

**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:**

**THOMAS S. BLANCO and CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION, Respondents**

**Agency Case No. 2020-1209**

**OAH Case No. 2021030825**

**PROPOSED DECISION**

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 15, 2021, from Sacramento, California.

John Shipley, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Lina Balciunas Cockrell, Attorney at Law, Messing Adam & Jasmine LLP, represented respondent Thomas S. Blanco (Blanco).

Matthew J. Peck, Attorney at Law, Hanson Bridgett LLP, represented respondent California Department of Corrections and Rehabilitation (CDCR).

Evidence was received and the record left open until January 31, 2022, for the parties to submit closing briefs. On December 10, 2021, CDCR filed its closing brief, marked as Exhibit U; on December 15, 2021, Blanco filed his closing brief, marked as Exhibit KK; on January 14, 2022, CalPERS filed its closing brief, marked as Exhibit 27; and on January 31, 2022, CDCR and Blanco filed their reply briefs, marked as Exhibits V and LL, respectively.

On January 31, 2022, Exhibits 27, U, V, KK, and LL were admitted as argument; the record was closed; and the matter was submitted for decision.

## **ISSUE**

Does Blanco's out-of-class (OOC) compensation paid exclusively in Blanco's final compensation period constitute special compensation that CalPERS must include in the calculation of Blanco's final compensation used to determine Blanco's service retirement allowance?

## FACTUAL FINDINGS

### Jurisdiction

1. Blanco was employed by CDCR from October 1986 through July 1, 2020. By virtue of that employment, Blanco was a pre-PEPRA<sup>1</sup> or classic state safety member of CalPERS.
2. On June 10, 2020, Blanco signed an application for service retirement. He retired for service effective July 1, 2020, with 26.040 years of service credit and has been receiving a retirement allowance since that date.
3. By letter dated August 21, 2020, CalPERS notified Blanco and CDCR that OOC compensation earned during Blanco's final compensation period, and reported to CalPERS by CDCR, was not eligible special compensation to be included in the calculation of Blanco's final compensation for retirement purposes pursuant to California Code of Regulations, title 2, section 571, subdivision (b)(7).<sup>2</sup> That determination resulted in Blanco receiving a lower service retirement allowance. Blanco and CDCR timely appealed CalPERS' determination.

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<sup>1</sup> PEPRA is an abbreviation for the California Public Employees' Pension Reform Act, which took effect in January 2013.

<sup>2</sup> The August 21, 2020 letter also outlined additional non-eligibility grounds. However, CalPERS stipulated on the record at hearing that the only ground for non-eligibility CalPERS continues to advance is the OOC compensation's failure to comply with California Code of Regulations, title 2, section 571, subdivision (b)(7).

4. On February 10, 2021, Renee Ostrander, in her official capacity as Chief of CalPERS' Employer Account Management Division, signed the Statement of Issues for the appeal. The matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

### **Blanco's CDCR Employment and Retirement**

5. The background facts are undisputed. For most of his CDCR career through retirement, Blanco worked as a Special Agent in CDCR's Office of Internal Affairs. However, from September 1, 2019, through February 23, 2020, CDCR lawfully appointed Blanco OOC to a Senior Special Agent position due to a vacancy in a critical supervisory position in the Office of Internal Affairs. Blanco performed the normally required work duties of his OOC position during the entirety of his OOC assignment.

6. Blanco earned additional OOC compensation<sup>3</sup> related to the OOC assignment. He had never previously been appointed OOC.

7. CDCR properly reported the OOC compensation as an item of special compensation to CalPERS at the time it was earned by Blanco. CalPERS member contributions were also deducted from Blanco's monthly paycheck for the OOC pay differential.

8. Blanco retired for service effective July 1, 2020. Thus, Blanco earned the OOC compensation related to his September 2019 through February 2020 OOC assignment during his final compensation period.

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<sup>3</sup> OOC compensation is sometimes also referred to as Temporary Upgrade Pay.

## Statutory and Regulatory Framework

9. Under the Public Employees' Retirement Law (PERL), the amount of an employee's service retirement allowance is generally determined by the employee's retirement age, credited service, and final compensation. (*Paxton v. Board of Admin.* (2019) 35 Cal.App.5th 553, 557 [*Paxton*].) Final compensation is a function of a classic member's highest "compensation earnable" during any 12-month period of employment, which in turn consists of the employee's "payrate" and "special compensation." (*Ibid.*) "Because 'payrate' and 'special compensation' are statutorily defined, an employee's pension will not necessarily reflect his total personal compensation." (*Ibid.*)<sup>4</sup>

10. Government Code section 20636, subdivision (c), provides that "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).) The Legislature directed CalPERS to "promulgate regulations that delineate more specifically and exclusively what constitutes 'special compensation' as used in this section." (*Id.*, subd. (c)(6).)

11. Government Code section 20636, subdivision (g)(3), states: "Notwithstanding subdivision (c), "special compensation" for *state members* shall mean all of the following: . . . (B) Compensation for performing normally required

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<sup>4</sup> Blanco's retirement age, credited service, and payrate are not at issue in this appeal.

duties, such as . . . out-of-class pay . . . .” (Gov. Code, § 20636, subd. (g)(3)(B) (emphasis added).)<sup>5</sup>

12. California Code of Regulations, title 2, section 571, subdivision (a), provides a list that “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 . . . .” That list includes premium pay, such as OOC pay. (Cal. Code Regs., tit. 2, § 571, subd. (a).) Subdivision (b) provides that items in subdivision (a) are subject to specific standards, including that they not be paid “exclusively in the final compensation period.” (*Id.*, subd. (b)(7).) Subdivision (c) states that “[o]nly 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).” (*Id.*, subd. (c).) Finally, subdivision (d) states that “[i]f 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.” (*Id.*, subd. (d).)

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<sup>5</sup> CalPERS’ unopposed request to take official notice, pursuant to Government Code section 11515 and Evidence Code section 452, subdivision (c), of post-hearing Exhibits 26, 26-1, and 26-2, the legislative history of Senate Bill No. 53, operative July 1, 1994, which resulted in the current statutory framework outlined above, is granted.

## Analysis

13. CalPERS determined that Blanco's OOC compensation earned during his final compensation period cannot be included in Blanco's final compensation for retirement purposes based on California Code of Regulations, title 2, section 571, subdivision (b)(7). On appeal, respondents raise three principal arguments that CalPERS' determination was erroneous:

First, both respondents contend that California Code of Regulations, title 2, section 571 does not apply to state members.

Second, both respondents argue that, even if California Code of Regulations, title 2, section 571 applied to state members, it would contravene Government Code section 20636, subdivision (g)(3)(B).

Third, Blanco argues, in the alternative, that equitable estoppel should compel CalPERS to include Blanco's OOC compensation in his final compensation.

### **(1) DOES CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 571 APPLY TO STATE MEMBERS?**

14. Respondents argue that California Code of Regulations, title 2, section 571 does not apply to state members. Based on the plain meaning of the regulatory text as well as consideration of several extrinsic aids, the court agrees. Additionally, as discussed below, the deference ordinarily given to CalPERS' interpretation of its own regulations, the non-precedential *Peterson* decision, and CalPERS' public policy arguments do not alter that conclusion.

## Plain Meaning of Regulatory Text

15. “Generally, the same rules of construction and interpretation which apply to statutes govern the interpretation of rules and regulations of administrative agencies.” (*California State Restaurant Assn. v. Withlow* (1976) 58 Cal.App.3d 340, 344.) The primary task is to discern the intent of the regulation; where possible, that task will begin and end with the plain meaning of the regulation’s text, and without resorting to extrinsic aids. (*Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519; *Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 201-202.)

16. In reviewing section 571, subdivision (a) first provides a list that “exclusively identifies and defines special compensation items” for *contracting agency members and school members* that must be reported to CalPERS if they are contained in a written labor policy or agreement. Subdivision (b) provides that items of compensation in subdivision (a) are also subject to specified standards. Finally, subdivisions (c) and (d) provide that if an item of compensation is not on the exclusive list in subdivision (a) or is out of compliance with one of the standards in subdivision (b), the item shall not be included in the individual’s final compensation for retirement purposes. In sum, section 571’s subdivisions reference each other and form a cohesive, integrated whole, addressing the contours and limitations of special compensation specifically for contracting agency and school members.

17. CalPERS acknowledges that subdivision (a) only applies to contracting agency and school members. However, CalPERS argues that because subdivision (b) does not expressly reference contracting agency and school members, its standards are applicable to all CalPERS members. That argument lacks merit, because it fails to read section 571 as an integrated whole. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1011 [observing that

“regulations, like statutes, must be read as a whole and construed in context”].) Even though subdivisions (b), (c), and (d) do not expressly reference contracting agency and school members, they refer back to subdivision (a). More importantly, section 571 does not contain a single reference to state members, nor does it otherwise textually signal that it intends to sweep state members within its ambit. Thus, CalPERS’s interpretation is inconsistent with the plain meaning of section 571, because it reflects a labored attempt to sever subdivisions (b), (c), and (d) from subdivision (a), and also reads non-existent language of applicability to state members into the regulation.

18. In sum, the plain meaning of section 571’s text suggests that it does not apply to state members. As such, it does not apply to Blanco.

### **Extrinsic Aids**

19. Regulatory construction generally begins and ends with the plain meaning of the regulation’s text. Nevertheless, even assuming that section 571 were ambiguous, several extrinsic aids also suggest that it does not apply to state members, including section 571’s rulemaking file; CalPERS Circular Letter No. 200-056-11;<sup>6</sup> CalPERS reference guides; and CalPERS’ prior litigation positions.

20. **Rulemaking file:** Section 571’s rulemaking file reveals the primary purpose for which it was promulgated: to specifically address “a statewide problem with *local agency employers* ‘converting’ various benefits of selected employees to salary, only during the final compensation period,” thereby increasing the employees’

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<sup>6</sup> CDCR’s unopposed request to take official notice of CalPERS Circular Letter No. 200-056-11, attached to CDCR’s closing brief, pursuant to Government Code section 11515 and Evidence Code section 452, subdivisions (b) and (c), is granted.

pensions. (Emphasis added.) Whereas state member benefits are established by statute, local contracting agency and school district members have the opportunity to contract for optional benefits as part of the collective bargaining process. Thus, the “pension spiking” practices of local contracting agencies and school districts posed a greater danger to creating unfunded liabilities for the CalPERS retirement trust fund, necessitating preventative action.

Consistent with the stated purpose for section 571’s promulgation, CalPERS’ initial statement of reasons and final statement of reasons in the rulemaking file expressly provide:

Section 571 makes specific what constitutes special compensation for *local agencies and school districts*, as required by the revised statutory scheme.

(Emphasis added.) By contrast, CalPERS noted that the “definition of special compensation for state employees remains substantially the same.”

Finally, the rulemaking file instructively notes that section 571 was developed with survey input from local agencies, school districts, and their employee groups. State employers and employees were not surveyed, which reasonably suggests that they were never intended to be governed by section 571.

21. **CalPERS Circular Letter No. 200-056-11:** This circular letter, issued August 19, 2011, was sent to all CalPERS employers to inform them of “newly enacted California Code of Regulations, (CCR) Title 2, Section 570.5 and amendments to CCR Section 571, subdivision (b).” The circular letter specifically noted that whereas section 570.5 applied to “all employers reporting compensation to CalPERS,” section 571, subdivision (b), only applied to “all schools and public agencies reporting

compensation to CalPERS.” Since the state is neither a school nor a contracting public agency, CalPERS’ circular letter also reasonably suggests that state employers and employees were never intended to be governed by section 571, including subdivision (b). Contrary to CalPERS’ argument, it is unsurprising that the circular letter was nonetheless sent to state employers, because it also included discussion of section 570.5, which does apply to state employers.

22. **CalPERS Reference Guides:** CalPERS publishes separate reference guides for the state, and for contracting agencies and schools. The special compensation section of the 2021 “Public Agency & Schools Reference Guide” extensively discusses the requirements of California Code of Regulations, title 2, section 571. By contrast, the special compensation section of both the January and April 2021 versions of the State Reference Guide does not mention section 571, but only references Government Code section 20636, subdivision (g)(3). Thus, CalPERS’ own reference guides, relied upon by CalPERS employers and members as reflecting CalPERS’ policies and positions, reasonably suggest that section 571 does not apply to state employers and employees.

23. **CalPERS’ Prior Litigation Positions:** In *Paxton*, CalPERS consistently maintained at the administrative hearing, in CalPERS staff’s argument to the Board to adopt the ALJ’s decision, and in briefing before the Court of Appeal, that California Code of Regulations, title 2, section 571 does not apply to state employees. (See, e.g., Respondent CalPERS’ Opposition Brief, 2018 WL 2727989, at p. 23, fn. 4.)

### **Deference to CalPERS’ Current Interpretation**

24. CalPERS argues that its current interpretation of California Code of Regulations, title 2, section 571 should nonetheless be given deference. Generally,

courts give deference to an agency's interpretation of its own regulation. (*Pacific Gas & Electric Co. v. Public Utilities Commission* (2015) 237 Cal.App.4th 812, 840.) However, as discussed above, CalPERS' current interpretation that section 571, subdivision (b), applies to state members is inconsistent with the plain meaning of the regulation's text and CalPERS' prior interpretations expressed in the above-cited extrinsic aids. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13 [noting that a vacillating position is entitled to no deference].)

### ***Peterson* Decision**

25. CalPERS also relies on its prior decision in the Matter of the Appeal Regarding Final Compensation Calculation of Jill C. Peterson and California State University, Sacramento (*Peterson*), which concluded that California Code of Regulations, title 2, section 571, subdivision (b), applied to all CalPERS members, including state members. That reliance is misplaced for two reasons.

First, *Peterson* is a non-precedential decision. As such, it is not binding on this court.

Second, even if considered as potentially persuasive authority, *Peterson* is unpersuasive. *Peterson* did not engage in any meaningful regulatory construction analysis of section 571; it summarily concluded that subdivision (b) applied to all CalPERS members on the basis that only subdivision (a) specifically references contracting agency and school members. However, as explained above, that conclusion is based on an unnatural reading of section 571, which fails to consider the regulation as an integrated whole. Thus, the court, respectfully, disagrees with *Peterson's* analysis.

## **CalPERS' Public Policy Arguments**

26. Finally, CalPERS argues that if California Code of Regulations, title 2, section 571 did not apply to state members, it would allow state members to engage in pension spiking creating unfunded liabilities and also result in unequal treatment of state members versus contracting agency and school members. Respondents counter that pension spiking concerns are significantly lower for state members and that the PERL statutory scheme is already "chock-full of differences between the treatment of State members, on the one hand, and Public Agency and School members, on the other hand."

27. Although CalPERS' public policy concerns are valid, such concerns alone cannot override the clear regulatory language of section 571 as currently promulgated. To address its public policy concerns, CalPERS can amend section 571 or promulgate a comparable regulation directed at state members, if it believes it can do so consistent with an authorizing statute.

## **Conclusion**

28. In sum, based on the plain meaning of the regulatory text, and as further supported by consideration of several extrinsic aids, California Code of Regulations, title 2, section 571 does not apply to state members. Thus, special compensation for state members is presently governed by Government Code section 20636, subdivision (g)(3), which plainly states that it shall include OOC compensation. The statute itself includes no limitation concerning when the OOC compensation was earned, nor has CalPERS promulgated another regulation placing such a limitation on OOC compensation earned by state members.

To the extent that CalPERS uses section 571, subdivision (b), as “guidance” to place limits on OOC compensation earned by state members, that would constitute an impermissible underground regulation, which is especially troubling given that state members had no input in the development of section 571. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568-569 [“One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation . . . as well as notice of the law’s requirements so that they can conform their conduct accordingly . . . .”].)

Consequently, Blanco’s OOC compensation earned during his final compensation period constitutes special compensation that must be included in Blanco’s final compensation used to determine Blanco’s service retirement allowance.

**(2) IF CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 571 APPLIED TO STATE MEMBERS, WOULD IT CONTRAVENE GOVERNMENT CODE SECTION 20636, SUBDIVISION (G)(3)(B)?**

29. Having concluded that California Code of Regulations, title 2, section 571 does not apply to state members, the court need not, and does not, reach the issue of whether section 571, or any future comparable regulation promulgated with respect to state members, would contravene Government Code section 20636, subdivision (g)(3)(B). For present purposes, it suffices that no such regulation directed to state members has yet been promulgated.

### **(3) DOES EQUITABLE ESTOPPEL COMPEL CALPERS TO INCLUDE BLANCO'S OOC COMPENSATION IN HIS FINAL COMPENSATION?**

30. Having concluded that Blanco's OOC compensation must be included in his final compensation under applicable law, it is unnecessary to consider whether equitable estoppel may be invoked under the circumstances of this case.

### **LEGAL CONCLUSIONS**

1. Respondents have the burden of proving by a preponderance of the evidence that Blanco's OOC compensation paid exclusively in Blanco's final compensation period constitutes special compensation that CalPERS must include in Blanco's final compensation used to determine Blanco's service retirement allowance. (See *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn. 5 ["the party asserting the affirmative at an administrative hearing has the burden of proof"].) A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

2. The amount of an employee's service retirement allowance is generally determined by the employee's retirement age, credited service, and final compensation. (*Paxton*, 35 Cal.App.5th at 557.) Final compensation is a function of a classic member's highest "compensation earnable" during any 12-month period of employment, which in turn consists of the employee's "payrate" and "special compensation." (*Ibid.*)

3. Government Code section 20636, subdivision (c), provides that "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).) The Legislature directed CalPERS to “promulgate regulations that delineate more specifically and exclusively what constitutes ‘special compensation’ as used in this section.” (*Id.*, subd. (c)(6).)

4. Government Code section 20636, subdivision (g)(3), states: “Notwithstanding subdivision (c), “special compensation” for state members shall mean all of the following: . . . (B) Compensation for performing normally required duties, such as . . . out-of-class pay . . . .” (Gov. Code, § 20636, subd. (g)(3)(B).)

5. California Code of Regulations, title 2, section 571, subdivision (a), provides a list that “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 . . . .” That list includes premium pay, such as OOC pay. (Cal. Code Regs., tit. 2, § 571, subd. (a).) Subdivision (b) provides that items in subdivision (a) are subject to specific standards, including that they not be paid “exclusively in the final compensation period.” (*Id.*, subd. (b)(7).) Subdivision (c) states that “[o]nly 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).” (*Id.*, subd. (c).) Finally, subdivision (d) states that “[i]f 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.” (*Id.*, subd. (d).)

6. Based on the Factual Findings as a whole, and specifically, Factual Findings 13 through 28, California Code of Regulations, title 2, section 571 does not

apply to state members like Blanco. Pursuant to Government Code section 20636, subdivision (g)(3)(B), Blanco's OOC compensation paid exclusively in Blanco's final compensation period constitutes special compensation that CalPERS must include in Blanco's final compensation used to determine Blanco's service retirement allowance.

## **ORDER**

1. Respondents' appeal is GRANTED and CalPERS' prior determination concerning Blanco's out-of-class compensation is REVERSED.

2. CalPERS shall include Blanco's out-of-class compensation earned in his final compensation period as special compensation in the calculation of his final compensation used to determine his service retirement allowance, and shall make any necessary retroactive adjustments.

DATE: February 23, 2022

*Wim vanRooyen*

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings