirement system. Contracting public agencies have no authority to supersede PERL mandates. Accordingly, respondent's actual duties and responsibilities control whether she is a management employee under the PERL, not the City's characterization of her as such. To find otherwise, would allow public agencies contracting with CalPERS to subvert many, if not all, of the PERL's provisions regarding the characterization of compensation.

18. Government Code section 20630, subdivision (a), defines "compensation" in pertinent part as "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 ..." Government Code section 20636 sets out the items that can be considered as final compensation, which consists of pay rate and special

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[2] *McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044; § 20160, subd. (d).; Evid. Code, § 500.

compensation. Respondent's payrate is not at issue. The issue at hand is whether respondent's Management Incentive Pay constitutes special compensation, which can be included in her final compensation.

19. To determine who is entitled to special compensation in the form of Management Incentive Pay, one must look to the PERL and regulations enacted pursuant to the PERL. Government Code section 20630, subdivision (c), provides in pertinent part:

> (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).
>
> [¶] ... [¶]
>
> (6) *The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section.* A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 and following of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations. (Italics added.)
>
> (7) Special compensation does not include any of the following:
>
> > [¶] ... [¶]
> >
> > (C) Other payments the board has not affirmatively determined to be special compensation.
> >
> > [¶] ... [¶]

20. Pursuant to Government Code section 20630, subdivision (c)(6), the Board set out in the California Code of Regulations, an exclusive list of all items defined as "special compensation." CCR, title 2, section 571 provides in pertinent part:

> (a) The following list exclusively identifies and defines special compensation items for members employed by contracting agencies and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement:
>
> > (1) INCENTIVE PAY
> >
> > [¶] ... [¶]
> >
> > Management Incentive Pay - Compensation granted *to management employees* in the form of additional time off or extra pay due to the unique nature of their job. Employees within the group cannot have the option to take time off or receive extra pay. This compensation must be reported periodically as earned and must be for duties performed during normal work hours. This compensation cannot be for overtime, nor in lieu of other benefits excluded under the statutes, nor for special compensation not otherwise listed in this Section 571. (Italics added.)
> >
> > [¶] ... [¶]
>
> (b) The Board has determined that all items of special compensation listed in subsection (a) are:
>
> > (1) Contained in a written labor policy or agreement as defined at Government Code section 20049, provided that the document:
> >
> > > (A) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;
> > >
> > > (B) Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;

(C) 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;

(D) Indicates an effective date and date of any revisions;

(E) Is retained by the employer and available for public inspection for not less than five years; and

F) Does not reference another document in lieu of disclosing the item of special compensation;

(2) Available to all members in the group or class;

(3) Part of normally required duties;

(4) Performed during normal hours of employment;

(5) Paid periodically as earned;

(6) Historically consistent with prior payments for the job classification;

(7) Not paid exclusively in the final compensation period;

(8) Not final settlement pay; and

(9) Not creating an unfunded liability over and above PERS' actuarial assumptions.

(c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).

(d) If an item of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual.

21. The parties did not cite authority defining a "management employee" entitled to Management Incentive Pay. CalPERS witness, Karin Zimmerman, has been a CalPERS Retirement Program Specialist for 7 and a half years. She is responsible for reviewing payroll at the time of retirement to make sure that the member's compensation complies with the law. She testified that all items of special compensation are listed in CCR, title 2, section 571, subdivision (a). Under this section, extra salary beyond base pay for management incentive is included as final compensation. To determine if an employee is eligible for Management Incentive Pay, she looks at the employee's duty statement to determine if she/he is managing a unit or division and if she/he is planning or directing an organization or unit on a large scale. Ms. Zimmerman testified that to be eligible for Management Incentive Pay, the employee must not simply be supervising others, but must plan and direct the path the unit might take in meeting goals and objectives. She testified that belonging to a group which the employer calls "management" does not necessarily establish that the member is a manager for purposes of CCR, title 2, section 571, subdivision (a).

22. In Ms. Zimmerman's opinion, respondent was not a management employee and was not entitled to Management Incentive Pay as special compensation. She reported to the City Manager, she did not have management duties herself, she supervised one to two clerical employees and the remainder of her duties, such as responding to emails, phones and foot traffic, were not "management only tasks." Her duties were mostly clerical duties and did not involve directing an organization or unit and establishing goals and objectives. Ms. Zimmerman also reviewed the organizational chart for the City which showed that respondent reported to the City Manager but there was no employee or unit reporting to her. She occupied a "stand alone position."

23. Respondent's written job description, the qualifications necessary for her position, the City organizational chart and respondent's testimony about her duties support Ms. Zimmerman's opinion. Respondent's duties were clerical and secretarial, with a minimum of supervision of clerical employees. She was not responsible for setting or meeting any City policies, goals or objectives or for organizing or managing a City function or unit.

