ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)
April 2, 2019

VIA FACSIMILE & U.S. MAIL
Fax No. 916-795-3972

Ms. Cheree Swedensky
Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

Re: County of Sutter’s Written Argument in Support of CalPERS Board Adopting the Proposed Decision In the Matter of the Appeal to Purchase Service Credit Prior to Membership of Lester E. Eaton, and County of Sutter, Case No. 2017-1219
Client-Matter: SU060/011

Dear Ms. Swedensky:

Respondent County of Sutter (“County”) requests that the California Public Employees’ Retirement System (“CalPERS”) Board of Administration (“Board”) adopt the Proposed Decision issued by the Administrative Law Judge (“ALJ”) in the above-referenced matter.

I. INTRODUCTION

From July 11, 2003 to November 19, 2005, Lester Eaton served as a Volunteer Reserve Correctional Officer (“Volunteer Reserve”) with Sutter County. In 2012, Eaton requested to purchase service credit prior to membership (“SPM”) for the period he was a Volunteer Reserve. As a Volunteer Reserve, Eaton was a volunteer and not a County employee. The record compuls a finding that Volunteer Reserves were not County employees for the purposes of enrollment in CalPERS membership. Volunteer Reserves were distinguishable from regular Correctional Officers in the terms and conditions of employment, the Volunteer Reserve position was not listed on the County’s salary schedule, and all parties understood that the Volunteer Reserve positions were volunteer positions.

The ALJ correctly determined that Eaton was ineligible for enrollment as a CalPERS member during the time he performed services as a Volunteer Reserve and could not purchase SPM. Therefore, the County requests that the CalPERS Board adopt the Proposed Decision as its own decision in the matter.
II. FACTUAL AND PROCEDURAL BACKGROUND

Eaton was employed as a Volunteer Reserve Correctional Officer from July 11, 2003 to November 19, 2005. (PD, p. 2, ¶ 1.) On November 20, 2005, Eaton was hired as a full-time, benefited Correctional Officer and was enrolled in CalPERS membership. (Id.) In 2012, seven years after Eaton was hired as a full-time Correctional Officer, he submitted a request to purchase SPM for the period covering July 11, 2003 to November 19, 2005. (PD, p. 2, ¶ 2.) CalPERS ultimately determined that Eaton could not purchase or receive service credit during the time period he served as a Volunteer Reserve. (PD, p. 4, ¶ 9.) Eaton filed an appeal, which was heard by an ALJ from the Office of Administrative Hearings on November 13, 2018. (PD, p. 1.) After briefing from the Parties, the ALJ issued her Proposed Decision on March 6, 2019, denying the appeal.

III. ARGUMENT

A. Burden of Proof

As the party asserting a right to purchase SPM, Eaton has the burden of proof. (PD, p. 8, ¶ 2; Randy G. Adams (2015) CalPERS Precedential Dec. No. 15:01.) The ALJ correctly determined that Eaton was unable to carry his burden of proof.

B. Volunteer Reserves were Volunteers and were Treated Differently than County Employees

The County adopted an ordinance establishing a reserve unit for individuals to volunteer their services, except when paid as authorized by the Sheriff. (PD, pp. 4-5, ¶ 12.) Under the County’s ordinance concerning the reserve unit, remuneration paid to Volunteer Reserves was considered reimbursement for expenses to help defray the costs of purchasing uniforms and other equipment. (Id., RT 81:20-23.) The ordinance clearly provided that the remuneration was not salary, wages, or compensation for services rendered. (PD, pp. 4-5, ¶ 12.)

Volunteer Reserves were treated differently than Correctional Officers with respect to their terms and conditions of employment. Volunteer Reserves were not required to go through the same hiring process as regular County employees. (PD, p. 5, ¶ 15; pp. 6-7, ¶ 21; RT 77:6-78:6.) The process for hiring Volunteer Reserves did not require a written examination or interviews with command staff. (Id.) The County also does not maintain personnel files for Volunteer Reserves or provide Volunteer Reserves with periodic performance evaluations, unlike regular Correctional Officers who have personnel files and receive performance evaluations. (RT 67:19-68:12.) Volunteer Reserves were not part of an association or bargaining unit and were considered “at-will,” unlike regular Correctional Officers. (PD, p. 6, ¶ 18.)
Volunteer Reserves were only required to work a minimum of 16 hours per month to remain in the program, but could volunteer to work additional hours on a voluntary basis. (PD, p. 6, ¶ 17.) A Volunteer Reserve was free to refuse shifts or cancel shifts. (RT 80:6-9.) Correctional Officers are required to work 40 hours per week and had no discretion to decline shifts. (PD, p. 11, ¶ 8.)

Volunteer Reserves also did not receive any benefits. Volunteer Reserves did not accrue vacation, sick leave, holidays, or other time off. (PD, p. 5, ¶ 14; p. 6, ¶ 18.) Volunteer Reserves also did not receive health benefits. (PD, p. 5, ¶ 14; p. 6, ¶ 18.) Neither Volunteer Reserves nor the County contributed to CalPERS for services provided by Volunteer Reserves. (PD, p. 6, ¶ 18.)

Volunteer Reserves received an hourly stipend of $6.50 per hour. The hourly stipend for regular Correctional Officers was roughly three times more than the pay for Volunteer Reserves. (PD, p. 6, ¶¶ 17, 19.) Initially, the remuneration for Volunteer Reserves was paid as a stipend of $25 per four hour shift. (PD, p. 6-7, ¶ 21.) However, it was later broken into an hourly rate because a court attached the stipend in a divorce proceeding concerning one of the Volunteer Reserves. (PD, p. 6-7, ¶ 21.) None of the Volunteer Reserve positions were listed on the County's salary schedule. (PD, p. 7, ¶ 23.) As discussed below, under these circumstances, the remuneration was not considered "compensation earnable" for the purposes of the Public Employees' Retirement Law ("PERL").

C. Eaton and Others Understood the Volunteer Reserves were Volunteers

As noted above, the County did not include Volunteer Reserves on its salary schedule, even though all regular County classifications are listed on the salary schedule. (PD, p. 7, ¶ 23.) Captain Sampson, who oversaw the Volunteer Reserve program and was a former Volunteer Reserve, testified that he understood that Volunteer Reserves were volunteers and not County employees. (PD, p. 6, ¶ 20; RT 76:23-77-2.) Eaton conceded that he understood that he was not a regular Correctional Officer when he was serving as a Volunteer Reserve. (RT 48:8-11.) Eaton testified that he worked as a Volunteer Reserve to try to get his foot in the door. (PD, p. 6, ¶ 16.) Eaton acknowledged that he was free to refuse shifts and that he had discretion on whether to accept a shift. (RT 45:4-11.)

D. The Determination by CalPERS Staff and the ALJ's Proposed Decision were Correct

In order to purchase SPM, the remuneration Eaton earned must meet the definition of "compensation earnable" under the PERL. (PD, p. 7, ¶ 24.) CalPERS staff and the ALJ's Proposed Decision correctly determined that the remuneration that Eaton received did not qualify as "compensation earnable" within the meaning of the PERL and applicable regulations.
CalPERS’ witness testified that the remuneration Eaton received did not meet the definition of “compensation earnable” because the remuneration was designed to defray costs and was not listed on any publicly available pay schedule. (PD, pp. 6-7, ¶ 25.) Volunteer Reserves were only required to work 16 hours per month to maintain volunteer status and had the ability to decline shifts, unlike Correctional Officers who had to work a full-time schedule and could not decline shifts. (Id.)

The Proposed Decision correctly determined that the remuneration paid to Eaton did not meet the definition of “compensation earnable.” (PD, p. 11.) The Volunteer Reserve position was not included on any salary schedule and was not considered an employee classification with the County. (Id., ¶ 8.) The County Ordinance concerning Volunteer Reserves also clearly provided that the remuneration was “reimbursement...for expenses and not as salary, wages, or compensation for services rendered.” (Id.) Eaton was not required to undergo the same hiring process as regular Correctional Officers and he was free to decline shifts. (Id.) While Eaton did work a significant number of hours, as the ALJ correctly noted, “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.” (Id.)

Accordingly, the remuneration Eaton received did not constitute “compensation earnable” within the meaning of the PERL and the appeal was properly denied.

IV. CONCLUSION

Therefore, the County requests that the CalPERS Board adopt the Proposed Decision as its own decision in the matter.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Michael D. Yourif

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