

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Calculation of Final  
Compensation of:

GREGORY J. OLIVER,

Respondent,

and

COUNTY OF TUOLUMNE,

Respondent.

CalPERS Case No. 2014-0340

OAH No. 2014080719

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings (OAH), on October 23, 2014, in Sacramento, California.

Cynthia A. Rodriguez, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

There was no appearance by, or on behalf of respondent Gregory J. Oliver.<sup>1</sup>

The appearance of County of Tuolumne was previously waived by letter dated October 17, 2014, from Sarah Carrillo, Tuolumne County Counsel.

Evidence was received, the record closed, and the matter was submitted for decision on October 23, 2014.

<sup>1</sup> Compliance with service requirements under Government Code section 11509 was established and, at the request of CalPERS, this matter proceeded by way of default under Government Code section 11520.

## ISSUE

Whether the automobile allowance paid by the County of Tuolumne to respondent should be included in his final compensation for purposes of calculating his service retirement allowance?

## FACTUAL FINDINGS

1. The Statement of Issues was made and filed on August 22, 2014, by Renee Ostrander, Acting Chief of the Customer Account Services Division, in her official capacity.

2. Respondent County of Tuolumne contracted with the CalPERS Board of Administration to participate as a public agency member pursuant to Government Code section 20460, et seq. The provisions for local public agencies contracting with CalPERS are set forth in the Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.)

3. Gregory J. Oliver (respondent) was employed by Tuolumne County as its County Counsel. By virtue of his employment, respondent became a miscellaneous member of CalPERS subject to the provisions of the PERL.

4. On or about January 16, 2013, respondent signed an application for service retirement. Respondent retired for service effective March 12, 2013, with 23.371 years of service credit. He has been receiving a retirement allowance from that date.

5. CalPERS is a prefunded, defined benefit retirement plan. Benefits for its members are funded by members and employer contributions, and by interest and other earnings on those contributions. The amount of a member's contribution 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 of Administration sets the employer contribution rate on an annual basis.

6. The amount of a member's service retirement allowance is calculated by applying a percentage figure, based upon the member's age on the date of retirement, to the member's years of service and the member's "final compensation." In computing a member's 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 retirement allowance.

7. After receiving respondent's application for service retirement, CalPERS Compensation Review Unit (CRU) staff began a review of his payroll, as reported by Tuolumne County, in order to determine what amounts and items were allowed under the PERL, and therefore should be included in his compensation earnable and used for purposes

of calculating his service retirement allowance. When CRU performed its review, it found that Tuolumne County reported to CalPERS a \$450 monthly amount as special compensation which was identified as an auto allowance. CalPERS determined that the PERL does not allow auto allowances to be included in the calculation of final compensation earnable, or otherwise used to determine the service retirement allowance.

8. By letter dated July 23, 2013, respondent and Tuolumne County were both notified of CalPERS' determination and advised of their appeal rights.

9. By letter dated August 12, 2013, respondent filed a timely appeal and requested an administrative hearing.

#### *CalPERS' Final Compensation Determination*

10. Samuel Camacho, Jr. is a CRU analyst at CalPERS. Mr. Camacho's duties include performing base compensation calculations and determining whether the final compensation reported to CalPERS is accurate. He reviewed the compensation reported by Tuolumne County for respondent. Mr. Camacho testified at hearing.

In evaluating and making final compensation determinations, Mr. Camacho typically reviews "publically available salary schedules" and any employment contracts in existence for the member. He did so in this case and found that respondent's pay rate did not match any Tuolumne County salary schedule. Rather, it consisted of a base salary plus four items of special compensation corresponding to: 1) management incentive pay; 2) longevity pay; 3) employer contributions; and 4) auto allowance.

11. Mr. Camacho sent an email to Tuolumne County Human Resources Manager, Ann Fremd, requesting a clarification and breakdown of the auto allowance. He was advised that Tuolumne County did not include the auto allowance in its compensation plans, but it was included in separate employment agreements for its County Counsel<sup>2</sup> and Chief Administrative Officer. It was only available to them. Ms. Fremd understood that in 2005, the Tuolumne County Board of Supervisors, in closed session, approved the auto allowance but also indicated its intent to have it included as part of respondent's salary for purposes of reporting to CalPERS. She further indicated that such intent was never reported to Tuolumne County Human Resources, and therefore the County continued to report this amount to CalPERS as an auto allowance.

12. Mr. Camacho was guided in his evaluation of final compensation by Government Code section 20636 and California Code of Regulations, title 2, section 571,

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<sup>2</sup> The Memorandum of Understanding (MOU) between respondent and Tuolumne County dated September 12, 2000, provided under "Supplemental Benefits" that respondent was to receive: "As compensation for use of his personal vehicle for in-county travel for the benefit of COUNTY, COUNSEL shall receive a monthly automobile allowance of Four Hundred Fifty Dollars (\$450.00)."

which together define payrate and special compensation (compensation earnable), and outline limitations to items that can be included by employers. CalPERS does not attempt to interpret members' intent, but looks to the language of any employment contract. Section 571 provides the exclusive list of nine criteria that all special compensation must meet.

