

ATTACHMENT A
PROPOSED DECISION

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

In the Matter of the Appeal Regarding
Reportable Compensation to Determine the
Final Compensation of:

NADINE P. LEVIN,

Respondent,

and

CITY OF MOUNTAIN VIEW,

Respondent.

Case No. 2011-0224

OAH No. 2012100476

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, State of California, on November 7, 2012, in Sacramento, California.

Carol A. McConnell, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS or petitioner).

Nicole Clemens, Deputy City Attorney, represented the City of Mountain View and Nadine P. Levin (respondent), who was present.

Evidence was received and the record remained open for parties to submit written closing arguments. Respondents' Posthearing Brief was received on December 7, 2012, and marked as Exhibit J for identification. CalPERS' Closing Brief was received on January 7, 2013, and marked as Exhibit 14 for identification. Respondents' Reply Brief was received on January 18, 2013, and marked as Exhibit K for identification. The record was closed and the matter was submitted on January 18, 2013.

ISSUES

Whether an automobile allowance paid by the City of Mountain View to respondent was special compensation, and properly included as compensation earnable for purposes of calculating her service retirement.

Whether the short-term pay respondent received for her assumption of additional responsibilities as the Interim Employee Services Director for the City of Mountain View was special compensation, and properly included as compensation earnable for purposes of calculating her service retirement.

FACTUAL FINDINGS

1. The Statement of Issues was made and filed on October 9, 2012, by Renee Ostrander, Assistant Division Chief of the Retirement Account Services Division, California Public Employees' Retirement System. She did so in her official capacity.

2. The City of Mountain View (City) contracted with the CalPERS Board of Administration to participate as a public agency member pursuant to Government Code section 20460 et seq. The provisions for local public agencies contracting with CalPERS are set forth in the Public Employees' Retirement Law (PERL).

3. Respondent was employed by the City as the Assistant City Manager. By virtue of this employment, respondent became a local miscellaneous member of CalPERS subject to the provisions of the Government Code.

4. On or about May 11, 2010, CalPERS received respondent's Service Retirement Election Application (application). Respondent retired for service effective June 4, 2010. She has been receiving a retirement allowance since that date.

CalPERS' Final Compensation Determination

5. When respondent submitted her service retirement application, the amount of her "payrate" as reported by the City was higher than the "payrate" for her position as shown on the City's pay schedules. Consequently, the CalPERS system automatically triggered a request to the CalPERS Compensation Review Unit (CRU) for review of the amounts. It was assigned to Andrew McDuffie, a Retirement Program Specialist II and Compensation Review Analyst. Mr. McDuffie has worked for CalPERS for 14 years, and has been in the CRU since 2005. His duties include performing base compensation calculations and determining whether final compensation reported to CalPERS is accurate.

6. Mr. McDuffie determined that the City's Salary Plan and Position Listing for the Assistant City Manager position showed a bi-weekly payrate of \$7,308.96, which equated to \$15,836.08 per month. However, the City reported different monthly payrates for respondent. This was because the City included merit pay (10 percent of respondent's salary) which added \$1,583.60 per month. The City included this amount in her payrate, although it should have been separately reported to CalPERS as an item of special compensation. When respondent's merit pay was added to her payrate, it increased her monthly salary to \$17,419.68 per month. This amount is not at issue.

7. Mr. McDuffie made the following additional determinations that are pertinent to this case. First, the City paid respondent bi-weekly payments of \$240, which equated to \$520 per month, as an auto allowance. The CRU determined that such auto allowances could not properly be included in the calculation of compensation earnable, or used in final compensation to determine respondent's service retirement allowance.

Second, the City paid respondent \$401.99 bi-weekly, which equated to \$870.98 per month, as short-term pay. The short-term pay was to compensate respondent for serving as both the Assistant City Manager and the Employee Services Director for five months during her final compensation period, from January 4, 2010, until she retired on June 4, 2010. The CRU determined that under the PERL, such pay was payment for overtime, and therefore not properly included in the calculation of compensation earnable, or used in final compensation to determine service retirement allowance.

8. By letter dated September 29, 2010, respondent and the City were notified of CalPERS' determinations and were advised of their appeal rights. By letter dated October 28, 2010, the City filed a timely appeal on behalf of itself and respondent, and requested an administrative hearing. The Statement of Issues confirmed that the appeal is limited to the issue of "whether the auto allowance pay and/or short-term pay can be included in respondent Levin's compensation earnable and thus included in her final compensation for the calculation of her service retirement allowance."

Background and History – Auto Allowance

9. The auto allowance has been provided to City department heads since at least 1989. The City Council approved additional compensation for its department heads in the amount of \$520 per month, and referred to it as an auto allowance. The City explained that although termed an "auto allowance," the amount exceeds the actual expense of department head use of their personal vehicles for City business within the San Francisco Bay Area. The allowance does not require submission of auto expenses or mileage. If a department head travels outside the Bay Area, the City reimburses for actual travel expenses and mileage.

The City Council considered the City's auto allowance policy on its November 28, 1989 agenda, and adopted City staff's recommendation that the payments be made as additional pay and included in the bi-weekly payroll. It was reported on the recipient's W-2 as taxable income. Respondent began receiving the auto allowance when she began working for the City in 1989.

10. CalPERS Audit. In 1996, CalPERS audited the membership and payroll reporting process as it related to the City's contract with CalPERS. In its draft audit report, CalPERS made a finding that the auto allowance was not reportable compensation. The City disagreed. By letter dated September 20, 1996, the City's Finance and Administrative Services Director, Robert Locke, explained to CalPERS that this pay was intended to increase the base compensation of eligible employees, and to the extent the allowance paid exceeded actual travel costs, it was appropriately considered compensation. CalPERS

concluded at that time that the allowance constituted reportable compensation. It removed the finding from the final audit report.

11. City Resolution. Following the 1996 audit, the City adopted a resolution to memorialize the audit finding that the auto allowance was compensation. The intent was to eliminate any future confusion over the issue. In a June 29, 1999 staff report to the City Council regarding compensation amendments, staff recommended that the City Council “clarify that auto allowance is compensation paid in recognition of the fact that department head and Council appointees are required to use their personal vehicles for City business without receiving mileage reimbursement.” By resolution, the City Council approved this intent and designated such payment as “‘special compensation’ as defined in Government Code Section 20636.”¹ The City averred that it consulted CalPERS on the language included in the resolution. Michael Martello was the City Attorney at that time. He testified that he was involved with the 1999 resolution. He was aware of the earlier CalPERS audit finding and believed it was important to memorialize that the auto allowance was a “PERSable” benefit. He understood that City staff had consulted with a reliable CalPERS employee to have the resolution language “checked” by CalPERS. Mr. Martello understood that CalPERS was very particular about any language included in resolutions.

12. Subsequent to the 1996 audit and the 1999 resolution, the City continued to report the amount of auto allowance as compensation. It has reported the auto allowance in this way to CalPERS for over 14 years, and paid CalPERS contributions on the amount.

13. In early 2010, the issue of auto allowance arose in the context of calculating a different City retiree’s final compensation. CalPERS concurred with the City that the auto allowance was special compensation. On May 6, 2010, Patty Kong, the City’s Director of Finance and Administrative Services, spoke with Angel Gutierrez with the CalPERS CRU. Mr. Gutierrez agreed that the auto allowance could properly be included in respondent’s retirement compensation. Ms. Kong confirmed her understanding with Mr. Gutierrez in writing on May 21, 2010. The City believes that CalPERS changed its position only after Mr. McDuffie was assigned to the City’s account and expressed a different opinion.

Background and History – Short-Term Pay

14. Respondent received five percent of her salary as compensation for her assumption of additional duties to serve as the Interim Employee Services Director while also serving in her regular position as Assistant City Manager. This was in accordance with the City’s short-term pay policy, adopted in 1993, which authorizes the City Manager to approve short-term pay adjustments, in an amount of up to 10 percent for a maximum of one

¹ The pertinent language of the 1999 City Resolution states:

It is the intent of Council that car allowances be provided as payment for that employee’s services due to the requirement that personal vehicles be used for City business and, such payment is designated a “special compensation” as defined in Government Code Section 20636.

year, when any employee has assumed short-term responsibilities. This policy was to be used whenever the City's out-of-class pay policy did not apply. The City's out-of-class pay policy only applies to non-safety, non-management employee when such employees perform temporary work at a higher classification than their regularly assigned position.

The City Council adopted the short-term pay policy by resolution dated May 25, 1993. The purpose of the policy is to provide a uniform procedure for compensating employees with short-term pay.

15. In late 2009, the City Manager approached respondent about serving in a dual capacity. The Employee Services Director had retired in December 2009, and the vacancy needed to be filled. Due to the vacancy and City budgetary concerns, respondent agreed to serve in both positions on an interim basis. By letter agreement dated December 4, 2009, she agreed to receive short-term pay of an additional five percent of her salary, commencing January 4, 2010. This continued until her retirement on June 4, 2010.

Discussion

Auto Allowance

16. 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).) "Compensation earnable" is composed of (1) pay rate, and (2) special compensation, as defined in Government Code section 20636.

17. "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).)

18. "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).) However, Government Code section 20636, subdivision (g)(4)(I) specifically excludes auto allowance from being considered as pay rate or special compensation: " 'Payrate' and 'special compensation' for state members do not include any of the following: ... (I) Compensation for additional services outside regular duties, such as standby pay, callback pay, court duty, *allowance for automobiles*, and bonuses for duties performed after the member's regular work shift." (Italics added.)

19. The City's monthly auto allowance payments to respondent were not special compensation that could properly be included in compensation reportable to CalPERS. All City documents identified the payments as an "auto allowance." The City's 1999 resolution expressly acknowledged that such payments were occasioned by "the requirement that personal vehicles be used for City business." City employees were not provided any other means for being reimbursed for travel within the San Francisco Bay Area. They could only make separate claim for travel expenses if the travel was outside the Bay Area. For these reasons, the City's auto allowance was properly excluded from the payrate and special compensation reportable to CalPERS.

20. Time Bar. Respondents contend that CalPERS is time barred from retroactively correcting any erroneous determination made in the 1996 audit pursuant to Government Code section 20160. They are mistaken. This is not an appeal based upon the 1996 audit findings. CalPERS is not seeking to correct its error. Rather, this is an appeal by respondent and the City from the CalPERS determination letter dated September 29, 2012, denying inclusion of the auto allowance and short-term pay in calculating respondent's service retirement allowance. More important, reliance upon Government Code section 20160, subdivision (a)(1), in asserting the time bar is misplaced. This section applies a six-month limitation period for correcting an error or omission by "any active or retired member, or any beneficiary of an active or retired member." It does not apply to CalPERS. There is no statute of limitations on CalPERS's duty to correct its errors or those of a contracting agency such as the City. Thus, Government Code section 20160, subdivision (b) provides that "the board shall correct all actions taken as a result of errors or omissions of ... any contracting agency ... or this system." Government Code section 20160 places no time limitation for doing so.

For all the above reasons, respondents' argument that CalPERS is time barred from retroactively correcting for the City's auto allowance policy is without merit.

21. Laches and Estoppel. Respondents further contend that CalPERS is barred by both the defenses of laches and estoppel from retroactively correcting their determination that the City's inclusion of the auto allowance was compensation. As respondents noted, laches requires unreasonable delay and acquiescence in the act or prejudice due to the delay. (*Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 263.) The defense of estoppel requires: 1) the party to be estopped must be apprised of the facts; 2) must intend their conduct will be acted upon; 3) that the other party must be ignorant of the true facts; and 4) the other party must have relied upon the conduct to her injury. (*Id.* at p. 257; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462.) The defenses of laches and estoppel are not available if an important public policy adopted for the benefit of the public would be nullified. (*Id.* at p. 259, 263.) Thus, the court of appeal determined in a CalPERS matter that estoppel was not available where "[p]ublic interest and policy would be adversely affected ... [and] [m]anifestly it would have a disruptive effect on the administration of the retirement system." (*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 585.)

The City and respondent reasonably relied on the CalPERS 1996 audit findings, the purpose of which was to verify that the City's payroll reporting complied with CalPERS

policy and regulations. CalPERS was aware that the auto allowance was being reported by the City as reportable compensation. The City relied on the CalPERS audit and continued to report the auto allowance in this way to CalPERS for 14 years. Respondents have satisfied all four elements of the estoppel defense.

CalPERS, as a government agency, may be excepted from the doctrine of equitable estoppel where the defense is being used to enlarge the statutory authority or powers of a government agency. As noted earlier, estoppel will not be applied where it would be sufficiently adverse to public interest or policy.

This is an instance where to include the auto allowance as an item of special compensation to be included in respondent's service retirement allowance would be in direct contravention of the PERL. To allow inclusion of the auto allowance would grant to CalPERS powers that were not ceded to it by the Legislature. Application of estoppel would enlarge the statutory authority or powers of CalPERS. To the degree that it would allow members to have a lifetime or higher retirement benefits than permitted by the statutory formula, application of estoppel would be sufficiently adverse to public interest or policy, and inconsistent with the fiduciary duty the Board of Administration owes to the trust fund it administers and to its beneficiaries. Because the City made contributions to CalPERS on the auto allowance, there do not appear to be issues related to unfunded liability or unjust enrichment. Presumably, CalPERS can return contribution overpayments to the City and to respondent, and the status, rights, and obligations of all of the parties might be adjusted to be the same that they would have been if the error or omission had not occurred. (Gov. Code, § 20160, subd. (e).)

For all the above reasons, the doctrine of estoppel is not available as a defense to respondents. While the elements of equitable estoppel have been satisfied here, it would violate the PERL and public policy to allow the defense to be asserted against CalPERS in this case.

22. Auto Allowance as Special Compensation. Respondents note that special compensation also includes payment received for "other work conditions." (Gov. Code, § 20636, subd. (c)(1).) They contend that the City's auto allowance meets these requirements because it is paid to department heads, pursuant to a City Council approved resolution, and relates to department head use of their vehicles within the Bay Area during their normal working hours. Respondents further suggest that the auto allowance falls within the classification of both management incentive pay and off-salary schedule pay, which have been affirmatively determined by CalPERS to be special compensation. (Cal. Code Regs., tit. 2, § 571, subd. (a)(1).) Respondents urge that when the substance of the auto allowance is examined in context of the definitions applied to permissible special compensation categories, the City's auto allowance is both off-salary schedule pay and management incentive pay.

Respondents bear the burden of establishing a right to include the auto allowance in the calculation of respondent's compensation earnable. The additional arguments raised by respondents have been considered, along with the matters set forth in Finding 19. The auto

allowance payments by the City to respondent were additional payments for her use of her automobile, and consistent with the City's resolution confirming its "requirement that personal vehicles be used for City business." For these reasons, respondents have not demonstrated that the auto allowance should be considered as special compensation.

Short-Term Pay

23. In disallowing respondent's short-term pay from inclusion in either payrate or special compensation, CalPERS relies upon Government Code section 20635 which provides as follows:

When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service. For the purposes of this part, overtime is the aggregate service performed by an employee as a member for all employers and in all categories of employment in excess of the hours of work considered normal for employees on a full-time basis, and for which monetary compensation is paid.

If a member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full time, the position with the highest payrate or base pay shall be reported to this system. ...

(Italics supplied.)

24. It is undisputed that respondent received short-term pay for performing additional duties occasioned by two different full time positions – Assistant City Manager and Employee Services Director. Only her highest payrate for her full time position was reportable to CalPERS as payrate. The additional short-term pay was not part of her payrate. It constituted overtime under Government Code section 20635, and accordingly cannot be included in the calculation of her service retirement allowance.

25. Respondents contend that the short-term pay constituted special compensation. They rely upon the City's short-term pay policy, which may be granted to any employee performing, on a temporary basis, additional responsibilities and who does not qualify for out-of-class compensation. Respondents believe that such compensation was premium pay which recognizes as special compensation pay "to employees who are required by their employer ... to work in an upgraded position/classification of limited duration." (Cal. Code Regs., tit. 2, § 571, subd. (a)(3).) Respondents urge that respondent's assumption of both positions did not constitute overtime because she was an exempt employee and not eligible for overtime. They believe the additional compensation awarded her was not for additional

hours worked, nor paid upon submission of additional hours worked, but was awarded for additional responsibilities assumed for an upgraded position.

26. A plain reading of Government Code section 20635 dictates that when members work in two or more positions, the additional service constitutes overtime. Respondent's concurrent work as Assistant City Manager and Employee Services Director amounted, in effect, to overtime work. The Legislature expressly excluded such overtime work from computation of a member's pay rate or special compensation. (Gov. Code §§ 20635, 20636, subd. (g)(4)(H).) "In so doing the Legislature has specifically considered instances where an employee is asked to take on additional duties and found that such additional duties are to be treated as excluded overtime." (*Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983, 992.)

The above matters having been considered, CalPERS properly excluded respondent's short-term pay from inclusion in either payrate or special compensation. The short-term pay constituted overtime under Government Code section 20635, and accordingly cannot be included in the calculation of her service retirement allowance.

27. Any other assertions put forth by respondents at the hearing and in closing briefs, and not addressed above, are found to be without merit and are rejected.

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 and 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).)

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. 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).)

9. 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.

10. Government Code section 20636, subdivision (g)(4)(I) specifically excludes auto allowance from being considered as pay rate or special compensation: " 'Payrate' and 'special compensation' for state members do not include any of the following: ... (I) Compensation for additional services outside regular duties, such as standby pay, callback

pay, court duty, allowance for automobiles, and bonuses for duties performed after the member's regular work shift."

Government Code section 20636, subdivision (g)(4)(H) specifically excludes payments for overtime from being considered as pay rate or special compensation.

11. 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.)

Legal Conclusions

12. The matters set forth in Findings 16 through 27 have been considered. Respondents did not meet their burden to establish that compensation received by respondent as an automobile allowance and short-term pay were properly included as compensable earnable for the purpose of calculating her retirement benefits. Respondent's pay for these two components are specifically excluded by the PERL. (Gov. Code, §§ 20635, 20636, subd. (g)(4)(H) & (I).)

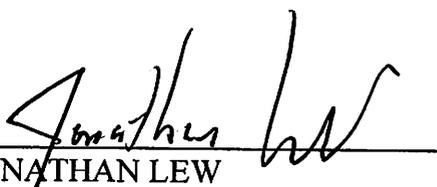
13. While the elements necessary to raising an equitable estoppel defense were present here, it would violate the PERL and public policy to allow the defense to be asserted in this case. (Finding 21.) Other defenses raised by respondents were also considered and determined to have no application to this case. (Findings 20, 22, 25 and 26.)

14. CalPERS correctly determined that respondent's compensation earnable for purposes of calculating her retirement benefits cannot include amounts previously paid to respondent as an automobile allowance and short-term pay.

ORDER

The appeal of Nadine P. Levin and the City of Mountain View to include automobile allowance and short-term pay into Ms. Levin's compensable earnable, for purposes of calculation of her final service retirement allowance, is DENIED.

DATED: February 7, 2013



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings