

**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 Final Compensation  
Calculation by:**

**WILLIAM RICHARDS**

**and**

**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,**

**Respondents**

**Case No. 2021-0564**

**OAH No. 2021100208**

**PROPOSED DECISION**

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on April 14, 2022.

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

William Richards, respondent, represented himself.<sup>1</sup>

There was no appearance by or on behalf of respondent South Coast Air Quality Management District (District), and the matter proceeded as a default against this respondent pursuant to Government Code section 11520.

Oral and documentary evidence was received, and the matter was submitted for decision on April 14, 2022.

## **ISSUE**

Whether compensation paid by the District to respondent to offset the amount the District previously paid towards his retirement contributions can be included in the calculation of his “final compensation” for purposes of determining his CalPERS retirement allowance.

## **FACTUAL FINDINGS**

### **Background**

1. Respondent established membership with CalPERS through his employment with Los Angeles County Schools in 1990 and the Metropolitan Water District of Southern California from 1991 through 2001.

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<sup>1</sup> All future references to “respondent” are to William Richards.

2. On November 13, 2001, respondent established membership with the San Bernardino County Employees' Retirement Association (SBCERA) by virtue of his employment with the District, where he worked until retirement.

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

4. On July 23, 2020, respondent submitted an application for service retirement with CalPERS, with an effective retirement date of July 30, 2020. Respondent retired for service effective July 30, 2020, and has been receiving his service retirement allowance since or around March 2, 2021. Respondent also retired for service with SBCERA concurrently and has been receiving his retirement allowance.

5. The amount of a member's service retirement allowance is calculated by applying a percentage figure based upon the member's age on the date of retirement, the member's years of service, and the member's "final compensation." In computing a member's retirement allowance, CalPERS's staff may review the salary reported by the employer and reciprocal retirement system for the member to ensure that only those items allowed under the Public Employees' Retirement Law (PERL), or "compensation earnable," will be included in the member's "final compensation" for purposes of calculating the monthly retirement allowance.

6. As part of the retirement process, SBCERA submitted to CalPERS a report showing respondent's highest consecutive one-year salary as a Human Resources Manager, which was for the period from June 29, 2019, to June 28, 2020. CalPERS

reviewed the documentation submitted to determine respondent's final compensation amount that would be used to calculate his monthly service retirement benefit.

7. On February 10, 2021, CalPERS notified respondent by letter that the following compensation by the District did not comply with the PERL: "Employer Paid Benefit Cap A," "Parking Fee Advance," "Ride Share Incentive Pay," "Sick Leave Time Sell Back," and "Offset Pay." CalPERS notified respondent that it would exclude these payments from the calculation of respondent's final compensation.

8. On April 11, 2021, after being granted an extension, respondent filed an appeal letter in which he indicated he was not contesting the determination that the employer paid benefit, parking fee advance, and sick leave sell-back did not meet the definition of compensation earnable and were thus justifiably excluded from the final compensation amount. However, respondent indicated that he was appealing the determination that a portion of his base salary, identified as "offset pay," was not considered compensation earnable.<sup>2</sup>

9. On September 29, 2021, complainant signed the statement of issues identifying the issue to be resolved as whether the offset pay, compensation paid by the District to respondent to offset the amount the District previously paid towards his retirement contributions, can be included in the calculation of his final compensation for purposes of determining his CalPERS retirement allowance. This hearing followed.

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<sup>2</sup> Although respondent did not reference the ride-share incentive, he did not address this in his appeal letter and confirmed at hearing that he was only contesting the exclusion of the offset pay from his final compensation.

## **Evidence Regarding Offset Pay**

10. James Bertrand is an Associate Governmental Program Analyst for CalPERS, Employer Account Management Division, Compensation Compliance Review Unit. Mr. Bertrand's duties include reviewing compensation reported by public employers and reciprocal system members to verify that any reported compensation is in compliance with the PERL. Mr. Bertrand's testimony and the documentary evidence he relied on are summarized as follows:

11. Mr. Bertrand reviewed the documentary evidence CalPERS relied on to conclude that certain compensation the District paid to respondent did not fall within the definition of compensation earnable, and thus could not be used to calculate respondent's final compensation. The subject of this hearing is the determination that the hourly rate reported for respondent exceeded the maximum hourly rate contained in the District's publicly available pay schedule.