24. Although there was no authority offered as to how the PERL defined a management employee, one can look to Government Code section 3513, respecting employer-employee relations in State employment for guidance. That section provides in pertinent part:

> As used in this chapter:
>
> [¶] ... [¶]
>
> (e) "Managerial employee" means any employee having significant responsibilities for formulating or administering agency or departmental policies and programs or administering an agency or department.

25. It is clear that respondent did not have significant, or any, responsibilities for formulating or administering agency or departmental policies and programs or administering an agency or department.

26. The plain meaning of the word "management" includes making decisions and exercising control. The Merriam Webster Dictionary Website defines "management" as "the act or skill of controlling and making decisions about a business, department, sports team, etc., [and] the people who make decisions about a business, department, sports team, etc. ..." It is clear that respondent did not control or make decisions about any City department.

27. The evidence is persuasive that respondent was not eligible as a "management employee" to receive Management Incentive Pay as "special compensation" pursuant to Government Code section 20630, subdivision (c)(6), and CCR, title 2, section 571, subdivision (a)(1).

28. *CalPERS Approval*: Respondent claims that CalPERS approved her position as a management employee when it approved Management Incentive Pay for the City. Based on this "approval", respondent made contributions to CalPERS for Management Incentive Pay for 17 years, without challenge. This argument is not persuasive. CalPERS approved the *plan* advanced by the City to pay Management Incentive Pay to management employees. CalPERS did not review or approve a list of persons for positions that qualified for Management Incentive Pay. (Findings 7 and 8.) The October 31, 1997, CalPERS letter to the City accepted the City's Management Incentive Pay as an item of special compensation, because the Management Incentive Pay which was described in the CAMP contract conformed with the definition of Management Incentive Pay in California Code of Regulations, section 571, subdivision (a)(1). However, in the letter CalPERS advised that payroll reporting of the Management Incentive Pay benefit was "in accordance with CalPERS regulations... assuming all the standards in the California Code of Regulations are met." One of the standards, of course, is that the employee receiving Management Incentive Pay is actually a management employee, pursuant to Government Code section 20630, subdivision (c)(6), and CCR, title 2, section 571, subdivision (a)(1).

29. *CalPERS Duty to Investigate*: Respondent maintains that CalPERS had a duty to investigate the manner in which the City classified its employees to determine whether they were management employees eligible for Management Incentive Pay. Respondent also maintains that CalPERS should have challenged her inclusion at the time Management Incentive Pay was approved, rather than after her retirement. Respondent cites no authority for the proposition that CalPERS had such a duty, when the duty allegedly arose and whether the alleged duty was a continuing one. Not only is there no authority for respondent's argument, but imposing such a duty upon CalPERS would be onerous and unworkable. CalPERS cannot be required to continuously review and monitor the employment decisions of contracting agencies.

30. *General Benefit as Special Compensation*: Respondent argues that if she is not eligible for Management Incentive Pay, she is eligible to have the Management

Incentive Pay she received included in her final compensation as special compensation, because the benefit was actually a general benefit, such as a General-Flex Benefit. This argument is not persuasive. CCR, title 2, section 571, subdivision (a)(1), contains a lengthy and exclusive list of benefits which may be included as special compensation. General benefits and General-Flex Benefits are not included, nor is there any benefit included in the list which can reasonably be construed to include the benefit respondent received.

LEGAL CONCLUSIONS

1. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198). The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) "final compensation." (Gov. Code, §§ 20037, 21350, 21352, 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)

2. The management and control of PERL's retirement system is vested in the Board. (Gov. Code, §§ 20120, 20021.) The PERL mandates that compensation reported to the Board "shall be reported in accordance with Government Code section 20636 and shall not exceed compensation earnable, as defined in Section 20636." (Gov. Code, § 20630, subd. (b).) Government Code section 20636, subdivision (a), defines "compensation earnable" as being comprised of "payrate" and "special compensation."

3. "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence...." (*McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044; § 20160, subd. (d); Evid. Code, § 500.) In this matter, respondent bears the burden of establishing that CalPERS' interpretation of Government Code section 20630, subdivision (c)(6), and CCR, title 2, section 571, subdivision (a)(1), as it applies to Management Incentive Pay is not correct under the PERL. As set forth in the Findings, respondent failed to meet this burden.

4. As set forth in the Findings and Legal Conclusions as a whole, CalPERS properly determined that the Management Incentive Pay respondent received from 1995 through October 2012 should not be included as special compensation in the calculation of her retirement benefit.

ORDER

The decision of CalPERS to exclude respondent Julia Erickson's Management Incentive Pay from the calculation of her retirement benefit is UPHELD.

The appeal of respondent Julia Erickson to the CalPERS decision to exclude Management Incentive Pay from the calculation of her retirement benefit is DENIED.

DATED: May 26, 2015

ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings