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LEGAL UPDATE

August 29, 2016

To: Superintendents, Member School Districts (K-12)

From: Mia N. Robertshaw *MNR*
Assistant General Counsel

Subject: CalPERS Retirement Benefit Based on Salary Schedule, Not
Employment Agreement
Memo No. 30-2016

The California Court of Appeal, Third Appellate District, recently found that a city manager’s California Public Employees’ Retirement System (“CalPERS”) retirement benefit could not be based on the salary he claimed because that salary “did not appear on a publicly available pay schedule.” (*Tanner v. California Public Employees’ Retirement System et al.* (June 28, 2016, C078458) ___ Cal.App.4th ___.)¹ As discussed below, we recommend that all districts maintain salary schedules that cover all positions, including management and senior management positions.

Facts and Conclusion of the Case

Tanner is a pension spiking case.² A retired city manager, Joseph Tanner, argued that his retirement benefit should be based on the \$305,844 salary which was listed in his written employment contract with the city and in a cost analysis document prepared by city staff. The city manager’s salary was not set forth in a single-page salary schedule. CalPERS determined that Tanner’s retirement benefit could not be based on the \$305,844 salary because the salary “did not appear on a publicly available pay schedule.” Rather, CalPERS determined that Tanner’s retirement benefit should be based on a lower salary of \$216,000, as set forth in a prior employment agreement.³ Tanner challenged this determination. The trial court

¹ The case is available online at <http://www.courts.ca.gov/opinions/documents/C078458.PDF>.

² Pension “spiking” is inflating an employee’s final compensation in order to increase retirement benefits.

³ In 2006, Joseph Tanner entered an employment agreement to serve as the City Manager for the City of Vallejo, with a base salary of \$216,000 plus additional compensation including an automobile allowance, deferred compensation, leave paid out as salary, and employer-covered employee contributions to CalPERS. Some of these forms of additional compensation were listed in the contract as converting into base pay. CalPERS reviewed the contract and found that the additional compensation would not be converted into base pay for retirement purposes. After CalPERS’ review, Tanner and the City entered a new contract in 2007 with a base salary of \$305,844. This base salary included the costs associated with the additional compensation in the 2006 contract.



and court of appeal agreed with the CalPERS decision. The court of appeal found that “neither Tanner’s final contract with the city nor a chart prepared by city staff to show how Tanner’s final base salary was determined qualified as a publicly available pay schedule for purposes of determining the amount of Tanner’s final compensation and, in turn, his retirement benefit.” (*Tanner, supra*, at 2.)

A CalPERS member’s retirement benefit is based on a formula which includes the member’s “payrate.” (Gov. Code, §§ 20630, 20636.) “Payrate” is defined in the Government Code:

“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 [Government Code section 20636(e)(2)].

(Gov. Code, § 20636, subd. (b)(1) (emphasis added).) Accordingly, the court determined that an employee’s pay “must be paid in cash pursuant to a *publicly available pay schedule* in order to qualify as payrate and thus as ‘compensation earnable’ that can be reported to CalPERS for use in the calculation of the employee’s retirement benefit.” (*Tanner, supra*, at 9 (emphasis in original).) The court found that Tanner’s \$305,844 salary appeared in both his 14-page employment agreement and the one-page related cost analysis with various figures, and both of these documents were publicly available. However, the court found that neither document qualified as a “pay schedule.”

The court determined that “a *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.” (*Tanner, supra*, at 14 (emphasis in original).) In reaching this conclusion, the court determined that the Legislature intended to require employers to use a document which isolates the rate of pay of its CalPERS member employees, separate from other information and figures, in order to facilitate public disclosure and prevent pension spiking. “A document that catalogs or lists the rate of pay or base pay of one or more employees who are CalPERS members, separate and apart from other information, more readily informs the public of the payrate that will or may be used in determining the amount of an employee’s retirement benefit.” (*Tanner, supra*, at 15.)

Recommendation

Districts should confirm that they have salary schedules for all classified positions, including management positions. Such salary schedules may include multiple positions, or be limited to one position. The salary schedule(s) should isolate the rate of pay of districts’ CalPERS member employees, separate from other information and figures, in order to facilitate public disclosure. These salary schedules must be publicly available and must meet the requirements outlined in the California Code of Regulations, Title 2, section 570.5. Specifically, the pay schedule:

1. Has been approved and adopted by the governing body;
2. Identifies the position title for every employee position;
3. Shows the payrate for each identified position, either as a single amount or a range;



4. Indicates whether the payrate is hourly, daily, monthly, or annually, etc.;
5. Is posted at the office of the employer and available for public review during normal business hours, or available on the employer's website;
6. Indicates the effective date and date of any revisions;
7. Is retained by the employer and available for public inspection for at least five years; and
8. Does not reference any other document instead of disclosing the payrate.

Districts should not rely upon employment agreements or budget analysis documents to contain any CalPERS member employee's "payrate."

Be aware that this decision could impact employees in certificated positions when they are members of CalPERS as a result of prior employment. As a best practice, we recommend that districts have publicly available salary schedules for all positions.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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