

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 Involving:

OFELIA P. PETTENGILL,

Appellant/Respondent,

and

SAN BERNARDINO COUNTY
SUPERINTENDENT OF SCHOOLS,

Public Employer/Respondent.

CalPERS Case No. 2013-0037

OAH No. 2013080903

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on June 24, 2014.

Rory J. Coffey, Senior Staff Counsel, represented petitioner Karen DeFrank, Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS), State of California.

Appellant/respondent Ofelia P. Pettengill represented herself and was present throughout the administrative hearing.

Elizabeth Zamora-Mejia, Attorney at Law, made a telephonic appearance on behalf of her client, public employer/respondent San Bernardino County Superintendent of Schools (County Superintendent). A letter dated May 28, 2014, addressed to Rory J. Coffey, was identified as Respondent's Exhibit 1 to support of the County Superintendent's appearance and argument in this matter.

On June 24, 2014, the matter was submitted.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED July 25, 2014

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ISSUE

Should the Longevity Incentive paid by the County Superintendent to Ms. Pettengill be included in calculating her service retirement allowance?

FACTUAL FINDINGS

Factual Background

1. Ms. Pettengill is 62 years old. She was born in San Bernardino, California, and grew up in the Inland Empire. She graduated from San Bernardino High School in 1970.
2. After graduating from high school, Ms. Pettengill began a successful and lengthy public service career. After working for the County of San Bernardino for several years, she became employed by the City of Redlands in 1975. She continued this employment for three years. In 1978, she became employed by the San Bernardino City Unified School District. Ms. Pettengill continued this employment until 1999, when she began employment with the San Bernardino County Superintendent of Schools. Ms. Pettengill was employed by the County Superintendent for 13 years. She finished her career with the County Superintendent's Office as Secretary to the San Bernardino County Board of Education.
3. Ms. Pettengill was a trusted and highly skilled employee. When she filed her CalPERS application for a service retirement, she had provided the County Superintendent's Office with far more than five years of satisfactory work performance at the "E" step of her salary range. Her base pay was \$5,078 per month when she retired. In addition to her base pay, Ms. Pettengill received a five percent longevity incentive stipend.
4. Before she retired, Ms. Pettengill was a member of the San Bernardino Public Employees' Association (SBPEA). The memorandum of understanding (MOU) between the SBPEA and the County Superintendent's Office set forth various employee rights, including employee compensation and benefits.
5. Section 4.7 of the SBPEA MOU provided:
 - 4.7 Longevity. Effective July 1, 1993, employees who have served five (5) years of satisfactory work performance at the "E" step in the same position classification or same salary range will receive a longevity stipend award of five percent (5%) added to their base salary in that year and continuing in subsequent years if they maintain satisfactory work performance evaluations. This adjustment will be made on the employees' [sic] subsequent years. An employee having previously attained longevity status will continue to receive the five percent (5%) longevity stipend as long as they [sic]

maintain satisfactory work performance evaluations (as defined above) and remain in the bargaining unit regardless of the position held.

6. On April 3, 2012, Ms. Pettengill filed an application for a service retirement allowance with CalPERS. Before retiring, she had been employed for 35.3 years by several public employers who had contracted with CalPERS for retirement and other benefits for eligible employees.

7. Ms. Pettengill and the County Superintendent expected that Ms. Pettengill's service retirement allowance would be calculated using a formula that included her age at retirement, her 35.3 years of credited CalPERS service, and a final compensation calculation that included both her base pay and the five percent longevity stipend. Ms. Pettengill's belief was based upon her conversations with her employer, her understanding of the MOU, and being told by a CalPERS San Bernardino regional office staff member – after Ms. Pettengill produced a copy of a recent paycheck – that that would be the case.

8. Ms. Pettengill retired from public service on June 30, 2012. She did not receive a retirement check in August 2012, so she contacted CalPERS staff in Sacramento. Ms. Pettengill was told that her application for a service retirement was being audited to determine whether there was pension spiking. In September 2012, when she received her first retirement check, she observed that her check was approximately \$250 less than she had anticipated. She learned that CalPERS had determined that her final compensation should not include the five percent longevity stipend. At some point shortly thereafter, CalPERS reached a contrary determination and provided Ms. Pettengill with several retirement checks that included a service retirement allowance based upon final compensation that included both base pay and the longevity stipend. CalPERS then reversed its determination.

In a letter dated October 19, 2012, Tomi Jimenez, a CalPERS Manager in the Compensation and Employer Review Customer Account Services Division, advised Ms. Pettengill that the "longevity incentive" identified in the MOU did not comply with the Public Employee Retirement Law (PERL), and the remuneration Ms. Pettengill received as a result of that stipend could not be used to calculate her service retirement allowance "because of the work performance requirement to the incentive." Ms. Pettengill was advised of her right to appeal.

9. By letter dated October 27, 2012, Ms. Pettengill appealed from CalPERS's adverse decision and requested that the five percent longevity stipend be included in calculating her final compensation.

Jurisdictional Matters

10. On February 21, 2014, petitioner Karen DeFrank, Chief, Customer Account Services Division, signed the statement of issues in her official capacity. Paragraph X of the

statement of issues alleged: “This appeal is limited to the issue of whether the Longevity Incentive can be included in the calculation of respondent Pettengill’s final compensation.”

The statement of issues was served on Ms. Pettengill and on public employer/respondent San Bernardino County Superintendent of Schools. Thereafter, the matter was set for hearing at CalPERS’s San Bernardino regional office.

11. The administrative record in this matter was opened on June 24, 2014. Rory J. Coffey, Senior Staff Counsel, appeared on petitioner’s behalf and was present throughout the administrative proceeding. Ms. Pettengill appeared on her own behalf and was present throughout the administrative proceeding. When no appearance was made by or on behalf of public employer/respondent County Superintendent, the administrative law judge directed Attorney Coffey to telephone Elizabeth Zamora-Mejia, Attorney at Law, to determine whether an appearance would be made by or on behalf of public employer/respondent County Superintendent. In response to Attorney Coffey’s telephone call, Attorney Zamora-Mejia advised that no personal appearance would be made on behalf of her client, the County Superintendent; however, Attorney Zamora-Mejia asked that a letter she had authored, dated May 28, 2014, addressed to Attorney Coffey, be marked to identify and support the County Superintendent’s legal argument in this matter. There was no objection to this request.

The original letter to Mr. Coffey, dated May 28, 2014, was marked as Respondent’s Exhibit 1. Thereafter, a stipulation was recited relating to the truth of the matters alleged in Paragraphs II, III, IV, VII, VIII and IX of the statement of issues; it was also stipulated that the sole issue for determination was identified correctly in Paragraph X of the statement of issues. Official notice was taken of governing statutes and regulations; sworn testimony was received; documentary evidence was introduced; closing arguments were given; the record was closed; and the matter was submitted.

Contracting Public Agencies and the CalPERS Retirement Program

12. Contracts between CalPERS and the several public entities that employed Ms. Pettengill before she filed her application for a service retirement, including the County Superintendent, were subject to PERL. Among other matters, these contracts provided for the creation of a CalPERS-defined benefit retirement plan for eligible employees of the contracting public entities.

Under the CalPERS-defined benefit plan, a member’s service retirement allowance is calculated by applying a formula that involves the member’s age at retirement, the member’s years of credited service with CalPERS contracting agencies, and the member’s “final compensation,” which is defined as “the remuneration paid out of funds controlled by the employer in payment of the member’s services performed during normal working hours or for the time during which the member is excused. . . .” (Gov. Code, § 20630.) By statute, “final compensation” is the employee’s “payrate” and any “special compensation.” (Gov. Code, § 20636.)

The Arguments

13. CalPERS argued that the Longevity Incentive that Ms. Pettengill received should not be included in calculating her final compensation because that stipend was not available to others in her class of employment, i.e. it was not available to others who were not employed at the “E” salary step or others whose performance had been deemed by the County Superintendent to be unsatisfactory. CalPERS claimed that these two eligibility requirements, which were set forth in the applicable MOU, rendered the longevity stipend unavailable to all members of Ms. Pettengill’s class. CalPERS observed that the MOU’s provisions relating to the longevity stipend did not comply with specific requirements set forth in California Code of Regulations, title 2, section 571, subdivision (a).

14. The County Superintendent argued that the question of “availability” was the sole matter at issue, and that “the longevity stipend in question was easily obtained and readily accessible, as evidenced by the fact it was received in each year by virtually all employees in the SBPEA bargaining unit with the required years of service.”¹ The County Superintendent also claimed that in any given year, less than five percent of employees with long-term service received unsatisfactory performance evaluations and that no employee in Ms. Pettengill’s class had ever failed to receive the longevity stipend. The County Superintendent observed that CalPERS failed to inquire into the facts of the matter and that the County Superintendent would provide CalPERS with additional documentation to establish those factual matters upon request.

15. Ms. Pettengill argued that CalPERS’s argument made no sense because her bargaining unit and the County Superintendent’s Office reached an agreement providing her with eligibility for the longevity stipend; she did all that was required to receive the stipend; she and her employer intended that she receive the stipend; and payment to her of the longevity stipend would not create an unfunded liability because the County Superintendent made all required contributions to CalPERS related to the longevity stipend. Ms. Pettengill argued that CalPERS’s determination resulted in a reduction in her retirement benefits of approximately \$250 per month, and that it felt as if that reduction was a result of her not having provided satisfactory performance.

Angel Gutierrez’s Testimony

16. Angel Gutierrez has been employed by CalPERS for the past 15 years. For the past six years, Mr. Gutierrez has served as a Retirement Program Specialist II with CalPERS’s Compensation Review Unit. Mr. Gutierrez was knowledgeable about statutes and regulations relating to the calculation of a service retirement and with the facts and circumstances relating to Ms. Pettengill’s situation.

¹ The County Superintendent’s argument is set forth in Attorney Zamora-Mejia’s May 28, 2014, letter to Attorney Coffey.

Mr. Gutierrez testified that PERL governs what remuneration can be included in determining final compensation. Contracts between CalPERS and public entities relating to retirement benefits are subject to PERL. One retirement benefit provided under PERL to eligible public employees is a prefunded, defined benefit retirement plan.

Under CalPERS's defined benefit plan, a member's service retirement allowance is calculated by applying a formula that involves the member's age at retirement, the member's years of service with contracting agencies, and the member's "final compensation." PERL defines "final compensation" as the employee's "payrate" and any "special compensation."

In Ms. Pettengill's situation, there was no dispute concerning her age at retirement or the number of years of her credited service. Nor was there a dispute about her "payrate." The sole issue was whether Ms. Pettengill's five percent longevity stipend qualified as "special compensation."

Mr. Gutierrez testified that "special compensation" was defined under Government Code section 20636, subdivision (c), and was limited by California Code of Regulations, title 2, section 571, subdivision (a). According to Mr. Gutierrez, whether "longevity pay" constitutes "special compensation" that may be included in calculating an employee's final compensation requires an examination of the applicable MOU between the employee's bargaining unit and the public employer.

Mr. Gutierrez examined the MOU between SBPEA and the County Superintendent, paying close attention to section 4.7. He observed that section 4.7 could disqualify some employees who were in Ms. Pettengill's class, either because they had not attained "E" step salary status or because they had not obtained or failed to maintain satisfactory work performance evaluations. He opined that these criteria were inconsistent with the regulatory mandate requiring special compensation be "available to all members in the group or class."

Mr. Gutierrez compared section 4.7's provisions to other longevity provisions, including longevity provisions contained in California School Employee Association (CSEA) contracts. The CSEA provisions he reviewed did not contain eligibility requirements requiring employment at the highest pay step status or satisfactory performance; the unrestricted longevity incentive provisions complied with regulatory requirements. CalPERS honored these unrestricted agreements and included the income obtained by those employees who enjoyed applicable longevity in calculating their final compensation.

On cross-examination, Mr. Gutierrez conceded he did not make the original determination for CalPERS; he did not speak with Ms. Pettengill; and, he did not calculate the impact of CalPERS's determination on Ms. Pettengill's financial situation. Mr. Gutierrez agreed that CalPERS's letter to Ms. Pettengill, dated October 19, 2012, merely stated that Ms. Pettengill's longevity stipend did not qualify as special compensation "because of the addition of the work performance requirement to the incentive" and that it did not mention the failure of an employee to attain "E" step salary status. Mr. Gutierrez was unaware of any

factual investigation conducted by CalPERS to determine whether the longevity stipend in question was easily obtained and readily accessible, whether the longevity stipend was received each year by virtually all employees in the SBPEA bargaining unit who had the required years of service, whether less than five percent of employees with long-term service received unsatisfactory performance evaluations, or whether any employee in Ms. Pettengill's class failed to receive the longevity stipend. Mr. Gutierrez testified that even if these factual matters were true, CalPERS's legal analysis and determination would remain the same because section 4.7's longevity and salary step limitations made longevity pay unavailable to all members of Ms. Pettengill's class who possessed the required years of employment with the County Supervisor.

LEGAL CONCLUSIONS

The Public Employees' Retirement Law

1. One of the benefits offered to many public employees in California is membership in CalPERS. Members of CalPERS, once vested, participate in a defined benefit retirement plan that supplies a monthly retirement allowance under a formula comprising factors such as final compensation, service credit (i.e., the credited years of employment), and a per-service-year multiplier. The retirement allowance consists of an annuity (which is funded by member contributions deducted from the member's paycheck and interest thereon) and a pension (which is funded by employer contributions and which must be sufficient, when added to the annuity, to satisfy the amount specified in the benefit formula). (*In re Marriage of Sonne* (2010) 185 Cal.App.4th 1564, 1568.) The determination of what benefits and items of pay constitute compensation is crucial to the computation of an employee's ultimate pension benefits. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.)

Statutory Authority

2. "Compensation" means 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 for specified reasons. (Gov. Code, § 20630, subd (a).) When compensation is reported, the employer must identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation cannot exceed "compensation earnable" as defined in PERL. (Gov. Code, § 20630, subd. (b).)

3. Government Code section 20636 provides in part:

(a) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(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. . . .

[¶] . . . [¶]

(c)(1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

(2) Special compensation shall be 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, subject to the limitations of paragraph (2) of subdivision (e).

(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.

[¶] . . . [¶]

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. . . .

4. Government Code section 20636.1 provides in part:

(c)(1) Special compensation of a school member includes any payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

[¶] . . . [¶]

(6) The board shall promulgate regulations that delineate more specifically and exclusively what

constitutes “special compensation” as used in this section. . . .

Regulatory Authority

5. California Code of Regulations, title 2, section 571 provides in part:

(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency . . . that must be reported to CalPERS if they are contained in a written labor policy or agreement:

(1) INCENTIVE PAY

[¶] . . . [¶]

Longevity Pay - Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.

[¶] . . . [¶]

(b) The Board has determined that all items of special compensation listed in subsection (a) are:

(1) Contained in a written labor policy or agreement as defined at Government Code section 20049 . . .

(2) Available to all members in the group or class . . .

[¶] . . . [¶]

(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 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.

Decisional Authority

6. Pension provisions should be liberally construed and all ambiguities should be resolved in favor of the pensioner. However, this rule of liberal construction is applied for the purpose of effectuating obvious legislative intent and should not blindly be followed so as to eradicate the clear language and purpose of the statute. (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 473.)

7. The PERS system, via its definitions of “compensation earnable” and “final compensation” contemplates equality in benefits between members of the same group or class of employment and at the same rate of pay. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1492.)

8. The Legislature and the Board of Administration of the Public Employees Retirement System adopted limitations on the salary that may be considered in calculating a public employee’s retirement allowance. Among other matters, these limitations exclude from consideration payments that are not available to similarly situated public employees. (*Prentice v. Board of Administration, California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 986.) By regulation, CalPERS further defined “special compensation.” An item of compensation is reportable as “special compensation” only if it is contained in a written labor policy or agreement and is available to all members in the group or class. In sum, calculation of “compensation earnable” is not based on individual efforts. Rather, both components of “compensation earnable,” an employee’s payrate and special compensation, are measured by the amounts provided by the employer to similarly situated employees. (*Id.*, at pp. 991-992.)

9. The intent of the parties is not controlling in determining what constitutes “special compensation.” (*Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310.)

Ultimate Conclusion

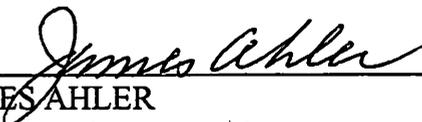
10. The compensation paid by the County Superintendent to Ms. Pettengill for her years of service was conditioned upon her status at the “E” salary step and her satisfactory performance evaluations. A longevity stipend awarded on this basis cannot be included in determining “compensation earnable” when calculating her service retirement allowance. The “E” step salary status and the possibility that some members of the class might not maintain satisfactory work performance evaluations made the award of a longevity stipend unavailable to all members in Ms. Pettengill’s class. While deciding that Ms. Pettengill’s service retirement cannot include consideration of the longevity stipend is a conclusion that is not easily reached in light of Ms. Pettengill’s many years of exemplary public service, it is required under the law. Ms. Pettengill’s stellar performance is not at issue in this case, just as the actual practice of the County Superintendent’s Office in awarding a longevity stipend is irrelevant to the legal determination in that matter.

The SBCPE's MOU longevity incentive at issue did not comply with the requirement set forth in California Code of Regulations, title 2, section 571, subdivision (b)(2).

ORDER

The Longevity Incentive paid by the San Bernardino County Superintendent of Schools to Ofelia P. Pettengill shall not be included in final compensation for purposes of calculating her service retirement allowance.

Dated: July 24, 2014



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings