

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Calculation of Final Compensation for:

MICHAEL C. GLAZE, Respondent

CalPERS No. 2017-1218

OAH No. 2018041142

PROPOSED DECISION

Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on September 26, 2019, in Sacramento, California.

California Public Employees' Retirement System (CalPERS) was represented by Preet Kaur, Senior Staff Counsel.

Michael C. Glaze (respondent/applicant) was represented by Sara M. Knowles, Attorney at Law, Leland, Morrissey, and Knowles.

South Feather Water and Power Agency (SFWPA) (respondent/employer) was represented by Emily E. LaMoe, Attorney at Law, Law Offices of Minasian, Meith, Soares, Sexton and Cooper LLP.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED January 20, 2020
K. P. [Signature]

The parties appeared for hearing, and agreed there were no factual issues in dispute. A briefing schedule was set to address the legal issues. On October 24, 2019, respondent SFWPA submitted a closing brief, marked Exhibit F1, and respondent Glaze submitted a closing brief, marked Exhibit F2. On November 21, 2019, CalPERS submitted a closing brief, marked Exhibit 35. On December 19, 2019, respondent SFWPA submitted a reply brief, marked Exhibit G1, and respondent Glaze submitted a closing brief, marked Exhibit G2. The matter was submitted for decision on December 19, 2019.

ISSUE

Did CalPERS correctly identify respondent Glaze's payrate and increases, from August 2008 through January 2017, to calculate his final compensation and monthly retirement allowance?

FACTUAL FINDINGS

The Parties

1. CalPERS is a retirement system created by statute for the purpose of administering retirement, disability, and death benefits for California state employees in accordance with the provisions of Public Employees' Retirement Law (PERL) (Government Code¹ section 20000 et al.) It also provides such services to employees of other governmental entities that choose to participate in the CalPERS pension system

¹ All further references are to the Government Code, unless otherwise specified.

by contract. (§ 20460.) Retirement benefits are provided under defined benefit plans. The benefit plans are funded by contributions: a member's contribution is determined by applying a fixed percentage to the member's compensation; and a public agency's contribution is determined by applying a contribution rate to the agency's payroll. Using certain actuarial assumptions, the CalPERS Board of Administration sets employer contribution rates on an annual basis.

2. Respondent SFWPA is a California irrigation district. It provides water service to the communities of Oroville, Palermo, and Bangor in southeast Butte County, and operates the South Feather Power Project, a hydropower project. SFWPA is a public agency, governed by a five-member board of directors (Board). On June 24, 2008, SFWPA contracted with CalPERS for the provision of retirement benefits to eligible employees under the PERL. The SFWPA/CalPERS contract was last amended on July 24, 2012.

3. Respondent Glaze worked as the General Manager (GM) of SFWPA from November 1992 through January 2017. By virtue of his employment, respondent Glaze was a local miscellaneous member of CalPERS. On November 23, 2016, respondent Glaze submitted an application to CalPERS for a service retirement, with an effective date of January 28, 2017. Respondent Glaze has been receiving retirement benefits since January 28, 2017, with his monthly retirement allowance calculated by CalPERS.

Employment and Salary

4. The GM is the Chief Executive Officer of SFWPA, supervising all operating divisions. The GM is appointed by, and serves as Secretary to the Board. In 1992, the Board appointed respondent Glaze as the GM of SFWPA, creating a contractual employment agreement (Agreement) with specific terms and conditions applicable to

respondent Glaze, alone. The 1992 Agreement was set on the Board's agenda for review and consideration, and copies of the Agreement were available to the public. The Board voted and adopted the Agreement in open session, and the Agreement was executed by respondent Glaze and the Board President. The 1992 Agreement provided respondent Glaze with a salary of \$73,000, with an annual cost-of-living adjustment (COLA) or three-percent increase, whichever is greater. An updated Agreement was signed in August 25, 2008 and April 22, 2014; the Board also adopted several salary amendments for respondent Glaze in the intervening years. Each year, SFWPA reported respondent Glaze's salary to the California State Controller's Office and to www.transparentcalifornia.com.

5. On June 28, 2008, SFWPA executed a contract with CalPERS, making its employees members of PERS. Between June 28, 2008 and January 28, 2017, SFWPA reported respondent Glaze's annual salary and increases as follows: June 28, 2008 to August, 23, 2008 - \$147,171, August 24, 2008 to September 5, 2009 - \$180,000 (22.3 percent increase), September 6, 2009 to August 21, 2010 - \$185,390.40 (3 percent increase), August 22, 2010 to August 20, 2011 - \$190,964.80 (3 percent increase), August 21, 2011 to August 18, 2012 - \$198,785.60 (4 percent increase), August 19, 2012 to August 17, 2013 - \$201,780.80 (1.5 percent increase), August 18, 2013 to April 12, 2014 - \$204,796.80 (1.5 percent increase), April 13, 2014 to October 11, 2014 - \$215,009.60 (5 percent increase), October 12, 2014 to August 15, 2015 - \$221,457.60 (3 percent increase), August 16, 2015 to August 13, 2016 - \$228,092.80 (3 percent increase), and August 14, 2016 to January 27, 2017 - \$234,936 (3 percent increase). SFWPA reported the following final compensation for respondent Glaze to CalPERS: January 28, 2016 to January 27, 2017 (1 year) - \$230,887.08/year or \$19,240.59/month, and January 28, 2014 to January 27, 2017 (3 years) - \$223,173.60/year or

\$18,597.80/month. Based on these figures, SFWPA calculated the monthly retirement allowance for respondent Glaze to be \$138,150.72/year or \$11,512.56/month.

Final Compensation by CalPERS

6. CalPERS rejected the final compensation amounts calculated by SFWPA for respondent Glaze, finding that respondent Glaze's reported payrates did not comply with sections 20630 and 20636 of the PERL, California Code of Regulations, title 2, section 570.5, and related case law, because: (1) they were not provided pursuant to a publically available pay schedule; and (2) the payrate increases were not available to other employees in the same group/class. CalPERS determined respondent Glaze's final compensation as follows: January 28, 2016 to January 27, 2017 (1 year) - \$206,512.68/year or \$17,209.39/month, and January 28, 2014 to January 27, 2017 (3 years) - \$205,172.76/year or \$17,097.73/month. Based on these figures, CalPERS calculated Glaze's monthly retirement allowance to be \$126,215.04/year or \$10,517.92/month.

7. To calculate the monthly allowance, CalPERS used respondent Glaze's payrate on June 28, 2008 (\$70.76/hour, \$11,321.60/month, or \$147,180.80/year), the date SFWPA contracted with CalPERS, and added the payrate increases provided to the group of employees in the SFWPA Management and Professional Employees Unit (MPEU). Using the MPEU percentage increases, CalPERS calculated respondent Glaze's payrate and increases as follows: June 28, 2008 to August 23, 2008 - \$147,171, August 24, 2008 to January 24, 2009 - \$152,443.20 (3.58 percent increase), January 25, 2009 to September 5, 2009 - \$160,076.80 (5 percent increase), September 6, 2009 to August 21, 2010 - \$164,923.20 (3 percent increase), August 22, 2010 to August 20, 2011 - \$169,832 (3 percent increase), August 21, 2011 to August 18, 2012 - \$193,606.40 (14 percent increase), August 19, 2012 to August 17, 2013 - \$201,364.80 (4 percent

increase), August 18, 2013 to April 12, 2014 - \$203,070.40 (0.85 percent increase), April 13, 2014 to August 15, 2015 - \$204,193.60 (0.55 percent increase), August 16, 2015 to August 13, 2016 - \$206,419.20 (1.1 percent increase), and August 14, 2016 to January 27, 2017 - \$206,648 (0.1 percent increase).

8. Respondents appealed CalPERS's determination. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings pursuant to section 11500 et seq.

Discussion

9. Respondent is a CalPERS member by virtue of the 2008 and 2012 contracts between his employer, SFWPA, and CalPERS. Upon retirement, a member is entitled to a retirement allowance based on the member's age, length of service, and "final compensation." "Final compensation" is the highest annual average "compensation earnable" by a member during a consecutive 12-month period of employment preceding the effective date of his or her retirement (§§ 20037, 20042.) CalPERS may review earnings reported by an employer to ensure that only those items allowed under the PERL are included as "final compensation" for purposes of calculating a retirement allowance.

10. Compensation earnable is the payrate combined with the special compensation of the member. (§ 20636, subd. (a).)

"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).

(§ 20636, subd. (b)(1).)

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

(§ 20636, subd. (c)(2).)

11. The PERL provides said limitations on compensation earnable, "preventing local agencies from artificially increasing a preferred employee's retirement benefits by providing the employee with compensation increases which are

not available to other similarly situated employees. (*Prentice v. Board of Administration (Prentice)* (2007) 157 Cal.App.4th 983, 993.) In *Prentice*, CalPERS precluded a salary increase not available to other employees in the same group/class. On appeal, the Court found the salary increase was not part of Prentice's payrate, because "the increase Prentice received was never part of a published pay schedule within the meaning of [Government Code] section 20636, subdivision (b)(1)." (*Prentice* at p. 994.) The Court also rejected the argument that disclosure of Prentice's full salary in the city's annual budget was sufficient to satisfy the statute.

[A]s we view the entire statutory scheme, the limitations on salary are designed to require that retirement benefits be based on the salary paid to similarly situated employees, [Cal]PERS acted properly in looking at the published salary range rather than the exceptional arrangement the city made with Prentice and reflected in the city's budget documents. The defect in Prentice's broad interpretation of 'pay schedule' is that it would permit an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees.

(*Id.* at p. 994.)

PUBLICALLY AVAILABLE PAY SCHEDULE

12. According to the California Code of Regulations, title 2, section 570.5, a pay schedule must meet the following requirements:

- (1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;
- (2) Identifies the position title for every employee position;
- (3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;
- (4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;
- (5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;
- (6) Indicates an effective date and date of any revisions;
- (7) Is retained by the employer and available for public inspection for not less than five years; and
- (8) Does not reference another document in lieu of disclosing the payrate.

13. In other words, a publically available pay schedule is a "written or printed list, catalog, or inventory of the rate of pay or base pay of one or more employees who are members of CalPERS," and not an individual's employment agreement. (*Tanner v.*

CalPERS (Tanner) (2016) 248 Cal.App.4th 743, 755.) In *Tanner*, the Court found that an increase in an employee's payrate in his final contract with the City of Vallejo did not qualify as compensation earnable, because it was not a part of a publically available pay schedule.

The only documents that list Tanner's salary as \$305,844 are his amended contract and the May 8, 2007 documents relating to his amended contract. [They] do not qualify as a pay schedule. These documents relate only to Tanner personally, without listing any other position or person.

14. The *Tanner* Court also dedicated an entire section of its decision to the legislative history for the term pay schedule.

The term pay schedule first appeared in the Public Employees' Retirement Law in 1993, . . . as part of a bill sponsored by CalPERS to address the then "recently uncovered, but apparently widely used, practice of 'spiking' (intentional inflation) the final 'compensation' (upon which retirement benefits are based) of employees of [Cal]PERS local contracting agencies." (Sen. Public Employment & Retirement Com., Analysis of Sen. Bill No. 53 (1993–1994 Reg. Sess.) as amended Mar. 16, 1993, p. 1.) The stated purpose . . . was to ensure that payrates would "be stable and predictable among all members of a group or class of employment" and that they would "be publicly noticed b[y] the governing body." (Sen. Public Employment &

Retirement Com., Analysis of Sen. Bill No. 53, supra, as amended Mar. 16, 1993. p. 5.)

15. In this case, SFWPA introduced three employment Agreements for respondent Glaze. However, SFWPA did not offer the statutorily required publically available pay schedule listing respondent Glaze or the GM position.

16. Without a publically available pay schedule,

[CalPERS], in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:

(1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;

(2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;

(3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;

(4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that

conforms with the requirements of subdivision (a) of a former CalPERS employer.

Here, in determining his final compensation, CalPERS used respondent Glaze's payrate on June 29, 2008, when SFWPA first contracted with CalPERS for pension coverage: \$70.76/hour, \$11,321.60/month, or \$147,180.80/year. Then, CaPERS applied the percentage increases in salary given to the MPEU from June 29, 2008, through January 28, 2017.

17. Respondents argue that California Code of Regulations, title 2, section 570.5, is inapplicable, because it became effective on August 10, 2011, after SFWPA had contracted with CalPERS. Respondents' argument lacks merit. California Code of Regulations, title 2, section 570.5 was adopted to clarify section 20636 (*Adams and the City of Bell*, Prec. Dec. 15-01 at p. 14, citing Notice of Proposed Regulatory Action, California Code of Regulations, title 2, section 570.5.) "If the amendment merely clarified existing law, no question of retroactivity is presented." (*McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 471-472.) Clarifying amendments have "no retroactive effect because the true meaning of the statute remains the same." (*Helga Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 922.)

PAY RATE INCREASES

18. Between June 29, 2008, and January 27, 2017, respondent Glaze received annual pay increases, which were voted on and approved by the Board, specific to him, and not available to any other SFWPA employee. In fact, SFWPA never included respondent Glaze in a group or class of employment, and "[a] single employee is not a group of class." (§ 20636, subd. (e)(1).)

19. "Payrate,' for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, . . . [is] subject to the limitations of paragraph (2) of subdivision (e)." (§ 20636, subd. (b)(1).) Section 20636, subdivision (e)(2) states:

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

SFWPA employs represented employees in four groups or classes: Management and Professional Employees Unit (MPEU), Clerical and Support Employees Unit (CSEU), Water Treatment and Distribution Employees Unit (WTDEU), and Hydropower Generation Employees Unit (HGEU). Respondent Glaze is most similarly situated to the MPEU group/class. The MPEU includes the following positions: Environmental and Safety Managers, Water Treatment Superintendents, Information Systems Managers, Special Project Managers, Water Division Managers, Power Division Managers, Water Resources Engineers, and Hydro-Operations Managers. CalPERS used the pay increases given to the MPEU, from June 29, 2008 to January 28, 2017, to calculate his compensation earnable and final compensation.

20. Considering the evidence as a whole, CalPERS correctly calculated respondent Glaze's compensation earnable, final compensation, and retirement

allowance, using the payrate increases provided to the MPEU. All other arguments and defenses raised have been considered and are rejected.

LEGAL CONCLUSIONS

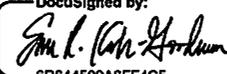
1. Respondents have the burden of proof in this matter because they have appealed an action by CalPERS. "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence" (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044.) In this case, respondents failed to meet their burden.

2. Based upon the factual findings as a whole, the CalPERS calculation of payrate, compensation earnable, and monthly retirement allowance for respondent Glaze should be affirmed.

ORDER

The CalPERS calculation of payrate, compensation earnable, and monthly retirement allowance for respondent Michael C. Glaze is AFFIRMED.

DATE: January 21, 2020

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ERIN R. KOCH-GOODMAN

Administrative Law Judge

Office of Administrative Hearings