

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Appeal Regarding the
Calculation of Final Compensation Involving:

CalPERS Case No. 2016-028

DANIEL A. HARP,

OAH No. 2016070611

Appellant/Respondent,

and

SAN BERNARDINO COUNTY,

Respondent,

and

SAN BERNARDO COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION,

Respondent.

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on November 22, 2016.

John L. Shipley, Senior Staff Attorney, represented petitioner, Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS), State of California.

Daniel A. Harp, appellant/respondent, represented himself and was present throughout the administrative hearing.

No appearance was made by or on behalf of respondents San Bernardino County and San Bernardino County Employees' Retirement Association.

The matter was submitted on November 22, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 12/20 20 16
Det. J. Weston

ISSUE

Should Auto Allowance, Cellular Device Allowance, Cash Out Holiday Pay, Cash Out Vacation Pay, Retirement Excess Cash Payment, and Cash Out Admin Pay be included in the calculating David A. Harp's final compensation?

FACTUAL FINDINGS

Stipulations

1. At the outset of the hearing conducted on November 22, 2016, petitioner, through counsel, and David A. Harp, appellant/respondent, stipulated to the following:

A. CalPERS made and filed the Statement of Issues in its official capacity and not otherwise.

B. Respondent, Daniel A. Harp, established membership with CalPERS through his employment with San Bernardino County Schools on October 18, 1973.

On January 16, 1978, Mr. Harp commenced employment with the California State University, San Bernardino. On April 1, 1980, Mr. Harp separated from employment with the California State University, San Bernardino.

On April 1, 1980, Mr. Harp commenced employment with the City of Newport Beach. On April 12, 1980, respondent Harp separated from employment with the City of Newport Beach.

On August 18, 1980, Mr. Harp commenced employment with San Bernardino County Schools. On October 18, 1980, Mr. Harp separated from employment with San Bernardino County Schools.

Mr. Harp retained membership with CalPERS throughout these periods of employment.

C. San Bernardino County Schools, the City of San Bernardino, California State University San Bernardino, and the City of Newport Beach are public agencies that contract with CalPERS for retirement benefits for eligible employees. Their contracts with CalPERS are subject to the California Public Employees' Retirement Law (PERL), found at Government Code section 20000 et seq.

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

D. On November 1, 1980, Mr. Harp established membership with respondent San Bernardino County Employees' Retirement Association (respondent SBCERA).

Respondent SBCERA is a public entity established under the California County Employees Retirement Law of 1937 (CERL), and it has a Reciprocal Agreement with CalPERS dated October 1, 1957.

Mr. Harp was last employed by respondent County of San Bernardino as an Assistant Assessor Recorder.

By virtue of his employment with respondent county, Mr. Harp has reciprocity rights for concurrent retirement with CalPERS and Respondent SBCERA.

E. On May 28, 2015, Mr. Harp applied for service retirement with CalPERS. Mr. Harp retired from public service effective January 5, 2015, with 5.614 years of CalPERS service credit; he has received a CalPERS service retirement allowance from that date.

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

G. The following provisions of the Government Code are relevant in calculating final compensation: Section 20351; Section 20630; Section 20636; and Section 20638.

H. The following regulations, promulgated by the Board of Administration through California Code of Regulations, Title 2, Division 1, Chapter 2, Subchapter 1, Article 4, are relevant to this appeal: Section 570; Section 570.5; and Section 571

I. CalPERS staff reviewed the compensation reported by respondent county on behalf of Mr. Harp in the form of Auto Allowance, Cellular Device Allowance, Cash Out Holiday, Cash Out Vacation, and Retirement Excess Cash, and determined the items of compensation just mentioned were not allowed as compensation pursuant to the PERL, and should not be included in calculating Mr. Harp's final compensation. CalPERS contends these items are neither "pay rate" nor

“special compensation” pursuant to Government Code Section 20636 and its implementation regulations. [Mr. Harp stipulated that CalPERS has taken that position, but he disputes the validity of CalPERS’s contention.]

J. By letter dated September 16, 2015, Mr. Harp and respondent county were notified of CalPERS’s determination and of their appeal rights.

K. By letter dated October 14, 2015, Mr. Harp provided additional information, filed a timely appeal, and requested an administrative hearing.

L. CalPERS conducted a secondary review of Mr. Harp’s compensation status with the additional information Mr. Harp provided. Following that review, CalPERS confirmed its previous determination that Auto Allowance, Cellular Device Allowance, Cash Out Holiday, Cash Out Vacation, Retirement Excess Cash, and Cash Out Admin Pay should not be included in calculating final compensation. [Mr. Harp stipulated that CalPERS conducted a secondary review, but he disagreed with CalPERS’s staff’s conclusions and contentions following that review.]

M. By letter dated January 8, 2016, respondent Harp and respondent county were notified of CalPERS’s determination.

Additional Factual Matters

2. Mr. Harp was born in 1954. He graduated from San Bernardino High School in 1972. After high school, he attended California State University San Bernardino, where he received a bachelor’s degree in criminal justice in 1976.

Mr. Harp worked as a custodian for the San Bernardino County School District while attending college. After receiving his bachelor’s degree, he worked for California State University San Bernardino, as a police officer for two years. He then was employed as a police officer by the City of Newport Beach for a month. He returned to San Bernardino where he became employed by the San Bernardino County Assessor-Recorder’s Office.

Mr. Harp was employed by the San Bernardino County Assessor-Recorder’s Office from October 1980 until January 2015, when he retired as Assistant Assessor-Recorder. He enjoyed a lengthy and highly successful career as an assessor-recorder with the County of San Bernardino. He was required to drive long distances and was required to have a cell phone in his employment. He was not required to work on approved holidays although he sometimes did so voluntarily. He was a trusted and valued public employee.

Mr. Harp originally did not plan to retire in January 2015. His retirement in January 2015 came about as a result of his being narrowly defeated in an election for the office of San Bernardino County Assessor-Recorder.

3. By reason of his long term membership with CalPERS, Mr. Harp was not a “new member” subject to limitations under the California Public Employees’ Pension Reform Act of 2013.

4. Mr. Harp has been married to Suzanne Harp for 29 years. He and Suzanne have a 24-year-old daughter, who currently attends Loma Linda University Medical School. Mr. Harp also has an older daughter from a previous marriage.

Mr. Harp’s Employment Agreement with San Bernardino County

5. On November 1, 1980, following his employment with the County of San Bernardino, Mr. Harp became a member SBCERA, an entity that maintains a reciprocal agreement with CalPERS. By virtue of his employment with the County of San Bernardino, Mr. Harp has reciprocity rights for concurrent retirement with CalPERS and SBCERA.¹

6. For several years before his retirement, Mr. Harp was a member of Exempt Group B under the County of San Bernardino’s Exempt Compensation Plan. Exempt groups under the plan included several classifications of county employees who had significant vocational responsibilities and worked under the direction of a county administrator, an elected official, or a department head. Salaries for these exempt employees is set under published salary schedules. Exempt employees are entitled to various kinds of reimbursement and salary adjustments under the exempt employee compensation plan.

The Disagreement in Calculating the CalPERS Service Retirement Allowance

7. Mr. Harp currently receives a service retirement allowance from CalPERS of approximately \$1,400 per month, in addition to his receipt of an SBCERA service retirement allowance.

8. CalPERS’s staff concluded that Mr. Harp’s service retirement allowance from CalPERS should not include an auto allowance, cellular device allowance, cash out holiday pay, cash out vacation pay, a retirement excess cash payment, and cash out admin pay that Mr. Harp received. Among other matters, CalPERS asserts these items of compensation are

¹ Government Code section 20351 provides for reciprocity between CalPERS and other qualifying retirement systems. As mentioned in *Khan v. Los Angeles City Employees’ Ret. Sys.* (2010) 187 Cal.App.4th 98, 109, the Government Code allows cities and counties to enter into reciprocal agreements with CalPERS, provided these entities provide CalPERS with the same reciprocity they are given. This mutuality may be accomplished by ordinance in the case of a city, or by membership in a system that CalPERS has determined provides mutuality. By statute, any public agency that has entered into a reciprocity agreement with CalPERS pursuant to Section 20351 is deemed to have obtained reciprocity with any other agency that has a reciprocity agreement with CalPERS.

not listed in California Code of Regulations, title 2, section 571, which exclusively identifies and defines special compensation items.

9. Mr. Harp believes the calculation of his CalPERS retirement allowance should include items of compensation he received as a result of his employment, including auto allowance, cellular device allowance, cash out holiday pay, cash out vacation pay, a retirement excess cash payment, and cash out admin pay. He argues he earned this compensation, the County of San Bernardino provided other exempt employees with the same benefits on a regular basis, and he did not receive these items of compensation in contemplation of retirement. Mr. Harp believes California Code of Regulations, title 2, section 571, does not apply to his situation.

10. Mr. Harp determined that if his service retirement were to include the items of special compensation CalPERS improperly excluded, he would receive a CalPERS service retirement allowance of approximately \$2,000 per month, in addition to his receipt of the SBCERA service retirement allowance.

Compensation under the Exempt Compensation Plan

11. Mr. Harp used his personal vehicle for county business. As a Group B member, he was entitled to receive an automobile allowance under the County of San Bernardino Exempt Compensation Plan (2008-2011). The plan provided in relevant part:

Automobile Allowance

[¶] . . . [¶]

Effective August 2, 2008, . . . all County employees in benefit Groups A and B . . . shall receive a biweekly automobile allowance in the amount of \$561.54 with no mileage reimbursement, provided they are not assigned a County vehicle and they provide a private vehicle for their own use on County business . . . Employees selecting this allowance shall be required to have a vehicle available at all times for use on County business. This allowance shall be considered complete reimbursement for the acquisition, insurance, maintenance, repair, upkeep, fuel, and all other costs for the required vehicle. . . .

12. Mr. Harp was required to have a cell phone as a condition of employment. As a Group B member, he was entitled to receive a portable communication device allowance under the County of San Bernardino Exempt Compensation Plan (2008-2011). The plan provided:

Portable Communication Device Allowance

Effective June 23, 2007, all elected officials and all County employees in benefit Groups A and B shall receive a biweekly portable communication device allowance in the amount of \$92.31, if the following conditions are met: (1) The employee shall purchase a portable communication device capable of sending and receiving cellular telephone calls, and if approved by the appointing authority, capable of sending and receiving e-mails to and from the County e-mail system. (2) Any portable communication device to be utilized for sending and receiving e-mail shall be selected from a list as approved by the Information Services Department, which will be limited to devices utilizing Windows Mobile 5 or greater. (3) An employee may purchase a device currently in use at a cost to be determined by the Information Services Department. (4) The County shall pay for any license and set up expense for the device if any, and the employee shall pay for the equipment and monthly voice and data plans.

13. With regard to his receipt of cash out holiday pay, cash out vacation pay, retirement excess cash payments, and cash out admin pay, Mr. Harp argues he did not receive this compensation in anticipation of his separation from county employment. It is found that the compensation Mr. Harp received for holiday pay, vacation pay, retirement excess cash payments, and admin pay was not received in anticipation of separation from employment.²

14. With regard to his receipt of cash out holiday pay, cash out vacation pay, retirement excess cash payments, and cash out admin pay, Mr. Harp argues his compensation was not unique and was available to other Group B members. The County of San Bernardino Exempt Compensation Plan (2008-2011) enables exempt employees “to sell back holiday time prior to termination or retirement” (page 29), “to sell back vacation time” (page 45), to be compensated as a long term employee for whom retirement contributions are no longer necessary (page 52), and to cash out administrative leave (page 26).

15. Mr. Harp’s long term service with the County of San Bernardino resulted in his employer not being required to make retirement contributions to the county’s retirement program. Under his original employment agreement, Mr. Harp and others similarly situated were entitled to receive an excess retirement cash payment on an annual basis before 2011

² Mr. Harp produced evidence establishing that he received a cash out of holiday leave in 2010 and 2014, but not from 2006 through 2009 or from 2011 through 2013. He produced evidence establishing he received a cash out vacation pay from 2010 through 2014, but not from 2006 through 2009. He produced evidence establishing he received retirement excess cash from 2006 through 2009 and in 2014, but not from 2011 through 2013. He produced evidence establishing that the received cash out admin leave in 2006, 2007, 2009, 2010, and 2014, but not in 2008, or from 2011 through 2013.

for more than 30 years of service. In 2011, the employee compensation plan was amended. Following the 2011 amendment, a County of San Bernardino employee was permitted to receive – just one time – the retirement excess cash payment. In other words, the payment was not made periodically. Mr. Harp took his one-time retirement cash payment in 2011.

16. Mr. Harp acknowledged cash out holiday pay, cash out vacation pay, retirement excess cash payments, and cash out admin pay were not items of compensation specifically mentioned in California Code of Regulations, title 2, section 571, subdivision (a). Nevertheless, he argues his CalPERS service retirement allowance calculation should include the disputed compensation he received as an exempt Group B employee under Government Code section 31835. He asserts California Code of Regulations, title 2, section 571, subdivisions (a) and (b), are overly broad, inconsistent with provisions of Government Code section 31835, and inapplicable to his situation.

Mr. Harp also believes he might be subject to discrimination because he calculated his final average compensation (FAC) was \$16,204.09 per month; a question in CalPERS's Retirement Salary Request Form (CalPERS 0963 (04-2015)) required him to provide a breakdown of his final average compensation, but only because his FAC exceeded \$10,000. Those making less than \$10,000 per month were not required to provide a breakdown and, thus, were not subject to CalPERS's review and scrutiny.

CalPERS Evidence

17. Amy Baquera is currently employed by CalPERS as an associate government program analyst. She was previously employed by CalPERS as a retirement program specialist. Ms. Baquera was familiar with PERL and Mr. Harp's claim.

18. By letter dated September 16, 2015, CalPERS advised Mr. Harp that auto allowance, cellular device allowance, cash out holiday pay, cash out vacation pay, and retirement excess cash payment "did not meet the definition of 'Compensation Earnable'" under Government Code section 20636 and were not included in California Code of Regulations, title 2, section 571, as items of "special compensation."

Mr. Harp responded by letter dated October 14, 2015. In that letter, he claimed auto allowance and cellular device allowance "fell under the category of *Management Incentive Pay*," that cash out holiday pay was specifically authorized as "time off holiday compensation," that cash out vacation pay was not received in contemplation of retirement but was regularly received by him on an annual basis, and that retirement cash pay should be considered "longevity pay." His letter also stated that since cash out admin pay was not been mentioned in CalPERS's letter, "I conclude that this item does comply with California Public Employees Law and meets the definition of Compensation Earnable."

By letter dated January 8, 2016, CalPERS advised Mr. Harp of its completion of a secondary review. The letter advised Cash Out Admin Pay did not constitute compensation earnable under Government Code section 20636 because it was not payable and was not

special compensation for special skills, knowledge, abilities, work assignment, work days, or other conditions. In addition, cash out admin pay was not identified in Section 571 as special compensation.

19. Ms. Baquera was one of the CalPERS staff members who investigated and determined Mr. Harp could not include in his FAC various items of compensation including auto allowance, cellular device allowance, cash out holiday pay, cash out vacation pay, a retirement excess cash payment, and cash out admin pay.

20. Ms. Baquera testified the issue in this dispute related only to items of "special compensation." CalPERS asserts that Mr. Harp's compensation for auto allowance, cell phone allowance, and cash out holiday pay, cash out vacation pay, retirement excess cash payments, and cash out admin pay cannot be considered "special compensation" as those items are not included in the list set forth California Code of Regulations, title 2, section 571, subdivision (a), that "exclusively identifies and defines special compensation items for members employed by a contracting agency." In addition to not being included in section 571, subdivision (a), cash out holiday pay, cash out vacation pay, excess retirement pay, and cash out admin pay do not qualify as "special compensation" under section 571, subdivision (b), because the compensation was not paid periodically as earned, was not longevity pay, was not management incentive pay, and created an unfunded liability over and above CalPERS's actuarial assumptions.

Jurisdictional Matters

21. Required pleadings and notices were served on all parties.

By letter dated July 29, 2016, respondent San Bernardino County, through counsel, advised "The County of San Bernardino does not have a vested interest in the outcome of the proceeding and will therefore not appear at the hearing or produce witnesses and documents."

By letter dated August 1, 2016, the San Bernardino County Employees' Retirement Association, through counsel, advised that "SBCERA does not intend to participate in the administrative hearing proceeding."

The administrative record was opened on November 22, 2016. John L. Shipley, Senior Staff Attorney, represented petitioner. Daniel A. Harp, appellant/respondent, represented himself. No appearance was made by or on behalf of respondents San Bernardino County and San Bernardino County Employees' Retirement Association. The matter was submitted on November 22, 2016.

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LEGAL CONCLUSIONS

The Public Employees' Retirement Law – Decisional Authority re Compensation Earnable

1. Members of CalPERS, once vested, participate in a defined benefit retirement plan that provides a monthly retirement allowance under a formula comprising factors such as final compensation, service credit (i.e., the credited years of employment), and a per-service-year multiplier. The retirement allowance consists of an annuity (funded by member contributions deducted from the member's paycheck and interest thereon) and a pension (funded by employer contributions and which must be sufficient, when added to the annuity, to satisfy the amount specified in the benefit formula). (*In re Marriage of Sonne* (2010) 185 Cal.App.4th 1564, 1568.)

The determination of what benefits and items of pay constitute compensation is crucial to the computation of an employee's ultimate pension benefits. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.)

"Final compensation" is a function of the employee's highest "compensation earnable." "Compensation earnable" consists of a member's "payrate" and "special compensation." "Payrate" is the monthly amount of cash compensation received by the employee pursuant to publicly available pay schedules. An employee's pension will not necessarily reflect his total personal compensation because payrate, like special compensation, is measured by the amounts provided by the employer to similarly situated employees. "Special compensation" is, generally, a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions," but is "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." (*Molina v. Bd. of Admin., California Pub. Employees' Ret. Sys.* (2011) 200 Cal.App.4th 53, 65–66.) PERS further limits "special compensation" by regulation, in particular California Code of Regulations, title 2, section 571. (*Prentice v. Bd. of Admin., California Pub. Employees' Ret. Sys.* (2007) 157 Cal.App.4th 983, 991.)

Government Code section 20636 states a member's pensionable compensation consists of "payrate and special compensation." Regulation 571 contains limitations on what may be considered pensionable special compensation. First, special compensation must be "for services rendered during normal working hours." Second, to be classified as special compensation, the payment must be of a type that has been specifically delineated as special compensation by the board in Regulation 571. (*City of Pleasanton v. Bd. of Admin. of the California Pub. Employees' Ret. Sys.* (2007) 211 Cal.App.4th 522, 537.)

Finally, the calculation of "compensation earnable" is not based on individual efforts. (*Prentice, supra*, at p. 992.)

Statutory Authority

2. Government Code section 60630 provides:

(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.

3. Government Code section 60636 provides in 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. . . .

[¶] . . . [¶]

(c)(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. 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).

(3) 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.

[¶] . . . [¶]

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section

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

[¶] . . . [¶]

(C) Any other payments the board has not affirmatively determined to be special compensation

4. Government Code section 20638 provides in part:

The average monthly salary during any period of service 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 provided:

(a)(1) Entry into employment in which he or she became a member in one system occurred on or after October 1, 1957, and within 90 days of discontinuance of employment as a member of the other system.

(2) This subdivision shall not deny the benefit of this section to any person retiring after October 1, 1963, who entered membership prior to October 1, 1957, if he or she entered the employment in which he or she became a member within 90 days of termination of employment in which he or she was a member of the other system, and he or she became a member within seven months of entry into employment, or, if an employee of a district as defined in Section 31468, became a member at the time the district was included in a county retirement system.

(b) He or she retires concurrently under both systems and is credited with the period of service under the county system at the time of retirement.

5. Government Code section 20351 provides in part:

The provisions of this part extending rights to a member of this system, or subjecting him or her to any limitation by reason of his or her membership in a county retirement system, shall apply in like manner and under like conditions to a member of this system by reason of his or her membership in any retirement system established under Chapter 2 (commencing with Section 45300) of Division 5 of Title 4 with respect to which an ordinance complying with Section 45310.5 has been filed with and accepted by the board . . . However, provisions relating to computation of final compensation shall apply to any other member if the provision would have applied had the termination and entry into employment occurred after the acceptance or determination by the board.

6. Government Code section 31835 provides in part:

The average compensation during any period of service as a member of the Public Employees' Retirement System, . . . a member of a retirement system established under this chapter in another county . . . or a member of a retirement system of any other public agency of the state that has established reciprocity with the Public Employees' Retirement System . . . shall be considered compensation earnable . . . by a member for purposes of computing final compensation for that member provided:

(a) The period intervening between active memberships in the respective systems does not exceed 90 days, or 6 months if

Section 31840.4 applies. That period shall not include any time during which the member was prohibited by law from becoming a member of the system of another county.

Notwithstanding anything in this chapter to the contrary, the 90-day or 6-month restriction referred to in this section or any other provision of this chapter affecting deferred retirement shall not be applicable to any members who left county or district service prior to October 1, 1949, and subsequently redeposited.

(b) He or she retires concurrently under both systems and is credited with the period of service under that other system at the time of retirement.

The provisions of this section shall be applicable to all members and beneficiaries of the system.

Regulatory Authority

7. California Code of Regulations, title 2, section 570, provides in part:

“Final settlement pay” means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

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

(a) 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:

(1) INCENTIVE PAY

Bonus - Compensation to employees for superior performance such as “annual performance bonus” and “merit pay”. If provided only during a member’s final compensation period, it shall be excluded from final compensation as “final settlement” pay. A program or system must be in place to plan and identify performance goals and objectives

Longevity Pay - Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.

Management Incentive Pay - Compensation granted to management employees in the form of additional time off or extra pay due to the unique nature of their job. Employees within the group cannot have the option to take time off or receive extra pay. This compensation must be reported periodically as earned and must be for duties performed during normal work hours. This compensation cannot be for overtime, nor in lieu of other benefits excluded under the statutes, nor for special compensation not otherwise listed in this Section 571 . . .

Holiday Pay - Additional compensation for employees who are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays

(b) The Board has determined that all items of special compensation listed in subsection (a) are:

[¶] . . . [¶]

(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.

(c) 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).

(d) 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.

Ultimate Conclusions

9. During his employment with the County of San Bernardino, Mr. Harp received compensation in the form of auto allowance, cellular device allowance, cash out holiday pay, cash out vacation pay, retirement excess cash payment, and cash out admin pay. This compensation was not in contemplation of his separation from public service.

The auto allowance and cellular device allowance Mr. Harp received was designed to reimburse him for the use of his own car and own cell phone while he was at work; the allowance was not incentive pay awarded for superior performance based on a program or system in place that identified performance goals and objectives. In addition, auto allowance and cellular device allowances are not identified as items of special compensation in Regulation 571.

Mr. Harp was not normally required to work on approved holidays as a result of holding a position that required scheduled staffing without regard to holidays. Thus, the cash out holiday pay Mr. Harp received was not special compensation that could be included in calculating his FAC. In addition, cash out holiday pay is not identified as an item of special compensation in Regulation 571.

Mr. Harp did not take off time from work to go on vacation to the full extent he was able to do so. He accumulated many hours of vacation time. He cashed out his unused hours of vacation time over several years to, among other matters, finance his daughter's college education. The compensation Mr. Harp received in this regard was not related to his special skills, knowledge, abilities, work assignments, workdays or hours, or other work conditions. He voluntarily elected not to go on vacation. Thus, the cash out vacation pay Mr. Harp received was not special compensation that could be included in calculating his FAC. In addition, cash out vacation pay is not identified as an item of special compensation in Regulation 571.

Mr. Harp's long term service with the County of San Bernardino resulted in his employer not being required to make retirement contributions on his behalf after 30 years of service. Under his first employment agreement, Mr. Harp and others similarly situated were entitled to receive a cash payment on an annual basis for contributions the county was not required to make. This payment continued until 2011, when the county's employee compensation plan was amended. Following the 2011 amendment, a County of San Bernardino employee was permitted to receive – just one time – the retirement excess cash payment. In other words, the payment was not paid periodically as earned. Thus, the retirement excess cash payment Mr. Harp received in 2014 was not special compensation that could be included in calculating his FAC.

Mr. Harp did not take off time from work and utilize all of his "administrative leave" hours. He accumulated many hours of unused administrative leave time. He received compensation for unused administrative, just as he received compensation for unused vacation hours. The compensation Mr. Harp received in this regard was not related to his special skills, knowledge, abilities, work assignments, workdays or hours, or other work conditions. He voluntarily elected not to go use the administrative leave hours. Thus, the administrative leave cash out payment Mr. Harp received was not special compensation that could be included in calculating his FAC. In addition, cash out admin leave is not identified as an item of special compensation in Regulation 571.

10. No evidence was presented to establish CalPERS discriminated against Mr. Harp based on the fact he claimed an FAC in an amount exceeding \$10,000 per month.

11. The appeal should be denied.

ORDER

Mr. Harp's compensation from the County of San Bernardino for Auto Allowance, Cellular Device Allowance, Cash Out Holiday Pay, Cash Out Vacation Pay, Retirement Excess Cash Payment, and Cash Out Admin Pay shall not be included as "special compensation" in calculating final compensation.

Dated: December 19, 2016

DocuSigned by:
James Ahler
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JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings