ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal in the Calculation of Final Compensation of ALAN KOAHOU by:

LORRIE KOAHOU (heir to ALAN KOAHOU), Respondent

and

CITY OF COLTON, Respondent

Agency Case No. 2018-1287

OAH No. 2019100912

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 3, 2021. The matter was heard by telephone conference due to the ongoing public health emergency.

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

Lorrie Koahou, respondent, appeared on her own behalf.

No appearance was made by or on behalf of respondent, the City of Colton (City). The matter proceeded as a default pursuant to Government Code section 11520.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on May 3, 2021.

ISSUE

Did the City improperly report holiday cash-out amounts and college degree incentive pay and Peace Officer Standard Training (POST) pay as part of holiday cash-out amounts, causing CalPERS to erroneously calculate Alan Koahou's "final compensation"?

If so, is CalPERS required to reduce Mr. Koahou's monthly allowance in light of this error and collect $11,039.60 in overpayment of his retirement allowance?

FACTUAL FINDINGS

Background

1. CalPERS manages pension and health benefits for public employees, retirees, and their families. Retirement benefits are provided under defined benefit plans. A member's contribution is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a contribution rate to the agency's payroll. Using certain actuarial assumptions, the Board of Administration (board) sets employer contribution rates on an annual basis.

2. Mr. Koahou became a local safety member of CalPERS by virtue of his employment with the County of Riverside, and subsequently, as a police sergeant with the City.

3. On December 5, 2014, CalPERS received Mr. Koahou's application for service retirement. CalPERS accepted his application, and he retired for service effective December 29, 2014; he began receiving a monthly benefit of $8,403.67.

Public Agency Review Audit

4. On August 25, 2016, CalPERS's Office of Audit Services issued a Public Agency Review audit report conducted on the City to determine whether its reporting complied with the Public Employees' Retirement Law (PERL). The audit period covered sampled employees' earnings for the period July 1, 2013, through June 30, 2014. Within the category of special compensation reporting, the audit disclosed nine issues, two of which are relevant to this case.

5. Finding 2E of the audit report stated that the City's report of special compensation was not in accordance with the PERL. Specifically, the City had erroneously reported holiday pay cash-out as special compensation. The audit report stated:

> Specifically, the Agency's written labor agreement allows police employees to accrue holiday hours beyond the year in which it was earned. However, [California Code of Regulations, title 2, section 571] states that if a written labor agreement allows employees to accumulate holiday credit beyond the year in which it is earned, and an employee later elects to cash out accumulated holiday credit, it is not reportable compensation. Therefore, the Agency should not

have reported the Holiday Pay as special compensation to CalPERS.

6. Finding 2F of the audit report stated that the City's report of special compensation was not in accordance with the PERL. The audit found that the City incorrectly reported the amounts of POST pay and college degree incentive pay in the pay period ending June 20, 2014. The audit report stated:

> Specifically, the Agency included non-reportable Holiday Pay (see Finding 2E) in its calculation for POST Pay and College Degree Incentive Pay for three police officers. Compensation derived from items that are not reportable to CalPERS do not meet the definition of reportable compensation pursuant to Government Code Section 20636 and California Code of Regulations Section 571.

7. The City agreed with the audit's findings. By letter dated September 6, 2016, CalPERS directed the City to resolve the issues identified in the audit. In an email dated September 13, 2016, two CalPERS audit analysts emailed the City with directions for resolving each of the audit issues. For findings 2E and 2F, CalPERS directed the City to provide a list of impacted employees and reverse the incorrected amounts.

8. The audit report did not reference Mr. Koahou or any other particular employee by name.

Notification to Mr. Koahou of the Audit Findings

9. A year and a half after the audit, by letter dated April 26, 2018, CalPERS notified Mr. Koahou that an audit of the City identified compensation reported on Mr.

Koahou's behalf that did not comply with the PERL. The letter stated, "Based on the information provided to CalPERS from the Agency, your retirement allowance may require a reduction as Education Pay and [POST] Pay were incorrectly reported and were included in your final compensation period." The letter continued:

> Education Pay and POST Pay was [*sic*] incorrectly over reported for amounts in which the Education Pay and POST Pay derived from Holiday Pay Cash Out Amounts. The additional Education Pay and POST Pay are considered non-reportable special compensation, pursuant to Government (Gov.) Code section 20636 and California Code of Regulations 571. The non-reportable Education Pay and POST Pay amounts in question, were reported in addition to your normally earned Education Pay and POST Pay. Only the normal Education Pay and POST Pay should be reported pursuant to conditions of payment outlined in the Agency Labor Agreement.

The letter cited portions of Government Code sections 20636, 20160, and 20163, as well as Regulation[1] 571. The letter concluded that CalPERS would recalculate Mr. Koahou's retirement allowance and total amount of overpayments that may be due. The letter invited Mr. Koahou to provide any additional information before CalPERS made a final determination.

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[1] All further statutory references are to the Government Code and regulatory references are to Title 2 of the California Code of Regulations.

10. On June 20, 2018, CalPERS issued a final determination letter, reiterating the reasons outlined in the April 26, 2018, letter. The letter noted that the City reversed the identified compensation and all corresponding contributions that had been reported. The letter stated, "In addition, the non-reportable Education Pay and POST Pay will be excluded in your final compensation. We will calculate your new retirement benefit and the total overpayment that are due to CalPERS." Citing Section 20134 and Regulations 555 through 555.4, CalPERS notified Mr. Koahou of his right to appeal.

11. Mr. Koahou timely appealed the determination. In his letter dated July 11, 2018, he wrote:

> Had I received some information on the financial impact, with assurance of the accuracy of the audit/proposed action I might have simply conceded. I've yet to be informed and have been told by your office I won't know the amount until it takes effect in my account. So I am forced into the appeals process without knowing whether the appeal will cost me more than the proposed action.

12. By letter dated November 19, 2018, CalPERS notified Mr. Koahou that after reducing the overreported amounts for education and POST pay included in the holiday pay cash amounts, Mr. Koahou's final compensation amount was reduced from $10,463.79 to $10,086.73. Accordingly, CalPERS was reducing his monthly retirement allowance by $313.60. Additionally, there was an overpayment of $14,400.59. However, under Section 20164, the amount was reduced to $11,039.60. CalPERS provided Mr. Koahou a form by which he could elect how he wished to make repayment, but if no response was received, CalPERS would begin monthly deductions of $229.99 beginning March 1, 2019.

13. On October 11, 2019, complainant signed the statement of issues. While the statement of issues cited the audit findings 2E and 2F, it *only* stated that the POST pay and college degree incentive pay were overreported and derived from holiday pay cash-out amounts. There was no allegation that holiday cash-out amounts had been erroneously reported as indicated in finding 2E as a separate issue. The statement of issues lists two issues on appeal: Whether CalPERS correctly excluded college degree incentive pay and POST pay derived from holiday cash-out amounts reported by the City from Mr. Koahou's final compensation calculation, and whether CalPERS is correct in collecting overpayment.

14. The matter was originally consolidated for hearing with that of another City employee who similarly had his final compensation reduced following the CalPERS audit. At the January 30, 2020, hearing on these consolidated matters, it was learned that Mr. Koahou had passed away, and the matters were severed. The present matter was continued for CalPERS to determine whether Mrs. Koahou had a justiciable interest in the appeal.

15. By letter dated November 6, 2020, CalPERS notified OAH that Mrs. Koahou did have a justiciable interest, and she wished to proceed with the administrative appeal. This hearing followed.

Evidence Regarding Mr. Koahou's Compensation and Calculation of Retirement Benefit

16. Samuel Camacho, an analyst with CalPERS's Employer Account Management Division, testified at hearing about the findings of the audit and the application of those findings to Mr. Koahou's retirement allowance. CalPERS submitted computer screenshots for Mr. Koahou's retirement benefit calculations before and

after the audit, and Mr. Camacho testified about the changes affecting the allowance. The calculation of Mr. Koahou's retirement allowance was based in part on his "final compensation," which means his highest annual average compensation during any consecutive 36-month period of employment preceding the effective date of his retirement. (Gov. Code, § 20037.) The one-year final compensation amount was initially calculated to be $10,463,79 based on the period from June 29, 2008, through June 28, 2009. During this period (specifically, for the month of July 2008), the City reported special compensation in the amount of $9,908.58. This was significantly higher than special compensation reported for the other months in this period, which averaged between $1,000 and $2,000. According to finding 2E of the audit, the City had erroneously reported holiday cash-out as special compensation in July 2008. To elaborate, under Regulation 571, where a labor agreement allows an employee to accumulate holiday credit beyond the year in which it is earned, if the employee later elects to cash out the accumulated holiday credit, it is not reportable compensation. Accordingly, the special compensation for Mr. Koahou for July 2008 was reduced to $2,060.64.

17. As a result, fiscal year 2009 was no longer Mr. Koahou's highest paid year. Instead, his highest paid year was the period from December 20, 2013, to December 28, 2014, and his final compensation period was changed accordingly. During this period (specifically, for the month of June 2014), the City reported a payrate of $10,757.54 and special compensation of $2,627.40. Finding 2F of the audit found that during the June 2014 pay period, the City incorrectly reported the amounts of education incentive pay and POST pay. It did so by including non-reportable holiday cash-out pay in its calculation of these two amounts. Again, the City admitted it erroneously reported the pay and reversed the compensation reflected during this

pay period to reflect a reportable payrate of $9,466.64 and special compensation $2,068.28.

18. After these corrections, Mr. Koahou's final compensation following the corrections was $10,086.73, reduced from $10,463.79. This, in turn, reduced the monthly benefit from $8,701.16 to $8,387.56, a difference of $313.60.

19. Pursuant to Section 20164, CalPERS reduced the overpayment amount of $14,400.59 to $11,039.50. Dividing the later number by $313.60 (the amount CalPERS claims was overpaid) results in 35.2, which reflects that CalPERS was only seeking repayment for the 35.2 months preceding its November 2018 notification.

20. Mrs. Koahou did not present any evidence or challenge the audit findings or amounts reversed by the City. She indicated that she had little knowledge about her late husband's pension, but she felt she should continue with his appeal.

LEGAL CONCLUSIONS

General Principles Relating to CalPERS's Functions

1. The Constitution imposes on CalPERS a duty to "ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland v. Public Employees' Retirement System* (2002), 95 Cal.App.4th 29, 46.) But, "[CalPERS's] fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. [CalPERS] has a duty to follow the law." (*City of Pleasanton v. Bd. of Administration* (2012) 211 Cal.App.4th 522, 544.)

2. Pension legislation should be liberally construed and all ambiguities should be resolved in favor of the pensioner. (*In re Retirement Cases* (2003) 110

Cal.App.4th 426, 473.) "However, this rule of liberal construction is applied for the purpose of effectuating obvious legislative intent and should not blindly be followed so as to eradicate the clear language and purpose of the statute." (*Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1603.)

Burden and Standard of Proof

3. Complainant filed a statement of issues and contends that Mrs. Koahou has the burden of proof because she is appealing CalPERS's determination. While the party against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476), the fact that CalPERS filed a statement of issues is not dispositive as to the burden of proof. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, the court considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found "the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence." (*Id.* at p. 1051, fn. 5.) Here, CalPERS is the party asserting the affirmative, in that it is seeking to change the level of retirement benefits it has been paying to Mr. Koahou since he retired in January 2015 and to recoup overpayments. Where a change in the status quo is sought, the party seeking the change has the burden of proving that the change is necessary. (Evid. Code, § 500.) Moreover, CalPERS is seeking to correct an error in reporting pursuant to Section 20160. Under this provision, CalPERS, as the party seeking correction of an error, has "the burden of presenting documentation or other evidence to the board establishing the right to correction." (Gov. Code, § 20160, subd. (d).) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Relevant Statutory and Regulatory Authority

4. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Bd. of Administration* (1994) 23 Cal.App.4th 194, 198.) The formula for determining a member's retirement benefit takes into account: the years of service, a percentage figure based on the age on the date of retirement; and "final compensation." (Gov. Code, §§ 20037, 21350, 21352 and 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)

5. "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 for specified reasons. (Gov. Code, § 20630, subd (a).)

6. "Final Compensation" means the highest annual average compensation earnable by a member during any consecutive 36-month period of employment preceding the effective date of his or her retirement. (Gov. Code, § 20037.)

7. Government Code section 20636 provides in part:

> (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.

. . .

[¶] . . . [¶]

(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). . . .

[¶] . . . [¶]

(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:

[¶] . . . [¶]

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

8. Government Code section 20160 provides, in part:

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

[¶] . . . [¶]

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction . . .

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties . . . are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

9. Government Code section 20163 provides in part:

(a) If more or less than the correct amount of contribution required of members, the state, or any contracting agency, is paid, proper adjustment shall be made in connection with subsequent payments, or the adjustments may be made by direct cash payments between the member, state, or contracting agency concerned and the board or by adjustment of the employer's rate of contribution . . . . Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person . . . will receive the actuarial equivalent of the allowance to which the member is entitled. . . .

10. Government Code section 20164, subdivision (b), provides:

> (b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:
>
> (1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.
>
> [¶] . . . [¶]
>
> (e) The board shall determine the applicability of the period of limitations in any case, and its determination with respect to the running of any period of limitation shall be conclusive and binding for purposes of correcting the error or omission.

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

(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:

[¶] . . . [¶]

(2) EDUCATIONAL PAY

[¶] . . . [¶]

Educational Incentive - Compensation to employees for completing educational courses, certificates and degrees which enhance their ability to do their job. A program or system must be in place to evaluate and approve acceptable courses. The cost of education that is required for the employee's current job classification is not included in this item of special compensation.

[¶] . . . [¶]

Peace Officer Standard Training (POST) Certificate Pay - Compensation to local police officers, county peace officers and school police or security officers who obtain Peace Officer Standard Training (POST) certification.

[¶] . . . [¶]

(5) STATUTORY ITEMS

> Holiday Pay - Additional compensation for employees who are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays. If these employees are paid over and above their normal monthly rate of pay for approved holidays, the additional compensation is holiday pay and reportable to PERS.
>
> For those employees with written labor agreements providing holiday credit and allowing employees to cash out accumulated holiday credit, the cash out must be done at least annually and reported in the period earned. If a written labor agreement allows an employee to accumulate holiday credit beyond the year in which it is earned and an employee later elects to cash out accumulated holiday credit, it is not compensation for PERS purposes.

Evaluation

12. As framed by the statement of issues, the issue in this case is whether the City overreported POST pay and college degree incentive pay derived from holiday pay cash-out amounts. Neither the statement of issues nor the previous determination letter alleged that the City erred in reporting his holiday cash-out pay as a distinct issue. The testimony of Mr. Camacho was the first notice either Mr. or Mrs. Koahou received that Mr. Koahou's compensation had been reduced because of erroneous reporting of holiday cash-out compensation in July 2008 as noted in finding 2E. This item is significant because the reduction caused a change to the final compensation period, and in turn, caused finding 2F to be applicable. Consequently, Mr. and Mrs.

Koahou were not provided with any notice that reporting of holiday cash-out pay was a separate issue from the POST and education pay calculations for the June 2014 pay period. Notwithstanding the lack of notice, Mrs. Koahou did not raise the issue at hearing, and even if she had, it would be difficult to conclude she was prejudiced by the lack of notice.

13. CalPERS has the authority to review and correct erroneous reports of income made by its contract employers. After CalPERS audited the City's special compensation reporting, CalPERS determined that the City should not have reported holiday cash-out pay for previous years under Regulation 571, subdivision (a)(5). In addition, CalPERS identified an error in reporting of POST pay and college incentive pay where those percentages were calculated based on non-reportable holiday cash-out pay.

Complainant submitted documentary evidence showing where the City had reversed its reported special compensation of $7,847.94 for Mr. Koahou based on erroneous reporting of holiday cash-out pay for the July 2008 pay period. With this reversal, fiscal year 2009 was no longer Mr. Koahou's highest paid year. Instead, his highest paid year was the period from December 20, 2013, to December 28, 2014, and his final compensation period was changed accordingly. During the month of June 2014, the City reported a payrate of $10,757.54 and special compensation of $2,627.40. Finding 2F of the audit found that during the June 2014 pay period, the City incorrectly reported the amounts of education incentive pay and POST pay by including non-reportable holiday cash-out pay in its calculation of these two amounts. Again, the City reversed these payments, which resulted in a new reportable payrate of $9,466.64 and special compensation $2,068.28. After these corrections, Mr. Koahou's final compensation was $10,086.73, reduced from $10,463.79. This, in turn, reduced the monthly benefit from $8,701.16 to $8,387.56, a difference of $313.60. Finally, CalPERS reduced the amount of overpayment it was seeking from $14,400.59 to $11,039.50 pursuant to Section 20164, which is the approximate three-year period before the notification in November 2019.

Once the error in reporting was discovered, CalPERS had the duty to correct the error. Under Government Code section 20160, subdivision (e), CalPERS was required to make a correction that returned the parties to the status they would have occupied but for the error. Cause exists to affirm complainant's actions.

ORDER

The appeal by respondent Lorrie Koahou is denied. CalPERS's decision to reduce the retirement benefit payable to respondent and collect overpayment is affirmed.

DATE: May 28, 2021

Adam Berg (May 28, 2021 16:28 PDT)

ADAM L. BERG

Administrative Law Judge

Office of Administrative Hearings