

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Calculation of Final
Compensation of:

LLOYD KUHN,

Respondent,

and

SANGOR UNIFIED SCHOOL DISTRICT,

Respondent.

CalPERS Case No. 9398

OAH No. 2012010350

PROPOSED DECISION

This matter was heard before Administrative Law Judge Ann Elizabeth Sarli, State of California, Office of Administrative Hearings, on August 2, 2012, in Fresno, California.

Jeanlaurie Ainsworth, Senior Staff Counsel, represented the complainant Marion Montez, Assistant Division Chief of the Customer Account Services Division, California Public Employees' Retirement System (CalPERS).

Brian Martin, Esq., represented respondent Lloyd Kuhn who was present.

There was no appearance by or on behalf of respondent Sangor Unified School District (District).¹

Evidence was received and the record remained open for parties to submit written closing arguments. On October 5, 2012, CalPERS filed its Closing Brief, which was marked as Exhibit 27. On that same date, respondent filed his Post Hearing Brief, which was marked as Exhibit D.

The record closed on October 5, 2012, and the matter was submitted for decision.

¹ The matter proceeded as a default against respondent Sangor Unified School District pursuant to Government Code section 11520.

PROCEDURAL FINDINGS

1. The District contracted with the CalPERS Board of Administration (Board) to participate as a public agency member pursuant to Government Code section 20063. The provisions for local public agencies contracting with CalPERS are set forth in the Public Employees' Retirement Law (PERL), Government Code section 20500 et seq. By virtue of his employment with the District, respondent is a member of CalPERS and subject to all provisions of the PERL.
2. On June 9, 2008, CalPERS received respondent's Service Retirement Election Application. Respondent retired for service effective July 26, 2008, and has been receiving a retirement allowance since that date. Subsequent to July 26, 2008, respondent and CalPERS corresponded multiple times regarding calculation of his final compensation and whether certain compensation which the District had included in respondent's monthly pay rate was properly reported as compensation and should be taken into consideration in determining his final compensation.
3. On February 19, 2009, CalPERS advised respondent and the District in writing that certain items of compensation would not be included in his monthly payrate.
4. Respondent timely appealed the CalPERS determination. Marion Montez made and filed a Statement of Issues in her official capacity.
5. The matter was set for hearing before the Office of Administrative Hearings, an independent adjudicative body, pursuant to Government Code section 11500 et seq.

ISSUES

The parties raised several issues in the Statement of Issues and in respondent's Letter of Appeal. Some of the issues were settled prior to hearing and some were waived at hearing. The remaining issues are:

- A. Should the automobile allowance the District paid to respondent be included in his final compensation for purposes of calculating his retirement allowance?
- B. Should the step and column increase identified in respondent's contract with the District be included in his final compensation for purposes of calculating his retirement allowance?

FACTUAL FINDINGS

1. Between 2003 and his retirement in July 2008, respondent was employed as the Deputy Superintendent of the District. He also led the District's Business Department, which encompassed a wide range of functions including fiscal affairs, budgeting, personnel, labor relations, physical plant and facilities planning and development.

2003 Employment Contract

2. Respondent and the District entered into a three-year "Employment Agreement Deputy Superintendent Contract" dated October 28, 2003 (2003 contract). The pertinent parts of the contract are set forth below:

Under the heading "Salary," the 2003 contract provided:

The...annual base salary shall be \$110,000 ... the salary shall be increased annually based on the average step and column increase of the certificated salary schedule. This increase shall be effective beginning July 1, 2004 and continue July 1 of each contract year thereafter unless modified in writing by the parties."

Under the heading "Automobile Mileage Allowance," the 2003 contract provided:

The Deputy Superintendent is required to have a vehicle available at all times to exercise his powers and to perform his duties both inside and outside of the district. In order to reimburse [him] for this vehicle requirement, [he] shall be entitled to a ... \$750 monthly vehicle allowance to cover reasonable transportation expenses incurred for travel required by [his] employment, including expenses for repairs, gasoline, license, insurance and all other costs associated with the operation of an automobile.

Under the heading "Fringe Benefits," the 2003 contract provided:

In the final year of the Deputy Superintendent's employment... [he] may elect to roll into his salary the value of all non-salary benefits including, but not limited to... the automobile allowance.

2006 Employment Contract

3. On August 8, 2006, respondent and the District entered into a three-year "Employment Agreement Deputy Superintendent Contract" (2006 contract). Under the heading "Salary," the salary was identified as \$125,236. The language regarding the annual increase in salary based upon the average step and column increase of the certificated salary schedule was identical to the 2003 contract. The language regarding provision of an automobile mileage allowance was identical to the 2003 contract.

Under the heading "Fringe Benefits," the 2006 contract differed from the 2003 contract in that it allowed respondent to elect to convert the automobile mileage allowance to salary at any time. The 2003 contract had allowed him to do so in his final year of employment. The 2006 contract provided:

At his discretion, the Deputy Superintendent may elect to convert the value of all non-salary benefits including, but not limited to ... the automobile allowance into salary.

2007 Employment Contract

4. On June 26, 2007, respondent and the District entered into a three-year "Employment Agreement Deputy Superintendent Contract" (2007 contract). Under the heading "Salary," the salary was identified as \$140,000. The "Salary" section further stated:

The 2007 base salary shall be increased by a percentage equal to that granted to all other administrative employees as the result of negotiations. The salary shall be increased annually based on the average step and column increase of the certificated salary schedule and the percentage of increase granted to all other administrative employees as the result of negotiations. This increase shall continue July 1 of each contract year hereafter unless modified in writing by the parties.

The language regarding provision of an automobile mileage allowance was identical to the 2003 and 2007 contracts.

Under the heading "Fringe Benefits," the 2007 contract provided:

The value of any provided benefits including, but not limited to...the automobile and expense allowances, will be considered salary in addition to any base salary...

CalPERS Determination – Automobile Mileage Allowance

5. The District reported to CalPERS respondent's automobile mileage allowance in his payrate. CalPERS determined that the automobile mileage allowance did not meet the requirements to qualify as special compensation or payrate, and therefore should not be included in the payrate and the determination of respondent's final compensation. Respondent asserted that the automobile mileage allowance qualifies as special compensation because it is a payment for respondent's "special skills, knowledge, abilities and work assignments, work days and hours and other work conditions." Respondent stressed the unique character of his dual position as Deputy Superintendent and the person overseeing the District's business affairs. He asserted that the automobile mileage allowance is special compensation for these duties.

6. On the basis of the contract language alone, the automobile mileage allowance is specifically a monthly payment to compensate respondent for the use of his automobile on District business. As set forth in the Legal Conclusions, this type of compensation is excluded from special compensation or payrate. It is also clear from respondent's contracts that he was given the purported ability to "convert" automobile mileage allowance to salary

when it was financially advantageous for him to do so, and that he designated the automobile mileage allowance as salary in the final year of his employment in an attempt to enhance his final compensation, and thus his retirement benefit. As set forth in the Legal Conclusions, the conversion of employee benefits to payrate in anticipation of the separation from employment constitutes final settlement pay and is not included in special compensation.

CalPERS Determination –Step and Column Increase

7. The District did not report to CalPERS a step and column increase for respondent in his payrate the year June 26, 2007 through June 26, 2008, nor did the District pay respondent a step and column increase during that period. District Payroll Supervisor Vicky Lacy testified that, because respondent negotiated a new base salary of \$140,000 for the year June 26, 2007 through June 26, 2008, he received a 5.47 % increase in his salary from the previous year and thus did not get a step and column increase. Respondent maintained that the District is obligated to pay him the step and column increase pursuant to his contract, in addition to any salary increase he negotiated. Respondent has made a Government Claim against the District for this compensation and requests that the District be ordered to report to CalPERS the additional compensation in his payrate. The issue of whether the District complied with any contractual obligation to respondent is not before this forum. The Administrative Law Judge has no jurisdiction to decide the issue of what respondent should have been paid pursuant to his contract with the District.

8. Respondent argued in his closing brief that this hearing should remain open to give him an opportunity to resolve his contract claim with the District. He represented that he filed a Government Claim on October 3, 2012, four months after the hearing. Respondent's request to stay these proceedings is denied as untimely.

9. As set forth in the Legal Conclusions, final compensation cannot exceed what the member has earned and been paid. CalPERS may not include unpaid compensation in its calculations of respondent's final compensation.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198). The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) "final compensation." (Gov. Code, §§ 20037, 21350, 21352, 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)

2. Government Code section 20630 defines "compensation" 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 holidays, sick leave, industrial disability leave, vacation, compensatory time off, and leave of absence. Compensation shall be reported in accordance with section 20636 and shall not exceed compensation earnable, as defined in section 20636. (Gov. Code, § 20630, subs. (a) & (b).)

3. “Compensation earnable” is composed of: (1) pay rate, and (2) special compensation, as defined in Government Code section 20636.

4. “Pay rate” 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. “Pay rate” 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 schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e). (Gov. Code, § 20636, subd. (b)(1).)

5. “ ‘Special compensation’ of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.” (Gov. Code, § 20636, subd. (c)(1).)

“Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, 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).” (Gov. Code, § 20636, subd. (c)(2).)

“Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.” (Gov. Code, § 20636, subd. (c)(3).)

6. “The board shall promulgate regulations that delineate more specifically and exclusively what constitutes ‘special compensation’ as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee . . . shall be included as special compensation and appropriately defined in those regulations.” (Gov. Code, § 20636, subd. (c)(6).)

7. Special compensation does not include: “(A) Final settlement pay, (B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise, or (C) Other payments the board has not affirmatively determined to be special compensation.” (Gov. Code, § 20636, subd. (c)(7).)

8. A “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. (Gov. Code, § 20636, subd. (e)(1).)

9. “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 employees, 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...” (Gov. Code, § 20636, subd. (e)(2).)

10. California Code of Regulations, title 2, section 570 defines “Final Settlement Pay” to mean any pay or cash conversions of employer benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reported to CalPERS, in either pay rate or compensable earnable. (Gov. Code, § 20636, subd. (f).)

11. California Code of Regulations, title 2, section 571 exclusively identifies and defines special compensation items for members employed by a contracting agency that must be reported to CalPERS if they are contained in a written labor policy or agreement. (Cal. Code Regs., tit. 2, § 571, subd. (a).) The Board has determined that all items of special compensation listed in subsection (a) are:

- (1) Contained in a written labor policy or agreement;
- (2) Available to all members in the group or class;
- (3) Part of normally required duties;
- (4) Performed during normal hours of employment;
- (5) Paid periodically as earned;
- (6) Historically consistent with prior payments for the job classification;
- (7) Not paid exclusively in the final compensation period;
- (8) Not final settlement pay; and
- (9) Not creating an unfunded liability over and above PERS’ actuarial assumptions.

(Cal. Code Regs., tit. 2, § 571, subd. (b).)

California Code of Regulations, title 2, section 571, subdivisions (c) and (d) provide:

- (c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).
- (d) If an item 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.

Automobile Mileage Allowance

12. As set forth in the Findings and Legal Conclusions, respondent's automobile mileage allowance was not special compensation as defined in California Code of Regulations, title 2, section 571, subdivision (a). This compensation was not a payment for regular duties, but was reimbursement for the use of a vehicle. Additionally, respondent and the District deemed this compensation as "salary" exclusively in the final compensation period (Cal. Code Regs., tit. 2, § 571, subd. (a) (7)) and thus it constitutes final settlement pay pursuant to California Code of Regulations, title 2, sections 570 and 571, subdivision (a) (8), and Government Code, section 20636, subdivision (f).

13. In *Hudson v Board of Administration* (1997) 59 Cal. App. 4th 1310, the court explained that in 1993, the legislature added benefits conversions to the definition of final settlement pay. (Cal. Code Regs., tit. 2 § 570 and Gov. Code, § 20636, subd. (f).) The court found that the converted benefits at issue in that case were remuneration in excess of regular salary, given in connection with retirement. "As we have previously concluded, the Legislature did not intend to permit PERS members to obtain enhanced retirement benefits by recharacterizing as salary final year fringe benefits that normally would be excluded from compensation. We therefore construe the statute to exclude the converted benefits from compensation notwithstanding the rule of liberal construction." *Hudson v Board of Administration, Id.* at p. 1325.

14. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement, absent a statutory provision to the contrary. (*Greator v. Board of Administration* (1979) 91 Cal.App.3d 54, 57.) Respondent did not meet his burden to establish that compensation he received for automobile mileage allowance was properly included as compensation earnable for the purpose of calculating his retirement benefits.

15. As set forth in the Findings and in the Legal Conclusions, CalPERS properly determined that the automobile mileage allowance should be excluded from respondent's payrate and final compensation for the purposes of calculating his retirement benefit.

Step and Column Increase

16. As set forth in the Findings and Legal Conclusion 4, the step and column increase identified in respondent's 2007 contract was not paid to respondent in the contract year and was not reported to CalPERS as part of respondent's payrate. As set forth in Government Code, section 20636, subdivision (b)(1), "payrate" consists of the base pay *paid in cash*. (italics added)

17. As set forth in the Findings and in the Legal Conclusions, CalPERS properly determined that the step and column increase identified in respondent's 2007 contract should not be included as compensation earnable in the 2007 contract year for the purpose of calculating respondent's retirement benefits.

18. Respondent did not meet his burden to establish that the step and column increase identified in respondent's 2007 contract should be included as compensation earnable in the 2007 contract year for the purpose of calculating respondent's retirement benefits.

ORDER

The appeal of respondent Lloyd Kuhn to include his automobile mileage allowance and a step and column increase in his payrate and final compensation for purposes of calculation of his service retirement allowance is DENIED.

The decision of CalPERS to exclude respondent's automobile mileage allowance from his payrate and final compensation for purposes of calculation of his service retirement allowance is UPHeld.

The decision of CalPERS to exclude a step and column increase for the contract year 2007-2008 from respondent's payrate and final compensation for purposes of calculation of his service retirement allowance is UPHeld.

DATED: October 26, 2012


ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings