

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Appeal Regarding the
Calculation of Final Compensation of

VIRGILIO E. CHUA,

Respondent,

and

SAN FRANCISCO CITY AND COUNTY
HOUSING AUTHORITY,

Respondent.

Case No. 2016-0817

OAH No. 2016090534

PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, State of California (OAH), heard this matter on November 29, 2016, at Walnut Creek, California.

Senior Staff Counsel Elizabeth Yelland represented petitioner Renee Ostrander, Chief (petitioner), Employer Account Management Division, Public Employees' Retirement System, State of California (CalPERS).

Respondent Virgilio E. Chua appeared for the hearing, but he was not otherwise represented.

Respondent San Francisco City and County Housing Authority¹ was not represented at the hearing of this matter.

On November 29, 2016, the parties were deemed to have submitted the matter for decision and the record closed.

¹ Respondent Housing Authority did not file a request for hearing or otherwise provide a written appeal of the determination made by petitioner.

ISSUES

I. In determining compensation earnable for the calculation of the retirement benefit for the subject individual respondent, did petitioner correctly disallow the aggregate remuneration, which was paid from July 2008 through December 2013, of: (a) a 7.5 percent differential allowance paid by respondent Housing Authority to respondent Virgilio E. Chua during the period of time he held an unclassified acting assignment for a term of more than three years, and (b) a “supervisory/ subordinate differential” allowance that was paid by the subject local agency to respondent Chua after the end of the temporary unclassified assignment term that resulted as a settlement of an employee grievance action between respondent Chua and his union against respondent San Francisco City and County Housing Authority?

II. Did petitioner properly determine that the subject categories of remuneration received by respondent Virgilio E. Chua, in excess of his base contract salary as Accounting Manager for respondent Housing Authority, were not “special compensation” within the meaning of California Code of Regulations, title 2, section 571, subdivision (a)?

III. Can the Board of Administration apply principles of Equity to recognize that respondent Virgilio E. Chua and the San Francisco City and County Housing Authority, under the authority of the principles established under Civil Code section 3399, properly engaged in measures for inclusion as “compensation earnable” a 7.5 percent increase of compensation received by respondent Chua above the maximum payrate established for the agency’s Accounting Manager civil service position when the increased compensation had not been set out in a publicly-available pay schedule?

IV. Must CalPERS deny the appeal as initially filed by respondent Virgilio E. Chua regarding the matter of the payments calculation of the final compensation for purposes of defining the pension to be received by respondent Virgilio E. Chua?

FACTUAL FINDINGS

Respondent Chua’s Membership in CalPERS

1. Respondent Virgilio E. Chua (respondent Chua) is a member of CalPERS as a result of his employment with respondent San Francisco City and County Housing Authority (respondent Housing Authority), which is a public local agency contracting with CalPERS for retirement benefits for its eligible employees.

2. On August 20, 1986, respondent Chua began working for respondent Housing Authority. On February 1, 1999, respondent Chua attained the permanent civil service classification or position of Accounting Manager for that local agency.

Effective December 10, 2004, respondent Housing Authority assigned respondent Chua to an “Unclassified Acting Assignment” in a role having responsibilities performed

formerly by the local agency's Deputy Finance Department Director. The Unclassified Acting Assignment was originally prescribed as "not to exceed ninety (90) days." The local agency's Personnel Action Report (PAR) indicated that the temporary assignment was to reflect compensation at 7.5 percent above respondent Chua's then current pay for performing the duties and responsibilities of his permanent position as Accounting Manager. Even though respondent Chua held the acting assignment as the local agency's Deputy Finance Director, and later as the local agency's untitled titular department general manager position (whereby he "was made head of the entire Finance Department performing the duties of the Director of Finance with responsibilities far higher than the Accounting Manager position"), for more than 90 days, no official personnel action was taken until January 27, 2008, at which time another PAR indicated respondent's classification was in an "Unclassified Acting Assignment." Respondent Chua contends that respondent Housing Authority "in effect approved paying [him at] the Deputy Finance Director pay rate"

On September 28, 2007, another PAR extended the "Unclassified Acting Assignment" for approximately a one year period, that is until September 30, 2008. The Housing Authority's Interim Executive Director, however, on July 7, 2008, sent respondent Chua a memorandum advising him that effective that date, he would return to his permanent classification and resume the appropriate remuneration step and salary allotted to the classification of Accounting Manager. In the memorandum by the Housing Authority's Interim Executive Director, respondent was informed that the "Retained Pay" concept did not apply to acting assignments so that he could not be paid the higher level of remuneration that he had received for more than three years.

On July 16, 2008, after he was informed that respondent Housing Authority had restored him to the permanent position of Accounting Manager with the level of compensation received by him, respondent Chua sent a memorandum to the local agency's Director of Human Resources. He complained that the compensation payable to him would be at Step 5 for the Accounting Manager classification that was in a monthly amount of \$7,250. He pointed out that "one of [his] subordinates," who held the classification of Payroll Supervisor, was compensated at Step 5 for that classification in a monthly amount of \$6,835. Respondent Chua asserted that as the Payroll Supervisor's immediate supervisor his monthly compensation should have been \$7,348, or 7.5 percent above the compensation paid to the Payroll Supervisor. The Director of Human Resources for the local agency disagreed with respondent's argument and she informed respondent that the differential allowance was discretionary and that he was being paid six percent more than the Payroll Supervisor.

On July 23, 2008, respondent Chua's labor union (Municipal Executives' Association or MEA) filed with the local agency a letter, designated as "Step Two in Virgilio Chua's Grievance." The MEA letter noted: (i) respondent Chua had held a "temporary promotion," which lasted at least two continuous years and that he had been returned to a lower classification. Hence, the labor union's letter advanced that the agency's personnel manual "retained pay provisions" were applicable so that respondent Chua should not have incurred a reduction of compensation upon resuming the duties of Accounting Manager; and, (ii) respondent Chua should have benefitted from the "Supervisory/ Subordinate Differential"

compensation provisions of the local agency so that he should be paid no “less than 7.5 [percent] higher than” the pay of the person whom respondent Chua supervised.

On August 11, 2008, respondent Housing Authority’s Labor/Employee Relations Manager wrote MEA a letter denying the grievance of respondent Chua on both grounds (supervisory differential and retained pay). The August 2008 letter thoroughly refuted the arguments made by respondent Chua’s labor union. The letter noted that Chua’s positions were not supported by the local agency’s personnel manual, and as such did not present “a grievable matter.” Hence, respondent Chua’s grievance petition was denied. On August 28, 2008, MEA sent a letter to respondent Housing Authority’s permanent executive director elevating the grievance process to “Step Three” because the local agency’s position with regard to the compensation due respondent was “unsatisfactory.”

On October 28, 2008, respondent Chua signed an Agreement and General Release (Release) as settlement of the grievance brought by him against respondent Housing Authority. (A duly authorized official of the Housing Authority signed the Release on November 5, 2008.) The Release contained recitals regarding respondent’s Chua’s compensation after December 2004 until July 2008 as based upon his unclassified acting assignment; his receipt of 7.5 percent increase of pay above his permanent classification; his return in July 2008 to his permanent position with the compensation published for that position; and, the filing of a formal grievance regarding the amount of compensation payable to respondent Chua. The recitals in the Release conclude with, “WHEREAS, the parties wish to resolve their dispute without the expense of going through the grievance process provided for in the Memorandum of Understanding between the parties . . . for good and valuable consideration the adequacy of which is . . . acknowledged,” the parties settled the controversy. Under the Release’s settlement provisions, the first paragraph, which is titled “Payment” states, in pertinent part:

Payment:

- a. Upon execution of this agreement, the Housing Authority agrees to retain Chua’s salary at the rate of pay he was receiving immediately prior to the July 7, 2008, pay reduction, which is an amount equal to his current salary plus a 7.5% pay increase. Chua’s salary will therefore [be] “y-rated”²

² The meaning of “y’ rated” is set out in respondent Housing Authority’s Personnel Policies, Rules and Procedures, at Section K, and provides, in pertinent part:

RETAINED PAY (FORMERLY CALLED “Y” RATING):

When the duties assigned to a permanent or term employee are classified downward because of organizational, technological, or management initiated change, or Human Resources review determines the duties to be overclassified, the employee’s

at \$93,522 per year until such time as step 5 of the salary range for Accounting Manager is at a rate of pay equivalent to the salary Chua is to receive as specified in this paragraph (\$3,597/bi-weekly). [¶] [¶].

3. Respondent Chua contends that effective February 28, 2011, after the permanent Finance Director was removed, while he was serving in the capacity as a co-Finance Director along with the permanent Budget Manager, he assumed responsibilities for management of respondent Housing Authority's Finance Department. Because of additional responsibilities performed by him, a local agency's Personnel Action form "aligned" his pay with the Budget Manager's compensation at "the Y-rated monthly rate of \$8,703.50." When the Budget Manager retired effective December 31, 2011, respondent Chua was, in essence, made the sole "head of the entire Finance Department performing the duties of the Director of Finance." Respondent Housing Authority granted respondent Chua a monthly pay rate of \$8,703.50.

4. Respondent Housing Authority reported to CalPERS a monthly payrate for respondent Chua in an amount of \$8,703.50, for the period from March 2011 through December 2013. Notwithstanding the Release, the monthly payrate exceeded the publicly available pay schedule for the classification of Accounting Manger with respondent Housing Authority. As set out below, that payrate reported by the Housing Authority for respondent Chua, for that period of March 2011 through December 2013, was erroneous and contrary to law. (Respondent Chua's maximum payrate, as prescribed in a publically available pay schedule for Accounting Manager, was \$7,685.16 per month.)

Respondent Chua's Application for CalPERS Retirement Benefits

5. On October 29, 2013, respondent Chua signed an Application for Service Retirement (application), which was filed with CalPERS. The position, or civil service classification, title held by respondent Chua was identified on the application as Accounting Manager for respondent Housing Authority.

Based on years of service, respondent Chua retired effective December 31, 2013, with 28.774 years of service credit. As of that date, he has been receiving retirement allowances (pension payments).

The pension payment to respondent Chua, as calculated by CalPERS, reflects its analysis of the proper and accurate amount due respondent Chua as prescribed by law.

existing salary will be retained when it exceeds step 5 of the proper classification. In these instances, employees who have been performing satisfactorily, will retain their existing salary until salary step 5 of the proper class either matches or exceeds the retained salary

Procedural Matters Background

6. Separate letters, dated September 15, 2015, were dispatched to respondents. The letters advised respondents of the determination by CalPERS, that the payrate reported by respondent Housing Authority for respondent Chua a period of time leading to the December 2013 retirement date had been in error. The correspondence to respondent Housing Authority instructed that local agency that “the reported compensation [for respondent Chua] does not qualify as compensation earnable.” The letter further instructed respondent Housing Authority that the erroneous reported compensation “must be reversed out of [the] payroll system in order to recover the contributions paid for this benefit.”

The particularized September 15, 2015 letter, which consisted of six pages, to respondent Chua provided a comprehensive historical review as well as analysis of the law that required CalPERS to limit his pension allowance to the compensation listed on the publicly available pay schedule for the civil service position held by him. The letter noted that the “reported monthly payrate of \$8,703.50 exceeds the maximum of \$7,685 listed for the Accounting Manager position. Therefore, the reported monthly payrate *will not be used* for purposes of calculating your retirement benefit.” (Emphasis added.) Moreover, the letter to respondent Chua included the following: “In addition . . . the 7.5 [percent] pay increase you received was not given to other employees in the same membership classification. CalPERS considers the increase in compensation to be ‘Final Settlement Pay.’ ”

The respective September 15, 2015 letters gave notice to each respondent of the appeal rights provided by law.

7. On October 12, 2015, respondent Chua sent a three-page letter to CalPERS containing arguments relative to items of remuneration paid to respondent Chua by respondent Housing Authority that he believed should have been included in payrate and earnings so as to qualify the pay for an increased reportable compensation for retirement purposes. CalPERS viewed respondent Chua’s letter as an appeal of the determination made to exclude from the calculation of final compensation for setting his retirement benefit the above mentioned portion of compensation that had been erroneously reported by the Housing Authority to CalPERS.

8. CalPERS accepted respondent’s October 2015 letter as a duly filed appeal. Petitioner, in her capacity as Chief, Employer Account Management Division, CalPERS, issued the Statement of Issues on September 7, 2016. The matter proceeded to hearing on November 29, 2016

CalPERS Evidence at the Hearing

9. At the hearing of this matter, reliable and relevant information was established through Mr. Angel Gutierrez’s credible, persuasive, and compelling testimony.

Mr. Gutierrez is a Retirement Program Specialist II with the Employer Account Management Division of CalPERS. His duties, functions, and responsibilities include effecting retirement review studies of "reportable" compensation paid by local agencies to employees in accordance with the Public Employees Retirement Law.³ Mr. Gutierrez is exceedingly conversant with the regulations and statutes at issue in this matter.

Mr. Gutierrez persuasively testified that after CalPERS personnel reviewed information submitted by respondent Chua and respondent Housing Authority, as a Retirement Program Specialist he concluded that certain remuneration that respondent Chua received from respondent Housing Authority did not qualify as "final compensation" under pertinent statutes and regulations. Under the law, the amount of an individual pension recipient's service retirement allowance is calculated by applying a percentage result arrived at by use of the retiree's age on the date of retirement, the individual's years of service and the individual's final compensation. Because of notorious examples in recent history of abusive pension payouts, CalPERS personnel closely scrutinize salary information submitted by a local agency employer on behalf of an individual employee contemplating retirement so that only the items authorized under the Public Employment Retirement Law, and CalPERS's regulations, will be included in an applicant retiree's final compensation for the purpose of calculating the retirement allowance, which is paid by CalPERS for the remaining lifetime of the retiree or his/her spouse.

10. During his review of documents pertaining to respondent Chua, Mr. Gutierrez found that for the period of respondent Chua's employment with respondent Housing Authority, from December 10, 2004, until July 7, 2008, in a temporary unclassified acting assignment conducting work as the local agency's Deputy Finance Director, and then from July 7, 2008, until his retirement date, as Accounting Manager having a "Supervisory/Subordinate Differential" allowance and Retained Pay allowance due to performing work ordinarily executed by the agency's Finance Director, which was granted to him following settlement of respondent Chua's employee grievance, there were no "publicly available pay schedule(s)" for those positions held by respondent Chua.

The allowable payrate for calculation of final compensation, as reported by the local agency for respondent Chua, could only be discerned by the Retirement Program Specialist through the written employment contract-related documents between respondent Chua and the Housing Authority. The documents, which were unpersuasively described by respondent Chua as intended as a "pay schedule," were crafted as internal-use records, yet not adopted by the agency's governing board. And, the documents that set out respondent Chua's compensation in the questioned amount of \$8,703.50, were not available to public scrutiny.

Mr. Gutierrez established that the agency's internal-use documents as crafted between respondent Chua and respondent Housing Authority, did not meet the requirements for a publicly available pay schedule because the records were formulated and finalized in a closed session of the agency's executives.

³ Government Code section 20000, et seq.

11. During the process of his review, Mr. Gutierrez, on behalf of CalPERS, determined that respondent Housing Authority had improperly included in the monthly payrate for respondent Chua an increase of the payrate grounded upon a 7.5 percent above the pay schedule amount of compensation due the Accounting Manager.

Upon making his close review of documents and the law, during 2014 and 2015, Mr. Gutierrez objectively excluded from the calculation for pension purposes as respondent Chua's final compensation the items falling within the final settlement pay and compensation for over time services that were not described in publicly available records. Those categories could not be part of the payrate for respondent Chua that could be reported as "Persable" compensation. The monthly payrate for respondent Chua, under the refined calculation by CalPERS, was reduced from \$8,703.50 to \$7,685.16.

12. Mr. Gutierrez reasonably established that respondent Housing Authority's arrangement regarding paying an improper level of "reportable" remuneration to respondent Chua was contrary to CalPERS regulations regarding the definition of a "compensable earnable" as monetary figures allowable for the calculation of the lawful pension to which respondent Chua may expect to be paid by CalPERS.

And, Mr. Gutierrez persuasively demonstrated that petitioner's Division personnel's determinations in this matter were correct within the meaning of the applicable Government Code and California Code of Regulations provisions. Petitioner's representative, Mr. Gutierrez, was credible when he testified that the excluded excess compensation monthly payments are not lawfully eligible to be included in the calculation of respondent Chua's payrate in the process of prescribing the pension to be paid him by CalPERS. And those items could not be deemed as "special compensation."

13. As part of his thorough analysis, Mr. Gutierrez determined that the matter of additional compensation allotments paid to respondent for his provision of services in temporary assignments as Assistant Finance Department Director and then as Finance Department Director were not includible as payrate for purposes of ascertaining the final compensation for retirement benefit calculation for respondent Chua. And the Retirement Program Specialist advanced that the attempt by respondent Chua and respondent Housing Authority to craft a Settlement/Release Agreement as long ago as October/November 2008 could not alter the category of the compensation. Such efforts to reform terms of the compensation caused the remuneration to fall into the meaning of "final settlement pay," which cannot be used to calculate the retirement benefit (pension).

14. Mr. Gutierrez was thorough, reasonable and objective in his review of the information provided by respondent Chua and the Housing Authority. Mr. Gutierrez correctly interpreted the Public Employees Retirement Law and the CalPERS regulations that are applicable to the facts of this matter.

15. Mr. Gutierrez provided a thorough review of Final Settlement Pay as defined under the CalPERS regulations (Cal. Code Regs., tit 2, § 571, subd. (b).) And, he offered compelling testimony regarding reportable compensation.

Respondent Chua's Evidence at the Hearing

16. Respondent Chua offered testimonial evidence at the hearing of this matter. His testimony, however, was not persuasive. Respondent presented no competent, reliable evidence to refute or discredit the weight of evidence presented by Petitioner.

17. Respondent Chua did not prove that the excess compensation paid by the Housing Authority for his provision of services in an amount that was 7.5 percent greater than the maximum payrate for the classification of Accounting Manager, came within the statutory and regulatory definition of payrate, or that the greater remuneration could be classified as special compensation.

18. Respondent Chua was not persuasive that the doctrine of equitable relief (Civil Code section 3399) should be applied in this matter in order to allow the improperly reported amount of compensation paid by respondent Housing Authority to be treated as "compensation earnable." Such acceptance of excess compensation would redefine the item of remuneration to become part of the gross payrate for respondent Chua. There is no proper basis for application of equitable relief on this topic so as to reverse the determination made by CalPERS.

Ultimate Findings

19. Neither fraud nor mutual mistake of the respondent Chua and respondent Housing Authority revolved around the Release, which resolved or settled the labor grievance brought by respondent Chua against the employing local agency, on the topic of the categories of remuneration that would be paid to respondent Chua. It is not credible that a mistake was identified that would enable the parties to reform the published schedule for compensation for the position held by respondent Chua so as now to spike the pension allowance (retirement benefit) that CalPERS must now pay respondent Chua, or his spouse, into the future. Hence, doctrine of equity cannot be applied to resolve this controversy.

20. CalPERS perpetrated no unlawful injury upon respondent Chua by the action taken through the determination made, and expressed, through the CalPERS letter issued during September 2015.

21. Respondent Chau contends that he performed services for respondent Housing Authority for which he was paid for the work expected of either the local agency's Finance Department Deputy Director or Director and the compensation should have been reported as compensation earnable for purposes of calculation his retirement allowance. But, the position held by respondent was never recorded in a publicly-available pay schedule. Such compensation could not be lawfully included in "PERSable" compensation.

22. Respondent Chau could not identify any other civil service employee who occupied a position with the local agency similar to the roles held by him. Respondent Housing Authority could not lawfully create a “class of one” for respondent Chau to occupy for purposes of establishing an entitlement of Respondent Chau have his compensation included in the calculation of final compensation for purposes of defining the pension payable to Respondent Chau.

23. CalPERS exercised that subject state agency’s official duty in calculating, and then limiting, the final compensation attributable to respondent Chua’s employment with respondent Housing Authority.

24. The increased compensation paid to respondent Chua by respondent Housing Authority in accordance with the Release, dated October 28, 2008, constituted Final Settlement Pay. That form of compensation cannot be included in the final compensation calculation for the retirement allowance (pension) payable by CalPERS to respondent Chua.

LEGAL CONCLUSIONS

Statutory Basis

1. The provisions of the contract between respondent Housing Authority and CalPERS are promulgated by and grounded upon the Public Employees’ Retirement Law (PERL). (Gov. Code § 20000 et seq.)

Burden of Proof

2. The burden of proof in this matter rests upon respondent Chua to establish that the exclusion by CalPERS of the challenged categories of reimbursement paid to him as the public employee was erroneous with regard to determining compensation earnable in calculating the retirement benefit to which CalPERS is obligated to disburse to him or his spouse. (*In the Matter of the Final Compensation Determination of George Abbond* (1999) CalPERS Precedential Decision 99-02; *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1047-1051.) And, CalPERS is entitled to the presumption that the performance of its official duty was regularly performed. (Evid. Code, § 664; *Coffin v. Alcoholic Bev. Control Appeals Bd.* (2006) 139 Cal.App.4th 471, 476.)

The Constitutional Mandate

3. Article XVI, section 17 of the California Constitution provides as follows: “[t]he assets of a public pension or retirement system are trust funds and shall be held for the exclusive purpose of providing benefits to participants . . . and defraying reasonable expense of administering the system.”

Administration of the Retirement Fund

4. The CalPERS retirement fund was established as a trust, to be administered in accordance with the provisions of the PERL solely for the benefit of the participants. (Gov. Code, § 20170.) The management and control of the retirement system is vested in the CalPERS Board of Administration. (Gov. Code, § 20123.) The CalPERS Board of Administration has the exclusive control of the administration and investment of the Retirement Fund. (Gov. Code, § 20171.)

The Nature of the Fund and Determination of Service Benefits

5. As noted in *Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310, 1316, the PERL establishes a retirement system for employees of the State of California and participating local public agencies. CalPERS personnel determine employees' retirement benefits based on years of service, final compensation and age at retirement. The system is funded by employer and employee contributions calculated as a percentage of employee compensation. CalPERS determines employer contribution rates based on compensation figures and actuarial assumptions. CalPERS periodically adjusts employers' rates to compensate for any inaccuracy in those actuarial assumptions. Employee rates, in contrast, are fixed by statute.

A CalPERS member's 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." (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.) The determination of the benefits and the items for payrate as properly includible in final compensation are critical to computing the member's ultimate retirement benefit (pension). The PERL, and the CalPERS regulations, set forth detailed rules to guide that determination.

6. In a similar vein *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 584, noted that CalPERS is a defined benefit plan that sets an employee's retirement benefit upon the factors of retirement age, length of service and final compensation. Retirement allowances are therefore partially based upon an employee's compensation. An employee's compensation is not simply the cash remuneration received, but is *exactly defined* to include or exclude various employment benefits and items of pay. The scope of compensation is also critical to setting the amount of retirement contributions, because CalPERS is funded by employer and employee contributions calculated as a percentage of employee compensation. And, "statutory definitions delineating the scope of CalPERS compensation cannot be qualified by bargaining agreements. [Citation omitted.] Nor can the CalPERS Board characterize contributions as compensation or not compensation under the PERL, those determinations are for the Legislature. [Citation omitted.]" (*Pomona Police Officers' Assn. v. City of Pomona, supra*, 58 Cal.App.4th 578, 585.)

A member's final compensation is based on his "compensation earnable" over a defined period of time. And very important to the resolution of this controversy is the

concept that final compensation cannot exceed a civil servant's compensation earnable. (Gov. Code, §§ 20037 and 20630.)

Pertinent Statutory Authority

7. Government Code section 20630 provides, in pertinent part:

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 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.

8. Government Code section 20636 provides, in pertinent part:

(a) 'Compensation earnable' by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(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, pursuant to publicly available pay schedules. '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)

[¶] [¶]

(c)(1) Special compensation of a 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

[¶] . . . [¶]

(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 et seq. 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.

[¶] . . . [¶]

(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. One employee may not 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.

[¶] [¶]

(Emphasis added.)

9. Government Code section 20042 provides in pertinent part:

On the election of a contracting agency . . . 'final compensation' for a local member employed by that agency whose retirement is effective or whose death occurs after the date of the election and with respect to benefits based on service to the agency shall be computed under Section 20037 but with the substitution of the period of one year for three consecutive years. . . .

Pertinent Regulatory Authority - Determining "Final Compensation"

10. CalPERS's analytical approach to determine whether disputed payments should be included in a member's "final compensation" is grounded by the California Code of Regulations, title 2, sections 570, 570.5 and 571, subdivision (a).

California Code of Regulations, title 2, section 570, characterizes "Final Settlement Pay," as:

'Final settlement pay' means any pay or cash conversions 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.' 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 in 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.

(Emphasis added.)

California Code of Regulations, title 2, section 570.5 provides the meaning for the phrase "Requirement for a Publicly Available Pay Schedule" purposes of determining "compensation earnable," a member's payrate will be limited to the amount listed on a pay schedule that meets all of the following requirements:

- The schedule has been duly approved and adopted by the employer's governing body pursuant to public meeting laws;
- The schedule identifies the position title for every employee position;
- The schedule shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;
- The schedule indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, by-monthly, or annually;
- The schedule 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;
- The schedule indicates an effective date and date of any revisions;
- The schedule is retained by the employer and available for public inspection for not less than five years; and
- And, the schedule does not reference another document in lieu of disclosing the payrate.

California Code of Regulations, title 2, section 570.5 clarifies existing law which limited payrate to amounts set forth on a publicly available pay schedule, but provided little guidance as to what the schedule was to include. Hence, should a public agency employer fail to meet the requirements of the regulation with regard to "payrate," CalPERS may, in its sole discretion, determine an amount that will be considered the member's payrate, taking into consideration all information it deems relevant including, but not limited to: documents

that were approved by an employer's governing board in conformance to public meeting laws, as well as the last payrate of the member listed on a pay schedule that conforms to the requirements above for the current employer, current position, or former CalPERS employer, or the last payrate for the position with the current employer.

California Code of Regulations, title 2, section 571 defines "special compensation" in pertinent part as follows:

(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency . . . that must be reported to CalPERS if they are contained in a written labor policy or agreement:

[¶] . . . [¶]

(3) PREMIUM PAY

Temporary Upgrade Pay - Compensation to employees who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration.

[¶] . . . [¶]

(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.

(Emphasis added.)

Special Compensation Does Not Include the Premium Pay such as Temporary Upgrade Pay

11. Under the requirements of Government Code section 20636, subdivision (c)(6), CalPERS promulgated a regulation regarding a specifically and exclusive list of matters that constitute "special compensation." The CalPERS Board of Administration exclusively has delineated all items of "special compensation" that may be made part of final compensation for purpose of determination of the proper retirement allowance. The delineation of such items is set out in California Code of Regulations, title 2, section 571. The value of compensation paid pursuant to a Release of a grievance or as consideration for an agency to avoid protracted grievance proceedings or civil litigation are not recognized

under the subject regulation that governs the determination by CalPERS in calculating a retirement allowance.

Very important to this topic is that the category of remuneration extended to respondent Chua was not set out in a generalized labor policy of the local agency. And, there are rigid rules that prevent any local agency from artificially increasing the retirement benefits for a preferred employee, such as the Accounting Manager, by enabling the employee to be granted the greater compensation increases, which had not been made available to other similarly situated employees. (*Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983, 993-995.)

Respondent's Contentions

12. Respondent Chua raised as a dominant contention the quality of his performance in the provision of diligent, conscientious services, as respondent Housing Authority's acting Deputy Finance Department Director and then in a set of responsibilities equivalent to the Finance Department Director, directly relate to the scope of compensation that was paid him. Accordingly, he contends that the prerogative of respondent Housing Authority to set respondent Chua's remuneration is paramount, and that the local agency's right to reward respondent Chua's performance of the work was grounded on those parties' good faith in setting the significant amount of compensation for performance of work as the local agency's acting Finance Department Director for a period of more than three years.

Respondent Chua may have rendered excellent services in his employment with the Housing Authority. However, service retirement benefits are not based on a formula involving the value of the services provided by an employee. Respondent Housing Authority had the discretion to set respondent Chua's compensation as its acting Assistant Finance Department Director and in duties equivalent to the functions of the Finance Department Director and to award him premium pay for superior performance. CalPERS does not dispute Housing Authority's right to determine how its employees should be compensated. But, if such payrate is to be the basis of a retirement allowance, namely monthly pension payments, such compensation must be included in a publicly available pay schedule. Moreover, respondent Housing Authority cannot calculate service retirement benefits based on compensation when compensation does not qualify as "final compensation" under applicable statutes and regulations.

In this matter, respondent Housing Authority and respondent Chua attempted to manipulate the characterization of the value of the settlement of a labor grievance into increase salary payable to respondent Chua. Among the manipulations were respondents' efforts to represent that the settlement of the grievance action in October/November Settlement Release did not constitute a scheme to spike the retirement benefit (pension) payable to respondent Chau by CalPERS. The evidence, however, leads to a determination that the additional compensation payable to respondent operating as consideration that first underpinned settlement of the labor grievance brought by respondent Chua against his employing local agency. The efforts by respondent Housing Authority and respondent Chua

to include the value of the settlement of the grievance as being pay of a reportable payrate runs counter to the controlling statute, which came about through the Legislature's directive during 1993, in establishing clear criteria to qualify for a lawfully reportable payrate. The reformation of compensation actually paid to respondent in the form of an 7.5 percent increase above the prescribed salary paid to the Accounting Manager cannot serve to spike the pension that CalPERS must now pay to respondent Chua.

Effect of CalPERS Statutes and Regulations

13. In the event of a conflict between an employer's view of an employee's payrate and the calculation of CalPERS, the statutes comprising the PERL supersede all employment contracts, agreements, resolutions, policies and Memoranda of Understanding as promulgated by an employer. (*Longshore v. County of Venture* (1979) 25 Cal.3d. 14, 23; *Miller v. State* (1977) 18 Cal.3d 808, 815; *Boren v. State Personnel Board* (1951) 37 Cal.2d 634, 641.)

Inappropriateness of Equitable Relief to Allow Amendment to the Employment Contract

14. When a party seeks to reform a position in law or a contract under the principles of equitable relief as permitted by Civil Code section 3399,⁴ the party must show fraud, mutual mistake of the parties, or a mistake by one party where the mistake was suspected or known by the other party. But none of the grounds for application of equitable relief exist in this matter that would enable reformation of the local agency's payrate to persons occupying positions such as Accounting Manager, which is published in an publicly available schedule of compensation. A paramount requirement for application of the doctrine that reformation of objectionable language in a contract must be reformed is that the mutual mistake must be proved by "clear and convincing evidence." (*Perry v. Bedford* (1965) 238 Cal.App.2d 6.) Respondent Chua did not provide clear and convincing proof of a mistake existed at the time of the Release being drafted in approximately October 2008.

Furthermore, respondent Chua has not met the requisite criterion for reformation of the contract of employment, by way of the settlement of grievance Release agreement, because of "mutual mistake" under equitable principles so as to now bind CalPERS. The criterion is that the contemplated reformation can be only effected without inflicting prejudice to the rights of a third party. Should the employment contract for respondent Chua and respondent Housing Authority be reformed so as to impact compensation earnable, the result would be to allow money now lawfully excluded from calculation to be used to calculate retirement benefits payable by CalPERS to respondent Chua. Such new calculation will increase costs to CalPERS in making the prospective retirement disbursement payments

⁴ Civil Code section 3399 provides that "[w]hen, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it [contract] may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

to respondent Chua and his spouse. Also the future contributions that might be made by Housing Authority, and its current and future employees, to CalPERS will correspondingly increase unfairly so as to pay the retirement benefit to respondent Chua.

Another significant barrier to reformation of the contract is the matter of jurisdiction and proper use of pleadings. The doctrine of reformation of contract requires a civil suit in equity through properly crafted pleadings as filed in the superior court. This administrative adjudication proceeding before the CalPERS Board of Administration is the improper forum for a ruling to be attained on application of the doctrine of reformation of the employment contract at issue.

Finally, with regard to respondent Chua's contention that Equity in the way of equitable estoppel should empower CalPERS to provide him the benefit of receiving an increased level of retirement allowance notwithstanding the afore-cited statutory provisions and agency regulations. But, a precedential decision operates as an impediment to respondent Chua's contention for use of Equity resolving this controversy to his benefit. The subject precedential decision sets forth:

To find an estoppel in this case would be sufficiently adverse to public interest or policy. Here, the Board has a primary obligation to protect the retirement fund for the benefit of all its beneficiaries and to minimize the employers' cost of providing benefits. To allow respondent to have a lifetime of higher allowance than permitted by the statutory formula would result in an unfunded liability, and would also have a direct impact on his former employer against whose reserves his lifetime allowance will be drawn. The unfunded liability would pass to the employer in the form of increased contributions and higher future contribution rates to fund its miscellaneous members' account. This would be a windfall to respondent or in equivalent legal terms unjust enrichment.

To find an estoppel here would, in essence, grant to CalPERS powers that were not ceded to it by the Legislature. The grant of power was to administer a plan based upon a specific statutory retirement benefit formula. To find an estoppel here would be to allow CalPERS to unilaterally alter the statutory retirement benefit formula without benefit of enabling statutory authorization. That is the task of the Legislature, not the Board.

If this were a matter solely driven by the equities of the situation then respondent wins. He [did not] make the mistake, CalPERS did. This is not uncommon in that there are public policy considerations that inform and condition the decision making process in this administrative hearing. The arguments raised by

the Board are sound ones. They broaden the scope of inquiry so that the consequences of a particular decision can be assessed against the backdrop of its impact on the retirement system. (*In the Matter of the Appeal of Decreased Level of Retirement Allowance of HARVEY H. HENDERSON*, Case No. L-1997120250, Precedential Board Decision No. 98-02, Effective November 18, 1998.)

In this matter pertaining to respondent Chua, his position is less persuasive than the *Harvey H. Henderson* precedential decision. In that matter, the application of estoppel was argument based upon a “mistake” purportedly made by CalPERS. But, in the matter of respondent Chua, he argued that mistakes were made by respondent Housing Authority by, among other things, failing to prompt the local agency’s controlling hierarchy to conduct a public proceeding that broadcast the granting of increased compensation to him while acting as the acting Finance Department Director, and that the awarded increased compensation was not set out in a publicly available pay schedule. Hence, without question, the doctrine in Equity deemed equitable estoppel does not apply in this controversy.

Final Settlement Pay

15. CalPERS Precedential Decision⁵ 00-06, titled *In the Matter of Appeal Regarding Calculation of Benefits Pursuant to the Employer’s Report of Final Compensation of Roy T. Ramirez, Respondent, and City of Indio, Respondent*, Case No. 2640, effective November 15, 2000, is controlling and dispositive of issues in this controversy.

The *Roy T. Ramirez* precedential decision dealt with the rejection by CalPERS of respondent Ramirez’s contention that the final compensation should include the remuneration received by the subject employee as increased salary as a city’s police chief when he assumed, on a temporary basis, the duties of acting city manager.

And, in an appellate court decision, the court of appeal held on the issue of compensation that is not “PERSable,” and therefore remuneration that cannot be included as part of final compensation, that CalPERS can only recognize increases of earnings that are part of a published pay schedule as prescribed by Government Code section 20636, subdivision (a)(1). The court stated,

⁵ Government Code section 11425.60. Of particular note is the last sentence of subdivision (b) of the subject statutory provision that reads, “An agency’s designation of a decision . . . as a precedent decision is not subject to judicial review.” And, the first sentence of subdivision (b) of the statute recognizes the ability of an agency “to be able to make law and policy through adjudication as well as through rulemaking.” (Law Revision Commission Comments to Stats. 1995, ch. 938 § 21 (Senate Bill), following Gov. Code, § 11425.60.)

[A]s a practical matter, inclusion of a provisional or temporary salary in a budget document would not have afforded any other person holding the position the right to receive the same increase Because, as we view the entire statutory scheme, the limitations on salary are designed to require that retirement benefits be based on the salary paid to similarly situated employees, PERS acted properly in looking at the published salary range rather than the exceptional arrangement the city made with Prentice The defect in Prentice's broad interpretation of "pay schedule" is that it would permit an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees. (*Prentice v. CalPERS* (2007) 157 Cal.App.4th 983, 994.)

16. In essence, the statutes, regulations, an appellate court decision, and a CalPERS precedential decision provide the basis for the prohibition as to any arrangement for improperly enhancing a public employee's final compensation by factoring the calculation for final compensation of an increase of salary by virtue of performing temporarily assigned additional job duties outside of the work expected of the employee's actual civil service classification.

Ultimate Determinations

17. CalPERS lawfully and properly excluded from the payrate category for final compensation incorrectly reported payments, namely a 7.5 percent increase from July 2008 through December 2013 of the compensation for the position of Accounting Manager with respondent Housing Authority, as paid to respondent Chua under settlement of a grievance as finalized in a Release agreement dating from approximately October 2008. And, that category or item of remuneration cannot be included in the calculation used to determine the retirement pay (pension) that is to be disbursed by CalPERS to respondent Chua, or his spouse, for their remaining respective lifetimes.

18. CalPERS properly determined the forms of compensation earnable as received by respondent Chua that could serve as the basis for calculation of the final compensation as the amount prescribed as remuneration for the Accounting Manager position that was set out in a publicly available pay schedule.

19. The compensation paid to respondent for the work performed as in roles as acting Finance Department Assistant Director and in functions constituting the essential functions expected of the Finance Department Director for a term of years, did not qualify as special compensation within the meaning of California Code of Regulation, title 2, section 571, subdivision (a), or the PERL's provisions.

Dispositive Conclusion

20. Good cause exists to sustain the determination of the CalPERS Chief of Employer Account Management Division that the disputed categories of remuneration, paid to respondent Chua in connection with his service as Accounting Manager for respondent Housing Authority, must be excluded from the calculation of his service retirement benefit allowance.


This conclusion is based on the Factual Findings and on the Legal Conclusions, above.

ORDER

The determination by the Chief, Employer Account Management Division, CalPERS, that the disputed amount of compensation, represented as a 7.5 percent increase of remuneration from July 2008 through December 2013, made available to Virgilio E. Chua in connection with his service as Accounting Manager for San Francisco City and County Housing Authority, be excluded from the calculation of his service retirement benefit allowance, is sustained.

The appeal of respondent Virgilio E. Chua is denied.

DATED: December 28, 2016

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PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings