

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

DENNIS C. LEONE,

Respondent

and

FRESNO UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. 2014-0504

OAH No. 2014060834

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on March 24, 2015, in Fresno, California.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Attorney James M. Makasian of the Law Office of James M. Makasian represented respondent Dennis C. Leone, who was present throughout the hearing.

No appearance was made on behalf of respondent Fresno Unified School District (District).

Evidence was received, and the record was left open to allow the parties to submit simultaneous written closing argument. CalPERS's closing argument is marked as Exhibit 21, and Mr. Leone's closing argument is marked as Exhibit C. The record was closed, and the matter was submitted for written decision on May 8, 2015.

SUMMARY

The sole issue to be determined on appeal is whether the remuneration the District paid to Mr. Leone and reported to CalPERS as "Converted Positive Active Teacher: Fresno

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Adult Education Adult Ed Voc. Consortium” should be included in the calculation of Mr. Leone’s compensation earnable for his position as a Custodial Services District Supervisor I under the Public Employees’ Retirement Law (Gov. Code, § 20000 et seq.) (PERL). For the reasons discussed below, such payment does not qualify as part of Mr. Leone’s pay rate or as special compensation, and therefore must be excluded from the calculation of his compensation earnable, final compensation, and, ultimately, monthly retirement allowance for that position.

FACTUAL FINDINGS

Procedural Background

1. The District is a public agency contracting with CalPERS for retirement benefits for its eligible employees.

2. Mr. Leone worked for the District as a Custodial Services District Supervisor I from 1997 through May 1, 2013. He is a school miscellaneous member of CalPERS by virtue of that employment.

3. On January 31, 2013, Mr. Leone signed, and CalPERS received, a Service Retirement Election Application. His application was approved, and he retired for service effective May 1, 2013. He had a total of 30.510 years of service credit as of that date.¹

4. On November 15, 2013, Tomi Jiminez, manager of the Compensation and Employer Review Unit in the Customer Account Services Division of CalPERS, sent Mr. Leone and the District separate correspondence advising that CalPERS had recently completed a review of compensation reported by the District on behalf of Mr. Leone and found compensation that does not comply with the PERL. Ms. Jiminez explained:

The District reported to CalPERS on Dennis Leone’s behalf, identified as “converted position active teacher”, payments in varying amounts almost every service period from January 28, 2002 through June 30, 2009. The teaching compensation was reported to CalPERS as “special compensation”. California Code of Regulations (CCR) Section 571 (a) and (b) delineates specifically and exclusively what can be reported to CalPERS as “special compensation”. Only those items listed in the CCR 571 (a) or meeting the criteria listed in CCR 571 (b) are reportable. If the special competition item is not included in the exclusive

¹ At hearing, Mr. Leone argued that CalPERS’s determination of his service credit was incorrect. However, the calculation of his service credit is not part of his appeal, and his argument was not considered.

list, it is not reportable for retirement purposes. Compensation from a second job as a teacher is not listed in CCR 571 (a).

Special compensation shall be for services rendered during normal working hours, and the teaching compensation that the District reported was earned outside of the normal working hours of Dennis's primary position as Custodial Services District Supervisor I.

The teaching compensation reported for the second job is considered overtime as stated in California Public Employees' Retirement Law Government Code (GC) Section §20635 (*sic*) Overtime Compensation Excluded (page 194-195).

[¶] ... [¶]

The teaching compensation pay is not for services rendered on a full-time basis nor is it listed in the exclusive list to be considered as special compensation. Thus, the teaching pay does not qualify as "compensation earnable" and should not have been reported as compensation to CalPERS.

Therefore, the reported special compensation for teaching pay will be excluded from your [his] retirement calculation. CalPERS request that the District reverse this compensation out of Mr. Leone's reported payroll.

Ms. Jiminez's correspondence notified Mr. Leone and the District of their respective appeal rights.

5. Mr. Leone timely appealed CalPERS's decision to exclude the teaching compensation reported by the District. The District did not exercise its appellate rights.

6. On June 11, 2014, Karen DeFrank, acting solely in her official capacity as Chief of the Customer Account Services Division of CalPERS, signed the Statement of Issues.

7. On July 7, 2014, CalPERS served the jurisdictional documents, including a Notice of Hearing, on Mr. Leone and the District.

8. This matter was called for hearing on the date and at the time and location stated in the Notice of Hearing. No one appeared on behalf of the District, and an evidentiary hearing was conducted as a default proceeding pursuant to Government Code section 11520 as to that party only.

CalPERS's Review of Mr. Leone's "Compensation Earnable"

9. Andrew McDuffie is a Retirement Program Specialist II employed in the Compensation and Employer Review Unit of CalPERS. He was assigned to review the compensation the District reported for Mr. Leone's position as a Custodial Services District Supervisor I.

10. In reviewing Mr. Leone's compensation, Mr. McDuffie noted that the District made payments to Mr. Leone in varying amounts almost every service period from January 28, 2002 through June 30, 2009. Such payments were reported to CalPERS as "Converted Positive Active Teacher: Fresno Adult Education Adult Ed Voc. Consortium," and identified as "special compensation."

11. Mr. McDuffie inquired with the District and Mr. Leone about the supposed special compensation, and both reported that such compensation was payment Mr. Leone received for a second job as a teacher. At no time did the District or Mr. Leone tell Mr. McDuffie that the special compensation was considered "training pay."

12. Mr. McDuffie obtained and reviewed the publicly available pay schedule for the District's management employees for the relevant timeframe. The pay schedule included the compensation Mr. Leone received as a Custodial Services District Supervisor I. Such compensation did not include any of the remuneration Mr. Leone received for "Converted Positive Active Teacher: Fresno Adult Education Adult Ed Voc. Consortium."

13. Mr. Leone was part of the District's "management team." As such, the terms and conditions of his employment were governed by the District's Handbook of Working Conditions and Benefits for its management team. At all times relevant, the Handbook provided the following with regard to the compensation received by management, including Mr. Leone:

All designated management positions and corresponding salaries are listed in the current management salary schedule. (<http://hr.fresno.k12.ca.us>) Placement on the management employee salary schedule is the responsibility of the Division of Human Resources/Labor Relations.

1. Initial Placement shall be on the first step, unless such placement shall be a reduction in salary. In such cases, the next highest step shall be appropriate placement. In the event the number of duty days between administrative positions should exceed 5% within the next highest step shall be applicable.

2. The Associate Superintendent, Division of Human Resources/Labor Relations, will make a recommendation regarding salary placement to be Superintendent when there are unusual circumstances.
3. Bonus additions to placement of basic schedule (additives).
 - A. \$100.00 for M.A. on all classes
 - B. \$200.00 for BA + 90
 - C. \$200.00 for earned Doctorate
 - D. Career Increment of .75% each year from the 11th to the 20th year to a total of 7.5% at the 20th year and thereafter. Effective July 1, 1995, years of service for career increment purposes shall mean years of service in FUSD except that up to five (5) years of service credit shall be granted for out of district service.

14. At no time during the relevant timeframe did the Handbook include any compensation for "Converted Positive Active Teacher: Fresno Adult Education Adult Ed Voc. Consortium."

Mr. Leone's Hearing Testimony

15. Mr. Leone's position as a Custodial Services District Supervisor I was a full-time position with the District, and his primary duties consisted of hiring all new custodians for the District.

16. Mr. Leone provided conflicting testimony at hearing about the District's "custodial training program." On the one hand, he stated that the program is a training program for prospective custodians, and the District hires its new custodians from that program. On the other hand, he described the participants in the program as "employees" of the District.² But regardless of the trainees' employment relationship with the District, Mr. Leone became a teacher with the program in 2001 or 2002, and was responsible for teaching the participants all phases of cleaning the District's buildings.

17. Mr. Leone claimed that the employment contract he signed with the District on December 10, 2008, covered his duties as a teacher in the District's custodial training program. The contract described his position as a "Teacher, Adult Education" at Cesar

² For the sake of ease of reference, it will be assumed that the program includes both prospective employees and newly hired employees.

Chavez Adult School and identified that position as a .4333 Full-Time Equivalent position. Mr. Leone explained that the “special compensation” the District reported to CalPERS on his behalf was his compensation for that position and was paid in addition to his salary as a Custodial Services District Supervisor I. He further explained that he performed his teaching duties during the normal working hours of his position as a Custodial Services District Supervisor I.

18. Mr. Leone explained at hearing that he would not have retired when he did had he known the compensation he received for teaching prospective and new custodians would not be included in the calculation of his final compensation. Instead, Mr. Leone relied on two estimates of his retirement allowance provided by CalPERS on March 7, 2012 (based on an anticipated retirement date of April 27, 2012) and January 10, 2012 (based on an anticipated retirement date of May 1, 2013), both of which included such compensation.

19. Both estimates provided by CalPERS contained language stating that the calculation was not a final determination of Mr. Leone’s retirement allowance, and his actual retirement allowance cannot be determined until after he retires.

Summary

Mr. Leone held and was compensated for two separate jobs with the District

20. Mr. Leone held, and the District compensated him for, two separate and distinct jobs – one as a full-time Custodial Services District Supervisor I, and another as a part-time Teacher, Adult Education. That he may have performed the duties of both jobs at the same time, even if found to be true, is irrelevant. The District’s governing board expressed its clear intent to make the two positions separate and distinct from one another by designating one as a 1.0 FTE³ position, and the other as a .4333 FTE position. The District reported Mr. Leone’s compensation for the latter position to CalPERS as “Converted Positive Active Teacher: Fresno Adult Education Adult Ed Voc. Consortium.” Since he retired from the former position, that compensation is not included in the calculation of his monthly retirement allowance.

The compensation Mr. Leone received for teaching was not special compensation

21. Mr. Leone’s argument that the compensation he received for teaching prospective and new janitors should be considered special compensation for his Custodial Services District Supervisor I position is not persuasive. That compensation was not included in the District’s publicly available pay schedule for that position and, therefore, is not included within his payrate. Nor was such payment identified in the District’s applicable Handbook as compensation for which its management employees, including Mr. Leone, were potentially eligible. Instead, the compensation was paid for Mr. Leone’s second job as a

³ “FTE” stands for full-time equivalent.

part-time teacher. Therefore, it does not qualify as “special compensation” for his Custodial Services District Supervisor I position.

22. When all the evidence is considered, the persuasive evidence established that the payments the District identified as “Converted Positive Active Teacher: Fresno Adult Education Adult Ed Voc. Consortium” should not be included in the calculation of Mr. Leone’s compensation earnable, his final compensation, and, ultimately, his monthly retirement benefit for his Custodial Services District Supervisor I position for the reasons explained in the Legal Conclusions below. Therefore, Mr. Leone’s appeal should be denied.

LEGAL CONCLUSIONS

Background

1. The appellate court in *Oden v. Board of Administration of the Public Employees’ Retirement System* (1994) 23 Cal.App.4th 194, described CalPERS as follows:

The Public Employees’ Retirement Law (PERL, Gov. Code, § 20000 et seq.) establishes PERS, a retirement system for employees of the state and participating local public agencies. PERS is a prefunded, defined benefit plan which sets an employee’s retirement benefit upon the factors of retirement age, length of service, and final compensation. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478 [280 Cal.Rptr. 847].) Retirement allowances are therefore partially based upon an employee’s compensation. An employee’s compensation is not simply the cash remuneration received, but is exactly defined to include or exclude various employment benefits and items of pay. ([former] § 20022.)⁴ The scope of compensation is also critical to setting the amount of retirement contributions, because PERS is funded by employer and employee contributions calculated as a percentage of employee compensation.⁵ (*City of Sacramento v. Public Employees Retirement System, supra*, at p. 849.)

⁴ Predecessor statute to Government Code section 20630.

⁵ To clarify:

PERS determines employer contribution rates based on compensation figures and actuarial assumptions. PERS periodically adjusts employers’ rates of contribution to compensate for any inaccuracy in those assumptions. Employee contributions, in contrast, are fixed by statute.

(*Id.*, at p. 198.)

Burden of Proof

2. Mr. Leone has the burden of proving that the compensation he received for training prospective or new custodians qualifies as “special compensation” for his job as a Custodial Services District Supervisor I, and he must do so by a preponderance of the evidence. (See, *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn. 5.) Evidence that is deemed to preponderate must amount to “substantial evidence.” (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be “substantial,” evidence must be reasonable in nature, credible, and of solid value. (*In re Teed’s Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Law

3. Government Code section 20630 defines “compensation” as follows:

(a) As used in this part, “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 because of any of the following:

(1) Holidays.

(2) Sick leave.

(3) Industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code, Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or Section 44043 or 87042 of the Education Code.

(4) Vacation.

(5) Compensatory time off.

(6) Leave of absence.

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall

(*Hudson v. Board of Administration of the Public Employees’ Retirement System* (1997) 59 Cal.App.4th 1310, 1316.)

be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.

4. Government Code section 20635 provides the following about compensation a member receives for performing a second, part-time job:

When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service. For the purposes of this part, overtime is the aggregate service performed by an employee as a member for all employers and in all categories of employment in excess of the hours of work considered normal for employees on a full-time basis, and for which monetary compensation is paid.

If a member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full time, the position with the highest payrate or base pay shall be reported to this system. This provision shall apply only to service rendered on or after July 1, 1994.

5. Government Code section 20636 defines "compensation earnable," as is relevant here, as follows:

(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. "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, subject to the limitations of paragraph (2) of subdivision (e).

[¶]...[¶]

(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).

[¶]...[¶]

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes “special compensation” as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 and following of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

6. Pursuant to the authority provided in Government Code section 20636, subdivision (c)(6), the Board of Administration for CalPERS adopted California Code of Regulations, title 2, section 571, which contains the *exclusive* listing of items that may be considered “special compensation” for employees of contracting agencies.

Legal Analysis

7. Mr. Leone was compensated for performing two separate positions with the District – a Custodial Services District Supervisor I position and a part-time teaching position. The compensation he received for the latter position, which the District reported to CalPERS as “Converted Positive Active Teacher: Fresno Adult Education Adult Ed Voc. Consortium,” constituted “overtime” as defined by the PERL. (Gov. Code, § 20635.) It was not included in the publicly available pay schedule for the former position, and therefore was not part of his “payrate” for that position. Nor does such compensation constitute “special compensation” for his position as a Custodial Services District Supervisor I. It was not included in the handbook applicable to that position, and it was compensation paid for a second position rather than “a payment received for special skills, knowledge, abilities, work assignment, work days or hours, or other work conditions.” (Gov. Code, § 20636, subd. (c))

(1.) Therefore, such compensation was properly excluded from Mr. Leone's compensation earned, final compensation, and, ultimately, his monthly retirement allowance for his position as a Custodial Services District Supervisor I.

8. Any claim that CalPERS is estopped from excluding the compensation Mr. Leone received for performing his part-time teaching position because such compensation was included in the two estimates of his retirement allowance must fail as a matter of law. In *Hudson v. Board of Administration of the Public Employees' Retirement System* (1997) 59 Cal.App.4th 1310, the appellate court said:

“[E]stopper will not be applied against the government if to do so would nullify a strong rule of policy adopted for the benefit of the public.” (Citation.) PERS's desire to maintain the actuarial soundness of the system it administered reflected not only its own interest but also a recognized public policy. “[T]he Legislature intended to create and maintain the PERS on a sound actuarial basis” (Citation.)

(*Hudson v. Board of Administration of the Public Employees' Retirement System* (1997) 59 Cal.App.4th 1310, 1331-1332.)

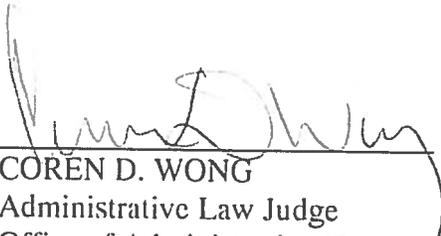
Conclusion

9. CalPERS correctly determined that Mr. Leone's compensation earned for purposes of calculating his final compensation and, ultimately, monthly retirement allowance for his position as a Custodial Services District Supervisor I does not include the compensation the District reported to CalPERS as “Converted Positive Active Teacher: Fresno Adult Education Adult Ed Voc. Consortium.” Such compensation was paid for performing a separate and distinct part-time job, was not included in his payrate for his Custodial Services District Supervisor I position, and did not constitute special compensation for that position. Therefore, Mr. Leone's appeal should be denied.

ORDER

The appeal of respondent Dennis C. Leone is DENIED.

DATED: May 13, 2015


COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings