

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Consolidated Matter of the Appeal Regarding Final
Compensation by:**

**CALIFORNIA MILITARY DEPARTMENT, and MICHELE
MILOTA, Personal Representative of the ESTATE OF
CHRISTIAN WELLS, Respondents.**

Case Nos. 2017-1162 and 2018-0608

OAH Nos. 2018050613 and 2018081091

PROPOSED DECISION

Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this consolidated matter on July 18, 2019 and November 13, 2019, in Sacramento, California.

Preet Kaur, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Paul S. Eck, Deputy General Counsel, represented respondent California Military Department.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED March 20 20 20

K. Pasley

No one appeared for or on behalf of respondent, the estate of Christian Wells. Michele Milota, personal representative of the estate, was duly served with the Notice of Hearing. Accordingly, the matter proceeded as a default against the estate of Christian Wells pursuant to Government Code section 11520, subdivision (a).

Evidence was received and the record was held open to allow the parties to submit written closing briefs. CalPERS' initial and reply briefs were marked as Exhibits 24 and 25, respectively. Respondent California Military Department's initial and reply briefs were marked as Exhibits G and H, respectively. The matter was submitted for decision on February 14, 2020.

ISSUE

The sole issue on appeal is whether the Basic Allowance for Housing and Basic Allowance for Subsistence, provided by respondent California Military Department to its State Active Duty servicemembers hired on or after January 1, 2013, constitute "special compensation" or other pensionable compensation to be included in the calculation of final retirement pay under the Public Employees' Pension Reform Act.

FACTUAL FINDINGS

Background

1. The California Military Department (CMD) is a public agency comprised of military servicemembers (both state and federal), as well as civil service employees. CMD's servicemembers are not represented by any collective bargaining unit, nor is there any state contract outlining their rights, pay, or benefits. Rather, servicemembers'

pay and benefits is dictated by statute. (Mil. & Vet. Code, §§ 320 & 321 [mandating that servicemembers receive the same pay and benefits as their federal counterparts].)

2. Since 1961, the CMD has contracted with CalPERS for retirement benefits for its eligible employees and servicemembers. The provisions of CMD's contract are contained in the Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.)¹

3. CalPERS is a defined benefit plan, funded by member and employer contributions, as well as interest and other earnings on those contributions. The amount of a member's contribution is calculated by applying a fixed percentage to the member's compensation. The employer's contribution is calculated by applying a rate to the agency's payroll. Using actuarial assumptions specified by law, the CalPERS Board of Administration (Board) sets the employer contribution rate on an annual basis.

4. A member's service retirement allowance is calculated based on the member's age, years of service, and "final compensation." CalPERS may review the salary reported by the employer for the member to ensure only those items allowed under the PERL are included in the member's "final compensation" for purposes of calculating the member's service retirement allowance.

Relevant Definitions

5. "[C]ompensation' means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal

¹ Unless otherwise noted, all further references are to the Government Code.

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 . . . (4) Vacation. (5) Compensatory time off. (6) Leave of absence." (§ 20630, subd. (a).)

6. Section 20636, subdivision (g), defines "compensation earnable" as:

(1) Notwithstanding subdivision (a), "compensation earnable" for state members means the average monthly compensation, as determined by the board, upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay, and is composed of the payrate and special compensation of the member. The computation for an absence of a member shall be based on the compensation earnable by the member at the beginning of the absence and for time before entering state service shall be based on the compensation earnable by the member in the position first held by the member in that state service.

7. Section 20636, subdivision (g)(2) defines "payrate" as:

[T]he average monthly remuneration paid in cash out of funds paid by the employer to similarly situated members of the same group or class of employment, in payment for the member's services or for time during which the member is excused from work because of holidays, sick leave, vacation, compensating time off, or leave of absence, pursuant to publicly available pay schedules. . .

8. Special compensation "includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions . . . 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." (§ 20636, subd. (c)(1) & (2).) Special compensation also includes "[t]he monetary value, as determined by the board, of living quarters, board, lodging, fuel, laundry, and other advantages of any nature furnished to a member by their employer in payment for the member's services . . ." and "[o]ther payments" as determined by the Board. (§ 20636, subd. (g)(3)(A) & (D).)

Public Employees' Pension Reform Act of 2013

9. Effective January 2013, the Public Employees' Pension Reform Act (PEPRA) was enacted to establish sweeping government pension reform which included capping pensionable salaries, establishing new retirement formulas, and increasing retirement age for new employees hired after January 1, 2013. (§§ 7522.02 & 7522.04, subd. (e).) One of the main purposes of PEPRA was to address concerns about abusive practices such as pension spiking.²

10. Section 7522.34, subdivision (c), provides, in pertinent part:

Notwithstanding any other law, "pensionable compensation" of a new member does not include any of the following: . . . (7) Any employer-provided allowance,

² Members who joined CalPERS prior to January 1, 2013 are deemed "classic" members, and retained their existing retirement and health benefits going forward.

reimbursement, or payment, including, but not limited to, one made for housing, vehicle, or uniforms

Military Pay

11. Monthly pay for servicemembers on State Active Duty (SAD) has three components: Basic Pay, Basic Allowance for Housing (BAH), and Basic Allowance for Subsistence (BAS). These rates are derived from the federal tables for base monthly pay rate, BAH rate, and BAS rate. (Mil. And Vet. Code, §§ 320 & 321.) The Department of Defense further defines these components as follows:³

Basic Pay: Basic Pay is the fundamental component of military pay. All members receive it and typically it is the largest component of a member's pay. A member's grade (usually the same as rank) and years of service determines the amount of basic pay received.

Allowances: Allowances are the second most important element of military pay. Allowances are moneys provided for specific needs, such as food or housing. Monetary allowances are provided when the government does not provide for that specific need. For example, the quantity of government housing is not sufficient to house all military members and their families. Those who live in government housing do not receive full housing allowances. Those who

³ <https://militarypay.defense.gov/Pay/>

do not live in government housing receive allowances to assist them in obtaining commercial housing.

The most common allowances are Basic Allowance for Subsistence (BAS) and Basic Allowance for Housing (BAH). A majority of the force receives both of these allowances and, in many cases, these allowances comprise a significant portion of the member's total pay.

Most allowances are not taxable, which is an additional imbedded benefit of military pay.

BAH: BAH is an allowance to offset the cost of housing when you do not receive government-provided housing. Your BAH depends upon your location, pay grade and whether you have dependents. BAH rates are set by surveying the cost of rental properties in each geographic location. Therefore, BAH rates in high-cost areas will be much greater than those in low-cost areas. BAH rates are published on the Defense Travel Management Office Web page.

BAS: BAS is meant to offset costs for a member's meals. This allowance is based in the historic origins of the military in which the military provided room and board (or rations) as part of a member's pay. This allowance is not intended to offset the costs of meals for family members. Beginning on January 1, 2002, all enlisted members get full BAS, but pay

for their meals (including those provided by the government). This is the culmination of the BAS Reform transition period.

Because BAS is intended to provide meals for the service member, its level is linked to the price of food. Therefore, each year it is adjusted based upon the increase of the price of food as measured by the USDA food cost index. This is why the increase to BAS will not necessarily be the same percentage as that applied to the increase in the pay table, as annual pay raises are linked to the increase of private sector wages.

12. The Payroll Procedures Manual (PPM) published by the State Controller's Office (SCO), lists Basic Pay, BAH, and BAS under different codes on separate Payment Details sheets. Historically, the CMD has separately reported to CalPERS Basic Pay, BAH, and BAS under the "State – Pensionable Compensation" category. For "new" members on or after January 1, 2013, CMD reported BAH and BAS as "Special Compensation." Similarly, the Exempt Salary Schedule published by the California Department of Human Resources (CalHR) lists Basic Pay separately from BAH and BAS.

CalPERS' Audit

13. On December 27, 2012, CalPERS issued a Circular Letter to all agencies, including CMD, notifying them of the new requirements under PEPR for new members hired after January 1, 2013. Specifically, the Circular Letter noted that "pensionable compensation" did not include "... allowance or reimbursement for housing and vehicles ..." After PEPR took effect, the CMD continued to report BAH

and BAS as special compensation items for PEPPRA members hired after January 1, 2013.

14. On May 25, 2017, CalPERS' Office of Audit Services (OFAS) completed a Public Agency Review (PAR) of CMD's payroll and other relevant records regarding reported compensation for a sample set of employees over the service period from July 1, 2013 to June 30, 2016. The OFAS issued a final PAR report to the CMD, which identified areas where CMD was not in compliance with the PERL and related rules and regulations.

15. OFAS found that the CMD reported a housing allowance as "special compensation" for two employees whom were hired after January 1, 2013, and thus subject to PEPPRA as new members. Specifically, for the June 2016 pay period, the CMD reported housing allowances of \$3,969 and \$3,675 for two PEPPRA servicemembers under special compensation, "State-Pensionable Compensation." OFAS advised the CMD that housing allowances are not reportable as special compensation for PEPPRA members.

16. In an email dated June 27, 2017, CalPERS reiterated that it is the CMD's responsibility to comply with the PERL, the California Code of Regulations, and the Government Code. CalPERS also requested the CMD provide information regarding the affected PEPPRA members so that payroll corrections could be made. On July 21, 2017, the CMD advised CalPERS that it would appeal CalPERS' determination that BAH and BAS are not pensionable compensation.

17. On August 30, 2017, CalPERS made its final determination that BAH and BAS are not reportable as special compensation, and notified respondents of their appeal rights. Respondents timely appealed. This hearing followed.

CMD's Position

18. CMD distinguished SAD servicemembers from civil service employees, noting that the former is governed by the Military and Veterans Code (MVC) and not civil service rules. (*Martin v. Riley* (1942), 20 Cal.2d 28, 36 ["The militia is governed by laws relative to military affairs and not by laws regulating civil matters unless an unmistakable intention to the contrary clearly appears"].) Prior to 1961, CMD's civil service employees were members of CalPERS. However, a separate State Military Retirement existed exclusively for SAD servicemembers, was 100-percent funded by the state, and was governed by the MVC.

19. An Auditor General's Report for the year ending 1960 found that the MVC did not provide a funding mechanism for SAD servicemember retirement. The Auditor General recommended amendments to the MVC to allow funding on an actuarially sound basis, a periodic actuarial valuation to determine the state's liability, servicemember contributions at a level consistent with other state retirement systems, and administration by CalPERS. Accordingly, in 1961, the MVC was amended to order that all SAD servicemembers become members of CalPERS.

20. CMD argued that the California Legislature did not intend PEPRRA to be applied to CMD. First, the Governor's Office did not solicit CMD's input through a bill analysis, as is customary when proposed legislation would impact CMD. The proposed language of PEPRRA did not contain any military terms such as "military," "soldier," or "airman," or reference the MVC, to suggest that the proposed legislation would impact CMD. Finally, CMD reiterated that servicemembers are distinctive from civil service employees: the former do not work subject to a labor agreement, are not represented by a collective bargaining unit, and are not afforded the full panel of employment protections afforded to civil service employees.

21. Additionally, CMD noted that the items of special compensation listed in section 571.1 are discretionary or require a condition precedent. On the contrary, every servicemember is entitled to BAH and BAS upon being ordered to SAD. Each SAD servicemember receives BAH and BAS as part of his or her regular monthly pay, by virtue of being ordered to active duty. The amount of BAH and BAS paid to SAD servicemembers is fixed by federal law and cannot be altered by any state authority. CMD argued, therefore, BAH and BAS are impermeable to the type of pension spiking which PEPPRA was intended to prevent.

22. For all of these reasons, CMD contended PEPPRA does not apply to CMD or its servicemembers, and that BAH and BAS should be included in CalPERS' calculation of servicemembers' final compensation.

Analysis

23. CalPERS is vested with the sole authority to determine the type and level of retirement benefits to be paid to its members. In calculating retirement benefits, CalPERS uses the PERL definitions for compensation and special compensation. (§§ 20630 & 20636.) For classic members, special compensation includes allowances for housing "and other advantages of any nature furnished to a member by their employer in payment for the member's services." (§ 20636, subd. (g)(3)(A).) For PEPPRA members, pensionable compensation does not include "[a]ny employer-provided allowance, reimbursement, or payment, including, but not limited to, one made for housing, vehicle, or uniforms . . ." (§ 7522.34, subd. (c).)

24. The evidence established that BAH and BAS are separate from, and not a part of, a servicemember's Basic Pay or payrate. The Department of Defense separately defines Basic Pay and Allowances (including BAH and BAS). The PPM published by the

SCO separately lists Basic Pay, BAH, and BAS under different codes. CalHR lists Basic Pay, BAH, and BAS separately in the Exempt Salary Schedule. Finally, CMD has historically reported Basic Pay, BAH, and BAS to CalPERS in separate categories.

25. CMD argues that PEPRRA does not apply to CMD or its servicemembers. In interpreting statutory language, the fundamental rule is to determine the lawmakers' intent." (*Delaney v. Superior Court (Delaney)* (1990) 50 Cal.3d 785, 798.) The key to statutory interpretation is applying the rules of statutory construction and in their proper sequence: (1) plain meaning, (2) legislative history, and (3) reasonableness of a proposed construction. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 122; *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd.* (1994) 23 Cal.App.4th 1120, 1126.)

26. The Legislature's chosen language is the most reliable indicator of its intent, because "it is the language of the statute itself that has successfully braved the legislative gauntlet." (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 338.) The words of the statute must be given "a plain and commonsense meaning," unless the statute specifically defines the words to give them a special meaning. (*Flannery v. Prentice (Flannery)* (2001) 26 Cal.4th 572, 577.) "If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction." (*California School Employees Assn., supra*, 8 Cal.4th at p. 340.) "In such a case, there is nothing for the court to interpret or construe." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239.)

27. Notwithstanding the above, "the 'plain meaning' rule does not prevent a court from determining whether the literal meaning of the statute comports with its purpose." (*MacIsaac v. Waste Management Collection and Recycling, Inc. (MacIsaac)*

(2005) 134 Cal.App.4th 1076, 1079 [citations omitted].) As the *MacIsaac* court explained:

. . . [A]lthough the words used by the Legislature are the most useful guide to its intent, we do not view the language of the statute in isolation. (*Flannery, supra*, 26 Cal.4th at p. 578.) Rather, we construe the words of the statute in context, keeping in mind the statutory purpose. (*Delaney, supra*, 50 Cal.3d at p. 798, 268.) We will not follow the plain meaning of the statute "when to do so would 'frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results.'" (*California School Employees Assn., supra*, 8 Cal.4th at p. 340, quoting *People v. Belleci* (1979) 24 Cal.3d 879, 884.) Instead, we will "'interpret legislation reasonably and . . . attempt to give effect to the apparent purpose of the statute.'" (*American Tobacco Co. v. Superior Court* (1989) 208 Cal.App.3d 480, 490, quoting *Zidell v. Bright* (1968) 264 Cal.App.2d 867, 869.)

(*MacIsaac, supra*, 134 Cal.App.4th at p. 1079.)

28. Under the PERL, a "member" is "a public employee who is a member of any type of a public retirement system or plan." (§ 7522.04, subd. (d).) A "new member" is defined as including "an individual who becomes a member of any public retirement system for the first time on or after January 1, 2013, and was not a member of any other public retirement system prior to that date." (§ 7522.04, subd. (f)(1).) This statutory language is clear and unambiguous. Since 1961, CMD has contracted with

CalPERS to provide retirement benefits to its servicemembers. As such, those servicemembers are CalPERS members subject to the PERL (§ 20282.)⁴

29. CMD's argument that the Legislature did not intend PEPRRA to apply to CMD or its servicemembers is unpersuasive. PEPRRA does not include a carve out or other exception for CMD or its servicemembers. Nor has the Legislature amended section 20282 to provide that PEPRRA does not apply to CMD or its servicemembers. Moreover, CMD provided no legal authority for its position that the failure of the Governor's Office to solicit CMD's input on the proposed language of PEPRRA establishes that PEPRRA was not intended to apply to CMD. Historically, the Governor's Office has solicited CMD's input on proposed legislation that would affect military personnel; however, there is no legal requirement that it do so in each instance. Such historical practice, without more, is not enough to override the plain and unambiguous

⁴ Section 20282 states:

All officers, warrant officers, and enlisted persons who after October 1, 1961, are placed on full-time active duty with the office of the Adjutant General, pursuant to Sections 142, 321, 340 and 551, or former Section 167 of the Military and Veterans Code, shall become members in the manner and under the same conditions as under this article apply to other state employees. The retirement benefit provisions of the Military and Veterans Code shall not apply to those persons. This section shall not apply to the Adjutant General or the Assistant Adjutant General.

language of the elaborate statutory scheme set forth in the PERL, which includes PEPRA.

30. When all of the evidence is considered, CMD failed to establish that BAH and BAS should be included as pensionable compensation in the calculation of final compensation for purposes of servicemember retirement. Accordingly, its appeal must be dismissed.

LEGAL CONCLUSIONS

1. Respondents have the burden of proving that Basic Housing Allowance and Basic Subsistence Allowance are pensionable compensation to be included in the calculation of servicemembers' final compensation for retirement. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1047.) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

2. Based on the Factual Findings as a whole, and in particular Factual Findings 23 through 30, CMD failed to establish that BAH and BAS should be included as pensionable compensation in the calculation of final compensation for purposes of servicemember retirement. Accordingly, its appeal must be dismissed.

//

//

//

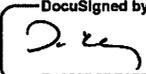
//

//

ORDER

CalPERS's determination that Basic Allowance for Housing and Basic Allowance for Subsistence are not pensionable compensation is AFFIRMED. The appeals by respondents California Military Department and the Estate of Christian Wells are DISMISSED.

DATE: March 17, 2020

DocuSigned by:

E4650D5DE8FE46C...

TIFFANY L. KING

Administrative Law Judge

Office of Administrative Hearings