ATTACHMENT A

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

In the Matter of the Statement of Issues
Against:

PAUL M. LOMBARDO,
Respondent,

and

LOS ANGELES COUNTY,
Respondent.

Case No. 2018-0298
OAH No. 2018090528

PROPOSED DECISION

This matter came before Cindy F. Forman, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on January 18, 2019.

Charles H. Glauberman, Senior Attorney, represented complainant Renee Ostrander, Chief, Employer Account Management Division, Board of Administration (Board), California Public Employees' Retirement System (CalPERS).

No appearance was made by or on behalf of respondent Paul M. Lombardo (respondent Lombardo) or respondent Los Angeles County (respondent County) (collectively, respondents).

At the hearing, CalPERS's counsel amended the Accusation as follows:

- Page 2, line 18: “City of La Habra” was stricken and replaced by “County of Los Angeles”;
- Page 2, line 19: “respondent City” was replaced by “respondent County”;
- Page 2, line 21: “respondent City” was replaced by “respondent County”.

CALIFORNIA PUBLIC EMPLOYEES’ RETIREMENT SYSTEM
FILED Feb. 12, 2019
The changes were made by interlineation on Exhibit 1.

Documentary evidence and testimony was received and the matter was submitted for decision on January 18, 2019.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues, dated June 15, 2017, in her official capacity. The Statement of Issues seeks to determine whether the amounts paid by respondent County to respondent Lombardo for “Sick Buyback” and “Vacation Buyback,” which are included in the retirement benefit calculations by the Los Angeles County Employees' Retirement Association (LACERA) for respondent Lombardo, must be included in the calculation of respondent Lombardo’s final compensation for purposes of determining his CalPERS retirement allowance. CalPERS asserts that the amounts paid by respondent County for “Sick Buyback” and “Vacation Buyback” are not to be included in the calculation of respondent Lombardo’s CalPERS retirement benefits.

2. On September 21, 2018, CalPERS served respondents by certified and first class mail with the Statement of Issues, Notice of Hearing, copies of Government Code sections 11507.5, 11507.6, and 11507.7 relating to discovery under the Administrative Procedure Act, and Proof of Service. CalPERS received the return receipt cards confirming the certified mail delivery to respondents. The Notice of Hearing stated that the hearing for this matter was scheduled for January 10, 2019. (Exhibit 2.)

3. Neither respondent Lombardo nor respondent County appeared in person at the January 10, 2019 hearing. When contacted by telephone during the hearing, respondent Lombardo explained he had been unable to attend the hearing because his brother-in-law’s funeral had been scheduled for that afternoon,1 and he requested a continuance. Complainant’s counsel did not object to respondent Lombardo’s request. Respondent Lombardo confirmed that he would be available on January 18, 2019, to attend a hearing in this matter.

4. An Order continuing the hearing in this matter to January 18, 2019, was served on all parties by regular first-class mail on January 10, 2019. On January 16, 2019, respondent Lombardo informed complainant’s counsel by e-mail that he would be unable to attend the hearing on the rescheduled date. The e-mail stated: “I wanted to give you notice that I will be unable to attend the hearing that was rescheduled for Friday morning. I will be out of town for personal reasons. I understand this may forfeit my right to appeal.” (Exhibit 19.)

1 In response to the request of the Administrative Law Judge, respondent Lombardo supplied a funeral card corroborating the date and time of the funeral.
5. Neither respondent Lombardo nor respondent County appeared at the January 18, 2019 hearing and were not otherwise represented. Compliance with Government Code sections 11505 and 11509 having been established, this matter proceeded as a default against respondent Lombardo and respondent County pursuant to Government Code section 11520.

Background

6. Respondent Lombardo established membership with CalPERS through his employment with the City of La Habra on April 4, 1993. Respondent Lombardo separated from employment with the City of La Habra on July 1, 2005, but retained membership with CalPERS.

7. The City of La Habra is a public agency that contracts with CalPERS for retirement benefits for its eligible employees. The provisions of the City of La Habra's contract with CalPERS are contained in the California Public Employees' Retirement Law (PERL), found at Government Code (Code) section 20000 et seq.

8. CalPERS is a defined benefit plan. Benefits for 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 sets employer contribution rates on an annual basis.

9. On July 1, 2005, respondent Lombardo established membership with LACERA through employment with respondent County, a public agency contracting with LACERA for retirement benefits for its eligible employees. Respondent Lombardo was last employed by respondent County as a Fire Captain.

10. CalPERS and LACERA are reciprocal retirement systems. Reciprocity is an agreement among public retirement systems to allow members to move from one public employer to another public employer within a specific time limit without losing valuable retirement and related benefit rights.

11. By virtue of his employment with respondent County, respondent Lombardo has reciprocity rights for concurrent retirement with CalPERS and LACERA. Respondent Lombardo established reciprocity between CalPERS and LACERA on July 1, 2005.

12. On March 13, 2017, respondent Lombardo signed an application for service retirement. Respondent Lombardo retired for service effective March 31, 2017, with 12.305 years of service credit, and has been receiving his retirement allowance from that date.
Calculation of CalPERS Retirement Benefit

13. The amount of a CalPERS member’s service retirement allowance is calculated by applying a percentage figure, based upon the member’s age on the date of retirement, the member’s years of service, and the member’s “final compensation.” In computing a member’s service 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 member’s retirement allowance.

14. On March 24, 2017, CalPERS received a completed CalPERS Retirement Salary Request Form from LACERA as well as documents providing the components of respondent Lombardo’s final average compensation. (Exhibit 10.) The documents from LACERA reflected that respondent Lombardo received as part of his final average compensation certain payment components described as “Sick Buyback” in the amount of $3,386.74 and “Vacation Buyback” in the amount of $11,191.61. These components of respondent’s compensation payments were reported during respondent Lombardo’s final compensation period of April 1, 2016, through March 31, 2017. (Exhibit 11.)

15. The Memorandum of Understanding (MOU) governing respondent Lombardo’s employment with respondent County provides that a safety employee such as respondent Lombardo is not required to take off vacation or holiday time. The MOU further provides that certain fire department employees need not be paid for certain current and deferred vacation but instead the time will be kept on the books and remain available for use and be subject to payoff at termination if not used. The pertinent MOU provisions state as follows:

Article 13 EMPLOYEE BENEFITS
Section 2. Vacation and Holiday Time

The Department will continue the practice of not requiring the safety employees in this Unit to take off vacation or holiday time.

a. Vacation Time

Any 56-hour safety Fire Department employee whose sum of current and deferred vacation is in excess of 720 hours on December 31, 2005, will not be paid off for such time; rather, the time will be kept on the books and remain available for use and be subject to payoff at termination if not used. This time is available for use as time off by the employee at his/her option.
Effective December 31, 2005, all 56-hour safety employees will be paid for vacation over 480 hours at the end of the calendar year.

(Exhibit 13.)

16. The Los Angeles County Code of Ordinances (LACCO), section 6.20.030, provides that a full time permanent County employee who has five years of continuous service can receive payment for accumulated sick leave at full pay up until certain maximums and that such payment shall be computed at the workday hourly rate of pay in effect on the employee’s final day with the County. (Exhibit 14.)

17. CalPERS determined that the provisions of LACERA’s reciprocity agreement with CalPERS are subject to the statutes and regulations of the PERL. Consequently, according to CalPERS, compensation provided by respondent County to respondent Lombardo for purposes of calculating his final compensation is subject to the PERL.

18. After review of the compensation provided by LACERA on behalf of respondent Lombardo in the form of “Sick Buyback” and “Vacation Buyback” reported from April 1, 2016, through March 31, 2017, CalPERS determined that the amounts allocated to these items are not eligible to be included in the calculation of respondent Lombardo’s final compensation for retirement benefits under the PERL, notwithstanding the provisions of the MOU and LACCO section 6.20.030. According to CalPERS, the inclusion of these items in the calculation of retirement benefits by LACERA is not binding on the calculation of retirement benefits by CalPERS. On July 27, 2017, CalPERS notified respondent Lombardo of its determination and advised him of his appeal rights. (Exhibit 4.)

19. By letter dated August 21, 2017, respondent Lombardo filed a timely appeal. In his letter, respondent Lombardo asserted that the decision by CalPERS to reduce the final compensation reported by LACERA directly contradicted the provisions of Code section 20638, which states that CalPERS shall consider the “highest annual average compensation during any 12 or 36 month period of employment as a member of a County retirement system [as] compensation earnable . . . for purposes of computing final compensation for the member . . . .” (Exhibit 5.)
LEGAL CONCLUSIONS

1. Members of CalPERS, once vested, participate in a defined benefit retirement plan that provides a monthly retirement allowance based on factors of retirement age, length of service, and final compensation. 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. The scope of compensation is also critical to setting the amount of retirement contributions because [CalPERS] is funded by employer and employee contributions calculated as a percentage of employee compensation.” (DiCarlo v. County of Monterey (2017) 12 Cal.App.5th 468, 480-481, citations omitted.)

2. As used in the PERL, “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.” (Code, § 20630, subd. (a).) For a member of a county retirement system, such as respondent Lombardo, the “highest annual average compensation during any consecutive 12- or 36-month period of employment as a member of a county retirement system shall be considered compensation earnable by a member of [CalPERS] for purposes of computing final compensation.” (Code, § 20638.) According to Code section 20636, subdivision (a), “compensation earnable” consists of a member’s “payrate” and “special compensation.”

3. Code section 20636, 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.” The amounts paid to respondent Lombardo for “Sick Buyback” and “Vacation Buyback” do not constitute “payrate” because neither item reflects his normal monthly rate of pay or base pay.

4. “Special compensation” is defined as follows: “Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions,” but is “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.” (Code, § 20636, subsd. (c)(1) and (c)(2).)

5. Code section 20636, subdivision (c)(7), places express limits on special compensation: “Special compensation does not include any of the following: (A) Final settlement pay. (B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise. (C) Any other payments the [CalPERS Board] has not affirmatively determined to be special compensation.”

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

(1) INCENTIVE PAY

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. A program or system must be in place to plan and identify performance goals and objectives . . . .

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.

Management Incentive Pay - Compensation granted to management employees in the form of additional time off or extra pay due to the unique nature of their job. Employees within the group cannot have the option to take time off or receive extra pay. This compensation must be reported periodically as earned and must be for duties performed during normal work hours. This compensation cannot be for overtime, nor in lieu of other benefits excluded under the statutes, nor for special compensation not otherwise listed in this Section 571 . . .

Holiday Pay - Additional compensation for employees who are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays . . . .

7. CCR section 571. subdivision (c), further emphasizes the exclusivity of the subdivision (a) list: “Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to [CalPERS] will be subject to review for continued conformity with all of the standards listed in subsection (b).”

8. Subdivision (b) of CCR section 571 provides in relevant part that all items of special compensation listed in subdivision (a) are “(1) Contained in a written labor policy or agreement as defined by Government Code section 20049 [¶ . . . ¶] (3) Part of normally required duties; [¶] (4) Performed during normal hours of employment; [¶] (5) Paid periodically as earned; [¶] (6) Historically consistent with prior payments for the job classification; [¶] (7) Not paid exclusively in the final compensation period; [¶] (8) Not final
settlement pay; and [(9)] (9) Not creating an unfunded liability over and above [CalPERS’s] actuarial assumptions."

9. The amounts paid to respondent Lombardo for “Sick Buyback” and “Vacation Buyback” do not constitute “special compensation” under the provisions of Code section 20636 and CCR section 571. Neither item constitutes compensation for special skills, knowledge, abilities, work assignment, work days, or other conditions. (Code, § 2936, subd. (c).) In addition, neither item is listed as special compensation in CCR section 571, subdivision (a). (DiCarlo, supra, 12 Cal.App.5th at 483 [Code section 20636 and CCR section 571 together provide “clearly and unambiguously” that only those items of compensation expressly identified in section 571, subdivision (a), constitute special compensation that must be included in CalPERS’s calculation of retirement benefits.].) Nor is there any evidence that CalPERS “affirmatively determined” that either back vacation pay or back sick pay constitutes “special compensation” as required by CCR section 571 or Code section 20636. In addition, the payments constituted final settlement pay, were not paid periodically as earned, and were paid exclusively in respondent Lombardo’s final compensation period, thus falling outside the scope of CCR section 571, subdivisions (b)(5), (7), and (8). (See CCR, § 571, subd. (d) [“If any item of special compensation is not listed in subsection (a), or 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.”].)

10. As set forth in Legal Conclusions 2 through 9, respondent Lombardo’s payments for “Sick Buyback” and “Vacation Buyback” do not constitute payrate or special compensation. These items therefore are not compensation earnable and cannot be considered final compensation under the PERL, which is based solely on the amount of compensation earnable, for the purposes of calculating respondent Lombardo’s CalPERS retirement benefits.

11. Nothing in the reciprocity provisions between LACERA and CalPERS requires CalPERS to calculate respondent Lombardo’s retirement benefits based on the rules used by LACERA. (See Code § 20351 [“The provisions of this part extending rights to a member of this system, or subjecting him or her to any limitation by reason of his or her membership in a county retirement system, shall apply in like manner and under like conditions to a member of this system by reason of his or her membership in any retirement system. . . .” (Emphasis added.])

12. The case of Stillman v. Board of Retirement of the Fresno County Employees’ Retirement Assoc. (2011) 198 Cal.App.4th1355, 1363 is instructive. In that case, Stillman was covered by two reciprocal retirement programs, the Fresno County Employees’ Retirement System (FCERA), governed by the County Employees Retirement Law of 1937 (CERL), and the San Luis Obispo County Pension Trust (SLOCPT). SLOCPT considered employer “pickup” payments as compensation for purposes of calculation of benefits under the SLOCPT retirement program. FCERA did not consider the employer “pickup” payments as final compensation under the CERL. Stillman claimed that FCERA was required to use
the definition of “final compensation” employed by SLOCPT, notwithstanding the CERL. The court disagreed with Stillman, and affirmed the trial court’s judgment that FCERA was correct in applying the definitions of compensation set forth in the CERL to determine Stillman’s retirement benefits. According to the Stillman court, “Noncompensation does not become compensation just because it is paid by a reciprocal employer.” (Stillman, 198 Cal.App.3d at 588.) Likewise, in this case, IACERA’s consideration of respondent’s back sick and vacation pay as compensation is not binding on CalPERS and does not change the meaning of earnable compensation under the PERL.

13. Respondent Lombardo has the burden of proving his case by a preponderance of the evidence. In McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, the court considered the issue of burden of proof in an administrative hearing concerning retirement benefits, and found as follows: “As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence.”

14. As set forth in Legal Conclusions 1 through 12, respondent Lombardo has not met his burden. His appeal should be denied.

ORDER

The appeal by respondent Paul Lombardo is denied. Respondent Lombardo’s payments from the County of Los Angeles for “Sick Buyback” and “Vacation Buyback” shall not be included in the calculation of his final compensation for purposes of determining his CalPERS retirement allowance.

DATED: February 12, 2019

DocuSign by:

Cindy F. Forman

CINDY F. FORMAN
Administrative Law Judge
Office of Administrative Hearings