ATTACHMENT A

THE PROPOSED DECISION
BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES’ RETIREMENT SYSTEM

In the Matter of the Calculation of Final Compensation of:

BURT S. HIRSCHFELD,

Respondent,

and

JUDICIAL COUNCIL OF CALIFORNIA,

Respondent.

Agency Case No. 2016-1071
OAH No. 2017010959

PROPOSED DECISION


John Shipley, Senior Staff Attorney, represented Petitioner Renee Ostrander, Chief, Employer Account Management Division, California Public Employees’ Retirement System (CalPERS).

Respondent Burt S. Hirschfeld represented himself.

Sabrina L. Thomas, Attorney at Law, represented Respondent the Judicial Council of California. The representation was limited to an appearance to move to strike a subpoena duces tecum served by Respondent Hirschfeld.

The record closed on June 13, 2014.

ISSUES

1. Whether the payments Respondent Hirschfeld received pursuant to a settlement agreement terminating his relationship with his employer should be included in the calculation of his final compensation.
2. Whether the time for which Respondent Hirschfeld received payments pursuant to a settlement agreement should be included in the calculation of his total amount of service credit.

FACTUAL FINDINGS

1. The Judicial Council of California (JCC) is a state agency. On June 15, 2004, the JCC employed Burt S. Hirschfeld (Respondent) as an Assistant Division Director, an “at will” position exempt from state civil service. His payrate in that position was $14,054 per month. By virtue of this employment, Respondent is a state miscellaneous member of CalPERS.

2. CalPERS is a defined benefit plan established by the Public Employees’ Retirement Law (the PERL). (Gov. Code, § 20000 et seq.) 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.

3. 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 to the member’s “final compensation.” In computing a member’s retirement allowance, CalPERS staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member’s “final compensation” for purposes of calculating the retirement allowance.

4. On September 23, 2015, the JCC placed Respondent on paid administrative leave for 28 days. Respondent and the JCC then entered into an agreement to separate Respondent from his employment with the JCC. The resulting Separation Agreement was signed by Respondent on November 24, 2015, and by the JCC on December 3, 2015, and identifies Respondent’s position as Assistant Director, Real Estate and Facilities Management office. In pertinent part the Recitals section provides:

2. JCC management has informed [Respondent] that it lacks confidence that [Respondent] will be able to perform in a manner and at a level needed as the JCC moves forward and that [Respondent’s] employment will be terminated.

3. Effective September 23, 2015, [Respondent] has been placed on paid administrative leave for a period of 28 days, ending October 21, 2015. During the period of paid administrative leave, [Respondent] will be relieved of all job duties, will have

1 All statutory references are to the Government Code.
4. [Respondent] seeks to avoid involuntary termination of his JCC employment.

5. [Respondent] and the JCC have concluded it is desirable and in the best interests of the Parties to enter into this Agreement in order to resolve fully and completely all issues between them concerning or in any way related to [Respondent’s] employment at the JCC and his separation from such employment.

5. In pertinent part, the Terms of Agreement section provides:

2. Voluntary Resignation in lieu of Termination
The JCC has offered to allow [Respondent] to resign his employment in lieu of termination. [Respondent] has accepted JCC’s offer. [Respondent] will sign and date the attached Notice of Resignation, will sign and date this Agreement, and will submit them to the JCC. The Parties agree that [Respondent’s] Notice of Resignation is voluntary and will be placed in his official personnel file maintained by the JCC.

3. Administrative Leave; Leave Balances
When [Respondent] resigns his employment in lieu of termination . . . [Respondent] must resign effective February 29, 2016, the date [Respondent’s] unused leave accruals are exhausted ("run time"). During the period that he is “running time,” [Respondent] will accrue 8 holidays and 80 hours of additional leave and will retain all other employment benefits including medical and retirement benefits and the employer’s CalPERS contribution.

4. Voluntary Resignation; No Re-employment
The Parties agree that [Respondent] has given the JCC notice of resignation from his employment and that the JCC has accepted his resignation. The Parties agree that [Respondent] will not revoke, rescind, or otherwise cancel his notice of resignation. [Respondent] will not at any time seek or accept re-employment with the JCC.

6. Meanwhile, on August 21, 2015, JCC had issued a memorandum to its employees announcing the implementation of a new compensation structure. The memorandum followed an extensive analysis of the operations of the JCC, performed by an
outside consultant. This change impacted Respondent’s position as to both title and salary. Respondent’s position title was changed to Principal Manager, Zone 2 (classification code 2426). The maximum payrate for this position is $12,375 per month. However, Respondent continued to receive $14,054 per month. He thus received a payrate different than others in his group or class of employees.

7. On February 9, 2016, Respondent submitted an application for service retirement with an effective retirement date of March 26, 2016. He retired for service on that date, and has received a retirement allowance since that time.

8. Following receipt of Respondent’s application, CalPERS staff undertook a review of the compensation that the JCC reported to CalPERS, to determine compliance with the PERL.

9. By letters dated June 10, 2016, CalPERS advised Respondent and the JCC of its final determination that payments to Respondent associated with the Separation Agreement did not qualify as compensation earnable, and should not have been reported to CalPERS. CalPERS requested that the JCC “immediately stop reporting this benefit for all impacted employees.” Also, CalPERS wrote that the “reported compensation for [Respondent] must be reversed out of [CalPERS’s] payroll system in order to recover the contributions paid on this benefit.”

10. CalPERS then undertook a review of the amount of service credit that was used to calculate Respondent’s retirement allowance. The JCC had reported service credit of 16.850 years, based on earnings through February 29, 2016. However, the earnings were not for work performed and were not in compliance with the PERL. It was therefore determined that service credit could not be earned during that time period. By letter dated August 29, 2016, CalPERS notified Respondent that his service credit for retirement allowance purposes would be reduced to 16.329 years.

11. As a result of the determinations it made, CalPERS reduced Respondent’s monthly retirement allowance. In addition, CalPERS deducted the resulting overpayment total of $641.67 from subsequent allowance payments. The overpayment has since been reimbursed in full.

12. Respondent filed a timely appeal of CalPERS’s determinations and this hearing followed.

LEGAL CONCLUSIONS

1. The burden of proof in this appeal from CalPERS’s decision to correct errors it asserts were made in the calculation of Respondent’s retirement allowance rests with Respondent.
2. It is clear that CalPERS has the authority, albeit with some limitations, to correct mistakes. Under section 20160, subdivision (b), CalPERS “shall correct all actions taken as a result of errors or omissions of . . . any state agency . . . or this system.”

3. Section 20636, subdivision (a), defines “compensation earnable” as “the payrate and special compensation of the member” as further limited and defined. Subdivision (b)(1) defines payrate as “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.” Subdivision (c)(7)(A) provides that special compensation does not include “final settlement pay” and subdivision (f) states:

As used in this part, “final settlement pay” means pay or cash conversion 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.

4. California Code of Regulations, title 2, section 570, defines final settlement pay as:

[A]ny 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.

5. The evidence established that the pay that Respondent received from September 23, 2015, through his eventual effective retirement date was paid in connection with the Settlement Agreement that severed his employment relationship with the JCC. The Agreement specifically stated that Respondent was relieved of all job duties, and was prohibited from the workplace. He did not work and was prohibited from working or
returning to work for the JCC in the future. It was clear that the JCC intended to terminate Respondent’s employment, and that the Agreement was in lieu of this action. Thus, under section 20636, subdivisions (a), (b) (c) and (f), and California Code of Regulations, title 2, section 570, the pay and cash conversion of employee benefits (pay received for “run time”) that Respondent received from September 23, 2015, forward, was final settlement pay and did not qualify as compensation earnable.

In addition, Respondent was not paid during that time period in accordance with members of his same group of employment. The payrate of such members was reduced, but the JCC continued to pay Respondent the same amount. If Respondent had continued to work, his payrate would have been subject to the reduction plan put in place to gradually reduce compensation for employees in his same group. Thus, the pay that Respondent received did not qualify as compensation earnable under section 20636, subdivision (b)(1).

6. The evidence established that Respondent is not entitled to service credit for the time he was paid pursuant to the Settlement Agreement. Respondent was prohibited from working and did not work during that time period. As stated above, the pay he received does not qualify as compensation earnable under the PERL. The payments were made over time, and included certain benefits, but were not made for services rendered; they were periodic payments made in exchange for his resignation. It therefore follows that he is not entitled to service credit for the time period.

7. At the heart of this matter is the JCC’s apparent misunderstanding of its ability to bind CalPERS in a settlement agreement with an employee. This led to an unfortunate result for Respondent, who seemingly relied on his employer to have the relevant knowledge and information. But the PERL governs CalPERS, which makes its own determinations in calculating retirement allowances in accordance with relevant statutes and regulations. The PERL provides limitations to CalPERS benefits, and these include when employees are separated pursuant to a final settlement agreement. Based on the facts and applicable law, CalPERS was correct in its conclusions and properly adjusted Respondent’s retirement allowance. CalPERS also properly collected the overage mistakenly paid to Respondent ($641.67) prior to the adjustment. (§ 20160, subd. (b).)

---

ORDER

The appeal of Respondent Burt S. Hirschfeld is denied.

DATED: July 18, 2017

MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings