

ATTACHMENT E

THE PROPOSED DECISION

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

**In the Matter of the Appeal Regarding Final Compensation
of:**

KELLEY M. WILLIAMS, Respondent,

and

COUNTY OF INYO, Respondent

Agency Case No. 2022-0798

OAH No. 2023050015

PROPOSED DECISION

Alan R. Alvord, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on July 25, 2023, and January 30, 2024.

Austa M. Wakily, Senior Attorney, California Public Employees' Retirement System (CalPERS), represented complainant Renee Ostrander, Employer Account Management Division, CalPERS.

Kelley M. Williams, respondent, represented herself.

Grace Enders Weitz, Deputy County Counsel, County of Inyo, was present to represent county witnesses who appeared under subpoena.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on January 30, 2024.

DECISION SUMMARY

After respondent retired from the County of Inyo, CalPERS determined that the payrate the employer reported on respondent's behalf was not based on publicly available pay schedules, so CalPERS calculated a lower final compensation, which reduced respondent's retirement benefit. Respondent appealed the CalPERS determination.

The evidence showed that CalPERS's calculation of respondent's final compensation was correct.

FACTUAL FINDINGS

Jurisdiction and Procedural Matters

1. Respondent began employment with the County of Inyo (county) in November 2002. The county contracts with CalPERS to administer its retirement programs; respondent became a CalPERS member by virtue of this employment. She applied for service retirement by uploading a CalPERS retirement application through the CalPERS member self-service portal on November 1, 2021. Her retirement date was December 31, 2021.

2. On April 20, 2022, CalPERS notified respondent that some of the pay rates that the county reported to CalPERS on her behalf did not meet the definition of "compensation" and "compensation earnable" under Government Code sections 20630 and 20636 and did not comply with the publicly available pay schedule requirements in the California Code of Regulations. CalPERS therefore based its final compensation calculation on a lower compensation amount than respondent expected.

3. On May 16, 2022, respondent submitted her request to appeal the CalPERS determination.

4. On May 25, 2023, complainant, signed the Amended Statement of Issues.

5. The hearing commenced on July 25, 2023. After the lunch break, the county informed the parties that it may have discovered additional documents that could affect CalPERS's determination. The parties agreed to pause the hearing and allow the county time to confirm the documents, send them to CalPERS, and for CalPERS to consider the new documents. The hearing was scheduled to resume on January 30, 2024.

6. On December 27, 2023, CalPERS issued a follow up to formal determination letter stating that it had reviewed the new documents and that its final compensation determination had not changed. The hearing in this matter resumed as scheduled on January 30, 2024.

Respondent's Early Work for the County

7. Respondent began working for the county in 2002 as a prevention specialist. She also worked as assistant to the Health & Human Services Director.

Respondent Becomes Assistant to the County Administrative Officer

8. Respondent became an assistant to the County Administrative Officer (CAO) in 2008. The CAO is also the county's Director of Emergency Services. One of respondent's assignments as assistant to the CAO involved working on the county's emergency services. Respondent testified that Inyo is a large county in area but has a small population. The emergency response area is very large. Respondent's work involved emergency planning, training, grant preparation, coordinating the county's emergency response with State and Federal agencies, and mandatory reporting to the various State and Federal government agencies.

Respondent Advocates to Create a New Emergency Services Manager Position

9. Respondent testified that, as the number of disasters in the county increased, the emergency services portion of her job became more complicated and required more of her time in addition to other tasks as assistant to the CAO. After working for the CAO from 2008 to 2012, it became clear to her that the county needed a "stand alone" emergency services manager. From 2012 to 2018, she "dogged" the CAO to create a job description for an emergency services manager (ESM) position. The CAO agreed the position was needed and told her if she could find funding for the position, he would approve it. In 2016, respondent, on behalf of the county, applied for and received approval of a grant to pay for half of the ESM salary.

10. The Board of Supervisors approved an "at will," unrepresented management ESM position with funding in the 2016-17 budget at salary range 78.

11. To fill the newly created ESM position, the county conducted an extensive recruitment effort that included posting the job announcement in various

statewide professional association and government agency websites. Qualified applicants were invited to interview before a panel comprised of the County Sheriff, Public Works Director, and a former City of Bishop Police Chief. Respondent was required to apply for the position through this competitive hiring process. Respondent had over 500 hours of emergency services response training, knew the rules for grants, understood how to seek funding from State and Federal agencies, and how that funding required accountability and reporting. In addition, she had specific knowledge of the county's operations because of her experience working in emergency services as an assistant to the CAO.

