

**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:**

**SHAIRON A. ZINGSHEIM, Respondent**

**and**

**OHLONE COMMUNITY COLLEGE DISTRICT, Respondent  
(Employer)**

**Agency Case No. 2023-0709**

**OAH No. 2024040226**

**PROPOSED DECISION**

Alan R. Alvord, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 14, 2024, by videoconference.

Austa M. Wakily, Senior Attorney, represented complainant Brad Hanson, Interim Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS).

Shairon Zingsheim, respondent, represented herself.

John Z. LaCrosse, Esq., Liberty Cassidy Whitmore, represented respondent Ohlone Community College District (district).

Oral and documentary evidence was received. The record was held open for the parties to submit closing briefs. CalPERS and respondent district submitted post-hearing closing arguments. Respondent Ms. Zingsheim did not submit any written closing argument. On October 18, 2024, the record was closed, and the matter was submitted for decision.

## **ISSUE**

May CalPERS use the payrates and longevity pay that the district reported on Ms. Zingsheim's behalf from July 1, 2021, through June 30, 2022, to calculate Ms. Zingsheim's final compensation to determine her monthly retirement allowance? In the alternative, is CalPERS required to use the payrates and longevity pay listed for Salary Range 237 in the district's unrepresented salary schedule?

## **SUMMARY**

After it initially calculated Ms. Zingsheim's retirement allowance based on her employer's reported salary, CalPERS performed a review, and concluded that it was required to reduce her payrate because the payrate her employer reported did not comply with the Public Employees' Retirement Law. Ms. Zingsheim and her employer appealed the CalPERS decision. The evidence showed that CalPERS correctly reduced Ms. Zingsheim's payrate.

## **Jurisdictional Matters**

1. Respondent Ms. Zingsheim became a CalPERS member on July 19, 1999, through her employment with the City of Morgan Hill. On September 29, 2009, Ms. Zingsheim began employment with the district, a public agency that contracts with CalPERS to administer its retirement programs. After more than 12 years of service to the district, on March 4, 2022, she applied for service retirement with a requested retirement date of July 1, 2022.

2. On August 5, 2022, CalPERS sent Ms. Zingsheim a letter confirming her benefit option and stating that her monthly retirement benefit is \$12,758.78 based on her retirement date of July 1, 2022, and the payroll her employer reported through June 30, 2022. The letter stated, "Your benefit will be adjusted if additional information is reported by your employer." The letter also provided that a retroactive benefit payment would be issued on August 16, 2022, to cover the period July 1, 2022, through July 31, 2022, her first regular benefit payment will be issued on or shortly after September 1, 2022, to cover the period August 1, 2022, through August 31, 2022, and future benefit payments will be direct deposited on or shortly after the first of each month.

3. On April 5, 2023, CalPERS sent Ms. Zingsheim a letter stating its retirement allowance final determination.

4. Ms. Zingsheim's final compensation period is the last 12 months of her employment with the district from July 1, 2021, through June 30, 2022. CalPERS performed a compliance review for Ms. Zingsheim's compensation. On November 28, 2022, CalPERS sent a letter to Ms. Zingsheim informing her that it determined some of the compensation her employer reported did not comply with the Public Employees

Retirement Law. As a result, CalPERS adjusted her payrate from the reported \$22,022.92 to \$20,974.17, and adjusted longevity pay from the reported \$550.57 to \$524.35. That adjustment decreased her final compensation from \$22,573.49 to \$21,498.52 and decreased her monthly retirement benefit by \$612.23. CalPERS also informed her she had been overpaid by \$3,061.15.

5. On April 5, 2024, complainant signed the Statement of Issues, which was served on respondents, along with all required jurisdictional documents. Respondents Ms. Zingsheim and Ohlone Community College District filed timely notices of defense. This hearing followed.

### **Ms. Zingsheim's Employment History with the District**

6. Ms. Zingsheim previously worked at the City of Morgan, Monterey County, and Gavilan Community College District. She began with the district in 2009 as Associate Vice President of Human Resources. She was promoted to Vice President of Human Resources and Training (VPHRT) in 2018.

7. The VPHRT is an executive level position under the direction of the Superintendent/President and is responsible for operations of the district's Human Resources Department. Duties include staffing, employee relations, union relations, directing the professional development program, and employee benefits for the district.

### **July 2019 Administrator Employment Agreement**

8. On July 1, 2019, the governing board of the district and Ms. Zingsheim entered into an Administrator Employment Agreement (2019 Employment Agreement). The 2019 Employment Agreement stated her position as VPHRT for a

two-year term beginning July 1, 2019, through June 30, 2021, at salary range 237, step F. The monthly salary was \$19,764.17, plus longevity pay.

9. The 2019 Employment Agreement included an optional retirement matching contribution provision in which the district would match up to \$433.54 per month in a deferred compensation plan if she chose to participate. She elected to participate in this deferred compensation plan.

10. The district's "Administrators: Academic and Classified Management, Supervisorial and Confidential" document effective July 1, 2020, listed the salary ranges, but no salaries, for various administrative positions. There were four positions listed with salary range 237: Vice President HR and Training (Ms. Zingsheim's position); Vice President Student Services; Vice President Administration; and Vice President/Academic Affairs Deputy Superintendent.

### **COVID-19 Duties Added to VPHRT Position**

11. When the COVID-19 pandemic began in March 2020, the district's Superintendent assigned Ms. Zingsheim responsibility for the district's COVID-19 recovery program. This included ensuring employees were properly sheltering in place at home, were brought back to campus safely, virus contact tracing, vaccine tracking, preparing classrooms for students to safely return to school and employees to return to work providing safe in-person services, and working with unions concerning workplace safety. Ms. Zingsheim testified that the global pandemic required her to perform duties that were never performed before or expected to be performed. She testified that she believes she was the most senior executive with experience handling large-scale projects, she had access to employee records, and it was most appropriate for her to take on the role of COVID-19 recovery program oversight.

12. A "VP HR COVID-19 Duties" statement was prepared in early 2021 to capture the role as the district was beginning to hire temporary employees to execute the COVID-19 program. Ms. Zingsheim testified that she spent "a tremendous amount of hours," over 70 percent of her time initially, working on the COVID-19 project. The work tapered off to 50 percent in 2022. The COVID-19 recovery program duties were incorporated into Ms. Zingsheim's regular duties as VPHRT. She did not consider them to be overtime duties.

### **July 2021 Administrator Employment Agreement**

13. On June 1, 2021, Ms. Zingsheim and the district's Superintendent/President signed a new employment agreement, to be effective July 1, 2021, for one year through June 30, 2022 (2021 Employment Agreement).

14. The 2021 Employment Agreement stated Ms. Zingsheim's position as Vice President, Human Resources and Training (VPHRT) Covid 19 Recovery Project Director.

15. The 2021 Employment Agreement raised Ms. Zingsheim's salary from Range 237 to Range 238, step F, with a corresponding raise in longevity pay.

16. The district's "Administrators: Academic and Classified Management, Supervisorial and Confidential" document effective July 1, 2021, listed only Ms. Zingsheim's VPHRT position at salary range 238. The other vice president level administrator positions that previously shared range 237 with Ms. Zingsheim's position, the Vice President Student Services, Vice President Administrative and Information Technology, and the Vice President/Academic Affairs/Deputy Superintendent positions were not increased to range 238; they remained at range 237.

17. On June 10, 2021, 10 days after the parties signed the 2021 Employment Agreement, the district processed a Personnel Action Form. The "reason for revision" section of the form stated, "discontinue \$10,000 paid to deferred comp and include in salary effective July 1, 2021." In a "comments" section of the form was written:

Employee receives \$833.33 per month paid directly into Deferred Compensation by the district. This action discontinues that monthly contribution to deferred compensation and instead places employee on Range 238/F on the management schedule effective July 1, 2021. Employee's new employment contract is effective July 1, 2021-June 30, 2022. Employee is Vice President of Human Resources with the additional responsibilities for overseeing the District's COVID-19 recovery. Employee will continue in both roles until June 30, 2022.

18. Ms. Zingsheim testified that she did not ask for a salary increase before the 2021 Employment Agreement was signed. She believes the district Superintendent wanted to recognize her additional work on the COVID-19 recovery program. She testified that at the time of the salary increase, she had not informed the district that she planned to retire.

### **Ms. Zingsheim's Decision to Retire**

19. In the summer of 2021, Ms. Zingsheim made the decision to retire. She had several reasons for the decision, including her husband's health and the additional stress that the COVID-19 duties caused her.

20. Ms. Zingsheim testified she notified the district informally of her retirement plans in September 2021. A document was prepared for the October 2021 district board meeting that listed personnel actions. Ms. Zingsheim's retirement plans were listed on this document; she testified that the document was her formal notice to the board of her retirement plans.

### **Ms. Zingsheim's Replacement at the District**

21. After Ms. Zingsheim retired, the district hired Vy Le as the new VPHRT. Ms. Le had previously worked for the district as executive assistant to the VPHRT, a human resources specialist, a human resources senior analyst, human resources supervisor, and human resources director. Ms. Le's duties as VPHRT included the COVID-19 recovery program responsibilities.

22. Ms. Le's salary level when hired was set at range 237. She testified at the hearing that she believed her lower salary was appropriate because Ms. Zingsheim, her predecessor, had more experience.

### **CalPERS's Basis for Reducing Ms. Zingsheim's Payrate**

23. CalPERS asserted that the payrate increase Ms. Zingsheim received in her final year does not comply with the Public Employees Retirement Law because it was not based on a publicly available pay schedule, was not available to other members of the same group or class of employees, was to compensate her for additional responsibilities related to COVID-19 response classified as overtime, and constituted "final settlement pay."

24. Jennifer Sandness, a manager in the CalPERS compensation compliance review unit, testified that the raise Ms. Zingsheim received in her final year was not

given to any of the similarly situated vice president level employees. The person who filled the position behind Ms. Zingsheim received a lower salary at range 237. In addition, CalPERS was unable to find any publicly available pay schedule for the VPHRT position that complied with the CalPERS regulation, California Code of Regulations, title 2, section 570.5. Ms. Sandness testified that, because there was no publicly available pay schedule, CalPERS used its discretion to determine the amount considered to be payrate, taking into consideration all relevant information including the factors set forth in section 570.5, subdivision (b). Based on these factors, CalPERS applied salary range 237 for Ms. Zingsheim's payrate.

## **Respondents' Arguments**

25. Respondents argued that Ms. Zingsheim's COVID-19 recovery program responsibilities were not overtime, that her salary increase in the final year was not final settlement pay, that CalPERS never asserted the pay schedules were not in compliance until the hearing, and that the retirement law must be liberally construed in Ms. Zingsheim's favor.

26. Respondents did not present any evidence or argument that the overpayment CalPERS claimed was incorrect.

## **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 district, 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. Respondents bear the burden of proof to establish by a preponderance of evidence that the CalPERS determination was erroneous. (Evid. Code §§ 110, 115.)

7. 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.

8. 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).)

9. 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." (*Id.* at 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." (*Id.* at subd. (c)(1); *Molina v. Board of Admin., California Public Employees' Retirement System* (2011) 200 Cal.App.4th 53, 65-66.)

10. 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.)

11. 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.

12. 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 identified position, which may be stated as a single amount or as multiple amounts within a range; (4) indicates the time base; (5) is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's website; (6) indicates an effective date and date of any revisions; (7) is retained by the employer and available for public inspection for not less than five years; and (8) does not reference another document in lieu of disclosing the payrate. (Cal. Code Regs., tit. 2, § 570.5, subd. (a).)

13. 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).)

### **Ms. Zingsheim's Payrate Was Not Listed on a Publicly Available Pay Schedule**

14. 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.

*(Ibid.)*

15. 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 pp. 756-757.)

16. The evidence in this case established that the district's documents listing the payrate for Ms. Zingsheim's position did not meet the statutory requirements for a publicly available pay schedule. The "Administrators: Academic and Classified Management, Supervisorial and Confidential" document (Exhibit 9), stated salary ranges only. It did not state the payrate or time base. The "Unrepresented Management Salary Schedule" (Exhibit 10) showed the salary ranges and salary amounts for each range and step, but no time base or positions associated with each range. To find the payrate for the VPHRT position, one must look at both documents. This violates the requirement in Code of Regulations, title 2, section 570.5, subdivision (a)(9) that the document not require reference to another document in lieu of disclosing the payrate. In addition, the district's witness, Ms. Le, testified that neither document was expressly approved by the governing board.

### **CalPERS Correctly Concluded Ms. Zingsheim's Additional COVID-19 Response Duties Constituted Overtime**

17. Government Code section 20635.1 excludes overtime from compensation earnable for purposes of calculating a retirement allowance. That section defines overtime for school members as "the aggregate service performed by an employee as a member for all school employers and in all categories of employment in excess of 40 hours of work per week, and for which monetary compensation is paid."

18. Ms. Zingsheim testified that the additional COVID-19 duties required her to work additional hours. The Personnel Action Form dated June 10, 2021, (Exhibit 23) states that the increase in Ms. Zingsheim's salary from range 237 to 238 was, in part, related to the "additional responsibilities" for the COVID-19 recovery program. The

evidence established that Ms. Zingsheim's additional COVID-19 responsibilities were overtime and therefore must be excluded from calculation of her retirement allowance.

19. Exhibit 23 also shows that the district justified raising respondent's salary range to compensate for the deferred compensation election and adding it to her salary. The deferred compensation amount was not reportable as salary to be considered for calculating her retirement benefit. Removing the deferred compensation and adding it to her salary had the effect of improperly converting non-reportable compensation to reportable for the purpose of including it in her retirement calculation.

### **CalPERS Correctly Concluded Ms. Zingsheim's Payrate Increase Constituted Final Settlement Pay**

20. California Code of Regulations, title 2, section 570 states that final settlement pay must be excluded from payroll reporting to CalPERS in either payrate or compensation earnable. Final settlement pay is defined as pay or cash conversions of employee benefits in excess of compensation earnable, granted or awarded to a member in connection with or in anticipation of a separation from employment.

21. Ms. Zingsheim testified that she informed the district of her retirement plans in September 2021. She also testified that she made the decision to retire in the summer of 2021, which coincided with the July 2021 Employment Agreement. Other evidence supported CalPERS's conclusion that the district's decision to increase her salary range to 238 was in anticipation of her retirement. She was previously on a two-year contract cycle. The July 2021 Employment Agreement changed to a one-year term to end June 30, 2022, which coincided with her retirement date. The fact that Ms. Zingsheim's replacement, Ms. Le, was hired at range 237 also supports the conclusion

that the district's decision to increase Ms. Zingsheim to range 238 was a final-year spike of her salary.

22. The issue in this case was not whether Ms. Zingsheim deserved the raise she received in her last year of work for the district. All the evidence showed that she was a highly valued employee and a gifted leader who helped the district through the very difficult COVID-19 pandemic and recovery. The district properly wanted to reward her for her expertise and hard work. However, CalPERS must apply the laws and regulations in calculating a member's final compensation and benefit amount. The evidence in this case showed that CalPERS correctly calculated Ms. Zingsheim's final compensation.

### **CalPERS Correctly Used Salary Range 237 for Respondent's Payrate**

23. Since the payrate range 238 that the district reported to CalPERS for Ms. Zingsheim was not based on a publicly available pay schedule, included overtime, and constituted final settlement pay, CalPERS was required to use its discretion to determine an amount to be considered payrate. (Cal. Code Regs., tit. 2, § 570, subd. (b).) Salary range 237 was the previous payrate that Ms. Zingsheim received, was the same salary range given to other employees in the vice president class, and was the salary range for Ms. Zingsheim's replacement, Ms. Le. CalPERS's conclusion to use salary range 237 complied with its discretionary requirements under section 570.

## **ORDER**

CalPERS's calculation for payrate, compensation earnable, and monthly retirement allowance for respondent Shairon A. Zingsheim, was correct. In addition,

CalPERS correctly calculated that it had overpaid Ms. Zingsheim \$3,061.15. Ms. Zingsheim is required to repay this amount to CalPERS.

DATE: November 15, 2024

*Alan R. Alvord*

ALAN R. ALVORD

Administrative Law Judge

Office of Administrative Hearings