

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Statement of Issues Regarding:

PHILIP K. MOSLEY, Respondent

and

CITY OF BIG BEAR LAKE, Respondent

Case No. 2020-0557

OAH No. 2020080715

PROPOSED DECISION

Robert Walker, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on May 10, 2021. The hearing was conducted by videoconference.

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

Respondent Philip K. Mosley appeared in propria persona.

No appearance was made by or on behalf of respondent City of Big Bear Lake. On proof of service of a notice of hearing, the matter proceeded as a default with regard to City of Big Bear Lake.

The record was closed, and the matter was submitted for decision on May 10, 2021.

FACTUAL FINDINGS

Jurisdictional Matters

1. (In this decision, Mr. Mosley will be referred to as respondent.) Respondent established membership with CalPERS through employment with the City of Pomona in 1981 and through employment with the City of Rancho Cucamonga in 1986. He retained his membership after separating from employment with the City of Rancho Cucamonga.

2. On December 9, 1997, respondent established membership with the San Bernardino County Employees’ Retirement Association (SBCERA) through employment with the City of Big Bear Lake.

3. CalPERS and SBCERA are reciprocal retirement systems. Reciprocity is an agreement among public retirement systems to allow members to move from one public employer to another within a specific amount of time without losing certain valuable retirement and related benefits. Respondent has reciprocity rights for concurrent retirement with CalPERS and SBCERA.

4. Respondent submitted an application to CalPERS for service retirement. He retired from service effective February 1, 2020, and has been receiving his retirement allowance since May 4, 2020.

5. The amount of a member's service retirement allowance is calculated by applying a percentage figure, based on the member's age on the date of retirement, to the member's years of service and the member's final compensation. Only those items allowed under the California Public Employees' Retirement Law, Government Code section 20000 et seq. (PERL), may be included in a member's final compensation for purposes of calculating a retirement allowance.

6. In reporting respondent's final compensation, SBCERA included payments for an "Emp. Paid Flexible Benefit Plan" (flexible benefit payments).

Respondent's Appeal

7. By a letter dated April 17, 2020, CalPERS notified respondent that CalPERS had excluded the flexible benefit payments from the calculation of respondent's final compensation.

8. The exclusion resulted in a reduction in respondent's retirement allowance.

9. By a letter dated April 22, 2020, respondent appealed.

Respondent's Compensation

10. Respondent worked at the City of Big Bear Lake as the Director of Community Services. The city had a publicly available pay schedule. Respondent and the city negotiated his contract each year. The city agreed that he would be paid the

highest salary allowed, i.e., the highest salary listed in the publicly available pay schedule for members of the group or class of employment he was in. Over and above that, the city agreed to pay respondent an amount to reimburse him for his contribution to the cost of health insurance. As noted above, these flexible benefit payments were reported to CalPERS as being part of respondent's compensation.

11. A flexible benefit plan is an employee benefit plan that allows employees to choose from a variety of pre-tax benefits. Employees can contribute a portion of their gross income before any taxes are calculated and deducted. Plans normally include options such as insurance benefits and benefits that help employees with various life events such as adoption. Because employees can choose among benefits, as one can choose food in a cafeteria, these plans are commonly referred to as cafeteria plans.

12. Respondent testified as follows: He and the city agreed that his flexible benefit payments were over and above his salary, which was set at the highest salary allowed according to the terms of the publicly available pay schedule. Nevertheless, on respondent's pay stubs, there was an initial entry for overall pay authorization, which included the flexible benefit payments, and then a deduction showing the flexible benefit payments were being withheld to pay respondent's share of the cost of health insurance.

13. Respondent contends that the flexible benefit payments were part of his regular pay. He also contends that the fact that there was a deduction from his overall pay authorization brings the flexible benefit payments within the statutory definition of payrate. As will be explained below, that is not correct because the deduction was from an amount in excess of the highest salary listed in the publicly available pay

schedule, which is the maximum salary CalPERS can include in its calculation of final compensation.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Respondent has the burden of proof. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. (Evid. Code, § 500.) “‘Burden of proof’ means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.” (Evid. Code, § 115.)

2. The standard of proof is proof by a preponderance of the evidence. (Evid. Code, § 115.)

Statutory Authority

3. When a member who also is a member of a reciprocal retirement system applies to CalPERS for retirement, the member’s employer or reciprocal retirement system reports the member’s compensation. CalPERS calculates the member’s final compensation based on the report it receives. An employer or reciprocal retirement system is required to report in accordance with Government Code section 20636. (Gov. Code, § 20630, subd. (b)). The compensation shall not exceed compensation earnable as defined in Government Code section 20636. (Gov. Code, § 20630, subd. (b)).

4. Government Code section 20636, subdivision (a), defines compensation earnable as including two things – payrate and special compensation.

PAYRATE

5. Government Code section 20636, subdivision (b)(1), defines payrate and provides, in part:

“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.* (Italics added.)

6. Government Code section 20636, subdivision (b)(2)(D), further provides:

“Payrate” shall include an amount *deducted from a member's salary* for any of the following:

[¶] . . . [¶]

(D) Participation in a flexible benefits program. [Italics added.]

SPECIAL COMPENSATION

7. Government Code section 20636, subdivision (c), provides, in part:

(1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

(2) Special compensation shall be 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.

[¶] . . . [¶]

(7) Special compensation does not include any of the following:

[¶] . . . [¶]

(C) Other payments the board has not affirmatively determined to be special compensation.

8. California Code of Regulations, title 2, section 571, provides, in part:

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: (Italics added.)

9. The list that follows does not contain a reference to an employee benefit plan, a flexible benefit plan, or a plan to off-set the cost an employee incurs for health insurance.

Respondent's Flexible Benefit Is Not Payrate

10. Respondent's flexible benefit is not part of his payrate within the terms of Government Code section 20636, subdivision (b)(1). According to that subdivision, payrate means "the monthly rate of pay or base pay . . . paid . . . pursuant to publicly available pay schedules." A person's payrate cannot include amounts that are not "pursuant to publicly available pay schedules." Respondent's contract provided for his salary to be the highest salary allowed according to the terms of the publicly available pay schedule. That is the upper limit CalPERS can consider as payrate. Respondent's flexible benefit was over and above that limit.

11. As noted above, Government Code section 20636, subdivision (b)(2)(D), further provides that payrate shall include an amount *deducted from a member's salary* for participation in a flexible benefits program. Respondent contends that the fact that there was a deduction from his overall pay authorization brings the flexible benefit payments within the statutory definition of payrate. But subdivision (b)(2)(D) was not intended to nullify the definition of payrate. Subdivision (b)(2)(D) merely makes clear that having a flexible benefit deducted from a salary that is set pursuant to a publicly available pay schedule does not reduce the payrate. However, subdivision (b)(2)(D) does not apply to respondent's situation in which the deduction was from an overall pay authorization that included the highest salary obtainable pursuant to a publicly available pay schedule plus an amount equal to the flexible benefits deduction.

Respondent's Flexible Benefit Is Not Special Compensation

12. As noted above, California Code of Regulations, title 2, section 571, provides, an *exclusive* list of special compensation items. And the list does not contain

a reference to an employee benefit plan, a flexible benefit plan, or a plan to off-set the cost an employee incurs for health insurance.

CalPERS Is Not Required to Use a “Compensation Earnable” Calculation Provided by a Reciprocal Retirement System

13. Government Code section 20638 provides, in part:

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 this system for purposes of computing final compensation for the member
....

14. This provision is conditioned on certain matters that are not in dispute in this case.

15. Anticipating that respondent would contend that this provision limits CalPERS’s authority under Government Code sections 20630 and 20636 to exclude certain items of compensation, CalPERS cited to *Mark L. Wheeler, et al.*, CalPERS Case No. 2016-1073, OAH No, 2017100516, Precedential Decision 19-01 (January 04, 2021.) In *Wheeler*, CalPERS held that Government Code sections 20630 and 20636 control. Government Code section 20638 does not require CalPERS to accept a reciprocal retirement system’s calculation of compensation earnable.

Conclusion

16. Because respondent’s flexible benefit is neither payrate nor special compensation, it is not compensation earnable within the terms of Government Code

section 20636, subdivision (a). And according to Government Code section 20630, subdivision (b), the compensation reported to CalPERS shall not exceed compensation earnable.

ORDER

Respondent's appeal is denied. CalPERS is not required to include respondent's "Emp. Paid Flexible Benefit Plan" in the calculation of final compensation.

DATE: June 7, 2021

Robert Walker
Robert Walker (Jun 7, 2021 14:34 PDT)

ROBERT WALKER

Administrative Law Judge

Office of Administrative Hearings