

ATTACHMENT A

THE PROPOSED DECISION

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

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

JANINE J. TARKOW,

Respondent

Case No. 2020-1464

OAH No. 2021030855

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter virtually using the Microsoft Teams application on August 10, 2021.

John Shipley, Senior Staff Attorney, California Employees' Retirement System (CalPERS) represented the complainant, Renee Ostrander, Chief, Employer Account Management Division, CalPERS.

Eliot Grossman, Attorney at Law, represented respondent, Janine J. Tarkow, who was present and participated in the proceedings.

The record closed for purposes of submitting evidence on August 10, 2021, but held open until October 4, 2021, for the parties to submit closing briefs. On September 21, 2021, complainant filed a request for official notice of three additional exhibits, which were labor agreements (memorandums of understanding) for bargaining units that did not pertain to respondent or any University of California class of employees. Respondent objected to complainant's request and to the admission of any additional exhibits. Given that the record was held open solely for the purpose of closing briefs and not the submission of additional evidence; the exhibits could have been submitted at the hearing but were not; and the labor agreements did not pertain to respondent or any University of California employee; the exhibits were deemed both irrelevant and untimely and were rejected.

The matter was submitted for decision on October 4, 2021, following receipt of closing briefs.

ISSUE

Whether an administrative stipend labeled "special assignment-project pay,"¹ received by respondent from February 1, 2018, to June 29, 2020, during her employment at the University of California, San Diego (UCSD), should be included in the calculation of respondent's "final compensation" used to determine her monthly service retirement benefit?

¹ Hereafter, "administrative stipend" and "special assignment-project pay" are used interchangeably.

SUMMARY

The administrative stipend labeled "special assignment-project pay," received by respondent from February 1, 2018, to June 29, 2020, during her employment at UCSD may not be included in the calculation of respondent's "final compensation" used to determine her monthly service retirement benefit. The administrative stipend did not meet any of the exclusive criteria set forth in California Code of Regulations, title 2, section 571, subdivision (a), which defines what constitutes special compensation, and was not contained in a written labor policy or agreement, which is required under that subdivision. For the same reason, the administrative stipend also did not meet all the criteria in California Code of Regulations, title 2, section 571, subdivision (b), which is required to be considered special compensation. Specifically, the administrative stipend was not contained in a written labor policy or agreement (as defined at Government Code section 20049) that was duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws. Because it failed on that issue, it was unnecessary to consider the other criteria in California Code of Regulations, title 2, section 571, subdivision (b). CalPERS properly calculated respondent's final compensation and respondent's appeal is denied.

FACTUAL FINDINGS

Background and Jurisdiction

1. Respondent established membership with CalPERS through employment with the San Diego County Office of Education-Grossmont-Cuyamaca Community College District (District) on October 1, 1989. By virtue of this employment, respondent

became a local miscellaneous member of CalPERS. Respondent permanently separated from her employment with the District on or around September 16, 2000.

2. On September 8, 2000, respondent established membership with the University of California Retirement System (UCRS) by virtue of her employment with UCSD.

3. CalPERS and UCRS are reciprocal retirement systems. Reciprocity is an agreement among public retirement systems to allow members to move from one public employer to another public employer within a specific amount of time without losing valuable retirement and related benefit rights. Respondent has reciprocity rights for concurrent retirement with CalPERS and UCRS.

4. On April 21, 2020, respondent submitted an application for service retirement with CalPERS, with an effective retirement date of July 1, 2020. Respondent retired for service effective July 1, 2020, and has been receiving her service retirement allowance since or around November 1, 2020.

5. At the time of her separation from UCSD, respondent's job title was Organizational Consultant IV.

6. 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's staff may review the salary reported by the employer for the member to ensure that only those items allowed under the Public Employees' Retirement Law (PERL) will be included in the member's "final compensation" for purposes of calculating the monthly retirement allowance.

7. As part of the retirement process, respondent's employer submitted reports of her compensation to CalPERS, and CalPERS reviewed the documentation submitted to determine respondent's final compensation amount that would be used to calculate her monthly service retirement benefit.

8. As part of its submissions, respondent's employer submitted documents showing respondent received monthly administrative stipends labeled as "Special Assignment-Project Pay" from February 1, 2018, to June 29, 2020. Respondent's employer reported the administrative stipends as "compensation earnable" that should be considered in calculating respondent's final compensation.

9. Documents submitted to CalPERS and admitted as evidence entitled, "Administrative Stipend Approval Form (stipend form)," set forth the various administrative stipend amounts respondent received from February 1, 2018, to June 29, 2020. Each stipend form is one page. The stipend forms included respondent's name and her payroll title, Organizational Consultant IV. It included her monthly base pay (which changed over time) as well as the amount of the stipend paid during each applicable pay period. A box was checked on each stipend form indicating that respondent acquired "significant job duties" as part of a "temporary assignment" for the UC Path project. It did not include a change in respondent's payroll title or indicate that she was working in an upgraded position or classification from Organizational Consultant IV. The following is a detailed description of the information contained on each stipend form and other documents pertaining to respondent's administrative stipend:

- Stipend Form for February 1, 2018, to July 31, 2018: an administrative stipend in the amount of \$1,531.28 per month, or 18 percent of

- respondent's base salary; the form was signed only by respondent's immediate supervisor and "Cheryl A. Ross" as the "Approval Authority."
- Stipend Form for August 1, 2018, to January 31, 2019: an administrative stipend in the amount of \$1,531.28 per month, or 18 percent of respondent's base salary; the form submitted was signed only by respondent's supervisor and there was no signature under the "Approval Authority."
 - A document submitted by the UCSD Business and Financial Services Office dated April 12, 2021, clarified the above two stipend forms as follows: due to a merit salary adjustment that occurred in July 2018, the amounts listed as an administrative stipend from July 1, 2018, to January 31, 2019, were adjusted to \$1,584.87.
 - Stipend Form for February 1, 2019, to January 31, 2020: an administrative stipend in the amount of \$1,584.87 per month, or 18 percent of respondent's base salary; the form submitted was signed by respondent's supervisors (Pearl Trinidad and "Nancy") and by "Cheryl A. Ross" as the "Approval Authority."
 - Stipend Form for February 1, 2020, to June 30, 2020: an administrative stipend in the amount of \$751.10 per month, or 7.5 percent of respondent's base salary; the form submitted was signed by respondent's supervisor (signature could not be read), by a human resources "reviewer," and "Cheryl A. Ross" as the "Approval Authority."

10. CalPERS sent a letter to respondent dated September 30, 2020, indicating that it had identified the above-referenced administrative stipends as compensation

that did not comply with the PERL. Specifically, it informed respondent that the administrative stipend, labeled as "Special Assignment – Project Pay" was not listed in California Code of Regulations, title 2, section 571, subdivision (a), which sets forth the exclusive list of pay that may be considered "special compensation" and therefore "compensation earnable" when determining a member's "final compensation."

11. On October 10, 2020, respondent appealed that determination contending that she believed her administrative stipends were "compensation earnable."

12. On March 24, 2021, complainant filed a Statement of Issues regarding respondent's administrative stipend paid from February 1, 2018, to June 29, 2020. The issue to be resolved is whether the various administrative stipends paid to respondent during that time frame as "Special Assignment – Project Pay" constitutes "special compensation" in accordance with the PERL and applicable regulations.

13. It is noted that a stipend form for August 1, 2017, to January 31, 2018, in the amount of \$850.71 per month, or 10 percent of respondent's base salary, was submitted as evidence by respondent. The form was not signed by a supervisor or an approval authority and was not mentioned in the Statement of Issues. A statement by the employer included with the document represented that the form was stored "on-site" and due to COVID-19 "stay at home" restrictions, the signed copy could not be provided. In that respect, it appeared that if, and when, the form was provided to CalPERS it was provided without signature. It is noted, however, that as of the date of the hearing there were no stay-at-home orders in effect and a signed copy still was not provided. It is also noted that at hearing, respondent did not make any contention that this administrative stipend form, which was during a time period outside of the time period specified in the Statement of Issues, should have been included (or that

the time period specified in the Statement of Issues was otherwise erroneous). Nonetheless, for the reasons discussed in Legal Conclusions in this decision, whether this administrative stipend form, or the additional compensation respondent received from August 1, 2017, to January 31, 2018, should have been deemed "special compensation" is moot because none of the administrative stipends constituted special compensation for the reasons discussed in Legal Conclusions.

Evidence Presented by CalPERS

14. Jose Martin is an Associate Governmental Program Analyst for CalPERS. Mr. Martin's testimony is summarized as follows: His duties include reviewing compensation reported by public employers to verify that any reported compensation is in compliance with the PERL. He is familiar with the PERL, which includes provisions concerning reciprocal retirement systems, like UCERS. He is also familiar with the law pertaining to how to calculate "compensation earnable," which would include "special compensation." When reviewing the pay reported by respondent's employer, he determined that her administrative stipends, paid as "Special Assignment – Project Pay" was not "special compensation" because it was not listed in California Code of Regulations, title 2, section 571, subdivision (a), which specifies the only things that may be considered "special compensation." There is nothing in that regulation that provides a special project may be considered "special compensation."

Regarding respondent's contention that her administrative stipend constituted "premium pay" because her special project was a temporary upgrade or classification, Mr. Martin disagreed. He noted that special compensation under the category of premium pay for a temporary assignment is where the member is working in a higher classification, in essence, a higher job than their normal pay for a certain duration of time - not just taking on additional duties.

Even assuming respondent's pay did meet one of the categories in California Code of Regulations, title 2, section 571, subdivision (a), Mr. Martin believed it did not satisfy the criteria of California Code of Regulations, title 2, section 571, subdivision (b), because neither "administrative stipend" or "Special Assignment – Project Pay" were contained in a labor agreement, there was no evidence that this type of pay was available to the entire group or class to which respondent belonged, and the duties of the position did not appear to be a part of her normal duties.

When pressed during vigorous cross-examination whether the language in Government Code section 20049, which states that a "labor policy or agreement" is any "written policy, agreement, memorandum of understanding . . . or any other document," meant that respondent's administrative stipend forms could meet the criteria, Mr. Martin held firm on his position and stated that it did not. Mr. Martin explained that a labor agreement is a document like a memorandum of understanding. He also pointed out that just because something is documented in a labor agreement also does not necessarily mean it complies with all the provisions contained in California Code of Regulations, title, 2, section 571, subdivision (b), so it still may not be "special compensation." Finally, when asked why the testimony of respondent's employer or her agency's decisionmaker would not be sufficient to show a payroll item is "special compensation," Mr. Martin reiterated again that whatever the item of special compensation is, it must be listed in the regulation as well as specified in a labor agreement.

Mr. Martin's testimony was consistent, credible, and he demonstrated a thorough knowledge of how to determine whether a payroll item constitutes "special compensation."

Evidence Presented by Respondent

15. Pearl Trinidad is the Executive Director of Business and Financial Services at UCSD. Her testimony is summarized as follows: Ms. Trinidad's duties include organizational optimization, leading initiatives and strategic projects to improve functions of UCSD, overseeing payroll, business analytics, finance and budget, and staff optimization. She has also held other positions at UCSD, including payroll director, which included oversight of payroll distribution as well as overseeing the provision of salary and benefits for employees. Ms. Trinidad supervised respondent during the last three years respondent was employed at UCSD.

Ms. Trinidad explained that the "special project" respondent was assigned to during the time she received the administrative stipend was the UC Path project. Prior to taking on the extra duties in the UC Path project, where she received the "working title" of Director of Workforce Optimization, respondent's "working title" was "Director of STRIVE." Respondent's official payroll/classification, however, did not change during the time she worked on the UC Path project. She was classified as an Organizational Consultant IV.

Ms. Trinidad contended that respondent's duties under the UC Path project were much broader than her regular job. As the Director of STRIVE, respondent was responsible for all training programs for Business and Financial Services, career exploration, process improvement, training others, and supervising a small group of one or two employees. These duties were all completed within the Business and Financial Services office.

When respondent starting work as the Director of Workforce Optimization for the UC Path project, a project designed to place all employees at the University of

California's 10-campus under one payroll system, her duties included, among other things, organizational management of UC Path project, developing a training curriculum, providing training, developing a "hypercare" plan (assembling a quick response team that would respond to issues once the new payroll program went live), and communicating with relevant individuals outside her department and UCSD.

The duties respondent had under UC Path project did fall within the regular scope of her duties as an Organizational Consultant IV, but she was not required in her regular position as Director of STRIVE, to do the level of work she did while working on the UC Path project. Although many of the skills were the same, in the UC Path project, she had to use them on a broader level. There was also special knowledge, skills and abilities respondent needed to have while working on the UC Path project, specifically, skills that fall under the acronym ADKAR – awareness, desire, knowledge, ability, and reinforcement. This is a special certification that not all individuals have and for the UC Path project, it was required. Respondent performed the work on the UC Path project during her normal working hours.

Ms. Trinidad said the position for the UC Path project "would have been approved" by UCSD administration and the UC Regents. Ms. Trinidad also said that she was the one who recommended respondent receive a stipend to work on the initiative, but she did consider others "in management." Ms. Trinidad contended that an "administrative stipend" is considered "compensation" for those who work in the UC system to "count towards retirement." She indicated that "policy" provides for how a stipend must be recommended and calculated. When asked, however, if there is "anything in writing" that discusses that policy, she stated, "I don't have that."

Written Labor Policies or Agreements

16. No labor agreement, labor policy, or any other document used by UCSD to specify the payrate, special compensation, and benefits of represented and unrepresented employees was submitted as evidence.

17. Although respondent submitted administrative stipend forms, as detailed above in paragraph 9, there was no evidence these single-paged forms constituted labor agreements that were duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws.

18. No documentary evidence was submitted to support Ms. Trinidad's contention that the UC Path project position "would have been approved" by UCSD administration and the UC Regents.

19. No documentary evidence was submitted to support Ms. Trinidad's contention that the administrative stipend respondent received "is considered compensation" for those who work in the UC system to "count towards retirement." While she indicated policy provides how a stipend is calculated, no policy was provided.

20. Respondent did not testify.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or

defense that he is asserting.” (Evid. Code, § 500.) The standard of proof is proof by a preponderance of the evidence. (Evid. Code, § 115.) Accordingly, in this case, respondent has the burden to prove by a preponderance of the evidence that the administrative stipend she received that was labeled as “special assignment-project pay” should be included in the calculation of her final compensation used to determine respondent’s monthly service retirement benefit.

Applicable Law

2. The PERL is contained at Government Code section 20000 et seq.

3. Government Code section 20350, regarding concurrent retirement, provides:

Notwithstanding Section 20638, if a member on deferred retirement from this system is eligible to retire for service from a reciprocal retirement system and does so retire prior to the time the member becomes entitled to retire under this system, his or her retirement shall be deemed a concurrent retirement for purposes of computing final compensation under Section 20638.

4. Government Code section 20351, regarding county retirement systems, provides:

The provisions of this part extending rights to a member of this system, or subjecting him or her to any limitation by reason of his or her membership in a county retirement system, apply in like manner and under like conditions to a

member of this system by reason of his or her membership in any retirement system established under Chapter 2 (commencing with Section 45300) of Division 5 of Title 4 with respect to which an ordinance complying with Section 45310.5 has been filed with and accepted by the board or by reason of his or her membership in a retirement system established by or pursuant to the charter of a city or city and county or by any other public agency of this state and that system, in the opinion of the board, provides a similar modification of rights and benefits because of membership in this system and with respect to which the governing body of the city, city and county or public agency and the board have entered into agreement pursuant to this section. An agreement under this section shall provide that the governing body shall modify its retirement system to conform to any amendments to this part affecting a member's right because of membership in a county retirement system, and may contain other provisions consistent with this section as the board deems appropriate. This section applies only to a member whose termination and entry into employment resulting in a change in membership from this system to the other system or from the other system to this system occurred after the acceptance by the board or after the effective date specified in the agreement. However, provisions relating to computation of final compensation apply to any other

member if the provision would have applied had the termination and entry into employment occurred after the acceptance or determination by the board.

5. Government Code section 20370 defines who is a member within the meaning of the PERL.

6. Government Code section 20630 provides:

(a) As used in this part, "compensation" means the 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.

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636, or in accordance with Section 20636.1 for school members, and shall not exceed compensation earnable, as defined in Sections 20636 and 20636.1, respectively.

7. Government Code section 20635 provides:

When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service. For the purposes of this part, overtime is the aggregate service performed by an employee as a member for all employers and in all categories of employment in excess of the hours of work considered normal for employees on a full-time basis, and for which monetary compensation is paid.

If a member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full time, the position with the highest payrate or base pay shall be reported to this

system. This provision shall apply only to service rendered on or after July 1, 1994.

8. Government Code section 20636 provides:

(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).

(2) "Payrate" shall include an amount deducted from a member's salary for any of the following:

(A) Participation in a deferred compensation plan.

(B) Payment for participation in a retirement plan that meets the requirements of Section 401(k) of Title 26 of the United States Code.

(C) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of Title 26 of the United States Code.

(D) Participation in a flexible benefits program.

(3) The computation for a leave without pay of a member shall be based on the compensation earnable by the member at the beginning of the absence.

(4) The computation for time before entering state service shall be based on the compensation earnable by the member in the position first held by the member in state service.

(c)(1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

(2) **Special compensation shall be 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. If an individual is

not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e).

(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall do all of the following:

(A) Identify the pay period in which the special compensation was earned.

(B) Identify each item of special compensation and the category under which that item is listed, as described in regulations promulgated by the board pursuant to paragraph (6), for example, the item of Uniform Allowance would be reported under the category of Statutory Items.

(C) Report each item of special compensation separately from payrate.

(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

(5) The monetary value of a service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 and following of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

(7) Special compensation does not include any of the following:

(A) Final settlement pay.

(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

(C) Other payments the board has not affirmatively determined to be special compensation.

(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.

(e)(1) As used in this part, "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. A single employee is not a group or class.

(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

(f) As used in this part, "final settlement pay" means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a

member in connection with, or in anticipation of, a separation from employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay. . . . [Emphasis Added].

9. Government Code section 20636.1, provides:

(a) Notwithstanding Section 20636, and Section 45102 of the Education Code, "compensation earnable" by a school member means the payrate and special compensation of the member, as defined by subdivisions (b) and (c), 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. For purposes of this part, for classified members, full-time employment is 40 hours per week, and payments for services rendered, not to exceed 40 hours per week, shall be reported as compensation earnable for all months of the year in which work is performed. "Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e). . . .

10. Government Code section 20638 provides that the highest annual average compensation during any consecutive 12- or 36-month period of employment as a member of a county retirement system shall be considered compensation earnable by a member of CalPERS for purposes of computing final compensation.

11. California Code of Regulations, title 2, section 571, provides, in part:

(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS **if they are contained in a written labor policy or agreement:**

(1) INCENTIVE PAY

[¶] . . . [¶]

(2) EDUCATIONAL PAY

[¶] . . . [¶]

3) PREMIUM PAY

Temporary Upgrade Pay - Compensation to employees who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration.

(4) SPECIAL ASSIGNMENT PAY

[¶] . . . [¶]

(5) STATUTORY ITEMS

[¶] . . . [¶]

(b) The Board has determined that all items of special compensation listed in subsection (a) are:

(1) Contained **in a written labor policy or agreement** as defined at Government Code section 20049, provided that the document:

(A) **Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;**

(B) Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;

(C) 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 internet website;

(D) Indicates an effective date and date of any revisions;

(E) Is retained by the employer and available for public inspection for not less than five years; and

(F) Does not reference another document in lieu of disclosing the item of special compensation.

- (2) Available to all members in the group or class;
 - (3) Part of normally required duties;
 - (4) Performed during normal hours of employment;
 - (5) Paid periodically as earned;
 - (6) Historically consistent with prior payments for the job classification;
 - (7) Not paid exclusively in the final compensation period;
 - (8) Not final settlement pay; and
 - (9) Not creating an unfunded liability over and above PERS' actuarial assumptions.
- (c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).
- (d) If an item of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual. [Emphasis Added].**

Evaluation

12. 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.)

13. Respondent did not establish by a preponderance of the evidence that, under applicable law, the administrative stipend she received from February 1, 2018, to June 29, 2020, during her employment at UCSD, constitutes "special compensation" that should be included in the calculation of her final compensation for determining her monthly service retirement benefit.

14. In *DiCarlo v. County of Monterey* (2017) 12 Cal.App.5th 468, 480–482, the court explained at length how a member's retirement benefits are calculated when special compensation is at issue:

"The Public Employees' Retirement Law (PERL, Gov. Code, § 20000 et seq.) establishes PERS, a retirement system for employees of the state and participating local public agencies. PERS is a prefunded, defined benefit plan which sets an employee's retirement benefit upon the factors of retirement age, length of service, and final compensation. [Citation.] Retirement allowances are therefore partially based upon an employee's compensation. An employee's compensation is not simply the cash remuneration received, but is exactly defined to include or exclude various employment benefits and items of pay. ([Gov. Code,] §

20022.) The scope of compensation is also critical to setting the amount of retirement contributions, because PERS is funded by employer and employee contributions calculated as a percentage of employee compensation. [Citation.]” (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198, 28 Cal.Rptr.2d 388.)

“Compensation reported by the employer to CalPERS ‘shall not exceed compensation earnable, as defined in [Government Code] Section 20636.’ (Gov. Code, § 20630, subd. (b).)” (*Tanner v. California Public Employees’ Retirement System* (2016) 248 Cal.App.4th 743, 750, 207 Cal.Rptr.3d 558 (*Tanner*)). Government Code section 20636, subdivision (a) states: “‘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 [Internal Revenue Code compliance].” (Italics added.)

Subdivision (c) of Government Code section 20636 includes the following definition of special compensation: “Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions. . . . Special compensation shall be 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. . . . Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.” (Gov. Code, § 20636, subd. (a)(1)-(3).)

Government Code section 20636, subdivision (c)(7) places express limits on special compensation: “Special compensation does not include any of the following: (A) Final settlement pay. . . . (B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise. (C) Other payments the [CalPERS board of administration] has not affirmatively determined to be special compensation.” (*See City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 527, 149 Cal.Rptr.3d 729 (*City of Pleasanton*)).

Government Code section 20636 further provides that “[t]he [CalPERS board of administration] shall promulgate regulations that delineate more specifically and exclusively what constitutes ‘special compensation’ as used in this section.” (Gov. Code, § 20636, subd. (c)(6).) Pursuant to that direction, CalPERS’s board of administration promulgated

section 571 in 1994. (Cal. Code Regs., tit. 2, §§ 566.1, 570, 571, 572, noticed July 15, 1994, p. 17.)

Section 571, subdivision (a) expressly provides that the list of items that constitute special compensation that must be reported to CalPERS is exclusive: "The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a **written labor policy or agreement.**" Subdivision (c) of section 571 further emphasizes the exclusivity of the subdivision (a) list: "Only items listed in subsection (a) have been affirmatively determined to be special compensation." [Emphasis added, italics omitted].

Thus, in determining whether respondent's administrative stipend constitutes "special compensation" that should be included in the final calculation of respondent's monthly service retirement benefit, two things must be established. First, it must fall within one of the exclusive categories listed in California Code of Regulations, title 2, section 571, subdivision (a), and be included in a written "labor policy or agreement," and second, if it is listed in Section 571, subdivision (a), and set forth in a written "labor policy or agreement," it also must meet all of the specified criteria set forth in California Code of Regulations, title 2, section 572, subdivision (b).

Respondent argued, generally and through her witnesses, that her administrative stipend constituted "premium pay" because during the limited time she received the administrative stipend, she was required to work in an upgraded position or classification. Respondent further argued that virtually any document, like the

administrative stipend forms approving respondent's administrative stipend each month, can constitute the "labor policy or agreement" required by Government Code 20049 and California Code of Regulations, title 2, section 571, subdivision (a).

CalPERS argued, generally and through its witnesses, that respondent's administrative stipend was merely renumeration for the additional duties she undertook for working on a special project but that in public employment, an upgraded position or classification means a different or higher job title. CalPERS further argued that respondent's administrative stipend also cannot qualify as special compensation because under any category because it was not contained in a "labor policy or agreement" like a memorandum of understanding, and therefore did not meet the criteria of either Government Code section 20049 or California Code of Regulations, title 2, section 571.

CalPERS' argument is correct. Respondent's administrative stipend did not meet any of the exclusive criteria set forth in California Code of Regulations, title 2, section 571, subdivision (a), which defines what constitutes special compensation. There are several listed categories in that subdivision regarding what constitutes special compensation that must be reported to CalPERS: incentive pay, educational pay, premium pay, special assignment pay, and statutory items. Each category, except for premium pay, contains an exclusive list of what types of pay qualify. None of the types of pay listed in any of the categories cover the type of pay respondent received. No evidence submitted, including the administrative stipend forms, show that respondent's administrative stipend would meet the definition of any of the exhaustive lists of the types of pay in each category. Therefore, that leaves only the category of "premium pay," which is defined as compensation to employees who are required by

their employer or governing board or body "to work in an upgraded position/classification of limited duration." (Cal. Code Regs., tit. 2, § 571, subd. (a).)

Respondent did not work in an "upgraded position or classification." Her job title, Organizational Consultant IV, remained the same during the time she worked on the UC Path project. Although she may have used additional skills for the position, there was no evidence that the additional duties constituted a different position or classification than the one respondent was currently performing. Although respondent and Ms. Trinidad argued that respondent's job during that project included many more duties than that required of an Organizational Consultant IV, it does not change the fact that no written documentation from UCSD or the University of California was produced to show that the UC Path project involved a different classification or position. No duty statements or other human resources documents were provided to show that the duties and skill required for the UC Path project was substantially different or considered an upgrade from Organizational Consultant IV. Most important, no written labor policy or agreement showed that the "position" of working on the UC Path project was considered an upgrade or classification change from that of Organizational Consultant IV. No written labor policy or agreement classified the "administrative stipend" as premium pay, or any other kind of special compensation. Thus, even if one were to argue that respondent's job duties while working on the UC Path project did constitute the type of upgrade contemplated in the definition of "premium pay," it cannot – by law - constitute "special compensation." The administrative stipend was merely an agreement between respondent and her supervisor(s) and was not included in a written *labor policy or agreement* as required by California Code of Regulations, title 2, section 571, subdivision (a) or (b), or Government Code section 20049. Respondent submitted no written labor policy or agreements that defined the specific administrative stipend she received as special

compensation. The numerous forms respondent submitted that were entitled, "Administrative Stipend Approval Form," were just that – forms granting respondent temporary stipends by her supervisor. They were not documents evidencing a *labor policy or agreement*.

California Code of Regulations, title 2, section 571, subdivision (a), does not define *labor policy or agreement*. In interpreting statutory language, the fundamental rule is to determine the lawmakers' intent. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) The Legislature's chosen language is the most reliable indicator of its intent, because "it is the language of the statute itself that has successfully braved the legislative gauntlet." (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 338.) The words of the statute must be given "a plain and commonsense meaning," unless the statute specifically defines the words to give them a special meaning. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 577.) If the statutory language is clear and unambiguous, there is no need for statutory construction because there is nothing to interpret or construe. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239.) Generally, the same rules of construction and interpretation that apply to statutes govern the interpretation of rules and regulations of administrative agencies. (*California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 345.) Finally, when determining the meaning of a statute or regulation, one must consider the statute or regulation in context of the entire statutory or regulatory scheme as a whole, rather than in isolation. (*Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1261.)

Although California Code of Regulations, title 2, section 571, subdivision (a), does not define *labor policy or agreement*, California Code of Regulations, title 2, section 571, subdivision (b)(1)(a), which refers to Government Code section 20049,

does. In defining *labor policy or agreement*, California Code of Regulations, title 2, section 571, subdivision (b)(1)(A), refers to the meaning contained in Government Code section 20049, and requires that whatever the document is purporting to be the *labor policy or agreement* have been "duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws." Consequently, in public employment, a written *labor policy or agreement* means a memorandum of understanding, document purporting to be a memorandum of understanding, or a document that is an addendum to a memorandum of understanding that modifies the original memorandum of understanding, adopted in accordance with applicable collective bargaining and open meeting laws.

No evidence was submitted that the forms respondent submitted entitled, "Administrative Stipend Approval Form" were approved and adopted by any governing body of respondent's employer responsible for approving labor agreements for groups/classes of represented and excluded public employees. No evidence was submitted that the "Administrative Stipend Approval Form" or any other documents pertaining to respondent's administrative stipend were approved by anyone in accordance with applicable public meeting laws. It was respondent's burden to put forth evidence of this nature; not CalPERS burden to show why it did not meet the criteria. Not only did respondent fail to provide any labor policy or agreement, the "Administrative Stipend Approval Form" simply does not constitute a labor policy or agreement.

Government Code section 20049, the statute that Section 571 is derived from, states:

"Labor policy or agreement" means any written policy, agreement, memorandum of understanding, legislative

action of the elected or appointed body governing the employer, or any other document used by the employer to specify the payrate, special compensation, and benefits of represented and unrepresented employees.

Respondent attempts to extract the words "or other document" from Government Code section 20049, without regard to the rest of the words in the statute, to argue that virtually any single page, form, or memo agreed upon in the context of an employment relationship can constitute a *labor policy or agreement*. This interpretation of Government Code section 20049 is incorrect. It is clear from the plain language of Section 20049 that it is referring to a *labor* policy or agreement entered into between an employer and represented and unrepresented employees, and not *individual* agreements between an employee and a supervisor, or anyone else for that matter, regarding additional compensation. Construing the statute in the manner respondent suggests would mean any employee and supervisor would be able to enter into an agreement to bump an employee's pay without regard to any duly executive labor agreements and confer upon that employee a retirement benefit not contemplated by the PERL.

Ms. Trinidad contended that the UC Path project position would have to have been approved by the UC Regents, and that there is a "policy" regarding how the stipends should be calculated, which she further contended constitutes "compensation" that counts towards retirement. No such document was provided either to CalPERS during its investigation, nor submitted as an exhibit. Nonetheless, even if it were, the "policy" would have to be contained in a labor agreement duly approved by the governing body, here, the UC Regents, and not just an internal UCSD policy or other document. California Code of Regulations, title 2, section 571,

subdivision (b) is very specific that whatever the written labor policy or agreement that specifies what the item of special compensation is, the written labor policy or agreement must: be duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws; indicate the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation; be 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 internet website; indicate an effective date of the document and of any revisions; be retained by the employer and available for public inspection for not less than five years; and not reference any other document in lieu of disclosing the item of special compensation. None of these provisions are satisfied by the administrative stipend forms respondent submitted.

Finally, the California Court of Appeal addressed what constitutes a labor policy or agreement in *Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983. In that case, the Court determined that a temporary increase in pay for an employee that was set forth in an *individual* agreement between the employee and employer, but which was not specified in any written *labor* policy or agreement, did not constitute special compensation. Specifically, when addressing the fact that the agreement between the employee and employer did not constitute a written labor policy or agreement as contemplated in California Code of Regulations, title 2, section 571, the Court said:

Contrary to Prentice's contention on appeal, the fact his raise was the subject of a written memorandum from the city manager to the human resources department did not satisfy the requirement that it be set forth in a written labor

policy or agreement. A written *employment* agreement with an individual employee is not a *labor* policy or agreement within the meaning of the regulation. As used in the regulation, the term “labor” modifies both “policy or agreement,” and implicitly restricts the referenced policies or agreements to either policies which cover a whole class of employees or collective bargaining agreements. This restricted and more literal reading of the regulation is required because the broad interpretation offered by Prentice would essentially provide no limit on the compensation a local agency could provide to individual employees by way of individual agreements. (*Id.* at p. 995 [Emphasis in original].)

15. Because respondent failed to show her administrative stipend was anything more than an agreement between herself and her supervisors, and was not contained in a written *labor* policy or agreement within the meaning of applicable law, it is unnecessary to address whether respondent meets any other criteria contained in California Code of Regulations, title 2, section 571, subdivision (b), since all must be met in order to constitute special compensation. While respondent and her supervisors may have intended the administrative stipend to count towards her retirement, the failure to have the item of special compensation identified in a labor policy or agreement is fatal to respondent’s position.

16. Accordingly, it is concluded that the administrative stipend respondent received for “Special Assignment – Project Pay” attributable to her work on the UC Path project from February 1, 2018, to June 29, 2020, does not constitute special

compensation (and thus does not constitute compensation earnable) under Government Code section 20636. The administrative stipend payments to respondent are not special compensation. For the reasons discussed above, the administrative stipend payments are "other payments" that the board has not affirmatively determined to constitute special compensation and are therefore specifically excluded under Government Code section 20636, subdivision (c)(7)(C). Consequently, the administrative stipend payments for respondent's work on the temporary UC Path project were properly omitted from the calculation of respondent's final compensation used to determine her monthly service retirement benefit.

17. Evidence and arguments presented by the parties that were not referenced in this decision were nonetheless considered in reaching this decision. All arguments contrary to this decision are rejected.

ORDER

The appeal of respondent Janine J. Tarkow to include the administrative stipend labeled "special assignment – project pay" that she received from February 1, 2018, to June 29, 2020, during her employment at the University of California, San Diego, in the final compensation calculation used to determine respondent's monthly service retirement benefit, is denied.

DATE: October 29, 2021

Kimberly J. Belvedere

KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings