

ATTACHMENT E

THE PROPOSED DECISION

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

In the Matter of the Appeal Regarding the Final

Compensation Calculation of:

MARIA T. SANTILLAN-BEAS, Respondent,

and

CITY OF LYNWOOD, Respondent.

Case No. 2019-0782 (Statement of Issues)

OAH No. 2020110582

PROPOSED DECISION

Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on November 16, 2021, by videoconference.

Charles H. Glauberman, Senior Attorney, represented California Public Employees' Retirement System (CalPERS).

Kendra L. Carney Mehr, Esq., represented respondents Maria T. Santillan-Beas and City of Lynwood.

The record was held open after the conclusion of the hearing for the parties to lodge closing and reply briefs, and to respond to items attached to each other's reply briefs. The events which transpired while the record was held open are described in the ALJ's orders marked as Exhibits 27 and 28.

The record was closed, and the matter submitted for decision on January 10, 2022.

SUMMARY

Respondents appeal CalPERS' determination to exclude from former City Council Member Santillan-Beas's final compensation used to determine her retirement allowance pay she received for attending meetings of various public authorities within the City of Lynwood. Her attendance at those meetings was a requirement of her city council member position. In order to qualify as final compensation, pay must either be special compensation or payrate. However, respondents failed to meet their burden of establishing by a preponderance of the evidence that the compensation in question was either. Respondents agree the compensation in question was not special compensation. Because it was not subject to publicly available pay schedules, the compensation does not qualify as payrate either. Two City Council resolutions in evidence setting the pay per meeting for two of the public authorities do not qualify as publicly available pay schedules. The only publicly available pay schedules in evidence describe the city council member position and therefore is the only proper component of Ms. Santillan-Beas's final compensation for purposes of determining her retirement allowance. The appeal therefore is denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. CalPERS is a defined benefit plan administered under the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.) CalPERS is governed by its Board of Administration (Board). (Ex. 1.)

2. Respondent Maria T. Santillan-Beas (respondent) was elected as a city council member by the City of Lynwood, commencing October 7, 2003. (Ex. 3.)

3. On October 14, 2003, respondent signed and submitted an Election of Optional Membership form and elected to become a member of CalPERS under Government Code section 20322, as a city council member. (Ex. 3, p. 50.)

4. Respondent City of Lynwood (the City) is a public agency that contracts with CalPERS to provide retirement benefits for its employees. The provisions of the City's contract with CalPERS are contained in the PERL. (Exs. 1; 3; 17, pp. 112-157.)

5. On November 8, 2018, respondent signed an application for service retirement. Respondent retired for service effective December 5, 2018, and has been receiving a monthly retirement allowance of \$326.43 since that date. (Exs. 12, 13.) The monthly retirement allowance was calculated based on respondent's highest salary as a city council member over the 12-month period of December 2017 through November 2018, when she earned \$975 per month and overall \$11,700. (Exs. 5, 19.)

6. Respondent and the City were informally advised of respondent's projected monthly retirement allowance before she retired, which was close to the amount she ultimately was paid. (Exs. 5-11.)

However, respondent and the City protested respondent's projected monthly amount, contending it was too low and derived in error by CalPERS. This was because, as explained in more detail below, in addition to her compensation for serving as a city council member, respondent also served on separate city-related public authorities. Respondent was paid a stipend for each meeting she attended for most of the public authorities. (*Ibid.*)

Respondent and the City believed respondent's retirement allowance should be based on her highest year of combined pay by the City, for her services as a city council member and on the public authorities, which was in 2004 when she made approximately \$34,948. If so, respondent's monthly retirement allowance would be considerably more than \$326.43. (See, e.g., Exs. 7, 8, 10, 11, 14, 15.)

7. Beginning no later than October 2018, the City began advocating for a higher monthly retirement allowance for respondent, by sending to CalPERS letters and e-mails, as well as meeting with CalPERS staff. (Exs. 4-11, 15.)

8. CalPERS reviewed respondent's member file, as well as documents and information submitted by the City. After evaluating all of the information at its disposal, CalPERS concluded only respondent's compensation as a city council member had been reported to CalPERS and was pensionable. (Exs. 6, 9, 16.) CalPERS determined it could not include compensation respondent received for attending the public authorities' meetings because that compensation failed to meet the definition of special compensation or payrate within the meaning of the PERL, and therefore could not be factored into respondent's retirement allowance. (*Ibid.*)

9. By letter dated June 10, 2019, respondent and the City were notified of CalPERS' determination and were advised of their appeal rights. (Ex. 16.)

10. By letter dated July 9, 2019, the City filed a timely appeal for itself and respondent, and requested an administrative hearing. (Ex. 17.)

11. On or about October 21, 2020, the Statement of Issues was filed by Renee Ostrander, Chief of CalPERS' Employer Account Management Division. (Ex. 1.)

Respondent's Compensation Paid by the City

12. Respondent served on the city council continuously from 2003 until her 2018 retirement. (Exs. 3, 15.)

13. Respondent received a monthly salary for serving as a city council member, which was set by ordinance and statute. (Ex. 15, pp. 88-92; Gov. Code, § 36516.) During the years of respondent's highest compensation in that position (2017 & 2018), her salary also was set by publicly available pay schedules. (See, e.g., Exs. 23; 26, attachments B & C.)

14. From 2003 through her retirement in 2018, respondent's monthly and yearly compensation for serving as a city council member were as follows:

Year(s)	Monthly	Yearly
2003	\$804	\$8,040 (partial year served)
2004-2007	\$804	\$9,648
2008-2018	\$975	\$11,700

(Ex. 15, pp. 87-92.)

15. As a requirement of being a city council member, respondent also served on various city-related boards, commissions, and agencies, including the Lynwood

Public Financing Authority (financing authority), Lynwood Redevelopment Agency and its successor-in-interest (redevelopment authority), the Lynwood Information Inc., and the Lynwood Housing Authority (housing authority). (Ex. 15, pp. 87-92; Testimony [Test.] of Cynthia Stafford.)

16. The public authorities were created either by ordinance or resolution, and all engaged in City business. (Test. of Stafford; Ex. 15, pp. 87-92.)

17. The public authorities are legally separate entities. (Test. of Gregory Lake.) None of the public authorities has a contract with CalPERS. (Test. of Lake; see also Gov. Code, § 20322.)

18. Respondent was required to attend several meetings each month for the public authorities, as were the other city council members. The meetings for the public authorities were held concurrently with city council meetings, though their agendas were different than the city council's agenda. (Test. of Stafford.)

19. For those public authorities compensating her, respondent was paid per meeting she attended. The number of meetings she attended for each public authority varied from year-to-year. The compensation for attending meetings also varied among the public authorities and from year-to-year. For example, from 2003 until it was dissolved in 2007, respondent was paid \$450 per meeting of the Lynwood Information Inc. She also was paid \$450 per meeting for the financing authority, until 2008 when that amount was reduced to \$100 per meeting. (Ex. 15, pp. 87-92.)

20. In 2004, respondent was compensated \$13,050 for attending Lynwood Information Inc. meetings; \$11,250 for attending financing authority meetings; and \$1,000 for attending redevelopment authority meetings. Respondent received more compensation for attending meetings in 2004 than any other year.

21. For reasons not clear from the record, the number of meetings respondent attended dwindled over the years. Whereas in 2004 respondent was paid \$25,300 for attending the public authorities' meetings, by 2017 she received only approximately \$1,500. (Ex. 15, pp. 87-92.)

22. As shown below, these dynamics caused respondent's total compensation from the City to fluctuate from 2003 to 2008, and then stabilize in 2009 and thereafter. (Ex. 15, pp. 87-92.)

23. Respondent's combined yearly compensation for serving as a member of city council and the various public authorities was as follows:

2003	\$12,715
2004	\$34,948
2005	\$34,348
2006	\$31,923
2007	\$29,848
2008	\$12,775
2009	\$12,800
2010	\$12,750
2011	\$12,775
2012	\$13,335
2013	\$13,080

2014	\$12,950
2015	\$13,000
2016	\$13,490
2017	\$13,240
2018	(partial service, no amount specified.)

(Ex. 15, pp. 87-92.)

24. No publicly available pay schedule for the City's public authorities is in evidence. The only publicly available pay schedules in evidence are those issued by the City in 2017 and 2018, and those schedules reference pay for city council members but not the public authorities. (Ex. 26, attachments B & C.)

25. Respondents also submitted City resolutions for the financing authority (in 1996) and housing authority (in 2012). (Ex. 17, pp. 158-162.) Those two resolutions state how much members of city council will be paid for attending each meeting, where the funds will come from to pay them, and background information concerning the public authorities in question. (*Ibid.*)

26. In 2004, the City reported to CalPERS respondent's compensation for service as a city council member. It was not established by a preponderance of the evidence, however, that the City also reported to CalPERS respondent's total compensation for attending the public authority meetings that year. (Exs. 13, 20, 21; Test. of Taras Kachmar.) At most, only approximately \$1,500 in addition to respondent's city council salary was reported to CalPERS in 2004.

(Ex. 21, pp. 220-221.)

27. During a limited period, between 2008 and 2011, the City reported as “special compensation” to CalPERS some of respondent’s payments for attending the public authority meetings. The amount of reported special compensation ranged between \$30 to \$120 per month, with an approximate average of \$60 per month. (Exs. 18, 21.)

28. Throughout this dispute, the City has contended that historically it has calculated the retirement benefit contributions it makes to CalPERS for its city council members based on all payments, including those made for attending public authority meetings. (See, e.g., Ex. 17, p. 101.) However, the City failed to establish by a preponderance of the evidence it had done so. As discussed above, the evidence concerning respondent’s reported compensation undercuts the City’s contention. As discussed below, the City’s payroll reporting during the times in question was sporadic and erroneous. Finally, Gregory Lake, an Associate Governmental Program Analyst for CalPERS, testified persuasively that since a change in the PERL effective in 1994, CalPERS has not accepted from cities compensation for service on city-related boards, commissions, and agencies excluded from CalPERS membership

29. Respondent contends she made contributions to CalPERS based on her combined compensation for serving as a city council member and for attending the public authority meetings. (See, e.g., Ex. 17, p. 113.) However, when she retired, respondent’s total contributions to CalPERS totaled only \$12,329.89 (Exs. 13, 20), which averaged approximately \$64 per month. This amount is low enough as to undercut the credibility of her contention.

30. The City’s former Director of Human Resources, Cynthia Stafford, explained in her testimony the City’s former payroll clerk failed to report correct compensation to CalPERS for City employees and officers. Ms. Stafford also testified

much of the City's payroll data before 2017 was lost. She and her staff did their best to piece together compensation data, which resulted in the creation of a spreadsheet summarizing yearly payments made to respondent. (Ex. 15.) However, Ms. Stafford's testimony and the spreadsheet do not rebut the veracity of CalPERS' summary of compensation reported by the City to CalPERS for respondent. (Ex. 21.)

31. Ms. Stafford conceded in her testimony that respondent's compensation for service on the public authorities from 2004 through 2006 did not constitute special compensation. However, she opined the compensation should be considered payrate because city council members were required to serve on the public authorities and the City viewed that work and compensation as part of the city council members' regular rate of pay, or payrate.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. "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.) Thus, the party asserting a claim or making changes has the burden of proof in administrative proceedings. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 [*McCoy*].) Put another way, there is a built-in bias in favor of the status quo; the party seeking to change the status quo usually has the burden of proving it. (*Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1388.) In this case, respondent and the City bear the burden of proof, as they are requesting CalPERS to increase respondent's monthly retirement

allowance amount based on an argument CalPERS has not accepted. In that regard, respondents are proposing changes that will disturb the status quo.

2. The standard of proof in this matter is the preponderance of the evidence. (*McCoy, supra*, 183 Cal.App.3d at p. 1051.) That standard of proof is met when a party's evidence has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Respondent's Retirement Allowance

3. CalPERS is a prefunded, defined benefit retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198 [*Oden*].) A member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) final compensation. (*Prentice v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479 [*Prentice*].)

4. Compensation for purposes of determining a member's retirement allowance is not based simply on the total amount of remuneration received by the member. It is "exactly defined to include or exclude various employment benefits and items of pay." (*Oden, supra*, 23 Cal.App.4th at p. 198.)

5. For a local entity member like respondent, final compensation, one of the three factors described above for determining a retirement allowance, is the highest average "compensation earnable" paid during a consecutive 12-month period. (Gov. Code, §§ 20037, 20042.)

6. The PERL defines "compensation" as the "remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours." (Gov. Code, § 20630, subd. (a).) "Compensation shall be

reported in accordance with Section 20636 . . . and shall not exceed compensation earnable, as defined in Section 20636 or Section 20636.1.” (Gov. Code, § 20630, subd. (b).)

7. In turn, “compensation earnable” is a combination of payrate and special compensation. (Gov. Code, § 20636, subd. (a).)

8. Special compensation is pay for special skills, knowledge, or abilities. (Gov. Code, § 20636, subd. (c)(1).) California Code of Regulations, title 2, section 571 provides an exclusive list of the different items of pay considered to be special compensation.

9. Payrate, per Government Code section 20636, subdivision (b)(1), is:

[T]he 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).

10. To qualify as a publicly available pay schedule, the document must “list, catalog, or inventory . . . the rate of pay or base pay of one or more employees.” (*Tanner v. Public Employees’ Retirement System* (2016) 248 Cal.App.4th 743, 755 [*Tanner*].) Pay schedules cannot include information in addition to employee pay and

cannot reference documents to assist in validating the pay. (*Tanner, supra*, 248 Cal.App.4th at pp. 755-757.)

11. Respondent and the City correctly point out the phrase “pursuant to publicly available pay schedules” was not added to Government Code section 20636 until 2006. Respondent and the City therefore argue payrate did not require a publicly available pay schedule in 2004, when respondent received her highest year of compensation.

However, CalPERS correctly argues a publicly available pay schedule was not a new requirement when added to Government Code section 20636 in 2006 but was a clarification of existing law. (*Prentice, supra*, 157 Cal.App.4th at p. 990 fn 4; *Tanner, supra*, 248 Cal.App.4th at pp. 756-757.) Amendments to statutes that are matters of clarification may be applied retroactively. (*Ibid.*) Therefore, in order to qualify as payrate in 2004, the compensation in question must have been subject to a publicly available pay schedule.

12. Respondents do not argue the compensation for attending public authority meetings was special compensation. (See Ex. A, p. 4.) Instead, they argue it qualifies as payrate and therefore should have been included in respondent’s final compensation amount. (*Ibid.*)

13. In this case, the publicly available pay schedules in evidence list pay for the city council member position but do not reference the public authorities. Respondents did not introduce any publicly available pay schedule, as commonly understood, for the public authority positions at any time.

Respondents did submit two city council resolutions that list the pay amount per meeting for two of the public authorities in question, the financing authority in

1996 and the housing authority in 2012. But the two resolutions do not qualify as publicly available pay schedules for various reasons.

First, a city council resolution covering pay for one public authority is not a list, catalog, or inventory of pay fitting *Tanner's* description of a pay schedule.

Next, the two submitted resolutions include information other than pay amounts, which violates the holding in *Tanner* that a pay schedule can only have the payment amount. To the extent respondent and the City urge consideration of the two resolutions to reflect a publicly available pay schedule, referencing various documents to derive an employee's pay schedule would ask the public to piece together respondent's pay from different sources, which also violates the *Tanner* holding.

Even if the resolutions could be considered a pay schedule, there is still a lack of evidence supporting respondents' argument. Respondent was paid for attending meetings of three public authorities in 2004, but she has only provided resolutions for two public authorities. Only one of those resolutions (financing authority) covered meetings respondent attended in 2004. The other resolution from 2012 cannot validate the 2004 pay. There are no resolutions covering the other two public authorities for which respondent was compensated for attending meetings in 2004.

14. In summary, respondent's pay in 2004 for attending meetings of various public authorities was not subject to a publicly available pay schedule. Because payrate is limited to compensation listed on a publicly available pay schedule, respondent's pay for attending the public authority meetings cannot be considered payrate, and therefore cannot be considered in determining her final compensation for purposes of her retirement allowance. (Factual Findings 1-31.)

15. The above conclusion is supported by other legal principles. For example, while Government Code section 20322 specifically allows a city council member to be a CalPERS member if he or she so elects, those who serve on other "public commissions, boards, councils, or similar legislative or administrative bodies are excluded from membership in this system." Health and Safety Code section 34274 specifically excludes service on housing authorities from membership. It therefore does not follow that respondent's service on CalPERS-excluded entities still entitled her to bolster her CalPERS credit earned while serving on a CalPERS covered entity, the city council.

In addition, the City reported very little, if any, of the public authority meeting compensation to CalPERS in 2004 and thereafter. Respondent's contributions to CalPERS for 2004 and after are low enough to indicate very little, if any, of her contributions were related to the public authority compensation. It would be inconsistent with the above-described general principles of the PERL for a member to receive a retirement allowance based on amounts not subject to employer reporting or to employee contributions.

Finally, as mentioned above, Government Code section 20636, subdivision (b), defines payrate as the normal monthly rate of pay, or base rate of pay, paid to a member. Respondent received a regular salary, or base pay, for her service on city council. No evidence presented suggests she similarly received a regular monthly amount for attending public authority meetings. If anything, that pay fluctuated depending on how many meetings she attended and how many public authorities she served on. An irregular per diem pay is anything but a normal rate of pay. Moreover, a payment in addition to base pay cannot also be base pay. But respondent and the City argue respondent is entitled to multiple payrates from multiple pay schedules: one


monthly payrate for her service as a city council member, and additional, irregular payrates based on differing payments for serving on different public authorities. This argument is inconsistent with the definition of payrate.

16. Based on the above, respondent and the City failed to meet their burden of establishing by a preponderance of the evidence that CalPERS' determination to include only respondent's salary as a city council member in her final compensation was in error or that her current monthly retirement allowance amount is wrong. (Factual Findings 1-31; Legal Conclusions 1-15.)

ORDER

Respondents' appeal is denied.

DATE: 02/03/2022


Eric C. Sawyer (Feb 3, 2022 13:21 PST)

ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings