

ATTACHMENT A

THE PROPOSED DECISION

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

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

**STEPHEN M. LECOUBE and COUNTY OF SACRAMENTO,
Respondents**

Agency Case No. 2020-0664

OAH No. 2020100944

PROPOSED DECISION

Heather M. Rowan, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter via telephone and video conference on August 30, 2021, from Sacramento, California.

John Shipley, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Stephen M. LeCouve represented himself.

There was no appearance by or on behalf of the County of Sacramento (County). CalPERS established that it served the County with a Notice of Hearing.

Consequently, this matter proceeded as a default hearing against the County pursuant to Government Code section 11520, subdivision (a).

Oral and documentary evidence was received. The record was held open to allow respondent to determine whether the County would retroactively change the language in its contract with the Sacramento sheriffs' union. On January 5, 2022, the ALJ held a status conference. The parties agreed the matter would be submitted on the evidence received on August 30, 2021. On January 5, 2022, the record closed and the matter was submitted for decision.

ISSUE

Whether respondent established his final annual compensation included his canine handler pay the County reported.

FACTUAL FINDINGS

Background and Jurisdictional Matters

1. On August 14, 1989, by virtue of his employment with the City of Oakdale, respondent became a member of CalPERS. He remained a member of CalPERS through employment with a total of three cities until April 3, 2002. On March 24, 2002, respondent became a Deputy Sheriff for the County and thereby established membership with the Sacramento County Employees' Retirement System (SCERS).

2. CalPERS and SCERS 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 SCERS. He established reciprocity between CalPERS and SCERS effective July 15, 2002.

3. On December 20, 2019, respondent applied for service retirement with CalPERS, with an effective retirement date of December 30, 2019. He had 12.839 years of CalPERS service when he retired. Respondent began receiving his retirement allowance on or around April 5, 2020.

4. As part of the retirement process, the County remitted a "Retirement Salary Request Form" to CalPERS. The County submitted documentation to support respondent's final average compensation, which identified the components of respondent's final compensation between December 27, 2018, and December 28, 2019. In addition to respondent's regular salary, respondent received: "Holiday in Lieu Paid Over Max;" "Vacation Paid Over Max;" "Animal Allowance;" "Clothing Allowance;" "10% K-9 Handler;" and "20% Educational Incentive."

5. By letter dated March 13, 2020, CalPERS informed respondent that not all the compensation SCERS reported is pensionable for purposes of his CalPERS retirement. Specifically, CalPERS denied the amounts reported as: "Vacation Paid Over Max;" "Animal Allowance;" and "10% K-9 Handler."¹ Based on the Public Employees' Retirement Law (PERL), these amounts are not "compensation" for purposes of determining respondent's retirement benefit amount. Because his compensation did

¹ Animal Allowance was renamed 10% K-9 Handler in October 2019. They represent one allowance and are referred to herein as the "canine allowance."

not fit within the PERL's definition of compensation or pensionable "special compensation," it was excluded. The letter also informed him of his appeal rights.

6. Respondent appealed CalPERS's determination as to his canine allowance and requested an administrative hearing. On September 17, 2020, Renee Ostrander, Chief of CalPERS's Employer Account Management Division, signed and thereafter filed a Statement of Issues seeking to confirm respondent's final average compensation. The matter was set for an evidentiary hearing before an Administrative Law Judge of OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

CalPERS's Evidence

7. Sara Fleming is an Associate Government Program Analyst with CalPERS's Compensation and Compliance Unit. She reviews payroll information for CalPERS members when they retire to ensure all compensation complies with CalPERS's laws and regulations.

8. When a member retires for reciprocal service, he must retire simultaneously with CalPERS and, in this case, SCERS. He receives a retirement benefit amount from CalPERS and a separate amount from SCERS. CalPERS must apply its own rules to calculate compensation, regardless of the reciprocal entity's rules.

9. Ms. Fleming's department reviews the compensation employers report and ensures each aspect qualifies as either regular compensation or special compensation, which are defined by statute and regulation. Compensation earnable is the payrate found in a publicly available pay schedule and special compensation must fit within the statutory list that "exclusively identifies" the types of payments that can and should be included in the member's final average compensation.

10. To include respondent's canine allowance, it must be listed in California Code of Regulations, title 2, section 570 (Section 570), subdivision (a), and must comply with all the requirements in subdivision (b). Ms. Fleming determined respondent's canine-related allowance is listed in subdivision (a)(4),² but does not comply with Section 570, subdivision (b)(4), which states any item of special compensation must be for work "[p]erformed during normal hours of employment."

11. In the 2019 "Addendum #1 to the 2018-2021 Agreement between [the County] and the Sacramento County Sheriffs' Association in the Non-Supervisory Law Enforcement Unit," (MOU), the parties re-negotiated how canine handlers would be compensated. Canine handlers were previously "deemed to have spent ten (10) hours of scheduled work per month in ordinary care and informal training that cannot be performed during regularly scheduled hours." Effective October 2019, rather than being deemed to spend 10 hours caring for the dog, the canine handlers were awarded a 10-percent pay differential for time spent "in ordinary care and informal training that cannot be performed during regularly scheduled hours."

² Under "Special Assignment Pay," Section 570, subdivision (a)(4), includes:

Canine Officer/Animal Premium - Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to handle, train and board a canine or horse. Compensation shall not include veterinarian fees, feed or other reimbursable expenses for upkeep of the animal.

12. Ms. Fleming determined the canine allowance did not qualify as special compensation because, under the MOU, the allowance is for care that cannot be performed during regular working hours. The canine allowance was therefore excluded. She added that if the same 10-percent differential were given for work performed during regular working hours, the amount would be pensionable.

Respondent's Evidence

13. Respondent understands the language in Section 570 as well as in the MOU. He believes, however, that the language in the MOU does not reflect the parties' intent. When re-negotiating the language, the parties intended that the canine allowance would be pensionable.

14. Respondent believes the County also intended to recognize the danger presented to canine handlers. The 10-percent differential is not to care for the dog in off-work hours, but is akin to hazard pay, which is pensionable.

15. Although this was the parties' intent, the language is not accurate. Respondent believes the intent was to delete the language: "that cannot be performed during regularly scheduled hours." While he attempted to find some resolution through the County or his union, he was unable to do so. He is currently awaiting the outcome of litigation between the County and the union to correct the inaccuracies in the MOU, including as applied to the canine allowance.

Analysis

16. The essential facts in this matter are not in dispute. Respondent is a reciprocal member of CalPERS and is entitled to use his County pay to establish his CalPERS retirement benefit. SCERS reported respondent's "final average

compensation” for his last 12 months and included his canine allowance. His union’s MOU with the County states the canine allowance is a 10-percent differential awarded to canine handlers for animal care “that cannot be performed during regularly scheduled hours.”

17. Respondent persuasively testified that the MOU does not reflect the parties’ agreement that the differential was hazard pay, not overtime to care for an animal. The language in the MOU captures that purpose, in part. Without an amended agreement or direction from the County, however, the only evidence available is the MOU as written. On that basis, respondent’s appeal must be denied.

LEGAL CONCLUSIONS

Burden 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 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 his animal allowance should be included in his final compensation calculation.

Applicable Laws

2. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions and by interest and other earnings on those contributions. 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 rate to the payroll of the agency. Using actuarial assumptions specified by law, the CalPERS Board of Administration sets the employer contribution rate on an annual basis.

3. 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 may review the salary the employer reported for the member to ensure that only those items allowed under the PERL will be included in the member's "final compensation" for purposes of calculating the monthly retirement allowance.

4. Under Government Code section 20636, the following definitions apply:

(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.

[¶] . . . [¶]

(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.

[¶] . . . [¶]

(3) Special compensation shall be for services rendered during normal working hours . . .

[¶] . . . [¶]

(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.

[¶] . . . [¶]

5. California Code of Regulations, title 2, section 571 provides, in pertinent 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:

[¶] . . . [¶]

(4) SPECIAL ASSIGNMENT PAY

[¶] . . . [¶]

Canine Officer/Animal Premium - Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to handle, train and board a canine or horse. Compensation shall not include veterinarian fees, feed or other reimbursable expenses for upkeep of the animal.

[¶] . . . [¶]

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

[¶] . . . [¶]

(4) Performed during normal hours of employment;

[¶] . . . [¶]

(d) If an items [*s/c*] 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.

6. No evidence appearing to support respondent's argument that the canine allowance is hazard pay, CalPERS must, as a matter of law, exclude the canine allowance. Respondent did not meet his burden to prove he is entitled to final compensation that includes his animal allowance.

ORDER

Stephen LeCouve's appeal of CalPERS's determination of his retirement benefit is DENIED.

DATE: January 10, 2022

Heather M. Rowan
Heather M. Rowan (Jan 10, 2022 11:07 PST)

HEATHER M. ROWAN

Administrative Law Judge

Office of Administrative Hearings