

1 BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

2 In the Matter of the Calculation of Final) CASE NO. 2015-1047
3 Compensation of) OAH NO. 2016090597
4 KAREEMAH M. BRADFORD,) PRECEDENTIAL DECISION
5 Respondent,) 17-01
6 and) EFFECTIVE: November 15, 2017
7 CITY OF COMPTON,)
8 Respondent.)

9 PRECEDENTIAL DECISION

10 RESOLVED, that the Board of Administration of the California Public
11 Employees' Retirement System, acting pursuant to Government Code Section
12 11425.60, hereby designates its final Decision concerning the final compensation
13 determination of Kareemah M. Bradford as a Precedential Decision of the Board.

14 * * * * *

15 I hereby certify that on November 15, 2017, the Board of Administration,
16 California Public Employees' Retirement System, made and adopted the foregoing
17 Resolution to be effective immediately, and I certify further that the attached copy of
18 the Board's Decision is a true copy thereof as adopted by said Board of Administration
19 in said matter.

20 BOARD OF ADMINISTRATION, CALIFORNIA
21 PUBLIC EMPLOYEES' RETIREMENT SYSTEM
22 MARCIE FROST
CHIEF EXECUTIVE OFFICER

23 Dated: 11/20/17 BY ORIGINAL SIGNED
24 DONNA RAMEL LUM
25 Deputy Executive Officer
Customer Services and Support

1 BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

2 In the Matter of the Calculation of Final) CASE NO. 2015-1047
3 Compensation of) OAH NO. 2016090597
4 KAREEMAH M. BRADFORD,) DECISION
5 Respondent,)
6 and)
7 CITY OF COMPTON,)
8 Respondent.)
9

10 RESOLVED, that the Board of Administration of the California Public
11 Employees' Retirement System hereby adopts as its own Decision the Proposed
12 Decision dated March 20, 2017, concerning the appeal of Kareemah M. Bradford;
13 RESOLVED FURTHER that this Board Decision shall be effective 30 days following
14 mailing of the Decision.

15 *****

16 I hereby certify that on June 21, 2017, the Board of Administration, California
17 Public Employees' Retirement System, made and adopted the foregoing Resolution,
18 and I certify further that the attached copy of the Administrative Law Judge's Proposed
19 Decision is a true copy of the Decision adopted by said Board of Administration in said
20 matter.

21 BOARD OF ADMINISTRATION, CALIFORNIA
22 PUBLIC EMPLOYEES' RETIREMENT SYSTEM
MARCIE FROST
23 CHIEF EXECUTIVE OFFICER

24 Dated: 6/27/17

24 BY ORIGINAL SIGNED
25 DONNA RAMBL LUM
Deputy Executive Officer
Customer Services and Support

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

In the Matter of the Calculation of Final
Compensation of:

KAREEMAH BRADFORD,

Respondent,

and

CITY OF COMPTON,

Respondent.

Case No. 2015-1047

OAH No. 2016090597

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on January 19, 2017, in Los Angeles, California.

Christopher Phillips, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS). Eli Naduris-Weissman, Attorney at Law, represented respondent Kareemah Bradford (respondent), who was present. No appearances were made by or on behalf of respondent City of Compton (City).

During the hearing, complainant amended the Statement of Issues by striking the date "October 20, 2104" in line 4, paragraph VII and line 21, paragraph IX of page 2, and replacing it with the date "October 20, 2014." Respondent did not object to the amendment

Oral and documentary evidence was received, and argument was heard. The record remained open after the hearing to allow all parties to file and serve closing briefs by February 9, 2017, and to allow all parties to file and serve any responses by February 16, 2017. On February 9, 2017, CalPERS and respondent's closing briefs were received, marked as exhibits 11 and I, respectively, and lodged. On February 16, 2017, CalPERS and respondent's reply briefs were received, marked as exhibits 12 and J, respectively, and lodged. The record was closed, and the matter was submitted for decision on February 16, 2017.

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FACTUAL FINDINGS

Parties and Jurisdiction

1. On September 2, 2016, Renee Ostrander, Chief of the Employer Account Management Division of CalPERS, filed the Statement of Issues while acting in her official capacity.

2. Respondent is employed by the City as a Human Resources Director. By virtue of her employment, respondent is a local miscellaneous member of CalPERS.

3. The City is a local public agency that contracts with PERS for retirement benefits for its eligible employees. The provisions of the City's contract with CalPERS are contained in the California Public Employees' Retirement Law (PERL), which is set forth at Government Code¹ section 20000 et seq.

4. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions and by interest and other earnings on those contributions. The amount of a member's contribution is determined by applying a fixed percentage to the member's compensation. A local public agency's contribution is determined by applying a rate to the member compensation as reported by the agency. Using certain actuarial assumptions specified by law, the CalPERS Board of Administration (Board) sets the employer contribution rate on an annual basis.

5. The amount of a member's service retirement allowance is calculated by applying a percentage figure based upon the member's age on the date of retirement to the member's years of service and the member's "final compensation." In computing a member's retirement allowance, CalPERS staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member's final compensation for purposes of calculating the retirement allowance.

6. On April 15, 2015, respondent contacted CalPERS to inquire about the reporting of retroactive salary payments for wrongfully terminated employees upon retroactive reinstatement. Respondent is one of four employees who were wrongfully terminated by the City. She was reinstated to her position as Human Resources Director for the City pursuant to a October 20, 2014 Findings of Fact and Decision (Decision) of the City's Personnel Board. The Decision also awarded respondent a lump sum payment of her salary for the period of her wrongful termination from September 15, 2011, through October 20, 2014. The City did not report to CalPERS any of respondent's compensation for that time period for retirement purposes.

¹ All further statutory references are to the Government Code unless otherwise specified.

7. After respondent submitted her inquiry, CalPERS staff reviewed the City's reporting of respondent's compensation. After reviewing available information, CalPERS staff believed that the retroactive salary payment awarded to respondent was not for services rendered on a full-time basis during normal hours. CalPERS staff concluded that the City was correct in not reporting this compensation and that it should not be included in the calculation of respondent's final compensation for retirement purposes.

8. In letters dated May 22, 2015, CalPERS notified respondent and the City of its determination described above and advised them of their right to appeal that determination. (Exs. 4 and 5.)

9. In a letter dated July 19, 2015, respondent timely appealed the denial and requested an administrative hearing.

10. The issue on appeal is whether the compensation awarded to respondent for wrongful termination should be reported to CalPERS for retirement purposes upon her retroactive reinstatement.

Respondent's Employment History with the City

11. Respondent first became a City employee in July 1991. She held various positions, including account clerk, account technician, and contract administrator, before being promoted to her current position as the Human Resources Director on October 16, 2006.

12. On September 15, 2011, the City terminated respondent. Respondent challenged the termination, and a hearing on the matter was conducted on September 8, 9, and 10, 2014, before the City's Personnel Board. The hearing resulted in the issuance of the Decision, as discussed above. The conclusion and order of the Decision were as follows:

Based on the evidence presented, Hon. Cooper finds that the City of Compton did not have sufficient cause to terminate [respondent] as Human Resources Director (footnote omitted). Therefore [respondent] shall be reinstated forthwith to the position from which she was removed and shall be paid to her the salary to which she would have been entitled and had she not been removed.
(Ex. 8, p. 23)

13. Respondent was reinstated to her position on October 20, 2014. In compliance with the Decision, the City paid her retroactive salary for the period of September 15, 2011, through October 20, 2014. Respondent's retroactive salary for that period was paid according to a salary schedule contained in the Memorandum of Agreement (MOA). The MOA is a collective bargaining agreement between the City and respondent's labor union, Compton Management Employees Association, and it is approved and adopted by the City

Council at publicly held meetings. Under this pay schedule, which is public available on the City's website, respondent was paid as a member of the Chief Executive class of city employees, as the Human Resources Director at Step Level B. Respondent's salary was paid at the same rate as other similarly situated employees, in that her salary was deducted to reflect periods of furlough and increased to reflect pay raises made available to similarly situated employees of her group.

Respondent's Inquiry to CalPERS Staff

14. In December 2014, after respondent had returned to work as the City's Human Resources Director, she was tasked with looking into the reporting of CalPERS service credit for three other terminated employees who were also reinstated to employment with the City after a Personnel Board hearing or by settlement agreement. Respondent called CalPERS to inquire about how to report compensation awarded for a wrongfully terminated employee upon retroactive reinstatement.

15. On January 30, 2015, Christopher Vega, a CalPERS Customer Service Contact Center member advised respondent "the employer would have to go back and report all the pay periods missed from 2011-2014. Once they do that, [CalPERS] will let [respondent] know what is owed for contributions, and the contributions and service credit will post to the member's account." (Ex. 10, p. 4.)

16. The City, however, did not report respondent's retroactive salary payment for the period of September 15, 2011, through October 20, 2014.

17. As discussed above, on April 15, 2015, respondent contacted CalPERS again to inquire about the reporting of the retroactive salary payment. In the May 22, 2015 letter notifying respondent that the 2011 to 2014 retroactive salary payment was not reportable to CalPERS, Michelle Balzouman, Manager of CalPERS's Compensation and Employer Review Employer Account Management Division, wrote:

The compensation in question does not meet the definition of "Compensation Earnable" as provided in Government Code (GC) § 20636.

GC § 20636 (a) defines "Compensation Earnable" in relevant part as:

"(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).”

The compensation awarded to you was not for services rendered on a full-time basis during normal working hours. As a result, it does not meet the requirements for compensation earnable.

(Ex. 4)

Testimony of Michelle Balzouman

18. At the administrative hearing, Ms. Balzouman testified regarding CalPERS’s position on this case. She reiterated that respondent’s retroactive salary payment for the period of September 15, 2011, through October 20, 2014, does not fall within the definition of “compensation earnable” as provided in section 20636 because she did not render any services during the period in question.

19. Ms. Balzouman stated, however, that CalPERS has allowed the reporting of retroactive salary payment upon a state employee’s reinstatement after a wrongful termination. In support of this policy, CalPERS has relied on section 19584, which provides that, when a wrongful termination action is revoked or modified by the State Personnel Board, the reinstated employee is entitled not only to back pay, but also to all benefits that otherwise would have normally accrued.² Nevertheless, Ms. Balzouman testified that section 19584 applies only to state employees, but not to employees of local agencies such as respondent.

20. Ms. Balzouman asserted that in order to close this “loophole,” the Legislature has passed Assembly Bill 2028 (AB 2028), which enacted section 20969.3. Pursuant to

² Section 19854 provides, in pertinent part:

Whenever the board revokes or modifies an adverse action and orders that the employee be returned to his or her position, it shall direct the payment of salary and all interest accrued thereto, and the reinstatement of all benefits that otherwise would have normally accrued. . . . Benefits shall include, but shall not be limited to, retirement, medical, dental, and seniority benefits pursuant to memoranda of understanding for that classification of employee to the employee for that period of time as the board finds the adverse action was improperly in effect.

section 20969.3, retroactive salary payments for all wrongfully terminated CalPERS members are reportable for retirement purposes.

21. Specifically, section 20969.3 subdivision (a), provides that

A member who was involuntarily terminated and who is subsequently reinstated to that employment, pursuant to an administrative, arbitral, or judicial proceeding, shall be reinstated with all retirement benefits that the member otherwise would have accrued. Administrative proceedings also include proceedings before the governing board of a school district, a charter school, a county office of education, or a community college district.

22. Section 20969.3, however, is prospective, but not retroactive, in nature. Section 20969.3, subdivision (c), provides, "This section shall apply to members who were subject to an involuntary termination effective on or after January 1, 2017." As a CalPERS staff member who was involved in the drafting of AB 2028, Ms. Balzouman testified that the prospective nature of AB 2028 was critical to its successful passage.

23. During cross-examination, Ms. Balzouman was questioned regarding additional legislative materials relating to AB 2028. In particular, Ms. Balzouman was asked to respond to the statement in the legislative history that "CalPERS has apparently applied this interpretation of statute inconsistently in the past and both approved and rejected requests to credit reinstated school employees with service credit for periods corresponding to a wrongful termination." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Assem. Bill No. 2028 (2015-2016 Reg. Sess.) as amended June 13, 2016, p. 3.) Ms. Balzouman contended that this statement is inaccurate and reflects a "politically motivated" position taken by labor unions to gain support for the bill.

24. In her testimony, Ms. Balzouman also emphasized that if retroactive salary payments were awarded as a part of settlement agreement, CalPERS would not be bound by such an agreement because it is not a party to the action. In support of this position, she cited to a CalPERS Special Compensation Circular Letter dated December 12, 2016, which stated, "compensation awarded through a settlement agreement is not reportable to CalPERS." (Ex. H, p. 1.)

Respondent's Testimony

25. At the administrative hearing, respondent testified regarding the events which led to her appeal against the CalPERS decision, as described above. Respondent also testified about the hardship that CalPERS's decision had imposed upon her. She plans to retire at age 55 or 56. Respondent's retroactive salary payment for the period of September 15, 2011, through October 20 2014, represents 3.2 years of service credits and would reduce her retirement benefits by 10 percent, amounting to approximately \$100,000. Thus, CalPERS's decision has affected her ability to be made whole after she had suffered a

wrongful termination. The City, however, has not found a solution to this problem as it is unable to pay her retirement benefits due to the constraints of the collective bargaining agreement with her labor union. Therefore, her only recourse is through CalPERS.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.)

2. Based on the above, respondent has the burden of establishing by a preponderance of the evidence that the retroactive salary payment awarded to her for wrongful termination during the period of September 15, 2011, through October 20, 2014 should be reported to CalPERS for retirement purposes upon her reinstatement. As set forth in Factual Findings 1 through 25, and Legal Conclusions 1 through 24, that burden has been met.

Section 20969.3: Its Applicability and Legislative History

3. The parties agree that section 20969.3 does not apply in respondent's case because respondent was subject to an involuntary termination prior to the statute's effective date of January 1, 2017. The question that remains is whether, under prior law, respondent's retroactive salary payment was reportable to CalPERS for retirement purposes. In this regard, a review of the legislative history of AB 2028, which enacted section 20969.3, is helpful in determining whether the legislation was intended to be declaratory of prior law.

4. According to the legislative record, the intent of the bill's author was "clarifying that a wrongfully terminated school classified or local safety employee is entitled to have restored the service credit that would have been reported had he or she not been wrongfully terminated." (Assem. Com. on Public Employees, Retirement, and Social Security, Rep. on Assem. Bill No. 2028 (2015-2016 Reg. Sess.) as amended June 13, 2016, p. 1.) While it is evident that the intent of AB 2028 was to clarify prior law, there is no explicit intent to invalidate prior law. Therefore, nothing in the legislative history of AB 2028 suggests that prior law prohibited the reporting of retroactive salary payments for wrongful termination to CalPERS for retirement purposes.

5. At the administrative hearing, there was a dispute between the parties as to what CalPERS's practice was in granting or denying service credits for periods

corresponding to a wrongful termination under the prior law. Specifically, the parties focused on this statement, which was not attributed to either the bill's sponsors or to CalPERS, in the Senate Floor Analysis: "CalPERS has apparently applied this interpretation of statute inconsistently in the past and both approved and rejected requests to credit reinstated school employees with service credit for periods corresponding to a wrongful termination." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Assem. Bill No. 2028 (2015-2016 Reg. Sess.) as amended June 13, 2016, p. 3.)

6. Ms. Balzouman, in her testimony, stated that this statement was inserted by the bill's sponsors as a "politically motivated" position. Although Ms. Balzouman was involved in the passage of AB 2028 on behalf of CalPERS, her testimony, in this respect, is given little weight. The legislative record is evidence of legislative intent, and it is entitled to significant weight in interpreting legislative intent. (See § 9080 (a); *Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 401.) However, even if CalPERS was inconsistent in its past practices, it is not dispositive of respondent's entitlement to retirement benefits during her period of wrongful termination if the statutes do not provide for it. Thus, the issue of whether respondent's retroactive salary payment was reportable to CalPERS prior to the enactment of section 20969.3 must be analyzed within the statutory framework of the PERL.

General Principles of the PERL

7. In *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478-1479, the court summarized the general principles governing the determination of a public employee's retirement allowance:

Under the PERL, the determination of what benefits and items of pay constitute 'compensation' is crucial to the computation of an employee's ultimate pension benefits. The pension is calculated to equal a certain fraction of the employee's 'final compensation' which is multiplied by a fraction based on age and length of service. [Citations.] 'Final compensation' is the 'highest average annual *compensation earnable* by a member during the three consecutive years of employment immediately preceding the effective date of his retirement' or other designated consecutive three-year period. [Citation.] Both the employer and the employee are required to make contributions to the system, based on a percentage of 'compensation.'

8. Thus, "compensation," as defined under section 20630, is reported by the employer to CalPERS, but any "compensation" reported is not to exceed "compensation earnable" as defined by section 20639. (§ 20630, subd. (b).) "Compensation earnable" is then used to calculate "final compensation." (§§ 20037, 20042.) And "final compensation," along with age and length of service, are factors upon which a member's retirement allowance is based.

9. Section 20630, subdivision (a), provides:

“[C]ompensation” means the remuneration paid out of funds controlled by an 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.

10. Section 20636, subdivision (a), provides: “‘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.”

11. Section 20636, subdivision (b)(1), defines “payrate” as follows:

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. . . .

Interpreting the Definition of “Compensation Earnable” under the PERL

12. In its February 16, 2017 reply brief, CalPERS, asserted that “it doesn’t matter” if respondent’s retroactive salary payment meets the definition of “compensation” under the PERL because what matters is if it meets the definition of “compensation earnable.” (Ex. 12, p. 2.) CalPERS is correct in this assertion, to the extent that only “compensation earnable” is used to set the amount of the pension, and “compensation earnable” is a narrow subset of “compensation.” (*Ventura County Deputy Sheriffs’ Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 493–494; *Molina v. Board of Admin., California Public Employees’ Retirement System* (2011) 200 Cal.App.4th 53, 68.)

13. CalPERS further asserts, however, that respondent’s retroactive salary payment is not “compensation earnable” for failure to meet the definition of “payrate” because she did not render any services during her period of wrongful termination. In contending that respondent must “render services” in order for her retroactive salary payment

to meet the definition of “payrate,” CalPERS interprets the definition of “payrate” as consisting of three separate prongs: (1) 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; (2) for services rendered on a full-time basis during normal working hours; and (3) pursuant to a publicly available pay schedule.

14. In other words, CalPERS’s interpretation creates an independent requirement that the individual member must be performing actual services in order for any compensation to be “compensation earnable.” This interpretation, however, does not comport with provisions under the PERL allowing payment for time during which a member is excused from work, such as holiday, sick leave, and vacation time, to be reported to CalPERS. (See § 20630.) The purpose of these provisions is “to assure that an employee, entitled to certain time off from work, was nevertheless treated as if he had worked continuously.” (*Santa Monica Police Officers Assn. v. Board of Administration* (1977) 69 Cal.App.3d 96, 99–100.)

15. The basic principles of statutory construction require that “[t]he words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.” (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) Therefore, it is necessary to construe the definition of “payrate” more liberally.

16. Another way to interpret section 20636, subdivision (b)(1), is to read the definition of “payrate” as consisting of only two prongs: (1) 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, and (2) pursuant to a publicly available pay schedule. Under this interpretation, while the individual member is not required to perform actual services during the periods of time he or she is excused from work, the individual member’s “compensation earnable” is based on payments provided by his or her employer to similarly situated employee for services performed as a group.

17. Case law supports this second interpretation of section 20636, subdivision (b)(1). Courts have held that “calculation of compensation earnable is not based on individual efforts.” (*City of Sacramento v. Public Employees Retirement System, supra*, 229 Cal.App.3d at p. 1479; *Prentice v. Board of Admin., California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 992.) Rather, it is an “earnings factor . . . based on categories of groups of employees.” (*Santa Monica Police Officers Assn. v. Board of Administration, supra*, 69 Cal.App.3d at p. 99.) Indeed, both components of “compensation earnable,” an employee’s payrate and special compensation “are measured by the amounts provided by the employer to similarly situated employees.” (*Prentice v. Board of Admin., California Public Employees’ Retirement System, supra*, 157 Cal.App.4th at p. 992.)

18. Considering the State Retirement System as a whole, this second interpretation is also more reasonable. Under the PERL, “compensation earnable” is “exactly defined to include or exclude various employment benefits and items of pay.” (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198; citing former § 20020 (currently § 20630).) The principal purpose for these rules and the strict enforcement is “[p]reventing local agencies from artificially increasing a preferred employee’s retirement benefits by providing the employee with compensation increases which are not available to other similarly situated employees.” (*Prentice v. Board of Admin., California Public Employees' Retirement System, supra*, 157 Cal.App.4th at p. 993.)

19. Thus, the aim of section 20636 is not to exclude from the calculation of retirement benefits payments to members during times that they are excused from work, but to address the mischief of “pension spiking.” Further evidence of this legislative intent can be found in the legislative record repealing an earlier version of section 20636.³ During the 1993 to 1994 legislative session, the Legislature added the current definition of “payrate” to the PERL through Senate Bill 53. The Senate Floor Analysis of that bill indicated that revisions to the definition of “compensation earnable” were meant to tackle “widespread ‘spiking’ (purposeful inflation) of the final ‘compensation’ (upon which retirement benefits are based) of local contracting agency employees. . . .” (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Senate Bill No. 53 (1993-1994 Reg. Sess.) as amended August 31, 1993, p. 2.)

Respondent’s Retroactive Salary Payments as “Compensation Earnable”

20. Applying the analysis above to respondent’s case, respondent was unable to work due to a wrongful termination, through no fault of her own. But for her employer’s wrongful actions, she would have worked and rendered services. Thus, the period of her wrongful termination is akin to a paid leave of absence during which she was excused from work. Respondent was reinstated pursuant to a judicial decision and was awarded retroactive salary payment for the period of her wrongful termination from September 15, 2011, through October 20, 2014. The retroactive salary payment awarded to respondent was the same amount provided by the City to similarly situated employees of her group: her salary was reduced for furlough periods and increased for raises made available to employees of the same class. The retroactive salary payment was also paid pursuant to a publicly available salary schedule.⁴ Based on the specific facts of respondent’s case, the retroactive payment

³ Prior to 1993, former section 20023 (currently section 20636) defined “compensation earnable” as “the average monthly compensation as determined by the board upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay.”

⁴ In order for a pay schedule to be deemed “publicly available,” it must satisfy the requirements of California Code of Regulations, title 2, section 570.5. At the administrative hearing, complainant did not contend that the City’s pay schedule for the fiscal years of 2011 to 2014 failed to meet these requirements.

awarded to her for the period of her wrong termination, from September 15, 2011, through October 20, 2014, satisfies the definition of “compensation earnable” and therefore reportable to CalPERS for retirement purposes.

21. This outcome would be consistent with legislative intent and purpose of section 20636. Although “compensation earnable” is exactly defined to prevent local agencies from artificially inflating certain employee’s final compensation, there is no such mischief at issue here. It is important, in this respect, to distinguish respondent’s case from that of a payment as a result of settlement negotiations. Settlement payments are negotiated between the employer and the employee and present opportunities for the employer to provide certain employees with increases in compensation that are not available to other similarly situated employees. Indeed, the appellate court has held that neither the member nor his employer has authority to enter into settlement agreements that bind CalPERS’s determinations as to what constitutes compensation earnable. (*Molina v. Board of Admin., California Public Employees' Retirement System, supra*, 200 Cal.App.4th at pp. 61–69.)

22. However, where retroactive salary payment is a result of a judicial decision after a due process hearing, as is the case here, there is no opportunity for the employer and employee to manipulate payments in favor of one employee over another. Under the particular facts of respondent’s case, she was awarded a retroactive salary payment pursuant to a judicial decision after a hearing with the City’s Personnel Board. The City did not spike respondent’s pension by providing compensation increases to her which are not available to other similarly situated employees. On the contrary, the City had wrongfully deprived respondent of her compensation, and a judicial decision has ordered the City to award retroactive salary payment to her so that she may be compensated in the same manner as similarly situated employees.

23. Moreover, CalPERS contended that retroactive salary payments to state members who are reinstated pursuant to a judicial decision are reportable to CalPERS for retirement purposes, but retroactive salary payments to local members are not. CalPERS cited to section 19854 to justify its disparate treatment of state members as opposed to local members. Nevertheless, it is noteworthy that section 19854 is not a part of the PERL. Rather, it is a statute under the State Civil Services Act. Section 19854 requires the State Personnel Board, when reinstating a state employee after a wrongful termination, to provide for all the benefits, including retirement benefits, which would have normally accrued. This statute does not concern the reporting of a state member’s retroactive salary payments to CalPERS upon reinstatement after a wrongful termination. Given that a member’s pension can only be determined by the provisions of the PERL, CalPERS offered no reasonable explanation as to why it has authority under the PERL to consider the retroactive salary payments of state members as “compensation earnable,” but not that of local members.

24. Finally, although the retroactive salary payments awarded to respondent for the period of her wrongful termination from September 15, 2011, through October 20, 2014, should be reported to CalPERS for retirement purposes, CalPERS is a defined pension plan which requires contributions from both respondent and her employer. Therefore,

contributions should also be made to CalPERS for that period in the amount that respondent would have contributed had her employment not been terminated.

ORDER

1. The appeal of respondent Kareemah Bradford, seeking to report retroactive salary payment for the period of her wrongful termination from September 15, 2011, through October 20, 2014, to CalPERS for retirement purposes, is granted.

2. Contributions shall be made to CalPERS by respondent for the period of September 15, 2011, through October 20, 2014, in the amount that respondent would have contributed had her employment not been terminated.

DATED: March 20, 2017

ORIGINAL SIGNED

JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings