

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 of:**

TRACEY FRANCES PIRIE, Respondent.

Agency Case No. 2021-0148 (Statement of Issues)

OAH No. 2021040278

PROPOSED DECISION

Joseph D. Montoya, Administrative Law Judge (AU), Office of Administrative Hearings (OAH), State of California, heard this matter via videoconference on August 10, 2021.

Preet Kaur, Senior Staff Attorney, represented Complainant California Public Employees' Retirement System (CalPERS). Respondent Tracey Frances Pirie appeared and represented herself.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on August 10, 2021.

SUMMARY OF THE CASE

Respondent was a member of two public employee retirement systems that had agreed to reciprocity. She was a member of CalPERS, and she was a member of the Ventura County Employees' Retirement Association (VCERA). When she retired, CalPERS obtained information from VCERA about her final compensation, a key component in calculating retirement allowance. CalPERS determined that VCERA had credited Respondent with various amounts of earnings that constituted special compensation. CalPERS determined that all but one category of earnings amounted to special compensation not recognized under the Public Employees Retirement Law, or PERL.

Respondent appealed, requesting a hearing. At hearing, she contended that one category of compensation should be recognized as part of her payrate. However, the weight of the evidence established that the compensation was special compensation, but not of the type recognized by the PERL. Respondent's appeal must therefore be denied.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Renee Ostrander executed the Statement of Issues and Amended Statement of Issues on behalf of the Board of Administration, CalPERS, while acting in her official capacity as Chief of the Employer Account Management Division.

2. (A) Respondent Tracy Frances Pirie (Respondent) was a member of CalPERS, first through her employment with the City of Oxnard on February 5, 1979,

through June 13, 1981. Respondent remained an active member due to her employment by the City of Santa Barbara from October 10, 1988, through April 8, 2000. Her membership continued while employed by the County of Ventura (County) from April 16, 2000, through September 21, 2002, and while employed by the City of Ventura from September 23, 2002, to May 2, 2008. She returned to employment with the County after May 2008. She is classified as a local miscellaneous member of CalPERS.

(B) Respondent established membership in the VCERA by her employment with the County. Effective May 2, 2008, Respondent established reciprocity between CalPERS and VCERA.

3. As detailed further below, Respondent applied for service retirement in July 2020. CalPERS would not recognize some of the compensation paid to Respondent by the County when calculating Respondent's final retirement allowance, and in November 2020, CalPERS gave Respondent and VCERA written notice of its determination. By a letter dated December 14, 2020, Respondent filed a timely appeal and requested this administrative hearing. All jurisdictional requirements have been met.

4. (A) The Amended Statement of Issues limited the issues to whether the following items of compensation can be included in the calculation of Respondent's final compensation, which in turn is used for determining her retirement allowance: "FCM-Flex Credit MGMT F/T"; "FCX-Flex Credit Tier II Full Time;" "Y10-Tier 1 Retirement Offset 10;" "Vab-Vacation Buyback (Grossup);" and "EEP-EE Assist Donation (Grossup)."

(B) At the outset of the hearing, Respondent acknowledged that the precedential decision in the *Wheeler* case¹ barred all of the compensation items listed in Factual Finding 4(A) from inclusion in the final compensation calculation, except for the Y10-Tier 1 Retirement Offset 10, which Respondent asserted should be part of her final compensation, arguing it was not a species of unrecognized special compensation. Therefore, the hearing focused on the issue of whether the Y10-Tier 1 Retirement Offset 10 (Y10 Payment) should be a part of final compensation.

Reciprocal Retirement Systems

5. It is undisputed that CalPERS and VCERA are reciprocal retirement systems. Reciprocity is established when two or more public retirement systems agree 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. Reciprocity agreements, such as that between CalPERS and VCERA, are authorized by Government Code section 20351.² Reciprocity encourages career public service. (§ 31830.)

Respondent's Employment with the County and Her Compensation

6. Respondent worked for the County for just over 17 years. At the time of her retirement, she was the Sheriff's Bureau Manager, overseeing Human Resources

¹ Properly *In the Matter of the Appeal Regarding the Final Compensation of Mark L. Wheeler, Respondent, and Los Angeles County, Respondent, et al.*, CalPERS case no. 2016-1073, Precedential Decision 19-01, found at exhibit 13.

² All statutory citations are to the Government Code unless otherwise noted.

and record keeping for the Sheriff's Department, supervising, directly or indirectly, over 40 people. This was plainly a position of significant responsibility, given her monthly salary, which appears to have been one of the highest in the Department.

7. In 2019, Respondent earned monthly base pay at the maximum of her pay range, just under \$15,000 per month. The salary for Respondent's position increased in 2020, to just over \$15,300 per month, the maximum base salary for her position. According to Complainant's witness, Ms. Nguyen, Respondent was at the top of her pay range at retirement. VCERA reported that Respondent's final average compensation was \$19,653.36 per month during the year before her retirement. (Ex. 10, p. 1.) This indicates that Respondent was receiving approximately \$4,300 per month in other compensation.

8. Charts made available to CalPERS and admitted in evidence indicate that the monthly pay did not include the Y10 Payment, nor did it include some of the other compensation disallowed by CalPERS. The Y10 Payment was not included in pay schedules available to the public. Thus, CalPERS denominated the Y10 Payment as a type of special compensation, but not special compensation recognized by CalPERS for the purpose of calculating a retirement benefit.³

9. Exhibit 11 indicates that the Y10 Payment was an item of special compensation, and not part of Respondent's base pay or payrate. The Y10 Payment, along with the other disallowed items of special compensation, and the graduate degree education incentive, were listed separately from the regular pay.

³ Respondent was paid an educational incentive because of a graduate degree, which CalPERS deemed compensable special compensation under the PERL.

10. Respondent asserted that the Y10 Payment was compensation paid to employees such as herself to cover her retirement compensation. She explained that for many years before she retired, employees such as herself were paying a part of the retirement contribution. The County determined that it would reimburse the employees for their retirement contributions, and an August 6, 2013 resolution by the County's Board of Supervisors brought the reimbursement to fruition. (Ex. A.) It must be noted that the recommendations from staff to the Board indicated that the additional Tier I contribution would be with a supplemental pay code. (Ex. A, p. 2, par. 9.)

LEGAL CONCLUSIONS

1. Respondent has the burden of proof to establish Respondent's entitlement to the retirement benefits for which she has applied. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051). She must prove her case by a preponderance of the evidence. (Evid. Code, § 115.) A "preponderance of the evidence" is usually defined in terms of "probability of truth," for example, as evidence that, "when weighed with that opposed to it, has more convincing force and the greater probability of truth." (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482-483.)

2. The outcome of this case is controlled by a handful of statutes and a regulation. They tend to be lengthy, and not all provisions of those statutes and regulations are pertinent to the case. The pertinent provisions follow, though at times further text is provided to give context to the statute or regulation.

3. A CalPERS member's retirement allowance 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." (§§ 20037 and 21354).

4. "Compensation" is generally defined in section 20630 as follows:

(a) As used in this part, "compensation" means 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 any of the following:

(1) Holidays.

(2) Sick leave.

[1] . . . [1]

(4) Vacation.

(5) Compensatory time off.

(6) Leave of absence.

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636, or in accordance with Section 20636.1 for school members, and shall not exceed compensation earnable, as defined in Sections 20636 and 20626.1, respectively.

5. Section 20636 defines "compensation earnable." As seen below, it is made up of two components, payrate and special compensation, the latter term having the most relevance to this case.

(a) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b)(1) "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 for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. "Payrate," 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 pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e).

(2) "Payrate" shall include an amount deducted from a member's salary for any of the following:

(A) Participation in a deferred compensation plan.

[¶] . . . [¶]

(c)(1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

(2) 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).

(3) 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.

(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

(5) The monetary value of a service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."

(6) 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 under Section 201 et seq. of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

(7) Special compensation does not include any of the following:

(A) Final settlement pay.

(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

(C) Other payments the board has not affirmatively determined to be special compensation.

(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.

[¶] . . . [¶]

6. To summarize, section 20636, subdivision (a), defines compensation as “remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours,” and section 20636, subdivision (b), limits the compensation which can be counted toward calculation of a retirement allowance to what is deemed “compensation earnable.” Compensation earnable is composed of an employee’s payrate and special compensation. (§20636, subd. (a).)

7. Section 20636, subdivision (c)(6), calls for the promulgation of regulations that further define special compensation. The CalPERS Board has enacted such a regulation, found at California Code of Regulations, title 2 (CCR), section 571. CCR section 571 defines numerous types of special compensation not applicable here, e.g., “Tiller Premium,” which is extra pay to a firefighter who routinely operates the tiller of an aerial ladder, or premium pay provided to police officers who routinely patrol on a motorcycle. Section 571, subdivision (a) states: “The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement: [¶] . . . [¶]” Thereafter, numerous

requirements are stated, not repeated here to avoid a prolix decision. Likewise, numerous types of special compensation are listed, but not quoted here. None of the types of special compensation listed in the regulation encompass the Y10 Payment.

8. (A) The Y10 Payment was not included in Respondent's payrate. As pointed out by Complainant's witness, the Y10 Payment was not set out in publicly available pay schedules, as required by section 20636, subdivision (b)(1), but instead was set out with other items of special compensation that may have been recognized by VCERA, but only one of which was recognized by CalPERS.

(B) It cannot be found that the Y10 Payment was "payment received [by Respondent] for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions," which is the core definition of special compensation, found in section 20636, subdivision (c)(1). Nor does it meet any of the definitions of special compensation found CCR section 571.

(C) Under all the circumstances, the Y10 Payment shall not be included in the calculation of Respondent's final compensation.

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ORDER

The appeal of Respondent Tracey Frances Pirie is denied. The CalPERS calculation of her final compensation is upheld.

DATE: Sep 9, 2021

Joseph Montoya

JOSEPH D. MONTOYA

Administrative Law Judge

Office of Administrative Hearings