

ATTACHMENT C

FINAL 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 :

TIMOTHY BACON,

Respondent,

DARRYL HURT,

Respondent,

and

CITY OF RIVERSIDE,

Respondent.

Case No. 2012-0191
2012-0190

OAH No. 2014090781
2014090777

FINAL DECISION

Mary Agnes Matyszewski, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on May 28, 2015. The issues before the ALJ were whether certain settlement payments to Respondents Bacon and Hurt qualified as payrate and whether they should be excluded as final settlement pay.

Preet Kaur, Senior Staff Attorney, represented California Public Employees' Retirement System (CalPERS), State of California.

Joseph N. Bolander, Gaspard, Castillo, Harper, APC, represented respondents Timothy Bacon and Darryl Hurt who were present throughout the hearing.

Neil Okazaki, Deputy City Attorney, represented respondent City of Riverside.

On January 22, 2015, the case entitled *In the Matter of the Calculation of Final Compensation of: Timothy Bacon*, OAH No. 2014090781 and the case entitled, *In the Matter of the Calculation of Final Compensation of: Darryl Hurt*, OAH No. 2014090777, were consolidated, and these two cases were heard together.

The ALJ issued her Proposed Decisions on October 22, 2015. The Proposed Decisions concluded that CalPERS shall include the settlement payments as payrate in the calculation of respondents Bacon and Hurt's final compensation. At its December 16, 2015 meeting, the CalPERS Board of Administration declined to adopt the Proposed Decisions and determined to decide the matter itself, based upon the record produced before the ALJ and such additional evidence and arguments that were presented by the parties. On February 18, 2016, the Board held a full Board Hearing. All parties received notice of all proceedings before the Board. At the February 18, 2016 hearing before the Board, Preet Kaur represented CalPERS, Joseph Bolander, Esq. represented Respondents Bacon and Hurt, and Neil Okazaki represented Respondent City of Riverside.

ISSUE

Can compensation in the form of a "special salary adjustment" pursuant to a settlement agreement between Respondents Bacon and Hurt and the City be included in the calculation of Respondents Bacon and Hurt's final compensation?

SUMMARY

Respondents Bacon and Hurt were Police Lieutenants who filed a federal lawsuit against the City alleging they were wrongfully passed over for promotion to Captain. Respondents Bacon and Hurt resolved their litigation via a settlement agreement. The terms of the agreement provided that the City would award Respondents Bacon and Hurt back pay as if they had been promoted, would pay them all salary and benefits in the future at a Captain's rate, would purchase service credits to allow Respondents Bacon and Hurt to retire with 30 years of service, would place them on administrative leave, and later they would retire.

The City reported the additional compensation to CalPERS as a "special salary adjustment pursuant to a settlement."

On September 14, 2011, after reviewing pertinent documents, CalPERS staff issued a formal determination to the City and respondents Bacon and Hurt, stating the salary increase at the top-step level of a Captain, in the amount of \$1,821.04 per month, would be excluded in the calculation of Respondents Bacon and Hurt's final compensation. The determination letters explained that additional compensation reported on behalf of Respondents Bacon and Hurt failed to comply with the Public Employees' Retirement Law (PERL). Specifically, the additional compensation did not qualify as "payrate" under Government Code section 20636 and constituted "final settlement pay" under Title 2, California Code of Regulations, section 570. The letters informed respondents Bacon and Hurt and the City of their appeal rights. Respondents Bacon and Hurt timely appealed.

Respondents Bacon and Hurt, CalPERS staff, and counsel for the City at the time of the settlement of the lawsuit filed against the City by Respondents Bacon and Hurt, Senator Richard Roth, testified at the hearing.

FACTUAL FINDINGS

Jurisdictional Matters

1. On September 14, 2011, CalPERS notified Respondents Bacon and Hurt and the City that some of Respondents Bacon and Hurt's compensation reported to CalPERS did not qualify as "compensation earnable" for purposes of determining his final compensation calculation.

Respondents Bacon and Hurt appealed that determination. On September 19, 2014, CalPERS filed its statement of issues, Respondents Bacon and Hurt and the City filed notices of defense, and this hearing ensued.

Employment History

2. Respondent Bacon was employed as a peace officer with the City's police department for approximately 25 years, until he retired in 2010. Respondent Hurt was employed as a peace officer with the City's police department for more than 25 years, until he retired in 2011. The City is a public agency contracting with CalPERS for retirement benefits for its eligible employees. By virtue of their employment, Respondents Bacon and Hurt were local safety members of CalPERS. While peace officers, Respondents Bacon and Hurt were active in the Riverside Police Administrators' Association (RPAA), Respondent Bacon eventually was appointed by Respondent Hurt to serve on the RPAA Political Action Committee and Respondent Hurt was elected as the RPAA president in 2006.

Federal Litigation and Settlement Agreement

3. Respondent Bacon believed he was retaliated against at work and sued the City and several City employees in federal court for violating his rights. His lawsuit was consolidated with Respondent Hurt's federal lawsuit. That litigation was eventually settled between the parties. The settlement agreement was placed on the record but never reduced to writing. The only documentation of the agreement is the federal court's April 12, 2010, transcript. Richard Roth, then an attorney who represented all of the City defendants, made the following recitation on the record:

[T]he parties have reached a settlement in this matter. And as part of the settlement, that plaintiffs Hurt and Bacon have agreed to execute a settlement agreement and general release fully releasing defendants as to all claims and containing the following essential terms, among others:

Hurt will retire from the City of Riverside Police Department as a police lieutenant on January 19, 2011, and Bacon will retire as a police lieutenant on July 17, 2010, both 50 years of age.

And both will execute and return a completed retirement application concurrent with the execution and return of the settlement agreement document.

Within 30 days of receipt by the City of a fully executed original of the settlement agreement, the City will pay to Hurt and Bacon additional compensation from January 25, 2008, to today's date per the captain pay scale and during the administrative leave period provided for in a bit or before the City will ensure that both receive at least 12 months of compensation at the top-step Captain's rate prior to their retirement.

Upon retirement Hurt and Bacon will be entitled to receive all benefits normally accorded retiring police officers under City policy.

Prior to January 19, 2011, in the case of Lieutenant Hurt, and July 17, 2010, in the case of Lieutenant Bacon, the City will pay to them a sum sufficient to allow them to purchase additional service credits under the California Public Employees Retirement System rules and regulations in order to enable them to retire with 30 years of service.

The City will place Lieutenants Hurt and Bacon on paid administrative leave at a monthly salary equivalent to the top-step captain's monthly salary rate with full benefits commencing tomorrow and continuing to the respective dates of their retirement.

On or before January 19, 2011, the City will pay to Lieutenant Hurt the sum of \$300,000 as non-economic damages and on or before July 17, 2010, pay to Bacon the sum of \$250,000 as non-economic damages. (Transcript, Exhibit 7, page 2, line 1 - page 3, line 15.)

The attorney representing the City recited other terms regarding attorneys' fees and confidentiality, and the parties took a break in the proceeding to further negotiate the confidentiality provisions. (Transcript, Exhibit 7, page 3, line 16 - page 8, line 22.) At the conclusion of the additional negotiations and recitations, the federal judge asked Respondents Bacon and Hurt if they reflected "the terms of the settlement as you understand them," to which they replied in the affirmative. The federal judge noted that "the settlement is not contingent upon it being successfully reduced to writing." (Transcript, Exhibit 7, page 10, lines 8-14.)

The terms and conditions of the Settlement Agreement were to be kept confidential, other than certain described exceptions.

CalPERS's Documents

4. Respondents Bacon and Hurt's CalPERS payroll detail report from 2008 to 2010 contained entries identified as regular payroll and special compensation. The document reflected the change in Respondents Bacon and Hurt's CalPERS' contributions and income following the settlement of their litigation.

5. A June 3, 2010, CTP note indicated that the employer called regarding Respondent Bacon's service retirement status and was advised that the application was on file. Another note on that date documented: "Special Compensation was not included in estimate. It needed to be verified by Compensation Review." On June 22, 2010, Respondent Bacon called to verify his final compensation for retirement calculations and was advised the calculations were not complete.

6. On June 28, 2010, Respondent Bacon completed a Disability Retirement Election Application identifying his position title as "Police Lieutenant," and stating that he was currently working full-time. Respondent Bacon identified his treating physician and noted that his limitations/preclusions due to his injury were, "Cannot stand for long periods of time, very limited mobility, ongoing pain. Cannot walk without limping. Hard time lifting." Respondent Bacon noted that his injury affected his ability to perform his job because he "cannot complete daily tasks, makes my ability to perform impossible."

7. On September 1, 2010, Respondent Hurt completed a Disability Retirement Election Application identifying his position title as "Police Lieutenant." Attached to the application was a letter from the City advising CalPERS that Mr. Hurt's work-related injuries made him incapacitated from performing his usual and customary duties as a "Police Lieutenant."

City Documents

8. The City's October 2010 Salary Schedule noted that top-step police Lieutenants earned a monthly salary of \$11,563.

9. After the Settlement Agreement was negotiated, the City began reporting a different payrate, from what was previously reported, for Respondent Bacon from June 2010 to July 2010, and for Respondent Hurt from June 2010 to January 2011.

10. After receiving this information, CalPERS advised that Respondents Bacon and Hurt's salary exceeded the maximum amount allowed in the top-step lieutenant category. In reply, the City provided CalPERS with the Personnel Action Form for Respondents Bacon and Hurt. The form identified Respondents Bacon and Hurt's job position as "police lieutenant," and noted they received a "Special Salary Adjustment Pursuant to Settlement." The City also confirmed Mr. Bacon was a Lieutenant and attached the salary schedule for a police Lieutenant. The City indicated the same would apply to Respondent Hurt. The City also notified CalPERS

that Respondent Bacon and Hurt were never formally promoted and the increase in payrate was a result of a settlement agreement.

11. Respondents Bacon and Hurt's payroll stubs documented earnings for regular hours and earnings for Police Department management. Their payroll stubs also documented their withholdings and contributions, noting the sums paid towards their retirement benefits. Respondents Bacon and Hurt and the City made contributions based on the Captain's payrate.

CalPERS's Determination

12. In its September 14, 2011, letters to Respondent Bacon and the City, CalPERS noted that the City reported Respondent Bacon's monthly payrate for the period July 2009 to July 2010 as follows:

\$12,603.55 - 07/09 to 05/10 which equals \$11,562.89 in payrate and \$1,040.66 of 9% Employer Paid Member Contributions (EPMC)

\$14,588.49 - 06/10 to 07/10 which equals \$13,383.93 in payrate and \$1,204.56 of 9% EPMC.

13. In its September 14, 2011, letters to Respondent Hurt and the City, CalPERS noted that the City reported Respondent Hurt's monthly payrate for the period July 2009 to July 2010 as follows:

\$12,603.55 - 01/10 to 05/10 which equals \$11,562.89 in payrate and \$1,040.66 of 9% Employer Paid Member Contributions (EPMC)

\$14,588.49 - 06/10 to 01/11 which equals \$13,383.93 in payrate and \$1,204.56 of 9% EPMC.

CalPERS noted that according to the publicly available salary schedule, the maximum monthly salary allowed for a Police Lieutenant position was \$11,563. Further, CalPERS wrote that it had reviewed the requested documentation provided by the City, including the Personnel Action Form indicating that the special salary adjustment was pursuant to a settlement agreement. Based upon its review, CalPERS determined that the City had reported compensation that did not comply with the law.

CalPERS asserted that compensation reportable must meet all the criteria outlined in Government Code section 20636 and the regulations. CalPERS decided that the reported earnings did not meet that criteria and requested that the City correct the reported increased monthly pay rate of \$14,588.49 to the correct pay rate of \$12,603.55, which included Employer Paid Member Contributions, for the June and July 2010 reporting period "in order to recover the

contributions paid for this benefit." CalPERS further noted that Respondents Bacon and Hurt's "current monthly retirement allowance has already taken this adjustment into account." CalPERS advised the City and Respondents Bacon and Hurt of their right to appeal CalPERS' determination.

Witness Testimony

14. Respondent Hurt testified that he was hired as a police officer in 1982. He was promoted to Sergeant 10 years later and promoted to Lieutenant in 1995. Respondent Hurt testified that, in January 2011 he retired as a Captain, testifying, "I believed it was Captain."

Respondent Hurt testified about his union activities, his election to president of the Association, and his contentious interactions with the police captain and City Council, primarily centering on a plan to change the promotion system, which many police officers opposed. Respondent Hurt testified that the path to promotion to Captain for all officers was originally a very informal process, but then became more formalized and was based on education, experience and an interview process with the chiefs. Respondent Hurt stated he went through the process, was placed on the eligibility list, and believed he was passed over for promotion to Captain because of his union activities. Respondent Hurt also believed he was retaliated against at work for union activities and filed a federal lawsuit in 2009.

Respondent Hurt acknowledged that, as part of the settlement agreement, he was required to retire and in return he would be paid at the higher payrate. However, even though he was placed on administrative leave as part of the settlement, Respondent Hurt testified he was still required to perform various duties, make certain appearances, appear by telephone, and remain in contact with the department. All of these duties were those he previously performed as a Lieutenant. Respondent Hurt testified he remained in possession of his badge, his weapon, and all of his police powers. It should also be noted that Respondent Hurt had applied for disability retirement only five months after the settlement agreement was negotiated, claiming he was incapable of performing his usual and customary duties as a Lieutenant. Respondent Hurt believed that the captain's pay he received in the settlement would be factored into his retirement. His belief was based on the fact that the parties had negotiated an agreement whereby he and Respondent Bacon would receive top-step Captain pay at retirement.

15. Respondent Bacon was hired as a police officer in 1982. He became a Sergeant in the early 1990s and made Lieutenant in 1995. He testified that he believed he retired on July 16, 2010, "as a Captain."

Respondent Bacon testified that, due to employment retaliation for union activities, he filed a federal lawsuit that was consolidated with the one filed by Respondent Hurt. There was one settlement for him and Respondent Hurt; there were not separate settlement agreements. Respondent Bacon testified that, pursuant to the settlement, he believed he would receive back pay to the date when he should have been promoted to captain, that he would receive top-step Captain pay for a Captain with 30 years of service even though he only had 27 and one-half years of service, that "the City would pay money to CalPERS" to increase his service credit to 30

years, and that he would receive the top-step captain's wage. Respondent Bacon testified that he wanted to retire at the top-step Captain rate with 30 years' service credit

Respondent Bacon testified that he believed his Captain pay would be part of his retirement because this is what he was told by the City attorney and his personal attorney. Respondent Bacon testified that his and Respondent Hurt's attorneys were in the hallway; they were elated; he and Respondent Hurt got pulled into a separate room and were told: "this is happening." The two attorneys told him and Respondent Hurt that, "All is good, we got approval, we're good to go." Respondent Bacon testified that all the attorneys were pretty elated that the settlement had been reached but he was shocked that his career was going to possibly come to an end; it was "very surreal" for him.

Respondent Bacon testified that when they were in chambers, Respondent Bacon told the federal judge, "I am not stupid; I know the City will want us to retire." As he predicted, the agreement required him to be placed on administrative leave and retire. Respondent Bacon testified he had never been placed on administrative leave before, so was not familiar with it; he was discussing retirement during the negotiations. Respondent Bacon stated he performed services while on administrative leave. Most significantly, he testified he was involved in police efforts to oppose the release of a convicted murderer on parole. It should be noted for the record that Respondent Bacon applied for a disability retirement on June 28, 2010, only two and half months after his settlement agreement was negotiated. In that application, he claimed he was so incapacitated that it "makes my ability to perform impossible."

16. State Senator Richard D. Roth, represented the City defendants in the federal litigation. Senator Roth testified that during the process of negotiating the settlement, he, the City's Human Resources Deputy Director, another City employee, and Supervising Deputy City Attorney Jeff Brown, conducted a conference call with CalPERS. The purpose of the conference call was to outline the proposed settlement to CalPERS. Based on that conference call, Senator Roth's understanding was that CalPERS had no objections to the settlement the City was proposing, to wit, i.e., retroactive payment at a Captain's payrate and paying the men at a Captain's payrate until they retired. It was Senator Roth's understanding, following that telephone conference with CalPERS, that the proposed settlement was acceptable to CalPERS.

Senator Roth, however, could not recall the name of the CalPERS representative, his or her job title, or what he or she had stated. Senator Roth acknowledged that he was not familiar with CalPERS's processes. He did not know one way or the other if the conference call constituted a "final determination," or if any more work was required to effectuate the matter with CalPERS. He was not aware of any written confirmation from CalPERS regarding the settlement or the discussion.

Senator Roth testified that after that conference call, he told Respondents Bacon and Hurt's attorney that the men would be retired at the Captain's pay. Senator Roth testified that he "did not really touch on the retirement," and did not go into details about the retirement when he placed the settlement on the record because that was "a little bit outside of the purview of what

we are doing." It was "outside of the purview" of the agreement. Senator Roth testified that the retirement consequences of the payments were not discussed in the federal court minutes.

After leaving court, Senator Roth reduced the agreement to writing and circulated a draft to the attorneys, but there was disagreement regarding the nature and extent of the confidentiality provision, so a written settlement agreement was never executed. Senator Roth testified that when the parties could not agree on the confidentiality terms, he decided to rely on the transcript and stated, "Frankly the judge made that clear in the transcript that that would be the case." Thus, the parties were left with what was embodied in the printed transcript.

17. Samuel Camacho, CalPERS Retirement Program Specialist II, whose duties include reviewing compensation reported, testified about CalPERS's determination of Mr. Bacon's final compensation. Mr. Camacho was not the analyst who initially worked on this matter, but was called upon to testify in this proceeding. Mr. Camacho was not involved with the conference call with the City officials and has never spoken with Senator Roth or any City officials about the settlement.

Mr. Camacho explained the categories CalPERS considers to determine compensation earnable. Government Code section 20636 provides two parts to compensation earnable: payrate (the monthly base pay given to similarly situated groups of employees pursuant to a publicly available pay schedule) and special compensation (earnings based on knowledge, special skills, training, work hours, etc.). CalPERS uses the group or class an employee is placed in by the public agency to determine the payrate for the employee using the public agency's publicly available pay schedule, as well as labor agreements and labor policies that have been approved by the public agency's governing body.

Mr. Camacho testified that it is "very common" for CalPERS to determine that compensation reported does not qualify as final compensation. CalPERS still has to analyze the earnings reported to ensure that the compensation is funded and that there are no compliance issues. CalPERS is trying to curb pension spiking and make sure that agencies comply with the Government Code that defines final compensation and compensation earnable. CalPERS must ensure that it and the public agencies comply with the law. Adjustments to final compensation can be made even after members retire.

Mr. Camacho testified that the reasons why Respondents Bacon and Hurt's reported income did not qualify as compensation earnable were as follows:

1. The higher pay rate was for the last months of employment; it was paid in anticipation of retirement/separation from employment (definition of final settlement pay);
2. It was paid in anticipation of retirement/separation from employment (definition of final settlement pay);

3. Respondents Bacon and Hurt were Police Lieutenants, and their reported income exceeded the publicly available pay schedule for Lieutenants (failing to meet the definition of payrate);
4. The settlement was for two individuals, not a group or class (failing to meet the definition of payrate);
5. They identified their position title as Lieutenants on their CalPERS retirement application forms (failing to meet the definition of payrate); and
6. Nothing in the CTP notes documented that CalPERS advised the City that the settlement proposal was acceptable (no estoppel established).

Mr. Camacho acknowledged that all of the City's contributions were made at the Captain's pay rate. However, this could still create an unfunded liability because CalPERS does not just use the contributions information when making its decisions; it also considers whether the payrate increases are anticipated, whether they are pursuant to publicly available payrate schedules, and whether all employees are getting the same increases.

Mr. Camacho testified that even if the City's Personnel Action Form stated that Respondents Bacon and Hurt were "Captains," that his opinion would not change because the salary adjustment would still be excluded as benefits received in connection or anticipation of retirement. The City's Personnel Action Form, identified Respondents Bacon and Hurt's job positions as "Lieutenant" and gave them the higher pay as a "Special Salary Adjustment Pursuant to Settlement." As Mr. Camacho understood the settlement, the officers were going to retire and receive a payrate increase in exchange for that retirement. Mr. Camacho testified that CalPERS does not tell employers how to conduct promotions. Mr. Camacho admitted that the absence of a CTP note was not definitive evidence that the conference call did not take place, acknowledging that there are times when things are not documented in the CTP.

Mr. Camacho further testified that public agencies contact CalPERS personnel directly "all the time" requesting information on how to report compensation. However, in these conversations, CalPERS is not making a "final determination" so it is not bound by those conversations. Mr. Camacho testified that "a phone call or email is not a 'final determination' in any sense." When asked whether he thought it was fair to assume that discussions after the telephone call were final, Mr. Camacho testified that he did not know what the City understood following that conference call. However he testified that it is a "common understanding" that information given this way is just informational, "it is not the be-all and end-all."

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greator v. Board of Administration* (1979) 91 Cal.App.3d 54).

2. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Applicable Code Sections

3. Government Code section 20630 defines "compensation."

4. Government Code section 20636 defines "compensation earnable" as the "payrate and special compensation of the member as defined by subdivisions (b), (c), and (g) and as limited by section 21752.5."

5. Government Code section 20636, subdivision (b)(1), defines "payrate" as "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. 'Payrate,' for a member who is not in any 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"

6. Government Code section 20636, subdivision (f), defines final settlement pay as "pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment." This subdivision further states, that the "board shall promulgate regulations that delineate more specifically what constitutes final settlement pay."

7. Government Code section 20636, subdivision (g)(1), defines compensation earnable as "the average monthly compensation, as determined by the board, upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay, and is composed of the payrate and special compensation of the member."

8. Government Code section 20636, subdivision (g)(2), defines payrate as "the average monthly remuneration paid in cash out of funds paid by the employer to similarly situated members of the same group or class of employment, in payment for the member's services or for time during which the member is excused from work because of ... leave of absence."

9. Government Code section 20636, subdivision (g)(4)(G), provides that payrate and special compensation do not include final settlement pay.

Regulatory Authority

10. California Code of Regulations, title 2, section 570, provides:

"Final settlement pay" means any pay or cash conversion of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

For example, final settlement pay may consist of severance pay or so-called "golden parachutes". [sic] It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid either lump-sum, or periodic payments.

Final settlement pay may take the form of any item of special compensation not listed in section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.

11. California Code of Regulations, title 2, section 570.5 sets forth the criteria for a document to be considered a "publicly available pay schedule" as follows:
 - (a) For purposes of determining the amount of "compensation earnable" pursuant to Government Code Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:
 - (1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;
 - (2) Identifies the position title for every employee position;
 - (3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;
 - (4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;
 - (5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

- (6) Indicates an effective date and date of any revisions;
 - (7) Is retained by the employer and available for public inspection for not less than five years; and
 - (8) Does not reference another document in lieu of disclosing the payrate.
- (b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:
- (1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;
 - (2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;
 - (3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;
 - (4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer.

Applicable Case Law

12. The court in *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478-1479, summarized the general principles governing determination of a public employee's retirement allowance:

Under the PERL, the determination of what benefits and items of pay constitute 'compensation' is crucial to the computation of an employee's ultimate pension benefits. The pension is calculated to equal a certain fraction of the employee's 'final compensation' which is multiplied by a fraction based on age and length of service 'Final compensation' is the 'highest average annual *compensation earnable* by a member during the three consecutive years of employment immediately preceding the effective date of his retirement' or other designated consecutive three-year period Both the employer and the

employee are required to make contributions to the system, based on a percentage of 'compensation.'

Authority to Correct an Error

13. Government Code section 20160, subdivision (b) requires CalPERS to correct an error or omission of any active or retired member or any contracting agency:

- (b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.
- (c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.
- (d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).
- (e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time.

14. Government Code section 20164 provides that CalPERS' obligations to its members continue throughout their membership in CalPERS or throughout the life of retired members. The section sets forth limitations for the filing of civil actions.

CalPERS's Request for Official Notice

15. CalPERS filed a Request for Official Notice attaching a CalPERS decision and excerpts from city documents.

Equitable Estoppel

16. "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury The doctrine of equitable estoppel may be applied against the government where justice and right require it."

(*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305-306.) The party asserting the estoppel bears the burden of proof. (*Killian v. City and County of San Francisco* (1978) 77 Cal. App. 3d 1, 16.)

17. "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 against a private party 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." (*City of Long Beach v. Mansell*, supra, 3 Cal.3d at 496-497.) The party asserting the doctrine of estoppel has the entire burden of proving each element. If there is a failure to establish any element, the doctrine will not be applied.

18. However, appellate courts have held that "estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing." (*Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864,870.)

In *Medina*, the Court of Appeal found that estoppel was not available because the retirement board lacked authority to classify as "safety" members employees whose duties did not encompass being a police officer and did not otherwise meet the statutory definition of "safety" members. More specific to members' rights under the PERL, in *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, a trial court awarded increased retirement benefits to a CalPERS member based on the trial court's reading of the law and, alternatively, based on equitable estoppel. The Court of Appeal found that the trial court had misapplied the law and it also reversed the trial court's equitable estoppel ruling, explaining: "Because we disagree with the trial court's conclusion, and find section 20636 did at all times preclude CalPERS from treating Linhart's standby pay as pensionable compensation, we hold any award of benefits to Linhart based on estoppel is barred as a matter of law." (id. at page 543) The Board finds that *Medina* and *City of Pleasanton* are controlling here.

Payrate and Final Settlement Pay:

19. Final compensation is defined, in this case, as the highest average consecutive twelve months of "compensation earnable." (Gov. Code section 20042.) Compensation earnable is the compensation paid by the employer as "payrate" and "special compensation." (Gov. Code section 20636(a).) The salary increase provided pursuant to the Settlement Agreement does not qualify as compensation earnable because it fails to meet the three prongs of payrate under Gov. Code section 20636(b) and it is final settlement pay.

20. Payrate is defined under the PERL to be the 1) 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, 2) for services rendered during normal working hours, and 3) pursuant to a publicly available pay schedule. (Gov. Code section 20636(b)(1).)

21. The first prong of payrate is not met because Respondents Hurt and Bacon's rate of pay, pursuant to the Settlement Agreement, is not what is paid to similarly situated members

of the same group or class of employment. (Gov. Code section 20636, subd. (b); *Prentice v. Board of Administration*, (2007), 157 Cal.App.4th 983, 990.) Here, the evidence demonstrates that Respondents Bacon and Hurt worked and retired as Lieutenants, thus their pension must be based on the same payrate as other Lieutenants.

22. The second prong is not met because the settlement proceeds were paid, not for past or future services, but to resolve a legal dispute between the parties. Although the Settlement Agreement provides additional compensation to match the payrate of a captain, there is no evidence demonstrating Respondents Bacon and Hurt ever performed the duties of a captain. Receipt of the additional compensation was not contingent on the performance of any services. Respondents Bacon and Hurt also fail to meet the last prong of payrate because the Settlement Agreement does not conform to any of the criteria necessary for it to be considered a publicly available pay schedule pursuant to California Code of Regulations 570.5.

23. Final settlement pay is statutorily defined as “pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment.” (Gov. Code section 20636, subd. (f).) California Code of Regulations, title 2, section 570 provides that “[f]inal settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.” Final settlement pay may take the form of a “retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.” (*Id.*)

24. Here, the payments were calculated and adjusted in contemplation of Respondents Bacon and Hurt’s separation from employment. Respondents Bacon and Hurt both testified that they retired in exchange for receiving the settlement pay. Thus, as a matter of law, CalPERS is required to exclude the settlement pay from final compensation.

25. The settlement payments did not qualify as payrate and “final settlement pay” because they were provided in connection or anticipation of separation of employment. Therefore, the Board finds that they cannot be included in the computation of Respondent Bacon and Hurto’s final compensation.

ORDER

Timothy Bacon and Darryl Hurt's appeal of California Public Employees' Retirement System's decision regarding their final compensation is denied. California Public Employees' Retirement System's determination that the settlement proceeds did not qualify as payrate and must be excluded as final settlement pay is affirmed.