Respondent is Hired as the New ESM

12. The county ultimately selected respondent for the ESM position. On April 17, 2018, the county executed, and the Board of Supervisors approved, a contract with respondent to hire her as ESM at salary range 78, step E, the highest of five salary steps within range 78. At the time, the monthly salary was \$6,574.

Respondent Renegotiates Her Contract; the County Reclassifies ESM to Salary Range 82, with Retroactive Pay

13. Respondent testified that she accumulated over 569 hours of uncompensated overtime between 2018 and 2019. In addition, the ESM job description required her to work with a disaster coordinator, a position that the county created but had not filled. As a result, respondent felt she was doing two jobs. In 2019, respondent approached the CAO about renegotiating her contract. In those discussions, the CAO agreed to include the ESM position in an equity study that the county was performing for other positions.

14. While the equity study continued, the CAO agreed to allow respondent to receive "standby pay" for the days that the position required her to be on call outside of normal work hours. On June 25, 2019, the Board of Supervisors approved a standby compensation schedule of \$50 per day and \$75 per weekend for scheduled days off and holidays for, among others, the ESM classification. For purposes of CalPERS's final compensation calculation, standby pay is not included in compensation earnable. (Gov. Code, § 20635.)

15. The equity study report found that the ESM position was undercompensated. Respondent and the CAO discussed how to renegotiate the contract based on these findings. Respondent testified that she was willing to give up the standby pay in exchange for a promotion to salary range 84. The county offered her salary range 82. She testified that she was "not happy," but she had been trying to renegotiate her contract for a long time and she wanted her standby pay to be included in her salary so it could be considered as compensation for retirement. She agreed to a salary increase to range 82, step E, with no more standby pay on the condition that the county make the range 82 pay retroactive to July 1, 2020.

16. On November 17, 2020, the Board of Supervisors approved an amendment to respondent's contract that increased her salary to range 82, step E, retroactive to July 1, 2020. Salary ranges for all county positions had five steps, A through E. Rather than pay respondent's retroactive amount in a lump sum, the county created a new range 82, step F. The ESM position was the only classification in the county that received an additional salary step F; respondent was the only member of that classification.

17. To accommodate the new step F, county information technology personnel were required to recode the payroll system so the system would recognize a

step F for respondent. To pay respondent retroactively, she received pay at the range 82 step F monthly rate of \$8,203.76 from November 26, 2020, through June 9, 2021. Witnesses for the county did not have an explanation for why the county created a special temporary step F to pay respondent's retroactive increase in monthly installments rather than simply pay her a lump sum for retroactive pay.

18. After the retroactive component of her raise was fully paid, respondent's position reverted to the range 82 step E rate of \$7,677 with the pay period beginning June 10, 2021. Effective July 8, 2021, all employees received a four percent cost of living adjustment that increased respondent's range 82 step E payrate to \$7,983.99.

19. Deputy Personnel Administrator Sue Dishion testified at hearing that the reason the county created a step 82 F was to make sure the longevity and value of employer paid contributions were included in respondent's retroactive pay. Ms. Dishion also confirmed that the county's intention was to report the range 82, step E and F payrates to CalPERS for retirement purposes. She also testified that the increase from range 78 to range 82 was not a temporary COVID-related pay increase. The county intended the reclassification to be a permanent payrate increase for respondent.

The County Reclassifies the ESM Position to Range 78 After Respondent Retires

20. After respondent retired on December 31, 2021, the county reclassified the ESM position back down to salary range 78. On January 4, 2022, Ms. Dishion submitted a Departmental Personnel Action request to the Board of Supervisors requesting the board to reclassify the ESM position from range 82 to range 78 and to approve a revised job description. The justification for the requested action stated:

Inyo County's Emergency Services Manager retired as of December 31, 2021. The incumbent had spent many years with the County, and the current position description reflects that individual's unique skill set. This reclassification and revision of the job description will allow the CAO's Office to recruit broadly to fill this important position.

In a section of the request labeled "alternatives and consequences of negative action," Ms. Dishion stated:

The Board could decide not to reclassify and approve the revised job description for the emergency services manager. This is not recommended, as a qualified candidate is unlikely to be found who could meet the qualifications of the unique job description.

21. The county Board of Supervisors approved this reclassification in its public meeting on January 4, 2022, just four days after respondent retired.

22. Ms. Dishion testified at the hearing that the county reclassified the ESM position back down to range 78 because respondent had a high level of expertise and the county decided to recruit for the ESM position at a lower level.

23. Respondent contended at the hearing that the county downgraded the ESM position to split the job among different positions, and that her more complex work under the previous ESM job description justified the range 82 payrate and CalPERS should include the range 82 steps E and F payrate in her final compensation.

24. A comparison of the two job descriptions shows that, although the range 78 job description was fewer pages, the functions of the position did not significantly change from the range 82 position to the range 78 position. In addition, respondent did not offer evidence of another position the county used to perform any of the duties that she alleged were "split" from the ESM position when the county reduced the ESM payrate.

CalPERS Final Compensation Calculation

25. Sara Tomatis, a compensation compliance analyst, has worked for CalPERS since 2014. Her job includes ensuring that CalPERS calculates final compensation in a way that is consistent with the applicable statutes and regulations. She testified that "compensation earnable" includes an applicant's payrate plus any special compensation. CalPERS initially calculated respondent's benefit based only on her payrate without considering special compensation to put her "on roll" – to begin paying her a benefit immediately.

26. CalPERS reviewed the compensation that the county reported on behalf of respondent for October 14, 2018, through June 9, 2021, and determined that the payrates exceeded the rates listed on the county's July 2020 and July 2021 publicly available pay schedules for the ESM position. In addition, part of the special compensation reported, which included longevity pay and the value of employer paid member contributions, did not qualify as special compensation because the county calculated them based on the noncompliant base payrates.

27. CalPERS determined that respondent's temporary increase to range 82 step F did not qualify to be included in final compensation because the publicly available pay schedule for the time period showed the ESM position at salary range 78.

In addition, other county employees only received five steps (A through E) within their salary ranges; no other county employees were given a step F within their salary range. CalPERS also determined that respondent's compensation at range 82 step E, which occurred after respondent's retroactive pay was completed, also was not supported by a publicly available pay schedule. The only available pay schedule showed the ESM position receiving salary range 78.

28. In addition, after respondent retired, the county reclassified the position from range 82 to range 78. CalPERS considered this to be evidence that the range 82 payrate was applied only to respondent and not to all other people in the classification. Ms. Tomatis testified that the conversion of standby pay, which is not included in final compensation, to salary in order to include it in final compensation, is a "red flag" of salary spiking – an activity prohibited by the applicable laws and regulations. The county's reclassification of the position back down to range 78 after respondent retired was another red flag of salary spiking.

CalPERS Reviewed Additional Documents; Did Not Change Its Determination

29. As indicated above, after the first half-day of hearing, the county disclosed that it had located additional documents that could impact CalPERS's determination. The hearing was paused to allow time for the county to provide the new documents and for CalPERS to consider them. Karina Artunduaga, a compensation review analyst for CalPERS, testified at the second day of hearing. Ms. Artunduaga testified that the new documents, which were snapshots of the county's website preserved by the internet archive service Wayback Machine on certain dates, did not change CalPERS's determination. Although a document from the Wayback Machine referenced the ESM payrate at range 82 step F, Ms. Artunduaga testified that

the webpage does not, by itself, constitute a publicly available pay schedule as required by the Government Code and regulations. There was no evidence that the Board of Supervisors approved the list of payrates on the website. The only Board of Supervisors approved and publicly available pay schedules in evidence set the ESM salary at range 78.

LEGAL CONCLUSIONS

1. CalPERS's Board of Administration (board) is vested with management and control of the retirement system under the Public Employees' Retirement Law (Gov. Code, §§ 20000 et seq.; 20120.)

2. Respondent's employer, the County of Inyo, is a public agency. (Gov. Code, § 20056.)

3. Pension programs for public employees serve two objectives: to induce persons to enter and continue in public service, and to provide subsistence for disabled or retired employees and their dependents. The express statutory purpose underlying the state retirement system is to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees. (*Wheeler v. Board of Administration* (1979) 25 Cal.3d 600, 605; *Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 459.)

4. Members of CalPERS, once vested, participate in a defined benefit retirement plan that supplies a monthly retirement allowance under a formula comprising factors such as final compensation, service credit (i.e., the credited years of employment), and a per-service-year multiplier. The retirement allowance consists of

an annuity (funded by member contributions deducted from the member's paycheck and interest thereon) and a pension (funded by employer contributions and which must be sufficient, when added to the annuity, to satisfy the amount specified in the benefit formula). (*In re Marriage of Sonne* (2010) 48 Cal.4th 118, 121, citing Gov. Code, §§ 21350, 21362.2, subd. (a), and 21363.1, subd. (a).)

5. The determination of what benefits and items of pay constitute compensation is crucial to the computation of an employee's ultimate pension benefits. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.)

6. Government Code section 20630, subdivision (a), defines compensation as:

[T]he 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, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code, Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or Section 44043 or 87042 of the Education Code.

(4) Vacation.

(5) Compensatory time off.

(6) Leave of absence.

7. When an employer reports compensation to CalPERS, the employer must identify the pay period in which the compensation was earned regardless of when reported or paid and compensation cannot exceed "compensation earnable" as defined. (Gov. Code, § 20630, subd. (b).)

8. Final compensation is a function of an employee's highest "compensation earnable," which consists of "payrate" and "special compensation." (Gov. Code, § 20636, subd. (a).) An employee's "payrate" is the monthly amount of cash compensation to similarly situated members of the same group or class for services during normal working hours "pursuant to publicly available pay schedules." (Gov. Code, § 20636, subd. (b)(1).) "Special compensation" is payment received for an employee's special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions, but is "limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate." (Gov. Code, § 20636, subd. (c)(1); *Molina v. Board of Admin., California Public Employees' Retirement System* (2011) 200 Cal.App.4th 53, 65-66.)

9. When using a member's compensation to compute his or her benefit allowance, CalPERS must exclude any compensation based on overtime or work in excess of normal working hours. (Gov. Code, § 20635.)

10. CalPERS is authorized to promulgate regulations that it deems proper to carry out its management and control of the public employees retirement system. (Gov. Code, §§ 20120, 20121.) The regulations are found in California Code of Regulations, title 2, sections 550 to 599.554.

11. For purposes of determining compensation earnable, a member's payrate must be limited to the amount listed on a pay schedule that meets all of the following requirements: (1) approved and adopted by the employer's governing body according to public meeting laws; (2) identifies the position title for every employee position; (3) shows the payrate for every employee position; (4) shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range; (5) indicates the time base; (6) 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 website; (7) indicates an effective date and date of any revisions; (8) is retained by the employer and available for public inspection for not less than five years; and (9) does not reference another document in lieu of disclosing the payrate. (Cal. Code Regs., tit. 2, § 570.5, subd. (a).)

12. If an employer fails to meet these requirements, CalPERS's 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 documents approved by the employer's governing body in accordance with requirements of public meeting laws, last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the same position, and 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 subdivision (a) of a former CalPERS employer. (Cal. Code Regs., tit. 2, § 570, subd. (b).)

13. In other words, a publicly available 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,” and not an individual’s employment agreement. (*Tanner v. CalPERS (Tanner)* (2016) 248 Cal.App.4th 743, 755.) In *Tanner*, the Court found that an increase in an employee’s payrate in his final contract with the City of Vallejo did not qualify as compensation earnable, because it was not a part of a publicly available pay schedule. The court held:

The only documents that list Tanner’s salary as \$305,844 are his amended contract and the May 8, 2007 documents relating to his amended contract. [They] do not qualify as a pay schedule. These documents relate only to Tanner personally, without listing any other position or person. (*Id.*)

14. The *Tanner* Court also dedicated an entire section of its decision to the legislative history for the term pay schedule.

The term pay schedule first appeared in the Public Employees’ Retirement Law in 1993, . . . 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.) as amended Mar. 16, 1993, p. 1.) The stated purpose . . . 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.” (Sen. Public Employment & Retirement Com., Analysis of Sen. Bill No. 53, supra, as amended Mar. 16, 1993. p. 5.)

(*Tanner, Id.* at p. 756-757.)

15. Although the Board of Supervisors approved respondent’s pay increase to range 82, steps E and F at a public meeting, and it was a publicly available document, this payrate was not included in a board-approved publicly available pay schedule that listed all employee positions. In addition, the contract only referenced respondent, and did not apply the payrate to an entire class of employees. The contract does not meet the requirements in California Code of Regulations, title 2, section 570.5. Similarly, the Wayback Machine copies of historical web pages did not meet the requirements of publicly available pay schedules.

16. In addition, the range 82 steps E and F salary was an attempt to improperly convert on-call or standby pay, which may not be included in final compensation, into respondent’s includable payrate.

17. CalPERS’s discretionary determination to base respondent’s final compensation on range 78 step E was correct. This payrate met the requirements of California Code of Regulations, title 2, section 570.5. CalPERS’s calculation of final compensation for the period December 31, 2020, through December 30, 2021, was correct.

18. The issue in this case was not whether respondent’s range 82 rate of compensation was appropriate or whether she earned her pay. The county clearly valued respondent’s emergency services expertise and sought to reward her for both

her knowledge and her hard work. The salary increase was justified by an equity study. The evidence showed that respondent was a dedicated and hard-working public servant. However, CalPERS must apply the laws and regulations in calculating a member's final compensation and benefit amount. The evidence showed CalPERS correctly calculated respondent's final compensation.

ORDER

CalPERS's calculation for payrate, compensation earnable, and monthly retirement allowance for respondent Kelley M. Williams is affirmed. Respondent's appeal is denied.

DATE: February 27, 2024

Alan R. Alvord

ALAN R. ALVORD

Administrative Law Judge

Office of Administrative Hearings