

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:**

ESMERALDA MONDRAGON

and

CALISTOGA JOINT UNIFIED SCHOOL DISTRICT,

Respondents.

Agency Case No. 2018-0518

OAH No. 2019010651

PROPOSED DECISION

Karen Reichmann, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 20, 2019, in Santa Rosa, California.

Charles H. Glauberman, Senior Attorney, represented the California Public Employees' Retirement System.

Barry J. Bennett, Attorney at Law, represented respondent Esmeralda Mondragon, who was present throughout the hearing.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Nov. 20, 2019
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No appearance was made by or on behalf of the Calistoga Joint Unified School District.

The record remained open for the filing of closing briefs. Respondent's brief was timely filed and marked as respondent's exhibit 63. CalPERS's brief was timely filed and marked as CalPERS's exhibit 133.

Respondent's reply brief was timely filed on October 25, 2019, and marked as exhibit 64. Attached to the brief was a declaration and an attachment, which have been marked for identification as exhibit 65.

On October 28, 2019, CalPERS filed an objection to exhibit 65. The objection is sustained, and exhibit 65 was not admitted into the record and was not considered.

The record was deemed submitted for decision on October 25, 2019.

ISSUES

I. Did CalPERS err by excluding from its calculation of respondent's final compensation payments made to respondent for: 1) Automobile/Allowance/Expenses; 2); Health and Welfare Allocation; 3) Refund; and 4) Academic Performance Index¹?

¹ The Statement of Issues also identified issues related to "overtime pay" and "vacation cashouts." Respondent is not contending that these items should be included in her final compensation, so these issues will not be addressed this proposed decision.

II. Did CalPERS err in calculating respondent's final compensation at \$17,042.25, for purposes of determining her retirement allowance?

FACTUAL FINDINGS

Introduction

1. Respondent Esmeralda Mondragon (respondent) was employed by respondent Calistoga Joint Unified School District (District) as its superintendent from 2009 to 2017. Respondent is a school miscellaneous member of CalPERS. The District is a small school district in Napa County serving 925 students. The superintendent reports to the School Board (Board) and is not part of a bargaining unit.

2. Respondent submitted an application for service retirement on May 6, 2017, with an effective retirement date of August 3, 2017.

3. Respondent's application was referred to the CalPERS Compensation Compliance & Review Unit. CalPERS determined that the payrate reported by the employer was not on a publicly available pay schedule, which triggered further analysis to determine the appropriate creditable compensation to be used in determining respondent's retirement allowance.

CalPERS contacted the District and asked for documentation. CalPERS received documents and responses to queries from the District's Director of Human Resources and Payroll, John Mauro. CalPERS notified the District of its preliminary determination on September 5, 2017, and the District provided additional information. Respondent apparently received the preliminary determination as well, and recommended that CalPERS also contact Kelly Bucy, the Director of Fiscal Services for the Napa County

Office of Education. CalPERS did so and additional information was received and taken into consideration.

4. On November 13, 2017, CalPERS made its determination of respondent's final compensation as \$17,042.25 monthly for her highest compensation period, July 1, 2016 through June 30, 2017. The calculation was based on a determination that the compensation reported by the District to CalPERS during respondent's employment tenure included compensation which should not have been included in the calculation of respondent's final compensation.

5. Respondent filed an appeal. She contends that the District erred in determining her final compensation, and asserts that her final compensation should be calculated as \$21,540.83 monthly, based on the what she earned during her final year of employment with the District.

Respondent's Salary History

2009 CONTRACT

6. Respondent was hired in 2009. Her original contract ran from July 1, 2009 through June 30, 2012. The contract provided for salary of \$172,500 per year. (\$14,375 per month.) The contract also provided an additional \$400 monthly allowance for automobile costs. In October 2010, the District began paying respondent \$631 monthly for health care costs.

7. The contract provided for a pay increase up to 3%, to be applied to respondent's annual salary, if the schools in the District "meet or exceed" certain standards of the California Annual Performance Index (API).

The schools met the API standards, and a “retroactive salary adjustment” in the amount of \$5,175 – reflecting 3% of salary – was made to respondent for the 2009-2010 school year.

8. Respondent received API increases for the next three school years. In each case, the District gave respondent a retroactive salary increase to the beginning of the school year, which became a permanent salary increase.

2011 Addendum

9. In June 2011, the Calistoga School Board adopted an addendum to the original contract. The addendum applied to the 2010-2011 school year. The addendum provided for a one-time 1.75% off-salary-schedule payment, and authorized her to work five extra days each year, for extra pay at her current daily rate. The one-time 1.75% payment was made to all employee groups in the District.

2012 Addendum/Contract Extension

10. In 2012, respondent entered into an addendum to the contract, which extended the contract for three years. The addendum provided for a 2% salary increase retroactive to July 1, 2011. Respondent received another 2% salary increase in 2012, which was not supported by a contract addendum.

2013 Addendum

11. In June 2014, respondent and the District entered into an addendum, which gave her a salary increase of 3% retroactive to July 1, 2013. The automobile allowance was increased to \$650 per month. The addendum stated that if any of the District’s bargaining units were to receive an increase of pay greater than 3%,

respondent would receive a corresponding pay increase. Respondent received a 4.09% increase in light of this provision.

2014 Addendum

12. A second addendum adopted in June 2014 provided that respondent would receive another 3% raise effective July 1, 2014.

2014 Contract

13. Respondent entered into a new three-year employment contract with the District on December 8, 2014. This contract increased her salary to \$235,168 (\$19,597.33 per month), retroactive to July 1, 2014.

Evidence provided by the District established that \$7,800 of the new annual salary amount was intended by the Board to substitute for the prior automobile allowance, which was discontinued. \$7,572 of the new annual salary was intended to substitute for the prior health care allocation, which was discontinued.

2015 FSA Refund

14. In February 2015, respondent received a \$500 payment for an overpayment made to respondent's flexible spending account. This payment was then reported by the District to CalPERS as creditable compensation.

2015 Addendum

15. In June 2015, respondent and the District entered into an addendum which provided a 3% salary increase, effective July 1, 2015. The addendum provided that if any bargaining unit received an increase of more than 3%, respondent would receive a corresponding increase.

2016 Salary Increases

16. On May 9, 2016, the Board approved a 1.67% salary increase, retroactive to July 1, 2015, for all employees, and a 4.67% salary increase starting July 1, 2016, for all employees.

CalPERS's Determination of Final Compensation

17. CalPERS employee Sara Fleming testified at hearing and explained CalPERS's final compensation analysis. Fleming explained that CalPERS conducted an in-depth analysis of respondent's compensation dating to her original employment with the District. Fleming was not the representative who performed the analysis and drafted the determination letter, but she conducted a review of respondent's file prior to the hearing.

During CalPERS's review process, CalPERS learned that the superintendent's salary was not included on a publicly available pay schedule, and further concluded that the superintendent position was not in any group or class. CalPERS did not use respondent's 2014 contract as a starting point in its analysis of respondent's payrate, because of its determination that the 2014 contract included non-creditable compensation. Instead, CalPERS went back to respondent's initial contract and worked forward, applying only salary increases which it deemed conformed with the Public Employees' Retirement Law.

Through its communications with the District and with respondent, CalPERS determined that the superintendent position was most closely aligned with the District's Classified Management group. CalPERS credited respondent's initial 2009 salary, plus all salary increases that were given to the Classified Management group during respondent's tenure. CalPERS was never made aware during its determination

review that there was a Certificated Management group at the District. Testimonial evidence at hearing established that this group consisted of the principals and vice-principals at the schools, and that these individuals were also eligible to receive API awards. There were no written labor policies or agreements pertaining to the Certificated Management group entered into evidence.

18. CalPERS did not include any of respondent's API salary increases in its calculation of respondent's final compensation, for a number of reasons, including that the increases were not given to Classified Management employees, that the increases did not qualify as "bonuses" because they were not for superior performance, that the compensation did not conform with regulatory requirements, and that it constituted "final settlement" pay.

19. CalPERS did not credit the off salary schedule payment referenced in the 2011 addendum. CalPERS did not credit this item because it was not reported to CalPERS separately as special compensation.

20. CalPERS determined that the \$500 FSA refund item should not have been reported as payrate, and it was not included in CalPERS's final compensation determination.

21. In reaching its determination, CalPERS excluded the \$7,572 which was added to respondent's salary to replace the former health care allowance, and the \$7,800 which was added to respondent's salary to replace the former automobile allowance.

LEGAL CONCLUSIONS

1. The burden of proof is on the applicant to prove entitlement to a retirement benefit. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; *Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54, 57.) Respondent's assertion to the contrary is rejected.

2. A member's retirement benefit is calculated based in part on the final compensation, also referred to as compensation earnable. In determining final compensation, CalPERS applies the Public Employees' Retirement Law (Government Code section 20000 et seq.) and related regulations.

3. Government Code section 20636.1, subdivision (a), provides that compensation earnable by a school member such as respondent is based solely on base payrate and qualifying special compensation. Not all compensation lawfully paid to a member qualifies as compensation earnable.

4. Respondent contends that her entire final monthly compensation of \$21,540.83 qualifies as compensation earnable, and challenges CalPERS's calculation of \$17,042.25.

Payrate

5. "Payrate" is defined in Government Code section 20636.1, subdivision (b) 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 . . . '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 a publicly available pay schedules . . ."

6. California Code of Regulations, title 2, section 570.5, subdivision (a), defines the requirements for a "publicly available pay schedule." California Code of Regulations, title 2, section 570.5, subdivision (b), provides that when an employer has failed to meet the requirements for a publicly available pay schedule, the Board, in its sole discretion, may determine the amount to be considered payrate, taking into account all relevant information. Because respondent's payrate was not on a publicly available pay schedule, section 570.5, subdivision (b), applies. It was therefore in CalPERS's discretion to determine an amount to be considered payrate. CalPERS did not abuse its discretion in basing its calculation of payrate on respondent's initial salary and all salary increases given to the Classified Management group, which could be supported by adequate documentation. The District did not assert during CalPERS's review process that respondent should be considered a member of the Certificated Management group. Respondent's contention that CalPERS must treat her as a member of the Certificated Management group and credit her for all payments made to this group was not persuasive.

7. CalPERS did not abuse its discretion by not crediting an increase in salary made in replacement of the former automobile allowance and health care allowance as part of her payrate. The evidence established that the automobile allowance and health care allowance were previously paid to respondent separately as non-creditable compensation, but later rolled into her salary in the 2014 contract. Without benefit of a publicly available pay schedule, CalPERS was entitled to consider respondent's salary history and the apparent intent of the parties and to exclude this compensation from its calculation of respondent's final compensation.

Special Compensation

8. Respondent asserts that the payments she received for achieving API goals should be considered creditable as special compensation. Government Code section 20636.1, subdivision (c)(1), defines special compensation as "payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions." If an individual is not a member of a group or class, special compensation will be limited to that which is received by similarly situated members in the closest related group or class. Government Code section 20636.1, subdivision (c)(3)(C), provides that special compensation must be reported by the employer separately from payrate.

9. 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 numerous requirements that all items of special compensation must meet in order to be included in a member's final compensation. All special compensation items must be contained in a written labor policy or agreement, be duly approved by the employer's governing body in accordance with public meetings laws, indicate the conditions for payment of the items, be posted at the office of the employer or immediately accessible and available for public review from the employer or posted on the employer's website, indicate an effective date and date of any revisions, be maintained for inspection for not less than five years, must not reference another document in lieu of disclosing the item of special compensation, must be available to all members of a group or class, must not be paid exclusively in the final compensation period, and must not constitute final settlement pay. (Cal. Code Regs., tit. 2, § 571, subd. (b).)

10. "Bonus" pay can be an item of special compensation. It is defined as "Compensation to employees for superior performance such as 'annual performance bonus' and 'merit pay' . . . A program or system must be in place to plan and identify performance goals and objectives." (Cal. Code Regs., tit. 2, § 571, subd. (a).) CalPERS argues that the API awards do not qualify as bonus pay because they were premised on the District's schools merely meeting state standards, which would not reflect superior performance. There was no evidence to establish how many schools statewide met API standards or to establish the District's schools' history of meeting API standards. CalPERS's argument that an award for meeting API standards can never be considered as "bonus" special compensation is rejected.

11. Respondent contends that she meets the criteria for receiving special compensation for the API awards, because she was a member of, or closely related to, the Certificated Management group, whose members also received the API awards. The evidence was insufficient to establish that the awards were available to all Certificated Management employees during the years she received them. However, even assuming that respondent should be considered a member of the Certificated Management group, and even assuming that all members of the group received API awards, the evidence failed to establish that the API awards satisfied the requirements of California Code of Regulations, title 2, section 571, subdivision (b). There was no evidence of any written labor policy or agreement establishing the availability of the API award to any group or class, or that the existence of the API awards was publicly available. In addition, the API payments were folded into respondent's salary, and were not reported to CalPERS separately as special compensation, in violation of Government Code section 20636.1, subdivision (c)(3)(C). CalPERS did not err in declining to include the API awards in its calculation of respondent's final compensation.

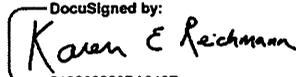
12. As set forth in Finding 9, CalPERS did not credit a 1.75% off salary schedule payment which was applied to the 2010-2011 school year. Such payments can be credited as special compensation pursuant to California Code of Regulations, title 2, section 571, subdivision (a). However, such payments must be reported to CalPERS as off salary schedule pay, pursuant to Government Code section 20636.1, subdivision (c)(3)(C). The District failed to do so. Accordingly, CalPERS did not err in excluding the 1.75% off salary schedule payment in the calculation of respondent's final compensation.

13. Respondent did not establish that her final compensation should include compensation paid to her as a substitution for previously paid car and health care allowances. Respondent did not establish that the \$500 FSA refund should be included in the calculation of her final compensation. Respondent did not establish that the API salary increases should be included in the calculation of her final compensation. Respondent did not establish that CalPERS erred in calculating her final compensation as \$17,042.25, for purposes of determining her retirement allowance.

ORDER

The appeal of respondent Esmeralda Mondragon is denied.

DATE: November 25, 2019

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KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings