

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:

PAUL E. DAVENPORT,

Respondent,

and

CITY OF CLAREMONT,

Respondent.

Case No. 2015-0662

OAH No. 2016050010

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Riverside, California, on October 18, 2016.

Christopher Phillips, Senior Staff Counsel, represented petitioner, Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS), State of California:

Paul Davenport, respondent, represented himself at the hearing.

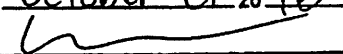
No appearance was made by or on behalf of the City of Claremont (City).

The matter was submitted on October 18, 2016.

ISSUE

Should the four percent Cost of Living Adjustment (COLA) increase in compensation reported by the City on behalf of Mr. Davenport be included in the calculation of his final compensation?

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED October 27 20 16


FACTUAL FINDINGS

Jurisdictional Matters

1. Mr. Davenport was employed by the City as a police lieutenant. He became eligible to receive CalPERS retirement benefits as a result of his employment with the City in accordance with the Public Employees Retirement Law. By virtue of his employment he was a local safety member of CalPERS.

On October 27, 2009, Mr. Davenport signed an application for a CalPERS service retirement with a requested retirement date of November 20, 2009. He retired for service effective November 20, 2009, with 28.932 years of service credit.

2. A disagreement exists concerning the amount of Mr. Davenport's "final compensation" in order to calculate his CalPERS service retirement allowance. Mr. Davenport believes that a four percent COLA increase in compensation reported by the City to CalPERS should be included in the calculation of his final compensation. This four percent COLA increase was based on a "Side Letter Agreement" dated March 2, 2009, between the City and the Claremont Police Management Association (CPMA) of which Mr. Davenport was a member.

After an audit, Petitioner determined that this four percent increase should be excluded from Mr. Davenport's final compensation because it constituted pay in anticipation of his separation from employment in violation of Government Code section 20636, subdivision (f), and because all employees within Mr. Davenport's class of employment were not eligible to receive the increase in violation of Government Code section 20636, subdivision (b)(1).

3. On March 5, 2014, Petitioner provided Mr. Davenport and the City with notice of the right to appeal its decision. Mr. Davenport timely appealed. The City did not appeal.

On April 5, 2016, Petitioner signed the Statement of Issues. The matter was then set for an administrative hearing.

Contracting Public Agencies and the CalPERS Retirement Program

4. The City, a public entity, contracted with CalPERS to provide retirement benefits to its eligible employees. The contract between the City and CalPERS is subject to the Public Employee Retirement Law, which provides a defined benefit plan to employees of contracting agencies.

The CalPERS retirement plan is funded by member and employer contributions. The amount of an employee's contribution is determined by applying a fixed percentage of the employee's compensation. A public agency's contribution is determined by applying a fixed

rate to the agency's payroll. Using certain actuarial assumptions specified by law, CalPERS's Board of Administration sets employer contribution rates on an annual basis.

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 CalPERS, 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." (Gov. Code, § 20636.)

The 2007 Memorandum of Understanding, the 2009 Side Agreement, and the Implementation Schedule

5. In 2007, the City entered into a memorandum of understanding with CPMA effective July 1, 2007, with four percent COLA adjustments on July 1, 2008, and July 1, 2009. Due to the 2008 financial crisis, the City asked its employees, including CPMA members, to agree to concessions in their salaries and benefits to minimize the City's budget shortfall. In a Side Letter Agreement dated March 2, 2009, CPMA agreed to the elimination of the July 1, 2009, four percent COLA.

A second document captioned "Implementation Schedule" dated March 20, 2009, related to these concessions. It contained the following language for "Range Adjustment/COLA for Retirees":

The July 1, 2009 4% COLA shall be replaced with a 4% adjustment to salary ranges for all unit members. Salaries for unit members shall be capped at salary step 16 with the exception of members who are within one year of retirement. These members shall receive a 4% COLA. To be eligible for this benefit, unit members shall provide formal written notification of their intent to retire and retirement date to the Police Chief and Personnel Division. . . .

6. John Traber, president of the CPMA at the time the Side Letter Agreement was made, testified about the facts and circumstances surrounding the Side Letter Agreement and the Implementation Schedule.

Mr. Traber said that the City approached him asking if CPMA would give up the July 1, 2009, COLA increase. Mr. Traber presented this proposal to the eleven members of CPMA. Not all of the members agreed to give up the increase. In particular, members who were set to retire did not want to lose their final COLA increase for pension calculation purposes. Mr. Traber went back to the City to renegotiate the MOU. His intention was to "help out individuals within the group." He made the City aware of Mr. Davenport's pending retirement and the pending retirements of two other CPMA members.

As Mr. Traber further explained, his intention was to preserve the four percent raise for people who would receive it for the purpose of retirement and to forego the raises for people who wanted to help out the City. He did not anticipate a problem with CalPERS because he believed the increase for those who intended to retire was, in fact, a negotiated raise that was “going to occur anyway.”

Mr. Davenport, in addition to the two other individuals, timely expressed their intent to retire and received the four percent increase as documented in the Implementation Schedule.

CalPERS's Audit and Subsequent Conclusions

7. In January 2009, CalPERS “flagged” Mr. Davenport’s retirement account because his “special compensation” exceeded audit parameters CalPERS set.¹ CalPERS asked the City to detail Mr. Davenport’s special compensation. In December 2009, the City transmitted to CalPERS a document that detailed Mr. Davenport’s “Special Compensation Reported.” CalPERS conducted an audit and determined that Mr. Davenport’s final settlement pay was erroneously reported. CalPERS sent a letter dated November 22, 2013, to Mr. Davenport and to the City with its conclusion that the four percent COLA increase he received could not be used to calculate his final retirement benefit. CalPERS stated that it was taking this action because the increase constituted “final settlement pay” “in anticipation of a separation from employment” pursuant to Government Code section 20636, subdivision (f), and California Code of Regulations, title 2, section 570, because not all members of CPMA were eligible to receive the increase as required under Section 20636, subdivision (b)(1).

Mr. Davenport provided a response dated December 12, 2013. In it, Mr. Davenport claimed that both the City and CPMA did not intend to create a COLA adjustment that conflicted with the law and, in fact, the COLA adjustment did not violate the law. At the hearing in this matter, Mr. Davenport made a similar argument.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Mr. Davenport has the initial burden to establish that he was entitled to the amount of the retirement allowance at issue in this proceeding. (Evid. Code, § 500; Evid. Code, § 550.) The standard of proof is a “preponderance of the evidence.” (Evid. Code, § 115.)

¹ Taras Katchmar, a CalPERS retirement program specialist, used the term “flagged” in his testimony at the hearing to describe how CalPERS discovered the COLA increase.

Relevant 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 and compensation cannot exceed "compensation earnable" as defined. (Gov. Code, § 20630, subd. (b).)

CalPERS is required to correct errors made by an employer and pay only those benefits authorized under the Public Employees Retirement Law. (Gov. Code, § 20160, subd. (b).) Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the retirement allowance so that the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled. (Gov. Code, § 20163.) In cases where an erroneous payment is made to a member or beneficiary, the right to collect shall expire three years from the date of payment. (Gov. Code, § 20164, subd. (b)(1).)

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 . . .

[¶] . . . [¶]

(7) Special compensation does not include any of the following:

(A) Final settlement pay.

[¶] . . . [¶]

(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. . . .

Relevant Regulatory Authority

4. California Code of Regulations, title 2, section 570 provides in part:

“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.

Relevant Appellate Authority

5. The Legislature and the Board of Administration of the Public Employees Retirement System adopted limitations on the salary which may be considered in calculating a public employee’s retirement allowance. Among other matters, these limitations exclude from consideration payments which were not available to similarly situated public employees. (*Prentice v. Board of Admin., California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 986.)

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. (*Prentice*, at pp. 991-992.)

Cause Exists to Affirm CalPERS’s Determination

6. Mr. Davenport did not establish by a preponderance of the evidence that the four percent COLA paid by the City of Claremont to him should be included in the final calculation of his retirement compensation.

The July 1, 2009, four percent COLA constituted "final settlement pay" in anticipation of Mr. Davenport's retirement and was not available to all members of his classification. The terms of the implementation schedule explicitly stated that the four percent COLA was only available to group members who were within one year of retirement and who have submitted a notice of intent to retire. Thus, by the very terms of the agreement, the COLA was "granted or awarded to a member in connection with or in anticipation of a separation from employment." (Cal. Code Regs., tit. 2, § 570.) This constitutes "final settlement pay," and as such, it is excluded from Mr. Davenport's final compensation pursuant to Government Code section 20636, subdivisions (b)(1) and (f).

ORDER

The July 1, 2009, four percent increase reported by the City of Claremont shall not be included in Mr. Davenport's final compensation for purposes of calculating his service retirement allowance.

Dated: October 26, 2016.

DocuSigned by:
Abraham Levy
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ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings