

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:

DURAND RALL,

Respondent,

and

OMNITRANS,

Respondent.

Case No. 2011-0772

OAH No. 2013010269

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter on August 20, 2013, in Oakland, California.

Senior Staff Counsel Jeanlaurie Ainsworth represented petitioner California Public Employees' Retirement System.

Kenneth J. Philpot, Attorney at Law, Tufts, Stephenson & Kasper, LLP, represented respondent Durand Rall, who was present.

There was no appearance by or on behalf of respondent Omnitrans.

The record closed and the matter was submitted on August 20, 2013.

On August 22, 2013, petitioner filed a Request for Official Notice, a memorandum of points and authorities in support of the request, and a CD containing over 900 pages of documents. Respondent Rall filed opposition to the request. Further argument on petitioner's request was heard in a telephone conference with counsel on August 28, 2013, at the conclusion of which petitioner's request was denied. The record remained closed, and the matter remained submitted as of August 20, 2013.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED October 11 20 13

Christina M. Moore

SUMMARY

Before he retired in 2009, respondent Rall was the Chief Executive Officer/General Manager for a public transit agency. His salary and other terms of employment were set by contract with the agency's governing board. During the last three-to-four years of his employment, respondent and the board amended his contract to convert certain benefits he was receiving – employer-paid deferred compensation and the use of an agency-provided automobile – to salary. CalPERS determined that those payments may not be included in the calculation of respondent's pension benefit. CalPERS's determination is correct. The evidence fails to establish that those payments were part of the payrate associated with respondent's position, and the payments do not qualify as special compensation. The payments in lieu of deferred compensation also constitute final settlement pay, which may not be included in the calculation of a member's pension.

FACTUAL FINDINGS

Respondent's CalPERS employment

1. From 1981 to 1990, respondent Durand Rall (respondent) was the general manager of the Riverside Transit Authority (RTA). In 1999, the California Public Employees' Retirement System (CalPERS) concluded that respondent was eligible for CalPERS membership with respect to his RTA employment.
2. In May 1993 respondent joined Omnitrans, a public transit agency that serves the San Bernardino Valley. Omnitrans is governed by a board of directors, composed largely of public officials from the cities that it serves, and from the County of San Bernardino. Omnitrans contracts with CalPERS for retirement benefits for its employees. Under the contract, Omnitrans and its employees are subject to the provisions of the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq.¹
3. Respondent was first employed by Omnitrans as its Interim General Manager. He became General Manager in May 1994, and later became Chief Executive Officer/General Manager. In all of these capacities, respondent was the head of the agency and reported directly to the Omnitrans board of directors. Respondent retired from Omnitrans on or about December 30, 2009, when he was 65 years old.
4. During his employment with Omnitrans, respondent's compensation and other terms of employment were controlled by contract with the agency's board of directors.

¹ All statutory references are to the Government Code, unless otherwise stated.

Respondent's initial contract

5. Respondent and the Omnitrans board entered into their initial contract in 1994.
6. Section 4 of that contract is titled "Salary and Compensation":
 - A. [Respondent's] salary is hereby fixed and established beginning with the commencement of the term of this Contract at the annual salary rate of \$105,000.00 which shall be paid in the manner and at the same times as other salaries of OMNITRANS are paid. After each annual evaluation of [respondent] as required by Section 11 is completed, the OMNITRANS Board shall review the salary level of [respondent] and approve any adjustment of [respondent's] salary as determined by the Board of Directors to be appropriate based on the performance of [respondent].

Section 6 of the contract is titled "Deferred Compensation":

- A. [Respondent] shall receive an annual deferred compensation paid by OMNITRANS of Seven Thousand Five Hundred Dollars (\$7,500.00). The amounts contributed by OMNITRANS under this provision shall be subject to the terms and conditions of the plan selected at the [respondent's] option and Internal Revenue Code requirements

And Section 10 is titled "Automobile":

OMNITRANS agrees that [respondent] shall have the exclusive and unrestricted use, at all times during the term of this Contract, of an automobile provided by OMNITRANS, provided [respondent] pays OMNITRANS the sum of \$100 per month. Said automobile shall be a fully equipped, full-sized sedan . . . and shall not be required to display exempt license plates. OMNITRANS shall be responsible for providing liability, property damage, and comprehensive insurance The cost of such insurance premium shall be borne by OMNITRANS. OMNITRANS shall be responsible for paying for the operation, repair and maintenance of said automobile.

7. Respondent elected to participate in the deferred compensation plan administered by the International City/County Management Association (ICMA), and Omnitrans made employer contributions to that plan as called for by Section 6 of the contract. Over time, Omnitrans increased the amount of its employer contributions, which ultimately reached \$15,000 per year in around 2005.

8. With respect to the automobile called for by Section 10 of the contract, Omnitrans leased a car for respondent. Significant transportation demands were associated with respondent's job. Omnitrans's service area covered 480 square miles, and included 15 cities in San Bernardino County. Respondent traveled to oversee Omnitrans's operations, to attend city council meetings, and to attend meetings of the county board of supervisors.

Omnitrans also leased cars for four other managers: the Director of Maintenance, the Director of Operations, and two Transportation Managers. Unlike respondent, these employees were not entitled to the unrestricted use of their vehicles.

9. Respondent and Omnitrans amended their contract from time to time. The procedure they followed was that all provisions of the contract would remain in place, except those that were amended.

July 1, 2006 contract amendment

10. In September 2006, respondent and Omnitrans amended their contract effective July 2, 2006. All provisions of their earlier contract remained in place, except Sections 4 and 6. The amendment provided as follows:

... Section 4, entitled "SALARY AND COMPENSATION", is hereby amended to fix [respondent's] annual salary for the period July 1, 2006 through June 30, 2007 at \$191,018 which includes a 4% increase over the annual salary for 2005, as provided in Section 4 of the Amendment effective July 1, 2004, and \$15,000, in lieu of deferred compensation contribution.

... Section 6, entitled "DEFERRED COMPENSATION", is hereby amended by revising the first sentence of subparagraph A. to read, "[Respondent] shall receive an annual deferred compensation paid by Omnitrans of zero dollars and cents (\$0.00) from July 1, 2006-December 31, 2006.["]

11. Converting Omnitrans's deferred compensation contributions into current salary was respondent's idea. As respondent describes it, he was going through a costly dissolution proceeding and he needed current income, as opposed to deferred income, to pay his former spouse. The Omnitrans board agreed to pay respondent, as part of his salary, the amounts it had been contributing to his deferred compensation account. No other employee of Omnitrans received salary in lieu of deferred compensation contributions. After the 2006 contract amendment, respondent found that he could afford to continue participating in the ICMA deferred compensation program through voluntary deductions in his salary.

July 1, 2007 contract amendment

12. By a contract amendment effective July 1, 2007, Omnitrans stopped providing respondent with an agency-owned vehicle, and instead agreed to pay him \$1,000 as salary “in lieu of providing an agency vehicle”:

... Section 4, SALARY AND COMPENSATION, is hereby amended to fix [respondent’s] annual compensation.

For the period July 1, 2007 through June 30, 2008 (“Year 1”), [respondent] shall receive \$214,405.00, which includes \$6500.00 in lieu of Deferred Compensation, \$1000.00 for the period June 1-30, 2008, in lieu of providing an agency vehicle, 4% increase for market adjustment increase of \$7641.00 and 4% increase for performance evaluation. . . .

For the period July 1, 2008 through June 30, 2009 (“Year 2”), [respondent] shall receive \$226,405.00, which includes \$12,000 as a salary increase in lieu of an agency-provided vehicle, plus a 4% market adjustment increase of \$7641.00 and a 4% increase for a performance evaluation of at least “meets” standards

For the period July 1, 2009 through June 30, 2010 (“Year 3”), [respondent] shall receive the annual compensation received for Year 2, plus a 4% increase for a performance evaluation of at least “meets” standards

13. The 2007 amendment reflected a decision by Omnitrans to stop providing agency vehicles to respondent and the four other managers because of liability concerns. As the leases for those vehicles expired, the vehicles were given up, the managers were required to use their own vehicles for business travel, and the managers were given an increase in salary in lieu of an agency-provided vehicle. Respondent was given the largest increase, \$1,000 per month, because he was the only manager who enjoyed the unrestricted use of the vehicle. The other managers were given salary increases commensurate with their former use privileges, either \$4,800 or \$6,000 per year.

14. Respondent testified that, when he entered into the 2006 and 2007 contract amendments, he was not considering retiring, no one at Omnitrans had suggested to him that he retire, and there was no discussion between him and the Omnitrans board about him retiring in exchange for the contract amendment. No contrary evidence was offered, and respondent’s testimony on these points is not questioned.

15. In June 2009, respondent gave Omnitrans six-months' notice of his intent to retire, as he was required to do under the terms of his contract. He retired on or about December 30, 2009.

16. Under RTA's contract with CalPERS, respondent's pension for his RTA service is based on the last three years of employment immediately preceding his effective date of retirement – December 2006 to December 2009. Under Omnitrans's contract with CalPERS, respondent's pension for his Omnitrans service is based on his final year of employment.

17. After respondent retired, CalPERS determined that the portion of his salary that represented employer payments in lieu of deferred compensation, and the portion that represented employer payments in lieu of an agency-provided vehicle, could not be used in the calculation of his pension benefit. CalPERS informed respondent and Omnitrans of its determination. Respondent appealed. CalPERS issued a statement of issues and this hearing followed.

LEGAL CONCLUSIONS

1. A member's pension is "calculated to equal a certain fraction of the employee's 'final compensation' which is multiplied by a fraction based on age and length of service." (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.) The determination of what benefits and items of pay are properly includible in final compensation is critical to computing the member's ultimate pension benefit. The PERL, and regulations adopted by CalPERS, set forth detailed rules to guide that determination.

2. A member's final compensation is based on his "compensation earnable" over a defined period of time. For his service at RTA, respondent's final compensation is his "highest average annual compensation earnable . . . during the three consecutive years of employment immediately preceding" his effective date of retirement. (§ 20037.) For his service at Omnitrans, respondent's final compensation is his highest annual "compensation earnable." (§ 20042.)

3. The term "compensation earnable" is defined by section 20636, subdivision (a), to include the member's "payrate" and any "special compensation" paid to the member. The definition and application of these key terms – payrate and special compensation – are fundamental to this case. Petitioner argues that the in lieu payments to respondent cannot be included in his compensation earnable because they are not part of his payrate, and because they do not qualify as special compensation; in petitioner's view, the in lieu payments are also a form of prohibited "final settlement pay" which is expressly excluded from the definition of special compensation. Respondent asserts that nothing in the PERL prohibited Omnitrans from converting his deferred compensation benefit and his automobile benefit

into salary, "so as to qualify as payrate." He denies that the in lieu payments constitute final settlement pay.

Payrate

4. "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. "Payrate," 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 pay schedules, for services rendered on a full time basis during normal working hours

(§ 20636, subd. (b)(1).) A "publicly available pay schedule" must identify the position title for every employee position and must show the payrate for each identified position. (Cal. Code Regs., tit. 2, § 570.5, subds. (a)(2) & (a)(3).) When an employer fails to establish such a pay schedule, CalPERS "in its sole discretion" may determine the amount to be considered payrate, based on relevant documentation. (Cal. Code Regs., tit. 2, § 570.5, subd. (b).)

Employer payments credited to a member's deferred compensation account are excluded from payrate. (§ 20636, subd. (g)(4)(E).) Amounts deducted from a member's salary for participation in a deferred compensation plan are not considered "employer payments," and are therefore included in a member's payrate. (§ 20636, subd. (b)(2)(A).)

5. In this case, there is no pay schedule that identifies the position title for every position in Omnitrans, and the payrate for each identified position, as required by the PERL and CalPERS's regulations: there is no pay schedule at all. The evidence, therefore, fails to establish that the payrate for the position of CEO/GM includes payments in lieu of deferred compensation, and payments in lieu of an agency-provided automobile.

6. In the absence of a pay schedule, it is within the discretion of CalPERS to determine an amount that will be considered payrate, based upon relevant documents. CalPERS concluded that Omnitrans's in lieu payments are not part of the payrate for the position of CEO/GM, and the evidence fully supports CalPERS's conclusion. From the beginning of the contractual relationship between respondent and Omnitrans, respondent's deferred compensation benefit and his automobile benefit were not included in his payrate. Even after Omnitrans and respondent amended their contract to provide for payments in lieu of deferred compensation, and in lieu of an agency-provided vehicle, and nominally made those payments part of respondent's salary, the contracts continued to identify those benefits and the amounts of those benefits separately. Respondent's contracts demonstrate that the in

lieu payments were benefits payable to him, not part of the payrate for the position of CEO/GM.

7. Respondent argues that, except for the limitations on final settlement pay, nothing prohibited Omnitrans from converting his deferred compensation benefit and his automobile benefit into salary, "so as to qualify as payrate." Payrate, however, does not include any benefit that an employer chooses to call salary; it is the monthly rate of pay or base pay for the position. The evidence in this case failed to establish that the in lieu payments for deferred compensation and an agency-provided vehicle were in fact part of the payrate of respondent's position.

8. Respondent argues that, under section 20636, subdivision (b)(2)(A), amounts that he chose to have deducted from his pay to participate in a deferred compensation plan do not operate to reduce his payrate. Respondent is correct. But CalPERS has never asserted that respondent's payrate should be reduced by the amount of money that he chose to deduct from his salary and direct to his deferred compensation account. CalPERS challenges only the payments that Omnitrans made to him in lieu of contributing to his deferred compensation account.

9. The evidence fails to establish that the payments to respondent in lieu of deferred compensation, and in lieu of an agency-provided vehicle, were part of the payrate for the position of CEO/GM.

Special compensation

10. "Special compensation" includes "a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions." (§ 20636, subd. (c)(1).) Special compensation is

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"

(§ 20636, subd. (c)(2).) CalPERS has further defined "special compensation" by regulation. (Cal. Code Regs., tit. 2, § 570.) Section 570 sets forth an exclusive list of items that constitute special compensation for the purpose of calculating a member's pension.

11. Pay in lieu of deferred compensation, and pay in lieu of an agency-provided vehicle, are not among the exclusive list of items set forth in section 570 of CalPERS's

regulations, that constitute special compensation. The evidence fails to establish that the in lieu payments to respondent constitute special compensation.

Final settlement pay

12. “Final settlement pay” is expressly excluded from special compensation. (§ 20636, subd. (c)(7)(A).) “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.” (§ 20636, subd. (f).) By regulation, CalPERS has determined that final settlement pay is generally, but not always, paid during the final compensation period. (Cal. Code Regs., tit. 2, § 570.)

13. The evidence fails to establish that the payments to respondent in lieu of an agency-provided vehicle constitute final settlement pay. The agency’s decision to stop providing automobiles to its employees advanced a legitimate business purpose, and comparable payments were made to other agency employees when the leases on their agency vehicles expired.

14. The same cannot be said for the payments to respondent in lieu of deferred compensation. In September 2006, two weeks before respondent turned 62 years old and three months before his final compensation period began, respondent and Omnitrans signed a contract amendment calling for the payment to respondent of \$15,000 per year in lieu of deferred compensation. (Respondent’s pension benefit for his RTA service is based on the period December 2006 to December 2009.) If allowed, the in lieu payments would have converted a nonpensionable benefit – employer paid deferred compensation – to pensionable final compensation. The in lieu payments were made at respondent’s request based upon his personal financial circumstances; they advanced no legitimate business purpose of the agency. Although respondent was not considering retiring at the time those payments began, it would be naïve to believe that, at that stage in respondent’s life and career, payments of that magnitude were not “in anticipation” of retirement. That is all section 20636 requires to establish that the payments were final settlement pay.

15. The payments to respondent in lieu of deferred compensation are final settlement pay, and therefore cannot constitute special compensation.

Limitations on increases in compensation earnable during the final compensation period

16. For a chief executive officer, like respondent, who is not part of a group or class of similarly situated members, payrate and special compensation are subject to certain limitations set forth in subdivision (e)(2) of section 20636, which provides as follows:

Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period application 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, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

The purpose of this provision is to “[prevent] local agencies from artificially increasing a preferred employee’s retirement benefits by providing the employee with compensation increases which are not available to other similarly situated employees.” (*Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983, 993.)

17. The statement of issues quotes subdivision (e)(2), and therefore appears to allege that the in lieu payments to respondent violated those provisions; petitioner also alludes to the issue in its brief. If that is the allegation, the evidence failed to support it. The evidence did not establish which employees were in the same membership classification as respondent, and did not establish that the increases in compensation earnable claimed by respondent exceeded the average increase for those employees during the same period.

Conclusion

18. CalPERS correctly determined that Omnitrans’s payments to respondent in lieu of deferred compensation, and in lieu of an agency-provided vehicle, should be excluded from his compensation earnable, by reason of the matters set forth in Legal Conclusions 5-9, 11, 14 and 15.

ORDER

The appeal of respondent Durand Rall is denied.

DATED: October 9, 2013


DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings