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BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Final Compensation DESI ALVAREZ, Respondent, and CHINO BASIN WATERMASTER, Respondent.	CASE NO. 2013-1113 OAH NO. 2014080757 CalPERS REQUEST FOR OFFICIAL NOTICE Hearing Date: April 11, 2016 at 9:00 am Hearing Location: Glendale Prehearing Conf.: None Scheduled Settlement Conf.: None Scheduled

TO THE COURT AND ALL COUNSEL AND PARTIES OF RECORD:

The California Public Employees' Retirement System, in its official capacity, (CalPERS) requests Official Notice pursuant to Government Code section 11515 and Evidence Code sections 452 and 453, of the following material which constitute official acts, publications, and official records of the Superior Court, State of California, in case number BA 376026. True and correct copies of the documents (redacted for personal information) are attached.

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I. The Board Respondents seek Official Notice of the following materials:

1. Attachment 1 - Senate Final History Re: SB 53, 1993-1994 Regular Session; Enrolled Bill Report; Public Employees Retirement System, Bill Analysis SB 53; Senate Rules Comm. Senate Floor Analysis – SB 53, 6/1/1993.
2. Attachment 2 – *Joseph Tanner v. California Public Employees' Retirement System*, Case No. C078458.
3. *In re the Matter of Randy Adams* (OAH 2012030095 (*Adams*).

II. Grounds for Judicial Notice

The Court can take judicial notice of official acts and files of any state administrative agency. *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750; *Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125, "records and files of an administrative board are properly subject to judicial notice"; *Carleton v. Torrosa (*1993) 14 Cal.App.4th 745, 753, fn. 1, handbook published public agency, Evidence Code, § 452(c); See also, Evid. Code, § 1280.) Courts may also take judicial notice of facts not reasonably subject to dispute as well as those facts capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, § 452(g), (h).)

The materials subject to the Board's Request for Judicial Notice constitute publications, records maintained by, and official acts of a public agency and facts not reasonably subject to dispute under Evidence Code section 452. Further, the existence and genuineness of the materials, as well as their significance, constitutes facts that are of common knowledge not reasonably subject to dispute under Evidence Code section 452, subdivision (g).

Evidence Code section 453 mandates that the court take judicial notice of any matters specified in section 452 if a party requests it, and (a) sufficient notice is given

to the adverse party; and (b) sufficient information has been furnished to the court to take judicial notice.

III. Conclusion

Based on the above, the Board requests that the court take official notice of the documents described above.

Respectfully submitted,

Dated: 7/11/16

PREET KAUR, SENIOR STAFF ATTORNEY
Attorney for California Public Employees' Retirement System

Attachment 1

VOLUME 1

CALIFORNIA LEGISLATURE

AT SACRAMENTO

1993–94 REGULAR SESSION
1993–94 FIRST EXTRAORDINARY SESSION

SENATE FINAL HISTORY

SHOWING ACTION TAKEN IN THIS SESSION ON ALL SENATE BILLS
CONSTITUTIONAL AMENDMENTS, CONCURRENT, JOINT RESOLUTIONS
AND SENATE RESOLUTIONS

CONVENED DECEMBER 7, 1992
ADJOURNED SINE DIE NOVEMBER 30, 1994

DAYS IN SESSION 255

CALENDAR DAYS 725

LT. GOVERNOR
President of the Senate

SENATOR BILL LOCKYER
President pro Tempore

Compiled Under the Direction of
RICK ROLLENS
Secretary of the Senate

By
DAVID H. KNEALE, ESQ.
History Clerk

S.B. No. 53—Russell (Principal coauthor: Senator McCorquodale) (Principal coauthor: Assembly Member Cannella) (Coauthors: Senators Hughes and Kopp) (Coauthors: Assembly Members Conroy and Ferguson).

An act to amend Sections 20083.9, 20181, 20330, 20361, 20615, 20662.5, 20662.6, and 21151 of, to add Sections 20022.9, 20034.03, 20304, and 20615.5 to, to repeal Sections 20022.05, 20361.1, 20361.2, and 20361.3 of, and to repeal and add Sections 20022 and 20023 of, the Government Code, relating to public retirement.

1993

Dec. 23—Introduced. To Com. on RLS. for assignment. To print.
Dec. 30—From print. May be acted upon on or after January 29.

1993

Jan. 4—Read first time.
Jan. 6—To Com. on RLS.
Mar. 16—From committee with author's amendments. Read second time. Amended. Re-referred to committee.
Mar. 18—Re-referred to Com. on P.E. & R.
Mar. 29—Set for hearing March 29.
Mar. 30—From committee: Do pass, but first be re-referred to Com. on APPR. (Ayes 3. Noes 0. Page 541.) Re-referred to Com. on APPR.
May 17—Set for hearing May 24.
May 18—From committee with author's amendments. Read second time. Amended. Re-referred to committee.
May 28—From committee: Do pass as amended. (Ayes 13. Noes 0. Page 1303.)
June 1—Read second time. Amended. To third reading.
June 7—To Special Consent Calendar.
June 10—Read third time. Passed. (Ayes 38. Noes 0. Page 1643.) To Assembly.
June 10—In Assembly. Read first time. Held at Desk.
June 17—To Coms. on P.E.,R. & S.S.
July 2—From committee with author's amendments. Read second time. Amended. Re-referred to committee.
Aug. 16—From committee: Do pass as amended, but first amend, and re-refer to Com. on W. & M. (Ayes 8. Noes 0.) Read second time. Amended. Re-referred to Com. on W. & M.
Aug. 19—From committee with author's amendments. Read second time. Amended. Re-referred to committee.
Aug. 30—From committee: Do pass as amended. To Consent Calendar.
Aug. 31—Read second time. Amended. To second reading.
Sept. 1—Read second time. To Consent Calendar.
Sept. 3—Read third time. Passed. (Ayes 76. Noes 0. Page 3987.) To Senate.
Sept. 3—In Senate. To unfinished business.
Sept. 7—To Special Consent Calendar.
Sept. 9—Senate concurs in Assembly amendments. (Ayes 38. Noes 2. Page 1370.) To enrollment.
Sept. 17—Enrolled. To Governor at 3 p.m.
Oct. 11—Approved by Governor.
Oct. 11—Chaptered by Secretary of State. Chapter 1297, Statutes of 1993.

S.B. No. 54—Ayala (Principal coauthor: Senator Leonard) (Principal coauthor: Assembly Member Brulte) (Coauthor: Senator Rogers) (Coauthor: Assembly Member Woodruff).

An act to add Section 7078.1 to the Government Code, relating to enterprise zones, and declaring the urgency thereof, to take effect immediately.

1993

Dec. 29—Introduced. To Com. on RLS. for assignment. To print.
Dec. 30—From print. May be acted upon on or after January 29.

1993

Jan. 4—Read first time.
Jan. 6—To Coms. on G.O. and REV. & TAX.

1994

Feb. 1—Returned to Secretary of Senate pursuant to Joint Rule 56.

SENATE PUBLIC EMPLOYMENT & RETIREMENT COMMITTEE — SB 53
Teresa Hughes, Chairwoman — Hearing date: 3/29/93
SB 53 (Russell), as amended 3/16/93 — FISCAL: yes

PERS: INFLATION OF "COMPENSATION" UPON WHICH PERS BENEFITS ARE CALCULATED: REMEDIES

HISTORY:

Sponsor: PERS Board of Administration

Prior legislation: SB 2470 (Cecil Green)
Ch. 1544/Stats 1990
AB 2331 (Elder) 1992
vetoed

SUMMARY:

Would provide a variety of statutory changes in response to the recently uncovered, but apparently widely used, practice of "spiking" (intentional inflation) the final "compensation" (upon which retirement benefits are based) of employees of PERS local contracting agencies.

ANALYSIS:

1) PROBLEMS WITH EXISTING LAW.

Existing PERS law contains a detailed definition of those pay and benefit items which may be included in the definition of final "compensation" eligible for use in the calculation of retirement benefits.

Existing PERS law also contains a detailed definition of those pay and benefit items which are specifically excluded in the definition of final "compensation" eligible for use in the calculation of retirement benefits.

However, the committee is advised that existing PERS law defining "compensation" is clearly flawed.

A series of audits have shown widespread "spiking" (purposeful inflation) of the final "compensation" (upon which retirement benefits are based) local contracting agency employees is a major problem in the Public Employees' Retirement System.

2) HISTORY OF "SPIKING" LEGISLATION.

The committee is advised that since the "spiking" problem was recognized several years ago, several attempts have been made to solve the problem:

a) In 1990, Ch. 1544 authorized the hiring of additional auditors at PERS. In conjunction with auditors from the State Controller's Office, a series of audits resulting from this legislation indicated a systemic problem with its roots in the interpretation of existing PERS statutory definitions of "compensation.

b) In 1992, first attempt at legislation to curb pension abuse was made in AB 2331 (Elder). While originally a PERS sponsored bill, the bill was amended in ways that the System did not support. The bill was vetoed by the Governor.

c) During the past three months, numerous meetings were conducted by the author involving PERS staff and interested parties during which a total review of PERS pension "spiking" accountability issues was conducted.

A high degree of consensus has, thusfar, been achieved among the parties in the development mutually agreed upon reform language embodied in this bill.

3) PERS BOARD ADOPTED A "SHORT-TERM" SOLUTION LAST DECEMBER

The committee is advised that the PERS Board, on December 18, 1992, adopted a short-term solution for resolving the many cases of pension abuse and improper payroll reporting that have been uncovered during agency audits and automated audits of member records when processing retirement applications.

This short-term solution was implemented by board regulations which are to sunset on June 30, 1994.

3) THIS BILL - AN OVERVIEW.

This bill provides substantial revisions of existing PERS law in the following areas:

a) provides a clear definition of compensation (current provisions relating to reportable pay-rate and compensation would be repealed and new definitions added),

b) provides full funding of all member benefits,

c) reduces the ability to manipulate "compensation", thereby increasing benefits,

d) provides the PERS Board with clear oversight of benefits,

e) does not interfere with collective bargaining

f) allows a 19-month window period for the re-negotiation of labor agreements which provide for the "grandfathering" of benefits negotiated in good faith and based on information provided by PERS until 6/30/94

g) provides a 10 year, rather than three year, statute of limitations in cases of fraud,

h) penalizes agencies that knowingly fail to enroll eligible employees into membership,

i) corrects an inequity in the conversion of sick leave into pension service credit at the time of retirement,

j) eliminates abuses by truly part-time city attorneys who are currently treated as "elective officers,"

k) adds a provision to permit the conversion of employer-paid member contributions during a members final compensation period if the employer opts to include this provision in its contract and pay for it,

l) eliminates windfall benefits to certain elected or appointed board/council members who can now receive full-time PERS service credit for monthly meetings,

m) repeal the authority that permits employers to hire retired annuitants for a limited but indefinite duration (i.e., without regard to the 960 hours in a calendar year rule that applies to employment situations for most other retired annuitants) to fill a temporary vacancy until a permanent appointment is made, and

n) simplifies internal and external audits.

FISCAL IMPACT:

According to PERS,

> "...administrative costs arising from the bill would be principally realized in informing employers of the many changes that result from its enactment. Informational letters, revision of the PERS Public Agency Procedures Manual and employer training seminars would all be required to educate employers of the provisions of the bill. In addition, regulations would have to be drafted, approved, and published as required by statute.
>
> These are routine and ongoing activities in the system and those specifically resulting from this bill, though providing an increased workload, can be absorbed within existing resources."

COMMENTS:

1) The committee is advised that a section-by-section analysis of this bill is attached.

2) PERS arguments in support of this bill are as follows:

"The bill would provide for more specificity as to which forms of special compensation are reportable to the system by requiring that they be identified in board regulations.

It would restrict an employers ability to spike pension benefits for preferred employees and provide up-front funding for the conversion of employer-paid member contributions.

It would motivate employers to enter employees into PERS membership at the time they first qualify and, in general, provide the system with greater statutory authority to combat pension abuse and ensure more accurate payroll reporting."

3) SUPPORT:

California State Association of Counties
California Union of Safety Employees
California Faculty Association
City of Claremont

4) OPPOSITION:

none to date

SECTION-BY-SECTION ANALYSIS OF THE 3/16/93 VERSION OF SB 53 PROVIDED TO THE COMMITTEE BY PERS

Section 1 (repeal Government Code Section 20022)

Section 20022 has long defined what is and what is not reportable compensation for PERS purposes. The section has been amended many times to address new forms of compensation and as new and imaginative forms of special compensation are contrived by employers and employees, or as related federal regulations are published, more amendments continue to be needed. With the passage of this bill, board regulations would define which forms of special compensation are reportable for PERS purposes.

Section 2 (add Section 20022) to succinctly define compensation as this term is to be understood when found throughout the retirement law

This section speaks to the actual remuneration received by a member that is reportable to the system and that will be used in determining the member's creditable service and the amount of the employer's and the member's contributions.

Section 3 (repeal Section 20022.05)

This section now identifies which forms of special compensation can be reportable compensation for PERS purposes. It also specifies that the Department of Personnel Administration will decide what is compensation for nonrepresented state employees, and that the Trustees of the California State University will determine what is considered compensation for managerial and supervisory employees of the CSU.

Under this bill Section 20023 and board regulations would identify what is "special compensation." The bill makes no provision for DPA or the CSU Trustees to make this determination for their respective nonrepresented employees. Special compensation for state, school and local agency members that will be reportable to PERS would be defined by board regulations.

Section 4 (add Section 20022.2)

This section would define the term "labor policy or agreement" as the term is to be understood when found throughout the retirement law.

Sections 5 (repeal Section 20023)

This section defines the term "compensation earnable" and Section 6 would add a new definition for the term.

This section would define compensation earnable in terms of the normal payrate, rate of pay, or base pay utilized for the periodic reporting of payroll information to the system and the calculation of retirement benefits earned and to ensure the proper funding of retirement benefits throughout the member's covered employment.

Payrates would have to be stable and predictable among all members of a group or class of employment and would have to be publicly noticed b the governing body.

This section would also provide for compensation received for extraordinary duties, i.e., "special compensation." It would replace the current "special compensation" statute, Section 20022.05 which would be repealed.

The board would be required to define in regulations each type of special compensation that will be allowed. The regulations would be an all-inclusive list; therefore, any item of special compensation not listed in the regulations will not be considered compensation earnable for PERS purposes.

Also defined in the section are the terms "group or class of employment" and "final settlement pay."

Section 7 (add Section 20024.03)

This section would define the term "final compensation" as the term is to be used in determining any benefit resulting from service in an elected or appointed position.

The addition of this section would limit the final compensation used in computing any benefit accruing from elected or appointed service with an agency to the highest average annual compensation earnable b the member during his or her elected or appointed service with the agency.

The member, then, could have more than one final compensation. Provision is made to preclude the application of this section to members serving in elected or appointed offices on the date this section would become operative.

Elected or appointed officers receive a year of service credit for each year of tenure in office (pursuant to Section 20814) regardless of the amount of service actually performed.

While in some cases the compensation received is commensurate with the position, in many cases only minimal remuneration is received for service in the office.

Frequently, the benefit accruing from this service is substantial because of a high final compensation acquired through an other highly compensated position while a member of PERS or of a reciprocal retirement system.

This can result in a large unfunded liability for the employer with whom the member served in an elected or appointed capacity.

Section 8 (amend Section 20025.2)

These amendments would redefine which of two or more full-time positions shall be reportable for PERS membership.

There are occasions where PERS members occupy two full-time positions and where the compensation is vastly different between the two positions. This is frequently the case where one of the positions is an elected or appointed position as defined in Section 20361.

Under current law a member may elect membership through a very low paying elective or appointed office and, later, for purposes of determining his or her final compensation, resign from the elective or appointed office and continue on in the much more highly compensated second position. This creates a large unfunded liability for the employer for whom the member served in the elective or appointed office.

This amendment would provide that the member would contribute on the more highly compensated position and, thereby, keep his compensation earnable more in line with the final compensation eventually used to determine his or her retirement benefits.

Section 9 (amend Section 20181)

This amendment would provide a 10 year, rather than a three year, statute of limitations in cases of fraudulent reporting of compensation to the system.

Section 10 (add Section 20304)

This new section would motivate employers to bring employees into PERS membership promptly when they qualify.

Failure to bring employees into membership timely, or at all, is not uncommon. The addition of this section to the retirement law would provide a statutory penalty for agencies that fail to enroll employees into membership upon qualification when the employer knows or should have known that they qualified.

Section 11 (amend Section 20335)

These amendments would give statutory recognition to the position of assistant city attorney and to the fact that it and the positions of city attorney and deputy city attorney are not excluded from membership in the system while others who perform professional legal services for a city are excluded.

Section 12 (amend Section 20361)

This amendment would redefine the definition of "elective officer," to specifically exclude certain elective and appointive officers from membership in the system, and to specify that a city attorney and an assistant city attorney are excluded from the definition of an elective officer.

The bill grandfathers in persons in an elective or appointed position on the operative date of the bill, and prescribes that the board shall be the sole judge of which elected or appointed positions qualify the incumbent as an "elective officer."

The purpose of this amendment is to exclude from membership in the system those elected and appointed officers who serve on commissions, boards, councils or similar public bodies who receive full service credit for minimal service and are typically compensated only for attendance at meetings and reimbursed for expenses.

These members are often able to use service from these elected or appointed positions with final compensation derived from a regular full-time and well compensated position and reap a windfall of unfunded benefits.

This amendment would address this problem by excluding from membership elected or appointed officers to commissions, boards, councils or similar bodies of about 746 local contracting agencies and 57 county school employers except for those specifically included.

Additionally, this amendment would remove city attorneys from the definition of "elective officer." By so doing city attorneys would not be excluded from membership but they would have to meet the same membership eligibility requirements as do all other employees of a contracting agency.

What prompts this amendment is that typically this position is filled by a lawyer who has his or her own law firm. The city pays the attorney a retainer, usually $24,000 - $28,000 per year, plus fees and expenses. Work assignments are then funneled to the law firm at a set fee (usually $150 - $200 per hour). During the course of a year over one hundred

thousand dollars ($100,000), and as much as two hundred and fifty thousand dollars ($250,000), can be paid for legal representation.

During the city attorney's final compensation period, he or she negotiates a different style contract that pays all fees as salary. This leads to enormous unfunded benefits.

Section 13 (repeal Section 20361.1)

This section would be repealed to remove a unique and little used perquisite enjoyed by "elective officers."

This section provides a one time opportunity for an "elective officer," who is in active membership in the system, to arbitrarily terminate his or her membership and take a refund of contributions and, at some later date, again elect membership should he or she choose to do so. No other members of the system have this option.

Section 14 (repeal Section 20361.2)

The proposed amendment to Section 20361 would exclude from membership, after the operative date of this legislation, an elected officer holding the office of member of a county board of education.

Section 20361.2 would, if it were retained in the law, be in conflict with Section 20361 and contrary to the intent of who should be included in the definition of "elective officer."

Section 20361 would provide for the continuing membership of any persons who are in membership pursuant to this Section (20361.2) on the operative date of this legislation.

Currently, no county board of education has elected to be subject to this section.

Section 15 (repeal Section 20361.3)

This bill would amend Section 20361 to remove a city attorney from optional member and "elective officer" status in the system. By so doing this would place a city attorney under the same membership eligibility requirements as other employees of a city.

It would be inappropriate for an assistant city attorney to have elective officer status when that status is not extended to a city attorney. By repealing this section a city would no longer be able elect to include an assistant city attorney in the definition of elective officer.

Only two cities have elected to amend their contracts for this provision, Simi Valley and Imperial Beach. The amendment to Section 20361 would provide that an assistant city attorney in these cities on the operative date of this legislation would continue in elective officer status.

Section 16 (amend Section 20615)

This amendment would align this section with other provisions of this bill by requiring that employers extend this benefit of employer-paid member contributions to all members in a group or class of employment and not just to some individual members in a group or class of employment.

Section 17 (add Section 20615.5)

This section would permit a local contracting agency or a school employer to include in its contract with the system the authority to convert employer paid member contributions to salary during a member's final compensation period of employment.

Section 20615 has, since the early 1980's, allowed contracting agencies and school employers the option of paying all or a portion of the normal contributions required of a member.

It has also allowed the employer the option of discontinuing the payment of the member's contributions at any time. Employers have, over the years, collectively bargained with employee groups to pay the member's contributions in lieu of giving the employee a pay raise.

Associated with these agreements was a provision for the conversion of the employer-paid member contributions to salary during an individual employees final compensation period.

The result was pension spiking and an unfunded liability for the employer. This has been a popular practice which has become a part of many collective bargaining agreements, and one which both employers and employees believe should be continued.

This proposed addition to the retirement law would permit the continuation of this practice on an actuarially funded basis. The employer could provide, by contract option, for the conversion of employer-paid member contributions for groups or classes of employees.

Public notice would have to be given of an agency's intention to provide this benefit and new employees would have to be informed of how this benefit fits into their total compensation and benefit package.

Section 18 (amend Section 20616)

This amendment would conform Section 20616 to Section 20615 as that section would be amended by this bill.

This amendment to Section 20616 would require the state or the Regents of the University of California to extend the benefit of employer-paid member contributions to all members in a bargaining unit or category of employment, and not just to a select individual or individuals, if it chooses to provide the benefit at all.

Section 19 (add Section 20616.5)

This new section would provide for the conversion of employer-paid member contributions for state and University of California employees during the employees final compensation period.

Conversion would be permitted for represented state members when agreed to in a memorandum of understanding and for nonrepresented members when approved by the Department of Personnel Administration or the Regents of the University of California, as appropriate.

This benefit would be actuarially funded and members must be informed of how this benefit relates to their total compensation and benefit package.

Section 20 and Section 21 (amend Section 20862.5 and Section 20862.8)

These amendments would clarify for employers how sick leave is to be reported to the system for the crediting of additional service to member accounts.

These amendments provide that no additional days of sick leave are to be reported for the purpose of increasing a member's retirement benefit and, where violation of this provision is discovered retirement benefits may be adjusted. Abuse has been found in this area and these amendments are needed to specifically prohibit this practice.

Section 22 (amend Section 21151)

This amendment would eliminate the ability of an employer to hire a retiree for an indefinite period until a permanent appointment can be made.

It has been found that employers are abusing this provision. The 960 hours in any calendar year than an employer can hire a retired annuitant should be sufficient time for an employer to make a permanent appointment to fill a vacant position.

Section 23 provides that the bill shall become operative on July 1, 1994.

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Analyst Name: Marsha Jones
Phone No.: 326-3451

TE AND CONSUMER SERVICES AGENCY — **ENROLLED BILL REPORT**

DEPARTMENT	AUTHOR	BILL NUMBER
Public Employees' Retirement System	Russell	SB 53

SUMMARY

This bill makes significant changes to a number of areas in the Public Employees' Retirement Law for the purpose of curbing pension abuse. The primary cause of "pension abuse" or "pension spiking" has been a patchwork, difficult-to-understand statute. Senate Bill 53 eliminates the convoluted language resulting from over 19 amendments (12 of which were enacted in the 7 year period between 1983-1990) and begins anew, starting with the fundamental question of what compensation should be permitted to form the basis of a pension from a public pension system. The language in this bill closes the loopholes.

LEGISLATIVE HISTORY

In 1992, similar legislation was introduced, AB 2331 (Elder), to curb pension abuse. This Board-sponsored measure was extensively amended during the process in ways the System could not support. Therefore, the Board eventually withdrew its sponsorship because of concerns that the provisions of the bill would result in unfunded liabilities for the employer. (The PERS Board eventually took a "Neutral" position on the bill after extensive amendments in the final days of the legislative session.) The bill was vetoed by the Governor.

PROGRAM IMPACT

SB 53, if enacted, would have a positive program impact on the retirement system. This bill recognizes that current law resulted in many employment agreements that purport to permit certain forms of "compensation" to be for PERS purposes; while well-intentioned, these arrangements fall outside PERS-permitted "compensation." However, SB 53 also recognizes that these PERS benefits were bargained for in good faith, in exchange for giving up other benefits. SB 53 establishes a starting point, July 1, 1994, for the new clearer definition of "compensation"; this starting point permits employees and employers to go back to the bargaining table to renegotiate benefits within the parameters of the law.

VOTE: Assembly	VOTE: Senate
Floor: Aye 76 No 0 Policy Committee: Aye 8 No 0 Fiscal Committee: Aye 21 No 0	Floor: Aye 38 No 0 Policy Committee: Aye 3 No 0 Fiscal Committee: Aye 13 No 0
RECOMMENDATION GOVERNOR: SIGN X VETO ___	DEFER TO OTHER AGENCY ___
DEPARTMENT DIRECTOR [signature] DATE 9/9/93	AGENCY SECRETARY DATE

SB 53 also recognizes that local employers may have legitimate reasons to agree to new methods of defining total compensation. Rather than seek to absolutely prohibit all methods that have been established during the past decade, SB 53 permits the employer to contract for **one** additional contract amendment. This **optional** benefit would allow the employer to convert to salary previous employer-paid member contributions during the final compensation period **but only so long as two fundamental public policies are satisfied:** (1) the enhanced benefit must be paid for on a **pre-funded basis.** This ensures that today's taxpayers pay for the costs of governmental services they receive today, rather than shifting these costs to future generations; and (2) the taxpayers are given ample notice (i.e., two publicly agendized meetings of the local governmental body) of the increased cost. Spiking practices such as converting sick leave or vacation leave to salary during the final compensation period or reporting unearned salary increases in the forms of bonuses are strictly prohibited by this bill.

SPECIFIC FINDINGS

- The bill would add a new Section 20022 to the Government Code to succinctly define compensation as this term is to be understood when found throughout the retirement law.

  This section speaks to the actual remuneration received by a member that is reportable to the System. This amount will be used in determining the member's creditable service and the amount of the employer's and the member's contributions.

- The bill would repeal existing Government Code Section 20022.

  Section 20022 has long defined what is and what is not reportable compensation for PERS purposes. The section has been amended many times to address new forms of compensation. In the past ten years, new and imaginative forms of "special" compensation have been developed by employers and employees, and as related federal regulations are published (e.g., concerning overtime standards), more amendments continue to be needed. The provisions of this bill would require PERS to develop regulations to define which forms of special compensation (beyond the new statutory baseline definition) are reportable for PERS purposes.

- This bill would repeal Section 20022.05.

  Section 20022.05 now repeats (from Section 20022) which forms of special compensation can be reportable compensation for PERS purposes. It also specifies that the Department of Personnel Administration decides

what is "compensation" for nonrepresented state employees, and that the Trustees of the California State University determine what is considered "compensation" for managerial and supervisory employees of the CSU.

Under the provisions of this bill, Section 20023, and PERS regulations for local and school employers, would identify what is "special compensation." The Department of Personnel Administration and the Trustees of the California State University would have the authority to determine which payments and allowances that are paid to state or CSU employees will be considered special compensation, subject to review and approval of PERS. Special compensation for school and local agency members that will be reportable to PERS would be defined by regulations.

- This bill would add Section 20022.2 to define the term "labor policy or agreement" as the term is to be understood when found throughout the retirement law.

- The bill would repeal Section 20023 which defines the term "compensation earnable" and would add a new definition for the term.

This section would define compensation earnable in terms of the normal payrate, rate of pay, or base pay utilized for the periodic reporting of payroll information to the System and the calculation of retirement benefits earned, and to ensure the proper funding of retirement benefits throughout the member's covered employment. Payrates would have to be stable and predictable among all members of a group or class of employment and for members not in a group or class and would have to be publicly noticed by the governing body. This section would also provide for compensation received for extraordinary duties, i.e., "special compensation." It would replace the current "special compensation" statute, Section 20022.05 which would be repealed. PERS would be required to define in regulations each type of special compensation that will be allowed. The regulations would be an all-inclusive list; therefore, any item of special compensation not listed in the regulations will not be considered compensation earnable for PERS purposes. Also defined in the section are the terms "group or class of employment" and "final settlement pay." The section would delineate what constitutes "payrate" and what is and is not "special compensation" for state members including CSU and would contrast these provisions with any conflicts arising from any approved memorandum of understanding. The Department of Personnel Administration and the Trustees of the California State University would be authorized to determine which payments and

allowances paid to nonrepresented state employees would be considered "compensation." Special compensation items for represented state and CSU members would have to be approved by PERS before being included as "compensation" for retirement purposes.

o The bill would add Section 20024.03 which would define the term "final compensation" as the term is to be used in determining any benefit resulting from service in an elected or appointed position.

The addition of this section would limit the final compensation used in computing any benefit accruing from elected or appointed service on a city council or a county board of supervisors to the highest average annual compensation earnable by the member during his or her elected or appointed service in each office. The member, then, could have more than one final compensation. Provision is made to preclude the application of this section to a member serving in the elected or appointed office on the date this section would become operative.

Currently, elected or appointed officers receive a year of service credit for each year of tenure in office (pursuant to Section 20814) regardless of the amount of service actually performed. While in some cases the compensation received is commensurate with the position, in many cases only minimal remuneration is received for service in the office. Frequently, the benefit accruing from this service is substantial because of a high final compensation acquired through an other highly compensated position while a member of PERS or of a reciprocal retirement system. This can result in a large unfunded liability for the employer with whom the member served in an elected or appointed capacity.

o The bill would amend Section 20025.2 to redefine which of two or more full-time positions shall be reportable for PERS membership.

There are occasions where PERS members occupy two full-time positions and where the compensation is vastly different between the two positions. This is frequently the case where one of the positions is an elected or appointed position as defined in Section 20361. Under current law, a member may elect membership through a very low paying elective or appointed office and, later, for purposes of determining his or her final compensation, resign from the elective or appointed office and continue on in the much more highly compensated second position.

This creates a large unfunded liability for the employer for whom the member served in the elective or appointed office. This amendment would provide that the member would contribute on the more highly compensated position and, thereby, keep his compensation earnable more in line with the final compensation eventually used to determine his or her retirement benefits.

o The bill would amend Section 20181 to provide a 10 year, rather than a three year, statute of limitations in cases of fraudulent reporting of compensation to the System.

o The bill would add Section 20304 to the Government Code to motivate employers to bring employees into PERS membership promptly when they qualify.

Failure to bring employees into membership timely, or at all, is not uncommon. The addition of this section to the retirement law would provide a statutory penalty for agencies that fail to enroll employees into membership upon qualification when the employer knows or should have known that they qualified.

o This bill would amend Section 20335 of the Government Code to give statutory recognition to the position of assistant city attorney and to the fact that it and the positions of city attorney and deputy city attorney are not excluded from membership in the System while non-employees who perform professional legal services for a city are excluded.

o The bill would amend Section 20361 to redefine the definition of "elective officer," to specifically exclude certain elective and appointive officers from membership in the System, and to specify that a city attorney and an assistant city attorney are excluded from the definition of an elective officer. The bill grandfathers in persons in an elective or appointed position on the operative date of the bill, and prescribes that PERS shall be the sole judge of which elected or appointed positions qualify the incumbent as an "elective officer."

The purpose of this amendment is to exclude from membership in the System those elected and appointed officers who serve on commissions, boards, councils or similar public bodies who receive full service credit for minimal service and are typically compensated only for attendance at meetings and reimbursed for expenses. These members are often able to use service from these elected or appointed positions with final compensation derived from a regular full-time and well compensated position and reap a windfall of unfunded benefits.

This amendment would address this problem by excluding from membership elected or appointed officers to commissions, boards, councils or similar bodies of about 746 local contracting agencies and 57 county school employers, except for those specifically included.

This amendment would remove city attorneys from the definition of "elective officer." City attorneys would not be excluded from membership, but they would have to meet the same membership eligibility requirements as do all other employees of a contracting agency. What prompts this amendment is that typically this position is filled by a lawyer who has his or her own law firm. The city pays the attorney a retainer, usually $24,000 - $28,000 per year, plus fees and expenses. Work assignments are then funnelled to the law firm at a set fee (usually $150 - $200 per hour). During the course of a year, over one hundred thousand dollars ($100,000), and as much as two hundred and fifty thousand dollars ($250,000), can be paid for legal representation. During the city attorney's final compensation period, he or she negotiates a different style contract that pays all fees as salary. This leads to enormous unfunded benefits.

- The bill would repeal Section 20361.1 to remove a unique and little used perquisite enjoyed by "elective officers."

This section provides a one time opportunity for an "elective officer," who is in active membership in the System, to arbitrarily terminate his or her membership and take a refund of contributions and, at some later date, again elect membership should he or she choose to do so. No other members of the System have this option.

- This bill would repeal Section 20361.2.

The proposed amendment to Section 20361 would exclude from membership, after the operative date of this legislation, an elected officer holding the office of member of a county board of education. Section 20361.2 would, if it were retained in the law, be in conflict with Section 20361 and contrary to the intent of who should be included in the definition of "elective officer." Section 20361 would provide for the continuing membership of any persons who are in membership pursuant to this section (20361.2) on the operative date of this legislation.

o This bill would repeal Section 20361.3.

In 1985, this section was added to the Government Code to provide that any person holding the office of assistant city attorney is an "elected officer" for purposes of electing optional membership pursuant to Section 20361.. If this bill is enacted, a city would no longer be able to contract to be subject to this optional section.

o The bill would amend Section 20615 of the Government Code.

This change in law would align this section with other provisions of this bill by requiring that employers extend this benefit of employer-paid member contributions to all members in a group or class of employment and not just to certain individual members in a group or class of employment.

o The bill would add Section 20615.5 to permit a local contracting agency or a school employer to include in its contract with the System the authority to convert employer paid member contributions to salary during a member's final compensation period of employment. Without this contract amendment, such conversions would be prohibited under the new definition of "compensation earnable."

Since the early 1980s, Section 20615 has allowed contracting agencies and school employers the option of paying all or a portion of the normal contributions required of a member. It has also allowed the employer the option of discontinuing the payment of the member's contributions at any time. Over the years, employers have collectively bargained with employee groups to pay the member's contributions.

PERS audits reveal that many memorandums of understanding also include a provision for the "conversion" of the employer-paid member contributions to salary during an individual employee's final compensation period. This has been a popular practice and one which both employers and employees believe should be continued. Reportedly, in lieu of salary increases, the employer has offered this benefit because it was less costly than an a-cross-the-board salary increase. However, unexpectedly and dramatically increasing a member's salary, for the purpose of inflating retirement benefits, creates an unfunded liability for the employer.

This bill would permit the employer to contract for a pre-funded benefit to allow for the conversion during the final compensation period of employer-paid member contributions for groups or classes of employees. The employer and employee groups could "negotiate" through the

collective bargaining process for the benefit conversion at the time the employer agrees to pay all or a portion of the normal contributions of the member. The amount that the employer agrees to pay, e.g., 7% or 9% or less, is the same amount that would be converted to salary during the employee's final compensation period. Before adopting this provision, an employer would request a valuation of the cost of this benefit and would have to place consideration of this benefit on the agendas for two consecutive public meetings. The bill also allows the employer to submit independent actuarial information to the board regarding the employer contribution costs. The board has the final authority to determine the amount of the additional employer contribution required to fund this contract amendment.

o The bill would amend Section 20862.5 and Section 20862.8 to clarify how sick leave is to be reported to the System for the crediting of additional service to member accounts.

This amendment provides that no "additional" days of sick leave shall be reported to PERS for the purpose of increasing a member's retirement benefit and, where violation of this provision is discovered, retirement benefits may be adjusted. Abuse has been found in this area and these amendments are needed to specifically prohibit the practice of reporting more sick days than appear on the books at retirement.

o The bill would amend Section 21151 to add a provision that would allow a retired person to be employed by a contracting agency to fill a position when a regular employee is on a leave of absence for a period not to exceed one year. The appointment must be by a resolution of the governing body and must be reported to the board and a copy of the resolution provided. This provision is not applicable to the state or a school employer.

o Another provision is also added that would permit the employment of a retired person by a contracting agency to a position deemed to be of limited duration and requiring specialized skills or during an emergency to prevent stoppage of public business. Such appointments would be limited to 960 hours in a calendar year, the same that is in current law for PERS retired annuitants. When an appointment is expected to, or will, exceed 960 hours in a calendar year, the governing body of an agency can, by a resolution presented to the board, request an extension of the appointment. Appointments under the section could not exceed a total of one year. The board must act to allow or disallow the extension within 60 days; failure to act during that time period would constitute automatic approval of the request. This provision is not applicable to the state or a school employer.

Section 21151 (g) currently allows an employer to hire a retiree until a permanent appointment can be made. This gives the employer an indefinite period of time to fill the vacant position and creates the potential for abuse.

- The bill provides that the measure shall become operative on July 1, 1994.

The PERS Board of Administration, on December 18, 1992, adopted a short-term solution for resolving the many cases of pension abuse and improper payroll reporting that have been uncovered during agency audits and automated audits of member records. This short-term solution was implemented by board regulations which sunset on June 30, 1994. The long-term solution to eliminating pension abuse and achieving accountability for accurate payroll and membership reporting is the language presented in SB 53. It is the intention of the board that this act be operative immediately upon the June 30, 1994, expiration of its short-term solution.

PROS AND CONS

Pro Arguments - The bill would provide for more specificity as to which forms of special compensation are reportable to the System by requiring that they be identified in PERS regulations. It would restrict an employer's ability to spike pension benefits for preferred employees and provide full-funding for the conversion of employer-paid member contributions. It would motivate employers to enter employees into PERS membership at the time they first qualify and, in general, provide the System with greater statutory authority to combat pension abuse and ensure more accurate payroll reporting.

Con Arguments - Employees and employers would no longer be able to bargain for arguably illegal retirement benefits. Instead, retirement shall be fully funded over the actuarial life of the contract. Some may object to having to pay "up front" for the additional benefits.

FISCAL IMPACT

Program Costs - If enacted, this bill would curb payroll reporting abuses and would eliminate practices that have created an unfunded liability for the employer.

Administrative Costs - Costs resulting from this bill would be principally limited to informing employers of the many changes that result from its enactment. Informational letters, revision of the PERS Public Agency Procedures Manual and employer training seminars would all be required to educate employers of the provisions of the bill.

These are routine and ongoing activities in the System and those specifically resulting from this bill, though providing an increased workload, can be absorbed within existing resources.

RECOMMENDATION TO THE GOVERNOR

SIGN THE BILL.

This is a PERS Board-sponsored bill intended to curb pension abuse and ensure more accurate payroll reporting. The bill passed both Houses of the Legislature without a dissenting vote.

1B

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
1993-94 REGULAR SESSION
BILL ANALYSIS

BILL NO: SB 53 AUTHOR: Russell
SPONSOR: Public Employees' Retirement System VERSION: Enrolled
POSITION: SUPPORT

SUMMARY

This bill makes significant changes to a number of areas in the Public Employees' Retirement Law for the purpose of curbing pension abuse. The primary cause of "pension abuse" or "pension spiking" has been a patchwork, difficult-to-understand statute. Senate Bill 53 eliminates the convoluted language resulting from over 19 amendments (12 of which were enacted in the 7 year period between 1983-1990) and begins anew, starting with the fundamental question of what compensation should be permitted to form the basis of a pension from a public pension system. The language in this bill closes the loopholes.

LEGISLATIVE HISTORY

In 1992, similar legislation was introduced, AB 2331 (Elder), to curb pension abuse. This Board-sponsored measure was extensively amended during the process in ways the System could not support. Therefore, the Board eventually withdrew its sponsorship because of concerns that the provisions of the bill would result in unfunded liabilities for the employer. (The PERS Board eventually took a "Neutral" position on the bill after extensive amendments in the final days of the legislative session.) The bill was vetoed by the Governor.

PROGRAM IMPACT

SB 53, if enacted, would have a positive program impact on the retirement system. This bill recognizes that current law resulted in many employment agreements that purport to permit certain forms of "compensation" to be for PERS purposes; while well-intentioned, these arrangements fall outside PERS-permitted "compensation." However, SB 53 also recognizes that these PERS benefits were bargained for in good faith, in exchange for giving up other benefits. SB 53 establishes a starting point, July 1, 1994, for the new clearer definition of "compensation"; this starting point permits employees and employers to go back to the bargaining table to renegotiate benefits within the parameters of the law.

SB 53 also recognizes that local employers may have legitimate reasons to agree to new methods of defining total compensation. Rather than seek to absolutely prohibit all methods that have been established during the past decade, SB 53 permits the employer to contract for one additional contract amendment. This optional benefit would allow the employer to convert to salary previous employer-paid member contributions during the final compensation

period but only so long as two fundamental public policies are satisfied: (1) the enhanced benefit must be paid for on a pre-funded basis. This ensures that today's taxpayers pay for the costs of governmental services they receive today, rather than shifting these costs to future generations; and (2) the taxpayers are given ample notice (i.e., two publicly agendized meetings of the local governmental body) of the increased cost. Spiking practices such as converting sick leave or vacation leave to salary during the final compensation period or reporting unearned salary increases in the forms of bonuses are strictly prohibited by this bill.

SPECIFIC FINDINGS

o The bill would add a new Section 20022 to the Government Code to succinctly define compensation as this term is to be understood when found throughout the retirement law.

This section speaks to the actual remuneration received by a member that is reportable to the System. This amount will be used in determining the member's creditable service and the amount of the employer's and the member's contributions.

o The bill would repeal existing Government Code Section 20022.

Section 20022 has long defined what is and what is not reportable compensation for PERS purposes. The section has been amended many times to address new forms of compensation. In the past ten years, new and imaginative forms of "special" compensation have been developed by employers and employees, and as related federal regulations are published (e.g., concerning overtime standards), more amendments continue to be needed. The provisions of this bill would require PERS to develop regulations to define which forms of special compensation (beyond the new statutory baseline definition) are reportable for PERS purposes.

o This bill would repeal Section 20022.05.

Section 20022.05 now repeats (from Section 20022) which forms of special compensation can be reportable compensation for PERS purposes. It also specifies that the Department of Personnel Administration decides what is "compensation" for nonrepresented state employees, and that the Trustees of the California State University determine what is considered "compensation" for managerial and supervisory employees of the CSU.

Under the provisions of this bill, Section 20023, and PERS regulations for local and school employers, would identify what is "special compensation." The Department of Personnel Administration and the Trustees of the California State University would have the authority to determine which payments and allowances that are paid to state or CSU employees will be considered special compensation, subject to review and approval of PERS. Special compensation for school and local agency members that will be reportable to PERS would be defined by regulations.

o This bill would add Section 20022.2 to define the term "labor policy or agreement" as the term is to be understood when found throughout the retirement law.

o The bill would repeal Section 20023 which defines the term "compensation earnable" and would add a new definition for the term.

This section would define compensation earnable in terms of the normal payrate, rate of pay, or base pay utilized for the periodic reporting of payroll information to the System and the calculation of retirement benefits earned, and to ensure the proper funding of retirement benefits throughout the member's covered employment. Payrates would have to be stable and predictable among all members of a group or class of employment and for members not in a group or class and would have to be publicly noticed by the governing body. This section would also provide for compensation received for extraordinary duties, i.e., "special compensation." It would replace the current "special compensation" statute, Section 20022.05 which would be repealed. PERS would be required to define in regulations each type of special compensation that will be allowed. The regulations would be an all-inclusive list; therefore, any item of special compensation <u>not</u> listed in the regulations will not be considered compensation earnable for PERS purposes. Also defined in the section are the terms "group or class of employment" and "final settlement pay." The section would delineate what constitutes "payrate" and what is and is not "special compensation" for state members including CSU and would contrast these provisions with any conflicts arising from any approved memorandum of understanding. The Department of Personnel Administration and the Trustees of the California State University would be authorized to determine which payments and allowances paid to nonrepresented state employees would be considered "compensation." Special compensation items for represented state and CSU members would have to be approved by PERS before being included as "compensation" for retirement purposes.

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Currently, elected or appointed officers receive a year of service credit for each year of tenure in office (pursuant to Section 20814) regardless of the amount of service actually performed. While in some cases the compensation received is commensurate with the position, in many cases only minimal remuneration is received for service in the office. Frequently, the benefit accruing from this service is substantial because of a high final compensation acquired through an other highly compensated position while a member of PERS or of a reciprocal retirement system. This can result in a large unfunded liability for the employer with whom the member served in an elected or appointed capacity.

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o The bill would add Section 20615.5 to permit a local contracting agency or a school employer to include in its contract with the System the authority to convert employer paid member contributions to salary during a member's final compensation period of employment. Without this contract amendment, such conversions would be prohibited under the new definition of "compensation earnable."

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employer to submit independent actuarial information to the board regarding the employer contribution costs. The board has the final authority to determine the amount of the additional employer contribution required to fund this contract amendment.

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o The bill would amend Section 21151 to add a provision that would allow a retired person to be employed by a contracting agency to fill a position when a regular employee is on a leave of absence for a period not to exceed one year. The appointment must be by a resolution of the governing body and must be reported to the board and a copy of the resolution provided. This provision is not applicable to the state or a school employer.

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PROS AND CONS

Pro Arguments - The bill would provide for more specificity as to which forms of special compensation are reportable to the System by requiring that they be identified in PERS regulations. It would restrict an employer's ability to spike pension benefits for preferred employees and provide full-funding for the conversion of employer-paid member contributions. It would motivate employers to enter employees into PERS membership at the time they first qualify and, in general, provide the System with greater statutory authority to combat pension abuse and ensure more accurate payroll reporting.

Con Arguments - Employees and employers would no longer be able to bargain for arguably illegal retirement benefits. Instead, retirement shall be fully funded over the actuarial life of the contract.. Some may object to having to pay "up front" for the additional benefits.

FISCAL IMPACT

Program Costs - If enacted, this bill would curb payroll reporting abuses and would eliminate practices that have created an unfunded liability for the employer.

Administrative Costs - Costs resulting from this bill would be principally limited to informing employers of the many changes that result from its enactment. Informational letters, revision of the PERS Public Agency Procedures Manual and employer training seminars would all be required to educate employers of the provisions of the bill.

These are routine and ongoing activities in the System and those specifically resulting from this bill, though providing an increased workload, can be absorbed within existing resources.

POSITION

SUPPORT.

This is a PERS Board-sponsored bill intended to curb pension abuse and ensure more accurate payroll reporting.

1C

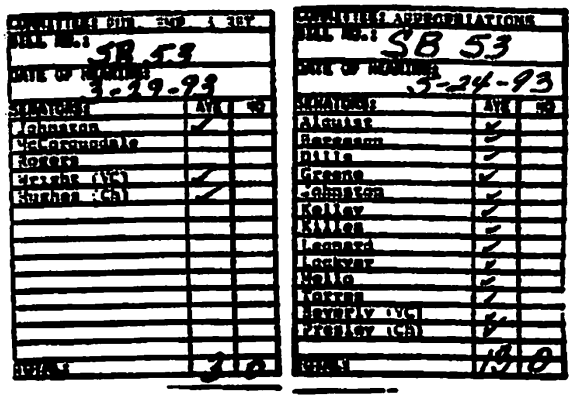
SPECIAL CONSENT

SENATE RULES COMMITTEE

Office of
Senate Floor Analyses
1020 N Street, Suite 524
445-6614

Bill No. SB 53
Author: Russell (R), et al
Amended: 6/1/93
Vote Required: 21

Committee Votes:



Senate Floor Vote:

Assembly Floor Vote:

SUBJECT: PERS: administration

SOURCE: Public Employees' Retirement System (PERS) Board of Administration

DIGEST: This bill provides a variety of statutory changes in response to the recently uncovered, but apparently widely used, practice of "spiking" (intentional inflation) the final "compensation" (upon which retirement benefits are based) of employees of PERS local contracting agencies.

ANALYSIS: Problems With Existing Law:

Existing PERS law contains a detailed definition of those pay and benefit items which may be included in the definition of final "compensation" eligible for use in the calculation of retirement benefits.

Existing PERS law also contains a detailed definition of those pay and benefit items which are specifically excluded in the definition of final "compensation" eligible for use in the calculation of retirement benefits.

However, the Senate Industrial Relations Committee is advised that existing PERS law defining "compensation" is clearly flawed.

A series of audits have shown widespread "spiking" (purposeful inflation) of the final "compensation" (upon which retirement benefits are based) local contracting agency employees is a major problem in PERS.

CONTINUED

History of "Spiking" Legislation:

The committee was advised that since the "spiking" problem was recognized several years ago, several attempts have been made to solve the problem:

1. In 1990, Chapter 1544 authorized the hiring of additional auditors at PERS. In conjunction with auditors from the State Controller's Office, a series of audits resulting from this legislation indicated a systemic problem with its roots in the interpretation of existing PERS statutory definitions of "compensation.

2. In 1992, first attempt at legislation to curb pension abuse was made in AB 2331 (Elder). While originally a PERS sponsored bill, the bill was amended in ways that the System did not support. The bill was vetoed by the Governor.

3. During the past three months, numerous meetings were conducted by the author involving PERS staff and interested parties during which a total review of PERS pension "spiking" accountability issues was conducted.

A high degree of consensus has, thus far, been achieved among the parties in the development mutually agreed upon reform language embodied in this bill.

PERS Board Adopted a "Short-term" Solution Last December:

The committee was advised that the PERS Board, on December 18, 1992, adopted a short-term solution for resolving the many cases of pension abuse and improper payroll reporting that have been uncovered during agency audits and automated audits of member records when processing retirement applications.

This short-term solution was implemented by board regulations which are to sunset on June 30, 1994.

This Bill - An Overview:

This bill provides substantial revisions of existing PERS law in the following areas:

1. Provides a clear definition of compensation (current provisions relating to reportable pay-rate and compensation would be repealed and new definitions added).

2. Provides full funding of all member benefits.

3. Reduces the ability to manipulate "compensation", thereby increasing benefits.

4. Provides the PERS Board with clear oversight of benefits.

5. Does not interfere with collective bargaining.

6. Allows a 19-month window period for the re-negotiation of labor agreements which provide for the "grandfathering" of benefits negotiated in good faith and based on information provided by PERS, until June 30, 1994.

7. Provides a 10-year, rather than three-year, statute of limitations in cases of fraud.

CONTINUED

3. Penalizes agencies that knowingly fail to enroll eligible employees into membership.

9. Corrects an inequity in the conversion of sick leave into pension service credit at the time of retirement.

10. Eliminates abuses by truly part-time city attorneys who are currently treated as "elective officers."

11. Adds a provision to permit the conversion of employer-paid member contributions during a members final compensation period if the employer opts to include this provision in its contract and pay for it.

12. Eliminates windfall benefits to certain elected or appointed board/council members who can now receive full-time PERS service credit for monthly meetings.

13. Repeals the authority that permits employers to hire retired annuitants for a limited but indefinite duration (i.e., without regard to the 960 hours in a calendar year rule that applies to employment situations for most other retired annuitants) to fill a temporary vacancy until a permanent appointment is made.

14. Simplifies internal and external audits.

See attachment for details.

FISCAL EFFECT: Appropriation: No Fiscal Committee: Yes Local: No

PERS estimates no increased program cost as a result of this bill, and states that any increased support costs would be absorbed within existing resources.

SUPPORT: (Verified 6/2/93)

Public Employees' Retirement System Board of Administration (source)
California State Association of Counties
California Union of Safety Employees
California Faculty Association
City of Claremont
Peace Officers Research Association of California
California Teachers Association
California Correctional Peace Officers Association

ARGUMENTS IN SUPPORT: PERS arguments in support of this bill are as follows:

"The bill would provide for more specificity as to which forms of special compensation are reportable to the system by requiring that they be identified in board regulations.

"It would restrict an employers ability to spike pension benefits for preferred employees and provide up-front funding for the conversion of employer-paid member contributions.

"It would motivate employers to enter employees into PERS membership at the time they first qualify and, in general, provide the system with greater statutory authority to combat pension abuse and ensure more accurate payroll reporting."

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The California State Association of Counties states, "Senate Bill 53 proposed to overhaul PERS Final Compensation code sections. It proposes top streamline, simplify, and limit opportunity for abuse. The bill has been crafted through a healthy process of interest group meetings which is on-going. We have appreciated the opportunity to participate in those meetings and continue to participate in future opportunities to meet on this important topic. It is or belief that Senate Bill 53 generally addresses the important issues needed for reform of the PERS compensation code sections. We continue to work with your staff on a limited range of technical issues of importance to us."

They believe that this bill will help restore credibility to the PERS compensation code sections.

DLW:ctl 6/2/93 Senate Floor Analyses

CONTINUED

SECTION-BY-SECTION ANALYSIS OF THE 3/16/93 VERSION OF SB 53 PROVIDED TO THE COMMITTEE BY PERS

Section 1 (repeal Government Code Section 20022)

Section 20022 has long defined what is and what is not reportable compensation for PERS purposes. The section has been amended many times to address new forms of compensation and as new and imaginative forms of special compensation are contrived by employers and employees, or as related federal regulations are published, more amendments continue to be needed. With the passage of this bill, board regulations would define which forms of special compensation are reportable for PERS purposes.

Section 2 (add Section 20022) to succinctly define compensation as this term is to be understood when found throughout the retirement law

This section speaks to the actual remuneration received by a member that is reportable to the system and that will be used in determining the member's creditable service and the amount of the employer's and the member's contributions.

Section 3 (repeal Section 20022.05)

This section now identifies which forms of special compensation can be reportable compensation for PERS purposes. It also specifies that the Department of Personnel Administration will decide what is compensation for nonrepresented state employees, and that the Trustees of the California State University will determine what is considered compensation for managerial and supervisory employees of the CSU.

Under this bill Section 20023 and board regulations would identify what is "special compensation." The bill makes no provision for DPA or the CSU Trustees to make this determination for their respective nonrepresented employees. Special compensation for state, school and local agency members that will be reportable to PERS would be defined by board regulations.

Section 4 (add Section 20022.2)

This section would define the term "labor policy or agreement" as the term is to be understood when found throughout the retirement law.

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Sections 5 (repeal Section 20023)

This section defines the term "compensation earnable" and Section 6 would add a new definition for the term.

This section would define compensation earnable in terms of the normal payrate, rate of pay, or base pay utilized for the periodic reporting of payroll information to the system and the calculation of retirement benefits earned and to ensure the proper funding of retirement benefits throughout the member's covered employment.

Payrates would have to be stable and predictable among all members of a group or class of employment and would have to be publicly noticed b the governing body.

This section would also provide for compensation received for extraordinary duties, i.e., "special compensation." It would replace the current "special compensation" statute, Section 20022.05 which would be repealed.

The board would be required to define in regulations each type of special compensation that will be allowed. The regulations would be an all-inclusive list; therefore, any item of special compensation not listed in the regulations will not be considered compensation earnable for PERS purposes.

Also defined in the section are the terms "group or class of employment" and "final settlement pay."

Section 7 (add Section 20024.03)

This section would define the term "final compensation" as the term is to be used in determining any benefit resulting from service in an elected or appointed position on a city council or a board of supervisors.
The addition of this section would limit the final compensation used in computing any benefit accruing from elected or appointed service with an agency to the highest average annual compensation earnable b the member during his or her elected or appointed service with the agency.

The member, then, could have more than one final compensation. Provision is made to preclude the application of this section to members serving in elected or appointed offices on the date this section would become operative.

Elected or appointed officers receive a year of service credit for each year of tenure in office (pursuant to Section 20814) regardless of the amount of service actually performed.

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while in some cases the compensation received is commensurate with the position. In many cases only minimal remuneration is received for service in the office.

Frequently, the benefit accruing from this service is substantial because of a high final compensation acquired through an other highly compensated position while a member of PERS or of a reciprocal retirement system.

This can result in a large unfunded liability for the employer with whom the member served in an elected or appointed capacity.

Section 8 (amend Section 20025.2)

These amendments would redefine which of two or more full-time positions shall be reportable for PERS membership.

There are occasions where PERS members occupy two full-time positions and where the compensation is vastly different between the two positions. This is frequently the case where one of the positions is an elected or appointed position as defined in Section 20361.

Under current law a member may elect membership through a very low paying elective or appointed office and, later, for purposes of determining his or her final compensation, resign from the elective or appointed office and continue on in the much more highly compensated second position. This creates a large unfunded liability for the employer for whom the member served in the elective or appointed office.

This amendment would provide that the member would contribute on the more highly compensated position and, thereby, keep his compensation earnable more in line with the final compensation eventually used to determine his or her retirement benefits.

Section 9 (amend Section 20181)

This amendment would provide a 10 year, rather than a three year, statute of limitations in cases of fraudulent reporting of compensation to the system.

Section 10 (add Section 20304)

This new section would motivate employers to bring employees into PERS membership promptly when they qualify.

Failure to bring employees into membership timely, or at all, is not uncommon. The addition of this section to the retirement law would provide a statutory penalty for agencies that fail to enroll employees into membership upon qualification when the employer knows or should have known that they qualified.

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Section 11 (amend Section 20335)

These amendments would give statutory recognition to the position of assistant city attorney and to the fact that it and the positions of city attorney and deputy city attorney are not excluded from membership in the system while others who perform professional legal services for a city are excluded.

Section 12 (amend Section 20361)

This amendment would redefine the definition of "elective officer," to specifically exclude certain elective and appointive officers from membership in the system, and to specify that a city attorney and an assistant city attorney are excluded from the definition of an elective officer.

The bill grandfathers in persons in an elective or appointed position on the operative date of the bill, and prescribes that the board shall be the sole judge of which elected or appointed positions qualify the incumbent as an "elective officer."

The purpose of this amendment is to exclude from membership in the system those elected and appointed officers who serve on commissions, boards, councils or similar public bodies who receive full service credit for minimal service and are typically compensated only for attendance at meetings and reimbursed for expenses.

These members are often able to use service from these elected or appointed positions with final compensation derived from a regular full-time and well compensated position and reap a windfall of unfunded benefits.

This amendment would address this problem by excluding from membership elected or appointed officers to commissions, boards, councils or similar bodies of about 746 local contracting agencies and 57 county school employers except for those specifically included.

Additionally, this amendment would remove city attorneys from the definition of "elective officer." By so doing city attorneys would not be excluded from membership but they would have to meet the same membership eligibility requirements as do all other employees of a contracting agency.

What prompts this amendment is that typically this position is filled by a lawyer who has his or her own law firm. The city pays the attorney a retainer, usually $24,000 - $28,000 per year, plus fees and expenses. Work assignments are then funneled to the law firm at a set fee (usually $150 - $200 per hour). During the course of a year over one hundred

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thousand dollars ($100,000), and as much as two hundred and fifty thousand dollars ($250,000), can be paid for legal representation.

During the city attorney's final compensation period, he or she negotiates a different style contract that pays all fees as salary. This leads to enormous unfunded benefits.

Section 13 (repeal Section 20361.1)

This section would be repealed to remove a unique and little used perquisite enjoyed by "elective officers."

This section provides a one time opportunity for an "elective officer," who is in active membership in the system, to arbitrarily terminate his or her membership and take a refund of contributions and, at some later date, again elect membership should he or she choose to do so. No other members of the system have this option.

Section 14 (repeal Section 20361.2)

The proposed amendment to Section 20361 would exclude from membership, after the operative date of this legislation, an elected officer holding the office of member of a county board of education.

Section 20361.2 would, if it were retained in the law, be in conflict with Section 20361 and contrary to the intent of who should be included in the definition of "elective officer."

Section 20361 would provide for the continuing membership of any persons who are in membership pursuant to this Section (20361.2) on the operative date of this legislation.

Currently, no county board of education has elected to be subject to this section.

Section 15 (repeal Section 20361.3)

This bill would amend Section 20361 to remove a city attorney from optional member and "elective officer" status in the system. By so doing this would place a city attorney under the same membership eligibility requirements as other employees of a city.

It would be inappropriate for an assistant city attorney to have elective officer status when that status is not extended to a city attorney. By repealing this section a city would no longer be able elect to include an assistant city attorney in the definition of elective officer.

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Only two cities have elected to amend their contracts for this provision. Simi Valley and Imperial Beach. The amendment to Section 20361 would provide that an assistant city attorney in these cities on the operative date of this legislation would continue in elective officer status.

Section 16 (amend Section 20615)

This amendment would align this section with other provisions of this bill by requiring that employers extend this benefit of employer-paid member contributions to all members in a group or class of employment and not just to some individual members in a group or class of employment.

Section 17 (add Section 20615.5)

This section would permit a local contracting agency or a school employer to include in its contract with the system the authority to convert employer paid member contributions to salary during a member's final compensation period of employment.

Section 20615 has, since the early 1980's, allowed contracting agencies and school employers the option of paying all or a portion of the normal contributions required of a member.

It has also allowed the employer the option of discontinuing the payment of the member's contributions at any time. Employers have, over the years, collectively bargained with employee groups to pay the member's contributions in lieu of giving the employee a pay raise.

Associated with these agreements was a provision for the conversion of the employer-paid member contributions to salary during an individual employees final compensation period.

The result was pension spiking and an unfunded liability for the employer. This has been a popular practice which has become a part of many collective bargaining agreements, and one which both employers and employees believe should be continued.

This proposed addition to the retirement law would permit the continuation of this practice on an actuarially funded basis. The employer could provide, by contract option, for the conversion of employer-paid member contributions for groups or classes of employees.

Public notice would have to be given of an agency's intention to provide this benefit and new employees would have to be informed of how this benefit fits into their total compensation and benefit package.

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require every school district within a county office's jurisdiction to submit to the county office a written request for the benefit increase before the county office could elect to amend its contract for the benefit increase.

Section 18 (amend Section 20616)

This amendment would conform Section 20616 to Section 20615 as that section would be amended by this bill.

This amendment to Section 20616 would require the state or the Regents of the University of California to extend the benefit of employer-paid member contributions to all members in a bargaining unit or category of employment, and not just to a select individual or individuals, if it chooses to provide the benefit at all.

Section 19 (add Section 20616.5)

This new section would provide for the conversion of employer-paid member contributions for state and University of California employees during the employees final compensation period.

Conversion would be permitted for represented state members when agreed to in a memorandum of understanding and for nonrepresented members when approved by the Department of Personnel Administration or the Regents of the University of California, as appropriate.

This benefit would be actuarially funded and members must be informed of how this benefit relates to their total compensation and benefit package.

Section 20 and Section 21 (amend Section 20862.5 and Section 20862.8)

These amendments would clarify for employers how sick leave is to be reported to the system for the crediting of additional service to member accounts.

These amendments provide that no additional days of sick leave are to be reported for the purpose of increasing a member's retirement benefit and, where violation of this provision is discovered retirement benefits may be adjusted. Abuse has been found in this area and these amendments are needed to specifically prohibit this practice.

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Section 22 (amend Section 21151)

This amendment would eliminate the ability of an employer to hire a retiree for an indefinite period until a permanent appointment can be made.

It has been found that employers are abusing this provision. The 960 hours in any calendar year than an employer can hire a retired annuitant should be sufficient time for an employer to make a permanent appointment to fill a vacant position.

Section 23 provides that the bill shall become operative on July 1, 1994.

1D

BILL ANALYSIS

DPA 104
(REV 11/89)

DEPARTMENT OF PERSONNEL ADMINISTRATION	AUTHOR	BILL NUMBER
	Russell	SB 53
SPONSORED BY	RELATED BILLS	ORIGINAL OR DATE LAST AMENDED
Public Employees' Retirement System	AB 2331, 1992	Original

BILL SUMMARY

This bill is sponsored by the Public Employees' Retirement System (PERS) to curb the potential for pension spiking and other payroll reporting abuses by local contract agencies. This bill would: 1) delete the definition of "compensation" from the PERS law and add "payrate" instead; 2) simplify the definition of "special compensation;" 3) define a "group or class of employees;" 4) prescribe the method of reporting sick leave credits to PERS services; 5) amend several provisions regarding optional membership rights; 6) permit PERS to charge an employer for administrative costs, as well as member contributions, if an employee was not reported for membership upon qualification; 7) delete a provision which permits certain retirees to work for an unspecified length of appointment; and 8) allow, rather than require, PERS to adjust any retirement allowance found to be the result of improper payroll reporting.

ANALYSIS

Specific Findings

1. Considerable attention has recently been focused on PERS due to newspaper articles about public employers' "pension spiking" and pension fraud or abuse. One local public employer has even had several of its employees face felony charges regarding pension fraud. It appears that the most common method of enabling employees to retire with benefits greater than should be otherwise earned is by manipulating compensation reported to PERS during an employee's last year or so prior to retirement.

   Compensation is a critical variable used for determining a member's death, disability or service retirement benefits since these benefits are based on a percent of "final compensation." Final compensation is the highest annual compensation earnable by a member over a period ranging up to 36 consecutive months, although this period is most likely to be only 12 months in those instances of flagrant pension fraud. For State members, the period has been designated as 12 months.

   Last year, the PERS Board of Administration (Board) sponsored legislation (AB 2331, Elder) to prevent pension fraud and to give the Board various enforcement powers. That legislation was vetoed because of various subsequent provisions (opposed by PERS), endorsed by labor representatives, which appeared to endorse pension spiking.

2. This bill represents PERS' second attempt at preventing pension fraud by focusing on compensation, membership exclusions and eligibility, and imposing financial disincentives for employers that fail to properly report employees for membership, as detailed below. (These provisions would become effective July 1, 1994, and some proposed regulations, which allow public agency collective bargaining agreements covering compensation, would apply until June 30, 1994.)

RECOMMENDED POSITION	DEPARTMENTAL USE	GOVERNOR'S OFFICE USE
SUPPORT, IF AMENDED		
DIRECTOR Date: 4-6-93	Analyst: OAA Date:	Position Noted: ( )
CHIEF DEPUTY DIRECTOR Date: 4-6-93	LRD: Date:	Position Approved: ( )
LEGISLATIVE REVIEW Date:	Unit Supvr: Date:	Position Disapproved: ( )
	Section Mgr: ALH Date:	Change Position to:
	Branch Chief: Date:	By: Date:
	Division Chief: WHC Date:	

LEGISLATIVE INTENT SERVICE (800) 666-1917

A. Although current PERS law contains a very detailed definition of items of pay which may and may not be used for purposes of retirement, the definition appears to no longer serve its purpose. Not only is the definition no longer all-inclusive and can be superseded by memorandum of understanding for State members, but it fails to differentiate between a member's base pay and his/her pay for special skills or abilities or other terms and conditions of employment. This overall lack of clarity and purpose has encouraged some contracting agencies to improperly report compensation to PERS, although the State has not had this problem. Also, the current PERS definition of "compensation earnable" does not specify what is includable for final compensation purposes. This bill would simplify the current definition and better define compensation earnable. Specifically, this bill would:

- Delete the current definition of compensation and replace it with "payrate." Payrate would be defined as the normal rate of pay or base pay for services rendered on a full-time basis by a group or class of employees during normal work hours and would be the same as that used for such payments as sick leave and vacation or for determining long-term or short-term disability benefits. This definition is straightforward and should reduce confusion about what should be reported as regards regular pay.

- Define "special compensation" as any payment for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions, provided a "labor agreement" had been reached to include this special compensation with the payrate. The Board would have the authority to promulgate regulations and determine whether the payments would constitute special compensation, and there would be a limit set on the percent of special compensation in excess of the payrate which could be added to the payrate. Special compensation would also include the monetary value of the member contributions which were in fact paid by the employer.

- Define which payments are not considered to be special compensation.

- Define "group or class of employees," for purposes of payrate and special compensation, for example, as members of a bargaining unit or "excluded employees." A single employee could not be considered as a group or class, and the highest ranking positions could also not be a group or class. This would prevent, for example, a City Manager from spiking his/her final compensation through an individual contract with the City Council.

- Define "compensation earnable," for purposes of determining PERS benefits, as the payrate and special compensation of the member.

- Specify that the final compensation for elective or appointed officers would be restricted to the compensation earnable in the elective or appointive office.

These new provisions would clarify, for contracting agency employers, what items of compensation must be reported for purposes of contributions and prevent the improper inflation of compensation during the final compensation period.

B. Current PERS law permits members who hold two or more full-time positions to designate the position in which membership shall be reported. PERS law presently excludes part-time employees but allows certain appointive and elective officials who do not work more than half-time to become PERS members on a voluntary basis. Since elective officers of contracting agencies frequently hold two positions, the electiva-

lower member contributions needed for the minimal salary earned. Prior to retiring, the higher paying position is elected for membership, resulting in a form of pension spiking. This proposed legislation would:

- Require that a person who holds two or more full-time positions become a member in the position with the highest payrate.
- Exclude from PERS membership local and school employees, who are first elected or appointed after June 30, 1994, to serve on school district or local boards, commissions, or councils, since these elective positions require less than half-time services.
- Delete the optional membership rights for persons holding the position of City Attorney or of Assistant City Attorney and subject these positions to the usual qualifications for membership. These provisions would apply to persons first elected or appointed, or following a break in service, after June 30, 1994.

C. At the present time, PERS law permits a retired person to receive compensation for services rendered a PERS-covered employer under specific conditions. One such provision permits a contracting agency to appoint a retired person to a temporary position until a permanent appointment is made. This bill would limit the conditions and length of time in which a retired person can serve a PERS-covered employer to very specific situations, with compensated services generally not exceeding 120 days in a calendar year.

D. PERS law currently requires that contributions from the member and the employer be paid if the actual date of membership is prior to the reported date, but no penalty to the member or employer is assessed. This bill would allow PERS to assess an employer which failed to enroll a person into membership with a $500 administrative fee, in addition to the member and the employer contributions for the period in which the person would have otherwise been a member.

E. Current PERS law specifies that the three-year period of limitation, for the correction of erroneous benefit payment made on the basis of fraud, shall begin upon the date of the discovery. Any payment now found to be in error, regardless of how made, must be adjusted. If benefits were found to be overpaid, a retiree or beneficiary could be required to pay back the overpayments to when the overpayment was first made. This bill would:

- Increase the period of limitation to ten years for fraudulently caused payments.
- Allow the PERS Board to authorize the continued payments if the adjustment (reduction, in this case) of the retirement allowance would cause the retired member any financial hardship and the elements of estoppel were present.

F. Current PERS law permits the State, the University of California, and school and local employers to pay all or a portion of the members' contributions. These employer payments are not now considered to be compensation earnable for purposes of determining retirement benefits, and only local employers are known to actually pay the members' contributions. Also, under federal Internal Revenue Service (IRS) law, Section 414(h)(2), the amounts contributed by a member to a public pension plan can be made on a pre-tax basis if characterized as though paid (picked-up) by the employer. The member contributions picked up by the employer are, however, currently considered to be part of PERS' compensation earnable.

These two provisions have caused a great deal of confusion at the local level, and many employers have allowed the employer payment of the member contributions and the value of the pre-tax contributions to be included as compensation earnable during the final compensation period. This practice is known as "pension spiking" and is one of the easiest ways to improperly inflate pension benefits.

This bill would now clarify that the employer payment of member contributions under PERS law would have to be made specifically for all members in the group or class of employment, and include the employer's payment in the member's payrate during the final compensation period if:

- The benefits were provided by collective bargaining agreement.
- The benefit, at the local or school level, had been provided through amendment of the employer's contract with PERS.
- Prior to amending its PERS contract, the local or school employer had provided timely public notice of its intent and fully disclosed the fiscal impact during a public meeting.
- The employer informed every new member of this benefit and how it affects their compensation and benefit package.
- The increased cost to the employer which provides this benefit is actuarially determined at a level percent of contributions throughout the period in which the liability must be amortized.

3. As currently worded, this bill unacceptably modifies the law regarding the State's current statutory authority to determine the salaries and benefits of its employees. There are also several provisions which appear to permit pension spiking. Specifically:

- The Government Code (Section 19816 et seq.) entrusts the Department of Personnel Administration (DPA) with the authority to set and negotiate the salaries and benefits of State employees, and that authority is recognized and cited in current PERS law. It appears that this authority should be affirmed in this bill.
- The definition of labor policy or agreement used in this bill is intended to apply to all PERS employers, including the State. However, since the definition of collective bargaining for State employees is presently found in the Government Code under the Ralph C. Dills Act, there could be circumstances where the PERS law might be inappropriately applied or misinterpreted in any collective bargaining issue involving State employee benefits.
- The board's authority to promulgate regulations and to determine what constitutes compensation should be limited to employers other than the State. Unlike all other public agencies, the State's authority is already in statute for DPA, with statutory recognition for collective bargaining and legislative oversight.
- It appears contrary to the purpose of eliminating pension fraud and abuse to permit benefit payments, which may have been computed on improperly reported items of compensation, to continue to be made, regardless of financial hardship to a member. It is the PERS Board's fiduciary responsibility to ensure that only those benefits which have been legally and actually accrued and earned by a member be payable.

- The provision which would permit the conversion of employer payment of member contributions to count as compensation for retirement purposes during the final compensation period should not be applicable to State employees. As noted earlier, this was a very common method of improperly inflating a local member's final compensation, even though it is specifically prohibited under current law. Since the State picks-up its employees' contributions, we do not want to jeopardize our plan's qualified status under the Internal Revenue Code nor give taxpayers the impression that the State would permit pension spiking. If the State is not removed from this provision, this bill would place a benefit for State employees into PERS law prior to collective bargaining and the Legislature's ratification of an MOU. State employees benefits must first be collectively bargained and ratified by the Legislature before placing the benefit in PERS law.

Cost Findings

The fiscal implications of this bill have not been fully determined at this time for the contracting agencies. Since the State has not permitted pension spiking nor allowed salaries to be improperly reported to PERS, no fiscal impact is expected for the State.

LEGISLATIVE HISTORY

This bill is sponsored by PERS, as was the original AB 2331 (Elder) last year, to address the issue of pension fraud and abuse. Although the language contained in this bill was the collaborative effort of PERS staff, and employee and employer organizations, including DPA staff, DPA had previously requested certain amendments be made to clarify the State's compensation and MOU statutory requirements. These amendments were not included in the bill's current version.

RECOMMENDATION - SUPPORT, IF AMENDED

The Department of Personnel Administration recognizes the need to prevent pension fraud and abuse in public pension plans and supports PERS in this endeavor. However, the measures which would prevent pension fraud at the local level need not be directed to the State, as the State has not had a problem in this area primarily because the State of California has to meet numerous statutory requirements that specify how employees' salaries and benefits are set. These provisions are then subject to ratification by the Legislature. These controls have successfully prevented pension fraud from becoming possible. Therefore, we consider this bill to contain unnecessary provisions to circumvent the current State bargaining/legislative process, which already provides adequate oversight. Suggested amendments, which would address the concerns we described in Section 3 of the analysis, are attached.

PROPOSED AMENDMENTS TO SENATE BILL 53

1. In Section 2, page 6, line 15, add (a) after 20022.

2. In Section 2, page 6, line 31, add the following subdivision:

(b) Notwithstanding any other provision of this part, the Department of Personnel Administration shall retain its authority under the Ralph C. Dills Act contained in Chapter 10.3 (commencing with Section 3512) of the Division 4 of Title 1 and Part 2.6 (commencing with Section 19815) of Division 5 of Title 2 to determine which payments and allowances that are paid by the state employer will be considered compensation for retirement purposes for any employee who is either: (1) excluded from the definition of state employee in subdivision (c) of Section 3513; (2) employed by the executive branch of government and is not a member of the civil service; or (3) included in the definition of state employee in subdivision (c) Section 3513. For state employees who are subject to collective bargaining, compensation will be included for retirement purposes only if a memorandum of understanding has been reached pursuant to Section 3517.5, in which case the memorandum of understanding shall be controlling without further legislative action, except that if such provisions

of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

3. In Section 4, page 7, line 39, strike the word "agency" and insert contracting agency or school employer.

4. In Section 4, page 7, line 40, strike the word "agency" and insert contracting agency or school employer.

5. In Section 6, page 9, line 10, strike the words "and 20616".

6. In Section 6, page 9, line 19, strike the period and insert for contracting agency, state university, school, and legislative and judicial branch employers.

7. In Section 6, page 9, line 37, between the comma and the word "group," insert for contracting agency and school employers.

8. In Section 6, page 10, line 22, strike the word "nay" and replace with shall.

9. In Section 6, page 10, after line 23, add the following subdivision:

(h) Notwithstanding subdivision (b) and (c), the Department of Personnel Administration shall retain its authority under the Ralph C. Dills Act contained in Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 and Part 2.6 (commencing with Section 19815) of Division 5 of Title 2 to determine which payments and allowances that are paid by the state employer will be considered special compensation for retirement purposes for any employee who is either: (1) excluded from the definition of state employee in subdivision (c) of Section 3513; (2) employed by the executive branch of government and is not a member of the civil service; or (3) included in the definition of state employee in subdivision (c) Section 3513. For state employees who are subject to collective bargaining, special compensation will be included for retirement purposes only if a memorandum of understanding has been reached pursuant to Section 3517.5, in which case the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

10. In Section 7, page 10, line 27, after the word "a", insert local or school.

11. In Section 7, page 10, line 37, after the word "a", insert local or school.

12. On page 17 and 18, strike Section 18 in its entirety.

13. On page 18 and 19, strike Section 19 in its entirety.

Attachment 2

Court of Appeal, Third Appellate District
Deena C. Fawcett, Clerk/Administrator
Electronically FILED on 6/28/2016 by J. Swartzendruber, Deputy Cle

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JOSEPH TANNER, Plaintiff and Appellant, v. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM et al., Defendants and Respondents.	C078458 (Super. Ct. No. 34201380001492CUWMGDS)

APPEAL from a judgment of the Superior Court of Sacramento County, Shelleyanne W. L. Chang, Judge. Affirmed.

Law Offices of John Michael Jensen and John Michael Jensen for Plaintiff and Appellant.

Reed Smith, Harvey L. Leiderman and Jeffrey R. Rieger for Defendants and Respondents.

In this "pension spiking" case, Plaintiff Joseph Tanner sought to overturn a decision of defendant California Public Employees' Retirement System (CalPERS) significantly reducing his expected retirement benefit.

Specifically, Tanner argues his retirement benefit should be set based on a base salary of $305,844, which was provided for in his final written contract with the City of Vallejo. The Board of Administration of CalPERS (also a defendant in this action) decided Tanner was not entitled to have his retirement benefit based on that figure. On Tanner's petition for a writ of administrative mandate, the trial court agreed with the board, holding (among other things) that the $305,844 figure could not be used as Tanner's final compensation for purposes of setting his retirement benefit because it did not qualify as his payrate due to the fact that the figure did not appear on a publicly available pay schedule.

On Tanner's appeal, we agree with the trial court that neither Tanner's final contract with the city nor a chart prepared by city staff to show how Tanner's final base salary was determined qualified as a publicly available pay schedule for purposes of determining the amount of Tanner's final compensation and, in turn, the amount of his retirement benefit. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

By virtue of his employment with a number of California cities over the years, up to and including his employment as city manager of the City of Pacifica, Tanner was a miscellaneous member of CalPERS.

In November 2006, while still employed by Pacifica, Tanner entered into a written agreement with the City of Vallejo to serve as that city's manager for a term of three years, from January 8, 2007, through January 7, 2010. Under the terms of that agreement, Tanner was to serve initially as a limited term employee not enrolled in CalPERS but was to become a permanent employee and be reinstated in CalPERS on or before March 8, 2007.[1] The agreement provided that Tanner's base annual salary was to

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1 The reason for this initial period of limited term employment is not entirely clear from the record, but it is also irrelevant for our purposes.

be $216,000, but he was also to receive certain other types of compensation, including (as relevant here) the following:

1) A monthly automobile allowance of $600 that was to "be converted to base salary after March 8, 2007";

2) A monthly contribution to a deferred compensation plan equal to 15 percent of his base salary, which the city was to "convert . . . to base salary upon reinstatement to [Cal]PERS";

3) 30 days of management leave per year, which was to "be paid as salary";

4) 240 hours of annual leave per year, with the right to sell back to the city up to 120 hours of accrued leave each year; and

5) The city's payment of Tanner's share of the required contribution to CalPERS, which, at the city's option, could be "converted to base salary."[2]

Tanner ended his employment with the City of Pacifica effective January 8, 2007, and began working for the City of Vallejo that same day.

Vallejo city staff forwarded the November 2006 contract to CalPERS, and CalPERS responded in a letter dated January 26, 2007. CalPERS acknowledged that Tanner's base salary qualified as reportable compensation for purposes of retirement. With respect to the first three items of compensation identified above, however, CalPERS explained that the Government Code provision defining reportable compensation did "not allow for converting additional compensation into base pay or adding non reportable compensation to base pay for retirement purposes. Thus, payments such as management leave credits; automobile allowance; and deferred compensation should not be converted

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2 This sort of payment is referred to as employer paid member contributions. Tanner's required contribution to CalPERS was 8 percent of his salary, with the city contributing another 1 percent. Thus, under this provision, the city was to pay Tanner's 8 percent contribution for him or pay him an equal amount as additional salary.

to salary and reported to CalPERS for retirement purposes." With regard to the employer paid member contributions, CalPERS explained that this amount could be reported to CalPERS provided that the city adopted "the appropriate resolution for a group or class of employees" and that the agreement "should be amended to reflect this provision." With regard to the provision for selling back annual leave, CalPERS pointed out that "[t]he City already provides management incentive pay to other management staff, 120 hours per year at their hourly rate of pay," but the California Code of Regulations "states that employees can not [*sic*] be granted the option of either taking time off or receiving pay. Therefore, in order for the City Manager's 'sell back of 120 hours of accrued leave' to qualify as management incentive pay, the option of time off or receiving cash payment must be taken out of the Managers [*sic*] contract and replaced by a management incentive pay clause similar to that found in the City's Memorandum of Understanding (MOU) for other management staff."

Following receipt of the letter from CalPERS, city staff undertook to create a new class or group of employees, to be known as the "Council Appointed Executive Staff," which would consist of the city manager and the city attorney. City staff also drafted a new employment agreement for Tanner that was to be entered into as of March 8, 2007, the date Tanner's employment was to become permanent under the original agreement. Under the new agreement, Tanner's base salary was to be $305,844. The contract also provided that the city would pay Tanner's portion of the contribution to CalPERS. There were no provisions, however, for an automobile allowance, deferred compensation, management leave, or annual leave sell-back. The March 2007 agreement specifically provided that it superseded the November 2006 agreement and contained a clause declaring that the March 2007 agreement represented the entire agreement of the parties.

At a meeting on March 27, 2007, the city council authorized the mayor to amend Tanner's employment agreement " 'to comply with CalPERS regulations' " and

authorized the city to pay the member contributions of the two employees in the "Council Appointed Executive Staff."

As of May 8, 2007, the mayor still had not signed the March 2007 agreement. On that date, the city's human resources operations manager, Debora R. Boutte, sent a memo to the mayor requesting that he authorize the agreement. In part, the memo explained that city staff had amended the employment agreement "to comply with [CalPERS] regulations without changing the total cost of the original employment agreement . . . . The necessary amendments involved moving the additional costs of the car allowance, deferred compensation, management leave and 1% of the Employment Paid Retirement Contribution be added [*sic*] to the base [salary] versus being reported separately as additional pay.[3] This change resulted in the base salary going from $216,000 to $305,844." The memo was accompanied by a document entitled "City Manager [¶] Salary Computation [¶] March 8, 2007," which Boutte referred to as a cost analysis, that showed how Tanner's new base salary was determined by adding to the original base salary the values of the automobile allowance, the deferred compensation, the management leave, the employer's share of the CalPERS contribution, and the annual leave sell-back.[4] While the cost analysis showed the new base salary, it did so among numerous other figures.

Sometime after Boutte sent these materials to the mayor, the mayor signed the March 2007 agreement. Ultimately, CalPERS reinstated Tanner effective March 8, 2007, thus allowing him to begin accruing service credit again.

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3 In communications following the January 2007 letter, CalPERS had explained to city staff that the employer's 1 percent share of the contribution to CalPERS was not reportable compensation for purposes of retirement and could not be converted into base salary.

4 We will refer to this document as the cost analysis.

Two years later, Tanner resigned his employment with the city effective June 1, 2009. He submitted an application for service retirement with CalPERS effective the next day and reported his highest compensation period as June 1, 2007 to May 31, 2008.

In December 2009, CalPERS notified Tanner that it would compute his retirement benefit based on his original base salary of $216,000 in the November 2006 agreement rather than the increased base salary in the March 2007 agreement. Tanner appealed that decision in February 2010.[5] The matter was heard by an administrative law judge over 10 days between November 2011 and May 2012.

In November 2012, the administrative law judge issued a proposed decision denying Tanner's appeal, and in February 2013, the board adopted that proposed decision as its own (with three minor changes). In the decision, the board concluded that Tanner's "compensation earnable for purposes of calculating his retirement benefits cannot include amounts previously paid to [him] as an automobile allowance, employer paid deferred compensation, 30-day leave allowance, one percent employer portion of PERS contributions, or 120-hour annual leave cash out option."

The board denied Tanner's petition for reconsideration in April 2013, and in May 2013 Tanner filed a petition for a writ of administrative mandamus in the superior court. In January 2015, the trial court entered its judgment denying Tanner's writ petition. In its ruling, the trial court noted that, to show that CalPERS had abused its discretion in determining that Tanner was not entitled to have his retirement benefit based on the increased base salary in the March 2007 agreement, Tanner had to "establish that the $305,844 was his 'pay rate.' " The court concluded that Tanner could not "legitimately

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[5] Tanner's appeal does not appear in the administrative record, as far as we can determine, but there are references to it in Tanner's prehearing conference statement and CalPERS's statement of issues in the administrative proceeding.

claim that his salary of $305,844 [wa]s 'pay rate,' because [Tanner] has not shown that this salary was on a publicly available 'pay schedule.' "[6]

Tanner timely appealed.

DISCUSSION

I

Contract Arguments

Tanner spends much of his opening brief arguing that the trial court erred by failing to properly apply contract principles, such as reformation for mistake and the parole evidence rule. In essence, Tanner's argument appears to be that under contract principles, he and the city made a mutual mistake in entering into the November 2006 agreement because they thought all of his compensation in that agreement could be used to calculate the amount of his retirement benefit, and when CalPERS informed them otherwise, they reformed the agreement to achieve their original intent by folding various miscellaneous items of compensation in the November 2006 agreement into his new, greater base salary in the March 2007 agreement. In Tanner's view, because the March 2007 agreement was an integrated contract that superseded and replaced the November 2006 agreement, CalPERS and the trial court could not lawfully construe the later agreement by referring to the earlier, superseded agreement.

As we will explain, however, we conclude Tanner's appeal is without merit regardless of these contract arguments, or any of the other arguments Tanner makes. This is so because we agree with the trial court that the greater base salary in the March

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6 The trial court also concluded that the additional items of compensation from Tanner's November 2006 contract that were folded into the new base salary in his March 2007 contract did not qualify as "special compensation" that could be added to the pay rate in the earlier contract for purposes of calculating Tanner's retirement benefit, but Tanner never actually made such an argument. Instead, his contention was that the base salary in his March 2007 agreement was the payrate on which he was entitled to have his retirement benefit calculated.

2007 agreement did not qualify as Tanner's payrate for purposes of calculating the amount of his retirement benefit because that salary was not paid pursuant to a publicly available *pay schedule*. For this reason, Tanner has no right to have his retirement benefit calculated based on that greater base salary.

II

The Public Employees' Retirement Law

Under the Public Employees' Retirement Law (Gov. Code, § 20000 et seq.), "[t]he formula for determining a member's retirement benefit takes into account (1) years of service; (2) a percentage figure based on age on the date of retirement; and (3) 'final compensation' . . . ." (*City of Sacramento v. Pub. Employees Ret. Sys.* (1991) 229 Cal.App.3d 1470, 1478, fn. 5.) As used in the Public Employees' Retirement Law, " 'compensation' means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work" for certain reasons not relevant here. (Gov. Code, § 20630, subd. (a).) Compensation reported by the employer to CalPERS "shall not exceed compensation earnable, as defined in Section 20636." (Gov. Code, § 20630, subd. (b).)

" 'Compensation earnable' by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5." (Gov. Code, § 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)." (Gov. Code, § 20636, subd. (b)(1), italics added.)

Based on the foregoing statutes, whether an employee is a member of a group or class of employees, the employee's normal monthly rate of pay or base pay must be paid in cash pursuant to a *publicly available pay schedule* in order to qualify as payrate and thus as "compensation earnable" that can be reported to CalPERS for use in the calculation of the employee's retirement benefit.

The question of what does or does not constitute a publicly available pay schedule has been addressed in only two published decisions.

In *Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983 (*Prentice*), "a local municipality decided to provide the manager of its water and power department with a 10.49 percent salary increase during what turned out to be the last two years of his career. Although the municipality had a salary range for the manager's position which would have applied to anyone else who filled the position, the municipality did not alter the salary range to reflect the increase and it was not otherwise available to other employees in the same class as the manager. In light of these circumstances, [Cal]PERS did not include the salary increase in calculating the manager's retirement allowance. The manager then challenged [Cal]PERS's decision by way of a petition for a writ of mandate, which the trial court denied." (*Id.* at p. 986.)

On Prentice's appeal, the appellate court concluded 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)" in that "the city consistently excluded the increase from the salary range available for Prentice's position." (*Prentice, supra*, 157 Cal.App.4th at p. 994.) The appellate court went on to reject the argument that disclosure of Prentice's full salary in the city's annual budget was sufficient to satisfy the statute, observing as follows: "Admittedly, as Prentice points out, his full salary would have been available to anyone examining the city's annual budget. However, as a practical matter, inclusion of a provisional or temporary salary in a budget document would not have afforded any other

person holding the position the right to receive the same increase, where, as here, the city itself consistently recognized that the salary range did not include the raise. Because, as 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.)

In *Molina v. Board of Administration* (2011) 200 Cal.App.4th 53 (*Molina*), a former public employee "sought to compel the inclusion in the calculation of his retirement pension all, or at least some portion of, the settlement proceeds received in the negotiated resolution of his wrongful termination action against the City of Oxnard." (*Id.* at p. 56.) The trial court denied his writ petition, and the appellate court affirmed. (*Ibid.*) In doing so, the appellate court explained as follows: "Molina fails to recognize the important difference between the amount he was paid by Oxnard (i.e., the settlement proceeds), which may be subject to income taxes, and the much narrower category of 'compensation earnable' that can be taken into account for pension purposes, as established under [the Public Employees' Retirement Law]. Because, under [the Public Employees' Retirement Law], even if a portion of the settlement amount had been labeled back pay and was includible in taxable income, it could not be included in Molina's 'payrate' because there was no evidence that the amount was either (1) paid to similarly situated employees or (2) paid in accordance with a 'publicly available pay schedule[ ] . . . for services rendered on a full-time basis during normal working hours.' " (*Id.* at p. 67.)

In the trial court here, CalPERS argued there was "no basis to distinguish the present case from *Prentice* and *Molina*. The only documents that list Tanner's salary as $305,844 are his amended contract and the May 8, 2007, documents relating to that amended contract. Just like the budget documents in *Prentice* and the settlement agreement in *Molina*, Tanner's amended contract and the May 8, 2007 documents do not qualify as a 'pay schedule.' These documents relate only to Tanner personally, without listing any other position or person. There is no evidence that the City Council ever voted to adopt any of these documents for any purpose, much less adopt them as 'pay schedules.' "

The trial court agreed with CalPERS on this point, finding that Tanner's claimed base salary of $305,844 did not appear on any publicly available pay schedule. In response to Tanner's argument that the cost analysis was his pay schedule, the trial court noted that the city "made an exceptional arrangement with [Tanner] to provide him significant compensation" that was "well above the salary paid to the last Vallejo City Manager." The court also observed that the cost analysis "differs from the 'pay schedules' for other groups or classifications of City employees," in particular, the document showing "the salary information for Department Heads and Executive Assistants." The court pointed out that the cost analysis Tanner claimed was his pay schedule was "specific to him only, in that it is dated 'March 8, 2007' and pertains only to the City Manager." Finally, the court concluded that Tanner's "broad interpretation of 'pay schedule' would permit an agency to provide additional compensation to a particular high-ranking official, any time it made a document with his specific pay information 'publicly available,' " and the court did "not believe that the Legislature intended such a broad construction of 'pay schedule.' "

On appeal, Tanner contends the city "satisfied the publicly available pay schedule 'requirement' as it existed in 2007" because "Boutte testified that the [cost analysis] was a pay schedule and that it was provided to the public" and because the city's human

resources director, Dennis Morris, "also testified that the City Manager's contract was [Tanner's] pay schedule." This argument is not persuasive for several reasons.

First, the question of whether the $305,844 base salary in Tanner's March 2007 agreement was paid pursuant to a publicly available pay schedule within the meaning of Government Code section 20636, subdivision (b)(1) is a question of law because it involves "[t]he proper interpretation of a statute, and its application to undisputed facts." (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 722.) Here, the facts are undisputed that Tanner's $305,844 base salary appeared in the March 2007 agreement and in the related cost analysis and both of those documents were publicly available. Thus, the question of whether either or both of those documents qualified as a pay schedule, as the Legislature intended that term in Government Code section 20636, subdivision (b)(1), is a question of law that we review de novo. The fact that Boutte may have characterized the cost analysis as a pay schedule and Morris may have characterized the March 2007 agreement as a pay schedule has very little bearing on our analysis of that legal question.

Second, even if we were to give weight to the testimony of Boutte and Morris on the question of whether the cost analysis or the March 2007 agreement qualifies as a pay schedule, it turns out their testimony is far less supportive of Tanner's argument on this point than he lets on. On the first day of the administrative hearing, Boutte testified that the city manager and city attorney positions are different from other positions within city employment because those two positions are filled only by the city council, which does not hire any other employees, and those two positions are the only ones that have "actual agreements," i.e., written contracts. When asked how the contracts for those two positions "differ from the way the other employees [are] hired, particularly with respect to published pay scales," Boutte responded, "We do not publish those salaries because they change, based upon what's negotiated between the two parties, the City and that individual. And it changes. And once the document is finalized through a resolution,

that becomes publicly [available] but *there is no set salary schedule for City Manager* or City Attorney." (Italics added.)

Later, when asked "what document contains the compensation for the City Manager," Boutte responded, "The contract, the agreement, the individual agreement. And possibly, the resolution may outline the total." And after that, when asked if she felt "any need to post the[] pay [of the city manager and city attorney] on a publicly available pay schedule," Boutte responded, "No, I did not."

It was only the following day, while being questioned about the items of compensation in the November 2006 agreement that were not included in the March 2007 agreement, that Boutte spontaneously referenced the cost analysis and described it as "the pay schedule in terms of how we determined the base salary for Mr. Tanner's contract."

In arguing that Boutte testified the cost analysis was a pay schedule, Tanner refers only to her testimony on the second day and ignores completely her testimony on the first day. Viewed as a whole, however, Boutte's testimony does not support Tanner's argument that Boutte believed the cost analysis qualified or served as a pay schedule.

As for Morris, he testified that a spreadsheet showing the salary ranges for department heads and executive assistants with the city was an appropriate pay schedule because "[a] pay schedule normally has the various steps of the salary range, from the top to the very -- you know, from start to the very top of the range. Then it's broken down in an hourly, monthly, biweekly basis, that type of thing. It's pretty standard." When asked if employees hired by contract at the city are on pay schedules, Morris responded, "Normally, no" because "normally their compensation is only specified in the agreement, in the contract itself." Morris then testified that the city attorney and the city manager were the only two city positions he could think of that were hired by contract. This is the testimony to which Tanner refers when he argues that "Morris . . . testified that the City Manager's contract was his pay schedule." Of course, as can be seen from the testimony itself, which we have set forth in full, Morris testified to no such thing. Instead, his

testimony is more consistent with Boutte's initial testimony, which was that there were no pay schedules for the city's two contract employees: the city manager and the city attorney.

In any event, as we have noted, the question of whether the $305,844 base salary in Tanner's March 2007 agreement was paid pursuant to a publicly available pay schedule within the meaning of Government Code section 20636, subdivision (b)(1) is a question of law, and thus we would not defer to either Boutte or Morris on this question even if their testimony had been more favorable to Tanner than it actually was. On questions of law, we exercise de novo review (*State Water Resources Control Bd. Cases*, *supra*, 136 Cal.App.4th at p. 722), which means we do not defer even to the trial court. Instead, we apply well-known rules of statutory interpretation to determine for ourselves the intended meaning of the statute and the impact of that meaning on the present case.

When interpreting a statute, "we begin with the plain language of the statute, giving the words their ordinary and common meaning. [Citation.] 'If the language is unambiguous, the plain meaning controls,' and no further analysis is warranted. [Citations.] If the language allows more than one reasonable construction, we consider 'such aids as the legislative history of the [statute] and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.' " (*State ex rel. Bartlett v. Miller* (2016) 243 Cal.App.4th 1398, 1408.)

Applying these rules here, we conclude that neither of the documents on which Tanner relies qualified as a pay schedule for purposes of determining his final compensation and thus the amount of his retirement benefit. In reaching that conclusion, we begin with the ordinary and common meaning of the word "schedule," which is, in this context, "a written or printed list, catalog, or inventory." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 1110, col. 1.) From this definition, and the surrounding context of the statute, we can discern that a *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.

Does the March 2007 agreement or the cost analysis meet this definition? No, because neither document qualifies as a list, catalog, or inventory of the rate of pay or base pay of one or more employees. It is true both documents show the base pay the city ultimately agreed to pay Tanner as city manager starting in March 2007, but neither document is limited to that pay information. For its part, the March 2007 employment agreement runs 14 pages and shows *all* of the terms and conditions of Tanner's employment as city manager, with the base salary for the position appearing on page seven of the agreement. As for the cost analysis, that document differs from the employment agreement in that it is only a single page and does not set forth all of the other terms and conditions of Tanner's employment; nonetheless, the cost analysis contains a slew of figures above and beyond Tanner's base salary under the March 2007 agreement, and a member of the public would be hard-pressed to locate the new base salary of the city manager position among all of the other figures on the page and identify it as such.

III

"Antispiking" Legislation -- Public Disclosure

Why is this important? Because we discern from the Legislature's use of the term pay schedule an intent to require the employer to use a document (or documents) that isolates the rate of pay or base pay of its employees who are CalPERS members from other employment information and other figures -- with the exception, of course, of the rate of pay or base pay for other such employees. The purpose behind such isolation is apparent, especially in light of the accompanying requirement that such pay schedules are to be made available to the public. A document that catalogs or lists the rate of pay or base pay of one or more employees who are CalPERS members, separate and apart from

other information, more readily informs the public of the payrate that will or may be used in determining the amount of an employee's retirement benefit.

That this was the Legislature's purpose -- to facilitate the public disclosure of pay information for public employees who are members of CalPERS -- appears not only from the terms the Legislature used in Government Code section 20636, subdivision (b)(1), but also from the circumstances surrounding the origin of that provision. The term pay schedule first appeared in the Public Employees' Retirement Law in 1993, when the predecessor statute to Government Code section 20636 -- former Government Code section 20023 -- was enacted in place of a previous statute bearing the same section number (Stats. 1993, ch. 1297, § 6, p. 7691) 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.) Mar. 29, 1993, p. 1.) The stated purpose of this part of the new section 20023 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." (*Id.* at p. 5.)

This purpose would not be served by deeming either the March 2007 agreement or the cost analysis to be a pay schedule. If we were to do so, we would be sanctioning a practice -- including an employee's rate of pay or base pay among any number of other figures or terms and conditions of employment -- that would frustrate, rather than further, the apparent legislative purpose and intent behind the law. Such a result would also deviate substantially from the ordinary and common meaning of the term pay schedule as a list, catalog, or inventory of the rate of pay or base pay of one or more employees.

Based on the foregoing analysis, we conclude that neither of the documents Tanner claims was a pay schedule qualified as such a document under the intended

meaning of Government Code section 20636, subdivision (b)(1). Accordingly, the trial court properly denied Tanner's writ petition on the ground that Tanner has no right to have his retirement benefit calculated based on the base salary in the March 2007 agreement.

DISPOSITION

The judgment is affirmed. CalPERS shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

Robie, J.

We concur:

Nicholson, Acting P. J.

Renner, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Tanner v. California Public Employees Retirement System et al.
C078458
Sacramento County
No. 34201380001492CUWMGDS

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✓ Honorable Shelleyanne Wai Ling Chang
Judge of the Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

Attachment 3

OFFICE OF ADMINISTRATIVE HEARINGS
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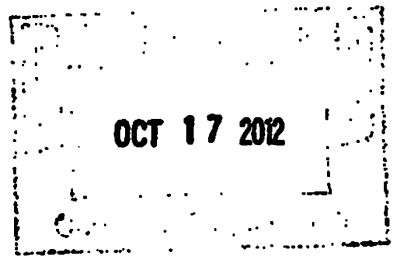
State of California
Department of General Services

October 16, 2012



California Public Employees' Retirement System
Legal Office
400 Q Street
Sacramento, CA 95811

Subject: Adams, Randy G.
OAH No. 2012030095
Agency No. 2011 0788

Enclosed are the following:

☒ The original Proposed Decision

☐ An agency order of adoption. If the Proposed Decision is adopted, please return a copy of the signed adoption order to the Office of Administrative Hearings.

☐ The original Decision

☒ Exhibits numbered: SEE ATTACHED LIST
Please make sure you have received all listed exhibits. If exhibits are missing, please contact OAH immediately.

☐ Email copy of the Proposed Decision to:

☐ The above referenced case was resolved prior to conclusion of the hearing. We are returning the enclosed original exhibits 1 – x to you.

JH

Encl.

Transmittal Form
OAH 60 (Rev. 04/09)

BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Calculation of the Final Compensation of: RANDY G. ADAMS, Applicant/Respondent, and CITY OF BELL, Public Entity/Respondent.	Agency Case No. 2011-0788 OAH No. 2012030095

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 19 and 20, 2012, in Orange, California.

Gregg McLean Adam, Attorney at Law, represented Applicant/Respondent Randy G. Adams, who was present throughout the administrative proceeding.

Stephen R. Onstot, Attorney at Law, represented Public Entity/Respondent City of Bell.

Wesley E. Kennedy, Senior Staff Counsel, represented Petitioner Marion Montez, Assistant Division Chief, Customer Account Services Division, California Public Employees' Retirement System, State of California.

The matter was submitted on September 28, 2012.

PRELIMINARY STATEMENT

Randy G. Adams enjoyed a long career in law enforcement. He served for many years as Chief of Police for the City of Simi Valley and as Chief of Police for the City of Glendale. On July 27, 2009, he began serving as the Chief of Police for the City of Bell.

Mr. Adams' last paid day of employment with the City of Bell was July 31, 2010. During his employment with the City of Bell, Mr. Adams earned "$17,577.00 per pay period" ($457,002.00 per year).

In December 2010, Mr. Adams applied to CalPERS for a service retirement based upon his many years of credited service. Mr. Adams contends that his service retirement allowance should be calculated on earnings reported to CalPERS by the City of Bell.

The City of Bell and CalPERS agree that Mr. Adams is entitled to a service retirement, but they assert that his retirement allowance should not be calculated upon earnings from the City of Bell because those earnings were not made pursuant to a publicly available pay schedule. In response, Mr. Adams claims that payment for his services was made pursuant to a legal employment agreement that was available to the public.

Mr. Adams did not establish by a preponderance of the evidence that his earnings from the City of Bell were made pursuant to a publicly available pay schedule. CalPERS correctly determined that Mr. Adams' earnings from the City of Bell did not constitute "compensation earnable" under the Public Employee Retirement Law. CalPERS correctly concluded that Mr. Adams' service retirement allowance should be based on his earnings from the City of Glendale and should include his year of service with the City of Bell.

FACTUAL FINDINGS

Background Information

1. The California Public Employees Retirement System (CalPERS) manages pension and health benefits for public employees, retirees, and their families. Retirement benefits are provided under defined benefit plans. A member's contribution is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a contribution rate to the agency's payroll. Using certain actuarial assumptions, the Board of Administration sets employer contribution rates on an annual basis.

2. A member's service retirement allowance is calculated by applying a percentage figure, based upon the member's age on the date of his or her retirement, to the member's years of credited service and the member's "final compensation." CalPERS may review earnings reported by an employer to ensure that only those items allowed under the Public Employee Retirement Law (PERL) are included as "final compensation" for purposes of calculating a retirement allowance.

3. Randy G. Adams (Mr. Adams or Applicant) was employed by the City of Glendale as Chief of Police from January 31, 2003, through July 10, 2009. Mr. Adams' "compensation earnable" during that employment was $19,574.61 per month ($234,895.32 per year).

Mr. Adams submitted an application to CalPERS for a service retirement that was dated May 15, 2009, with an effective date of July 11, 2009. He briefly retired after filing that application.

4. On July 27, 2009, Mr. Adams submitted an application to CalPERS for reinstatement from retirement because he began employment as Chief of Police with the City of Bell. CalPERS approved and processed that application on September 17, 2009, with an effective date of reinstatement backdated to July 27, 2009.

5. The City of Bell is a public agency that contracted with CalPERS for the provision of retirement benefits to eligible employees under PERL.

6. Negotiations concerning Mr. Adams' employment with the City of Bell began in earnest in April 2009, shortly before Mr. Adams retired from employment with the City of Glendale. The negotiations resulted in the signing of an Agreement for Employment dated May 29, 2009.[1] Robert A. Rizzo (CAO Rizzo), Chief Administrative Officer, City of Bell, signed the agreement on behalf of the City of Bell. Some City Council members were aware of CAO Rizzo's decision to hire Mr. Adams as Chief of Police.

Payment to Mr. Adams under the May 29, 2009, employment agreement was not made pursuant to a publicly available pay schedule. Mr. Adams' employment agreement and the personnel action report related to his employment were not readily available for public review. The employment agreement was ultimately made available by the City of Bell in response to a formal public records request.

The May 29, 2009, employment agreement was for an unspecified term, with Mr. Adams' employment as Chief of Police to commence on July 27, 2009. Under the agreement, Mr. Adams' "basic salary" was "$17,577.00 per pay period."[2] The agreement stated that Mr. Adams' basic salary could be adjusted "by the CAO, in his sole discretion . . . in an amount commensurate with Employee's performance."

The City of Bell's City Council did not approve or ratify the May 29, 2009, employment agreement.

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[1] In addition to the May 29, 2009, employment agreement, two other signed employment agreements were produced that contained different contract dates, called for the provision of different services, and required separate payments that, when added together, totaled $17,577 per pay period. These contracts were drafted and signed after Mr. Adams began employment with the City of Bell, and they did not constitute the employment agreement under which Mr. Adams was employed.

[2] The term "pay period" was not defined, but common usage established that a "pay period" was every two weeks. Mr. Adams basic pay was $457,002 per year.

The City of Bell Scandal

7. In July 2010, two Los Angeles Times reporters wrote an article that claimed that City of Bell officials were receiving salaries that were among the highest in the nation. These and other articles led to widespread criticism and a demand that certain City of Bell officials resign. Mr. Adams' hiring and his earnings became a focus of concern.

8. On July 23, 2010, Mr. Adams received a telephone call advising him that the City Council had decided in a closed session to announce that Mr. Adams' had resigned as Chief of Police. Mr. Adams denied resigning from employment and offered to meet with City of Bell attorneys to discuss his separation. On August 20, 2010, Mr. Adams learned that the City of Bell had not direct deposited his paycheck for the period August 12, 2010, through August 14, 2010.[3]

The Application for a Service Retirement

9. Mr. Adams submitted an application for a CalPERS service retirement dated December 5, 2010. Mr. Adams represented that his highest final compensation was the last 12 months of his employment with the City of Bell. He represented that his last day on the City of Bell payroll was July 31, 2010, noting that his employment was "terminated by failure to pay on 8-20-10." Mr. Adams requested that his service retirement allowance be calculated using his compensation with the City of Bell in the amount of $38,083.50 per month.

CalPERS' Response to the Application

10. Following the receipt of Mr. Adams' application, CalPERS reviewed what the City of Bell reported it had paid to Mr. Adams. CalPERS concluded that Mr. Adams' earnings were not "compensation earnable" under PERL because those earnings were not set forth in publicly available pay schedules. CalPERS determined that Mr. Adams' earnings with the City of Glendale, another covered public agency, had been set forth in publicly available pay schedules. CalPERS determined that Mr. Adams' highest average 12 consecutive months of compensation with the City of Glendale was $19,574.61 per month ($234,895.32 per year); CalPERS used the City of Glendale earnings to calculate Mr. Adams' service retirement allowance.

11. By letter dated December 17, 2010, CalPERS advised Mr. Adams that the Office of Audit Services (OAS) completed a review of the City of Bell's payroll reporting and member enrollment processes; that the OAS review noted that the Office of the Attorney General had filed a civil action against various persons, including Mr. Adams; that the resolution of the civil action might result in an adjustment of Mr. Adams' "compensation

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[3] This Factual Findings simply provides context. It is drawn from the Claim in an Action for Money and Damages that was filed on Mr. Adams' behalf with the City of Bell on February 1, 2011.

earnable"; and that "CalPERS' calculation of retirement benefits will take into account only compensation paid that it determines was proper and authorized, pursuant to properly approved and publicly available valid contracts entered into prior to 2005, or pursuant to publicly available schedules that can be substantiated as meeting the definition of compensation earnable" pending resolution of the civil action. The letter stated that CalPERS would use compensation from the City of Glendale to calculate Mr. Adams' retirement allowance. The letter notified Mr. Adams of his appeal rights.

12. By letter dated February 15, 2011, Mr. Adams timely appealed from CalPERS' determinations and requested an administrative hearing.

13. On July 12, 2012, Petitioner Marion Montez, CalPERS' Assistant Division Chief, Customer Account Services Division, signed the Statement of Issues giving rise to this administrative proceeding.

Mr. Adams' Employment History

14. After working briefly for the Los Angeles County Schools, Mr. Adams began his law enforcement career in July 1972 with the City of Buenaventura Police Department. He worked there for 23 years, rising to the ranks of Lieutenant and serving on the Command Staff. Mr. Adams met Pier'Angela Spaccia (Ms. Spaccia) during his employment with the City of Ventura. Mr. Adams was employed as Chief of Police by the City of Simi Valley from September 1995 through January 2003. Mr. Adams was employed as Chief of Police by the City of Glendale from January 2003 through July 2009. Mr. Adams was employed as Chief of Police by the City of Bell from July 2009 through July 2010.[4]

Mr. Adams was credited with 38.562 years of credited CalPERS service as a result of his public employment.

The Negotiations with the City of Bell

15. Mr. Adams met Ms. Spaccia in 1980 when both of them were employed by the City of San Buenaventura. Ms. Spaccia left that employment around 1990. She did not keep in close contact with Mr. Adams after that.

In 2003, Ms. Spaccia began working full time for the City of Bell as an assistant to CAO Rizzo. The City of Bell employed several persons, including CAO Rizzo, Ms. Spaccia, and the (then) Chief of Police, pursuant to written employment agreements.

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[4] According to benefit calculations provided by a CalPERS' actuary, Mr. Adams was credited with 1.015 years of service with the City of Bell, 6.440 years of service with the City of Glendale, 7.406 years of service with the City of Simi Valley, 23.181 years of service with the City of San Buenaventura, and 0.52 years of service with the Los Angeles County Schools, totaling 38.562 years of CalPERS service.

Before 2009, Ms. Spaccia learned that Mr. Adams was being considered for a law enforcement position in Orange County. She knew Mr. Adams had served as the Chief of Police for the City of Simi Valley and was the Chief of Police for the City of Glendale. Ms. Spaccia told CAO Rizzo that she knew Mr. Adams personally and she spoke very highly of him. Mr. Adams did not get the position in Orange County and remained employed as the City of Glendale's Chief of Police

About a year later, sometime in 2009, CAO Rizzo announced, "We need a chief from outside." CAO Rizzo asked Ms. Spaccia about Mr. Adams. Ms. Spaccia said Mr. Adams enjoyed an impeccable reputation. CAO Rizzo asked Ms. Spaccia to make arrangements to meet with Mr. Adams. Ms. Spaccia agreed and made the arrangements.

Ms. Spaccia contacted Mr. Adams at his office in Glendale. She arranged for a series of meetings between Mr. Adams, CAO Rizzo, several City of Bell employees, and several City Council members. Ms. Spaccia attended some meetings and typed certain documents related to Mr. Adams' employment, but she was not involved directly in the negotiations that resulted in Mr. Adams becoming employed as the City of Bell's Chief of Police.

16. A review of the emails between Ms. Spaccia and Mr. Adams highlight the negotiations that took place. Some emails demonstrate a conscious effort to shield salaries paid to certain City of Bell employees, including Mr. Adams, from public view.[5]

On April 14, 2009, Mr. Adams sent Ms. Spaccia an email. An attachment to the email was addressed to CAO Rizzo. In the attachment, Mr. Adams thanked CAO Rizzo for the employment opportunity; he stated that his PERS compensation was projected to be $270,000 per year; that the Chief of Police for the City of Bell made $160,000 to $190,000 per year; and that he was requesting a starting salary of $370,000 per year "plus the deferred compensation package we have discussed." Mr. Adams wrote, "The big difference, and I certainly value this, is that what I earn in this position will be 'persalbe.'" Mr. Adams mentioned a deferred compensation plan of $69,000 per year, "most of which is 'persalbe.'" Mr. Adams requested that the City of Bell pay employee costs for his CalPERS retirement and provide him and his dependents with lifetime medical, dental and vision insurance. The attachment suggested that employment commence on September 1, 2009, and that it be renewable yearly, subject to 30 days notice of termination by either party.

On April 14, 2009, Ms. Spaccia sent Mr. Adams an email that stated: "By the way . . after our morning meeting tomorrow Bob [CAO Rizzo] would like us to go to the Starbuck's to meet with the POA President and Vice-President . . . then we will go get [City Councilman M] and have lunch . . . hope that will work."

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[5] Ms. Spaccia, who served as the City of Bell's Assistant Chief Administrative Officer at the time, was responsible for typing employment agreements for certain City of Bell management employees including CAO Rizzo, herself, Chiefs of Police and Directors. The task was not assigned to clerical staff. The assignment of this seemingly routine chore to Ms. Spaccia helped keep the salaries confidential.

On April 15, 2009, Mr. Adams sent Ms. Spaccia an email. He ended the email as follows: "I am looking forward to seeing you and taking all of Bell's money?! Okay . . . just a share of it!!"

On April 16, 2009, Ms. Spaccia sent an email to Mr. Adams that responded to the attachment to CAO Rizzo. The email stated:

> LOL . . . well you can take your share of the pie . . . just like us!!! We will all get fat together . . . Bob has an expression he likes to use on occasion . . .
>
> Pigs get Fat . . . Hogs get slaughtered!!!!! So long as we're not Hogs . . . all is well!
>
> Have a nice night . . . see you tomorrow . . . .

On April 22, 2009, Mr. Adams sent Ms. Spaccia an email, thanking her "for helping me with the amazing opportunity." A draft memorandum of understanding was attached that stated that the City of Bell was aware that Mr. Adams had suffered several injuries that prevented him from heavy lifting; that the injuries were the result of industrial incidents occurring during Mr. Adams' employment at Buenaventura, Simi Valley, and Glendale; that "the City of Bell recognizes that Mr. Adams qualifies for, and will be filing for, a medical disability retirement"; and that the "City of Bell agrees to support his retirement and agrees that a service/medical retirement is justified and appropriate."

On April 23, 2009, Ms. Spaccia advised Mr. Adams that several documents needed to be prepared including an employment contract, an independent contractor (consultant) letter, a medical retirement acceptance letter, and a vehicle indemnification letter. Ms. Spaccia wrote: "As you might have surmised already, there are very specific reasons why it would not all be addressed as one all-encompassing contract, but I want to meet and be sure that you are comfortable with it." The plan to have the agreements spread amongst several documents, rather than having them set forth in a single document, demonstrated a desire to maintain secrecy about the details of Mr. Adams' employment agreement.

Ms. Spaccia attached a proposed employment agreement to an email dated May 14, 2009, that stated: "Take a look and call me when you have a few minutes . . . no rush."

By email dated May 27, 2009, Mr. Adams returned the contract to which he had made several changes. In that email, Mr. Adams represented that his legal advisor informed him that a general law city must have a contract signed by the mayor of that city on behalf of the city council, unless an enabling document authorized the Chief Administrative Officer to act for the City Council. According to the email, "I told [the legal advisor] that was the case and that Bob [CAO Rizzo] was in total control in the City of Bell. He said that was great, but feels I should have a copy of the agreement that gives Bob that authority as an attachment to my contract." The email asked Ms. Spaccia whether "we should make the Worker's Comp

letter a separate matter of understanding that we just sign and keep separate?" Mr. Adams' comment about need to have the worker's compensation letter separate signified his desire to keep certain details of his employment agreement confidential.

By email dated May 27, 2009, Ms. Spaccia stated that the revisions Mr. Adams proposed "were fine with the following exceptions: . . . 2) Do not include the last sentence you added in Section 5.[6] We have crafted our Agreements carefully so we do not draw attention to our pay. The word Pay Period is used and not defined in order to protect you from someone taking the time to add up your salary." The email also stated that it was a shame Mr. Adams' legal advisor was "so unwilling to recognize what you (I think) already have. We have painstakingly and carefully, and with attorney assistance made sure of what authority Bob has vs. what the City Council has. So, for your attorney's information, Bob has the proper authority to enter into a contract with you, and we are not interested in educating him on how we did that. If you would like to meet separately or discuss on the phone we can do that."

Ms. Spaccia's comments demonstrated that certain City of Bell officials did not want attention drawn to their pay; that employment agreements were carefully drafted to prevent the easy computation of salaries; and that CAO Rizzo did not want to provide Mr. Adams' legal advisor with any written documents concerning his purported authority to contract on behalf of the City of Bell. Ms. Spaccia's testimony that the drafting of the employment agreement was not intended to hide Mr. Adams' salary from the public and that it was drafted in the fashion it was merely to keep the salary from an individual who sought the position of Chief of Police did not make a great deal of sense.

17. The May 29, 2009, agreement that Mr. Adams and CAO Rizzo signed was not prepared by or provided to Edward W. Lee (Attorney Lee), an attorney with Best, Best & Krieger, who served as the City Attorney for the City of Bell.

On Friday July 10, 2009, Attorney Lee sent an email to CAO Rizzo that asked: "Is there a contract you need me to work on for the Chief and will this be on the upcoming Council agenda?"

On Sunday, July 12, 2009, CAO Rizzo provided an email response to the questions posed by Attorney Lee concerning the "Police Chief Contract" as follows:

> The contract has been prepared and signed . . .
> Remember the City Council by resolution gave me the authorization to execute any and all contracts and agreements on their behalf. There is no need for the council to discuss it, unless they want to discuss my termination and severance package first . . . .

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[6] Section 5 of the written employment agreement provided, in part, "Employee shall be paid (hereinafter the "Basic Salary") $17,577.00 per pay period."

These email exchanges were significant: they established that the City Attorney was unaware that Mr. Adams' employment contract had been prepared and signed; further, the exchange implies that the City Attorney was unaware or had forgotten that there was no "need for the council to discuss" the employment agreement; finally, CAO Rizzo threatened to resign from employment if there was a discussion about the agreement. CAO Rizzo's email underscored his purported belief that city council approval of Mr. Adams' employment agreement was unnecessary.

On Monday, July 13, 2009, CAO Rizzo expanded his response in an email to Attorney Lee that stated in part:

> Ed
>
> I have never been asked by the city Council to show, review, discuss, or anything else with any other Department head contracts since the Charter became effective, here is the list.
>
> 1. Spaccia
> 2. Lourdes
> 3. Eric
> 4. Luis Ramirez
> 5. Annette Pertez
> 6. The two Chiefs before Andy Probst
> 7. Andy Probst
> 8 The three Deputy Chiefs
> 9. Assistant Chief Chevez
> 10. The last three captains, and
> 11. The last four lieutenants' contracts
>
> [¶] . . . [¶]
>
> Ed – with our 15 years of working together and the City of Bell's continuing with you at BBK [Best, Best & Krieger] just because of our relationship. I wish you would have told [City Councilman M] you would look into it and get back with him; then discuss it with me so I could have warned you prior to your making suggestions which were nothing more than you falling into a political trap and now making me place my job on the line because of internal politics.
>
> [¶] . . . [¶]

your pal,

Bob

Other Employment Documents

18. Two other agreements related to Mr. Adams' employment with the City of Bell were produced following the public records request. The first, an employment agreement dated April 28, 2009, claimed to employ Mr. Adams as "Special Police Counsel to CAO" commencing July 27, 2009, at a basic salary of $9,844.68 per pay period. The second, an employment agreement dated April 28, 2009, claimed to employ Mr. Adams as "Chief of Police" commencing July 27, 2009, at a basic salary of $4,692.31 per pay period.

19. These two agreements were not mentioned in the email exchanges between Ms. Spaccia and Mr. Adams. Ms. Spaccia testified that she did not prepare the agreements and had no knowledge about them. This testimony was credible.

20. Rebecca Valdez, the City Clerk for the City of Bell, certified that the two agreements referred to in Factual Finding 18 were true and correct copies of employments agreements "in file in the official records of the City of Bell, California." However, the certification was not accurate. Ms. Valdez testified in this proceeding that the agreements containing the certifications were not maintained in any file for which she was responsible and that those documents were provided to her by CAO Rizzo.

21. Mr. Adams' employment agreement and the personnel action report related to his employment as Chief of Police were not available for public review without a public records request or some other demand, such as a subpoena, first being filed with the City of Bell.

It took the City of Bell staff about three weeks and a review by counsel before Mr. Adams' employment agreements were produced in response to the public records request. It was not established that the personnel action report related to Mr. Adams' employment, which was maintained in a confidential personnel file, was provided in response to a public records request, although it may have been.

The Absence of Publicly Available Pay Schedules and City Council Approval

22. The City of Bell had no pay schedule that set forth a salary or salary range for Chief of Police that was in effect when Mr. Adams signed the employment agreement.

Margaret Junker (Ms. Junker), a Chief Auditor with CalPERS, was in charge of the 2010 CalPERS audit of the City of Bell. That audit was, in part, initiated by the Los Angeles Times articles, the City of Bell scandal, and the filing of the Attorney General's civil action. The audit went back 17 years.

Ms. Junker testified that several City of Bell police chiefs had served under written employment agreements since 2006, including Mr. Adams. In the audit, CalPERS requested that the City of Bell provide evidence to establish that payment to Mr. Adams was made pursuant to publicly available pay schedules or that the employment agreement(s) was approved by City Council as required by law. No evidence was produced to establish those matters.[7]

23. Applicant's counsel suggested, through Ms. Spaccia's testimony and through the introduction of Resolution No. 2006-42[8], that CAO Rizzo possessed the legal authority to

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[7] It is irrelevant to the determination in this proceeding that CalPERS did not adjust the retirement allowances of several police chiefs employed by the City of Bell who served under employment agreements for which there was no public pay schedule or City Council approval in a public meeting.

[8] Resolution No. 2006-42 provided:

> Whereas, the second paragraph of Section 519 of the City's Charter allows the Bell City Council to authorize by resolution the Chief Administrative officer to bind the City, with or without written consent, for the acquisition of . . . labor, services or other items included within the budget approved by the City Council;
>
> Whereas, the City Council has determined that it is in the interest of efficient administration for the City to authorize the Chief Administrative Officer to bind the City with a written contract for the acquisition of labor or services;
>
> Now, therefore, the City Council of the City of Bell does resolve as follows:
>
> 1. Pursuant to the second paragraph of Section 519 of the City's Charger, the Bell City Council hereby authorizes the Chief Administrative Officer to bind the City by written contract for the acquisition of labor or services included within the budget approved by the Bell city Council.
>
> [¶] . . . [¶]
>
> 3. The authority granted by this resolution shall not apply to any written contract for services rendered by

enter into a binding employment agreement with Mr. Adams on behalf of the City of Bell because the agreement involved "the acquisition of . . . labor, services or other items included within the budget approved by the City Council." To support this argument, Applicant argued that the City Council adopted a five-year budget plan on May 2, 2005, that included "Police Services." The Police Services budget did not set forth the salary that was to be paid to the Chief of Police.

While it might be established elsewhere that the employment agreement signed by CAO Rizzo was valid and binding upon the City of Bell, that conclusion need not be reached in this proceeding. Even if it were determined that the contract signed by CAO Rizzo was binding on the City, that determination would not be the equivalent of public notice and formal approval of the employment agreement by the City Council.

24. The fact that Mr. Adams met with several City Council members (but never more than two at a time) before he signed the employment agreement did not establish City Council approval of Mr. Adams' employment contract.

26. Ms. Valdez, the City Clerk, testified that the City Council did not set Mr. Adams' salary or approve his employment agreement. There was no evidence to the contrary.

27. Lourdes Garcia (Ms. Garcia), who was employed by the City of Bell as the Director of Administrative Services, testified that CAO Rizzo directed her to prepare the contracts indentified in Factual Finding 18. Ms. Garcia provided the unsigned agreements to CAO Rizzo; she had no idea what happened to them after that.

28. Ms. Valdez and Ms. Garcia testified that Mr. Adams' salary seemed to be much greater than salaries previously paid to persons serving as City of Bell police chiefs.

Expert Testimony

29. Kung-Pei Hwang (Mr. Hwang) is a Senior Pension Actuary with CalPERS.

Mr. Hwang determined that the total length of time Mr. Adams worked for CalPERS agencies including the Los Angeles County Schools, the City of San Buenaventura, the City of Simi Valley, the City of Glendale, and the City of Bell, comprised Mr. Adams' 38.562 years of credited CalPERS service.

Using earnings from the City of Glendale as a basis for computation, Mr. Hwang determined that Mr. Adams's service retirement benefit calculation (option 3) was $22,347.94 per month ($258,175.28 per year).

> any person in the employ of the City at a regular salary . . . .

Using earnings from the City of Bell as a basis for computation, Mr. Hwang determined that Mr. Adams service retirement benefit calculation (option 3) was $42,522.55 per month ($510,270.60 per year).

Mr. Hwang's testimony had no relevance to the issue of whether there was payment under a publicly available pay schedule. It showed, however, that dramatically increasing the amount of a public employee's salary in the last year of employment will have a significant impact. In Mr. Adams' case, using his earnings with the City of Bell as a basis for calculating a service retirement almost would have doubled the amount of his service retirement allowance and it would have resulted in an unfunded liability having a present value of $3,182,706, according to Mr. Hwang.

30. Terrance Rodgers (Mr. Rodgers) is a CalPERS Staff Services Manager with CalPERS' Compensation Review unit. He and his staff are involved in determining a member's "compensation earnable." Mr. Rodgers testified that in order for a member's earnings from a public agency to constitute "compensation earnable," the earnings must be paid by the public entity under publicly available pay schedules. Mr. Rodgers testified that California Code of Regulations, title 2, section 570.5, became operative on August 10, 2011.

California Code of Regulations, Title 2, Section 570.5

31. California Code of Regulations, title 2, section 570.5 provides:

> (a) For purposes of determining the amount of "compensation earnable" . . . payrate shall be limited to the amount listed on a pay schedule that meets all of 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.

(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, 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.

32. Section 570.5 was sponsored by CalPERS and approved by the Office of Administrative Law on July 11, 2011. The regulation became effective on August 10, 2011.

33. The Notice of Proposed Regulatory Action related to section 570.5 stated that the regulation "will ensure consistency between CalPERS employers as well as enhance disclosure and transparency of public employee compensation . . . This proposed regulatory action clarifies and makes specific requirements for publicly available pay schedule and labor policy or agreement . . . "

The informative digest portion of that notice stated in part:

> Generally the law requires that a member's payrate be shown on a publicly available pay schedule, that special compensation be limited to items included in a labor policy or agreement, and that all records establishing and documenting payrate and special compensation be available for public scrutiny. Employers have not uniformly adhered to these requirements . . . .

The Arguments

34. Applicant argued that CalPERS' theories evolved since the publication of CalPERS' determination letter, which alleged only "over-reporting"; that the City of Bell never "over-reported" Mr. Adams' salary; that the May 29, 2009, employment agreement was the only agreement at issue in this matter; that the May 29, 2009, agreement constituted a "publicly available pay schedule" under legal standards that existed when Mr. Adams filed his application for retirement; that the May 29, 2009, employment agreement was "voluntarily" produced following a public records act request; and that the claim of "spiking" does not justify the retroactive application of the newly enacted pay schedule regulation.

35. The City of Bell argued that CAO Rizzo was not authorized to enter into an employment agreement with Mr. Adams on behalf of the City of Bell; that the City Council for the City of Bell never approved or ratified the May 29, 2009, employment agreement; that a Chief of Police salary of $457,000 per year was not included in the City of Bell's 2009 budget; that the May 29, 2009, employment agreement was not publicly available; that Mr. Adams remuneration from the City of Bell was not "compensation earnable" for CalPERS retirement purposes; and that Mr. Adams had no right to claim any retirement benefits from his arrangement with CAO Rizzo because Mr. Adams was not a City of Bell employee.

36. CalPERS argued that "compensation earnable" 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; that payrates must be stable and predictable among all members of a group or class and must be publicly noticed; that Mr. Adams's payrate was not "normal and he was not paid pursuant to a publicly available pay schedule; that payment to Mr. Adams did not involve City Council approval at a public meeting following notice; that California Code of Regulations, title 2, section 570.5 clarified existing law and did not impose new standards; and that Mr. Adams' salary with the City of Bell involved "final settlement pay" which is excluded his earnings from "payrate" and "special compensation."

Factual Conclusions

37. Mr. Adams was employed as Chief of Police by the City of Bell for approximately one year. His earnings from the City of Bell were not paid pursuant to a

publicly available pay schedule. His employment contract did not constitute a publicly available pay schedule. His employment contract was not approved or ratified by the City Council and it was not readily available for public review. There was a deliberate effort by CAO Rizzo and others to conceal Mr. Adams' employment agreement and payrate.

CalPERS correctly determined that payment to Mr. Adams by the City of Bell was not "compensation earnable" under PERL and that Mr. Adams was entitled to approximately one year of credited service for his service with the City of Bell. CalPERS properly used Mr. Adams' highest earnings with the City of Glendale to compute the amount of Mr. Adams' service retirement allowance.

LEGAL CONCLUSIONS

The Constitutional Mandate

1. Article XVI, section 17 of the California Constitution provides as follows:

> The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purpose of providing benefits to participants . . . and defraying reasonable expense of administering the system.

Administration of the Retirement Fund

2. The CalPERS retirement fund was established as a trust, to be administered in accordance with the provisions of the Public Employees Retirement Law solely for the benefit of the participants. (Gov. Code, § 20170.) Management and control of the retirement system is vested in the Board of Administration. (Gov. Code, § 20123). The Board of Administration has the exclusive control of the administration and investment of the retirement fund. (Gov. Code, § 20171.)

Burden and Standard of Proof

3. Government Code section 20128 provides in part:

> . . . [T]he board may require a member . . . to provide information it deems necessary to determine this system's liability with respect to, and an individual's entitlement to, benefits prescribed by this part.

4. Applicant has the initial burden to establish that he was entitled to a CalPERS service retirement and the amount of the retirement allowance. (Evid. Code, § 500; Evid.

Code, § 550.) The standard of proof is a "preponderance of the evidence." (Evid. Code, § 115.)[9]

5. Once Applicant introduces prima facie evidence sufficient to establish that he is entitled to a service retirement in some amount, the burden shifts to CalPERS and the City of Bell to refute the evidence that was offered or to explain why no reply to the prima facie evidence is necessary.

As explained in *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1667-1668:

> The terms burden of proof and burden of persuasion are synonymous. [Citations.] Because the California usage is "burden of proof," we use that term here.
>
> "Except as otherwise provided by law, 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." (Evid. Code, § 500.) To prevail, the party bearing the burden of proof on the issue must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence). (Evid. Code, §§ 115, 520.) The burden of proof does not shift during trial - it remains with the party who originally bears it. [Citations.]
>
> Historically in California, the burden of producing evidence or burden of production also has been known as the "burden of going forward" with the evidence." [Citations.] Here, we use "burden of producing evidence" as that is the California code usage. (Evid. Code, § 110.)
>
> Unlike the burden of proof, the burden of producing evidence may shift between plaintiff and defendant throughout the trial. (See Evid. Code, § 550; [Citations].) Initially, the burden of producing evidence as to a particular fact rests on the party with the burden of proof as to that fact. (Evid. Code, § 550, subd. (b); [Citations].) . . . But once that party produces evidence sufficient to make its prima facie case, the burden of producing evidence shifts to the other party to refute the prima facie case

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[9] Pension legislation must be liberally construed, resolving all ambiguities in favor of the applicant. However, liberal construction cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

> . . . [Citations.] Even though the burden of producing evidence shifts to the other party, that party need not offer evidence in reply, but failure to do so risks an adverse verdict. [Citation.] Once a prima facie showing is made, it is for the trier of fact to say whether or not the crucial and necessary facts have been established . . . .

Determination of Service Benefits

6. A CalPERS member's retirement benefit is based upon the factors of retirement age, length of service, and final compensation. Compensation is not simply the cash remuneration received, but is exactingly defined to include or exclude various employment benefits and items of pay. The scope of compensation is critical to setting the amount of retirement contributions for reasons related to employer funding. Statutory definitions delineating the scope of compensation cannot be qualified by bargaining agreements. Nor can the Board of Administration characterize contributions as compensation or not compensation under the PERL, as those determinations are for the Legislature. (*Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App4th 578, 584-585.)

Compensation Earnable

7. Government Code section 20630 provides in part:

> (a) As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of any of the following:
>
> (1) Holidays.
>
> (2) Sick leave.
>
> (3) Industrial disability leave . . .
>
> (4) Vacation.
>
> (5) Compensatory time off.
>
> (6) Leave of absence.
>
> (b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall

be reported . . . and shall not exceed compensation earnable, as defined in Section 20636.

8. Government Code section 20636 provides in part:

(a) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b)(1) "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).

[¶] . . . [¶]

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

Regulatory Authority

9. California Code of Regulations, title 2, section 570.5 – relating to publicly available pay schedules - is set forth in Factual Finding 31.

The proper application of the phrase "publicly available pay schedules" can be reached in this matter without reference to California Code of Regulations, title 2, section 570.5.

Statutory Interpretation - "Publicly Available" Pay Schedules

10. Under well-established rules of statutory construction, courts must ascertain the intent of the drafters to effectuate the purpose of the law. Because statutory language is generally the most reliable indicator of legislative intent, the words of a statute are first examined, giving them their usual and ordinary meaning and construing them in context. When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. Thus, if the language is unambiguous, the plain meaning governs and it is unnecessary to resort to extrinsic sources to determine legislative intent. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1560-1561.)

11. The word "available" means "suitable or ready for use" and "readily obtainable." (*The Random House Dictionary of the English Language* (2nd Ed.), p. 142.) The word "publicly" modifies "available." "Publicly" means "in a public or open manner or place" and "in the name of the community" and "by public action or consent." (*The Random House Dictionary of the English Language* (2nd Ed.), p. 1563.)

The Legislature intended that a public employee's "payrate" be readily available to an interested person without unreasonable difficulty. This concept does not apply to a situation in which a public employee's payrate is buried in a carefully crafted agreement designed to prevent the easy calculation of that salary, that is set forth in an employment agreement that is privately maintained and is not based on a published pay schedule or approved in a public manner, and that is not subject to public disclosure except through a formal public records request, subpoena, or other legal process.

12. Assuming that there is some ambiguity in interpreting the phrase "publicly available" as Appellant maintains, then other construction aides should be considered including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy. (*Bernard v. City of Oakland, supra*, at 584-585.)

13. Official notice was taken of Senate Bill 53, which was introduced in 1992 and enacted in 1993. SB 53 was designed to curb "spiking," the intentional inflation of a public employee's final compensation, and to prevent unfunded pension fund liabilities. SB 53 defined "compensation earnable" in terms of normal payrate, rate of pay, or base pay so payrates would be "stable and predictable among all members of a group or class" and "publically noticed by the governing body." The legislation was intended to restrict an employer's ability to spike pension benefits for preferred employees and to result in equal treatment of public employees. (Senate File History Re: SB 53)

14. The reference to "publicly available pay schedules" set forth in Government Code section 20636, subdivision (b)(1), was added by the Legislature in 2006. Legislative history confirms that "the change was a matter of clarification." (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 990, fn. 4.)

15. Using a broad interpretation of "pay schedule" based upon the inclusion of a salary disclosed only in a budget has the vice of permitting an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees. And, a written employment agreement with an individual employee should not be used to establish that employee's "compensation earnable" because the employment agreement is not a labor policy or agreement within the meaning of an existing regulation and would not limit on the compensation a local agency could provide to an individual employee by way of individual agreements for retirement purposes. (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 994-995.)

16. The term "publicly available" has been determined to be consistent with "a published monthly payrate," and a settlement payment that was not paid in accordance with a "publicly available pay schedule for services rendered on a full time basis during normal working hours" cannot be used to calculate the amount of a CalPERS retirement allowance. (*Molina v. Board of Admin., California Public Employees' Retirement System* (2001) 200 Cal.App.4th 53, 66-67.)

17. The PERS system, via its definitions of "compensation earnable" and "final compensation," contemplates equality in benefits between members of the "same group or class of employment and at the same rate of pay." There is clearly an intent not to treat members within the same class and at the same pay dissimilarly, although there is no intent to grant parity between employees of different classes and rates of pay. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1492.)

18. Mr. Adams' earnings from the City of Bell were not paid pursuant to a publicly available pay schedule; his contract dated May 29, 2009, did not constitute a publicly available pay schedule; his contract dated May 29, 2009, was not readily available for public review; there was a deliberate effort by City of Bell officials to conceal the details of Mr. Adams' employment agreement as Chief of Police, including his payrate; the City Council for the City of Bell did not approve Mr. Adams' employment agreement. Under these circumstances, it is concluded that Mr. Adams did not it established that his earnings from the City of Bell were made pursuant to a publicly available pay schedule.

Cause Exists to Affirm CalPERS Determinations

19. Mr. Adams did not establish by a preponderance of the evidence that his earnings with the City of Bell constituted "compensation earnable" and should be used in the calculation of his service retirement allowance. It was not established by a preponderance of the evidence that Mr. Adams' earnings with the City of Bell were pursuant to a publicly available pay schedule.

20. A preponderance of the evidence established that it was appropriate for CalPERS to include Mr. Adams' length of service as Chief of Police with the City of Bell in retirement calculations and to use Mr. Adams' highest 12 months of compensation with the City of Glendale in the calculation of his service retirement allowance.

ORDER

CalPERS' calculation of the service retirement allowance to which Randy G. Adams is entitled is affirmed.

Dated: October 4, 2012

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings