

ATTACHMENT A

THE PROPOSED DECISION

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

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

KATHRYN A. GERK, Respondent

and

CITY OF RICHMOND, Respondent

Agency Case No. 2018-1118

OAH No. 2019031127

PROPOSED DECISION

Karen Reichmann, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 10, 2019, in Oakland, CA.

John Shipley, Senior Attorney, represented the California Public Employees' Retirement System.

Amer Moorhead, Attorney at Law, represented respondent Kathryn Gerk, who was present throughout the hearing.

No appearance was made by or on behalf of the City of Richmond.

The record was closed and the matter was submitted for decision on July 10, 2019.

FACTUAL FINDINGS

1. Respondent Kathryn A. Gerk was employed by the City of Richmond (City) as the Emergency Services Manager. By virtue of her employment, respondent is a local miscellaneous member of the California Public Employees' Retirement System (CalPERS).

2. Respondent retired for service effective December 31, 2016, and has been receiving a monthly retirement allowance since that time. Retirement benefits are calculated pursuant to a formula, one component of which is the employee's "final compensation." Respondent's final compensation was based on payroll data provided by the City. The City's payroll data reflected a final semi-monthly compensation consisting of \$4,660.98 (\$9,321.96 monthly) in "pay rate" and \$466.10 (\$932.20 monthly) for "special compensation." Respondent's initial monthly retirement allowance were based on these figures.

3. In 2017, the CalPERS Office of Audit Services performed an audit of multiple public agencies, including the City of Richmond, to determine whether these agencies were properly reporting special compensation. The auditors reviewed a sample of active and retired employees of each agency. The agencies were notified of issues uncovered in the audit and were given an opportunity to respond before the issuance of a final audit report.

4. The final audit report concluded that the City improperly reported as special compensation a 10 percent pay differential paid to an employee in the

classification of Budget Administrator. The audit concluded that this pay did not meet the definition of special compensation and should not have been reported as such to CalPERS.

5. As a result of the audit, CalPERS contacted the City in June 2017, and directed the City to "reverse" the off-salary schedule payment for all active, retired, and separated employees for whom this payment was reported as special compensation. The City complied. Respondent's off-salary schedule payments were "reversed" from her payroll data maintained by the City and reported to CalPERS in approximately January 2018.

6. On March 30, 2018, William Greenhalgh, Staff Services Manager, CalPERS, wrote a letter to respondent explaining that compensation reported by the City to CalPERS had been found by audit not to comply with the law, and that her monthly retirement allowance would be reduced. Respondent was given the opportunity to submit additional information or documentation regarding the issue within 30 days. Respondent was further advised that: "Using the corrected final compensation amount per month, CalPERS will calculate the total overpayments that may be due to CalPERS and you will be notified of the overpayment amount and options for repayment in writing." The City was also given the opportunity to provide additional information or documentation. Respondent and the City did not submit any information or documentation to CalPERS in response to this letter.

7. On August 13, 2018, respondent was sent CalPERS's Final Determination Letter, confirming its decision to reduce her monthly allowance and seek return of overpaid benefits. Respondent was notified of her right to an appeal. On September 4, 2018, CalPERS notified respondent that her monthly allowance was being reduced by \$615.28 and that she would be required to pay back \$12,144.01 in overpaid benefits.

8. On September 12, 2018, respondent submitted her appeal.

9. The City's salary schedule in effect from July 1, 2015 through the time respondent retired reflects that the maximum monthly salary for the position of Emergency Services Manager was \$9,322. Respondent's monthly salary from July 1, 2015, until she retired on December 31, 2016, was \$9,321.96, four cents less than the maximum.

10. Respondent was a member of a bargaining unit represented by IFPTE Local 21 (Union). The City and the Union were parties to a memorandum of understanding (MOU) that was in effect during the period of July 2013 through June 2016. Section 25 of the MOU is under the section heading "Acting Pay." The section states, in part, that "When acting as a Department Head or supervisor of a special staff office (such as Redevelopment Director) the person in the acting capacity will receive a ten percent (10%) salary differential." The evidence did not establish that respondent's salary differential was premised on this provision.

11. The MOU does not contain a provision for off salary schedule pay. There was no evidence of any written labor policy or agreement in effect during respondent's employment which contains a provision for off salary schedule pay.

12. The MOU does not contain a provision for a training premium. There was no evidence of any written labor policy or agreement in effect during respondent's employment which contains a provision for a training premium.

13. The MOU does not contain a provision for a safety officer training/coordinator premium. There was no evidence of any written labor policy or agreement in effect during respondent's employment which contains a provision for a safety officer training/coordinator premium.

14. Respondent is proud of her long career with the City. Her position evolved over the years and her responsibilities increased. Respondent developed training courses and conducted monthly trainings, and was involved in the statewide and nationwide development of emergency protocols.

15. Respondent explained the background behind the 10% pay differential that is now being disallowed. Respondent sought a salary increase in 2014, after providing documentation to the City that her salary was significantly less than comparable employees at other similarly sized cities in the region. Respondent was told by the human resources department that she would get a 10% differential while a desk audit of her position was conducted. She understood it to be a "short term fix" while the City went through the process of updating her job description and salary schedule. The 10% differential was approved for one year, and then extended for a second year. She stopped receiving it in February 2016.

16. Respondent is understandably upset and disappointed that her monthly retirement allowance is being reduced and that she is being asked to pay back CalPERS when she did nothing wrong. Respondent worked hard throughout her career and believes she was underpaid for the valuable work she performed for the community.

LEGAL CONCLUSIONS

1. Government Code section 20160, subdivision (d), provides that the party seeking correction of an error has the burden of presenting evidence establishing the right to correction.

2. Respondent contends that CalPERS is time-barred from seeking to modify her monthly allowance in light of Government Code section 20160, subdivision (a)(1), which sets forth a six-month time limit for the correction of certain errors. This subdivision applies only to requests for correction made by active or retired members or their beneficiaries. It does not apply to an action to correct an error made by a contracting agency, such as the City of Richmond, or to an error made by CalPERS; such errors are governed by subdivision (b). There is no time limit set forth for the correction of errors under this subdivision. Government Code section 20164, subdivision (b), provides that "For purposes of payments into or out of the retirement fund for adjustment of errors or omissions pursuant to Section 20160 . . . the period of limitations shall be three years." It has been less than three years since respondent retired and began receiving a retirement allowance. CalPERS is not time-barred from seeking to correct the calculation of respondent's final compensation and to recover overpaid benefits.

3. A member's retirement allowance is calculated using a formula which includes the member's final compensation. In determining final compensation, CalPERS applies the Public Employees' Retirement Law (Government Code section 20000 et seq.) and related regulations. Not all compensation lawfully paid to an employee by a contracting agency qualifies for purposes of calculating final compensation.

4. Government Code section 20636, subdivision (a), provides that final compensation (referred to as "compensation earnable") is based solely on base payrate and qualifying special compensation.

5. "Payrate" is defined in Government Code section 20636 as "the normal monthly rate of pay or base pay of the member paid in cash to similarly situated

members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules.”

6. Government Code section 20636, subdivision (c), defines special compensation as “payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.” California Code of Regulations, title 2, section 571, subdivision (a), “exclusively identifies and defines special compensation items for members employed by contracting agency and school employers.” Subdivision (b) sets forth that all items of special compensation must be contained in a written labor policy or agreement, which must meet certain enumerated criteria.

7. The 10% salary differential paid to respondent did not constitute payrate, as it was pay in excess of the publicly available salary schedule.

8. The evidence established that the City of Richmond incorrectly reported the 10% salary differential paid to respondent as special compensation. CalPERS’s conclusion that the 10% salary differential did not satisfy the criteria for special compensation is correct. This off-salary schedule payment is not included in any written labor policy or agreement, as required by California Code of Regulations, title 2, section 571, subdivision (b). Respondent’s contention that the 10% salary differential payment was made pursuant to section 25 of the MOU was not supported by the evidence, including respondent’s testimony. Accordingly, the 10% salary differential cannot be credited to respondent as special compensation for purposes of calculating her final compensation.

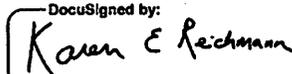
9. CalPERS’s determination that the 10% off-salary schedule pay must be excluded from the calculation of respondent’s final compensation is correct. CalPERS is

entitled to correct its erroneous calculation of respondent's monthly retirement allowance and to collect the amount overpaid to respondent within three years, in accordance with Government Code sections 20160 and 20164. Respondent's appeal is denied.

ORDER

The appeal of respondent Kathryn A. Gerk is denied.

DATE: July 16, 2019

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KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings