ATTACHMENT A

THE PROPOSED DECISION

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

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

KATHERINE CARAMELLA, Respondent

and

CITY OF SANTA ROSA, Respondent

Agency Case No. 2018-1051

OAH No. 2019031139

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 12, 2019, in Los Angeles, California.

Preet Kaur, Senior Attorney, represented California Public Employees' Retirement System (CalPERS). On July 26, 2019, the City of Santa Rosa (respondent City) filed a Notice of Withdrawal of its Notice of Defense. Therefore, the matter proceeded against Katherine Caramella (respondent Caramella) only. However, no

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED September 6, 2019
K. Pasley

appearances were made by or on behalf of respondent Caramella at the administrative hearing.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on August 12, 2019.

FACTUAL FINDINGS

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

2. Respondent Caramella timely filed an appeal and requested a hearing. On April 2, 2019, respondent Caramella was properly served with notice of the instant hearing date, time, and place.

3. As indicated above, on the day of the hearing, no appearance was made by or on behalf of respondent Caramella, despite the fact that she was served with timely and appropriate notice as required by Government Code section 11509. Therefore, this matter proceeded as a default prove-up pursuant to Government Code section 11520.

4. On July 8, 2003, respondent Caramella became a CalPERS member through her employment with respondent City as a Police Officer. By virtue of her employment, respondent Caramella was a local safety member of CalPERS.

5. Respondent City is a local public agency that contracts with CalPERS for retirement benefits for its eligible employees. The provisions of respondent City's contract with CalPERS are contained in the California Public Employees' Retirement Law (PERL), which is set forth at Government Code section 20000 et seq.

6. CalPERS is a defined benefit plan. 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 contribution is determined by applying a fixed percentage to the member's compensation. A local public agency's contribution is determined by applying a rate to the member compensation as reported by the agency. Using certain actuarial assumptions specified by law, the CalPERS Board of Administration (Board) sets the employer contribution rate on an annual basis.

7. The amount of a member's service retirement allowance is calculated by applying a 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 computing a member's retirement allowance, CalPERS staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL are included in the member's final compensation for purposes of calculating the retirement allowance.

8. Respondent Caramella retired for industrial disability with 11.923 years of service credit, effective December 31, 2015. She has been receiving her retirement allowance since that date.

9. In May 2017, CalPERS Office of Audit Services conducted a public agency review of respondent City to determine whether special compensation[1] reported to CalPERS complied with the PERL. After its review, CalPERS determined that the

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[1] Special compensation is a component of compensation earnable, which is used to calculate final compensation. (Gov. Code, §§ 20636, subd. (a); 20037; and 20042.)

reporting of special compensation for three respondent City employees was incorrect. Respondent City paid these three employees Holiday Pay, as additional compensation to work on approved holidays because they worked in positions that required scheduled staffing without regard to holidays. However, for all three employees, respondent City reported the Holiday Pay in lump sum amounts at the end of the year, rather in periodic amounts as the Holiday Pay was earned. Reporting the Holiday Pay in lump sum amounts was incorrect because Holiday Pay, as a type of special compensation, must be reported in the period that it was earned. (Gov. Code, § 20636, subd. (c)(3)(A).)

10. Respondent Caramella was one of the impacted employees. Respondent Caramella's Holiday Pay was erroneously reported in lump sum amounts at the end of the year from 2012 to 2015. Her Holiday Pay should have been reported as it was earned during the following pay periods: November 18, 2012, to December 12, 2012; November 17, 2013, to November 30, 2013; November 16, 2014, to November 29, 2014; and November 15, 2015, to November 28, 2015.

11. CalPERS requested respondent City to reverse the reporting of respondent Caramella's Holiday Pay in lump sum amounts and to repost it over the pay period in which it was earned. After respondent City reposted the Holiday Pay as earned per pay period, the correction resulted in a downward adjustment of respondent Caramella's final compensation and her monthly retirement allowance. When the Holiday Pay was previously reported in year-end lump sum amounts, respondent Caramella's final compensation period, her highest average compensation during a 12-month period, included additional Holiday Pay that was in fact earned outside of the final compensation period. Thus, the incorrectly reported Holiday Pay in lump sum amounts inflated respondent Caramella's retirement allowance. Accordingly,

when the Holiday Pay was reported correctly during the period in which it was earned, respondent's final compensation was reduced, and her monthly retirement allowance was also reduced from $5,096.37 to $4,933.08. This adjustment was retroactive to December 31, 2015, the date of respondent Caramella's retirement. Hence, respondent Caramella's monthly retirement allowance was adjusted retrospectively for the period of December 31, 2015, through August 31, 2018, resulting in an overpayment of retirement benefits in the amount of $4,945.16.

12. In separate letters each dated April 12, 2018, CalPERS informed respondent Caramella and respondent City that respondent Caramella's Holiday Pay "was incorrectly reported as a lump sum amount and should have been reported as earned per pay period." (Ex.5, p.1.) In these letters, CalPERS also provided respondent Caramella and respondent City with an opportunity to submit additional documentation for consideration before CalPERS made a final determination.

13. The record did not establish whether respondent Caramella or respondent City resubmitted any additional documentation to CalPERS. Regardless, in separate letters dated June 29, 2018, respondent Caramella and respondent City were notified of CalPERS' final determination that the reporting of Holiday Pay in lump sum amounts was incorrect. Both respondent Caramella and respondent City were also advised of their appeal rights.

14. In a letter dated July 12, 2018, respondent Caramella filed a timely appeal and requested an administrative hearing. Respondent Caramella wrote, "I assert that promissory [*sic*] estoppel precludes CalPERS from altering my disability retirement benefits as well as precludes CalPERS from demanding compensation for any alleged overpayments made." (Ex. 7, p.1.)

15. In a letter dated July 19, 2018, CalPERS informed respondent Caramella that it was seeking to collect the overpayment of $4,945.16, resulting from respondent City's erroneous reporting of respondent Caramella's Holiday Pay. CalPERS provided respondent Caramella with three options to repay the overpayment. CalPERS explained to respondent Caramella that if she did not choose an option, CalPERS would deduct $493.31 from her monthly retirement allowance warrant beginning October 1, 2018, until the overpayment is repaid in full. Respondent Caramella did not choose a repayment option. Therefore, CalPERS began to deduct the overpayment from respondent Caramella's monthly retirement allowance. By the time of the administrative hearing, the entire overpayment of $4,945.16 had been repaid in full.

16. The issue on appeal is limited to whether CalPERS correctly excluded the Holiday Pay in lump sum amounts from the calculation of respondent Caramella's final compensation and if so, whether respondent Caramella must repay the overpayment to CalPERS.

LEGAL CONCLUSIONS

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including the both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, note 5.) Thus, in challenging CalPERS' determination that her Holiday Pay was incorrectly reported in lump sum amounts, respondent Caramella bears the burden of proof by a preponderance of the evidence. As set forth in Factual Findings 1 through 16, and Legal Conclusions 1 through 9, that burden was not met.

2. Under the PERL, an employee's compensation for use in the calculation of a pension benefit "is not simply the cash remuneration received, but is exactingly defined to include or exclude various employment benefits and items of pay." (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198.) Which benefits and items of pay constitute "compensation" and "compensation earnable" is crucial to the computation of an employee's ultimate pension benefits. The pension is calculated to equal a certain fraction of the employee's "final compensation" which is multiplied by a fraction based on the age and length of service. (*City of Sacramento v. Public Employees' Retirement System* (1991) 229 Cal.App.3d 1470, 1478 (fns. omitted).)

3. Final compensation is determined, in part, by determining a member's compensation earnable. "Compensation" is generally defined as "the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours." (Gov. Code, § 20630, subd. (a).) "Compensation earnable" consists of "payrate" and "special compensation" of the member. (Gov. Code, § 20636, subd. (a).)

4. "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." (Gov. Code, § 20636, subd. (b)(1).) Special compensation includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions. (Gov. Code, § 20636, subd. (c)(1).)

5. The PERL also specifies the manner in which compensation and special compensation must be reported to the Board. For example, when reporting compensation, the employer must identify the pay period in which the compensation

was earned regardless of when the compensation was reported or paid. (Gov. Code, § 20630, subd. (b).) The same statue provides that compensation shall be reported in accordance with Government Code section 20636. (*Ibid.*) Under Government Code section 20636, subdivision (c)(3)(A), when reporting special compensation to the Board, the employer must identify the pay period in which the special compensation was earned.

6. Furthermore, the Board has promulgated California Code of Regulations, title 2, section 571 (Regulation 571), which exclusively identifies and defines special compensation items for members employed by contracting agency and school employers. Under Regulation 571, subdivision (b)(5), all special compensation must be "paid periodically as earned."

7. Given the foregoing, a preponderance of the evidence in this case supports CalPERS's determination to exclude respondent Caramella's Holiday Pay in lump sum amounts and to recalculate respondent Caramella's final compensation and retirement allowance based on reporting of the Holiday Pay during the period in which it was earned. It is undisputed that the Holiday Pay at issue constitutes special compensation under Regulation 571, subdivision (a)(5), because it is "additional compensation for employees who are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays." However, pursuant to Government Code sections 20630, subdivision (b), and 20636, subdivision (c)(3), and Regulation 571, subdivision (b)(5), respondent Caramella's Holiday Pay, as a form of special compensation, must be reported during the pay period in which it was earned, and not as a lump sum amount at the end of the year.

8. Although respondent Caramella did not appear at the administrative hearing, she contended in her July 12, 2019 appeal letter that equitable estoppel precludes CalPERS from recalculating her final compensation and retirement allowance. This argument was not persuasive. Equitable estoppel is not available to respondent Caramella because estoppel cannot be used to require payment of a larger pension than the law allows. 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* (2003) 112 Cal.App.4th 864, 870, as modified (Nov.4, 2003).) Additionally, in *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, the court declined to apply equitable estoppel to allow standby pay to be used in the formula for calculating a member's pensionable compensation because CalPERS was precluded by statute from doing so. Similar to *City of Pleasanton*, the Holiday Pay involved in this matter is an incorrectly-reported compensation which the relevant statutes and regulations under the PERL clearly do not allow.

9. Government Code section 20160, subdivision (b), requires CalPERS to correct any errors made by a contracting agency. Government Code section 20163 provides that "[a]djustments 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." Under these circumstances, CalPERS properly excluded respondent Caramella's Holiday Pay in lump sum amounts, recalculated her retirement allowance based on her Holiday Pay in periodic amounts as it was earned, and determined that respondent Caramella owed $4,945.16 in overpayment. Given that respondent Caramella has already paid the

overpayment in full, an order for payment is not necessary and will not be included in the Order below.

ORDER

1. Respondent Katherine Caramella's appeal is denied. CalPERS correctly determined that respondent Caramella's Holiday Pay in lump sum amounts cannot be included in the calculation of respondent Caramella's final compensation.

2. CalPERS' determination that respondent Caramella owed $4,945.16 in overpayment due to the incorrect reporting of Holiday Pay is upheld.

DATE: September 6, 2019

DocuSigned by:

Ji-Lan Zang

JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings