

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Calculation of Final
Compensation:

CLAY W. ROSENCRANS,

Respondent,

and

CITY OF LA VERNE,

Respondent.

Agency Case No. 2014-0699

OAH No. 2015030151

PROPOSED DECISION

This matter was heard before Administrative Law Judge, Glynda B. Gomez, Office of Administrative Hearings, on July 29, 2015 in Glendale, California.

The California Public Employees' Retirement System (CalPERS) was represented by Rory J. Coffey, Senior Staff Attorney.

Respondent Clay W. Rosencrans (Respondent) was self-represented.

There were no appearances made by or on behalf of Respondent City of La Verne (City).

The case was submitted for decision on July 29, 2015.

ISSUE

Whether CalPERS correctly excluded a performance bonus received by Respondent during the period of March 1, 2009, to February 27, 2010, as non-compliant with the Public Employees' Retirement Law (PERL), for the purpose of calculating his final compensation and retirement allowance?

FACTUAL FINDINGS

1. The Statement of Issues was made and filed on February 27, 2015, by Renee Ostrander, Assistant Division Chief, Customer Account Services Division of CalPERS, in her official capacity.

2. Respondent Rosencrans was employed by the City as a Park Maintenance Supervisor. As such, he is a local miscellaneous member of CalPERS. Respondent Rosencrans retired from service effective September 17, 2013, with 35.80 years of service and has been receiving his retirement allowance since that date. Respondent Rosencrans signed his application for service retirement on September 26, 2013.

3. The City is a public agency that contracts with CalPERS for retirement benefits for its eligible employees. The provisions for local public agencies contracting with CalPERS are set forth in the Public Employees Retirement Law (PERL). (Gov. Code § 20460)

4. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions, and by interest and other earnings on those contributions. The amount of a member's contributions is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a rate to the payroll of the agency. Using certain actuarial assumptions specified by law, the CalPERS Board of Administration sets the employer contribution rate on an annual basis.

5. The amount of a member's service retirement allowance is calculated by applying a percentage figure, based upon the member's age on the date of retirement, to the member's years of service and the member's final compensation.

6. CalPERS utilized proprietary software known as "my CalPERS" which automatically scans the member's earnings to find the highest year of compensation. The software also flags for CalPERS personnel instances or instances in which the Final Compensation includes "special compensation" as defined in the PERL.

7. With respect to Respondent Rosencrans, My CalPERS initially selected the period of March 1, 2009, to February 27, 2010, as Respondent's highest year of compensation. My CalPERS also alerted CalPERS staff to the fact that Respondent Rosencrans received special compensation as defined in the PERL, in the form of a five percent education incentive and a three percent performance bonus in the time period of March 1, 2009 to February 27, 2010. Although Respondent Rosencrans received an evaluation that recommended that he be awarded a second performance bonus during his final year with the City, he did not receive the performance bonus due to City's financial constraints. Therefore, the performance bonus was received only once and during the March 1, 2009 to February 27, 2010 time period.

8. Jennifer Sandness, a CalPERS Retirement Program Specialist II in the Compensation Review unit, reviewed Respondent Rosencrans' file including payroll records, special compensation summary, a CalPERS special compensation detail, and a CalPERS calculation summary detail. Ms. Sandness has six years of experience conducting this type of review for CalPERS. After her review, Ms. Sandness determined that Respondent's performance bonus could not be considered special compensation and constituted final settlement pay because it was paid during his highest paid three year period. When Ms. Sandness subtracted the disallowed performance bonus from Respondent Rosencrans' calculation of final compensation, she determined that the 2012-2013 period was Respondent Rosencrans' highest compensation period, not the 2009-2010 period.

9. On February 21, 2014, CalPERS notified Respondent Rosencrans that it could not consider the performance bonus as compensation earnable as defined in the PERL and could not consider it as part of the final compensation upon which his retirement calculation was to be calculated because it was considered to be final settlement pay and thus excluded from consideration.

10. Respondent Rosencrans appealed CalPERS' determination and asserted that the performance bonus was not final settlement pay because it was paid more than three years before his retirement.

11. The propriety of the performance bonus is not at issue. The performance bonus was approved by the City Council and was a matter of public record.

LEGAL CONCLUSIONS

1. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal. App. 4th 194, 198.) The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) final compensation. (Gov. Code §§ 20037, 21350, 21352, 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal. App. 3d 1470, 1479.)

2. "Final Compensation" for a local member who is a member of a contracting agency means the highest average annual compensation earnable by a member during the three consecutive years of employment immediately preceding the effective date of his retirement or any other three year consecutive period that the member designates in his retirement application. (Gov. Code, § 20037)

3. 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 holidays, sick leave,

industrial disability leave, vacation, compensatory time off or leave of absence. (Gov. Code, § 20630.)

4. "Compensation Earnable" means the payrate and special compensation of the member. (Gov. Code, § 20636, subd. (a).)

5. "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 or employment for services rendered on a full-time basis during normal working hours pursuant to publicly available schedules. (Gov. Code, § 20636, subd. (b).)

6. "Special Compensation" includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions. (Gov. Code, § 20636, subd. (c)(1).)

7. "Special Compensation" does not include "Final Settlement Pay." (Gov. Code, § 20636, subd. (c)(7)(a).)

8. "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. (Gov. Code, § 20636, subd. (f).)

9. California Code of Regulations, title 2, section 570 provides that "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 any item of special compensation not listed in Section 571.

It may also 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.

10. Items of Special Compensation including performance bonuses, are allowed under specific provisions and exceptions, such as: the pay must be contained in an approved labor agreement, be available to all members in the group or class, be a part of normal duties, during normal hours of employment, be paid as earned, be historically consistent with prior payments for the job classification, not be paid exclusively in the final compensation period, not be final settlement pay, and not create an unfunded liability over and above CalPERS' actuarial assumptions. (Cal. Code Regs., tit. 2, § 571.)

11. With respect to Incentive Pay bonuses, California Code of Regulations, title 2, section 571, subdivision (a)(1), specifically provides:

Bonus-Compensation to employees for superior performance such as "annual performance bonus" and "merit pay". If provided only during a member's final compensation period, it shall be excluded from final compensation as "final settlement" pay...
(bold in original)

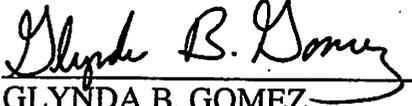
12. Respondent Rosencrans received a one-time three percent performance bonus during the period of March 1, 2009, to February 27, 2010. As set forth in Legal Conclusion 8 above, pay or cash conversions of employee benefits that are in excess of Compensation Earnable, that are granted or awarded to a member in connection with, or in anticipation of a separation from employment, are considered Final Settlement Pay and excluded from Compensation Earnable and the calculation of Final Compensation. Here, the performance bonus was paid more than three years before Respondent retired and there was no evidence that it was paid in connection with or anticipation of a separation from employment. However, as set forth in Legal Conclusion 11, above, a one-time bonus paid during the Final Compensation period is considered Final Settlement Pay and excluded from calculation of Compensation Earnable and Final Compensation.

13. Respondent's Final Compensation is based upon the highest average annual compensation earnable during the three consecutive years of employment immediately preceding the effective date of his retirement or any other three year consecutive period that the member designates. Here, Respondent Rosencrans' highest period of compensation is the 2009-2010 fiscal year and he sought to use the 2009-2010 fiscal year earnings as part of the Compensation Earnable upon which his Final Compensation and retirement benefit were determined. Under these circumstances, the performance bonus must be excluded from computation of the Compensation Earnable and Final Compensation upon which Respondent Rosencrans' retirement benefits are calculated because the performance bonus constitutes Final Settlement Pay under the PERL.

ORDER

Respondent's appeal is denied.

DATED: August 21, 2015


GLYNDA B. GOMEZ
Administrative Law Judge
Office of Administrative Hearings