

ATTACHMENT A

THE PROPOSED DECISION

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

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

**JANET NICHOLS and ALBANY UNIFIED SCHOOL DISTRICT,
Respondents.**

Agency Case No. 2022-0770

OAH No. 2023060401

PROPOSED DECISION

Administrative Law Judge Juliet E. Cox, State of California, Office of Administrative Hearings, heard this matter on May 30, 2024, by videoconference.

Senior Attorney Austa Wakily appeared representing complainant Brad Hanson, Interim Chief of the Employer Account Management Division, California Public Employees' Retirement System.

Attorney Robert E. Nichols appeared representing respondent Janet Nichols, who also was present throughout the hearing.

No one appeared for respondent Albany Unified School District.

The matter was submitted for decision on May 30, 2024. The hearing judge reopened the record the same day, to clarify the issue(s) in dispute and to receive evidence regarding notice to respondent Albany Unified School District. A further hearing occurred on June 25, 2024. At the conclusion of this further hearing, the matter was submitted for decision.

FACTUAL FINDINGS

1. Respondent Janet Nichols worked for many years as a classified employee for respondent Albany Unified School District. She retired for service effective September 14, 2021. Her last employment classification was as a School Secretary III.

2. Because of her employment with the District, Nichols is a school member of the California Public Employees' Retirement System (CalPERS).

3. After Nichols retired, a CalPERS staff member caused her to receive notice that CalPERS proposed to disregard \$2,500 Nichols had received from the District during her final employment year in calculating her monthly retirement allowance. Nichols appealed, requesting an administrative hearing.

4. A CalPERS staff member also caused CalPERS to direct the District to recharacterize the \$2,500 payment described above in Finding 3 (and below in Finding 10) as a payment that does not affect CalPERS's calculation of Nichols's monthly retirement allowance. The District did not appeal this directive.

CalPERS Review of Nichols's Final Compensation

5. During Nichols's employment, District staff members made regular reports to CalPERS regarding payments from the District to her. These reports characterized the District's payments in a manner permitting CalPERS to administer its retirement obligations in accordance with the Public Employees' Retirement Law (PERL) (Gov. Code, § 20000 et seq.).

6. CalPERS does not require supporting documentation from members' employers with every payroll report. Rather, CalPERS conducts periodic reviews of employers' reports regarding payments to employees who are CalPERS members, to confirm that employers have characterized payments in conformity with the PERL.

7. After Nichols retired, CalPERS staff members reviewed the District's payroll reports regarding her compensation from the District between October 2018 and September 2021. They sought supporting documentation regarding some payments.

8. A Memorandum of Understanding (MOU) between the California School Employees Association Albany Chapter 679 and the District governed the terms and conditions of Nichols's employment between July 1, 2019, and her retirement. No amendment, addition, or revision to this MOU is in evidence.

9. During the three years preceding her retirement, Nichols received hourly wages as well as longevity pay. The District's reports to CalPERS characterized these payments in a manner that corresponded to salary schedules in the MOU.

10. For the pay period ending June 30, 2021, the District reported to CalPERS that it had paid \$2,500 to Nichols in addition to her wages and longevity pay. CalPERS records show that the District reported this \$2,500 payment to CalPERS as "Off Salary Schedule Pay" (OSSP).

11. Although Nichols did not testify at the hearing, she acknowledged in correspondence with CalPERS that she had received the \$2,500 payment described in Finding 10. She described the payment as a "Covid Stipend," and stated that the District had withheld a contribution to CalPERS from this payment.

12. According to the salary schedules in the MOU, the hourly wage for employees in Nichols's classification increased effective July 1, 2020, and again effective July 1, 2021.

13. The MOU does not describe any basis for the District's \$2,500 payment to Nichols.

14. Aside from Nichols's reference in correspondence to a "Covid Stipend," Nichols offered no explanation as to why the District paid Nichols this \$2,500, whether she ever received a similar payment at any other time during her employment with the District, or whether any other employees in her classification also received similar payments in June 2021 or at any other time.

15. In the three years preceding Nichols's retirement, the \$2,500 payment described in Finding 10 was the only such payment the District reported to CalPERS for her. All other compensation the District reported to CalPERS during this period for Nichols was wages and longevity pay, as described above in Finding 9.

LEGAL CONCLUSIONS

1. The CalPERS Board of Administration “shall determine and may modify benefits for service and disability” in accordance with the PERL. (Gov. Code, § 20123.)

2. In the absence of other evidence, CalPERS may assume that the District’s reports to it are correct and complete. (Evid. Code, § 664.) The District must maintain payroll records, however, and must substantiate its reports to CalPERS upon request. (Gov. Code, §§ 20221, 20222.5.)

3. If complainant discovers an error by the District, complainant may ask the CalPERS Board of Administration to correct that error. (Gov. Code, § 20160, subd. (b).) Complainant bears the burden of demonstrating an error by the District that the Board of Administration should correct. (*Id.*, subd. (d).) Because alteration in the District’s reporting regarding Nichols could affect her final monthly retirement allowance, she may oppose complainant’s effort to revise the District’s reporting whether or not the District also opposes this effort.

4. A CalPERS member’s monthly retirement allowance depends in part on the member’s “final compensation.” (Gov. Code, § 21350 et seq.) The PERL recognizes two potential components of that compensation: “payrate” and “special compensation.” (*Id.*, §§ 20630, 20636.1.) The matters stated in Findings 8, 9, 10, and 13 do not establish either that the District characterized the \$2,500 payment described in Finding 10 as Nichols’s “payrate,” or that the District should have characterized this payment in this manner.

5. A CalPERS school member's "special compensation" is individualized for the employee, but must be "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." (Gov. Code, § 20636.1, subd. (c)(2).) In addition, "special compensation" must meet criteria the CalPERS Board of Administration has established by regulation. (Gov. Code, § 20636.1, subd. (c)(7)(C); Cal. Code Regs., tit. 2, § 571.)

6. OSSP is a type of "special compensation." (Cal. Code Regs., tit. 2, § 571, subd. (a)(1).) To qualify as OSSP, the District's \$2,500 payment to Nichols would have needed to be "in addition to base salary paid in similar lump-sum amounts to a group or class of employees. These payments are routinely negotiated through collective bargaining in lieu of increases to the salary schedule." (*Ibid.*)

7. The matters stated in Findings 8 through 13 establish that the relevant MOU did not call for the \$2,500 payment that Nichols received, but did call for a wage increase for Nichols effective July 1, 2021. On this evidence, the District erred by characterizing the June 2021 \$2,500 payment to Nichols as OSSP under California Code of Regulations, title 2, section 571, subdivision (a)(1).

8. CalPERS recognizes many other types of special compensation in addition to OSSP. (Cal. Code Regs., tit. 2, § 571, subd. (a).) To qualify for inclusion in CalPERS's calculation of a retiree's monthly retirement allowance, any such special compensation must meet additional regulatory criteria. (Cal. Code Regs., tit. 2, § 571, subd. (b).) These criteria include, in pertinent part, that a "written labor policy or agreement" must define and describe the special compensation (*id.*, subd. (b)(1)); that the special compensation must be "available to all members" in an employment classification (*id.*, subd. (b)(2)); that the special compensation must be "paid

periodically as earned” (*id.*, subd. (b)(5)); and that the special compensation must be “consistent with prior payments for the job classification” (*id.*, subd. (b)(6)).

9. The matters stated in Findings 8 through 15 establish that no written labor policy or agreement in evidence describes the \$2,500 payment in question. In addition, these matters fail to establish that similar payments were available to all School Secretary III employees; that similar payments occurred at regular intervals for Nichols or for any other School Secretary III; or that the \$2,500 payment to Nichols in June 2021 had any historical precedent. On this evidence, this payment does not qualify under California Code of Regulations, title 2, section 571, subdivision (b), as “special compensation” that should factor into CalPERS’s calculation of Nichols’s monthly retirement allowance.

10. If the June 2021 \$2,500 payment to Nichols does not qualify for inclusion in CalPERS’s calculation of Nichols’s monthly retirement allowance, CalPERS may need to adjust its calculation of that allowance, either prospectively or retrospectively. In addition, the matters stated in Finding 11 imply that CalPERS or the District may need to address contributions that CalPERS received either from Nichols or from the District because the District initially characterized this payment as OSSP. (Gov. Code, § 20164.5.) These issues, including without limitation any amounts due to or from Nichols or the District, are beyond this decision’s scope.

ORDER

The appeal by respondent Janet Nichols of CalPERS's determination that the PERL does not authorize CalPERS to factor the \$2,500 she received from the District in June 2021 into its calculation of Nichols's monthly retirement allowance is denied.

DATE: 06/26/2024



JULIET E. COX

Administrative Law Judge

Office of Administrative Hearings