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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THOMAS J. HARRON,

Plaintiff and Respondent,

v.

BOARD OF ADMINISTRATION OF
CALIFORNIA PUBLIC EMPLOYEES
RETIREMENT SYSTEM,

Defendant and Appellant.

D063248

(Super. Ct. No.
37-2012-000919890-CU-WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E.

L. Strauss, Judge. Reversed and remanded with directions.

Peter H. Mixon and Wesley E. Kennedy for Defendant and Appellant.

Lounsberry Ferguson Altona & Peak and James P. Lough for Plaintiff and
Respondent.

The Board of Administration of California Public Employees' Retirement System
(PERS) appeals a judgment granting Thomas Harron's petition for writ of administrative

mandamus ordering PERS to include in its calculation of his retirement benefits \$222,000 in compensation he received from the Otay Water District (District) during a one-year leave of absence pursuant to a wrongful termination action settlement agreement. On appeal, PERS contends the trial court erred because (1) Harron was not excused from work during his leave of absence as required under the Public Employees' Retirement Law (PERL) (Gov. Code, § 20000 et seq.),¹ (2) his settlement payments did not constitute "compensation earnable" under section 20636, (3) he was not in the employ of the District during his leave of absence, and (4) his settlement payments were "final settlement pay," not "compensation earnable" pursuant to section 20636, subdivisions (c)(7)(A) and (f). Because we conclude Harron's settlement payments did not, as a matter of law, constitute "compensation earnable" under section 20636, the trial court erred by granting his petition.

FACTUAL AND PROCEDURAL BACKGROUND

Harron was employed by various entities that had retirement benefit contracts with PERS from 1977 until 2001. From 1991 to 2001, he was District's general counsel. Under the District's contract with PERS, Harron was a member of PERS.

In September 2001, Harron filed an action against the District for wrongful termination. On September 26, 2007, Harron and the District entered into a settlement agreement and general release of claims (Settlement Agreement). In addition to a mutual release of all claims, the Settlement Agreement provided in part:

¹ All statutory references are to the Government Code unless otherwise specified.

"The District shall employ Harron for a one-year period commencing on February 10, 2008, and ending February 9, 2009. During this one-year period of employment with the District, Harron shall be on inactive or leave status, shall not be physically present at the District, and shall not take any action as an employee of the District unless expressly authorized to do so in writing by the Board of Directors of the District; the District will not object to Harron being employed by another employer during this one-year period of employment with the District. For this one-year period of employment, the District shall pay Harron an annual salary of Two Hundred Twenty-Two Thousand Dollars (\$222,000.00), payable in accordance with the District's regular payroll practices and subject to all required withholdings and deductions."

On February 9, 2009, Harron's employment with the District would be deemed terminated and he would have no further employment rights. The Settlement Agreement also provided: "The District shall use reasonable and lawful efforts to ensure that Harron's annual salary for this one-year period of employment with the District (i.e., \$222,000) is accepted and/or used by [PERS] in the calculation of Harron's retirement benefits under the District's retirement plan, but Harron represents and acknowledges that the Defendants have made no representations about whether Harron's annual salary for this one-year period of employment with the District will be accepted and/or used by [PERS] in the calculation of his retirement benefits under the District's retirement plan and, further, that he is not relying on and has not relied on any such representations."

On November 21, 2008, Harron submitted applications for service retirement, effective February 9, 2009, from the District under PERL and the County of San Diego, his employer after 2001, under the San Diego County Employees' Retirement System. In August 2009, PERS informed Harron and the District that the settlement proceeds he

received under the Settlement Agreement (i.e., \$18,500 per month) could not be used as his final compensation in calculating his retirement benefits because they constituted "final settlement pay" under section 20636, subdivision (f). PERS initially used Harron's \$10,326.57 monthly salary prior to his 2001 termination by the District as his final compensation, but later used his higher salary (\$176,000 annually, or \$14,666 per month) while employed with the County of San Diego based on reciprocity provisions between PERS and the County's retirement system.

Harron filed an administrative appeal challenging PERS's decision. Following a two-day administrative hearing, the administrative law judge (ALJ) issued a proposed decision (Proposed Decision) denying Harron's appeal and concluding PERS would not include the \$222,000 amount paid him pursuant to the Settlement Agreement in determining his retirement benefits. In November 2011, the PERS Board of Administration issued a final decision (Final Decision) substantially adopting the Proposed Decision.

In February 2012, Harron filed a petition for writ of administrative mandamus challenging the Final Decision. PERS filed an answer opposing the petition. The trial court issued a tentative ruling granting the petition and then issued a written order granting the petition and adopting its tentative ruling as its final ruling. On November 27, 2012, the court entered a judgment for Harron granting his petition. The judgment set aside PERS's decision that Harron's \$222,000 salary was not compensation and/or was final settlement pay, and directed PERS to include that amount in calculating

Harron's retirement benefits. PERS timely filed a notice of appeal challenging the judgment.

DISCUSSION

I

Standards of Review

"Code of Civil Procedure section 1094.5 is the administrative mandamus provision providing the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. [Citation.] [That statute] does not specify which cases are subject to independent review, leaving that issue to the courts. [Citation.] In cases reviewing decisions which affect a vested, fundamental right, the trial court exercises independent judgment on the evidence. [Citation.] Retirement benefits of the nature involved here have long been held to be a vested and fundamental right." (*Molina v. Board of Administration, etc.* (2011) 200 Cal.App.4th 53, 60 (*Molina*)). If the administrative decision "substantially affects a fundamental vested right, the trial court, in determining under [Code of Civil Procedure] section 1094.5 whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence." (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32.)

"On appeal, . . . the standard for review of the trial court's factual determinations is whether they are supported by substantial evidence. [Citations.] '[A]n appellate court

must uphold administrative findings unless the findings are so lacking in evidentiary support as to render them unreasonable. [Citations.] A reviewing court will not uphold a finding based on evidence which is inherently improbable [citation], or a finding based upon evidence which is irrelevant to the issues. [Citations.]' [Citation.] The reviewing court, like the trial court, may not reweigh the evidence, and is 'bound to consider the facts in the light most favorable to the Board, giving it every reasonable inference and resolving all conflicts in its favor. [Citations.]' " (*Jaramillo v. State Bd. for Geologists & Geophysicists* (2006) 136 Cal.App.4th 880, 889.)

On questions of law, we review the trial court's (and administrative agency's) conclusions de novo, or independently. (*Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983, 989 (*Prentice*); *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888-889; *O'Connor v. State Teachers' Retirement System* (1996) 43 Cal.App.4th 1610, 1620.) "Interpretation of a statute is a question of law." (*O'Connor*, at p. 1620.) "However, where our review requires that we interpret the PERL or a PERS regulation, the court accords great weight to PERS['s] interpretation." (*Prentice*, at p. 989.) " '[I]n determining the proper interpretation of a statute and the validity of an administrative regulation, the administrative agency's construction is entitled to great weight, and if there appears to be a reasonable basis for it, a court will not substitute its judgment for that of the administrative body.' [Citations.] In addition, an administrative ruling ' "comes before the court with a presumption of correctness and regularity, which places the burden of demonstrating invalidity upon the

assailant" " (*Campbell Industries v. State Bd. of Equalization* (1985) 167 Cal.App.3d 863, 868.)

However, the above rule " 'should not blindly be followed so as to eradicate the clear language and purpose of the statute. . . . [Citations.]' [Citation.] . . . 'The ultimate interpretation of a statute is of course an exercise of judicial power and it is the responsibility of the courts to declare its true meaning even if it requires rejection of an earlier erroneous administrative interpretation. [Citations.]' " (*Wheeler v. Board of Administration* (1979) 25 Cal.3d 600, 605.) Issues of statutory interpretation are reviewed de novo on appeal where there are no disputed factual issues. (*Alesi v. Board of Retirement* (2000) 84 Cal.App.4th 597, 601.) Our primary goal in interpreting a statute is to determine its legislative intent. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Legislative intent should be determined from the language of the statute, if possible. (*Ibid.*) "If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and *the plain meaning of the language governs.*' " (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268, italics added.)

In interpreting a statute, "our first task . . . is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context,

keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) Finally, "[a]ny ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, but such construction must be consistent with the clear language and purpose of the statute." (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 490.)

II

The PERL Generally

The PERL "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." (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198, fn. omitted.) "Under the PERL, the determination of what benefits

and items of pay constitute 'compensation' is crucial to the computation of an employee's ultimate pension benefits. The pension is calculated to equal a certain fraction of the employee's 'final compensation' which is multiplied by a fraction based on age and length of service. [Citations.] 'Final compensation' is the 'highest average annual compensation earnable by a member during the three consecutive years of employment immediately preceding the effective date of his retirement' or other designated consecutive three-year period." (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478, fns. omitted.) Final compensation for local miscellaneous members, including Harron, is based on the highest average compensation earnable over a consecutive 12-month period. (§§ 20037, 20042.)

Section 20630, subdivision (a), defines "compensation" under the PERL as "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 [¶] (4) Vacation. [¶] (5) Compensatory time off. [¶] (6) *Leave of absence.*" (Italics added.) However, "[c]ompensation . . . shall not exceed compensation earnable" (§ 20630, subd. (b), italics added.)

Section 20636, subdivision (a), defines "[c]ompensation earnable" as "the *payrate and special compensation* of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5." (Italics added.) Section 20636, subdivision (b)(1), provides: " '*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)." (Italics added.)

Section 20636, subdivision (c), provides:

"(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 . . . , 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)." (Italics added.)

However, "special compensation" does not include final settlement pay. (§ 20636, subd.

(c)(7)(A).)

Section 20636, subdivision (e), provides:

"(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. One employee may not be considered 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 employee[], 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."

Section 20636, subdivision (f), defines "final settlement pay" as "*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." (Italics added.)

Pursuant to section 20636, subdivision (e), PERS adopted a regulation allowing employers to request an exception to the "average increase" limitation on "compensation earnable." (Cal. Code Regs., tit. 2, § 572.) That regulation provides in part:

"An employee who is not in a 'group or class of employment' within the meaning of the [PERL], may request an exception from the 'average increase' procedure set forth in Sections 20636 and 20636.1. . . . [¶] . . . [¶]

". . . PERS' decision to grant or deny the request will be based on a comparison between increased compensation earnable, as reported for the employee during his or her period of final compensation and compensation earnable reported for the group or class of employees in his or her same membership classification.

". . . In no case will an exception be granted if PERS determines that the comparative increase in compensation earnable by the employee fails to conform with the following standards set forth in subsections (a) and (b) below as well as other applicable provisions of the law.

"(a) If reported in payrate, the increased compensation must be:

"(1) Contained in a written labor agreement; [¶] . . . [¶]

"(5) *Historically consistent with prior payments for the membership classification; and*

"(6) Not final settlement pay." (Cal. Code Regs., tit. 2, § 572, italics added.)

Operative as of August 10, 2011, PERS also adopted the following regulation setting forth requirements for a "publicly available pay schedule," as that phrase is used in the definition of "compensation earnable" under section 20636:

"(a) For purposes of determining the amount of '*compensation earnable*' pursuant to Government Code Sections 20630, 20636, and 20636.1, *payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:*

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

"(2) *Identifies the position title for every employee position;*

"(3) *Shows the payrate for each 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 internet 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, italics added.)

Therefore, under the PERL and its underlying regulations, "[c]alculation of 'compensation earnable' is not based on individual efforts" (*City of Sacramento v. Public Employees Retirement System, supra*, 229 Cal.App.3d at p. 1479.) "Rather, both components of 'compensation earnable,' an employee's payrate and special compensation, are measured by the amounts provided by the employer to similarly situated employees." (*Prentice, supra*, 157 Cal.App.4th at p. 992.) Even if an employee is not part of a group or class of employment, his or her "compensation earnable" is generally measured and limited by what similarly situated members in the closest related group or class receives and/or by the average increase in compensation earnable for all employees in the same membership classification. (See § 20636, subs. (b)(1), (c)(2), (e)(2).) In *Prentice*, we stated: "[W]e perceive as the central role of the limitations on compensation earnable [to be]: *preventing local agencies from artificially increasing a preferred employee's retirement benefits by providing the employee with compensation increases which are not available to other similarly situated employees.*" (*Prentice*, at p. 993, italics added.)

III

Harron's Settlement Payments Are Not "Compensation Earnable"

PERS contends the trial court erred by granting Harron's petition because the payments he received under the Settlement Agreement did not constitute "compensation earnable" under section 20636. Based on the undisputed facts in the administrative record, the payments Harron received under the Settlement Agreement were not, as a matter of law, made pursuant to a "publicly available pay schedule"; we conclude they

did not constitute "compensation earnable" under section 20636 and therefore must be excluded from the calculation of his retirement benefits under the PERL. Harron concedes his pay under the Settlement Agreement cannot be considered "special compensation" as defined in section 20636, subdivision (c). Therefore, for Harron's settlement pay to be "compensation" and "compensation earnable" under sections 20630 and 20636, it must constitute "payrate" under section 20636, subdivision (b). (§§ 20630, subd. (b), 20636, subd. (a).) We further conclude, contrary to Harron's assertion, his settlement payments were not based on the normal monthly rate or base pay paid to similarly situated members of the same group or class of employment within the definition of "payrate" under section 20636, subdivision (b)(1).

A

Based on our review of the administrative record, the only document that arguably could constitute the "publicly available pay schedule" required for Harron's "payrate," and therefore "compensation earnable," under section 20636 is the Settlement Agreement. A copy of that document is contained in the administrative record and testimony regarding it was provided at the administrative hearing. There is *no* evidence to support a finding that Harron's pay under the Settlement Agreement was pursuant to a "pay schedule," or was "publicly available," as required by section 20636, subdivision (b)(1), for a "payrate." Even without considering the PERS regulation (Cal. Code Regs., tit. 2, § 570.5) that sets forth requirements for a "publicly available pay schedule" (which regulation was adopted after the operative facts in this case), we conclude the Settlement

Agreement cannot be considered a "publicly available pay schedule" under section 20636, subdivision (b)(1).²

First, the Settlement Agreement cannot be considered a "pay schedule." The Settlement Agreement is a 14-page document that sets forth, in great detail, the terms and conditions of the settlement of Harron's wrongful termination action against the District. It affects only one former employee, Harron, and no other employees. It does not set forth any pay "schedule" for any group or class of employees of the District, whether described by job title, classification, or otherwise. As PERS asserts, the Settlement Agreement does not even describe the job title or position Harron would have as an "employee" of the District from February 10, 2008, through February 9, 2009. At most, the Settlement Agreement sets forth compensation Harron would receive as an ostensible employee during that period. That document, therefore, is the antithesis of a "pay schedule." Although we do not rely on it in deciding this appeal, PERS's regulation (Cal. Code Regs., tit. 2, § 570.5) that sets forth the requirements for a "publicly available pay schedule" describes what generally is considered to be a "pay schedule." That regulation requires the document to identify the position title for every employee position and show the payrate for each identified position. Harron does not, and could not reasonably, assert the Settlement Agreement satisfies those requirements. Therefore, the Settlement

² In deciding this appeal, we need not, and do not, decide whether PERS's regulation (Cal. Code Regs., tit. 2, § 570.5, operative August 10, 2011) applies retroactively to determinations of "payrate" and "compensation earnable" for pay received prior to the operative date of that regulation.

Agreement does not constitute a "pay schedule" within the meaning of section 20636, subdivision (b)(1).

Second, the Settlement Agreement does not constitute a "publicly available" pay schedule within the meaning of section 20636, subdivision (b)(1). The term "publicly available" in this context has an obvious meaning--i.e., the pay schedule must be posted, published, or otherwise easily obtainable by the public. A *confidential* settlement agreement or other document cannot be considered "publicly available," even if that confidential document may ultimately, through a public records request or otherwise, be obtained from the governmental agency. In this case, the Settlement Agreement contained a confidentiality provision, requiring Harron and his counsel to "keep *strictly confidential* the *existence*, terms, and conditions of the Settlement Agreement." (Italics added.) A provision requiring a document to be kept strictly confidential is the antithesis of a "publicly available" pay schedule. Even if the Settlement Agreement does not expressly require the *District* to likewise keep its existence, terms, and conditions strictly confidential, a truly "publicly available" pay schedule would not prohibit an employee from disclosing its existence, terms, and conditions. Rather, the intent underlying the "publicly available" requirement is to allow the public to freely access and obtain the terms of a pay schedule and allow employees and other interested persons to obtain and disclose the pay schedule to whomever they choose. A confidentiality provision necessarily precludes a document from constituting a "publicly available" pay schedule under section 20636, subdivision (b)(1).

Although we do not rely on it in deciding this appeal, PERS's regulation (Cal. Code Regs., tit. 2, § 570.5) that sets forth the requirements for a "publicly available pay schedule" describes what generally is considered to be a "publicly available" pay schedule. That regulation requires the document to have been approved and adopted by the employer's governing body per applicable public meeting law requirements, be posted at the employer's office or immediately accessible and available for public review during normal business hours or posted on the employer's website, and be retained by the employer and available for public inspection for at least five years. (Cal. Code Regs., tit. 2, § 570.5, subd. (a).) Harron cannot reasonably assert the District satisfied those requirements regarding the Settlement Agreement. Contrary to Harron's assertion, the mere fact the Settlement Agreement may have been approved by the District's governing board at a public meeting and thereafter made available to an interested person through a public records request does not satisfy the clear legislative intent underlying the requirement that a pay schedule be "publicly available." The Settlement Agreement does not constitute a "publicly available pay schedule" within the meaning of section 20636, subdivision (b)(1).

In *Prentice*, we addressed a similar situation in which an increase in a manager's salary was not pursuant to a "publicly available pay schedule." In that case, Prentice was the director of the water department for the City of Corona when in 2001 it asked him to become the general manager of its new department of water and power. (*Prentice, supra*, 157 Cal.App.4th at p. 987.) The city gave him a 10.49 percent pay raise because of the

new responsibilities in his new position. (*Ibid.*) In 2003, Prentice retired. (*Ibid.*) His successor as the general manager of the department of water and power was not paid the 10.49 percent increase in pay that Prentice had received. (*Id.* at p. 988.) PERS denied Prentice's request that his final compensation for calculating his retirement benefits include the 10.49 percent pay raise. (*Ibid.*) On appeal after the trial court denied Prentice's petition for writ of mandate, we reviewed applicable statutes and regulations and concluded:

"In sum, '[c]alculation of "compensation earnable" is not based on individual efforts' [Citation.] Rather, both components of 'compensation earnable,' an employee's payrate and special compensation, are measured by the amounts provided by the employer to similarly situated employees. (See § 20636, subs. (b)(1), (2), (c), (e)(2).)" (*Prentice, supra*, 157 Cal.App.4th at p. 992.)

After finding Prentice was a member of the city's class of managers and assistant managers of city departments, we concluded: "Prentice's [10.49 percent salary] increase was not part of his 'payrate' within the meaning of section 20636, subdivision (b)(1). Contrary to Prentice's contention on appeal, *his increased pay was never made part of a publicly available pay schedule*, as required by the statute." (*Prentice, supra*, 157 Cal.App.4th at p. 993, italics added.) The pay range for the management group that included Prentice's general manager position did not include the pay increase. (*Id.* at pp. 993-994.) The fact Prentice's full salary was evident in the city's annual budget did not make that salary available to any other person holding the position of general manager. (*Id.* at p. 994.) We concluded:

"Because, as we view the entire statutory scheme, the limitations on salary are designed to require that retirement benefits be based on the salary paid to similarly situated employees, *PERS acted properly in looking at the published salary range rather than the exceptional arrangement the city made with Prentice and reflected in the city's budget documents. The defect in Prentice's broad interpretation of 'pay schedule' is that it would permit an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees.*" (*Prentice, supra*, 157 Cal.App.4th at p. 994, italics added.)

In addition to concluding Prentice's salary increase was not part of his "payrate" under section 20636, subdivision (b)(1), we concluded his salary increase also did not constitute "special compensation" under section 20636, subdivision (c)(2), because it was not set forth in a written labor policy or agreement and was not available to all members of his class. (*Prentice, supra*, 157 Cal.App.4th at pp. 994-996.) In so concluding, we stated: "[T]he 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 [i.e., Cal. Code Regs., tit. 2, § 571, subd. (b)]. . . . [Our] 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."³ (*Prentice, supra*,

³ In addressing the issue of "payrate," we could have similarly concluded Prentice's individual employment agreement did not constitute a "publicly available pay schedule" under section 20636, subdivision (b)(1). That conclusion would be consistent with our

157 Cal.App.4th at p. 995.) Because Prentice's salary increase was not part of his "payrate" or "special compensation," we concluded it was not part of his final compensation for calculating his retirement benefits and affirmed the trial court's judgment. (*Id.* at p. 996.)

Contrary to Harron's assertion, *Molina, supra*, 200 Cal.App.4th 53 is also similar to the circumstances in this case and provides support for our conclusion. In *Molina*, a former employee filed a wrongful termination action against his former employer. (*Id.* at p. 56.) That action was settled seven years later. (*Ibid.*) Pursuant to the parties' settlement agreement, the former employee was paid \$875,000 and rehired for one day for the sole purpose of allowing him to purchase service credits from PERS. (*Id.* at p. 57.) PERS denied his subsequent request for it to consider all or part (i.e., \$200,000) of his settlement pay as earnable compensation.⁴ (*Molina, supra*, 200 Cal.App.4th at p. 58.) The trial court denied his petition for writ of administrative mandate. (*Id.* at pp. 59-60.) On appeal, *Molina*, citing our decision in *Prentice*, concluded that even if \$200,000 of the settlement proceeds was considered "back pay," that would not necessarily increase his retirement benefits because the "payrate" for the position he held was \$8,527.98 per month and "was not affected by the settlement payout." (*Molina*, at p. 66.) *Molina* stated: "Because, under PERL, even if a portion of the settlement amount

conclusion in this case that Harron's individual settlement agreement does not constitute a "publicly available pay schedule" under section 20636, subdivision (b)(1).

⁴ The former employee's regular salary at the time of his termination was \$8,527.98 per month. (*Molina, supra*, 200 Cal.App.4th at p. 58, fn. 4.)

had been labeled back pay and was includible in taxable income, it could not be included in Molina's 'payrate' because there was no evidence that the amount was either (1) paid to similarly situated employees or (2) paid in accordance with a 'publicly available pay schedule[] . . . for services rendered on a full time basis during normal working hours.' (Gov. Code, § 20636, subd. (b)(1).)" (*Id.* at p. 67.) The factual differences between *Molina* and this case do not require a different application of the statutory definition of "payrate" in this case than that applied by *Molina*. Because the facts in *Prentice* and *Molina* are sufficiently similar to this case, they provide support for our conclusion that Harron's pay under the Settlement Agreement was not pursuant to a "publicly available pay schedule" and thus not part of his "payrate" or "compensation earnable" within the meaning of section 20636, subdivisions (a) and (b)(1).

B

We further conclude Harron's settlement payments were not based on the normal monthly rate or base pay paid to similarly situated members of the same group or class of employment and therefore not included within the definition of "payrate" and "compensation earnable" under section 20636, subdivisions (a) and (b)(1). In support of his assertion that other similarly situated members of his group or class received the base pay that he did, Harron argues that "his successor General Counsel didn't share 'similar' job duties; they shared the exact same job duties." Harron then notes his successor as the District's general counsel was paid \$514,421.52 during the same 12-month period that he was paid \$222,000 while on a leave of absence. Based on Harron's argument, we infer he

argues the only similarly situated member of his group or class is the District's general counsel during the 2008 to 2009 period. However, Harron omits from his argument that the general counsel during that period was a law firm and not an individual and, more importantly, was *not* an employee of the District or a member of PERS. Our review of the administrative record shows it is undisputed that the District's general counsel during that period was the outside law firm of "Garcia Calderon Ruiz." Therefore, under the PERL an outside law firm cannot be considered a "similarly situated *member*[]" of [Harron's purported] group or class of employment" within the meaning of section 20636, subdivision (b)(1).

Furthermore, as PERS contends, the Settlement Agreement did not identify any particular position or job title from which Harron would be on a leave of absence during the one-year period. It did not identify Harron as the District's general counsel. In any event, the record shows its general counsel was an outside law firm and not Harron or any other person. Because the record does not show Harron was a member of any group or class of similarly situated members, his pay pursuant to the Settlement Agreement cannot constitute 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" within the meaning of section 20636, subdivision (b)(1). For this additional reason, Harron's

Settlement Agreement pay does not constitute "payrate" or "compensation earnable" within the meaning of section 20636, subdivisions (a) and (b)(1).⁵

Based on the above reasoning, the payments Harron received under the Settlement Agreement did not, as a matter of law, constitute "compensation earnable" under section 20636 and therefore may not be included in the calculation of his retirement benefits under the PERL. Accordingly, the trial court erred by finding those payments must be included in calculating Harron's PERS retirement benefits.

IV

Remaining Contentions

Because we dispose of PERS's appeal on the above ground, we need not, and do not, address its alternative contentions for reversal of the judgment. Also, to the extent Harron implicitly asserts the judgment should be affirmed based on estoppel grounds, the trial court did not find PERS was estopped from concluding Harron's Settlement Agreement pay should be excluded in calculating his retirement benefits and, in any event, Harron has not presented any substantive legal and factual analysis persuading us PERS should be so estopped. In any event, we strongly doubt a government agency, such as PERS, can be estopped in the circumstances of this case where it does not have authority

⁵ As noted above, because Harron concedes his Settlement Agreement pay does not constitute "special compensation" under section 20636, subdivision (c), we do not address whether his pay qualifies as that other statutory component of "compensation earnable." In any event, based on our review of the record in this case, we strongly doubt a plausible, much less persuasive, argument could be made that his Settlement Agreement pay was "special compensation."

to pay retirement benefits in excess of that prescribed by statute. (Cf. *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 543 ["Because we . . . find section 20636 *did* at all times preclude PERS from treating Linhart's standby pay as pensionable compensation, we hold any award of benefits to Linhart based on estoppel is barred as a matter of law."]; *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870 [estoppel is not available against government agency without authority to do what it appeared to do]; *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 893 ["principles of estoppel are not invoked to contravene statutes and constitutional provisions that define an agency's powers"].)

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions the court vacate its order granting Harron's petition for writ of administrative mandamus and issue a new order denying that petition. PERS is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.