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 Full-Time Payrate Reporting Of:

TUSTIN UNIFIED SCHOOL DISTRICT, Respondent

Agency Case No. 2020-0436

OAH No. 2020090431

PROPOSED DECISION

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

Charles H. Glauberman, Senior Attorney, represented complainant, Renee Ostrander, Chief, Employer Account Management Division, 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.[1] The reply briefs were received on November 12, 2021, and the record was closed.

CalPERS submitted two requests for official notice. One is dated September 1, 2021; one is dated October 29, 2021. Those requests are granted.

The District submitted a request for official notice, which is dated September 1, 2021. That request is granted.

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 this hearing followed.

It is determined as follows: The District's reporting complied with the applicable statutes. The requirement CalPERS sought to impose was an unenforceable underground regulation.

The District's appeal is granted.

---

[1] 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.

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)[2] 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.[3] 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. 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 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 an approximation of the number of work hours in an average

[2] All references to code sections are to the Government Code unless otherwise stated.

[3] Some school districts have a third schedule for employees paid by the day.

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.

Calculation of the District's Factor of 168

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. There is no single, correct approach to the calculation of such a factor; there are a few logical approaches.

8. Several Orange County school districts use a pay factor of 21 workdays per month. 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. Thus, it is logical to assume there are 21 workdays per month. That is not the only logical assumption, but it is one very logical assumption. And 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.

9. An alternate way to calculate the District's factor is as follows: Assume 21 workdays in a month. There are 5 workdays per week. Divide the 21 days per month by 5 days per week, and that produces 4.2 workweeks in a month. Multiply 4.2 weeks by 40 hours per week, and that produces 168 work hours per month. Thus, one way of calculating the District's 168 work hours per month involves the use of 40 hours per week, which is consistent with the definition of full-time employment in Section 20636.1, subdivision (b)(1).

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

CalPERS Contends the District's Reporting Was Incorrect

16. CalPERS contends the District, in reporting payrate, must either report the hourly rate and leave the conversion factor to the discretion of CalPERS or report a monthly rate that is 173.33 times the published hourly rate, i.e., CalPERS contends that, for reporting purposes,[4] the district must use a conversion factor of 173.33 rather than

---

[4] CalPERS says it is not concerned with what the District pays its employees; it is concerned only with how the District reports payrate to CalPERS. Thus, CalPERS contends the District can change its reporting practices without increasing or decreasing any employee's pay. Section 20636.1, subdivision (b)(1), provides: "Payrate means the . . . rate . . . paid in cash . . . pursuant to publicly available pay schedules." In view of that, it is difficult to imagine how an employer could pay one rate in cash and report something different to CalPERS. However, it is not necessary to resolve this conundrum in order to resolve the issues raised by the District's appeal.

168. CalPERS prefers that districts report the hourly rate and leave the conversion factor to the discretion of CalPERS.

17. CalPERS contends as follows: The $3,795 the District reported was not an accurate payrate for the employee. The published *hourly* rate of $22.5875 (which CalPERS rounds to $22.59) was 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 173.33, which in this case, would produce a monthly rate of $3,915.

18. No statute or regulation provides that the hourly rate is the true base rate of pay. No statute or regulation modifies or restricts the language of Section 20636.1 that defines payrate as either the normal monthly rate of pay or base pay. No statute or regulation specifies how a school district, in creating published pay schedules, is to go about converting hourly rates of pay to monthly rates of pay, except that Section 20636.1, subdivision (b)(1), provides that full-time employment is 40 hours per week. No statute or regulation suggests that published hourly rates are somehow more “true” than published monthly rates.

Calculation of CalPERS' Factor of 173.33

19. CalPERS arrives at the 173.33 factor as follows: Assume there are 52 weeks in a year.[5] Assume a 40-hour workweek. Multiply 52 times 40, and that produces an assumption of 2,080 work hours per year. Divide that by 12, and that produces an average of 173.33 work hours per month.

20. Both the District's factor of 168 and CalPERS' factor of 173.33 are logical. Also, both incorporate a 40-hour workweek.

CalPERS Appears to Contend that the Member's Being Employed Over the Course of 11 Months Required CalPERS "to Look at the True Base Pay"

21. In CalPERS Opening Brief at Page 10 beginning at line 8, CalPERS says:

> Although [the District] considered the Member to be a 10-month employee (See Exh. 14, A384), she was reported to CalPERS over 11 months based on the District's conversion of the annual payrate divided by 10. (2 RT 34:3-16.)[6] When [the District] reported the sampled Member over 11 months and divided that payrate by 10, [the District] was creating its own conversion. Because [the District] uses its own

---

[5] In years with 365 days, there are 52 weeks and one day. In years with 366 days, there are 52 weeks and two days. So it is useful to assume 52 weeks, but it is important to recognize that it is an assumption.

[6] This is a reference to the reporter's transcript of the hearing in this matter.

> conversion, and does not report the true base pay, CalPERS has to look at the true base pay of the member.

22. Section 206363.1, subdivision (b)(1), requires that payments for services rendered shall be reported for all months of the year in which work was performed. And Section 20962, subdivision (a)(2) provides:

> One year of service credit shall be granted for service rendered and compensated in a fiscal year in full-time employment for . . . ten months of service for persons employed on a monthly basis.

23. Nothing requires that the ten months of service must be in calendar months. They must be within a fiscal year, but they may span 11 months. (It may be possible that the ten months can span 12 months, because the statute does not say the 10 months must be consecutive. But that is not an issue here, and no opinion is expressed regarding that possibility.) Here, the important point is that the ten months might, for example, run from mid-August to mid-June. So the fact that the District reported the member's compensation over the course of 11 months was no justification for CalPERS not accepting the reporting of the member's "normal monthly rate of pay," which is one of the definitions of payrate in Section 20636.1, subdivision (b)(1).

24. It is not clear whether CalPERS contends there was something wrong with the District's reporting the member's compensation over 11 months. CalPERS refers to reporting over 11 months and then concludes that CalPERS was required "to look at the true base pay of the member," (CalPERS Opening Brief 10:8), i.e., that CalPERS could not accept the District's reporting of the normal monthly rate of pay.

25. If CalPERS is contending there was something wrong with the member's compensation being reported over 11 months, that contention is mistaken.

CalPERS Contends the Language of the Statutes Leads to the Conclusion that 173.33 is the Correct Factor

CalPERS Contends that Section 20636.1 Leads to a Conclusion that 173.33 is the Correct Factor

26. CalPERS says:

> 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 their own 168-hour conversion. ....That conversion is not based on a 40-hour workweek, is not based on a 12-month year, and is out of compliance with Section 20636.1. (CalPERS Opening Brief 17:14.)

27. Thus, CalPERS contends that Section 20636.1, subdivision (b)(1), requires that the calculation of a conversion factor must be "based on a 12-month year." That, however, is not correct. Subdivision (b)(1) does not mention a 12-month year. It says payments shall be reported for all months of the year, but that has nothing to do with how one calculates a conversion factor. The conversion factor needed here is the number of work hours in a month. CalPERS started its calculation with some assumptions about a year, worked through a calculation, and divided by 12 to get work hours per month. There is nothing wrong with that. It makes good sense. The District, however, started its calculation with some assumptions about a month,

worked through a calculation, and got work hours per month. There is nothing wrong with that. And it makes just as much good sense as CalPERS' approach. Neither approach is preferable to the other, and certainly there is nothing in Section 20636.1, subdivision (b)(1), that would suggest a preference for one approach over the other.

28. Further, CalPERS contends the District's conversion factor is not based on a 40-hour workweek, but it is. Both CalPERS' factor and the district's factor are based on a 40-hour workweek. As noted above, the district's calculation is based on an assumption that there are 21 workdays in a month. There are 5 workdays per week. Divide the 21 days per month by 5 days per week, and that produces 4.2 workweeks in a month. Multiply 4.2 weeks by 40 hours per week, and that produces 168 work hours per month. The District's factor is based on a 40-hour workweek.

CalPERS Contends Section 20962 Leads to a Conclusion that the District's 168 Factor Is Not Acceptable Because it Results in a Monthly Employee Receiving Less Than a Full Year of Service Credit for Ten Months of Service

29. Section 20962 provides for various quantities of service that will qualify a full-time employee for one year of service credit. Service for less than the times prescribed results in a fraction of one year of service credit. A member employed on a monthly basis qualifies for one year of service credit if he or she is employed for 10 months during a fiscal year. A member employed on a daily basis qualifies for one year of service credit if he or she is employed for 215 days during a fiscal year. A member employed on an hourly basis qualifies for one year of service credit if he or she is employed for 1,720 hours during a fiscal year. These qualifiers are discrete, i.e., a member need satisfy only one of them in order to qualify for one year of service credit.

30. Section 20962, subdivision (a), provides, in part:

> One year of service credit shall be granted for service rendered and compensated in a fiscal year in full-time employment for any of the following:
>
> [¶] . . . [¶]
>
> (2) Ten months of service for persons employed on a monthly basis.
>
> (3) Two hundred fifteen days of service . . . for persons employed on a daily basis.
>
> (4) One thousand seven hundred twenty hours of service . . . for persons employed on an hourly basis.
>
> [¶] . . . [¶]

31. Section 20962, subdivision (b), provides:

> A fractional year of credit shall be given for service rendered in a fiscal year in full-time employment for less than the time prescribed by this section.

32. Section 20636.1, subdivision (b)(1), defines full-time employment as 40 hours per week "for purposes of this part." That subdivision is in Part 3, Division 5, Title 2 of the Government Code. Section 20962 also is in in Part 3, Division 5, Title 2 of the Government Code. Thus, the definition of full-time employment in Section 20636.1, subdivision (b)(1), applies to Section 20962.

33. CalPERS contends the District's 168 factor results in a monthly employee receiving less that a full year of service credit for ten months of service. In its Opening Brief, CalPERS has inconsistent contentions regarding the sampled employee's service credit. In the Opening Brief, beginning at page 3, line 21, CalPERS contends the service credit was 0.9692. The calculation is as follows:

> [E]ven though [the District] reported full annual service credit for the Member, the full service credit was inaccurate and overreported. To accurately calculate the Member's monthly service credit, the monthly earnings of $3795 are divided by the corrected monthly payrate of $3915, which is then divided by 10 (months of service), to reach .09692. Over the full fiscal year the accurate service credit is thus .9692, as opposed to the full year reported for the Member.[7]

---

[7] Apparently, CalPERS granted the sampled employee less than a full year of service credit, but that is not an issue in this case. The District objected that service credit was not an issue in the appeal, and that objection was sustained. The matter of service credit is discussed only to address CalPERS' contention that the District's 168 factor results in erroneous reporting of service credit. It also is noted that there was testimony that the difference in the amount of service credit granted would not affect the sampled employee's retirement benefits because she already had all the service credit she needed.

34. However, in CalPERS Opening Brief, beginning at page 9, line 25, and again at page 16, footnote 3, CalPERS calculates the service credit as 0.977. The calculation is as follows:

> Using the Member's reported monthly earnings of $3795 divided by a payrate of $3795, equals 1, which is then divided by the factor of 10 due to Section 20962. This results in 0.1 service credit per month. (2 RT 26:6-22.)[8] Using the same earnings divided by an hourly payrate of $22.59 equals approximately 168; divided by 1720 hours due to Section 20962 is approximately .977 service credit, (*Id.*) So, the differences in reporting result in different service credit earned.

35. Nothing in Section 20962 or any other relevant code section supports such calculations. Nothing justifies applying the 1,720 hour requirement in Section 2062, subdivision (4), to persons employed on a monthly basis. That subdivision applies only to "persons employed on an hourly basis." Section 2062, subdivision (2), provides that a person employed on a monthly basis in full-time employment shall be granted one year of service credit for ten months of service. That is what the Legislature said, and, no doubt, that is what the Legislature meant.

36. The District's reporting of the sampled employee's payrate entitled the employee to a full year of service credit.

---

[8] This is a reference to the reporter's transcript of the hearing in this matter.

Before the Audit, CalPERS Never Told the District the 173.33 Factor was Required in Converting Hourly to Monthly Rates

37. The 173.33 factor is not contained in any applicable statute or regulation. And prior to the audit, CalPERS had not told the District or the Orange County Department of Education that school districts were required to use a 173.33 factor in converting hourly pay rates to monthly pay rates. School districts in Orange County use a variety of conversion factors. Most districts use the 168 hour factor.

CalPERS and School Districts Need a Conversion Factor

38. School districts need a conversion factor to create equitable pay schedules. And CalPERS needs a 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.

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

40. It would be appropriate for the Legislature to deal with these issues through legislation or for CalPERS to deal with them through a regulation.

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.)

The Deference Due CalPERS's Administration of the PERL Cannot Override the Unambiguous Language the Legislature Chose

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. (*City of Los Altos v. Board of Administration* (1978) 80 Cal.App.3d 1049, 1051.)

6. Nevertheless, 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. In the present case, CalPERS' contentions are at odds with the plain meaning of the applicable statutes.

CalPERS' Requirement that Districts Report an Hourly Rate or Use a 173.33 Factor is an Unlawful Underground Regulation

8. The Administrative Procedure Act (APA) begins at Government Code section 11340. One purpose of the APA is to prevent what CalPERS did here. CalPERS adopted a rule of general application that implements the law it enforces without

giving a voice to the people affected. And it seeks to apply that rule generally – not simply in a specific case.

9. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, provides an excellent review of the law concerning underground regulations. At pages 568-570, the *Tidewater* court said:

> The APA establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action (Gov. Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code, § 11346.2, subds. (a), (b)); give interested parties an opportunity to comment on the proposed regulation (Gov. Code, § 11346.8); respond in writing to public comments (Gov. Code, §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code, § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov. Code, §§ 11349.1, 11349.3).
>
> One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation *(Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204–205, . . . (Armistead)), as well as notice of the law's requirements so that they can conform their conduct accordingly *(Ligon v. State Personnel Bd.* (1981)

> 123 Cal.App.3d 583, 588, . . . (*Ligon*)). The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. (See *San Diego Nursery Co. v. Agricultural Labor Relations Bd.* (1979) 100 Cal.App.3d 128, 142–143 ....)

10. The *Tidewater, supra,* 14 Cal.4th 557, court emphasized the broad scope of the rule against underground regulations. At page 570, the court said:

> The APA provides that "[*n*]*o state agency* shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation......., unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." (Gov. Code, § 11340.5, subd. (a), italics added.) The APA applies "to the exercise of *any quasi-legislative power* conferred by *any statute* heretofore or hereafter enacted," and the APA's provisions "shall not be superseded or modified by any subsequent legislation

> except to the extent that the legislation shall do so expressly." (Gov. Code, § 11346, italics added.)

11. And the *Tidewater, supra,* 14 Cal.4th 557, court emphasized the breadth of the APA definition of "regulation." At page 571, the court said:

> The APA, however, defines "regulation" very broadly to include "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency." (Gov. Code, § 11342, subd. (g).) A regulation subject to the APA thus has two principal identifying characteristics. (See *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, . . . [describing two-part test of the Office of Administrative Law].) First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, . . .) Second, the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure." (Gov. Code, § 11342, subd. (g).)

12. CalPERS says “the law does indicate that 40 hours is full time for classified workers, which is what requires the 173.33 conversion.” (CalPERS Opening Brief 6:11.) CalPERS notes that Section 20636.1 requires school districts to report based on a 40-hour workweek, which CalPERS equates to 173.33 hours per month. CalPERS contends that, therefore, an underground regulation analysis requires a finding in CalPERS’ favor. (CalPERS Opening Brief 18:11.) But that conclusion is mistaken.

13. CalPERS requires school districts to either report pay rate as the hourly rate and leave the conversion to CalPERS’ discretion or use a 173.33 conversion factor. That requirement is an unlawful, underground regulation.

Evaluation

14. The District used a factor of 168 work hours to convert its published hourly rate of pay to a monthly rate of pay. That factor is derived logically from an assumption that there are 21 workdays in a month, which also is logical. In reporting to CalPERS, the District followed the Legislature’s directions in Section 20636.1 and reported the employee’s normal monthly rate of pay. This was the rate the District paid the employee in cash. It was based on a 40-hour week. It was published in the district’s pay schedule.

15. CalPERS conducted an audit and decided the District’s reporting had been in error. CalPERS contends a monthly payrate must be 173.33 times the hourly rate for the same position, i.e., a school district must use a conversion factor of 173.33 in converting an hourly payrate to a monthly payrate.

16. No statute or regulation specifies a 173.33 conversion factor. CalPERS’ 173.33 conversion factor is a logical conversion factor. But it is no more logical and no

more correct than the District's 168 conversion factor. And there is nothing in the law that requires a school district to use 173.33.

17. The sampled employee was employed for 10 months over the course of 11 months. CalPERS' briefs can be read as suggesting that the fact that the compensation was paid over the course of 11 months required the reporting to be in terms of an hourly rate in spite of the fact that the employee was paid a monthly rate. If that is the contention, it is mistaken. There is nothing about any of the relevant statutes that would prevent reporting 10 months of compensation over the course of 11 months. To the contrary, Section 20636.1, subdivision (b)(1), requires that payments shall be reported as compensation "for all months of the year in which work is performed."

18. CalPERS contends that, for two reasons, Section 20636.1 leads to a conclusion that 173.33 is the only correct factor. First, CalPERS contends that section requires that the calculation of a conversion factor must be based on a 12-month year. That is mistaken. That section does not mention a 12-month year. The factor for a person employed by the month must be related to the work hours in a month. But nothing requires that the calculation must start with assumptions about a year. Starting the calculation with assumptions about a month is logical and acceptable. Second, CalPERS contends that the District's factor is not based on a 40-hour workweek, but it is.

19. Finally, CalPERS contends the District's factor is not acceptable because it results in under reporting the service credit to which a member is entitled. That contention is based on CalPERS' improperly applying the 1,720-hour requirement for an hourly employee's qualifying for one year of service credit. In Section 20962, subdivision (a)(2), the Legislature provided that a full-time monthly employee qualifies

for one year of service credit for 10 months of service in a fiscal year. There is no justification for imposing the additional requirement that the employee provide 1,720 hours of service, which is the qualifier for a person employed on an hourly basis.

20. CalPERS and school districts need a conversion factor, but CalPERS is not permitted simply to choose one and require that school districts use it unless CalPERS makes this determination through the regulatory process.

21. For two reasons, CalPERS may not require school districts to either report an hourly rate or use a 173.33 factor in converting the hourly rate to a monthly rate. First, nothing in the applicable statutes supports that, and in this case, the District strictly complied with the requirements the Legislature enacted. Second, CalPERS' requirement is an unenforceable, underground regulation.

ORDER

The appeal of Tustin Unified School District is granted. The District may use a factor of 168 to convert the rate of pay for hourly employees to a rate of pay for monthly employees, and the District may report the resulting monthly rate as an employee's normal monthly rate of pay.

DATE: December 13, 2021

Robert Walker
Robert Walker (Dec 13, 2021 10:10 PST)

ROBERT WALKER

Administrative Law Judge

Office of Administrative Hearings