

ATTACHMENT C

RESPONDENT'S ARGUMENT

FAX

2/24/2022 3:59 PM (PST)

SENDER

From: Kendra L. Carney Mehr

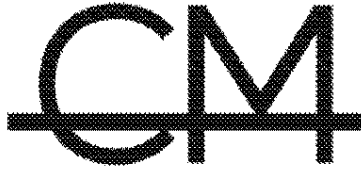
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MESSAGE

CalPERS Case No. 2019-0782

OAH Case No. 2020110582

Please find attached Respondents Maria Santillan-Beas and City of Lynwood's Argument Against the Proposed Decision. Please confirm receipt of same via email to klcm@carneymehr.com. Thank you.



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February 24, 2022

Cheree Swedensky
Assistant to the Board
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Sacramento, CA 94229-2701
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Via U.S. Mail and Fax

Re: **Maria T. Santillan-Beas and City of Lynwood, Respondents**
CalPERS Case No. 2019-0782, OAH Case No. 2020110582

Respondents' Argument Against the Proposed Decision

Dear Ms. Swedensky:

This letter shall serve as Respondents Maria Santillan-Beas and the City of Lynwood's Argument Against the Proposed Decision for consideration by the Board of Administration at its March 16, 2022 meeting. The primary issue in this matter is the unequitable and disparate application of CalPERS' decision to exclude reportable compensation in the calculation of compensation earnable as it relates to Lynwood City Councilmember Maria T. Santillan-Beas. As more fully set forth in the argument below, the Proposed Decision improperly relies on the retroactive application of regulations and case law established after Respondent Councilmember's highest year of compensable earnings.

This letter is timely submitted February 24, 2022, in response to correspondence from CalPERS dated February 8, 2022, which provided the Proposed Decision of Eric Sawyer, Administrative Law Judge, which was rendered on February 3, 2022, and provided Respondents the opportunity to submit written opposition argument.

Summary Argument

The Proposed Decision rests upon an improper determination to retroactively apply regulations and case law adopted more than ten years after Respondent Councilmember’s highest year of compensable earning. The Proposed Decision’s determination that the City’s pensionable compensation provided to council members for their required service on City Authority boards is not compensable earning does not follow the relevant statutes or regulations available at the time the compensation was earned.

Here, CalPERS inexplicably but conveniently relies on pay schedules from 2017 and 2018 to disregard earnable compensation from 2004. In fact, the City did not utilize a form of “publicly available pay schedule” that would meet the current regulations until, reasonably, the adoption and application of the current regulations in 2012. To apply interpretations and rules adopted years later is to ignore reason and instead venture down a dangerous rabbit hole to years of pensions earned by City of Lynwood employees prior to the City’s adoption of the correct “publicly available pay schedule.” And, should the Board be willing to take this unprecedented risk, it begs the question – why is CalPERS suddenly departing from past practice to treat one relatively low earning beneficiary different from all other City of Lynwood retirees?

For numerous reasons, including good public policy, the CalPERS Board of Administration should disregard the Proposed Decision and adopt its own decision in favor of Respondents.

Argument

Respondent Santillan-Beas’ Qualifying Service

Ms. Santillan-Beas served as a City Council member consistently from 2004 through 2018. During that time, in her capacity as a City Council member and as required by City Resolutions, Ms. Santillan-Beas sat on various City Authorities’ boards for which she earned contributory income. Ms. Santillan-Beas is a qualified, eligible member of PERS who elected to participate in its retirement benefits. She was elected to serve on the City Council and, as a result, required to also serve on various Authorities’ boards which were wholly comprised of the City’s Council members. The earnings payable to the Council members for appointment to these Authorities comprised compensation that the Council members earned as part of their mandatory Council member duties. As a result, these earnings are contributory to CalPERS.

Government Code section 20322, cited by CalPERS, provides that city council members are eligible for PERS retirement benefits so long as they file an election in writing to become a member. Here, Ms. Santillan-Beas formally elected membership into CalPERS through a written filing. To determine the compensation earned by an elected City Council member, Government Code section 20039 requires that the Council members’ final compensation “shall be based on the highest average annual compensation earnable by the member” for compensation earned pursuant to section 20322.

Section 20322(c) sets forth certain exceptions to membership eligibility. These exceptions include service on public commissions, boards, and councils. Importantly, section 20322(c) specifically excludes City Council members from these exceptions. Moreover, the exceptions set forth in subsection (c) are exceptions from “membership” in general and not exceptions from final compensation. For purposes of CalPERS, “compensation” includes, “(1) the remuneration paid in cash out of funds controlled by the employer.” (§ 20022, subd. (a).)

Ms. Santillan-Beas’s retirement benefit should be calculated based on her highest earnings of \$34,998 in 2004. Instead, CalPERS, upon her retirement, recalculated her retirement benefit based on her 2018 Council member stipend of \$975 only, which resulted in a significantly lower retirement benefit that Ms. Santillan-Beas expected based on the contributions paid since 2003.

City Compensation Complied with Relevant Requirements

The City’s compensation for City councilmembers in 2004 met the 2004 Government Code definition of “payrate.” For employees and retirees of the City, “final compensation” is defined as the “highest average annual compensation earnable” over either a one-year or three-year service period. [Gov. Code §§20037, 20042] Government Code §20636 defines “compensation earnable” to include a member’s “payrate” and “special compensation.”

In 2004, Government Code section 20636(b)(1) defined “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.”

From at least 2004 through 2006, the time period of Respondent Councilmember’s highest annual compensable earnings, the City adopted salaries for every group or class of employment only by resolution – never by a “pay schedule” in list format. In the matter at hand, the City Council considered various resolutions to create the relevant City Authorities at public meetings, voted publicly to adopt these resolutions to both require elected councilmembers serve on the Authority Boards as part of their regular City duties and establish earnings for this service, and has maintained publicly available records of these actions and the meetings of the Authority Boards. The Councilmember served on the City Council and related Authority Boards during her normal working hours and received the publicly established rate of pay for this service. Relevant resolutions have been provided to CalPERS.

Gregory Lake testified on behalf of CalPERS and repeated numerous times in his hearing testimony that he “*feels*” like the Councilwoman’s service as a council member at a City council meeting is somehow separate and distinct from her service as a council member at a mandatory City Authority Board meeting. In fact, neither CalPERS nor Mr. Lake provided more than an assertion or feeling, let alone a citation to contradict the City’s position. The City’s position

however, is evidenced in its adopted Resolutions establishing these City Authorities which required council members’ service on related boards.

With regard to the interpretation of CalPERS’ regulations and statutory rules, the California Supreme Court has specifically instructed that “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.” [*DiCarlo v. County of Monterey* (2017) 12 Cal.App.5th 468, 485, citing *Ventura County Deputy Sheriffs’ Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 490]. Clearly the definition of “payrate” and “publicly available pay schedule” provided by Government Code section 20636 lacked clarity because it was further explained by CalPERS proposed regulations adopted as California Code of Regulations section 570.5 in 2011, and still later, further expounded upon by the court in *Tanner v. Public Employees’ Retirement System*, 248 Cal.App.4th 743, in 2016.

As a result, the service of the Councilmember meets the definition of “payrate” contained in the version of Government Code section 20636(b)(1) in place in 2004, and Ms. Santillan-Beas is entitled to the benefit she earned. To find otherwise places the pension benefit earned by every other City employee during that time period in jeopardy.

CalPERS’ Duty Owed to the City and Its Employees

CalPERS’ core duty, as provided in California Constitution, Article XVI, section 17(b), is to discharge its duties solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries – demands that CalPERS, at bare minimum, issue timely, effective responses to resolve such disputes. Principles of equity require CalPERS honor the good faith expectations that Ms. Santillan-Beas has regarding their final compensation, including compensation for membership on all City-related administrative bodies.

The Council member’s current situation is comparable to the circumstances in *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567. Crumpler and other animal control officers paid higher safety member pension contributions for 20 years which were accepted by PERS without any correction. CalPERS later determined that Crumpler and the other animal control officers should have been classified as “miscellaneous” members with lower benefits. The Court of Appeal applied equitable estoppel principles to prevent PERS from retroactively reclassifying the officers and found that they were entitled to benefits based on the higher contributions that were paid for over 20 years. Here, prior to 2012, the City and its employees have continuously contributed to PERS based on the payrates established solely by publicly available resolutions. These contributions and pension benefit payments have been ongoing for as many years and impact many retirees. PERS has never refused acceptance of these amounts, nor has it informed the City or its Council members of any perceived discrepancy with its regulations until Ms. Santillan-Beas’ retirement.

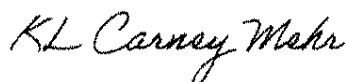
While the City appreciates that CalPERS has a fiduciary duty to the public pension system as a whole, pursuant to Article XVU, Section 17(b), of the California Constitution, CalPERS has a fiduciary duty “to its participants and their beneficiaries” which “shall take precedence over any other duty.” This primary duty to its members and beneficiaries is echoed by Government Code section 20151, which states that CalPERS’ “board and its officers and employees shall discharge their duties with respect to this system solely in the interest of the participants and beneficiaries...” These duties include duties of loyalty, of good faith and fair dealing, to account, to inform, and to not take advantage. CalPERS also acknowledges in its precedent decisions that it has a fiduciary duty to provide timely and accurate information to its members. (See *In re Application of Smith* (March 31, 1999) PERS Prec. Dec. No. 99-01 [“The duty to inform and deal fairly with members also requires that the information conveyed be complete and unambiguous”]. CalPERS must honor its obligations to the City of Lynwood and its employees, officials, and retirees.

Conclusion

The City has shown that CalPERS’ determination of Ms. Santillan-Beas’ earnable compensation is not tethered to the letter or intent of the law. The City Council of Lynwood recognizes the potential negative financial consequences to the City and its employees, officials, and retirees as a result of CalPERS and the Proposed Decision’s new interpretation of the City’s compensation. Principles of equity require the Board honor the good faith expectations that the Council members have regarding final compensation, of public employees, including disregarding the improper, retroactive application of regulations and case law to benefits earned based on salaries publicly approved by resolution well before the adoption of later rules and clarifications.

For the reasons set forth above, the City respectfully requests the Board not adopt the Proposed Decision but that it enter a new and different Decision to provide Ms. Santillan-Beas the pension benefit actually earned and leave the pension benefit paid to all other City retirees intact.

Best Regards,



Kendra L. Carney Mehr