ATTACHMENT E

THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues (Calculation of Final Compensation) Against: JOSE A. FERNANDEZ, Respondent, and CENTINELA VALLEY UNION HIGH SCHOOL DISTRICT, Respondent, and LOS ANGELES COUNTY OF EDUCATION, Respondent.	Case No. 2015-0461 OAH No. 2015071256

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, initially heard this matter in Sacramento, California, on February 10, 2016.

Elizabeth Yelland, Senior Staff Attorney, represented complainant Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS).

Jeffrey R.A. Edwards, Attorney at Law, Mastagni Holstedt, APC, represented respondent Jose A. Fernandez (hereafter "respondent").

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED May 19, 2016
Rosa Kunis

There were no appearances on behalf of respondent Centinela Valley Union High School District (hereafter "District") or respondent Los Angeles County Office of Education (hereafter "LACOE").

The parties agreed to submit the matter based on joint stipulated facts, exhibits, and simultaneous closing briefs. On February 19, 2016, the parties submitted the Joint Stipulated Facts, along with a Joint Stipulated Exhibits List to which were attached joint exhibits 1 through 18. The Joint Stipulated Facts document was marked exhibit 20 and made a part of the record. The joint exhibits were received in evidence. The parties also submitted Joint Legal Authorities which were marked exhibit 21. Complainant submitted a request for official notice of the published decision in *Prentice v. CalPERS Board of Administration* (2007) 157 Cal. App.4th 983 and the CalPERS precedential decision entitled "In the Matter of the Appeal for Calculation of Benefits Pursuant to the Employer's Report of Final Compensation for Roy T. Ramirez, Respondent, Precedential Decision Number 00-06, effective December 20, 2000. The request and attached decisions were marked exhibit 22 for identification and the Administrative Law Judge took official notice of the two decisions in accordance with Government Code section 11515.

On March 4, 2016, respondent's Closing Brief was received, marked exhibit 23, and made a part of the record. On March 11, 2016, complainant's Closing Brief was received, marked exhibit 24, and made a part of the record. The matter was initially submitted on March 11, 2016.

Upon review of the evidence, the Administrative Law Judge determined that further evidence and argument were required to properly decide the matter. The record was reopened and a second day of hearing was held on April 26, 2016. On that date, testimony from CalPERS employee Mary Peterson was received and counsel for complainant and respondent offered oral argument. The matter was finally submitted on April 26, 2016.

ISSUES PRESENTED

Whether respondent's reported Longevity Pay, Bonus/Extended Work Year Pay, and Pay Rates should be included in the calculation of respondent's final compensation as part of the formula for determining respondent's CalPERS retirement allowance.

FACTUAL FINDINGS

1. Complainant Renee Ostrander filed the Statement of Issues solely in her official capacity as Chief, Employer Account Management Division, CalPERS.

2. Respondent was first employed by respondent Centinela Valley Union High School District (District) on February 22, 1999, and served in various jobs culminating in

Superintendent.[1] Respondent is a local miscellaneous member of CalPERS. Respondent serves in a certificated position with District.

3. District and respondent Los Angeles County Office of Education (LACOE) are public agencies contracting with CalPERS for retirement benefits for eligible employees. As contracting members of CalPERS, District and LACOE are obligated to comply with the provisions of the Public Employees Retirement Law (PERL).

4. On July 1, 2009, respondent and District entered into an employment relationship defined in the Agreement for Employment of Superintendent. Under the heading entitled "Salary," the agreement stated:

> A) The Board agrees to pay Mr. Fernandez for his services as Superintendent and Mr. Fernandez agrees to accept a base salary of $198,938 per annum, to be paid in twelve (12) equal monthly installments, each installment to be paid on or about the last working day of each calendar month during the term of this agreement.
>
> B) Commencing July 1, 2009, the Superintendent shall be entitled to receive a longevity pay salary adjustment of nine percent (9%) per annum for his long-term service to the District and the Superintendent shall receive a management incentive salary adjustment of one thousand dollars ($1000) per month to be paid on or about the last day of each month for out of pocket expenses. The Superintendent Salary shall be increase [*sic*] annually on July 1st of each year by an amount not less than the increase in the Consumer Price Index for Los Angeles County.
>
> C) The Superintendent shall receive an annual stipend of two Thousand five hundred Dollars ($2500) for post graduate degree.

5. Section IV of the agreement reads:

> The Superintendent shall be required to render full time, and regular service to the District during the annual period covered by this agreement. The Superintendent work year shall be Two Hundred and Fifteen (215) days.

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[1] The Factual Findings are derived from the Joint Stipulated Facts, exhibits referenced in the Joint Stipulated Facts and the testimony received on the second day of the administrative hearing.

6. The amount of a member's service retirement allowance is calculated by applying a percentage figure, based on the member's age on the date of retirement, to the member's years of service and the member's "final compensation." In computing the member's retirement allowance, CalPERS staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member's final compensation for purposes of calculating the retirement allowance.

7. On September 24, 2013, Frances Meraz, Retirement Systems Coordinator of LACOE, emailed CalPERS staff requesting a review of respondent's compensation. CalPERS Compensation Review Unit conducted an investigation into the payroll reported by District for respondent back to 2008. CalPERS identified Payrates, Longevity Pay, Management Incentive Pay, Educational Incentive and Bonus/Extended Work Year Pay as non-compliant with the PERL. On September 30, 2013, CalPERS staff notified Ms. Meraz of their findings.

8. On April 15, 2014, District placed respondent on administrative leave and on or about August 20, 2014, District took final action to terminate respondent.

9. On July 8, 2014, CalPERS notified respondent that Payrates, Longevity Pay, Management Pay, Educational Incentive and Bonus/Extended Work Year Pay reported on his behalf by District were not in compliance with specified provisions of the PERL and implementing regulations.

10. On August 6, 2014, respondent appealed CalPERS' determination to deny Payrates, Longevity Pay and Bonus/Extended Work Year Pay as reported by District. Respondent is not appealing CalPERS' denial of Management Incentive Pay and Educational Incentive Pay.

11. On October 6, 2014, CalPERS acknowledged respondent's appeal and provided him with appeal rights.

12. On November 21, 2014, respondent submitted his Application for Service Retirement. On February 1, 2015, respondent retired for service with 28.276 years of service credit. He has been receiving his service retirement since that date.

13. On June 8, 2015, complainant filed and served the Statement of Issues. On July 31, 2015, complainant filed and served the Notice of Hearing.

Payrate

14. As noted above, respondent's base salary was set by the agreement executed on July 1, 2009. On February 28, 2012, respondent and District renewed the Employment Agreement by Amendment. The amended agreement was to commence July 1, 2012, and

expire on June 30, 2016. The terms and conditions in the 2009 agreement remained in full force and effect.

15. During the period July 1, 2009, until January 14, 2014, District did not maintain a pay schedule that included the salary for District's Superintendent. On August 1, 2013, District completed Classification Allocation Charts and Salary Schedules. The position of Superintendent is not included among the salary schedules. The next-closest position identified is that of Assistant Superintendent with a salary of $12,998.56 per month with no "step increases" indicated. A footnote to the chart reflects that "Management & Supervisory Series" employees are entitled to 3 percent salary increases at 5, 10, 15, and 20 years of service. The same longevity raises apply to the classified and certificated series of employees.

16. On January 14, 2014, District's Governing Board adopted Resolution 13-14/019 adopting LACOE's Human Resource System salary table as the official salary schedule for all District senior management, management, supervisory, and confidential employees. The resolution lists the effective date of the "NON BARGAINING UNIT MEMBERS SALARY SCHEDULE" as January 14, 2014. The Non Bargaining Unit Members Salary Schedule lists the Superintendent's "Daily Base Pay Rate" as $1,519.98. The evidence did not establish who determined respondent's daily pay rate. However, if one begins with respondent's base salary of $198,938 in School Year 2009/2010 and adds the 9 percent increases each year plus the consumer price index COLAs that respondent received during those years, the total ($326,796.55) divided by respondent's work year of 215 days equals $1,519.98. Respondent received Los Angeles County Consumer Price Index compounded increases of 1.8 percent in 2010, 1.8 percent in 2011, 1.6 percent in 2012, and 1.4 percent in 2013. In summary, the "salary chart" adopted by District appears to simply adopt LACOE's reporting of respondent's compensation to CalPERS, that relied upon figures provided by District to them.

Longevity Pay Salary Adjustments

17. The language relating to the 9 percent salary increases per year is recited above. Respondent in his closing argument contends that District, while labeling the increases as a "longevity pay salary adjustment," intended the salary increases as "year-to-year" pay raises and points to another section of the agreement that separately discusses "Special Compensation." The stipulation submitted by the parties is silent regarding District's intent regarding the disputed provision, but the agreement is not. The agreement not only labels the salary adjustment as a longevity salary adjustment, it amplifies that declared intent by adding, "for his long-term service to the District..."

18. While, as noted above, other employees were entitled to longevity salary increases of up to 15 percent in five-year increments, no other employee group or class was given a 9 percent per annum increase.

Bonus/Extended Work Year Pay

19. The 2009 Agreement for Employment specified that respondent's positon was a full-time regular job and his "work year" was defined as 215 days. The agreement also provided that respondent would accrue paid vacation days, exclusive of school holidays, at a rate of two and one-half days per month and paid sick days accrued at two days per month. He could carry over unused vacation or sick days, but was limited to 36 accrued vacation days.

20. On December 20, 2010, District implemented Board Policy 4313.3 that authorized the Superintendent to establish the work year for management and confidential employees subject to the Board's approval. The Superintendent was delegated the right to authorize employees to work beyond the contracted work year as he deemed necessary. This included respondent's right to authorize his own work beyond the defined school year. Each class of management employees were entitled to be paid for the extra days of work at their respective daily pay rate at the end of the school year. This figure was to be calculated by dividing the employee's annual salary by the days in the employee's specified work year.

21. In school year 2011-2012, District reported to LACOE that respondent had worked 258 days, or 43 days beyond his 215 school year. In school year 2012-2013, District reported to LACOE that respondent had worked 257 days or 42 days beyond the 215 school year. The days included personal days, sick days, vacation days, holidays, and conference days. These extra days, according to District, resulted in "bonus pay" to respondent of $50,127.84 and $52,990.56 in school years 2011-2012 and 2012-2013, respectively.

CalPERS' Computation of Respondent's Retirement Allowance

22. As noted above, respondent appealed CalPERS' disallowance of LACOE's reported compensation for respondent, including his payrates, longevity pay, management pay, educational incentive and bonus/extended work year pay. Respondent has since retired and the parties agreed that the ultimate issue to be determined now is the appropriate calculation of respondent's final compensation for retirement purposes.

23. During the second day of the administrative hearing, Mary Peterson, a Manager in the CalPERS Compensation Review Unit, explained that CalPERS used the August 1, 2013 published monthly salary of the Assistant Superintendent to compute respondent's final compensation. The amount was $12,998.56. This determination was based on CalPERS' historical practice of looking for the closest position on a published pay schedule when the member's position is not found on such a schedule. CalPERS did not adjust the salary based on other factors including cost of living increases provided other similarly situated employees or longevity increases available to managerial employees.

LEGAL CONCLUSIONS

1. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement absent a statutory provision to the contrary. (*Greatorex v Board of Administration* (1979) 91 Cal. App.3d 57.) Any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, but such construction must be consistent with the clear language and purpose of the statute. (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483,490.)

Appropriate Payrate

Applicable Law

2. Government Code section 20035.5 defines final compensation for school members of CalPERS and reads:

> Notwithstanding Section 20037, 'final compensation' for the purposes of determining any pension or benefit with respect to a school member who retires or dies on or after January 1, 2000, and with respect to benefits based on service with a school employer, means the highest annual compensation that was earnable by the school member during the consecutive 12-month period of employment immediately preceding the effective date of his or her retirement or the date of his or her last separation from service if earlier or during any other period of 12 consecutive months during his or her membership in this system that the member designates on the application for retirement.

3. Government Code section 20630 reads:

> (a) As used in this part, "compensation" means 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 because of any of the following:
>
> (1) Holidays.
>
> (2) Sick leave.
>
> (3) Industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code, Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or Section 44043 or 87042 of the Education Code.

(4) Vacation.

(5) Compensatory time off.

(6) Leave of absence.

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.

4. Government Code section 20636.1 defines "compensation earnable" for school members of CalPERS and reads:

(a) Notwithstanding Section 20636, and Section 45102 of the Education Code, 'compensation earnable' by a school member means the payrate and special compensation of the member, as defined by subdivisions (b) and (c), and as limited by Section 21752.5.

(b)(1) 'Payrate' means 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. For purposes of this part, for classified members, full-time employment is 40 hours per week, and payments for services rendered, not to exceed 40 hours per week, shall be reported as compensation earnable for all months of the year in which work is performed. <u>'Payrate,' for a member who is not in a 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, subject to the limitations of paragraph (2) of subdivision (e).</u>

(A) 'Payrate' shall include an amount deducted from a member's salary for any of the following:

(i) Participation in a deferred compensation plan.

(ii) Payment for participation in a retirement plan that meets the requirements of Section 401(k) or 403(b) of Title 26 of the United States Code.

(iii) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of Title 26 of the United States Code.

(iv) Participation in a flexible benefits program.

(B) For the purposes of this section, 'classified members' shall mean members who retain membership under this system while employed with a school employer in positions not subject to coverage under the Defined Benefit Program under the State Teachers' Retirement System.

(C) For the purposes of this section, and Sections 20962 and 20966, 'certificated members' shall mean members who retain membership under this system while employed in positions subject to coverage under the Defined Benefit Program under the State Teachers' Retirement System.

(2) The computation for any leave without pay of a member shall be based on the compensation earnable by him or her at the beginning of the absence.

(3) The computation for time prior to entering state service shall be based on the compensation earnable by him or her in the position first held by him or her in state service.

(c)(1) Special compensation of a school member includes any 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).

(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.

(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, provided that the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

(5) The monetary value of any service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, shall not be special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."

(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.

(7) Special compensation does not include any of the following:

(A) Final settlement pay.

(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

(C) Any other payments the board has not affirmatively determined to be special compensation.

(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.

(e)(1) As used in this part, 'group or class of employment' means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related

grouping. Under no circumstances shall one employee be considered a group or class.

(2) Increases in compensation earnable granted to any employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

(f) As used in this part, 'final settlement pay'" means any 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. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay.

(g) This section shall not apply to a new member, as defined in Section 7522.04.

(Underlining added.)

5. California Code of Regulations, title 2, section 570.5, outlines the criteria for pay schedules which may provide the basis for a member's payrate, including school employees subject to Government Code section 20636.1:

(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.

Discussion

6. Government Code section 20636.1, subdivision (b)(1), divides school members in the CalPERS system into two categories: those in a class or group who share common duties and a salary structure, and those like respondent who are not part of a group

or class with a shared salary structure. For the latter category, the "payrate" 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, subject to the limitations of paragraph (2) of subdivision (e)." The phrase "publicly available pay schedules" is further defined by California Code of Regulations, title 2, section 570.5, recited above. The Factual Findings include that the District's Governing Board did not maintain a salary schedule that included respondent's position as Superintendent until January 14, 2014. Under these circumstances, CalPERS staff exercised their "sole discretion" to determine respondent's payrate pursuant to California Code of Regulations, title 2, section 570.5, subdivision (b). The selection of the closest published salary, that of Assistant Superintendent, was a reasonable exercise of that discretion.

7. Respondent contends that District Governing Board's adoption of the LACOE Human Resource salary table essentially cured the failure to earlier adopt a publicly available salary schedule that included respondent's position. Complainant contends that the salary schedule was adopted in response to inquiries by CalPERS and should therefore be viewed with suspicion. Further, even if valid, the salary schedule should not be applied retroactively.

8. The salary schedule meets all of the requirements in California Code of Regulations, title 2, section 570.5. It therefore satisfies one of the criteria for "payrate" of a school employee who is not part of a group or class as required by Government Code section 20636.1. The fact that the rate includes longevity salary increases that are not properly part of respondent's compensation earnable (as explained below) does not negate the satisfaction of this threshold requirement.

9. District's Governing Board adopted the salary schedule on January 14, 2014, and the stated effective date of the schedule is the same date. These facts preclude the application of the salary schedule to any portion of respondent's highest 12-month period of employment occurring before January 14, 2014. Thus, the calculation of respondent's payrate for such period requires that complainant separately calculate the portion of the 12 months for which the Assistant Superintendent's published salary applies and the portion on and after January 14, 2014, to which the more recent salary schedule applies.

10. For the portion of the final 12 months until January 14, 2014, respondent's payrate should include any COLAs that District provided certificated management employees following August 1, 2013, the date upon which District published the Assistant Superintendent's salary.[2] Respondent's payrate for this period should also be increased by the 9 percent longevity increase to which respondent was entitled based on longevity increases provided all school district managerial employees.

11. Respondent's payrate for the second period, beginning on January 14, 2014, and extending until his termination on August 20, 2014, should include the pro rata share of

[2] As noted below, there were none.

his $198,938 base salary along with his individual COLA increases based on the Los Angeles County Consumer Price Index. The latter do not violate Government Code section 20636.1, subdivision (e)(2), limiting such increases to those afforded all school district certificated employees. For the reasons explained below, respondent's payrate for the second period excludes the 9 percent annual increases called for in his employment agreement.

12. While this amalgamation of payrates is admittedly awkward, it reflects both the determination by complainant of an appropriate payrate during the time that respondent's salary was not part of a publicly available pay schedule, and respondent's payrate once that deficiency was corrected. Moreover, complainant's concern about the timing of the January 14, 2014 published salary table is unwarranted as complainant also noted that that the publication requirement is obviously designed to promote transparency. This suggests that while the applicable statutory and regulatory language contemplates the contemporaneous publication of school district salaries once established or altered, there is a continuing obligation to do so.

Longevity Salary Increases

Applicable Law

13. Government Code section 20636.1, recited above, defines "compensation earnable" for school members of CalPERS as the combination of payrate and special compensation of the member.

14. California Code of Regulations, title 2, section 571, reads in pertinent part:

> (a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement:
>
> (1) INCENTIVE PAY
>
> Bonus - Compensation to employees for superior performance such as "annual performance bonus" and "merit pay". If provided only during a member's final compensation period, it shall be excluded from final compensation as "final settlement" pay. A program or system must be in place to plan and identify performance goals and objectives.
>
> Dictation/Shorthand/Typing Premium - Compensation to clerical employees for shorthand, dictation or typing at a specified speed.

Longevity Pay - Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.

[¶] ... [¶]

(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.

Discussion

15. Respondent argues that the 9 percent annual increases provided to him in accordance with his July 1, 2009 employment agreement were improperly labeled as a "longevity pay salary adjustment" and should be treated as year-to-year salary increases. There is no factual support for this contention and the agreement includes that the increases were "for [respondent's] long-term service to the District."

16. The longevity increases recited in respondent's employment contract do not meet the requirements of the PERL. Even if his tenure with District prior to his assumption of the position of Superintendent satisfied the requirement that the longevity bonus be paid to those with a minimum of five years with an employer, the increases were not part of a "written labor policy or agreement." The employment contract between respondent and District's Governing Board does not qualify as a labor agreement. (*Prentice v. CalPERS Board of Admin.* (2007) 157 Cal. App.4th 983, 995.) Moreover, the specific requirements for such agreements were not satisfied, including public accessibility to the agreement.

17. In summary, the longevity bonus provision of respondent's employment agreement with the school district did not qualify for treatment as "special compensation." It is therefore not a part of respondent's final compensation for the purpose of calculating his retirement allowance from CalPERS.

Bonus/Extended Work Year Pay

Applicable Law

18. Government Code section 20635.1 reads:

> Notwithstanding Section 20635, and Section 45102 of the Education Code, when the compensation of a school member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service. For the purposes of this part, overtime for school members is the aggregate service performed by an employee as a member for all school employers and in all categories of employment in excess of 40 hours of work per week, and for which monetary compensation is paid.
>
> If a school member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full time, the position with the highest payrate or base pay shall be reported to this system.

19. Government Code section 20636.1, subsection (c), defines special compensation to include payments to school members of CalPERS for "special skills, knowledge, abilities, work assignments, workdays or hours, or other work conditions." For individuals who are not part of a group or class, special compensation is limited to that received by similarly situated members in the closest group and the restrictions imposed by subdivision (e) (2), of Government Code section 20636.1, recited above.

Discussion

20. The resolution of this issue is pertinent to the determination of which 12-months period will be used to calculate respondent's retirement allowance. In other words, if respondent's "bonus pay" reported by District in school years 2011/2012 ($50,127.84) or 2012/2013 ($52,990.56) were added to respondent's payrate established by complainant based on the published Assistant Superintendent's salary, the totals in either year would exceed the combined total calculated above for respondent's last 12 months of service. This would render that combined total irrelevant. This, or course, would inject still another issue in this matter, as the Assistant Superintendent's salary relied upon by complainant was not published until August 1, 2013.

21. However the days in excess of 215 reported by District for respondent in school years 2011/2012 and 2012/2013 are labeled, they do not constitute "special compensation" by any reasonable interpretation of Government Code section 20636.1. Subdivision (c)(1) defines such payments to include "special... workdays or hours..." Respondent's employment agreement specified a salary of $198,938 per annum to be paid to respondent. In return, respondent agreed "to devote his full time, best efforts and abilities to performing the duties and responsibilities outlined [in the agreement] or as assigned to him from time to time by the Board." The paragraph entitled "Work Year" reads: "The

Superintendent shall be required to render full time, and regular service to the District during an annual period covered by this agreement. The Superintendent work year shall be Two Hundred and Fifteen (215) days." There is nothing in the agreement providing for extra compensation for days worked by respondent beyond 215 days. The final paragraph of the agreement notes that it constitutes the full and complete agreement between the parties and any amendments, modifications or variations must be in writing and approved by the parties. Reasonably interpreted, the 215 days constituted a *minimum* number of work days that the parties to the employment agreement expected respondent to work during any particular contract year.

22. The purported authority for "bonus" payments to respondent for days worked beyond 215 was District's Governing Board Resolution 4313.3, adopted December 14, 2010. By the terms of the Resolution, respondent had the sole discretion to extend his work beyond the contracted work year. Respondent was also empowered to authorize work by other management personnel beyond their respective work years for compensation. The compensation was defined as the affected employee's annual salary divided by contract work days. The language of the Board's policy strongly implies that the payments were for overtime, which is disallowed by Government Code section 20635.1.

23. The sentence in Government Code section 20635.1 defining overtime for school employees as compensated work beyond a 40-hour week must be read in the context of the statute as a whole. More importantly, that sentence must be interpreted in a manner consistent with all statutory provisions and regulations addressing special compensation. The clear import of the law in this area is the imposition of stringent limitations on the inclusion of special compensation to enhance a member's compensation earnable. Even where the language is clear, the plain meaning rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. (*Hudson v. Board of Administration* (1997) 59 Cal. App.4th 1310, 1319.) In this context, the 40-hour rule applies to those school employees who work in positions in which they are expected to work a conventional 40-hour workweek or less. This would not apply to senior management employees, like respondent, who as the chief executive of the school district was expected to devote whatever time was required in a given week to perform his duties. In sum, the general prohibition against counting overtime as special compensation is not limited to work in excess of 40 hours in a week.

24. Permitting the increases in compensation earnable based on the bonus payments in the two school years would also run afoul of Government Code section 20636.1, subdivision (e)(2). The approximately $50,000 increases in either year would clearly exceed the average increase in compensation earnable during the same period for other management employees.

ORDER

1. The final compensation component of respondent's CalPERS retirement shall be based on his last 12 months of service prior to his termination on August 20, 2014. For the segment of this period preceding January 14, 2014, respondent's compensation earnable shall be $12,998.56 per month, plus a 9 percent increase based on respondent's longevity with District.[3] For the remaining segment of the 12 months beginning on January 14, 2014, respondent's compensation earnable shall be $16,578 per month, plus Los Angeles County Consumer Price Index compounded increases of 1.8 percent in 2010, 1.8 percent in 2011, 1.6 percent in 2012, and 1.4 percent in 2013. With the disallowance of the employment agreement's annual longevity increases, respondent shall also receive the single 9 percent longevity increase for this segment based on his tenure with District.

2. Respondent's appeal of CalPERS' denial of his 9 percent annual salary increases and bonus payments are denied.

Dated: May 18, 2016

DocuSigned by:
Karl Engeman
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KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings

[3] There were no cost of living increases for management employees between the date on which District published the Assistant Superintendent's salary on a salary schedule, and January 14, 2014.