

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Application for Enhanced
Final Compensation of:

KEITH LEWINGER,

Respondent,

and

FALLBROOK PUBLIC UTILITY
DISTRICT,

Employer.

CASE NO. 2012-0602

OAH NO. 2012100562

(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 Diego, California on February 12, 2013. Oral and documentary evidence was received and the record was left open so the parties could submit closing briefs. The closing briefs were received and the matter was deemed submitted on April 29, 2013.

Keith Lewinger (respondent) personally appeared and was represented by Arlene Prater, Esq.

CalPERS' senior staff attorney Elizabeth Yelland, Esq., represented the California Public Employees' Retirement System (CalPERS).

There was no appearance on behalf of the Fallbrook Public Utility District (the District).

As previously noted, this matter was submitted on April 29, 2013.

FACTUAL FINDINGS

1. Renee Ostrander made and filed the Statement of Issues while acting in her official capacity as the Assistant Division Chief of the Retirement Account Services Division of CalPERS:

2. Respondent was employed by the District as the General Manager.

3. Pursuant to a contractual agreement with CalPERS, the District is a local public agency member of the retirement system pursuant to Government Code section 20460 et seq. Government Code section 20500 provides in pertinent part: "The contract may include any provision consistent with this part and necessary in the administration of this system as it affects the public agency and its employees. . . ."

The contract between the District and CalPERS incorporates the definitions of words and terms set forth in the Public Employees' Retirement Law(s) (PERL). The contract also states that the parties to the contract are subject to all provisions of the PERL, including all amendments.

4. On April 13, 2011, respondent signed and thereafter submitted a completed application for service retirement. Respondent's retirement became effective on July 6, 2011, and respondent has been receiving his retirement allowance since then.

5. By letter, dated October 6, 2011, CalPERS notified respondent that:

The California Public Employees' Retirement System (CalPERS) recently reviewed the compensation that Fallbrook Public Utility District reported on your behalf and discovered compensation that does not comply with CalPERS retirement laws.

The compensation in question has been defined by the City as an \$825.17 monthly vehicle allowance included in the monthly pay rate reported to CalPERS during your designated final compensation period. . . .

* * *

Special compensation reportable to CalPERS is delineated specifically and exclusively in the (CCR) Section 571 (a). Only those items listed in the CCR 571 (a) and (sic) meets the criteria listed in CCR 571 (b) are reportable. Vehicle allowance is not listed in the CCR Section 571 (a) and [is] thus not reportable to CalPERS.

Therefore, CalPERS will use a pay rate in the amount of

\$15,191.58 for the final calculation on your retirement allowance. This amount excludes the monthly car allowance in the amount [of] \$825.17 that was included in the monthly pay rate reported to CalPERS by the District. CalPERS requested that the District reverse this reported compensation out of our payroll system and report the correct pay rate on your account. . . (Exh. 4)

6. Respondent timely appealed CalPERS' determination and the instant hearing ensued.

7. The issues to be decided in the present matter are:

1) Can the vehicle/auto allowance reported by the District, and reflected as an increase in respondent's pay rate during his last years of employment, be included in respondent's final compensation for purposes of calculating respondent's retirement allowance?

2) Is \$825.17 the correct amount in dispute?

The Facts Underlying the Dispute

8. Respondent's employment as General Manager for the District was pursuant to a June 28, 1999 employment contract. That contract provided for a salary of \$9,167 per month, plus cost of living adjustments (COLAs). Additionally, the District agreed to provide respondent with a "car allowance of \$700/month to be increased annually on the anniversary date of this contract by the change in the Cost of Living index for the San Diego Area." (Exh. 8) The contract remained in effect until respondent retired on July 6, 2011.

9. Respondent's base salary was increased annually from 2000 through 2004. On July 25, 2005, the District's Board (the Board) voted to require respondent to provide one year's notice of his retirement. Upon such notice, all compensation, except fringe benefits, would automatically be converted to base pay.

10. On July 25, 2007, the Board voted to "Combine [respondent's] current base salary and car allowance into a single base salary." (Exh. 7, bates no. 64) On cross examination respondent testified that no other employees received a similar car allowance conversion.

11. From July 25, 2007, until respondent's July 6, 2011 retirement date respondent's base salary and car allowance remained "combined" into a single base salary. As set forth in Finding 8, above, respondent's car allowance as of the June 28, 1999 employment contract was \$700 per month and, until the July 25, 2007 "conversion," respondent's car allowance was increased annually by the change in the Cost of Living index for the San Diego Area. The last reported "car allowance" for respondent was in in 2005,

and was in the amount of \$752.02. After the July 25, 2007 “conversion,” respondent’s car allowance was increased along with his base salary. Mr. Terrance Rodgers, Staff Services Manager I with CalPERS’ Compensation Review Unit testified that the \$752.02 last reported car allowance was annually increased by merit and COLA increases. Based upon CalPERS’ calculations, upon respondent’s retirement in 2011, his automobile allowance increased to \$825.17 per month. Respondent, however, testified that from 2005 until his retirement on July 6, 2011, the economy “flattened out” and his car allowance would not have increased from \$752.02 to \$825.17 per month during that time period. Respondent presented no expert testimony to support this assertion.

12. Staff Services Manager Rodgers testified that he reviewed respondent’s employment agreement and the car allowance set forth therein did not meet the statutory definition of “payrate.” The Vehicle and Transportation components were not paid to similarly situated members for work performed and rendered pursuant to a publicly available salary schedule; consequently, CalPERS properly excluded the auto allowance component from respondent’s final compensation earnable for purposes of calculating his retirement benefits.

Mr. Rodgers also reviewed the ordinances and Board minutes related to respondent’s employment contract and concluded that Ordinance 322 and the Minutes for June 2007, improperly converted respondent’s car allowance to payrate (Exh. 7, bates 64-72) This is so because car allowance is a “non-reportable” item of compensation under the PERL. In fact, during the time-frames involved in this matter CalPERS provided several pamphlets to all CalPERS’ member agencies. The pamphlets, entitled “Reportable Compensation” were provided to member agencies, including the District, in 2003, 2007, and 2010. Those pamphlets list “Items which are NOT reportable to CalPERS,” and the pamphlets specifically prohibited reporting “Automobile Allowance” as part of “payrate” or “final compensation.” According to Mr. Rogers, it does not make any difference if the conversion occurred in anticipation of retirement, or years before retirement; such a conversion from car/automobile allowance is absolutely prohibited and the disallowance is not predicated on when the conversion occurred.

LEGAL CONCLUSIONS

Burden of Proof

1. Respondent has the burden of proof and that burden is by a preponderance of the evidence.

In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, the Court of Appeal stated the following concerning the burden of proof in an administrative hearing:

As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including

both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence.

In the absence of a statutory provision to the contrary, the applicant for a benefit has the burden of proof, as the moving party, to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (1 Cal. Public Agency Practice, sec. 39.03[9]; see also, *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Precedential Decision

2. On October 17, 2012, CalPERS' Board designated the Decision In the Matter of the Appeal Regarding the Final Compensation of: *Craig F. Woods* and *Tahoe-Truckee Sanitation Agency*, Case number 8705/ OAH number N-2010040719, as a precedential decision, Precedential Decision number 12-01.¹ The issue in the *Woods* matter was, "Whether the automobile allowance and employer paid deferred compensation paid by ITSA to respondent, and reflected as an increase in respondent's hourly rate during his last year of employment, should be included in his final compensation for purposes of calculating his retirement allowance?" The Administrative Law Judge who heard the *Woods* matter fully analyzed all of the laws and regulations relevant to the issue and concluded that "CalPERS correctly determined that respondent's compensation earnable for purposes of calculating his retirement benefits cannot include amounts previously paid to respondent as an automobile allowance and employer paid deferred compensation. The form and wording of Amendments #1 and #2, do not alter the nature of the inflated 'hourly rate' reported to CalPERS during respondent's final five months of service. . . ."

CalPERS and other such agencies were granted the power to designate certain decisions as "precedential" by Government Code section 11425.60. In pertinent part, that section provides:

(b) An agency may designate as a precedent[ial] decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur.

The issue in the present case is identical to the issue decided in the *Woods* matter; consequently, the *Woods* detailed and well-articulated analysis and conclusion that "respondent's compensation earnable for purposes of calculating his retirement benefits cannot include amounts previously paid to respondent as an automobile allowance" is

¹ Prior to the instant hearing CalPERS filed a request for official notice. The Request contained the *Woods* decision along with three other administrative decisions concerning whether an auto allowance can be included in the calculation of final compensation. The request for official notice and the decisions are marked as Exhibit 14, and received in evidence.

dispositive of the identical issue presented here.

Respondent seeks to distinguish the findings, analysis and conclusion reached in *Woods* on the basis that the conversion of automobile allowance in the *Woods* case occurred only months before Wood's retirement, whereas in the present case the conversion occurred approximately four (4) years prior to respondent's retirement. Respondent's attempt to distinguish *Woods* from the present case on that basis is unpersuasive. The only accounting expert who testified during the instant hearing, Mr. Rogers, stated that it does not make any difference if the conversion occurred in anticipation of retirement, or years before retirement; such a conversion from car/automobile allowance is absolutely prohibited and the disallowance is not predicated on when the conversion occurred.

The Amount Involved in the Prohibited Conversion

3. Mr. Rogers, the accounting expert, performed a very detailed and comprehensive evaluation of the amount involved in the conversion. According to his calculations, the value of the automobile allowance at the time of respondent's retirement was \$825.17 per month. In view of the following facts that amount is appropriate: (1) respondent's June 28, 1999 employment contract provided that respondent's car allowance was to be increased annually by the change in the Cost of Living index for the San Diego Area; and, (2) from 1999 until the conversion occurred in 2005, respondent's automobile allowance increased from \$700 per month to \$752.02, consequently an increase from \$752.02 per month in 2005 to \$825.17 per month in 2011 is consistent with the previous increase(s). Additionally, as previously noted, respondent has the burden of proof in the instant proceeding and he failed to prove by a preponderance of the evidence that CalPERS' calculation of his monthly, impermissibly converted, automobile allowance was erroneous.

ORDER

CalPERS' determination that respondent's final compensation was improperly inflated by \$825.17 per month and that respondent's pay rate for the final calculation of his retirement allowance is \$15,191.58 per month is upheld and respondent's appeal from that determination is denied.

Dated: May 17, 2013


ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings