

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 Calculation of:**

DONNA WHITMORE, Respondent,

and

OAKLAND CITY HOUSING AUTHORITY, Respondent.

Agency Case No. 2020-0453

OAH No. 2020080367

CORRECTED PROPOSED DECISION

Administrative Law Judge Traci C. Belmore, State of California, Office of Administrative Hearings, heard this matter on April 27, 2021, by videoconference and telephone.

Helen Louie, Attorney, represented the California Public Employees' Retirement System.

Respondent Donna Whitmore represented herself.

No appearance was made by or on behalf of respondent Oakland City Housing Authority.

The record closed and the matter was submitted for decision on April 27, 2021.

ISSUE

Did the California Public Employees' Retirement System (CalPERS) err by excluding additional compensation paid to respondent for assuming the duties of another position from September 25, 2017, through June 14, 2019, from its calculation of respondent's final compensation?

FACTUAL FINDINGS

1. Renee Ostrander, Chief of the Employer Account Management Division, filed the statement of issues in her official capacity.
2. The Oakland City Housing Authority (Housing Authority), a public entity, contracted with CalPERS to provide retirement benefits to its eligible employees. The contract between the Housing Authority and CalPERS is subject to the Public Employee Retirement Law (PERL). (Gov. Code, § 20000 et seq.) CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions, and by interest and other earnings on those contributions.
3. Respondent Donna Whitmore became a member of CalPERS through her employment at the Housing Authority in March 2000. By virtue of her employment at the Housing Authority, respondent was a local miscellaneous member of CalPERS.

4. On September 5, 2019, respondent signed an application for service retirement effective June 15, 2019. At the time of her retirement, respondent's title was Assistant Director of Leased Housing, which is classification level 18 at the Housing Authority. Respondent had 22.626 years of service credit.

5. On September 25, 2017, respondent had been reassigned to the position of Assistant Director of Property Management, classification level 15 at the Housing Authority. In exchange for taking on the duties of Assistant Director of Property Management, the Housing Authority gave respondent a five percent increase as special compensation. The Housing Authority initially designated the special compensation as off-salary-schedule pay and then changed the designation to temporary upgrade pay.

6. The Housing Authority did not change respondent's job classification. An employee transaction report dated August 28, 2017, listed respondent's position as Assistant Director of Leased Housing and provided her with a five percent salary increase as temporary assignment pay, effective September 25, 2017. The Housing Authority reported respondent's temporary assignment pay to CalPERS during the nearly two years she worked as Assistant Director of Property Management as "Special Compensation." The Housing Authority expected respondent's increased earnings to be included when CalPERS calculated her retirement benefit.

7. The amount of a member's service retirement is calculated by applying a percentage figure, based on the member's age on the date of retirement, to the member's years of service and the member's "final compensation." In computing a member's retirement allowance, CalPERS staff review the salary reported by the employer for the member to ensure that only those items allowed under PERL are

included in the member's final compensation for purposes of calculating the retirement allowance.

8. Respondent received two letters regarding her retirement benefit from CalPERS both dated September 27, 2019, with two different benefit amounts. One letter was an estimate of her retirement benefit and stated it would be \$7,082.09 based on a final compensation amount of \$12,944.73. The second letter stated CalPERS had processed respondent's service retirement application and determined that her retirement benefit would be \$6,737.39 based on a final compensation amount of \$12,314.66.

9. CalPERS reviewed respondent's payroll records in calculating her retirement allowance. During the last year of respondent's employment, the Housing Authority had reported respondent's monthly compensation as \$12,295.57 for her designated classification as Assistant Director of Leased Housing , and special compensation at a rate of \$283.74 bi-weekly.

10. CalPERS determined that the temporary assignment pay received for the duties performed as Assistant Director of Property Management should not be included in respondent's final compensation.

11. On November 13, 2019, CalPERS informed respondent and the Housing Authority that the 5 percent increase that had been paid to respondent between September 25, 2017, and June 14, 2019, and that was reported as temporary upgrade pay, did not qualify as compensation earnable, and would therefore not be included in the calculation of her retirement allowance. Respondent appealed the decision and this hearing ensued.

LEGAL CONCLUSIONS

1. A party seeking to obtain a recalculation of a retirement benefit has the initial burden to establish the amount of the retirement allowance he or she is entitled to receive. (Evid. Code, §§ 500, 550; *Greator v. Board of Administration* (1979) 91 Cal.App.3d 54, 57.) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

2. PERL establishes a retirement system for employees of the State of California and participating local agencies. (*Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310, 1316.) By virtue of her employment as Assistant Director of Leased Housing for the Housing Authority, respondent was a local miscellaneous member of CalPERS. (Factual Finding 3.)

3. The issue here is whether to include respondent's temporary assignment pay in her final compensation and retirement benefit calculation. An employee's final compensation is not simply the cash remuneration received; it is defined by the Legislature in applicable statutes and regulations. The definition of "final compensation" under PERL is not subject to change based on bargaining agreements, the Board's characterization, or the intent of the employer or employee. (*Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 585.)

4. Respondent contends that her pay increase for assuming the duties of Assistant Director of Property Management constituted an upgraded position and/or classification. However, the Housing Authority did not change respondent's classification. She remained Assistant Director of Leased Housing despite performing the duties of Assistant Director of Property Management. (Factual Finding 6.) Even if the Housing Authority were to reclassify respondent as Assistant Director of Property

Management, it would not constitute an upgrade. The classification level for Assistant Director of Leased Housing is 18. (Factual Finding 4.) The classification level for Assistant Director of Property Management is 15. (Factual Finding 5.) Respondent's reassignment to Assistant Director of Property Management was not an upgrade in position or classification.

5. When a public agency reports compensation to CalPERS, it must only report an employee's "compensation earnable." (Gov. Code, § 20630.) Compensation earnable is comprised of the member's payrate and special compensation. (Gov. Code, § 20636, subd. (a).)

6. Government Code section 20636, subdivision (b)(1), defines payrate as 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. During respondent's final year of service, her monthly payrate was \$12,295.57. (Factual Finding 10.)

7. Government Code section 20636, subdivision (c)(1) defines special compensation as payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions. Government Code section 20636, subdivisions (c)(2)-(7), and regulations adopted by the Board further define special compensation.

8. California Code of Regulations, title 2, section 571, subdivision (a), limits the definition of special compensation to those items delineated in the regulation. Subdivision (a)(3) includes temporary upgrade pay as a type of special compensation. It also defines temporary upgrade pay as compensation to employees who are

required by their employer to work in an upgraded position/classification of limited duration.

Respondent was paid for the full-time position of Assistant Director of Leased Housing, classification level 18. She received temporary assignment pay to perform the duties of Assistant Director of Property Management. Pursuant to Government Code sections 20630, and California Code of Regulations, title 2, section 571, respondent's temporary assignment pay does not qualify as special compensation, and should not be included in her final compensation. CalPERS properly excluded respondent's temporary assignment pay from her retirement allowance calculation.

ORDER

The appeal of Donna Whitmore is denied.

DATE: 06/16/2021



TRACI C. BELMORE

Administrative Law Judge

Office of Administrative Hearings