ATTACHMENT A

THE PROPOSED DECISION

ATTACHMENT A

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

In the Matter of the Appeal Regarding the Fair Labor Standards Act Pay of:

APPLE VALLEY FIRE PROTECTION DISTRICT, Respondent

and

KENNETH M. SANDERS, Respondent

and

STEWART E. DIETRO, Respondent

Case No. 2018-0684

OAH No. 2018120971

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on June 18, 2019, in San Bernardino, California.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Aug. 19, 2019

Charles Glauberman, Senior Attorney, represented complainant, Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS), State of California.

Isabel Safie, Attorney at Law, Best Best & Krieger, LLP, represented respondent Apple Valley Fire Protection District (AVFPD).

Kenneth M. Sanders, respondent, represented himself.

Stewart E. Dietro, respondent, represented himself.

Oral and documentary evidence was received. The record was held open for the parties to submit written closing arguments. The record was closed and the matter submitted for decision on July 17, 2019.

ISSUES

1. Did the AVFPD incorrectly report Fair Labor Standards Act (FLSA) premium pay for Mr. Sanders and Mr. Dietro to CalPERS thereby inflating the final compensation amount used to determine their monthly retirement allowance?

2. Is CalPERS entitled to collect the overpayments made to Mr. Sanders and Mr. Dietro, and Mr. Dietro's community property payee, as a result of the incorrect reporting?

SUMMARY

Under federal law, when a person works beyond the hours in their normal work week, under applicable circumstances, they are entitled under the FLSA to be paid

"time and a half" pay, or one and a half times their normal rate of pay for the hours worked in excess of the normal work week. In the case of Mr. Sanders and Mr. Dietro, it was not disputed that each worked three hours of FLSA time per week. In that respect, under federal law, they were entitled to three hours of FLSA premium pay, or, one and one half times their normal pay rate, for each of those three hours.

However, for purposes of reporting FLSA premium pay as special compensation under state law, the only portion of FLSA premium pay that qualifies as special compensation is the half time for each of the three hours of FLSA time worked. Put another way, the half-time is the only portion of the FLSA premium pay that is beyond their normal pay rate. The AVFPD incorrectly reported FLSA premium pay earned by Mr. Sanders and Mr. Dietro by reporting all pay earned during the three hours each week as FLSA premium pay at the time and a half rate, rather than just the half time rate, thereby inflating the final compensation amount used to determine the monthly retirement allowance to be paid to each upon retirement.

Following an audit of the AVFPD's reporting practices, CalPERS promptly discovered the errors; corrected the final compensation amounts for Mr. Sanders and Mr. Dietro; adjusted their monthly retirement allowance amounts; and sought to collect the overpayments made to Mr. Sanders, Mr. Dietro, and Mr. Dietro's community property payee as a result of the incorrect reporting.

CalPERS is within its' rights under applicable law, and is, in fact, obligated, to recalculate the final compensation for Mr. Sanders and Mr. Dietro; adjust the monthly retirement allowances to be paid to Mr. Sanders and Mr. Dietro; and collect the overpayments made to them prior to discovery of the incorrect reporting. CalPERS is not entitled to recover any overpayment made to Mr. Dietro's community property

payee, as that person was not a party to this matter, and no evidence supported the collection of any overpayment.

Background

1. The AVFPD is a public agency that contracts with CalPERS to provide retirement benefits for local fire safety employees. By virtue of his employment, Mr. Sanders became a CalPERS member on November 26, 1987; Mr. Dietro became a CalPERS member on January 1, 1985.

2. On October 28, 2015, Mr. Sanders signed an application for service retirement with CalPERS and retired on December 31, 2015, with 30.401 years of service credit. Mr. Sanders has been receiving his monthly retirement allowance since that date.

3. On April 18, 2016, Mr. Dietro signed an application for service retirement with CalPERS and retired on June 11, 2016, with 31.554 years of service credit. Mr. Dietro has been receiving his monthly retirement allowance since that date.

4. A member's service retirement allowance is calculated by applying a formula that involves the member's age at retirement, the member's years of service with CalPERS, and the member's "final compensation," which is defined as "the remuneration paid out of funds controlled by the employer in payment of the member's services performed during normal working hours or for the time during which the member is excused. . . ." (Gov. Code, § 20630.) By statute, "final compensation" is the employee's "payrate" and any "special compensation." (Gov. Code, § 20636.)

5. In approximately April 2016, CalPERS conducted an audit of the AVFPD and prepared a report. Among an error discovered was the incorrect reporting of FLSA premium pay to CalPERS. FLSA premium pay constitutes "special compensation" under the Public Employees' Retirement Law (PERL). The audit determined:

> The [AVFPD] incorrectly reported regular earnings and Fair Labor Standard Act (FLSA) premium pay for a full-time Fire Fighter and Paramedic whose normal work week was 56 hours . . . . The [AVFPD] paid and reported regular earnings at the straight time rate of pay for 53 hours and FLSA premium pay at time and a half for the three hours worked above 53-hours up to 56-hours. The [AVFPD] should have reported regular earnings at straight time the rate of pay for 56 hours and FLSA premium pay at half-time the rate of pay three hours each week. As a result, the [AVFPD] understated regular earnings and over reported special compensation each bi-weekly period. Government Code Section 20630(a) identifies compensation as payment for the member's services performed during normal working hours. Additionally, Government Code Section 20636(c)(6) and CCR Section 571(a) state the premium pay paid for the hours worked within the normally scheduled working hours that are in excess of the statutory minimum work week shall be included as special compensation.

6. On May 14, 2018, CalPERS sent a letter to the AVFPD advising it of the audit results, and requesting that the AVFPD stop incorrectly reporting FLSA premium

pay as noted above. The AVFPD disagreed with CalPERS that the manner in which it was reporting FLSA premium pay was incorrect.

7. On May 14, 2018, CalPERS sent letters to Mr. Sanders and Mr. Dietro regarding the audit results, and advising them that their final compensation would be recalculated, and their monthly retirement allowance adjusted downward.

Regarding Mr. Sanders, his final compensation, as a result of the corrected calculations, resulted in a reduction from $9,417.47 to $8,988.71. Therefore, his monthly retirement allowance would be reduced by $399.16, to $8,308.85 per month. Additionally, the overpayment that had been made to Mr. Sanders as a result of the incorrect calculations amounted to $10,890.85.

Regarding Mr. Dietro, his final compensation, as a result of the corrected calculations, resulted in a reduction from $7,905.99 to $7,563.25. Therefore, his monthly retirement allowance would be reduced by $183.70, to $5,575.54 per month. Additionally, the overpayment that had been made to Mr. Dietro as a result of the incorrect calculations amounted to $5,371.77 to him and $3,185.81 to his community property payee.

8. The AVFPD, Mr. Sanders, and Mr. Dietro timely sent letters to CalPERS appealing the determination that the AVFPD incorrectly reported FLSA premium pay, and contesting the changes to Mr. Sanders and Mr. Dietro's monthly retirement allowance, as well as the ability of CalPERS to collect the overpayments.

9. On December 21, 2018, complainant signed the Statement of Issues asserting that 1) FLSA premium pay was incorrectly reported by the AVFPD and should be excluded in the calculation of Mr. Sanders and Mr. Dietro's final compensation; and 2) CalPERS should be able to collect the $10,890.85 overpayment from Mr. Sanders;

and 3) CalPERS should be able to collect the $5,371.77 overpayment made to Mr. Dietro and $3,185.81 overpayment made to Mr. Dietro's community property payee[1] from Mr. Dietro.

FLSA Premium Pay as Special Compensation

10. California Code of Regulations, title 2, section 571, subdivision (a), exclusively identifies and defines special compensation items for members employed by contracting agencies, including the following:

> (5) STATUTORY ITEMS
>
> Fair Labor Standards Act (FLSA) - Compensation paid for normal full-time work schedule including premium pay required by FLSA. For example, a firefighter's normal work schedule is 56 hours per week. FLSA states premium pay must be paid on all hours worked above 53 hours per week up to what is considered normal for employees on a full-

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[1] Although it was alleged in the Statement of Issues, there were no documents provided to show how the calculation was reached with respect to the alleged overpayment to Mr. Dietro's "community property payee." A February 15, 2019, letter from CalPERS only made reference to the $5,371.77 overpayment to Mr. Dietro. Similarly, e-mails that contained charts showing extensive calculations made in connection with this matter showed the overpayments to Mr. Dietro but mentioned nothing about how the alleged $3,185.81 overpayment to the "community property payee" was calculated.

> time basis. In this example, the firefighter works 56 hours in a normal work week. Therefore compensation would be reported for 53 hours per week and FLSA premium pay would be reported for 3 hours per week. Any work performed above 56 hours per week would be considered overtime and would not be reported to PERS. . . .

11. Samuel Camacho is an Associate Governmental Program Analyst with CalPERS, and has worked at CalPERS since 2006. Mr. Camacho's testimony is summarized as follows: Mr. Camacho explained that there are two different types of compensation that go into a calculation of a member's compensation earnable, to help determine the member's monthly retirement allowance: normal base pay and special compensation.

In late 2015, CalPERS began an audit of the AVFPD's reporting practices. The audit report, which was released in April 2016, determined that the AVFPD was not properly reporting FLSA premium pay for firefighters. This included Mr. Sanders and Mr. Dietro. Specifically, Mr. Camacho explained that a firefighter's normal work week is 56 hours per week. For purposes of FLSA, which is a federal law, a firefighter must earn "time and a half" – or premium pay - for each hour worked over 53 hours per week.

Applicable law requires FLSA premium pay to be reported as special compensation to CalPERS under California Code of Regulations, title 2, section 571, subdivision (a). The AVFPD was reporting the entire three-hour period of FLSA pay as special compensation at a rate of time and a half, which was incorrect. While three hours per week of their normal work week did constitute FLSA premium pay under federal law, which required Mr. Sanders and Mr. Dietro to be paid time and a half, the

only portion of the pay rate for each of those three hours that was a premium for purposes of reporting special compensation was the half time.

To illustrate, Mr. Camacho gave the following example: A normal employee works a 40-hour work week. As a result, if a normal employee works 42 hours in a work week, that employee must be paid FLSA premium pay at a pay rate of time and a half for the extra two hours beyond 40 hours worked. However, for purposes of reporting special compensation under state law, the only portion of the two hours of FLSA premium pay that should be reported as special compensation is the half time rate. It is crucial to report the correct special compensation because that special compensation enhances a person's retirement benefits.

Mr. Camacho explained that because Mr. Sanders and Mr. Dietro's FLSA premium pay was reported as special compensation at a pay rate of time and a half for all three hours per week as opposed to just half time, it over-reported their special compensation. Thus, they are receiving benefits they are not entitled to, which is forbidden by the PERL.

Finally, Mr. Camacho referenced a manual published by CalPERS specifically designed to help agencies properly report compensation earnable, which is entitled the "Public Agency and Schools Procedures Manual" (2010 Manual). He noted that there is an example in the 2010 Manual that explains precisely how to report FLSA premium pay. The 2010 Manual reads:

> The FLSA determines at what point premium pay must be paid to employees. However, "premium pay" time under the FLSA is not the same as overtime as defined by the [PERL]
>
> . . . .

> For reporting purposes to CalPERS, keep in mind you need to report all compensation that is paid for normal full-time service. When reporting "premium pay" (as defined by FLSA) care must be taken not to disturb the pay rate/earnings relationship so the member will receive the correct service credit.
>
> [¶] . . . [¶]
>
> The following example is based on a firefighter whose normal full-time work schedule is 56 hours per week. FLSA states that premium pay must be paid on all hours worked above 53 hours per week up to what is considered normal for employees on a full-time basis. In this example, compensation would be reported at "straight time" for the entire 112 hours in the bi-weekly pay period (56 hours per week) on the normal payroll entry, and FLSA premium pay (3 hours of "half-time" pay) based on the 6 hours in the bi-weekly pay period (3 hours per week) would be reported in a second entry as special compensation. . . .

Mr. Camacho does not disagree that California Code of Regulations, title 2, section 571, subdivision (a), is not as clear as the explanation in the 2010 Manual with respect to the reporting of FLSA premium pay, but nonetheless, stated it is the correct manner in which to report FLSA premium pay.

Evidence Presented by Respondents

12. Kimberly Lopez is a secretary with the AVFPD. Ms. Lopez testified at the hearing. Her testimony is summarized as follows: When she learned how to report FLSA premium pay as special compensation, the example set forth in California Code of Regulations, title 2, section 571, subdivision (a) is "exactly" their situation. Safety employees work a 56-hour work week, and so three hours of that work week is FLSA premium pay. Thus, she was taught to report 53 hours of "straight time" pay to CalPERS, and three hours of FLSA premium pay at a rate of "time and a half."

13. Rose Marie Garrison is an administrative services manager with the AVFPD. Ms. Garrison testified at the hearing. Her testimony is summarized as follows: Part of her duties include handling payroll. She believed the CalPERS audit of the AVFPD began in November 2015. She believed all reporting to CalPERS by the AVFPD had been done correctly.

14. Mr. Sanders and Mr. Dietro submitted written statements in lieu of testimony that were substantially similar to each other. Generally, the statements cited California Code of Regulations, title 2, section 571, subdivision (a)(5), and expressed the conclusion that the AVFPD properly reported the FLSA premium pay for each of the three hours per week of their regular 56-hour work week.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The management and administration of CalPERS is vested in the Board of Administration (board). (Gov. Code, § 20120.)

2. Article XVI, section 17, subdivision (a), of the California Constitution provides in part:

> The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

3. The board, subject to applicable law and regulations, shall determine and may modify benefits for service and disability retirement benefits. (Gov. Code, § 20123.)

4. The Constitution imposes on CalPERS a duty to '"ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland v. Public Employees' Retirement System* (2002), 95 Cal.App.4th 29, 46 (cited with approval in *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 544.) But, "[CalPERS's] fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. [CalPERS] has a duty to follow the law." (*Ibid.*)

5. Members of CalPERS, once vested, participate in a defined benefit retirement plan that provides a monthly retirement allowance under a formula comprising factors such as final compensation, service credit (i.e., the credited years of

employment), and a per-service-year multiplier. The retirement allowance consists of an annuity (funded by member contributions deducted from the member's paycheck and interest thereon) and a pension (funded by employer contributions and which must be sufficient, when added to the annuity, to satisfy the amount specified in the benefit formula). (*In re Marriage of Sonne* (2010) 185 Cal.App.4th 1564, 1568.) The determination of what benefits and items of pay constitute compensation is crucial to the computation of an employee's ultimate pension benefits. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.)

6. "Under PERL, the determination of what benefits and items of pay constitute 'compensation' is crucial to the computation of an employee's ultimate pension benefits." (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.)

7. Government Code section 20160, provides:

> (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. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

8. Government Code section 20163, subdivision (a), provides:

(a) If more or less than the correct amount of contribution required of members, the state, or any contracting agency, is paid, proper adjustment shall be made in connection with

subsequent payments, or the adjustments may be made by direct cash payments between the member, state, or contracting agency concerned and the board or by adjustment of the employer's rate of contribution. Adjustments to correct any other errors in payments to or by the board, including adjustments of contributions, with interest, that are found to be erroneous as the result of corrections of dates of birth, may be made in the same manner. 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. Losses or gains resulting from error in amounts within the limits set by the Department of General Services for automatic writeoff, and losses or gains in greater amounts specifically approved for writeoff by the Department of General Services, shall be debited or credited, as the case may be, to the reserve against deficiencies in interest earned in other years, losses under investments, and other contingencies.

No adjustment shall be made because less than the correct amount of normal contributions was paid by a member if the board finds that the error was not known to the member and was not the result of erroneous information provided by him or her to this system or to his or her

employer. The failure to adjust shall not preclude action under Section 20160 correcting the date upon which the person became a member.

(c) The actuarial equivalent under this section shall be computed on the basis of the mortality tables and actuarial interest rate in effect under this system on December 1, 1970, for retirements effective through December 31, 1979. Commencing with retirements effective January 1, 1980, and at corresponding 10-year intervals thereafter, or more frequently at the board's discretion, the board shall change the basis for calculating actuarial equivalents under this article to agree with the interest rate and mortality tables in effect at the commencement of each 10-year or succeeding interval.

9. Government Code section 20164, subdivision (b), provides:

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.

10. Government Code section 20630 provides:

(a) As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of any of the following:

(1) Holidays.

(2) Sick leave.

(3) Industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code, Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or Section 44043 or 87042 of the Education Code.

(4) Vacation.

(5) Compensatory time off.

(6) Leave of absence.

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with

Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.

11. Government Code section 20636 provides:

(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).

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

(A) Participation in a deferred compensation plan.

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

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

(D) Participation in a flexible benefits program.

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

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

(c) (1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

(2) Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be

limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e).

(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall do all of the following:

(A) Identify the pay period in which the special compensation was earned.

(B) Identify each item of special compensation and the category under which that item is listed, as described in regulations promulgated by the board pursuant to paragraph (6), for example, the item of Uniform Allowance would be reported under the category of Statutory Items.

(C) Report each item of special compensation separately from payrate.

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

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

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 and following of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

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

(A) Final settlement pay.

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

(C) 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. A single employee is not a group or class.

(2) Increases in compensation earnable granted to an 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 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. . . .

12. California Code of Regulations, title 2, section 571, provides in part:

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

[¶] . . . [¶]

(5) STATUTORY ITEMS

Fair Labor Standards Act (FLSA) - Compensation paid for normal full-time work schedule including premium pay required by FLSA. For example, a firefighter's normal work schedule is 56 hours per week. FLSA states premium pay must be paid on all hours worked above 53 hours per week up to what is considered normal for employees on a full-time basis. In this example, the firefighter works 56 hours in a normal work week. Therefore compensation would be reported for 53 hours per week and FLSA premium pay would be reported for 3 hours per week. Any work performed above 56 hours per week would be considered overtime and would not be reported to PERS. . . .

(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.

Burden and Standard of Proof

13. Government Code section 20160, subdivision (d), provides that the party seeking to avail themselves of the correction provisions set forth in Section 20160 has the burden of showing right to a correction. It does not specify a standard of proof. In

this matter, CalPERS seeks to use Section 20160 to change the retirement benefits being paid out to Mr. Sanders and Mr. Dietro as a result of incorrectly reported FLSA premium pay by the AVFPD, and collect overpayments made based on those mistaken calculations from Mr. Sanders and Mr. Dietro. Accordingly, CalPERS, as the party seeking to rely on Section 20160 to correct mistakes and thereby alter future retirement benefit payments to Mr. Sanders and Mr. Dietro and collect overpayments, has the burden of proving the right to do so by a preponderance of the evidence. (Gov. Code, § 20160, subd. (d); Evid. Code, §§ 115, 500.)

Evaluation

CALPERS IS ENTITLED TO CORRECT MISTAKES

14. Pension legislation should be liberally construed and all ambiguities should be resolved in favor of the pensioner. (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 473.) "However, this rule of liberal construction is applied for the purpose of effectuating obvious legislative intent and should not blindly be followed so as to eradicate the clear language and purpose of the statute." (*Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1603.

While interpretation of a statute or regulation is ultimately a question of law, an administrative agency's interpretation of a statute or regulation involving its area of expertise is entitled to great deference, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1567, citing *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, 1104.)

Again, California Code of Regulations, title 2, section 571, subdivision (a)(5), provides:

> Compensation paid for normal full-time work schedule including premium pay required by FLSA. For example, a firefighter's normal work schedule is 56 hours per week. FLSA states premium pay must be paid on all hours worked above 53 hours per week up to what is considered normal for employees on a full-time basis. In this example, the firefighter works 56 hours in a normal work week. Therefore compensation would be reported for 53 hours per week and FLSA premium pay would be reported for 3 hours per week. Any work performed above 56 hours per week would be considered overtime and would not be reported to PERS.

CalPERS contends that the only portion of the pay rate that constitutes FLSA premium pay reportable as special compensation is the half-time for each of the three hours per week that Mr. Dietro and Mr. Sanders worked. The AVFPD contends that the regulation makes it clear that FLSA premium pay is to be reported for three hours per week. CalPERS's argument regarding its interpretation of Section 571, subdivision (a), is persuasive.

It is important to note that, while the regulation explains that FLSA premium pay is to be reported for each of the three hours per week, the regulation does not state anything about the pay *rate*. It is merely speaking of what hours constitute hours for which FLSA premium pay must be reported. For the definition of pay rate, one must look to statute.

Government Code section 20636, subdivision (b)(1), provides that "pay rate" for purposes of reporting compensation earnable means "the normal monthly rate of pay or base pay of the member" for services rendered on a full-time basis during "normal

working hours." Mr. Sanders and Mr. Dietro's "normal working hours" are 56 hours per week. Thus, their normal pay *rate* would be whatever the "straight time" pay rate is for the entire 56 hours worked. Consequently, the only portion of that pay *rate* that is premium, and that qualifies as special compensation, would be the half-time that exceeds the normal pay rate for each of the three FLSA hours worked per week. Thus, CalPERS's correctly concluded that the AVFPD over-reported the special compensation for Mr. Sanders and Mr. Dietro – a conclusion that is consistent with its 2010 Manual, regulation, and statute.

CalPERS relies on agencies to properly report compensation earnable for proper calculation of retirement benefits. CalPERS makes itself available to agencies should the agency have a question regarding how to properly report compensation earnable. CalPERS provides its 2010 Manual to employers for them to properly report compensation earnable. Similarly, members rely on agencies to properly report compensation earnable for proper calculation of retirement benefits. Members go to CalPERS, prior to retirement, to obtain a calculation of expected retirement benefits. It is an estimation based on the compensation reported and service years of the member. Members make the decision to retire in reliance on that projected estimation.

The Legislature, by enacting Government Code section 20160, clearly contemplated that, on occasion, errors would be made in the calculation of retirement benefits. Consequently, it set forth a procedure for the correction of those mistakes even after a member has retired in reliance on that calculation. In fact, Section 20160, subdivision (b), provides that the board "shall correct all actions taken as a result of errors or omissions" of any contracting agency. (*Ibid.*) Thus, the board is mandated to correct any errors in the AVFPD's reporting of special compensation for Mr. Sanders and Mr. Dietro. CalPERS conducted a timely audit after discovering irregularities in the

AVFPD reporting, and was entitled to correct the mistake in the calculation of Mr. Sanders and Mr. Dietro's final compensation amount, and thus their monthly retirement allowance amounts, under Government Code section 20160.

ESTOPPEL DOES NOT APPLY

15. Respondents collectively contend that CalPERS should be equitably estopped from collecting overpayments from Mr. Sanders and Mr. Dietro and adjusting the monthly retirement allowances of Mr. Sanders and Mr. Dietro. The elements of equitable estoppel are (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury; the detrimental reliance must be reasonable. (*Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1261.) Through no fault of CalPERS, the final compensation of Mr. Sanders and Mr. Dietro was erroneously calculated. Both Mr. Sanders and Mr. Dietro reasonably relied on the representations that their final compensation calculations and monthly retirement allowances would be a certain amount. Now that CalPERS seeks to collect the overpayments and reduce their monthly retirement allowances, it can be said that they have suffered injury. In these respects, the elements of estoppel are satisfied.

An additional requirement, however, applies in cases involving equitable estoppel against the government. In such cases, the court must weigh the policy concerns to determine whether the avoidance of injustice in the particular case justifies any adverse impact on public policy or the public interest. (*Schafer, supra, 237* Cal.App.4th at p. 1261.) In other words, even if the four elements of equitable estoppel are satisfied, the doctrine is inapplicable if the court determines that the avoidance of

injustice in the particular case does not justify the adverse impact on public policy or the public interest. (*Ibid.*)

In this case, it is in the public interest for CalPERS to be fiscally responsible – and accurate – in its administration of retirement benefits. It is also in the public interest to maintain the integrity of the retirement fund by avoiding erroneous overpayments. The precedential decision of *In re Henderson* (CalPERS Case No. 1558; OAH Case No. L-1997120250; November 18, 1998) explained the sound public policy against the application of estoppel in retirement benefit cases:

> CalPERS is not estopped from paying respondent only that which it is statutorily authorized to pay. It is not estopped from reducing his retirement allowance from an incorrect amount to a correct amount. Respondent has established the traditional elements of estoppel. However, judging the facts against the statutory and decisional law, estoppel is not established against CalPERS because to do so would violate a strong public policy.
>
> The Board owes a fiduciary duty of trustee to a trust fund and its beneficiaries. It cannot ignore a mistake that benefits one person any more than it can refuse to correct one that inures to its benefit.
>
> 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' costs of providing benefits. To allow respondent to have a lifetime of higher retirement allowance than permitted by the statutory formula would result in . . . 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 on 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.

The same reasoning applies here. To prevent CalPERS from correcting the mistake in Mr. Sanders and Mr. Dietro's final compensation calculation that resulted from the AVFPD's incorrect reporting of FLSA premium pay would be to confer a lifetime windfall on Mr. Sanders and Mr. Dietro and permit a monthly retirement allowance to be paid that neither Mr. Sanders nor Mr. Dietro is entitled to receive under applicable law. Therefore, estoppel does not apply.

Conclusion

16. The AVFPD incorrectly reported the FLSA premium pay, which constitutes special compensation, for Mr. Sanders and Mr. Dietro, resulting in an inflated final compensation. CalPERS is entitled to correct the mistaken reporting, as it did

consistent with the discussion above, and adjust the final compensation and monthly retirement allowances of Mr. Sanders and Mr. Dietro.[2]

17. CalPERS is entitled to collect $10,890.85 overpayment from Mr. Sanders.

18. CalPERS is entitled to collect the $5,371.77 in overpayment from Mr. Dietro. CalPERS is not entitled to collect the $3,185.81 in overpayment made to Mr. Dietro's community property payee as that person was not a party to this action and the overpayments did not go to Mr. Dietro. Further, there was no evidence regarding how the $3,185.81 in overpayments were calculated, so there is no basis to order repayment.

ORDER

1. CalPERS is entitled to correct the mistaken reporting of FLSA premium pay by the AVFPD consistent with this decision and adjust the final compensation and monthly retirement allowances of respondent Kenneth M. Sanders to $8,308.85 per month and Stewart E. Dietro to $5,575.54 per month.

2. CalPERS is entitled to collect $10,890.85 in overpayment from respondent Kenneth M. Sanders.

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[2] Under Section 20164, subdivision (b)(1), CalPERS's right to collect overpayment expires three years from the time of the payment. All of the payments to Mr. Sanders and Mr. Dietro in excess of what they were entitled were made within three years of the May 14, 2018, letter notifying them that CalPERS was reducing their monthly benefit and seeking collection of the over-payment.

3. CalPERS is entitled to collect $5,371.77 in overpayment from respondent Stewart E. Dietro.

4. CalPERS is not entitled to collect $3,185.81 in overpayment to respondent Stewart E. Dietro's unnamed community property payee.

DATE: August 16, 2019

DocuSigned by:
Kimberly Belvedere
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KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings