

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:

WILLIAM SAVKO,

Respondent

and

CITY OF EL CERRITO,

Respondent.

Case No. 2012-0658

OAH No. 2013050931

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, on September 4, 2013, in Walnut Creek, California.

The California Public Employees' Retirement System was represented by Elizabeth Yelland, Senior Staff Attorney.

Respondent William Savko was present and represented himself.

Respondent City of El Cerrito was represented by Jesse J. Lad, Attorney at Law.

The matter was submitted for decision on September 4, 2013.

SUMMARY

William Savko retired from his position as a police officer with the City of El Cerrito in December 2011. During his final year of employment, Savko received a payrate of \$42.94 per hour based upon an agreement between the city and the police officers' union that increased the payrate for officers who were about to retire. The rate he was receiving was higher than non-retiring officers received and was higher than the city's published pay schedule. CalPERS notified Savko and the city that the pay increase Savko had received was

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

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[Signature]

ineligible for inclusion in the "compensation earnable" used to calculate his retirement benefits and that those benefits would be calculated based upon a payrate of \$40.13 per hour.

It is concluded that the payrate of \$42.94 per hour constituted "final settlement pay" that must be excluded from the compensation used to calculate Savko's retirement benefits. It is also concluded that the \$40.13 per hour rate used by CalPERS may have been too low and should be reevaluated.

FACTUAL FINDINGS

1. The City of El Cerrito contracts with CalPERS for retirement benefits for its employees. Under the contract, the city and its employees are subject to the provisions of the Public Employees' Retirement Law (PERL), Government Code sections 20000 et seq.¹

2. William Savko was employed by El Cerrito as a police officer. By virtue of that employment, Savko is a state safety member of CalPERS. Savko signed an application for service retirement in October 2011 and retired effective December 29, 2011, with 31 years of service credit.

3. At the time of Savko's retirement, El Cerrito reported to CalPERS that his final payrate was \$42.94 per hour. CalPERS calculated Savko's pension based upon that figure. CalPERS subsequently determined that the El Cerrito salary schedule in effect at the time of Savko's retirement showed the payrate for police officers was \$40.13 per hour and that the city had granted Savko a seven percent increase over this amount based upon a "Side Letter of Agreement" between the city and the El Cerrito Police Employees' Association that had modified the parties' Memorandum of Understanding.

4. On January 27, 2012, CalPERS notified Savko and the city that the seven percent increase Savko had received did not meet the definition of "compensation earnable" found in section 20636, subdivisions (a) and (b), because that increase had not been paid to similarly situated members of the same class and was not paid pursuant to a publicly available pay schedule. In addition, CalPERS determined that the seven percent increase constituted "final settlement pay" as defined in section 20636, subdivision (f), and California Code of Regulations, title 2, section 570, because it was a benefit awarded in connection with or in anticipation of separation from employment. For all those reasons, the seven percent increase was determined to be ineligible to be included in the calculation of Savko's final compensation. The city was requested to stop using the \$42.94 payrate and to make corrections to Savko's account. The parties were informed that CalPERS would calculate Savko's retirement benefits using a payrate of \$40.13 per hour. The city filed a timely appeal and this hearing ensued.

¹ Unless otherwise indicated, all statutory references are to the Government Code.

The Memorandum of Understanding and Side Letter of Agreement

5. The Memorandum of Understanding between the city and the Police Employees' Association for the period July 1, 2007, through June 30, 2011, provided that effective July 2010, the base monthly salary for police officers would be increased by the results of a salary survey to be conducted by the city in January 2010.

6. The January 2010 survey showed that the base monthly salary for El Cerrito police officers was 14 percent below the median of the other area police departments surveyed. By the time this required increase was to be implemented, however, the city was facing a budget deficit of approximately one million dollars. In order to assist the city in dealing with its budget issues, the Police Employees' Association agreed to modify the MOU to implement the 14 percent increase in stages. The modifications are set forth in a Side Letter of Agreement dated July 8, 2010. Article XIII of the MOU relates to "Compensation." In the side letter, section 13.1 (Base Monthly Salaries) was modified to provide that salaries were to be increased by 3.5 percent every six months beginning July 2010, thereby making the full increase payable beginning in January 2012.

7. The side letter also added a new section 13.8 to the MOU. In relevant part, this new section provides:

Section 13.8 (new) Criteria for Service Credit

- Age 50 no later than the last day of the first pay period in June 2012
- PERS retirement eligible no later than the last day of the first pay period in June 2012
- Employee must designate that they will retire during the term of this MOU
 - **Service Credit for Police/Corporal Classifications**
 - For eligible employees effective July 2010 – 10.5%
 - For eligible employees effective January 2011 – 7%
 - For eligible employees effective July 2011 – 3.5%
 - Service Credit eliminated effective the last full pay period of June 2012

The purpose of section 13.8 was to ensure that officers retiring between July 2010 and January 2012 would receive the full benefit of the 14 percent increase to which the parties had agreed. Although not clear from the language of the section, the intent was that officers

retiring before the full 14 percent pay raise was implemented would receive a raise equal to the difference between the amount of any salary increases they had already received and the full 14 percent raise.

8. At its meeting of July 19, 2010, the El Cerrito City Council passed a resolution adopting the side letter agreement, which was incorporated into the resolution as an attachment.

9. On December 31, 2010, Savko notified the city that he intended to retire effective December 30, 2011. He requested that his “salary be increased for the last year of service per our MOU.” As a result, Savko was granted the full 14 percent increase effective December 30, 2010, thus increasing his payrate to \$42.94 per hour at a time when other police officers were receiving a lower payrate. As of January 9, 2011, the maximum payrate for police officers as shown on the city’s publicly available pay schedule was \$40.13 per hour. In subsequent publicly available pay schedules, higher pay rates were shown. Although not clearly established by the evidence, presumably the pay schedule published in July 2011 reflected the 3.5 percent increase to \$41.53 per hour that went into effect that month.

Issue

10. The basic issue in this case is whether the compensation to be used to calculate Savko’s retirement benefits should be the payrate he actually received during his final year of employment – \$42.94 per hour – or the payrate that was being paid to other officers and that was reflected in the city’s publicly available pay schedule.

Pertinent Statutory and Regulatory Sections

11. Section 20636 provides in pertinent part:

(a) “Compensation earnable” by a member means the payrate and special compensation of the member

(b) (1) “Payrate” 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, pursuant to publicly available pay schedules

h. . . .

(f) As used in this part, “final settlement pay” means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from

employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay.

12. California Code of Regulations, title 2, section 570 provides:

“Final settlement pay” means any pay or cash conversions of employee 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 reporting to PERS, in either payrate or compensation earnable.

For example, final settlement pay may consist of severance pay or so-called “golden parachutes.” It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

Final settlement pay may take the form of . . . a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.

13. California Code of Regulations, title 2, section 570.5, subdivision (a), provides that for purposes of determining “compensation earnable” under section 20636, “payrate shall be limited to the amount listed” on a publicly available pay schedule. Subdivision (b) provides that if an employer fails to meet the requirements of a publicly available pay schedule, “the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into account all information it deems relevant”

Discussion

14. The city’s position was set out in its appeal letter:

The service credit for police retirement was not intended to circumvent any CalPERS restrictions on final settlement pay. Rather, it was intended to avoid penalizing retiring police officers (by lowering their final year of compensation) for their union’s willingness to assist the City in difficult economic times. [¶] Pursuant to the [salary survey] agreement, police officers such as Mr. Savko were contractually guaranteed the full 14% salary increase effective July 2010. The service credit was intended to reflect this guarantee, not award them compensation in excess of entitlement. [¶] . . . The City and the [Police Employees’ Association] do not want retiring officers

such as Mr. Savko to face a lifetime of reduced retirement benefits because the parties temporarily deferred the wage increases to address unique economic circumstances.

15. Savko similarly contends that if CalPERS prevails in its position, he will be penalized because the Police Employees' Association "did the right thing" by helping the city deal with its budget deficit by agreeing to defer taking the 14 percent raise officers were owed under the MOU in a number of stages rather than all at once. He rightly points out that the side letter that allowed retiring officers to receive the full pay raise was not put in place to benefit him – it applied to any officer who elected to retire.

LEGAL CONCLUSIONS

1. As is pertinent to this proceeding, to qualify as the "compensation earnable" upon which a member's pension benefit is based, under section 20636 and California Code of Regulations, title 2, section 570, a member's rate of pay must meet three criteria: (1) it must be paid to similarly situated members of the same class, (2) it must be paid pursuant to a publicly available pay schedule, and (3) it must not include "final settlement pay," i.e., extra benefits awarded in anticipation of separation from employment.

2. The \$42.94 per hour payrate that Savko was receiving met the first criterion. The statute does not provide that the payrate must be paid to all members of the class, only to "similarly situated members." While the payrate Savko was receiving was not available to all members of the police officer class, it was available to any officers who were "similarly situated" to Savko – i.e., officers over 50 years of age who were eligible for CalPERS retirement and who designated they would retire during the term of the MOU.

3. The payrate did not meet the second criterion in that it was not paid pursuant to a publicly available pay schedule. During the first half of Savko's final year of employment, the publicly available pay schedule showed a maximum payrate of \$40.13 per hour. Presumably during the second half of that year it showed a maximum payrate of \$41.53 per hour. At no time before Savko's retirement did it show a rate of \$42.94 per hour.

4. Under California Code of Regulations, title 2, section 570.5, subdivision (a), the payrate used to determine "compensation earnable" under section 20636, "shall be limited to the amount listed" on a publicly available pay schedule. However, under subdivision (b), if a contracting agency fails to meet the requirements for a publicly available pay schedule, the CalPERS board has the discretion to determine the amount that will be considered the payrate, taking into account all information it deems relevant. One item of information the regulation specifies may be considered is "documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer."

Because the City Council did pass a resolution approving the side letter agreement and including the agreement in the resolution, there is a document that was approved in accordance with the requirements of public meetings and that is maintained by the employer that was, and is, publicly available.

But the side letter agreement is opaque; someone reading it would not readily know that officers were being given increased salaries in anticipation of their retirement. It refers only to “service credit[s]” of certain percentages, and not to pay raises of those percentages. One of the purposes of California Code of Regulations, title 2, section 570.5, is to provide disclosure and transparency requirements to government compensation. It may not have been done intentionally, but by couching the increase as a “service credit” rather than a pay increase, the parties failed to provide the required disclosure and transparency.

5. The third criterion – that the “compensation earnable” not include “final settlement pay” – is perhaps the most important. As set forth in the code and regulations, final settlement pay is a benefit awarded to a member in anticipation of separation from employment. While Savko was not provided a benefit not available to similarly situated El Cerrito police officers, the raise he got was undeniably granted in anticipation of his retirement. It was, in effect, a “golden parachute.” While intent of the side letter agreement was laudable, the result ran afoul of PERL requirements. The city ended up awarding precisely the sort of benefit section 20636 and California Code of Regulations, title 2, section 570, were intended to preclude.

Conclusion

6. Even if the city council resolution approving the side letter agreement could serve as a basis for overcoming the fact that the payrate Savko received during his last year of employment was not paid pursuant to a publicly available pay schedule, the fact that the increased salary he received constituted final settlement pay within the meaning of section 20636 precludes it from inclusion in the “compensation earnable” used to compute his pension benefit.

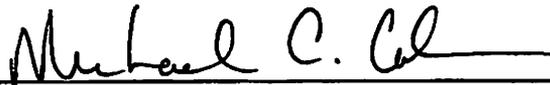
7. There is no question that this seems manifestly unfair to Savko. He was the unfortunate victim of an attempt by his union and the city to help the city deal with a budget deficit by deferring an otherwise required pay increase while at the same time seeking to protect officers who retired before the full pay raise could be implemented. But the result of those efforts simply did not comply with the PERL.

8. CalPERS’s position is that Savko’s pension benefit should be based upon the \$40.13 per hour payrate that was in effect at the beginning of his final year of employment. But it is unclear why Savko would not have been given credit for the \$41.53 per hour payrate that was in effect for the last five and a half months of his career. Use of that rate would provide Savko a final year’s payrate averaging about \$40.83 per hour.

ORDER

The appeal of respondents William Savko and the City of El Cerrito is denied. CalPERS' determination that Savko's benefits shall not be calculated based upon a payrate of \$42.94 per hour is affirmed. However, CalPERS shall reconsider whether Savko is entitled to have his benefits calculated using a payrate higher than the \$40.13 per hour it is currently using.

DATED: 9/26/13



MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings