Precedential Decision 99-02

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Determination of Final Compensation of GEORGE ABBOND, ET AL., Respondents, and CITY OF HUNTINGTON BEACH, Respondent.	Case No.: 2045 OAH No.: L-1998100159 Precedential Board Decision No. 99-02 Effective: September 17, 1999

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated June 17, 1999, concerning the appeal from the determination of final compensation of George Abbond, et al.

RESOLVED FURTHER, that the Board of Administration of the California Public Employees' Retirement System, hereby designates as precedential its decision concerning the appeal of George Abbond, et al., with the exception of part 3 of the Legal Conclusions on page 12 of the decision.

RESOLVED FURTHER, that this Board Decision shall be effective 30 days following mailing of the Decision

* * * * *

I hereby certify that on August 18, 1999, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the administrative law judge's Proposed Decision is a true copy of the decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
JAMES E. BURTON, CHIEF EXECUTIVE OFFICER

BY
BARBARA HEGDAL
ASSISTANT EXECUTIVE OFFICER

BEFORE THE BOARD OF ADMINISTRATION
CALIFORNIIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Determination of Final Compensation of GEORGE ABBOND, ET AL., Respondents, and CITY OF HUNTINGTON BEACH, Respondent.	)	Case No.: 2045 OAH No.: L-1998100159

Greer D. Knopf, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Huntington Beach, California on November 30,1998 and April 6, 1999.

Peter H. Mixon, Senior Staff Counsel, appeared on behalf of petitioner Public Employees' Retirement System.

Steven M. Berliner, Liebert, Cassidy & Frierson, Attorneys at Law appeared on behalf of respondent, City of Huntington Beach.

Stephen H. Silver, Silver, Hadden & Silver, Attorneys at Law, appeared on behalf of the following interested parties: Huntington Beach Management Employees' Organization (hereinafter referred to as "MEO") and individually named MEO members George Gendlin, Daniel Brennan, William Cooper, Judy D'Amico, Charles Desalvo, Jack Ellis, Arthur Folger, James Glore, Delmer Gray, Thomas Huntley, Wayne Lee, Johanna Rakhshani, Annabelle Richards, William Richardson, William Sage and Charles Spencer (hereinafter referred to collectively as "MEO Employees"); Huntington Beach Municipal Employees' Association (hereinafter referred to as "MEA") and individually named MEA members George Abbond, Don Allen, Rudy Alvarez, Didi Banse, Tobert Banse, Edgar Barckley, Tom Beckett, Donald Blackman, Evelyn Bolding, Maria Casiano, Robert Cavinder, Frank Ciareli, Evelyn Dart, Richard Dougherty, Ellen Dunn, Billy Dupree, Juan Flores, Gilbert Reitas, Beverly Gelbert, Gloria Gitsham, Wallace Huff, Edward Johnson, Iva Kinum, Joseph Kraus, Sergio Martinez, Ira Merlott, James Moore, John Parkin, Fredrick Reber, Jessie Shaw, Robert Sigmon, William Smith, Glen Sorrum, Richard Squibb, Betty Tate, James Vincent, Marilyn Vickers, Cheryl Vifinkle, Betty Walker and Tomasz Wysokinski (hereinafter collectively referred to as "MEA Employees"); Huntington Beach Firefighters' Association (hereinafter referred to as "FFA") and individually named FFA members James Babbit, Edward Birmingham, Mark Bodendenbender, Michenerr Burr, Bruce Burton, Curtis Campbell, John Connor, Frank Craig, James Ellis, Ron Farnam, Dale Fike, Robert Filipek, Lynn Foley, Gary Glenn, Kenneth Hall, Robert Hansen, Michael Johnson, Michael Kaneen, John Kaufmann, James Lacy, Raymond Mitchell, George Munsey, Bill Newtoin, Raymond Neville, Michael Nevins, Roderick Riegger, Stephen Rini, Blanche Roels, Don Shusta,

Thomas Townsend, John Van Dyke, Melvin Webb and John Sarver (hereinafter collectively referred to as "FFA Employees"); and non-represented employees Donald Lewis, Vick Morris, Louis Sandoval and Donald Watson (hereinafter referred to as "Non-Represented Employees"); Huntington Beach Police Management Association members Gary Davis, John Foster, Roger Parker, James Price, Jack Reinholtz, Merlin Schneblin and Bruce Young (hereinafter referred to collectively as "PMA Employees"); and Huntington Beach Marine Safety Officers Association member James Way (hereinafter referred to as "MSA Employee").

Eugene Boggs, The Petersen Law Firm, Attorneys at Law, appeared on behalf of interested parties Huntington Beach Police Officers' Association (hereinafter referred to as "POA"), Van Bethea, Warren Biscailuz, Dennis Branch, Cynthia Carvell, Patrick Clemens, James Dahl, Brian Davidson, August Frost, Richard Hooper, Ronald Jenkins, Darrell Klopp, Jim Lail, Dennis Martin, Brian Moore, Robert Moran, Keith Nale, Ronney Pomeroy, Michael Relic, Tristam Swann and William Van Cleve (hereinafter referred to as "POA Employees").

The record remained open for review of the documentary evidence and clarification of representation of the various parties. Thereafter, the record was closed and the matter was submitted on May 19, 1999.

FACTUAL FINDINGS

1. Statement of issues number 2045, dated October 22, 1998, was filed by James E. Burton, Chief Executive Officer of the Public Employees' Retirement System (hereinafter referred to as "PERS") in his official capacity against respondents Huntington Beach, MEO Employees, MEA Employees, FFA Employees, PMA Employees, POA Employees, MSA Employee and Non-Represented Employees. On November 4, 1998 PERS filed a first amendment to statement of issues adding as interested parties, MEO, MEA, FFA and POA. PERS filed a second amendment to statement of issues on November 30, 1998 adding respondent Ron Farnam to the action.

The matter was set for hearing to begin on November 30, 1998. The parties entered into a stipulation of fact and submitted exhibits, including the deposition testimony of two witnesses. The parties then submitted written evidentiary objections, briefs on the legal issues and gave closing arguments, all without the need for live testimony.

2. PERS is a defined benefit retirement plan for employees of the State of California and the participating local agencies. PERS is administered by the PERS Board (hereinafter referred to "the Board"). The Board has statutory and constitutional power to manage and administer the PERS plan. (California Constitution Article XVI, section 17, subdivision (a); Government Code section 20120). The City of Huntington Beach (hereinafter referred to as "the City") is a local agency and public employer. During all the relevant times to this action, the City contracted with the Board to include its eligible employees in the PERS retirement plan.

3. Members of PERS receive a retirement allowance, upon retirement, based on age at retirement, length of service and final compensation. These factors are defined in the Public

Employees' Retirement Law (hereinafter referred to as "PERL"). (Gov. Code sections 20000, et seq.) The City, as a local agency contracting with PERS, is subject to the provisions of the PERL (*City of Sacramento v. Public Employees' Retirement System (1994) 22 Cal. App. 4th 786, 789.)* The statutory formula for determining a member's service retirement allowance provides for application of a percentage figure to the member's final compensation when he retires. The percentage figure applied is based upon the employee's years of service and the employee's age on his date of retirement. Retirement benefits are funded by employer contributions, employee contributions and earnings on the assets. Employee contributions are fixed by statute and PERS sets the employer contributions based on employee compensation and actuarial projections.

4. During all relevant times to this action, the MEO was duly authorized to negotiate terms and conditions of employment with the City on behalf of MEO Employees. Effective January 1, 1991, the MEO and the City entered into a Memorandum of Understanding (hereinafter referred to as "the MEO MOU") concerning terms and conditions of employment. The MEO MOU provided in pertinent part as follows:

A. Each covered employee may have his or her "pick-up" contribution converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement;

B. Each covered employee may have his or her vacation accrual converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement; and

C. Each covered employee may have his or her optional vehicle allowance converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement.

5. During the relevant times to this action, the MEA was duly authorized to negotiate terms and conditions of employment with the City on behalf of the MEA Employees. Effective January 1, 1991, the MEA and the City entered into a Memorandum of Understanding (hereinafter referred to as "the MEA MOU") concerning terms and conditions of employment. The MEA MOU provided in pertinent part as follows:

A. Each covered employee may have his or her "pick-up" contribution converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement; and

B. Each covered employee may have his or her vacation accrual converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement.

6. During the relevant times to this action, the FFA was duly authorized to negotiate terms and conditions of employment with the City on behalf of the FFA Employees. Effective January 1, 1991, the MEA and the City entered into a Memorandum of Understanding (hereinafter

referred to as "the FFA MOU") concerning terms and conditions of employment. The FFA MOU provided in pertinent part as follows:

A. Each covered employee may have his or her "pick-up" contribution converted to salary and reported as compensation for all or any part of a 24-month period prior to his or her service retirement; and

B. Each covered employee may have his or her vacation accrual converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement.

7. During the relevant times to this action, the POA was duly authorized to negotiate terms and conditions of employment with the City on behalf of the POA Employees. Effective October 1, 1990, the POA and the City entered into a Memorandum of Understanding (hereinafter referred to as "the POA MOU") concerning terms and conditions of employment. The POA MOU provided in pertinent part as follows:

A. Each covered employee may have his or her "pick-up" contribution converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement; and

B. Each covered employee may have his or her vacation accrual converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement.

8. During the relevant times to this action, the PMA was duly authorized to negotiate terms and conditions of employment with the City on behalf of the PMA Employees. Effective January 1, 1991, the PMA and the City entered into a Memorandum of Understanding (hereinafter referred to as "the PMA MOU") concerning terms and conditions of employment. The PMA MOU provided in pertinent part as follows:

A. Each covered employee may have his or her "pick-up" contribution converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement; and

B. Each covered employee may have his or her vacation accrual converted to salary and reported as compensation for all or any part of a 24-month period prior to his or her service retirement.

C. Each covered employee may have his or her optional vehicle allowance converted to salary and reported as compensation for all or any part of a 24-month period prior to his or her service retirement.

9. During the relevant times to this action, the MSA was duly authorized to negotiate terms and conditions of employment with the City on behalf of the MSA Employees. Effective October 1, 1990, the MSA and the City entered into a Memorandum of Understanding (hereinafter referred to as "the MSA MOU") concerning terms and conditions of employment. The MSA MOU provided in pertinent part as follows:

A. Each covered employee may have his or her "pick-up" contribution converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement; and

B. Each covered employee may have his or her vacation accrual converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement.

10. During the relevant times to this action, the Non-Represented Employees negotiate terms and conditions of employment with the City. Benefits for the Non-Represented Employees were established by resolution of the City. Effective January 1, 1992, the City adopted Resolution number 6331 setting forth benefits for the Non-Represented Employees. Resolution number 6331 provided in pertinent part as follows:

A. Each covered employee may have his or her "pick-up" contribution converted to salary and reported as compensation for all or any part of a 24-month period prior to his or her service retirement;

B. Each covered employee may have his or her vacation accrual converted to salary and reported as compensation for all or any part of a 12-month period prior to his or her service retirement; and

C. Each covered employee may have his or her optional vehicle allowance converted to salary and reported as compensation for all or any part of a 24-month period prior to his or her service retirement.

11. The MEO Employees, the MEA Employees, the FFA Employees, the POA Employees, the PMA Employees, the MSA Employee, the MSOA Employee and the Non-Represented Employees (hereinafter referred to collectively as "the Affected Employees") all chose to make the conversions of benefits to salary (hereinafter referred to as "salary conversions") that were provided for in the MEO MOU, the MEA MOU, the FFA MOU, the POA MOU, the PMA MOU, the MSA MOU (hereinafter referred to collectively as "the MOUs") and Resolution number 6331. In exchange for the salary conversions the Affected Employees relinquished salary increases and/or other benefits that each employee would have otherwise received as part of each MOU or Resolution number 6331. None of the MOUS required the Affected Employees to agree to retire at any particular time in exchange for the salary conversion. In its payroll reporting to PERS, the City included the salary conversions in the calculation of the Affected Employees' final compensation.

At the time the City entered into the MOUs and Resolution number 6331, the City agreed to give the Affected Employees the option to make salary conversions. The salary conversions allowed the Affected Employees to relinquish the itemized fringe benefits in return for a salary increase of comparable value. The salary increases in turn were reported by the City as final compensation to PERS so as to enhance the bases upon which retirement benefits were calculated. The City knew the employees intended the increased salaries that resulted from the salary conversions would be reported to PERS as final compensation so as to increase the pensions of those employees. The City intended the covered employees would forego salary increases or other improvements in

their compensation in exchange for the receipt of the salary conversion option in the MOUs and Resolution 6331. The City anticipated the covered employees would exercise the option for salary conversion so as to increase their final compensation and resulting pensions. Each Affected Employee was ignorant of the fact that the City would later decide to challenge the legality of the salary conversions and would be taking action to attempt to prevent PERS from providing the anticipated enhanced retirement benefits. The Affected Employees believe the salary conversion option was consistent with the provisions of the Public Employees' Retirement Law (hereinafter referred to as "PERL") and they believed the resulting enhanced retirement benefits could lawfully be provided.

12. Sometime in the late 1980's, PERS staff became aware that many local agencies throughout the state were allowing their members to convert already accrued benefits into salary (hereinafter referred to as "retroactive benefit conversions") and to report the increased salary to PERS as final compensation in order to increase retirement benefits. A great deal of controversy arose about whether such conversions were lawful. PERS began notifying local agency employees that PERS would not be accepting any retroactive benefit conversions in the computation of final compensation. However, PERS would accept prospective salary conversions for benefits that had not yet been earned.

By November, 1992, PERS staff realized that many local agencies had negotiated MOUs that allowed various kinds of salary conversions. PERS was inundated with appeals of denials of retirement benefits augmented by various kinds of salary and benefit conversions. There were more than one thousand labor agreements throughout the state that contained provisions for some kind of salary and benefit conversions. Employees had been bargaining to accept increased retirement contributions from their public employers and in exchange were foregoing costs of living increases in their salaries. PERS staff was concerned that these employers and employees might not be aware that these agreements could diminish future retirement benefits. The Board decided to take action to address these special circumstances.

13. On December 18, 1992, the Board took action in the form of adoption of a policy regarding the reporting of final compensation to PERS. The purpose of this policy was to address the confusion regarding salary and benefit conversions and to remedy the problems that had arisen for these employers and employees concerning this issue. This policy was known as the "Short Term Policy". The Short Term Policy provided that for a limited period of time, from December 18, 1992 to June 30, 1994, certain types of salary conversions would be included in a member's final compensation if they were already duly authorized by the employing agency as of December 18, 1992. The items of pay to be allowed as salary conversions for purposes of computation of final compensation were as follows:

A. Conversion of employer-paid member contributions to compensation;

B. Conversion of unearned vacation leave credit to compensation;

C. Conversion of unearned sick leave credit to compensation; and

D. Conversion of unearned "other leave" credit to compensation.

All of the salary conversions chosen by the Affected Employees herein were the types of conversion permitted under the Short Term Policy. The salary conversions chosen by the Affected

Employees therefore were all included in the computation of the Affected Employees' final compensation.

14. The Affected Employees are impacted by the Short Term Policy and its application to their retirement or future retirement. Each of the Affected Employees opted for salary conversions that fall within the provisions of the Short Term Policy. Each of the Affected Employees has now either:

A. Retired for service with an allowance that was calculated by including the salary conversions in the retiree's final compensation; or

B. Applied for a service retirement allowance that includes salary conversions in the applicant's final compensation.

15. In November 1993 and again in February 1994, PERS began to bill the City for a portion of their liability for the increased funding due to the conversions of benefits exercised by the Affected Employees. This was unfunded liability that the City owed PERS. The first two quarterly bills sent by PERS to the City totaled $918,797.00. In June, 1994, the City suddenly notified PERS that the City now maintained the Short Term Policy was contrary to law. The City requested PERS to exempt the City from application of the Short Term Policy. This was a complete change of position for the City that had previously accepted the legality and application of the Short Term Policy. The City had previously entered into agreements with the Affected Employees to allow them to opt for salary conversions. When the City entered into these agreements, no one at the City had knowledge that it would later change its position and assert that the conversion option was in violation of the PERL or that the resulting retirement enhancements were illegal.

PERS conducted an investigation to determine whether the City's claim had merit. PERS allowed the City and the Affected Employees to submit materials on the issue of whether the salary conversions should be included in the employee's retirement allowance calculation. PERS correctly concluded the City was equitably estopped from challenging the inclusion of the salary conversions in the final compensation of the Affected Employees' retirement allowance.

LEGAL CONCLUSIONS

1. Cause does not exist to grant the City's appeal of PERS's decision to allow the salary conversions in the computation of the Affected Employees' final compensation, pursuant to Section 20022, in that respondent failed to sustain its burden to establish that the salary conversions were improperly included as items of final compensation for the purpose of calculating the levels of the Affected Employees' service retirement allowances, as set forth in Findings 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15.

Former Government Code section 20022[1] (hereinafter referred to as "Section 20022") sets forth the various items of pay that shall be included and excluded from an employee's compensation for retirement purposes. Section 20022(a) itemizes the pay items to be included in compensation and Section 20022(b) itemizes the pay items to be excluded from compensation.[2] Section 20022 (a)(12) and (b)(15) then recognize that the pay items listed may not be complete lists. In those subsections, the Legislature authorized the Board to use its discretion to determine whether any items of pay not expressly listed should be included or excluded from compensation. (See, *Hudson v. Board of Administration (1997) 59 Cal. App. 4th 1310, 1327 and City of Fremont v. Board of*

[1] Effective July 1, 1994, Government Code Section 20022 was amended. (Cal. Stats. 1993, ch. 1297) The Affected Employees herein each reported their disputed items of compensation before the effective date of the amendment. Therefore, the statute in effect prior to the amendment is the applicable statute in this case. All references to Government Code section 20022 are to the statute in effect before the 1994 amendment.

[2] Section 20022 states as follows:

"(a) "Compensation" includes (1) the remuneration paid in cash out of funds controlled by the employer, plus the monetary value, as determined by the board, of living quarters, board, lodging, fuel, laundry and other advantages of any nature furnished a member by his or her employer in payment for his or her 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; (2) any payments in cash by his or her employer to one other than an employee for the purpose of purchasing an annuity contract for a member under an annuity plan which meets the requirements of Section 403(b) of the Internal Revenue Code of the United States; (3) any amount deducted from a member's wages for participation in a deferred compensation plan established pursuant to Chapter 4 (commencing with Section 19993) of Part 2.6 of Division 5 of Title 2 or pursuant to Article 1.1 (commencing with Section 53212 of Chapter 2 of Part 1 of Division 2 of Title 5; (4) any amount deducted from the member's salary for payment for participation in a retirement plan which meets the requirements of Section 401(k) of the Internal Revenue Code of the United States; (5) any amount deducted from the member's salary for payment into a money purchase pension plan and trust which meets the requirements of Section 401(a) of the Internal Revenue Code of the United States; (6) employer "pick up" of member contributions which meets the requirements of Section 414(h)(2) of the Internal Revenue Code of the United Sates; (7) any disability or workers' compensation payments to safety members in accordance with Sections 4800 and 4850 of the Labor Code; (8) any special compensation for performing normally required duties such as holiday pay, bonuses (for duties performed on regular work shift), educational incentive pay, maintenance and noncash payments, out of class pay, marksmanship pay, hazard pay, motorcycle pay, paramedic pay, emergency medical technician pay, POST certificate pay, split shift differential and substitute differential in Sections 45196 and 88196 of the Education Code; (9) compensation for uniforms, except as provided in Section 20022.1; (10) any deductions from salaries of employees who have opted into a flexible benefits program; (11) temporary industrial disability payments pursuant to Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6 of Division 5 of Title 2; and (12) any other payments the board may determine to be compensation.

(b) "Compensation" shall not include: (1) the provision by an employer of any medical or hospital service or care plan or insurance plan (other than the purchase of annuity contracts referred to in this section) for its employees, any contribution by an employer to meet the premium or charge for such plan, or any payment into a private fund to provide health and welfare benefits for its employees; (2) any payment by an employer of the employee portion of taxes imposed by the Federal Insurance Contribution Act, (3) amounts not available for payment of salaries and which are applied by an employer for the purchase of annuity contracts including those which meet the requirements of Section 403(b) of the Internal Revenue Code of the United States; (4) the bonus sum provided for low-paid state employees in the Budget Act of 1975; (5) any benefits paid pursuant to Article 5 (commencing with Section 19878) of Chapter 2.5 of Part 2.6 of this division; (6) employers' payments which are to be credited as employee contributions for benefits provided by this system, or employer's payments which are to be credited as employee accounts in deferred compensation plans, provided, that amounts deducted from a member's wages for participation in a deferred compensation plan pursuant to paragraph (3) of subdivision (a) shall not be considered to be employer's payments; (7) payments for unused vacation, sick leave, or compensating time off, whether paid in lump sum or otherwise; (8) final settlement pay; (9) payments for overtime, including pay in lieu of vacation or holiday; (10) special compensation for additional services outside regular duties, such as standby pay, callback pay, court duty, allowance for automobile, bonuses for duties performed after regular work shift; (11) advanced disability pension payments provided pursuant to Section 4850.3 of the Labor Code; (12) amounts not available for payment of salaries and which are applied by the employer for the purchase of a retirement plan which meets the requirements of Section 401(k) of the Internal Revenue Code of the United States; (13) amounts not available for payment of salaries which are applied by the employer for payment into a money purchase pension plan and trust which meets the requirements of Section 401(a) of the Internal Revenue Code of the United States; (14) payments made by employers to or on behalf of their employees who have elected to be covered by a flexible benefits program, where those payments reflect amounts that exceed their employees' salaries, and (15) any other payments the board may determine not to be compensation...."

Administration (1989) 214 Cal. App. 3d 1026, 1031, 1033-1034.) It is well settled by case law that if provisions of PERL are ambiguous or uncertain, they are to be liberally construed in favor of the pensioner. (*City of Fremont v. Board of Administration, supra, 1033*). The Board's determination must be upheld unless it is patently unreasonable. (*City of Fremont v Board of Administration, supra, 1034*). PERS' contemporaneous interpretation of PERL is entitled to great weight unless it is clearly erroneous or unauthorized. (*Crumpler v. Board of Administration (1973) 32 Cal. App. 3d 567, 578*).

The Board properly exercised its statutory authority under Section 20022 when it adopted the Short Term Policy. The City did not challenge PERS's authority to adopt the Short Term Policy. The Board's inclusion of the pay items listed in the Short Term Policy was in compliance with Section 20022(a)(12). The items of compensation included for salary conversion under the Short Term Policy are not items that fall under any of the expressly excluded items of Section 20022(b) and they properly come within the purview of Section 20022(a)(12). This conclusion is supported by an evaluation of the applicable caselaw.

The decision in *Oden v. Board of Administration (1994) 23 Cal. App. 4th 194* addressed the issue of what was included as compensation under Section 20022(a)(6) and what was excluded under Section 20022(b)(6). The court concluded that subdivision (a)(6) was intended to allow only "salary deduction" employer-paid employee contributions under the definition of compensation. The court in *Oden, supra*, did not consider the issue of salary paid in exchange for the prospective relinquishment of other benefits as was the situation herein. In *Oden*, the employees total compensation was increased whereas in this case the Affected Employees' total compensation was not increased as a result of the salary conversions. Each Affected Employee herein bargained to give up benefits equal in value to their increases in salary.

The decision in *Pomona Police Officers' Ass'n. v. City of Pomona (1997) 58 Cal. App. 4th 578* applied the ruling in Oden to another case of attempted salary conversion. The *Pomona* case is quite different from the case herein since the employees there were not prospectively relinquishing the benefits in exchange for salary increases as they are here. The court in *Pomona* was understandably concerned that a salary conversion without a relinquishment of benefits was nothing more than a sham to get PERS to pay additional retirement benefits at no cost to the employer. This is clearly not the case herein where the salary conversions were all in exchange for benefit relinquishments.

The decision in *Hudson v. Board of Administration (1997) 59 Cal. App. 4th 1310* addressed the issue of what constitutes final settlement pay which is specifically excluded from the definition of compensation under Section 20022(b)(8). In *Hudson*, the salary conversions were given only if the employee agreed to retire within the following 12 months. Therefore, the court concluded such salary conversions fell within the definition of "final settlement pay" and were excluded as compensation under Section 20022(b)(8). The salary conversions in this matter do not fall within the definition of "final settlement pay" under the *Hudson* case because there is no evidence that any of them were conditioned upon an agreement to retire.

2. Cause does not exist to grant the City's appeal of PERS's decision to allow the salary conversions in the computation of the Affected Employees' final compensation pursuant to Government Code Section 20023, in that the salary conversions fall within the definition of compensation earnable because they were paid to similarly situated persons, all those who chose to receive salary in exchange for benefits, as set forth in Findings 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14.

3. ……*

4. PERS may properly adjust the computation of the City's contribution to the retirement system so as to include the payments of salary conversion to the Affected Employees" of the City pursuant to Government Code section 20532.

5. Except as found to be true in the above Findings, all other factual allegations of the Statement of Issues, First Amendment to the Statement of Issues and Second Amendment to the Statement of Issues and the assertions by the City are found to be unproven or surplusage. All motions, charges, defenses and arguments not hereinabove determined or disposed of on the record are found to be not established by the facts or the law.

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*Pursuant to Government Code section 11425.60, the Board of Administration adopted this decision as precedent with the exception of part 3 of the Legal Conclusions.

ORDER

1. The appeal of the City of Huntington Beach is hereby denied;

2. PERS shall include the payments of salary conversions to the Affected Employees in the computation of their final compensation for purposes of determining retirement pay.

Dated: June 17, 1999

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GREER D. KNOPF
Administrative Law Judge
Office of Administrative Hearings