13. In this case, the vehicle allowance paid by Tuolumne County to respondent did not meet the statutory definition of "payrate." The vehicle allowance was not paid to similarly situated members for work performed and rendered pursuant to a publicly available salary schedule. Also, the vehicle allowance was not considered "special compensation" pursuant to section 571. CalPERS properly excluded the vehicle allowance component from respondent's final compensation earnable for purposes of calculating his retirement benefits.

14. No evidence was presented on behalf of respondent. In his August 12, 2013 letter requesting an appeal and hearing, respondent set forth the basis for his appeal as follows:

Since the County of Tuolumne discontinued paying me an "Automobile Allowance" in 2005, the Special Compensation reported by the County of Tuolumne was in error. During my highest 12 months of compensation (which would have been the last twelve (12) months of work ending March 12, 2013), I did not receive any Automobile Allowance and no report of such should have been made to CalPERS.

## LEGAL CONCLUSIONS

### *Applicable Statutes and Regulations*

1. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198). The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) "final compensation" (Gov. Code, §§ 20037, 21350, 21352, 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)

2. Government Code section 20630 defines "compensation" as 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 holidays, sick leave, industrial disability leave, vacation, compensatory time off, and leave of absence. Compensation shall be reported in accordance with section 20636 and shall not exceed compensation earnable, as defined in section 20636. (Gov. Code, § 20630, subds. (a) & (b).)

3. "Compensation earnable" is composed of (1) pay rate, and (2) special compensation, as defined in Government Code section 20636.

4. "Pay rate" 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. "Pay rate" for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e). (Gov. Code, § 20636, subd. (b)(1).)

5. "Special compensation" of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions." (Gov. Code, § 20636, subd. (c)(1).)

"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. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e)." (Gov. Code, § 20636, subd. (c)(2).)

"Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned." (Gov. Code, § 20636, subd. (c)(3).)

6. "The board shall promulgate regulations that delineate more specifically and exclusively what constitutes 'special compensation' as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee . . . shall be included as special compensation and appropriately defined in those regulations." (Gov. Code, § 20636, subd. (c)(6).)

7. Special compensation does not include: "(A) Final settlement pay, (B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise, or (C) Other payments the board has not affirmatively determined to be special compensation." (Gov. Code, § 20636, subd. (c)(7).) Special compensation and pay rate specifically do not include: "Compensation for additional services outside regular duties, such as standby pay, callback pay, court duty, *allowance for automobiles*, and bonuses for duties performed after the member's regular work shift." (Gov. Code, § 20636, subd. (g)(4)(I).)

8. A “group or class of employment” means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work related grouping. One employee may not be considered a group or class. (Gov. Code, § 20636, subd. (e)(1).)

9. California Code of Regulations, title 2, section 571 exclusively identifies and defines special compensation items for members employed by a contracting agency that must be reported to CalPERS if they are contained in a written labor policy or agreement. (Cal. Code Regs., tit. 2, § 571, subd. (a).) The Board has determined that all items of special compensation listed in subsection (a) are:

- (1) Contained in a written labor policy or agreement;
- (2) Available to all members in the group or class;
- (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) Not creating an unfunded liability over and above PERS’ actuarial assumptions.

(Cal. Code Regs., tit. 2, § 571, subd. (b).)

“Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).” (Cal. Code Regs., tit. 2, § 571, subd. (c).)

“If an 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.” (Cal. Code Regs., tit. 2, § 571, subd. (d).)

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### *Legal Cause and Analysis*

10. 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.)

11. Respondent did not meet his burden to establish that compensation he received for automobile allowance is properly included as compensable earnable for the purpose of calculating his retirement benefits. Respondent's pay for this component is specifically excluded by the PERL. (Gov. Code, § 20636, subd. (g)(4)(I).)

12. Respondent's 2000 MOU with Tuolumne County separated his base compensation from the \$450 automobile allowance. Even accepting the County's intent to later include the automobile allowance as part of his compensation, it remained and was characterized as an automobile allowance. It was therefore an impermissible salary increase under the PERL. (Gov. Code, § 20636, subd. (g)(4)(I).) The restructuring of a component of compensation does not alter the nature of the pay as the law does not respect form over substance. (Civ. Code, § 3528; *Dept. Veterans Affairs v. Superior Court* (1999) 67 Cal.App.4th 743, 758.)

13. Case law supports a finding that the benefits at issue here are not a part of compensation earnable for purposes of calculating retirement benefits. "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." (*Oden v. Bd. of Admin. Of the Public Employees' Retirement System* (1994) 23 Cal.App.4th 194, 198.) "Employer-paid member contributions were authorized to reduce employees' income tax liability, they were not meant to increase retirement awards." (*Id.* at p. 209.)

### *Conclusion*

14. CalPERS correctly determined that respondent's compensation earnable for purposes of calculating his retirement benefits cannot include amounts previously paid to him as an automobile allowance. CalPERS' adjustment to respondent's final compensable earnable is supported by the PERL. (Gov. Code, § 20636; Cal. Code Regs., tit. 2, §§ 570, 571.)

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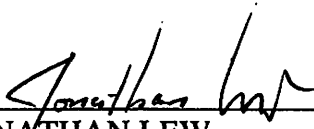
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ORDER

The appeal of respondent Gregory J. Oliver to include his automobile allowance for purposes of calculation his final service retirement allowance is **DENIED**.

DATED: November 12, 2014

  
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JONATHAN LEW  
Administrative Law Judge  
Office of Administrative Hearings