12. On December 5, 2014, the District's governing board voted to approve a three-year labor agreement with Teamsters Local 911 and comparable terms for non-represented employees (e.g., management and confidential employees), effective July 1, 2015. Under the provisions, the District ceased paying any portion of an employee's retirement contributions to SBCERA, but it offset this cost by increasing the employee's salary by an amount equal to what the District had previously paid on the employee's behalf. The offset amount is unique to each individual employee because an employee's retirement contribution is dependent on the bargaining group and the employee's age at time of membership with SBCERA.

13. During respondent's highest paid consecutive year with the District, from June 29, 2019, through June 28, 2020, respondent had a reported hourly base pay of \$76.85 for all but one pay period.<sup>3</sup>

14. The published salary schedule for the District (effective July 15, 2019) provides that a Human Resources Manager at the highest step (Step 7) has an hourly pay of \$71.23. The salary schedule effective July 1, 2018, lists the maximum pay for this position as \$69.32 per hour.

15. Under the PERL, a member's "compensation earnable," used for the calculation of the retirement benefit, consists of the member's "payrate" and "special compensation." The 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, pursuant to publicly available pay schedules. Because respondent's pay exceeded the maximum pay for the position listed in the District's pay schedule, CalPERS reduced respondent's payrate from \$76.85 to \$71.23 per hour.<sup>4</sup>

16. Respondent testified that because SBCERA bases the employee contribution amount on the age of the employee upon entry into the system, each employee within a job classification pays a different percentage toward retirement contribution. In 2015, the District, as did many other public employers, reduced the amount it would contribute to its employees' retirement. To offset this deduction, the

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<sup>3</sup> From the pay period of June 17 through 30, 2019, his base pay was \$74.79 per hour.

<sup>4</sup> For the pay period of June 17 through 30, 2019, his payrate was reduced from \$74.79 to \$69.32 per hour.

District increased employee pay to correspond with the reduction in retirement contributions. The District always intended that the salary increases would be considered as compensation earnable (i.e. pensionable), as the previous contributions by the employer on behalf of the district had been pensionable. The District did not amend the salary schedules to reflect the increase in compensation because it would have to have a separate schedule for each employee within a classification, whose pay was based on their individual SBCERA contribution percentage. Respondent had no idea that this would become an issue with his CalPERS retirement, as this offset was deemed pensionable by SBCERA.

17. Respondent understands that CalPERS is required to follow the PERL in determining his retirement benefit. However, he believes that the purpose of the PERL would be effectuated, considering that employer paid member contributions (EPMC) are pensionable special compensation.

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500; *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) The standard of proof is proof by a preponderance of the evidence. (Evid. Code, § 115.) In this case, respondent has the burden to prove by a preponderance of the evidence that his base pay including a retirement contribution offset should be used in calculating his final compensation.



## Relevant Provisions of the PERL and Regulations

2. The management and control of the retirement system is vested with the Board of Administration (Board). (Gov. Code, § 20120; *Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 896.) The California Constitution imposes on CalPERS a duty to "ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland v. Public Employees' Retirement System* (2002), 95 Cal.App.4th 29, 46.) But, "[CalPERS's] fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. [CalPERS] has a duty to follow the law." (*City of Pleasanton v. Bd. of Administration* (2012) 211 Cal.App.4th 522, 544.) Any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, but such construction must be consistent with the clear language and purpose of the statute. (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 490.)

3. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Bd. of Administration* (1994) 23 Cal.App.4th 194, 198.) The formula for determining a member's retirement benefit takes into account: the years of service, a percentage figure based on the employee's age on the date of retirement; and "final compensation." (Gov. Code, §§ 20037, 21350, 21352 and 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.) The determination of what items of pay constitute final compensation is thus crucial to the computation of an employee's ultimate pension benefits. (*Id.* at p.1478.)

4. Government Code section 20350, regarding concurrent retirement, provides:

Notwithstanding Section 20638, if a member on deferred retirement from this system is eligible to retire for service from a reciprocal retirement system and does so retire prior to the time the member becomes entitled to retire under this system, his or her retirement shall be deemed a concurrent retirement for purposes of computing final compensation under Section 20638.

5. Government Code section 20630, subdivision (a), 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 for retirement allowance calculation may be no more than "compensation earnable," as that term is defined in Section 20636. (*Id.* at subd. (b).)

6. "Compensation earnable" is composed of (1) payrate, and (2) special compensation, as defined in Section 20636, subdivisions (b), (c), and (g). (Gov. Code, § 20636, subd. (a).)

7. "Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated 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. (Gov. Code, § 20636, subd. (b)(1).)

8. A "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. A group or class

must include more than one employee. (§ 20636, subd. (e)(1).) An employee may not be a member of more than one group or class. (*Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983, 993.)

9. “Final Compensation” with concurrent retirement with a County Retirement System means the highest annual average compensation by a member during any consecutive 12 or 36-month period of employment preceding the effective date of his or her retirement. (Gov. Code, § 20638.)

### **Precedential Decision**

10. In the *Matter of the Appeal Regarding Final Compensation of Mark L. Wheeler, et al.*, CalPERS Case No. 2016-1073, OAH Case No. 2017100516, dated February 21, 2019; made precedential by the CalPERS Board effective September 18, 2019 (*Wheeler*), the Board addressed whether compensation reported by a Reciprocal Retirement System to CalPERS, which included items of special compensation that were allowed under the Reciprocal Retirement System’s statutory framework for calculating final compensation – but not allowable under the PERL – could be used in calculating the CalPERS retirement benefit. Relying on case law from the Court of Appeal, the Board confirmed that CalPERS is not bound by a Reciprocal Retirement System’s determination of what qualifies as compensation earnable when calculating a member’s CalPERS retirement benefit; items of compensation must qualify as compensation earnable under the PERL to be included when calculating a reciprocal member’s retirement benefits.

### **EVALUATION**

11. SBCERA and CalPERS are reciprocal retirement systems, but CalPERS is required to apply the PERL to determine whether compensation respondent received

while employed by the District constitutes compensation earnable within the meaning of Government Code section 20636. That provision defines compensation earnable to mean the “payrate” and “special compensation” of the member. “Payrate” is further defined as the normal monthly rate of pay or base pay of the member paid in cash to similarly situated 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. (*Id.* at subd. (b)(1).) In this case, respondent’s pay exceeded the maximum pay listed in the District’s publicly available pay schedule for his position because the pay scale did not include the retirement contribution offset. Thus, in determining respondent’s final compensation under the PERL, his compensation earnable is limited to the maximum pay available as specified in the pay schedule. Although the offset pay is pensionable by SBCERA, CalPERS is required to apply the PERL to determine respondent’s final compensation. (*Wheeler, supra.*)

12. Respondent essentially requests that CalPERS exercise administrative grace and determine that the offset can be included in his final compensation. He notes that because of the complicated manner by which SBCERA calculates a member’s retirement contribution, the District could not create a uniform pay schedule to reflect the offset since an employee’s pay within any classification would be dependent on that individual’s retirement contribution amount. Moreover, the District would not have reasonably believed that its actions would affect the pensions of its employees who are also members in reciprocal retirement systems.

To this end, applicability of Government Code section 20160 is considered. That statute permits the Board to exercise its discretion to correct the errors or omissions of any member and requires the Board to correct all actions taken as a result of errors or omissions of any state agency, contracting agency, or CalPERS. However, there are

several reasons why the statute is inapplicable. The error or omission that respondent seeks to be corrected is the District's failure to amend its pay schedules to reflect the inclusion of the pension contribution offset. First, this error is not correctable because the statute only applies to errors committed by "contracting agencies," i.e., public agencies contracting with CalPERS. In this case, the District is not a contracting agency as it has contracted with SBCERA to provide retirement benefits. Moreover, it was not established that the District's failure to amend its pay schedules was actually an error or omission. The District did not appear at the hearing; thus, it would be speculation to conclude that its failure to amend its pay schedules was indeed an error. In other words, there might be reasons why the district would not want to amend the pay schedule, for example, to avoid the perception that its employees were being overpaid. Moreover, even after receiving notice of CalPERS's decision to exclude the offset pay from respondent's final compensation, there was no evidence that it has sought to remedy the situation by amending its pay schedule.

13. In conclusion, while respondent's frustration and disappointment at having almost two percent of his income being excluded from his pension calculation is understandable, in administering the retirement plan, the Board is bound to uniformly apply the PERL. In this case, the Board cannot exempt respondent from the PERL's requirement that his final compensation be based on his payrate, which in turn is based on the District's publicly available pay schedule.


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## ORDERS

The appeal by respondent William Richards is denied.

DATE: May 12, 2022

  
Adam Berg (May 12, 2022 14:30 PDT)

ADAM L. BERG

Administrative Law Judge

Office of Administrative Hearings