

ATTACHMENT C
RESPONDENT'S ARGUMENT



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File No. 82690.10001

November 6, 2013

VIA OVERNIGHT COURIER & FACSIMILE

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
Lincoln Plaza North
400 Q Street, Room 3340
Sacramento, CA 95811



Re: In the Matter of the Appeal Regarding Reporting of Pay Increase in Lieu of Leave by TOWN OF MAMMOTH LAKES, Respondent.

Dear Ms. Swedensky:

Please accept the attached document as the Town of Mammoth Lakes' Respondent's Argument in the matter identified above.

Sincerely,

Roger K. Crawford
of BEST BEST & KRIEGER LLP

Enclosure



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RESPONDENT'S ARGUMENT

Respondent Town of Mammoth Lakes requests that the Board of Administration of CalPERS reverse the Proposed Decision of the Administrative Law Judge ("Judge") in this matter. Respondent Town of Mammoth Lakes objects to the Judge's ruling for the following reason:

Compensation Pursuant To The Election is Compensation Earnable Because It Is Part of An Employee's Pay Rate

The five percent increase in base pay pursuant to an employee's election is properly considered part of the compensation earnable of a member because it is part of the pay rate. To be classified as pay rate, the compensation must be: (1) part of the normal monthly rate of pay or base pay of the member; (2) paid to similarly situated members of the same group or class of employment; and (3) for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules.

(1) The income earned as part of the election is part of the employee's normal monthly rate of pay. The employees making the election choose to forego future benefits in exchange for greater up-front income in terms of monthly pay. The Judge's reference to Hudson is unavailing. Hudson relates to a one time conversion of benefits to salary as part of final settlement pay. (Hudson v. Board of Administration (1997) 59 Cal. App. 4th 1310, 1324. Hudson does not, therefore, apply to this situation. In fact, in Hudson, the court expressly limited its holding to the case before it, in which "it is not disputed that the final year conversions (1) involved benefits which clearly would not have been considered salary prior to



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the conversions and (2) were made for the express purpose of enhancing appellants' retirement benefits." (Id. at p. 1324. In a footnote, the Hudson court takes a position more applicable to Respondent's current position:

Appellants posit the hypothetical of an employee who elects at the outset of a 30-year career to receive a higher salary by foregoing benefits, in the expectation of eventually getting a higher pension. The hypothetical employee's retirement benefits, however, would reflect salary actually paid to him over the years, not a temporary "conversion" of nonsalary items to salary in the final year as occurred here.

(Id. at p. 1324, n. 9.) Under Hudson, therefore, salary paid as part of an election is not to be considered as or treated in the same way as a temporary conversion. Rather, such salary should be considered part of the employee's pay rate.

(2) The income earned as part of the election is paid to similarly situated members of the same group or class of employment. The group or class of employment is the bargaining unit which offers the election to its members - The Mammoth Lakes General Employees Association, for instance. Within that group, all members may opt to take the election. However, only those members who actually take the election receive the one-off five percent (5%) increase in base pay. These members are "similarly situated members of the same group or class of employment." They all opted to take the Election, they all received a five percent (5%) increase in base pay, and they all earn 8.6667 less hours of comprehensive leave per month.

The Judge took issue with the fact that this income is not paid to all members of the class. This, however, is not what the statute requires. The statute requires that it be paid to "similarly



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situated members of the same group or class” not that it be paid to all members of the same group or class. Here, it is paid to those members who took the election, thereby becoming similarly situated members of the same group or class.

(3) The income earned as part of the election is for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. When an employee chooses to forego the accrual of comprehensive leave in exchange for an increase in base pay, that employee makes a choice to increase his or her pay rate rather than to receive additional comprehensive leave. The result of the election is that an employee works more hours in the average month, because they accrue less leave. The increased compensation the employee receives is, therefore, a direct result of increased services rendered. The Judge asserted that the evidentiary record does not support the claim that employees who take the election work more hours than those who do not. However, this is a basic assumption of the election. In fact, the Judge included, in Factual Finding 11, the fact that employees who elect to take the increase in pay suffer a reduction of 8.6667 hours of comprehensive leave each month. It would be nonsensical to suggest that employees who receive 8.6667 hours less leave than their colleagues do not work more hours. The income earned as part of the election is clearly, therefore, in exchange for services rendered.

Neither CalPERS nor Respondent offered any evidence regarding whether the pay was pursuant to publicly available pay schedules because it was not at issue. The Judge acknowledged that the Respondent maintains two separate salary schedules – one with and one



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without the five percent in lieu pay. In addition, the parameters of the election were clearly included in the MOU, which was quoted from in the proposed decision.

CONCLUSION

For the foregoing reasons, the Town of Mammoth Lakes respectfully requests that you reverse the decision of the Judge and find that the five percent increase in salary paid pursuant to the Election is “compensation earnable” and is reportable for CalPERS purposes. In addition the Town respectfully requests that you reverse CalPERS requirement that the Town reverse the amount of in lieu pay reported for employees for three years prior to the date of the Audit Report.