

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Application to Receive  
Refund of Monetary Credits by:

HON. CHRISTOPHER J. WARNER,  
  
Respondent.

Case No. 2011-0999

OAH No. 2012020693

(STATEMENT OF ISSUES)

**PROPOSED DECISION**

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge, Office of Administrative Hearings, in San Bernardino, California on July 3, 2012.

Hon. Christopher J. Warner, retired judge (respondent), personally appeared and was represented by Michael J. Bidart, Esq. and Jeffrey I. Ehrlich, Esq.

CalPERS' Senior Staff Counsel Renee Salazar, Esq., represented the California Public Employees' Retirement System (CalPERS).

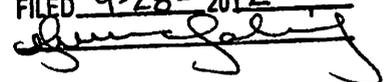
Oral and documentary evidence was received on July 3, 2012, and the record remained open so the parties could submit written closing briefs. The closing briefs were received and the matter was deemed submitted on July 31, 2012.

**FACTUAL FINDINGS**

1. Karen Defrank made and filed the Statement of Issues while acting in her official capacity as Chief of the Customer Account Services Division of CalPERS.

2. Respondent was employed by the County of San Bernardino as a Superior Court Judge. By virtue of this employment respondent is a member of the Judges' Retirement System II (JRS II).

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FILED 9-28-2012



3. Respondent's employment as a Superior Court Judge with the County of San Bernardino began on July 29, 1996, and continued until his disability retirement on October 22, 2010.

4. By letter, dated October 28, 2010, CalPERS notified respondent of the following:

Dear Judge Warner:

The Judges' Retirement System II (JRS II) has received notification from the Commission on Judicial Performance (CJP) that you have been approved for a Disability Retirement, effective October 22, 2010.

**Allowance Payable**

Pursuant to Government Code section 75560.1, you are entitled to receive a monthly allowance equivalent to 65% of your final compensation, which is an average of your salary for the previous 12 months. Based on the judicial monthly salary of \$14,899.08, you are entitled to receive a monthly allowance of \$9,684.40. . . . (Exh. I)

5. On November 8, 2010, respondent filed his Judges' II Disability Retirement Application with CalPERS and, thereafter, began receiving monthly disability retirement payments from CalPERS in the amount of 65% of his final compensation in addition to cost of living advances (COLA's)

6. On May 10, 2011, respondent signed, and thereafter submitted to CalPERS, a "Distribution of JRS II Contributions or Monetary Credits" form requesting a refund of his JRS II retirement contributions or monetary credits in addition to the continued receipt of his monthly disability retirement payments.

7. By letter, dated June 9, 2011, CalPERS responded to respondent's refund request, as follows:

Dear Judge Warner:

I am responding to your letter dated May 10, 2011. You have requested to receive a distribution of your Monetary Credits with no interruption to your disability retirement.

The disability retirement benefit provided by Government Code (GC) section 75560.4 of the Judges' Retirement Law is provided in lieu of service retirement

of any other benefit. . .

. . . you applied for and were approved to receive a disability retirement by the Commission on Judicial Performance. Under GC section 75560.4(2), you were entitled to a disability retirement allowance equal to sixty-five percent of your final compensation [footnote omitted]. This benefit was paid to you beginning on October 22, 2010, forfeiting your right to receive a distribution of Monetary Credits. (Exh. E)

8. Respondent timely appealed from CalPERS' determination that he was not entitled to receive both his disability retirement benefits and a refund of his monetary credits, and the instant hearing ensued.

9. The issue in this matter is a legal issue: whether the statutes governing respondent's retirement entitle respondent to a refund of his monetary credits in addition to continued receipt of his disability retirement allowance?

#### LEGAL CONCLUSIONS

Respondent retired pursuant to California Government Code Article 4: Disability Retirement, which contains Government Code sections 75560 through 75564. Government Code section 75560.4, entitled "Benefit Factor" defines the amount of retirement allowance a disability retiree "shall" receive. That section provides:

(a) A judge who retires for disability **shall** receive a retirement allowance in an amount equal to the lower of the following:

(1) The benefit factor under subdivision (d) of Section 75522 multiplied by the judge's final compensation on the effective date of the disability retirement, multiplied by the number of years of service the judge would have been credited if the judge's service had continued to the age the judge would have first been eligible to retire under subdivision (a) of Section 75522.

(2) Sixty-five percent of the judge's final compensation on the effective date of the disability retirement.

(b) Notwithstanding subdivision (a), the retirement allowance of a judge who retires for disability shall equal 65 percent of the judge's final compensation on the effective date of the disability retirement regardless of the judge's age or length of service, if the Commission

on Judicial Performance determines that the disability is predominantly a result of injury arising out of and in the course of judicial service. (emphasis added)

Government Code section 75522, which was cross-referenced in Government Code section 75560.4, describes the benefit factor available to a judge who is eligible to retire upon attaining both 65 years of age and 20 or more years of service, or upon attaining 70 years of age with a minimum of five years of service. Pursuant to Government Code section 75522, (c) a judge who retires pursuant to section 75522 may elect to receive either a lifetime retirement allowance or the amount of his or her monetary credits determined pursuant to Government Code section 75520, not both. In fact, pursuant to Government Code section 75522, subdivision (f), "If a retired judge fails or refuses to make an election pursuant to subdivision (c) within the time allowed, he or she shall be deemed to have elected to receive a monthly retirement allowance . . . ."

The mandatory word "shall," as used by the legislature in Government Code section 75560.4, in conjunction with the lack of a provision allowing a judge receiving disability retirement to determine whether to take a monthly retirement allowance or refund of his monetary credits, evidences the legislative intent that a judge who retires based on disability may not elect to have his monetary credits refunded; rather, he shall receive a monthly retirement allowance and nothing more. In contrast, a judge who retires pursuant to Government Code section 75522 may elect to receive either a monthly retirement allowance or his monetary credits, but not both.

Further evidence for the fact that monetary credits and monthly retirement allowances are two separate "retirement options" may be gleaned from the language of Government Code section 75521, which controls "early retirement." Pursuant to Government Code section 75521, subdivision (a), a judge who leaves office before ". . . accruing at least five years of service shall be paid the amount of his or her contributions to the system, and no other amount." A judge who leaves judicial office after accruing five or more years of service but before they are eligible to retire under Government Code section 75522 "shall be paid the amount of his or her monetary credits determined pursuant to Section 75520 . . . ." Monetary credits are defined by Government Code section 75520 as follows:

- (a) A judge shall, monthly, accrue monetary credits equal to 18 percent of the judge's monthly salary.
- (b) To the total monetary credits in each judge's account, an additional amount shall be credited monthly at a rate, not less than zero, equal to the annual net earnings rate achieved by the Judges' Retirement System II Fund on its investments of moneys in the Judges' Retirement System II Fund during the preceding fiscal year.

Comparing and contrasting the Government Code provisions governing early retirement, regular retirement, and disability retirement leads to the inescapable conclusion that only a judge who qualifies for regular retirement pursuant to Government Code section 75522 may elect between receiving either his monetary credits, determined pursuant to Government Code section 75520, or a monthly retirement allowance equal to the benefit factor multiplied by the judge's final compensation, multiplied by the number of years of service credit. Judges who retire early or who retire based on disability do not have such an election. Early retiring judges are only entitled to their monetary contributions (if they have less than five years on the bench) or their monetary credits (if they have five years or more on the bench) and judges who retire based on disability are only entitled to receive the lower of the following:

(1) The benefit factor under subdivision (d) of Section 75522 multiplied by the judge's final compensation on the effective date of the disability retirement, multiplied by the number of years of service the judge would have been credited if the judge's service had continued to the age the judge would have first been eligible to retire under subdivision (a) of Section 75522.

(2) Sixty-five percent of the judge's final compensation on the effective date of the disability retirement.

(b) Notwithstanding subdivision (a), the retirement allowance of a judge who retires for disability shall equal 65 percent of the judge's final compensation on the effective date of the disability retirement regardless of the judge's age or length of service, if the Commission on Judicial Performance determines that the disability is predominantly a result of injury arising out of and in the course of judicial service. (G.C. § 75560.4)

Respondent is currently receiving sixty-five percent of his final compensation on the effective date of his disability retirement with COLA's and he is not entitled to receive anything more.

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ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Respondent's appeal is denied.

Dated: September 27, 2012

A handwritten signature in black ink, reading "Roy W. Hewitt". The signature is written in a cursive style with a large initial "R".

ROY W. HEWITT  
Administrative Law Judge  
Office of Administrative Hearings