

**ATTACHMENT B**

**FINAL DECISION**

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

**In the Matter of the Appeal Regarding Full-Time Payrate  
Reporting Of:**

**TUSTIN UNIFIED SCHOOL DISTRICT, Respondent**

**Agency Case No. 2020-0436**

**OAH No. 2020090431**

**FINAL DECISION**

Robert Walker, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on September 2 and 3, 2021. The hearing was conducted by video conference.

At the hearing before the ALJ, Charles H. Glauberman, Senior Attorney, represented, California Public Employees' Retirement System (CalPERS).

Joshua E. Morrison, Attorney at Law, and Jacquelyn Takeda Morenz, Attorney at Law, represented Tustin Unified School District (District).

Oral and documentary evidence was received. The parties submitted closing arguments in the form of briefs. Each party submitted a brief dated October 29, 2021, and those briefs are referred to as CalPERS Opening Brief and District Opening Brief.

Each party submitted a brief dated November 12, 2021, and those briefs are referred to as CalPERS Reply Brief and District Reply Brief.<sup>1</sup> The reply briefs were received on November 12, 2021, and the record was closed.

CalPERS submitted two requests for official notice. One was dated September 1, 2021; one was dated October 29, 2021. Those requests were granted by the ALJ.

The District submitted a request for official notice, which was dated September 1, 2021. That request was granted by the ALJ.

## **SUMMARY**

CalPERS conducted an audit of the District's reporting of payrate for the District's classified employees. CalPERS concluded the District had been reporting incorrectly, and CalPERS directed the District to change its reporting practices. The District appealed, and a hearing was held before the ALJ on September 2 and 3, 2021.

The ALJ issued a Proposed Decision dated December 13, 2021, in which he determined: that the District complied with Government Code section 20636.1 when it reported monthly payrates based on its monthly work hour conversion factor of 168. The ALJ found that Government Code section 20636.1 does not require agencies to use a conversion factor of 173.33 when reporting monthly payrates, but instead only requires agencies to either report the base rate of pay or a monthly payrate. The ALJ reasoned that CalPERS' requirement for monthly reporting to be based on a 173.33

---

<sup>1</sup> Some abbreviated references to the briefs will provide a page number and line number. For example, a reference to page 10, line 5 would be 10:5.

conversion factor had no basis in law. Without a basis in law, the ALJ concluded that CalPERS' use of the 173.33 conversion factor was an underground regulation. Consequently, the ALJ granted the District's appeal.

At its February 15, 2022, meeting, the CalPERS Board of Administration (Board) requested a Full Board Hearing of this case. On April 18, 2022, the Board conducted a Full Board Hearing. All parties received notice of the proceedings before the Board. At the April 18, 2022, hearing before the Board, the District was represented by Joshua E. Morrison, Attorney at Law. Charles Glauberman, Senior Attorney, represented CalPERS.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. The District is a public agency as defined in the California Public Employees' Retirement Law (PERL). (Gov. Code § 20056.) The District contracts with CalPERS to provide retirement benefits for the District's non-teaching staff, i.e., classified employees. In 2018 CalPERS conducted an audit of 64 agencies' payrate reporting practices. CalPERS conducted the audit of the District by reviewing the reporting for a single employee, the sampled employee. CalPERS concluded the reporting had been in error. While the audit was of a sampled employee, CalPERS directed the District to change its reporting practice as to all similarly situated employees.

2. CalPERS identified a few issues, and the parties reached agreements on resolving all but one. In December 2018, CalPERS issued a final audit report. Exception 4 to the audit directs the District to adjust its payrate reporting. By a letter dated February 19, 2020, the District appealed Exception 4. The statement of issues provides

that “the appeal is limited to the issue of whether Respondent District incorrectly reported full-time payrates” for its classified employees.

3. Payrate affects the calculation of final compensation, which in turn, affects a member’s retirement benefits.

### **Published Hourly and Monthly Payrates**

4. Government Code section 20630, subdivision (b)<sup>2</sup> refers to employers reporting compensation to CalPERS and provides that, regarding school members, compensation shall be reported in accordance with Section 20636.1. That section, at subdivision (b)(1), requires that members be paid pursuant to publicly available pay schedules. California Code of Regulations, title 2, section 570.5, subdivision (a)(5), also requires that payrate be available for public review.

5. Annually, the District publishes two pay schedules for classified employees. One schedule is for employees paid by the hour. A second schedule is for employees paid by the month.<sup>3</sup> The schedules are composed of payrates according to a position’s range and various steps. Some employees who are paid by the month do the same work as employees who are paid by the hour. The District calculates overtime and pay docking for monthly employees based on the hourly pay schedule. In order to make compensation equitable, the District creates the schedule for employees paid by the month by multiplying the payrate in the hourly schedule by the number of work

---

<sup>2</sup> All references to code sections are to the Government Code unless otherwise stated.

<sup>3</sup> Some school districts have a third schedule for employees paid by the day.

hours in a month. Because there is not a standard number of days in a month or in a year, the number used as the work hours in a month is an average arrived at after making one or more assumptions.

6. Here the issues concern a position in range 36, step F. When the District creates the published pay schedules, it multiplies the hourly pay rate for a range and step by 168, which is the District's approximation of the number of work hours in an average month. In the 2012-2013 school year, the hourly rate for range 36, step F, was \$22.5875 per hour. The District multiplied the hourly rate by its 168 conversion factor and determined the monthly rate of pay should be \$3,794.70. The district rounded that to \$3,795, which was the rate published for range 36, step F, in the schedule of monthly payrates. The District did this for dozens of ranges and steps. Range 36, step F was the pay range for the employee sampled in the Audit, but the sample was representative of all of the District's classified employees compensated on a monthly basis.

### **The Different Conversion Factors at Issue**

7. Because years and months do not have a consistent number of days, if one factor is used constantly, there will be years and months in which it is only an approximation.

8. Under Section 20636.1, CalPERS uses a conversion factor of 173.33 hours in a month. To reach 173.33, CalPERS begins with a 40-hour work week (eight hours a day for five days a week) over all 52 weeks in a year. Multiply 52 weeks times 40 hours, and that results in 2,080 work hours per year. Divide that by 12 months in a year, and that produces an average of 173.33 work hours per month. Dividing 173.33 monthly work hours by eight hours in a workday results in 21.667 workdays per month.

9. The District's monthly conversion factor of 168 work hours in a month is based on several assumptions. Except in a leap year, in years when January 1 falls on a Saturday, there are 260 weekdays per year. Except in a leap year, in years when January 1 falls on any other day of the week, there are 261 weekdays per years. That is an average of 260.85 weekdays per year. Many public employees in California have 11 holidays per year, and in most cases, if a holiday falls on a Saturday or Sunday, it is celebrated on the following Monday, a weekday. So, 260.85 minus 11, which is 249.85, is the average number of days worked in a year. Divided by 12 months, the average number of workdays per month is 20.82. In a leap year that average would be adjusted up by 0.08 days per month for an average of 20.90 workdays per month. The District then rounds up to assume there are 21 workdays per month. The District starts its calculation of work hours with an assumption that there are approximately 21 workdays in a month. A full-time employee generally works 8 hours per day. The District multiplies 21 workdays by 8 hours per day and arrives at 168 work hours per month.

10. To convert an hourly rate to a monthly rate, the District simply multiplies the hourly rate by 168 monthly work hours.

### **The District's Reporting of Payrate**

11. Government Code section 20636.1, subdivision (a), provides that compensation earnable means the payrate and special compensation of a member.

12. Section 20636.1, subdivision (b)(1) provides, in part:

"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.

13. Thus, an employer can report either “the normal monthly rate of pay” or “base pay.” Those are in the disjunctive, and nothing about the statute suggests that an employer may not choose which one to report.

14. Section 20636.1, subdivision (b)(1), further provides:

[F]ull-time employment is 40 hours per week, and payment for services rendered . . . shall be reported as compensation earnable for all months of the year in which work is performed.

15. When the District reported the sampled employee’s compensation for a month, it used her base hourly rate, and multiplied that rate by its 168-hour conversion. So, the District took the base hourly rate of \$22.5875 and multiplied it by its conversion factor or 168 monthly hours. This resulted in the reported, but incorrect, monthly payrate of \$3,795.

16. Thus, when it came time for the District to report the sampled employee’s compensation for a month, the District could have looked to the hourly schedule and reported the base pay, the \$22.5875 hourly rate, or the District could have looked to the monthly schedule and reported the \$3,795 monthly rate. Section 20636.1, subdivision (b)(1), leaves the choice to the school district. The District chose to report from the monthly schedule based on the incorrect conversion factor of 168 work hours in a month.

## CalPERS Determined the District's Reporting Was Incorrect

17. CalPERS determined that the District, in reporting payrate, must either report the hourly rate, which CalPERS would automatically convert based on the 173.33 conversion factor; or report a monthly rate that is based on the 173.33 conversion factor derived from Section 20636.1.

18. CalPERS has no preference as to whether the district reports the hourly rate, or if it reports a monthly rate based on the 173.33 conversion factor. As made clear at hearing, the 173.33 conversion factor does not require the District to increase its pay to classified school members.

19. CalPERS' determination is based on the following: The \$3,795 the District reported was not an accurate payrate for the employee. Because the published *hourly* rate of \$22.5875 (which CalPERS rounds to \$22.59 for efficiency purposes) was used to determine the monthly pay, overtime, and docking or reductions in pay, CalPERS contends that the hourly rate is the "true base rate of pay" for the member. (CalPERS Opening Brief 8:8.) CalPERS contends: "Although monthly employees are paid according to the *monthly* pay schedule, the true payrate or base pay for such employees is their *hourly* rate." (CalPERS Opening Brief 12:12.) CalPERS further contends that, to convert to a monthly rate, one must multiply by the 173.33 monthly conversion factor, which in this case, would produce a monthly rate of \$3,915. Alternatively, CalPERS calculates the monthly payrate by multiplying the hourly payrate by 40 hours in a week ( $40 \times \$22.59 = \$903.60$ ), multiplied by 52 weeks in a year ( $\$903.60 \times 52 = \$46,987.20$ ), divided by 12 months ( $\$46,987.20/12 = \$3,915.60$ ). That results in a monthly payrate of \$3,915.60.

## **CalPERS and School Districts Need a Consistent Conversion Factor to Apply Across All School Agencies**

20. School districts need a consistent conversion factor to create equitable pay schedules. CalPERS needs a consistent conversion factor to use when a school district chooses to report base pay, i.e., the hourly rate, rather than the normal monthly rate of pay. The conversion factor must be consistent, regardless of employer, to ensure that all CalPERS members receive the same benefits for the same amount of work at the same rate of pay.

21. Full-time employment for classified school members is 40 hours per week, and service credit is earned for all hours up to 40. CalPERS' interpretation requiring the 173.33 monthly conversion is a logical extension of the 40-hour workweek from Section 20636.1.

22. CalPERS points out, and caselaw supports, that it is important to have uniformity in reporting so that retirement benefits are paid equitably so that all members receive the maximum retirement benefits to which they are entitled.

23. CalPERS observes that Section 20636.1 was enacted to standardize the reporting of compensation of school employees and to ensure that all hours worked, up to 40 hours per week, earn service credit. CalPERS cannot allow each of its roughly 800 school agencies to use their own conversions, because different conversions result in different retirement calculations for members who earn the same pay and work the same hours.

## LEGAL CONCLUSIONS

### **Burden and Standard of Proof**

1. The District has the burden of proof. Evidence Code section 500 provides, in part, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." The District appeals from CalPERS' determination that the District incorrectly reported payrates for its classified employees. The District has the burden to prove that its reporting was not incorrect.

2. The standard of proof is a preponderance of the evidence. (Evid. Code § 115.)

### **CalPERS' Interpretation of Section 20636.1 Is Entitled to Deference**

3. An administrative construction of an enactment by those charged with enforcing it is entitled to great weight, and courts will not depart from such construction unless it is clearly erroneous or unauthorized. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1565.) Deference to CalPERS' interpretation of the PERL is "in recognition of the fact that, as the agency charged with administering the PERL, PERS has expertise and technical knowledge as well as an intimate knowledge of the problems dealt with in the statute and various administrative consequences arising from particular interpretations." (*City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 539.)

4. CalPERS is the agency charged with the enforcement of the PERL, and CalPERS' determinations are entitled to great deference. (*Pleasanton v. CalPERS, supra*, 211 Cal.App.4th at 539.)

5. There is a strong policy favoring statewide uniformity in interpretation as between CalPERS and its contracting agencies, and CalPERS cannot be expected to accept different interpretations for different agencies. (*City of Los Altos v. Board of Administration* (1978) 80 Cal.App.3d 1049, 1051.)

6. In interpreting a statute, courts follow the Legislature's intent, as exhibited by the plain meaning of the actual language. (*People v. Loeun* (1997) 17 Cal.4th 1.) "The words the Legislature chose are the best indicators of intent. Absent ambiguity, we presume the lawmakers meant what they said, and the plain meaning of the language governs." (*In re Gilbert R.* (2012) 211 Cal.App.4th 514.) A literal interpretation of a statute is required unless it is repugnant to the obvious purpose. (*Duty v. Abex* (1989) 214 Cal.App.3rd 742, 749.) In interpreting a statute, courts will "presume the Legislature meant what it said," and the plain, common sense meaning controls; only avoiding any statutory construction that would produce unreasonable, impractical, or arbitrary results. (*Bonnell v. Med. Bd. of Cal.* (2003) 31 Cal.4th 1255, 1261; *Pool v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1385.)

7. The ultimate goal of statutory interpretation is to ascertain the legislature's intent. (Code of Civ. Proc. § 1859.) The interpretation should harmonize all sections of a statute. (*Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 759.) When interpreting statutes, courts "consider the consequences which would flow from our interpretation and avoid constructions which defy common sense, frustrate the apparent intent of the Legislature or which might lead to mischief or absurdity." (*Henry v. Workers' Comp. App. Bd.* (1998) 68 Cal.App.4th 981, 985.)

8. Section 20636.1 was passed to ensure that classified school members receive service credit, and to ensure that full service credit is earned for 1,720 hours in

a fiscal year. Section 20636.1 was also designed to standardize the reporting of compensation for school employees.

## **Evaluation**

9. CalPERS conducted an audit and decided the District's reporting based on its 168-hour conversion factor was in error. CalPERS' determination was correct, as school districts are not free to choose their own conversion factors for payrate reporting, but must use a conversion factor of 173.33 when converting an hourly payrate to a monthly payrate.

10. District's reported payrate to CalPERS was in error. Instead of following Section 20636.1 and reporting payrate based on all twelve months and a 40-hour workweek using the 173.33 monthly conversion, the District used its own 168-hour conversion.

11. CalPERS' interpretation achieves uniformity and ensures that members earning the same payrate, but employed by different districts, receive the same retirement benefits.

## **ORDER**

The Board, after considering the entire record as well as oral argument of counsel, denies the appeal of Tustin Unified School District. The District's reporting was erroneous and must be corrected. The District must either report payrate using the hourly pay schedule, or using the 173.33 conversion factor derived from Section 20636.1 for its monthly employees.

DATE: April 19, 2022