



## Pension and Health Benefits Committee Agenda Item 9

May 17, 2016

**Item Name:** Assembly Bill 2028 (Cooper) – Restoration of Credit for Service and Compensation Earnable

As Introduced February 16, 2016

*Sponsor: California School Employees' Association*

**Program:** Legislation

**Item Type:** Action

### **Recommendation**

Approve a **Support, if Amended** position on Assembly Bill (AB) 2028 to apply the bill to all active California Public Employees' Retirement System (CalPERS) school and local agency members, consistent with the treatment of all retired CalPERS members reinstated to active service following an involuntary termination as provided under existing law.

### **Executive Summary**

This bill requires credit for service and compensation earnable for a wrongfully terminated school member or local safety member, to include the amount of service that would have been credited and the compensation earnable reported as though the member had not been wrongfully terminated. It also requires employers to notify CalPERS within five days of the date of a final decision ordering that an employee be reinstated after he or she had been wrongfully terminated.

The CalPERS Legislative and Policy Engagement Guidelines suggest support for proposals that correct structural deficiencies in the Plan. CalPERS staff recommends amendments to expand eligibility to local miscellaneous members so that all similarly situated active members are able to receive service credit, and conform to existing law that applies to active state members and retired members.

### **Strategic Plan**

This item supports CalPERS 2012-17 Strategic Plan Goal C to engage in state and national policy development to enhance the long-term sustainability and effectiveness of our programs.

### **Background**

#### *Current Eligibility for Restoration of Credit for Service and Compensation Earnable*

Under existing law, there are two code sections that permit service credit to be granted retroactively to employees that have been subject to an involuntary termination (and that action) which has been subsequently reversed. The first section, Government Code Section (GCS) 19584, applies only to state employees and requires the State Personnel Board (SPB), when

revoking or modifying an “adverse action” and ordering the employee to be returned to his or her position, to direct payment of salary and interest, as well as reinstatement of retirement and other benefits that otherwise would have accrued.

The second section, GCS 21198, applies to all CalPERS members that retired after an involuntary termination and were subsequently reinstated to their employment. School members and contracting agency members who do not retire after an involuntary termination do not have any eligibility to have service credit granted regardless of whether or not the termination is reversed. For the purposes GCS 21198, it is not relevant whether the individual did not retire because he or she was not eligible to retire or simply chose not to retire.

CalPERS’ role in these termination reversals is limited to determining the amount of service credit that can be restored to the member’s account, if any. This determination is not tied to the amount of money that might be paid to a reinstated employee. In addition, CalPERS is not a party to these termination reversal agreements, and is not required to grant service credit that would not otherwise be permitted by the law. As such, if an agreement includes provisions that promise service credit to an employee, CalPERS will not grant the service credit if the agreement includes compensation that is not reportable or does not include reinstating the individual to active service.

For state employees, the agreement for reinstatement to employment comes from the SPB. For school and contracting agency members, there is more variety in sources of the agreement, depending on the public agency, including local agency personnel commissions and arbitrators chosen pursuant to a memorandum of understanding (MOU). Upon receipt of an agreement, CalPERS staff determines whether the agreement meets the requirements of the law, including requirements related to compensation, reinstatement, and whether the agreement comes from an appropriate judicial or administrative proceeding.

CalPERS receives anywhere from 15 to 20 reinstatement agreements per month, with approximately a quarter of the cases involving retirees reinstating to active service under GCS 21198, and another quarter of the cases involving state employees reinstated to active service by the SPB pursuant to GCS 19584. Approximately 40 percent of the reinstatement agreements received each month involve school and local safety employees not in retirement status. AB 2028 would allow this latter group of members to also receive retirement service credit for the period they were away from work following an involuntary termination.

## **Analysis**

### **1. Proposed Changes**

Specifically, this bill does the following:

- Requires service credit to be granted to CalPERS members who are employed by a county office of education, a school district, a community college district, or are local safety members, if the member has been wrongfully terminated.
- Specifies that the service credit and compensation earnable to be credited to the member shall be what would have been reported had the employee not been wrongfully terminated.
- Defines “wrongful termination” as any termination action by an employer that has been reversed or modified by a final decision ordering reinstatement.



- Defines “final decision ordering reinstatement” as a final decision of the employer, a court, an administrative agency, a personnel commission, or an arbitrator, that orders the reinstatement of the employee to employment with the employer.
- Requires the employer of the employee who has been wrongfully terminated to notify CalPERS of the final decision ordering reinstatement within five days of the decision becoming final.
- Requires the notice of reinstatement to include the date of wrongful termination and the date on which the employee was reinstated.
- Requires the employer to provide any additional information CalPERS may require to implement the bill.

## 2. Treatment of Similarly Situated Members

Because state employees reinstated to active service are already entitled under existing law to have service credit and compensation earnable restored to their accounts, this bill only applies to the following members that are involuntarily terminated:

- County Office of Education employees;
- School district employees (both school pool & direct contracting);
- Community college district employees; and
- Local safety employees.

AB 2028 does not provide contracting agency miscellaneous members that are involuntarily terminated and not eligible to retire, the ability to receive retirement service credit and compensation earnable for the time they were away from work upon successful appeal of their termination. There is minimal additional workload to CalPERS staff to process these cases for the remaining population of contracting agency members. In addition, applying the bill to all CalPERS school and contracting agency members will help ensure consistency in CalPERS implementation and administration of the review process, and improve communications to CalPERS members and employers in this area.

## 3. Consistency with Existing Law

Under existing law, CalPERS is authorized to restore service credit to a retired member that was involuntarily terminated, when that individual is reinstated to employment pursuant to an administrative or judicial proceeding. Under AB 2028, an employee that experiences a wrongful termination that has been reversed or modified by a final decision of the employer, a court, an administrative agency, a personnel commission, or an arbitrator, and that orders reinstatement of the employee to employment, would be eligible to have their service credit and compensation earnable restored.

CalPERS staff recommends amendments to make the provisions of AB 2028 consistent with the provisions of the Public Employees’ Retirement Law (PERL) that apply to all retired CalPERS members reinstated to active service following an involuntary termination. These provisions specify that only the amount of service and compensation earnable that would have been reported to CalPERS had the employee not been involuntarily terminated will be counted for “all retirement purposes,” including benefit eligibility and calculation.

These proposed changes will ensure CalPERS does not accept requests to restore service and compensation earnable made by an employer or an arbitrator outside of an administrative or judicial proceeding. They will also help prevent the improper use of lawsuit

settlement payments to inflate retirement allowances, as well as settlements that grant service credit prospectively without actual work being performed.

CalPERS staff also recommends amendments to apply the bill on a prospective basis, so that service and compensation earnable will be restored for members reinstated to active service by an administrative or judicial proceeding completed on or after the bill's effective date. This will help ensure that employers are able to provide all required documentation and CalPERS has the resources to properly determine whether the agreement meets the requirements of the law, including requirements related to compensation, reinstatement, and whether the agreement comes from an appropriate judicial or administrative proceeding.

### **Budget and Fiscal Impacts**

#### 1. Benefit Program Costs

Any additional benefit costs would be borne by school and contracting employers and members, as if the employee had continued to perform creditable service during the time they were away from work.

#### 2. Administrative Costs

Minor and absorbable costs associated with receiving and processing employer requests and documentation.

### **Benefits and Risks**

#### 1. Benefits

- According to the author: *"By clarifying that a wrongfully terminated school classified or local safety employee is entitled to have restored the service credit that would have been reported had he or she not been wrongfully terminated, this bill will ensure parity and equity between these employees and state workers."*
- Reduces the time spent by CalPERS staff to respond to employer requests to restore service credit and compensation earnable to reinstated school and local safety members that are currently not eligible.

#### 2. Risks

- According to the Department of Finance, *"It is our understanding this bill seeks to align the state-employee provision about restoring service credit to school and local safety members. However, the Legislature purposefully limited service-credit restoration to state employees when the statute was added in 1985. The policy should not necessarily transfer to local agencies. The wrongfully terminated employees did not work during the period they were fired and thus, did not earn service credit for the period they were absent from employment. Therefore, the employees are not entitled to receive service credit."*
- As currently written, the bill creates inconsistency in the CalPERS work rules and processes used to verify eligibility and restore service credit and compensation earnable; increasing the potential for error.

### **Attachments**

Attachment 1 – Legislative History

Attachment 2 – Support and Opposition



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**Mary Anne Ashley, Chief**  
Legislative Affairs Division

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**Doug P. McKeever**  
Deputy Executive Officer  
Benefit Programs Policy and Planning

