

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 Final
Compensation of:**

RAUL M. ROJAS, Respondent

and

**MARIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION,
Respondent,**

and

COUNTY OF MARIN, Respondent.

Agency Case No. 2021-0508

OAH No. 2021120666

PROPOSED DECISION

Carmen D. Snuggs-Spraggins, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on May 2, 2022.

Helen L. Louie, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Raul M. Rojas was present and represented himself.

There was no appearance on behalf of respondents Marin County Employees' Retirement Association (MCERA) and Marin County (County).

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on May 2, 2002.

SUMMARY

Respondent concurrently retired from CalPERS and MCERA. The issue in this case is whether CalPERS correctly calculated Respondent's final compensation. Because the evidence established that 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, Respondent's appeal from CalPERS' determination is denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent initially became a CalPERS member through his employment with the City of Pico Rivera from December 1989 through May 29, 1992. He was subsequently employed by the City of Upland from June 1, 1992 to May 6, 1994, and

the City of Bakersfield from May 9, 1994 to December 30, 2000, and from July 2, 2001 to March 22, 2014.

2. The City of Pico Rivera, the City of Upland, and the City of Bakersfield (collectively, Cities) are public agencies contracting with CalPERS for retirement benefits for its eligible employees. The provisions of the Cities' contracts with CalPERS are contained in the California Public Employees' Retirement Law (PERL).

3. Respondent retained his membership in CalPERS after separating from his employment with the City of Bakersfield on March 22, 2014.

4. On March 24, 2014, Respondent established membership with MCERA through his employment with the County. By virtue of his employment with the County and corresponding MCERA membership, Respondent has reciprocity rights for concurrent retirement with CalPERS and MCERA.

5. Respondent retired from service on December 31, 2020, and began receiving his retirement allowance in March 2021.

6. After its review of Respondent's compensation reported by MCERA, CalPERS concluded that the automobile allowance Respondent received from December 15, 2019 to November 28, 2020, does not meet the definition of "compensation earnable" as defined by the PERL.

7. By letters dated March 16, 2021, CalPERS advised Respondent and MCERA that: a) under the PERL and special compensation regulations, an automobile allowance is not compensation earnable or special compensation and b) it excluded Respondent's automobile allowance payments from calculating his final compensation

for purposes of determining his retirement benefits. CalPERS also notified Respondent of his appeal rights.

8. On April 7, 2021, Respondent timely filed an appeal challenging CalPERS's determination. (Ex. 19.)

9. On December 2, 2021, the Statement of Issues was filed on behalf of CalPERS in its official capacity, listing the issue to be decided as whether payments made to Respondent identified as "Automobile Allowance" can be included in the calculation of his final compensation for purposes of determining CalPERS retirement allowance. (Ex. 1.)

10. MCERA and the County filed Notices of Non-Appearance on February 9 and March 7, 2022, respectively.

11. All jurisdictional requirements have been met.

CalPERS and Reciprocal Retirement Systems

12. A CalPERS pension is a defined benefit plan. Benefits for CalPERS members are funded by member and employer contributions, interest, and other earnings on the 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. The CalPERS Board of Administration sets the employer contribution rate on an annual basis using certain actuarial assumptions specified by law.

13. CalPERS and MCERA are reciprocal retirement systems. Reciprocity is an agreement among public retirement systems to allow members to move from one

public employer to another public employer within a specific amount of time without losing valuable retirement and related benefit rights.

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

15. On May 22, 2020, CalPERS issued Circular Letter 200-023-20 (Circular Letter) to all reciprocal retirement systems (reciprocal system) regarding the reciprocal compensation review process and information required by the reciprocal system to submit to CalPERS. The Circular Letter directs the reciprocal system to provide to CalPERS, among other things, a "Retirement Compensation Request" form and a breakdown of all components of the member's compensation. (Ex. 10, p. A38.) The breakdown of compensation components is defined as "all earning codes or pay types that make up a member's final average compensation." (Id. at p. A39.) CalPERS cites to the decisions in *CalPERS v. Los Angeles County Employees Retirement Association* and *San Bernardino County Employees' Retirement Association (Wheeler)* and *Stillman v. Board of Retirement of Fresno County Employees' Retirement Association (Stillman)* as authority affirming CalPERS' calculations of the retirement benefits of reciprocal members by including only those payments that qualify as compensation earnable under the PERL and County Employees Retirement Law (CERL). These cases are discussed in the Legal Conclusions.

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CalPERS cites to Government Code sections 20630, 20636, 20636.1, and 72552.34 in the Circular Letter, which define "compensation," "compensation earnable," and "pensionable compensation," as well as California Code of Regulations, title 2, sections 570, 570.5, 571, and 571.1, which define "final settlement pay" and "special compensation," and set forth the requirements of a publicly available pay schedule.

The Circular Letter lists auto allowances as one of the commonly denied reciprocal compensation items.

Respondent's Employment with and Retirement from the County

16. On February 13, 2014, the County's Board of Supervisors offered Respondent an appointment as its Director of Public Works. A car allowance of \$800 per month is listed in the employer offer letter as one of the benefits Respondent would receive. Respondent could earn 15 days of vacation per year, and was allowed 12 sick days, five personal leave days, and five management leave days per year.

17. On August 24, 2020, Respondent completed a CalPERS Service Retirement Election Application form indicating that his retirement date would be December 31, 2020, and that he was a MCERA member. MCERA provided final average compensation information for Respondent for the period of December 15, 2019, to November 28, 2020.

CalPERS Compliance Review of Compensation Reported by MCERA

18. James Bertrand, an Associate Governmental Program Analyst (AGPA) in CalPERS' Compensation Compliance Review Unit, testified at the hearing. His duties

include reviewing members' reported compensation to make sure it complies with the PERL.

19. Mr. Bertrand explained that a member's final compensation is the compensation paid to an employee for services rendered or for time during which the member is excused from work. Compensation earnable includes a member's payrate and items of special compensation that are reported to CalPERS. A member's payrate is the normal rate of pay for a position or the base rate paid to an employee in accordance with a salary schedule. Special compensation is compensation paid in addition to a member's base pay rate because of the member's skills or possession of certificates or degrees. CalPERS' Compensation Compliance Review Unit determines whether all compensation reported is compensation earnable. If it is not, CalPERS excludes that compensation from its calculation pursuant to the applicable statutes and regulations.

20. Mr. Bertrand was not involved in CalPERS' determination regarding Respondent's final compensation. However, Mr. Bertrand reviewed the documents submitted by MCERA and the Compensation Compliance Review Unit's determination as explained more fully below.

21. Mr. Bertrand asserted that CalPERS determined MCERA's reported final average compensation for Respondent included his auto allowance. When CalPERS calculated Respondent's final compensation, it did not include the payments for the car allowance because it concluded those payments do not comply with the PERL. Mr. Bertrand offered the opinion that CalPERS made the correct determination.

22. On March 16, 2021, CalPERS issued a determination letter to Respondent informing him that:

Due to the concurrent retirement with the CalPERS and MCERA, the compensation provided by MCERA is subject to the statutes and regulations of the [PERL]. Compensation has been identified that does not comply with the PERL.

The Compensation in question was identified by MCERA as "Automobile Allowance" and was reported from December 15, 2019, to November 28, 2020. This compensation does not meet the definition of "Compensation Earnable" as provided in Gov. Code section 20636.

Accordingly, we excluded these payments from the calculation of your final compensation.

23. In support of its determination, CalPERS cited to Government Code sections 20351, 20636, and 20638, and California Code of Regulations, title 2, section 571. CalPERS also made Respondent aware of his appeal rights. (Ex. 17.)

24. By letter dated April 7, 2021, Respondent, through his former attorney, in response to the determination letter, requested an appeal of the determination. His grounds for appeal are that the automobile allowance is "management incentive pay" and fits under the category of "off-salary-schedule pay." (Ex. 19, p. A174.) Respondent explained that he was required to travel to various locations to provide training, and because of his position as the Director of Public Works, "he was provided additional pay – entitled "Automobile Allowance" to compensate him for the additional stress and demand of the position, including travel." (*Ibid.*) Respondent contended the pay was available to employees in similar positions and noted that his hiring document did

not list the automobile allowance in his employment offer letter as "non-pensionable," but listed it after mentioning pension compensation. (*Ibid.*)

25. CalPERS did not change its determination. Mr. Bertrand explained that management incentive pay cannot include any items specified in the PERL. Because an automobile allowance is mentioned in the PERL, it is not management incentive pay. Mr. Bertrand further explained that off-salary-schedule pay is compensation paid in a lump sum in lieu of a salary increase. An example of this is collective bargaining for a specific one-time payment of a certain amount in lieu of a salary increase. An automobile allowance does not fall within that category.

Respondent's Evidence

26. Respondent asserted he was surprised to receive CalPERS' determination letter. He contends the County paid him the automobile allowance as a catch-all that County department heads were provided because they could not take a lot of time off because of the nature of their positions. Accordingly, Respondent believes his automobile allowance is management incentive pay. However, Respondent's testimony was contradicted by his employment offer from the County stating he was allowed to take up to five days each of management time and personal leave per year, in addition to earned vacation time. No evidence was presented that he did not take leave available to him during his employment with the County. Respondent declined to provide testimony regarding his previous contentions that his automobile allowance fits within the category of off-schedule-salary pay.

27. Respondent testified he received an automobile allowance every pay period during his tenure as the County's Director of Public Works. His contract was

reviewed and renewed every year. Respondent used his own vehicle when performing his job duties.

LEGAL CONCLUSIONS

Burden of Proof

1. Respondent, as an applicant for retirement benefits, has the burden of proof by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; *Greator v. Board of Administration* (1979) 91 Cal.App.3d 54, 57.)

2. 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.)

3. 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, subs. (a) & (b).)

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

5. "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).)

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

7. "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).)

8. "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).)

9. "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).)

10. 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) (emphasis added).)

11. To determine final compensation where there is concurrent retirement with a county retirement system, CalPERS shall consider the highest annual average compensation during any 12 or 36-month period of employment to be compensation earnable. (Gov. Code, § 20638.)

12. 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).) Those items include:

(1) INCENTIVE PAY

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.

13. California Code of Regulations, title 2, section 571, subdivision (b), provides:

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.

13. "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).)

14. "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).)

15. CalPERS' calculations of retirement benefits must only include only those payments that qualify as compensation earnable under the PERL. (*Stillman; DiCarlo v. County of Monterey* (2017) 12 Cal.App.5th 468; *Wheeler; In the Matter of the Appeal Regarding Calculation of Final Compensation of Craig F. Woods, Respondent and Tahoe-Truckee Sanitation Agency, Respondent*, CalPERS Precedential Decision No. 12-01; and *In the Matter of the Appeal Regarding the Final Compensation Calculation of Daniel A. Harp, Respondent, and San Bernardino County, Respondent, and San Bernardino County Employees' Retirement Association, Respondent*, CalPERS Case No. 2016-0208, OAH No. 2016070611.)

16. Respondent did not meet his burden to establish that compensation he received for an 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).)

17. Respondent's 2014 employment offer separated his base compensation from the \$800 per month automobile allowance. Even if the County intended to make the automobile allowance management incentive pay, and there is no evidence that this is the case, it remained and was characterized as an automobile allowance.

18. 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.)

19. 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, § 571.)

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ORDER

The appeal of respondent Raul M. Rojas to include his automobile allowance in the calculation of his final compensation for purposes of determining his CalPERS retirement allowance is DENIED.

DATE: 06/01/2022

Carmen Snuggs-Spraggins

CARMEN D. SNUGGS-SPRAGGINS

Administrative Law Judge

Office of Administrative Hearings