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

In the Matter of the Application to Purchase Service Credit Prior to Membership of:

LESTER E. EATON,

and

COUNTY OF SUTTER,

Respondents.

PROPOSED DECISION

This matter was heard before Marcie Larson, Administrative Law Judge, Office of Administrative Hearings, State of California, on November 13, 2018, in Sacramento, California.

Austa Wakily, Senior Staff Attorney, represented the California Public Employees’ Retirement System (CalPERS).

Steven Welty, Attorney at Law, represented respondent Lester Eaton who was present at the hearing.

Michael Youril, Attorney at Law, represented respondent County of Sutter (County).

Evidence was received and the record remained open to allow the parties to file written closing arguments. On January 22, 2019, the parties’ closing briefs were received. On February 5, 2019, the parties reply closing briefs were received, the record was closed and the matter was submitted for decision.1

1 CalPERS closing brief was marked as Exhibit 13. The County’s closing brief was marked as Exhibit G. Mr. Eaton’s closing brief was marked as Exhibit H. CalPERS reply brief was marked as Exhibit 14. The County’s reply brief was marked as Exhibit J. Mr. Eaton’s reply brief was marked as Exhibit K. The briefs were admitted as argument.
ISSUE

The issue for determination is whether respondent Lester Eaton is eligible to purchase Service Prior to Membership (SPM) service credit for the period of July 11, 2003, through November 19, 2005.

FACTUAL FINDINGS

Background and Procedural History

1. On or about July 11, 2003, Mr. Eaton served as a Reserve Correctional Officer (RCO) for the County’s Sheriff’s Office. He held the position of RCO until November 19, 2005. Effective November 20, 2005, Mr. Eaton was hired as a Correctional Officer (CO) for the County, where he is still employed as a Correctional Sergeant.

2. On October 5, 2012, Mr. Eaton signed a “Request for Service Credit Cost Information-Service Prior to Membership” form (Service Credit form), requesting information for the cost of service credit for the period of time of July 11, 2003, through November 19, 2005. On the Service Credit form, Mr. Eaton wrote that as an RCO he worked over 200 hours per month and 70 percent of time per month. CalPERS received the request on November 19, 2012.

3. At the request of Mr. Eaton, Cecilia Roma, Executive Secretary II with the County’s Sheriff’s Office, provided a letter, dated August 12, 2013, to CalPERS which certified that Mr. Eaton was a current employee of the County. The letter also stated that Mr. Eaton started at the County as an RCO on July 11, 2013, earning $6.25 per hour, and continued in that position until November 19, 2005. Ms. Roma included a “Payroll/Personnel Form (PPF) Enter New Hire” form, which provided information concerning Mr. Eaton’s hiring information for his RCO position.

4. By letter dated August 13, 2013, Lorie Rosales, Membership Analysis & Design, Customer Account Services Division for CalPERS, informed the County that Mr. Eaton had filed a Service Credit form to determine if he was eligible to purchase SPM based on his RCO position with the County. Ms. Rosales further informed the County that, based on the information provided to CalPERS, it was determined that “by December 2003, Mr. Eaton qualified for membership” in CalPERS. Neither Mr. Eaton nor the County had paid CalPERS contributions for Mr. Eaton during the period of time in which he was requesting SPM. Ms. Rosales notified the County that “Mandatory Arrears under the provisions of the Government Code applies to the period from December 27, 2003 to November 19, 2005.” Ms. Rosales further explained that based on the determination, the County and Mr. Eaton would be “liable for the costs associated with this error.” The County was given 30 days to provide additional information that may impact CalPERS’ determination.
5. On October 1, 2013, Karen Ropp, Human Resources Director for the County, provided CalPERS with additional information concerning Mr. Eaton’s employment as an RCO. Ms. Ropp explained that the County was correcting previous information submitted to CalPERS. Specifically, Ms. Ropp explained:

- RESERVE Correctional Sergeant Lester Eaton was not an employee of the Sutter County Sheriff’s Office during the period of July 11, 2003 through November 19, 2005. During that timeframe Reserve Correctional Sergeant Eaton was a volunteer under Sutter County Ordinance Chapter 330, which was approved by action of the Board on June 22, 1970.

- The stipend provided to Reserve Correctional Sergeant Eaton was not to compensate for hourly services. The stipend is to defray the ancillary expenses incurred by Reservists in the course of volunteering, such as the purchase and professional dry cleaning expenses for uniform maintenance, and for miscellaneous safety equipment.

Ms. Ropp further stated that it was the “County’s position that stipends are not wages for hours worked and as such do not qualify the volunteer for membership.” Ms. Ropp requested that CalPERS review the additional information provided by the County and reverse the determination that the County was required to submit mandatory arrears to CalPERS.

6. On December 31, 2014, CalPERS informed Mr. Eaton of the County’s explanation that his position as an RCO was a volunteer position and the stipend he received was not compensation for “hourly services,” rather the stipend was to “defray the ancillary expenses incurred by Reservists.” CalPERS further advised Mr. Eaton that, based on the information provided by the County, he was “not eligible to purchase the SPM service credit because the retirement law does not permit service credit for non-compensated employment.”

7. By letter dated November 18, 2015, Mr. Eaton submitted information to CalPERS demonstrating that he received W-2 tax statements from the County documenting money he earned as an RCO, and various deductions taken from his pay, including federal, state, social security, and Medicare taxes. Mr. Eaton explained that between 2002 and 2005, he worked an average of 50 hours per week, and earned in excess of $15,000 per year. Mr. Eaton requested CalPERS to review the additional information and reconsider the determination that he was ineligible to purchase SPM service credit.

8. On December 7, 2015, CalPERS informed Mr. Eaton that the additional information he submitted would be reviewed by the CalPERS Membership Management Section. Mr. Eaton’s request for a SPM cost calculation was placed on hold pending completion of the review.
9. By letter dated August 9, 2017, Jennifer Rocco, Assistant Division Chief, Membership Services Section for CalPERS, informed Mr. Eaton of CalPERS’ determination that his County service as an RCO from July 11, 2003 through November 19, 2005, was performed a volunteer. As a result, he was excluded from the CalPERS system and not eligible to purchase SPM. Ms. Rocco cited the County’s “Sheriff’s Reserve Units” Memorandum of Understanding (MOU) which provided that “a member of the Unit shall be reimbursed per shift ‘for expenses and not salary, wages, or compensation for services rendered.’”

Ms. Rocco further explained that, pursuant to Government Code section 20636, the monies Mr. Eaton received as an RCO did not meet the definition of “Compensation Earnable,” which is the “payrate or special compensation of a member.” Specifically, Government Code section 20636, subdivision (b)(1), defines “payrate” as follows:

“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.

Ms. Rocco informed Mr. Eaton of his right to appeal the decision to deny his request to purchase SPM service credit.

10. On September 7, 2017, Mr. Eaton requested to appeal the decision made by CalPERS as set forth in the August 9, 2017 letter.

11. On June 3, 2018, Renee Ostrander, Chief, Employment Account Management Division for CalPERS, signed and thereafter filed the Statement of Issues. Thereafter, the matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Sutter County Ordinance Chapter 330-Sheriff’s Reserve Unit

12. Effective on June 22, 1997, the County Board of Supervisors passed Ordinance 404, section 1, Chapter 330, which provided the following in relevant part:

330-010 - SHERIFF’S RESERVE UNIT CREATED

A Sheriff’s Reserve Unit hereby is created and established as an organization which shall be composed of person who shall have been appointed and sworn in as members thereof of the Sheriff or Undersheriff. The number of members in the Unit may be regulated by the Sheriff as to the needs of personnel by the County of Sutter and/or the Sheriff. The members shall serve
gratuitously as such except, when paid as authorized by the County of Sutter or the Sheriff.

330-040 - SHIFTS; COMPENSATION

Each member of the Unit shall serve as such for at least two assigned shifts each calendar month for which he shall be paid the sum of ten dollars ($10.00) per shift as reimbursement to him for expenses and not as salary, wages, or compensation for services rendered.

Respondent Eaton's Evidence

TESTIMONY OF ROY WHITEAKER

13. Roy Whiteaker was elected Sheriff of the County in 1970. He was reelected five times and retired in January 1991. During the time Mr. Whiteaker served as Sheriff, volunteer RCOs worked for the Sheriff’s Office. At some point during his tenure, some RCOs were paid as part-time RCOs due to the increased educational and training requirements implemented by Mr. Whiteaker. Once the additional training was completed, some of the RCOs reached a part-time paid status.

14. Mr. Whiteaker explained that, as of the 1980s when the part-time paid position was established, RCOs typically performed the same duties as a CO. However, RCOs had the ability to set their own schedule. An RCO could refuse to work a shift that was offered, whereas a CO could not. If the RCO agreed to take a shift, a minimum of four hours of work was required. A typical full-time CO was required to work an eight-to-ten-hour shift. RCOs did not accrue vacation time or sick leave. They also did not receive health care. Mr. Whiteaker did not work for the County during the period of time Mr. Eaton served as an RCO. Mr. Whiteaker also was not familiar with the implementation of the RCO program as of 2003.

RESPONDENT EATON’S TESTIMONY

15. Mr. Eaton explained that he applied to work as an RCO in 2003. However, he was not required to go through the CO hiring process and nor attend a police academy. Mr. Eaton had previously worked as a farmer. He wanted to work as a CO, but there were no openings. As such, Mr. Eaton submitted an application to work as an RCO to get his “foot in the door.” Mr. Eaton completed a background check, physical, and psychological examination. Once hired for the position, he completed on-the-job training. At some point, he completed 24 hours of standard training such as first aid and other required training.
16. Mr. Eaton explained that he performed the same duties as a CO. He transported inmates, worked in the jail, and performed court bailiff duties. Mr. Eaton wore a standard CO uniform, which he purchased. He wore a badge and name tag, and had County Sheriff emblem on the shoulders of his uniform shirt. He wore an equipment belt, which he purchased. He also carried his own handgun, handcuffs, a flashlight, a cardio pulmonary mask (CPR) mask, and transportation keys. Mr. Eaton estimated the total cost of his uniform in 2003 was approximately $700. Between 2003 and 2005, he had approximately five uniform sets, the total cost of which did not exceed $2,000.

17. As an RCO, Mr. Eaton was required to work a minimum of 16 hours per month. He could elect to work more than 16 hours per month, as needed by the Sheriff's Office. An average CO worked 160 per month. Mr. Eaton often worked shifts with another RCO. There were approximately four active RCOs, but most did not work as many hours as Mr. Eaton worked. He estimated that during the period he worked as an RCO, he worked over 100 hours every two weeks. He would typically work a 12-hour shift, and cover shifts for COs that were on vacation or sick. Initially, Mr. Eaton was paid $6.25 per hour and received a check every two weeks. In late 2004, his pay was raised to $6.50 per hour.

18. Mr. Eaton's W-2 forms demonstrate that in 2003, Mr. Eaton was paid $6,237. In 2004, he was paid $17,396. In 2005, he was paid $18,558, which included pay as a full-time CO starting on November 20, 2005. Income taxes and Medicare were taken out of his pay each year. He did not contribute towards CalPERS retirement. He also did not receive medical benefits. He did not receive vacation hours, sick leave or holiday pay. As an RCO, Mr. Eaton was not a part of a union or bargaining unit. He could be released as an RCO at any time without cause. He also did not receive performance evaluations.

19. Once Mr. Eaton was hired as a CO, his pay was raised to $18 per hour and he accrued vacation hours, sick leave, and holiday pay. He also received a separate uniform allowance. Mr. Eaton made contributions towards his CalPERS retirement and received medical benefits. He became a member of the Sutter Deputy Sheriff's Association. He received performance evaluations as a CO. His employment as a CO cannot be terminated without Mr. Eaton being afforded due process rights.

County's Evidence

Testimony of Captain David Samson

20. David Samson is a Captain with the Sheriff's Office. He started as a reserve in 1987, and was hired as a deputy in 1992. He was promoted to Captain in 2006, serving as the Operations Division Commander for four years, then as the Jail Commander. Mr. Samson retired in June 2018. During his tenure as Commander, Mr. Samson oversaw the County's volunteer RCO units and divisions.

21. Mr. Samson explained there is a separate application process for the RCO positions, which does not follow the same procedure as a CO. Additionally, the pay given to
RCOs is intended to be a uniform allowance. Initially, the process for paying RCO was that the County auditor issued a check to the reserve treasurer for the total amount of shifts worked. The treasurer divided the funds based on the number of shifts worked by each RCO. RCOs received a $25 stipend for each four-hour shift. During the period of time that Mr. Samson oversaw the RCO program, RCOs did not receive a $10 stipend for a shift.

In approximately 1991, an RCO was going through a divorce and his ex-wife included his uniform stipend as part of his income. The court ordered the money he received as an RCO to be attached. However, at that time, there was no process in place to attach the money issued to an RCO. As a result, the County issued RCOs a payroll number and converted the $25 stipend per shift to an hourly amount so the money given to RCOs could be attached if necessary.

22. Mr. Samson also explained that the pay for RCOs is taken from the Sheriff’s Office budget, which is approved by the County Board of Supervisors, and which includes a specific allocation for the money paid to RCOs.

**TESTIMONY OF CHRISTINE LUIGARD**

23. Christine Luigard is a Human Resources Assistant for the County. She is responsible for entering transactions into the County’s payroll system for new hires, promotions, transfers and funding changes. Ms. Luigard is familiar with the County’s “Step Table,” which lists all of the County’s classifications and payrates. She reviewed the County’s Step Table for 2003, 2004, and 2005. The RCO position was not listed on these tables because RCO is not a county classification. Additionally, Ms. Luigard explained the County’s Human Resources office does not maintain personnel files for RCOs because they are not County employees.

**CalPERS Evidence**

24. Samuel Camacho is an Associate Governmental Program Analyst in the Employer Account Management Division for CalPERS. Mr. Camacho is part of the Compensation and Compliance unit which renders determinations on compensation that is reported to CalPERS. Mr. Camacho reviewed the information concerning Mr. Eaton’s request to purchase SPM. He explained that in order for Mr. Eaton to be eligible to purchase SPM, he would have had to perform work for the County which was considered “compensation earnable” under the CalPERS standards.

25. Mr. Camacho opined that, based on the information provided by the County and Mr. Eaton, the money Mr. Eaton received from the County was not compensation earnable under Government Code section 20636. Specifically, Mr. Eaton’s position as an RCO was not part of the group or class of COs, who are considered employees of the County. The money RCOs received from the County was a stipend to defray necessary costs, such as uniforms and equipment, and not to compensate RCOs for services rendered. The RCO position and stipend amount was not listed on any available pay schedule.
Additionally, an RCO was only required to work 16 hours per month to maintain the RCO status, and had the option to decline shifts. Conversely, COs were required to work a full-time schedule and could not decline a shift. Based on this information, CalPERS determined that Mr. Eaton was not eligible to purchase SPM service credit for the period of time he worked as an RCO.

LEGAL CONCLUSIONS

1. The purpose of the Public Employees’ Retirement Law (PERL) is “to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits.” (Gov. Code, § 20001.)

2. The party asserting the affirmative in an administrative action has the burden of going forward and the burden of persuasion by the preponderance of the evidence. (McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051.) An applicant for retirement benefits has the burden of proof to establish a right to the entitlement, absent a statutory provision to the contrary. (Greatorex v. Board of Administration (1979) 91 Cal.App.3d 54, 57.) Thus, Mr. Eaton has the burden of proof to establish that he was eligible to purchase SPM service credit for the period of July 11, 2003, through November 19, 2005, while he worked as an RCO.

3. The PERL defines an employee as “[a]ny person in the employ of any contracting agency.” (Gov. Code, § 20028 subd. (b).) A reserve officer is considered to be an employee of the county in which he is performing his duties. (See Lab. Code, § 3362.5.)

4. Government Code section 20069, subdivision (a), provides in pertinent part that:

   “State service” means service rendered as an employee or officer (employed, appointed, or elected) of the state, the California Institute for Regenerative Medicine and the officers and employees of its governing body, the university, a school employer, or a contracting agency, for compensation, and only while he or she is receiving compensation from that employer therefor [*...*]

5. Government Code section 200630 provides 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 be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.

6. Government Code section 20636 defines “compensation earnable” provides, in pertinent 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. California Code of Regulations, title 2, section 570.5, further provides, in pertinent part:

(a) For purposes of determining the amount of “compensation earnable” pursuant to Government Code Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:
(1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

(2) Identifies the position title for every employee position;

(3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

(4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;

(5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

(6) Indicates an effective date and date of any revisions;

(7) Is retained by the employer and available for public inspection for not less than five years; and

(8) Does not reference another document in lieu of disclosing the payrate.

(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:

(1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;

(2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;

(3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;
(4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer.

8. The evidence established that the monies paid to Mr. Eaton while he volunteered as an RCO did not meet the definition of "compensation earnable" under Government Code section 20636. The RCO position was not included as a County position classification. Additionally, pursuant to County Ordinance 404, section 1, Chapter 330, the money provided to RCOs by the County for volunteering was "reimbursement... for expenses and not as salary, wages, or compensation for services rendered." Further support of the County's contention that the money paid to RCOs was not compensation for services rendered is the fact that the stipend paid to RCOs was not listed on a publicly available pay schedule.

While Mr. Eaton worked more hours than the 16-hour per month minimum for an RCO to maintain reserve status, he did so to "get his foot in the door" and improve his chances of obtaining a CO position. As a volunteer RCO, he was not required to undergo the same hiring process as individuals hired as a CO, he was not employed on a full-time basis, he did not have normal work hours, and he was free to decline shifts. Mr. Eaton's ability to take on more shifts, thereby increasing the total stipend amount he received from the County, does not transform the money received to compensation earnable under the PERL.

9. The matters set forth in the Factual Findings and Legal Conclusions have been considered. Mr. Eaton did not meet his burden to establish that he is entitled to purchase SPM service credit for the period of time he served as an RCO for the County.

ORDER

The appeal of respondent Lester Eaton to purchase Service Prior to Membership service credit for the period of July 11, 2003, through November 19, 2005, is DENIED.

DATED: March 6, 2019

MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings