

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues  
Against:

GEORGE A. PEREZ,

and

CITY OF CUDAHY,

Respondents.

Board Case No. 2015-0666

OAH No. 2016050850

**PROPOSED DECISION**

The hearing in this matter was before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, at Los Angeles, California, on November 8, 2016.

Complainant Renee Ostrander, then Acting Division Chief, Customer Account Services Division, California Public Employees' Retirement System (PERS), was represented by Christopher Phillips, Senior Staff Attorney. Respondent George A. Perez was present for the hearing and was represented by Stanley L. Friedman, Attorney at Law. City of Cudahy (Cudahy) was represented by Matthew C. Sgnilek, of Kutak Rock LLP.

*Briefs and Request for Official Notice*

The record remained open for briefing, as follows: complainant's closing brief, received December 5, 2016, marked for identification as exhibit 22; closing brief of respondent Perez, received December 29, 2016, marked for identification as exhibit C; and respondent Cudahy's reply and closing brief, received December 29, 2016, marked for identification as exhibit D.

On December 5, 2016, complainant filed a Request for Official Notice regarding PERS Precedential Decision No. 00-06 (Ramirez), attaching a copy of the adopted Decision in the matter of the appeal of calculation of benefits regarding Roy T. Ramirez and the City of Indio (Ramirez Decision). A copy of the Ramirez Decision was attached, and the Request was served on both respondents. Neither respondent objected to the Request, which is marked for identification as exhibit 23. Official notice is taken of the Ramirez Decision

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pursuant to Government Code section 11515, which allows a request for official notice to be made "before or after submission of the case for decision" and provides that the other parties shall be given a reasonable opportunity to refute the matters to be officially noticed. Under Government Code section 11425.60, subdivision (a), an agency's decision after an administrative hearing may not be relied on as precedent unless it is designated as a precedential decision.

The closing brief of respondent Perez (exhibit C) had attached a PERS Circular Letter dated August 19, 2011, relating to new regulations, effective August 10, 2011. Respondent Cudahy's reply and closing brief (exhibit D) had attached a web printout of a salary of a city manager of Laguna Beach. There was no request to add these documents to the record either during the hearing or in either brief. The briefs and documents were filed on the last day the record remained open, so PERS had no opportunity to respond to the documents. As the record was held open only for briefing, the PERS Circular Letter and web printout are not received in evidence.

The record was closed and this matter was under submission as of December 29, 2016.

### *Burden and standard of proof*

The ALJ raised the issue of which party bears the burden of proof. Complainant PERS contends respondent Perez bears the burden, as he has applied for benefits. Respondent Perez contends that PERS bears the burden of proof.

When a person seeks to establish eligibility for a benefit or service administered by the government, the burden of proof is on him or her to establish such eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161; *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57; *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 [footnote 5].) Under Government Code section 11504, in a hearing on a statement of issues, the respondent "must show compliance (with the pleaded statutes) by producing proof at the hearing . . . ." In state administrative hearings, unless indicated otherwise, the standard of proof is "persuasion by a preponderance of the evidence." (*McCoy v. Board of Retirement, id.* at p. 1051.) Respondent Perez bears the burden to establish, by a preponderance of the evidence, that he is entitled to the benefits he seeks.

### *Summary*

Respondent Perez contends that he is entitled to a retirement allowance based on his pay in four contracts covering many years of service as Cudahy's City Manager. Cudahy agrees. PERS contends that Perez's salary as City Manager did not meet certain requirements and that, therefore, he is entitled to a lower retirement allowance based on his pay as the Director of Cudahy's Department of Parks and Recreation. The evidence and law support PERS' contentions.

## FACTUAL FINDINGS

1. The Statement of Issues was filed by complainant in her official capacity as Acting Division Chief, Customer Account Services Division, PERS.
2. Respondent George A. Perez (respondent Perez or Perez) was first employed by Cudahy beginning in 1976 doing maintenance work, and later in 1980 or 1981 through 1994 as a program coordinator for Cudahy's Department of Parks and Recreation (Parks & Rec). He served on the city council from 1994 to 1999 or 2000, when he resigned to become the Director of Parks & Rec for about two months. Due to what Perez described as turmoil over several prior city managers, he then became the City Manager of Cudahy. By virtue of his employment, respondent Perez is a local miscellaneous member of PERS. His salary as city manager is at issue in this proceeding.
3. On September 30, 2011, respondent Perez signed an application for service retirement. Respondent Perez retired for service effective March 29, 2011, with 17.052 years of service credit, and has been receiving his retirement allowance from that date.
4. Cudahy is a public agency contracting with PERS for retirement benefits for its eligible employees. The provisions of Cudahy's contract with PERS are contained in the Public Employees' Retirement Law (PERL), found in Government Code section 20000 et seq.<sup>1</sup>
5. PERS is a defined benefit plan administered by the PERS Board of Administration (PERS Board). Benefits for its members are funded by member and employer contributions, and by interest and other earnings on those contributions. The amount of a member's contributions is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying its employer contribution rate to the payroll of the employing agency. Using certain actuarial assumptions specified by law, the PERS Board sets the employer contribution rate on an annual basis. These and other relevant provisions are found in the PERL.
6. The PERL refers to a member's pension on retirement as a service retirement allowance (retirement allowance). The amount of a member's retirement allowance is calculated by a formula applying a set percentage figure, based upon the member's age on the date of retirement, to the member's years of service, and the member's "final compensation." In this matter, respondent Perez's age on the date of retirement and years of service are not in issue. The formula applicable to respondent Perez under section 20037 establishes that Perez's "final compensation" means his highest average one year compensation earned during his final three years of employment before retirement. More specifically, section 20017 states, as applicable here, that for an employee of a contracting agency (such as Cudahy), "final compensation" means "the highest average annual compensation earnable by a member

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<sup>1</sup> All statutory references are to the Government Code unless otherwise noted.

during the three consecutive years of employment immediately preceding the effective date of his or her retirement . . . .” In computing a member’s retirement allowance, PERS 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.<sup>2</sup>

7. Respondent Perez was terminated by the City Council at a meeting and was notified of the termination in March 2011. His final compensation period of March 3, 2010, through March 2, 2011 applies to the formula for his retirement allowance. The monthly final compensation reported by Cudahy to PERS was \$15,604. PERS referred to Perez’s final compensation and calculated a monthly retirement allowance of \$5,694.05 (exhibit 7). Later, PERS discovered what it contends is an error in that Cudahy was reporting amounts as Perez’s payrate that were not published on a publicly available pay schedule for Perez during his final compensation period, nor was the reported payrate publicly approved and adopted in open City Council meetings.

8. By letter dated January 3, 2014, Perez and Cudahy were notified of PERS’ determination, advised of their appeal rights, and notified that PERS would recalculate Perez’s retirement benefits using the monthly payrate amount of \$8,946, calculated based on the maximum monthly payrate for Cudahy’s Director of Parks & Rec (\$8,871) plus bilingual pay for Cudahy’s employees (\$75). PERS reduced Perez’s monthly retirement allowance to \$3,380.70 (exhibit 20).

9. By letter dated January 27, 2014, respondent Perez, through his attorney, filed a timely appeal, requesting an administrative hearing.

10. When Perez became City Manager for Cudahy, he worked under a series of contracts covering periods from August 30, 2000, until his termination in March 2011. The first contract begins August 30, 2000, and was to run for three years, subject to extension. Paragraph three, titled Salary, provides for monthly gross payment of \$7,416, with a yearly C.P.I. (Consumer Price Index) increase, and other increases allowed on the basis of a performance review. (Exhibit 8.) The contract was signed by Perez and Cudahy Mayor David M. Silva. An agenda for the meeting of the Cudahy City Council and Cudahy Community Redevelopment Commission on August 30, 2000, does not reference the position of city manager. However, item 5C refers to discussion and possible action concerning a contract for a City Administrator /Commission Executive Director. (Exhibit 8.) (A salary schedule supplied later listed Perez’s position at that time as City Administrator. See Factual Finding 19.) It cannot be determined from the evidence whether this agenda was provided by Cudahy in response to requests and exchange of correspondence between PERS and Cudahy such as found in exhibits 15 through 18, or whether it was obtained in some other way. A letter from PERS to Perez dated July 30, 2013, referred to as a “pre-deprivation letter”

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<sup>2</sup> “Final compensation” and other relevant terms are defined in the PERL. Applicable provisions of the PERL are discussed in more detail in the Legal Conclusions below.

(exhibit 19), states that PERS had reviewed city council agendas and concluded they referred to proposed contract terms and did not include payrate information or any indication that the contracts were approved by the city council.

11. The second contract begins April 16, 2003, and was to run for five years, subject to extension. Paragraph three, titled Salary, provides for monthly gross payment of \$8,357.21, with a yearly C.P.I. increase or an increase of eight percent, whichever is greater, and other increases allowed on the basis of a performance review. (Exhibit 9.) The contract was signed by Perez and Cudahy Mayor Osvaldo Conde. An agenda for the meeting of the Cudahy City Council and Cudahy Community Redevelopment Commission on April 16, 2003, includes item 4B, discussion and possible action concerning a contract for City Manager /Commission Executive Director, with a direction that the city attorney draft and finalize the contract, subject to execution by the mayor. (Exhibit 9.) Similar to the 2000 contract and agenda noted above, it cannot be determined whether the agenda was provided by Cudahy in response to a request from PERS.<sup>3</sup>

12. The third contract begins June 28, 2006, and was to run for five years, subject to extension. Paragraph one, titled Duties, includes for the first time that in addition to City Manager, Perez is to serve as Executive Director of the Cudahy Community Redevelopment Commission. Paragraph three, titled Salary, provides for monthly gross payment of \$8,357.21, same as the second contract and which "has been adjusted annually pursuant to said 2003 Agreement." with a yearly C.P.I. increase or an increase of eight percent, whichever is greater, and other increases allowed on the basis of a performance review. (Exhibit 11.) The contract was signed by Perez and Cudahy Mayor Frank Gurule. An agenda for the meeting of the Cudahy City Council and Cudahy Community Redevelopment Commission on June 28, 2006, includes item 5C, which requests the council to approve an amendment to Perez's 2003 contract, authorize the city attorney and contracts administrator to draft and finalize the contract, and authorize the mayor to execute the contract. (Exhibit 10.) An Agenda Report is also included in exhibit 10, addressing the amendments to certain contract terms and recommending approval by the city council. Similar to the 2000 and 2003 contracts and agendas noted above, it cannot be determined whether the agenda and report were provided by Cudahy in response to a request from PERS.

13. The fourth and last contract begins October 7, 2008, and was to run for five years, subject to extension. Perez's duties included serving as City Manager and as Executive

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<sup>3</sup> Exhibit 16 is comprised of three documents. Two are letters from PERS to Cudahy in 2012 and 2013 requesting further information relating to several employees, including Perez. The third document is a memo dated April 16, 2003, from the Cudahy city attorney to the mayor and councilmembers including proposed contract terms for renewal of Perez's contract. This memo is not referenced in the other two letters in the exhibit. The memo suffers from the same lack of information regarding how, when and from whom it was received. Further, it relates to proposed contract terms, but did not indicate that the terms were adopted or ratified by Cudahy.

Director of the Cudahy Community Redevelopment Commission. Paragraph three, titled Salary, provides for monthly gross payment of \$14,379, with a yearly C.P.I. increase or an increase of eight percent, whichever is greater, and other increases allowed on the basis of a performance review. (Exhibit 13.) The contract was signed by Perez and Cudahy Mayor David M. Silva. In an agenda for the meeting of the Cudahy City Council and Cudahy Community Redevelopment Commission on October 7, 2008, item 5B includes requests to approve an amendment to Perez's 2006 contract and a recommendation to approve the contract, authorize the city attorney and contracts administrator to draft and finalize the contract, authorize the mayor to execute the contract. (Exhibit 13.) An Agenda Report is also included in exhibit 13, noting the base pay has not changed based on yearly increases and addressing the amendments to certain contract terms and recommending approval by the city council. Similar to the 2000, 2003 and 2006 contracts and agendas noted above, it cannot be determined whether the agenda and report were provided by Cudahy in response to a request from PERS.

14. A Memorandum of Understanding (MOU) between Cudahy and its miscellaneous employees (exhibit 14) provides, among other things, that employees may receive additional pay of \$75 per month if they are bilingual. Under the PERL, Perez's final compensation could include this additional pay as special compensation, although there was a question by PERS whether the benefit to miscellaneous employees was also available to managers such as Perez.

15. Also in evidence is an agenda for the meeting of the Cudahy City Council and Cudahy Community Redevelopment Commission on August 7, 2007 (exhibit 12), wherein item 6H references amending an earlier resolution establishing the compensation and positions of management of city employees. The earlier resolution was not offered in evidence. The resolution recites that the city manager recommended that the city council reorganize management positions, and includes, among other things, an attachment with salary ranges (M1 through M5), position titles, and salary steps. The positions of city manager and executive director of the Cudahy Community Redevelopment Commission are not listed. The position of director of Parks & Rec is listed in range M3, with a highest salary for the years 2008-2009 in step J in the amount of \$8,871. As noted in Factual Finding 8, this salary was used by PERS as Perez's base salary in its recalculation of his retirement allowance.

16. Taras Kachmar, a Retirement Program Specialist II in PERS' Compensation Review and Analysis Unit (CRU), testified at the hearing. He did not perform any work on Perez's matter but stated that the analysts who did, Cherise Canning and Miss K. Zimmerman, no longer work in the CRU. Kachmar reviewed PERS documents and his testimony established that, on initial review of Perez's application for retirement pension, a concern about an earnings spike was resolved. However, a second review occurred based on news stories of criminal indictments of David Silva and Osvaldo Conde.

17. PERS asked Cudahy for information related to several employees, including Perez. Cudahy eventually replied to specific questions, including that (a) no employee other than Perez received an eight percent increase each year; (b) there was no document that made management employees eligible to receive the additional \$75 per month as a bilingual allowance; (c) there were no organizational charts of Cudahy, as requested from 2003 to 2013, and there were no duty statements for the positions of City Manager and Executive Director of the Community Development Commission, as requested from 2006 to 2011; and (d) in response to whether Perez's salary was on a publicly available pay schedule in accordance with California Code of Regulations, title 2,<sup>4</sup> section 570.5, Cudahy replied that Regulation 570.5 became effective August 2011. (Exhibit 17.)

18. According to Kachmar, these questions were designed to obtain information for PERS to assess whether the compensation reported by Cudahy was proper for use in the formula to determine Perez's retirement allowance. For example, if no other employee received eight percent raises, it may indicate that Perez was treated differently than other employees and the raises might not be considered. If there was no document allowing the bilingual allowance for management, it may indicate that Perez was not entitled to it. Organizational charts might help determine in what group or class the city manager belonged and help confirm the payrate and special compensation of the city manager's position. A pay schedule under the requirements of Regulation 570.5 could be considered in determining Perez's final compensation. Kachmar noted that, although Regulation 570.5 was not effective until August 2011, the PERL included prior references to a pay schedule in section 20636. Kachmar noted there were no documents indicating that the city council had by any formal action approved or ratified the final contracts signed with Perez. Kachmar also noted that, although Perez's contracts referred to salary increases based on C.P.I. or eight percent, Perez received both. PERS' recalculation used the pay schedule for director of Parks & Rec because it was the last position occupied by Perez which was listed on the pay schedule attached to the city council agenda for August 7, 2007 (see Factual Finding 15 and exhibit 12). This pay schedule met PERS' requirements. Kachmar's testimony was credible and reliable.

19. Kachmar reviewed a printout of Perez's salary from his appointment on August 10, 2000, listed as City Administrator, to April 1, 2009 (exhibit 18), provided by Cudahy to PERS in June 2013. It shows an 8.8 percent increase for renewal of contract in 2002 and, in all years from 2003 to 2009, an eight percent increase as "annual increase per contract." There are also C.P.I. increases in 2000 and all years from 2003 to 2009 ranging from 2.0 to 3.6 percent.

20. Perez credibly testified to his history of residence in and employment by Cudahy. He attended a city council meeting in 2000 when his first contract as city manager was discussed, however the discussion was in closed session and he was asked to leave. In

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<sup>4</sup> All further references to regulations are to California Code of Regulations, title 2, and are referred to as "Regulation."



2000 and later years, his contracts were signed after the city council meetings for which the contracts appeared as an agenda item. Perez recalled receiving the eight percent and C.P.I. increases. After publicity about pension and other financial issues in the cities of Bell and Maywood in 2008 or 2009, and because the economy was generally poor, the Cudahy city department heads met and agreed to not take raises. Perez was aware of the salaries of other city managers for other cities, some of which were in the range of \$240,000 to \$250,000. According to Perez, city council agendas and his contracts as city manager were all available at the public counter in city hall.

*Summary of the parties' contentions*

21. The parties raise various contentions. The contentions of PERS include, but are not limited to: the requirements of the PERL cannot be altered by agreements between Cudahy and Perez; compensation earnable is not necessarily based on the pay that a member receives but, rather, is determined by law; the requirements for a pay schedule in Regulation 570.5 have not been met; Regulation 570.5 can be applied retroactively to this matter; employment agreements are not publicly available pay schedules; the city council did not approve the final contracts; and the C.P.I. increases and eight percent increases were only provided to Perez and to no other city employee and, therefore, cannot be considered.

22. Perez contends, among other things, that there was no fault by Perez if there were any legal requirements that were not met. Rather, any such fault was by Cudahy. The requirements for a publicly available pay schedule in Regulation 570.5 should not apply because the regulation became effective in August 2011 after Perez left employment in March 2011.

23. Cudahy contends, among other things, that Regulation 570.5 cannot be applied retroactively. Even if it did, Perez's contracts comply with Regulation 570.5. The contracts were publicly approved and available to the public. There was no pension spiking. PERS failed to use its discretion under Regulation 570.5 to determine final payrate by referencing the salary of other city managers in other cities, and not by referencing the salary of the Cudahy director of Parks & Rec. PERS delayed unreasonably in making its recalculation and is estopped from doing so. Perez cannot be required to repay the alleged overpayments.

*Publicly available pay schedule, as it relates to the parties' contentions*

24. As discussed in more detail in the Legal Conclusions, an element of payrate, as used to determine a PERS' member's final compensation in the calculation of a retirement allowance, must be contained in a publicly available pay schedule. The evidence established that the amounts paid to Perez for his service as city manager were not contained in a publicly available pay schedule.

25. The contentions of Perez and Cudahy are not convincing, as they are not supported by the law and the facts. As discussed in more detail below, even without the

application of the requirements for a publicly available pay schedule in Regulation 570.5, the evidence does not establish that there were publicly available pay schedules regarding Perez's pay as city manager, nor was there evidence that the city took formal action to approve or ratify the contracts. If Regulation 570.5 is applied, further specific requirements have not been met. There was no unreasonable delay by PERS. After Perez's application for a retirement allowance in September 2011, PERS requested further information from Cudahy in July 2012, but received no response; PERS posed specific questions to Cudahy in August 2012, but received no response; PERS again requested information in October 2012 and February 2013. Cudahy provided some information in March and June 2013. PERS then completed its review and notified Perez and Cudahy of its recalculations on July 30, 2013. PERS did not abuse its discretion by not considering salaries of other employees of other cities, or by using the salary of the director of Parks & Rec to determine Perez's retirement allowance. The law, noted below, requires PERS to pay only what is due as a retirement allowance. The law allowing correction of mistakes, and placing the parties as they were before the mistake was made, has practical implications here that prevent its application in a way that would allow Perez to receive a higher retirement allowance.

26. Perez is correct that Regulation 570.5 (and, for that matter, Regulation 571, discussed below, which was amended at the same time) became effective in August 2011, after he left employment. However, his retirement application is dated September 30, 2011. Logically, PERS should apply the law as it exists at the time a retirement application is submitted. Regulation 570.5 lists numerous requirements of a pay schedule in relation to the statutory references to "publicly available pay schedules" (section 20636, subdivision (b)(1)) or payrate and compensation schedules as public records available for public scrutiny (section 20636, subdivision (d)). Even without the clarification supplied by Regulation 570.5, Cudahy did not have pay schedules or payrate and compensation schedules that were publicly available, as required by the statute. The purpose of the statute was to permit the public to have effective access to pay information such that the public could find the salaries for public employees listed by date, position and amount. Cudahy did not have documents that effectively and efficiently allowed the public to have access to such information. The employment contracts and city council agendas were available on request. However, these documents did not contain the information necessary to determine, for all employees including the city manager, the salary paid for specific positions in Cudahy at any given period of time. Nor was the required information contained in one inclusive document.

## LEGAL CONCLUSIONS AND DISCUSSION

1. Cause exists to deny respondent Perez's appeal, in that Perez did not establish his eligibility for a retirement allowance above that ultimately determined by PERS, based on Factual Findings 2-26 and Legal Conclusions 2-33, below. Although there was no evidence of any appeal submitted by Cudahy, it participated in the proceedings.  
*Statutes and regulations*

2. Various statutes, regulations, appellate court decisions and PERS precedential decisions apply to the determination of Perez's appeal.

3. The PERL vests the management of the retirement system in the PERS Board, and gives the Board the authority to make rules binding on its members. (Sections 20120-20122.) Subject to other provisions of the PERL and pertinent regulations, "the board shall determine and may modify benefits for service and disability" for those it determines are entitled to receive benefits. (Sections 20123, 20125.)

4. Cudahy's contract with PERS subjects Cudahy and its employees to all provisions of the PERL. (Section 20506.)

5. By virtue of the contract between Cudahy and PERS, Perez's retirement allowance is calculated by a formula applying a percentage figure based on his age at retirement to his years of service and his final compensation, as described in section 20037 and as noted in Factual Finding 6.

6. "Compensation" is addressed in section 20630, which states:

"(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 . . . . [¶] (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."

7. "Compensation earnable" includes references to payrate, special compensation and final compensation. Section 20636 states, 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). [¶] . . . [¶] <sup>5</sup>

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

8. The reference to a pay schedule to determine compensation earnable is addressed in Regulation 570.5, which states:

“(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

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<sup>5</sup> Subdivision (c) defines special compensation and might apply to the inclusion of monthly bilingual pay of \$75 to Perez. However, subdivision (c) was not cited in the Statement of Issues, and PERS' recalculation of Perez's retirement allowance includes monthly bilingual pay of \$75. It is not an issue for determination in this proceeding.

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.”

9. Regulation 571 defines and lists items of special compensation, which may be considered in determining the retirement allowance. A bilingual “premium” is allowed as special assignment pay under subdivision (a)(4) and can be considered as part of a member’s special compensation. This is the only subdivision of Regulation 571 included in the Statement of Issues.

10. Sections 20160, 20163 and 20164 relate to PERS’ duties to make corrections under the circumstances herein. Section 20160 provides, in pertinent part:

“(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

“(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

“(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

“(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

“Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an ‘error or omission’ correctable under this section.

“(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

“(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

“(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

“(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. . . .”

11. Section 20163, subdivision (a) provides, in pertinent part: “Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled.”

12. Section 20164 provides, in pertinent part:

“(a) The obligations of this system to its members continue throughout their respective memberships, and the obligations of this system to and in respect to retired members continue throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged. The obligations of the state and contracting agencies to this system in respect to members employed by them, respectively, continue throughout the memberships of the respective members, and the obligations of the state and contracting agencies to this system in respect to retired members formerly employed by them, respectively, continue until all of the obligations of this system in respect to those retired members, respectively, have been discharged. The obligations of any member to this system continue throughout his or her membership, and thereafter until all of the obligations of this system to or in respect to him or her have been discharged.

“(b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:

“(1) In cases where this system makes an erroneous payment to a member or beneficiary, this system’s right to collect shall expire three years from the date of payment.

“(2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply. [¶] . . . [¶]

“(e) The board shall determine the applicability of the period of limitations in any case, and its determination with respect to the running of any period of limitation shall be conclusive and binding for purposes of correcting the error or omission.”

*Appellate opinions and precedential decisions re compensation and publicly available pay schedules*

13. Key aspects of the PERL applicable to Perez’s circumstances, or which can be analogized to Perez’s circumstances, have been the subject of interpretation and application in appellate decisions and precedential decisions.<sup>6</sup> Generally, in defining “compensation earnable” and “final compensation,” the PERL contemplates equality in benefits between members of the “same group or class of employment and at the same rate of pay.” (*City of Sacramento v. Public Employees’ Retirement System* (1991) 229 Cal.App.3d 1470, 1492.) “[B]oth components of ‘compensation earnable,’ an employee’s payrate and special compensation, are measured by the amounts provided by the employer to similarly situated employees. (See § 20636, subs. (b)(1), (2), (c), (e)(2).)” (*Prentice v. Board of Administration, California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 992 (*Prentice*).

14. The PERL requires a “publicly available pay schedule for services rendered on a full time basis during normal working hours.” (*Molina v. Board of Admin., California Public Employees’ Retirement System* (2011) 200 Cal.App.4th 53, 66-67 (*Molina*)). Section 20636, subdivision (b)(1) was amended in 2006 to add the requirement of a “publicly available pay schedule.” The Legislature intended that a public employee’s payrate be readily available to an interested person without unreasonable difficulty. (Adams Decision.) Indicia of a publicly available pay schedule include formal approval by the public body, in open session after notice to the public, of a salary or salary range for a given position, described in the detail required by section 20636, subdivision (b)(1), and Regulation 570.5, and the schedule’s ready availability for review by any member of the public without the necessity of a public records request, subpoena, or other legal process. (Adams Decision.) A pay increase is not included in an employee’s payrate unless it is published in a pay schedule. (*Molina, supra*, 200 Cal.App.4th at p. 66, citing *Prentice, supra*.)

15. *Molina* was decided in September 2011 and makes no reference to Regulation 570.5. In essence, the court decided that wrongful termination pay was not included in the determination of a retirement allowance, in part because there was no publicly available pay schedule related to it. In *Prentice*, decided in 2007 before Regulation 570.5 issued, the court

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<sup>6</sup> One PERS precedential decision, the Ramirez Decision, is noted in the introduction. Another PERS Precedential Decision No. 15-01 (the Adams Decision) was the subject of official notice during the hearing and was a part of exhibit 21.

reviewed a pay schedule that did not include the specific, higher pay received by Prentice. The city would have given correct information to any member of the public who asked, and the amount was included within the city budget, a public document. Such inclusion in the budget would not have afforded anyone else attaining Prentice's position a right to receive the same increase. Although there are these and other distinguishing facts, the holding is nevertheless instructive about the nature of the documents necessary to satisfy the statutory requirement of a publicly available pay schedule. The acceptable pay schedule for Prentice did not include the higher pay.

16. The Adams Decision related to Randy Adams, who separated from employment with the City of Bell in 2009 and submitted his application for retirement allowance in December 2010. There was a contract for Adams' service as police chief but no evidence that there was a pay schedule or that the contract was approved by the city. Although Regulation 570.5 is recited in the factual findings, the application of the phrase "publicly available pay schedule" was reached without reference to the regulation. (Adams Decision, p. 19, Legal Conclusion 9; see exhibit 21.) In summary, the Adams Decision, at Legal Conclusions 10 through 18, determined that Adams' 2009 contract was not a publicly available pay schedule. Again, there are some factual distinctions between Adams' facts and Perez's scenario, but they do not compel a different outcome. This is so even though those facts include affirmative efforts by the city of Bell to obscure from the public the salary paid to Adams. The following Legal Conclusions (17 through 20) are patterned after, or quoted from, the Adams Decision.

17. When the plain language of a statute, with the words given their usual meaning, is clear and unambiguous that plain meaning governs. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1560-1561.) The words "publicly" and "available" can be defined by reference to a dictionary.

18. "The Legislature intended that a public employee's 'payrate' be readily available to an interested person without unreasonable difficulty. This concept does not apply to a situation in which a public employee's payrate is buried in a carefully crafted agreement designed to prevent the easy calculation of that salary, that is set forth in an employment agreement that is privately maintained and is not based on a published pay schedule or approved in a public manner, and that is not subject to public disclosure except through a formal public records request, subpoena, or other legal process." (Adams Decision, Legal Conclusion 11.) Here, the elements of being "buried in a carefully crafted agreement" that is privately maintained do not necessarily apply. However, Perez's contracts and the agendas are not the type of publicly available pay schedule as required under section 20636 or under the reasoning from *Molina* and *Prentice*, discussed above, and *Tanner v. California Public Employees' Retirement System* (2016) 248 Cal.App.4th 743 (*Tanner*), discussed below.

19. The Adams Decision then reached alternative conclusions, as if there was some ambiguity in the phrase "publicly available," by referring to the Legislative history of Senate Bill 53, enacted in 1993 to prevent spiking of public employees' final compensation, by



defining that term. Section 20636, subdivision (b)(1) was amended in 2006 to add the references to publicly available pay schedules. This amendment was determined to be a “matter of clarification.” (*Prentice, supra*, 157 Cal.App.4th at p. 990, fn. 4.)

20. “Using a broad interpretation of ‘pay schedule’ based upon the inclusion of a salary disclosed only in a budget has the vice of permitting an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees. And, a written employment agreement with an individual employee should not be used to establish that employee’s ‘compensation earnable’ because the employment agreement is not a labor policy or agreement within the meaning of an existing regulation and would not limit on [sic] the compensation a local agency could provide to an individual employee by way of individual agreements for retirement purposes. (*Prentice v. Board of Admin., California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 994-995.)” (Adams Decision, Legal Conclusion 15.)

21. In *Tanner*, the City of Pacifica employed Tanner as city manager from January 2007 until he resigned effective June 1, 2009 (before Regulation 570.5 was issued). He began negotiating contract terms in November 2006. The only documents listing Tanner’s salary was his amended contract and a cost analysis relating to the amended contract. The documents related only to Tanner without listing any another city position or employee and there was no evidence the city council ever voted to adopt the documents for any purpose, and not specifically as pay schedules. The facts were undisputed and the court determined it was a question of law whether the salary was paid pursuant to a publicly available pay schedule, as required under section 20636, subdivision (b)(1). With reference to *Molina* and *Prentice*, and without referring to Regulation 570.5, the *Tanner* court determined that the contract and cost analysis were not publicly available pay schedules. It referenced dictionary definitions of the words and concluded that a pay schedule “is a written or printed list, catalog, or inventory of the rate of pay or base pay of one or more employees who are members of CalPERS.” (*Tanner, supra*, 248 Cal.App.4th at 755.) Both documents listed Tanner’s pay, but were not limited to that pay information. The employment agreement ran 14 pages, with one term indicating the pay amount, and the cost analysis included numerous other figures “and a member of the public would be hard-pressed to locate the new base salary of the city manager position among all of the other figures on the page and identify it as such.” (*Ibid.*)

22. The *Tanner* court also “discerned from the Legislature’s use of the term pay schedule an intent to require the employer to use a document (or documents) that isolates the rate of pay or base pay of employees who are CalPERS members from other employment information and other figures—with the exception, of course, of the rate of pay or base pay for such other employees.” (*Id.* at p. 756.) The legislative purpose would not be served by deeming Tanner’s contract or the cost analysis to be a pay schedule. Such a practice “would frustrate, rather than further, the apparent legislative purpose and intent behind the law.” (*Id.* at 756-757.) As a result, PERS was permitted to use Tanner’s base salary to calculate his retirement allowance, but not the increased salary in the amended contract.

23. The *Tanner* analysis was made without reference to Regulation 570.5, the requirements of which (see Legal Conclusion 8) have not been met under the facts herein.

*PERS' recalculation of Perez's retirement allowance*

24. Sections 20160 and 20163, and Regulation 570.5 and *Tanner*, offer insight into the alternatives faced by PERS under the present circumstances. Section 20160 gives PERS discretion "upon any terms it deems just" to correct the errors or omissions. Section 20163 allows adjustments so the member will receive the "allowance to which the member is entitled." Under Regulation 570.5, subdivision (b), when an employer does not meet the stated requirements of a pay schedule, the PERS Board "in its sole discretion, may determine an amount that will be considered to be payrate, taking into account all of the information it deems relevant . . . ." PERS did so with respect to Perez, using the highest salary available under a publicly available pay schedule for a position he previously held, Director of Parks & Rec, for the years 2008 and 2009, which accommodates Perez's tenure with the city, albeit in another position. In *Tanner*, PERS used the last salary of Tanner that complied with the law. It did the same here for Perez.

*Contentions including delay and estoppel*

25. PERS' ability to correct the mistake of allowing Perez's retirement allowance to be calculated using an improper compensation amount is not affected by laches. PERS' calculation was erroneous. The PERL mandates that PERS "correct all actions taken as a result of errors or omissions of . . . this system." (Section 20160, subd. (b); see *Welch v. California State Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1, 27.) The PERL provides no time limit for PERS to perform its statutory obligation to correct its actions. Finding "a legislative purpose of 'correcting system errors or omissions wherever possible,'" the court in *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29 concluded that "[w]e should not supply a limitation period not contemplated by the Legislature." (*Id.*, at p. 50.) Perez and Cudahy have not cited any authority that the doctrine of laches may be used to prevent PERS from complying with obligations mandated by a statute that intentionally imposes no time limitation on corrective actions.

26. Cudahy argues that PERS should be equitably estopped from disallowing the higher amount of salary because Perez reasonably relied upon the belief he would receive a retirement allowance based on a higher salary amount. There was no evidence of such reliance.

27. The requisite elements for equitable estoppel are the same whether applied against a private party or the government: (1) the party to be estopped was apprised of the facts, (2) the party to be estopped intended to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended, (3) the party asserting estoppel was ignorant of the facts, and (4) the party asserting estoppel suffered injury in reliance on the conduct. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

28. Neither estoppel nor fiduciary theories will serve to compel PERS to treat compensation as pensionable when it does not qualify under section 20636. More specifically, if section 20636 precludes a portion of pay from being considered, PERS cannot be ordered to pay a pension based on the excluded portion, notwithstanding any failure to timely notify the member of excess contributions to PERS made on the member's behalf and any promises made by the employer. (*City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 543-544.) Nor will PERS' fiduciary duty to members justify forcing PERS to violate the mandates of the PERL by virtue of an order to pay greater benefits than the statutes allow. (*Chaidez v. Board of Administration* (2014) 223 Cal.App.4th 1425, 1431-1432.) Further, PERS made no promise to Perez, direct or implied, that the pay reported by Cudahy to PERS was the proper compensation as legally defined for use in the formula to determine his retirement allowance. PERS has no way to predict when a member will file for retirement benefits and its duty to review and determine the appropriate components to use in the formula arises only when retirement occurs. PERS did not therefore mislead Perez.

29. Perez's estoppel argument is problematic because appellate courts have held that "estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing." (*Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 870.) As discussed above, the PERL does not support Perez's final compensation including the higher amount of salary. Finally, for estoppel to apply against a government agency that had no legal authority to do what it is requested to do, it must be shown that "the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, pp. 496-497.) In this case, respondent Perez failed to establish that an injustice would result if his final compensation is based on compensation that Cudahy improperly included in its reporting to PERS and was not made publicly known by an available pay schedule.

30. An unreasonable delay in commencing an administrative proceeding may result in the application of laches if the delay caused prejudice to Perez. (*Gates v. Dept. of Motor Vehicles* (1979) 94 Cal.App.2d 921, 925; *Brown v. California State Personnel Board* (1985) 166 Cal.App.3d 1151.) Laches is established by an unreasonable delay in bringing an action resulting in prejudice to the other party in presenting a defense. (*Id.*) The party asserting laches bears the burden of establishing prejudice; prejudice is never presumed. (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 362.)

31. In this case, it was not established that any inordinate or unreasonable delay occurred, resulting in prejudice that would trigger laches. The delay argued by Cudahy (not by Perez) is not specifically stated. As noted above, significant time passed before PERS received answers from Cudahy, and to only some of its questions. PERS made its recalculation and notified Perez and Cudahy slightly over four months later. This is not an unreasonable delay. Further, as noted above, under *City of Pleasanton v. Board of Administration, supra*, 211 Cal.App.4th at pp. 543-544, PERS cannot be ordered to pay a

pension based on compensation that does not comply with section 20636, notwithstanding any failure to point out that the employer was making excess contributions to PERS based on retirement promises made by the employer to the employee.

32. Cudahy also argues that Perez cannot be ordered to repay the alleged overpayments. The Statement of Issues makes no reference to repayment, and the issue is beyond the jurisdiction of this proceeding. There was also no evidence of specific repayment options beyond reference in PERS' letter dated January 3, 2014, that PERS would adjust the retirement allowance and notify Perez of the amount of the overpayment and repayment options.

*Outcome*

33. PERS is within its rights and is obligated to adjust Perez's retirement allowance downward, based on its redetermination of his final compensation.

**ORDER**

The appeal of respondent George A. Perez from PERS's reduction of his service retirement allowance is denied.

DATED: January 30, 2017

DocuSigned by:  
*David Rosenman*  
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**DAVID B. ROSENMAN**  
Administrative Law Judge  
Office of Administrative Hearings