

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Philip K. Mosley (Respondent) established membership with CalPERS through employment with the City of Pomona in 1981 and City of Rancho Cucamonga in 1986. He retained his membership after separating from employment with the City of Rancho Cucamonga. Each of these cities contracts with CalPERS to provide benefits for their eligible employees.

On December 9, 1997, Respondent established membership with the San Bernardino County Employees' Retirement Association (SBCERA) through employment at the City of Big Bear Lake as Director of Community Services. SBCERA is a public entity that was established under the California County Employees' Retirement Law of 1937.

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

Respondent retired from service effective February 1, 2020, and he has been receiving his retirement allowance since May 4, 2020.

The City of Big Bear Lake had a publicly available pay schedule, and he was paid the highest salary allowed (i.e. the highest salary listed in the publicly available pay schedule for members of the group or class he was in). Over and above the salary, the City agreed to pay Respondent an amount to reimburse him for his contribution to the cost of health insurance. The City reported these payments as "Emp. Paid Flexible Benefit Plan" (flexible benefit payments) to CalPERS as part of his final compensation.

On April 17, 2020, CalPERS notified Respondent that CalPERS had excluded the flexible benefit payments from the calculation of his final compensation. This exclusion resulted in a reduction in Respondent's retirement allowance.

Thereafter, on April 22, 2020, Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on May 10, 2021. Respondent represented himself at the hearing. Respondent City did not appear at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS

answered Respondent's questions and clarified how to obtain further information on the process.

Respondent testified on his own behalf. He stated that he and the City agreed his flexible benefit payments were over and above his salary and that he was paid the highest salary allowed according to the publicly available pay schedule. On his pay stubs, there was an entry which included the flexible benefit payments and a deduction showing the payments were being withheld to pay his share of the cost of health insurance. Respondent contended that the flexible benefit payments were part of his regular pay. He also contended that the fact there was a deduction from his overall pay brings the flexible benefit payments within the statutory definition of payrate.

CalPERS presented evidence that the flexible benefit payments were not payrate and did not meet any of the definitions of "special compensation" found in California Code of Regulations (CCR) section 571(a). The payments were paid to Respondent to allow him to purchase health benefits and are not an item of allowable special compensation found in CCR section 571(a). CalPERS also presented evidence that the flexible benefit payments did not meet the exclusive, exhaustive criteria provided in CCR section 571(b), and none of the payments were included on the list provided in CCR section 571(a).

For these reasons, CalPERS argued the additional compensation did not constitute "compensation earnable" under the Public Employees' Retirement Law (PERL) and should not have been reported to CalPERS as final compensation for purposes of determining Respondent's CalPERS monthly retirement allowance.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent bore the burden of demonstrating that the compensation he seeks to have included in his final compensation qualifies under the PERL.

The ALJ held that Respondent did not meet his burden of proof. Specifically, the ALJ found that Respondent's flexible benefit is not payrate. According to Government Code section 20636(b)(1), payrate means, "the monthly rate of pay or base pay ... paid ... pursuant to publicly available pay schedules." A person's payrate cannot include amounts that are not paid "pursuant to publicly available pay schedules." Respondent was paid the highest salary allowed according to the terms of the publicly available pay schedule. That is the upper limit CalPERS can consider as payrate. Because Respondent's flexible benefit was paid over and above that limit, it did not qualify as payrate.

The ALJ similarly held that Respondent's flexible benefit is not special compensation. CCR section 571 provides an exclusive list of special compensation items. That list does not contain any reference to an employee benefit plan, a flexible benefit plan or a plan to off-set the cost an employee incurs to purchase health insurance.

Finally, the ALJ held that CalPERS is not required to use a “compensation earnable” calculation provided by a reciprocal retirement system.

Based on the evidence and the law, the ALJ ultimately concluded that Respondent’s flexible benefit is neither payrate nor special compensation, and it is not compensation earnable within the terms of Government Code 20636. Therefore, CalPERS correctly excluded the flexible benefit pay reported by SBCERA because it does not qualify as compensation earnable under the PERL. Accordingly, the ALJ denied Respondent’s appeal.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

September 15, 2021.

John Shipley
Senior Attorney