

MEMORANDUM

DATE: September 21, 2016

TO: Board of Retirement

FROM: James Wilbanks, Retirement Administrator
Jeff Berk, Legal Counsel

RE: Marin County Employees Retirement Association (Marin CERA)
Court Decision

I. INTRODUCTION

Last month, the California Court of Appeal issued a decision in a case involving the interpretation and impact of the California Public Employees' Pension Reform Act of 2013 ("PEPRA") legislation. The question before the court was whether the Marin Retirement Board's decision to exclude certain items from compensation earnable violated vested rights. The court concluded that it did not. The purpose of this memo is to inform the Board of this decision and possible implications to pay code items approved by the Board.

II. BACKGROUND

Compensation earnable is used for calculating contributions to fund benefits and to calculate the benefits themselves. Historically, what is to be includable in "compensation earnable" has been the subject of litigation for many years and the courts have differed in their opinions.

In 2012, the Legislature passed and the Governor signed the California Public Employees' Pension Reform Act of 2013 ("PEPRA"). The legislation impacted a number of areas for public employees and created a different benefit structure for current ("Legacy") employees and future ("PEPRA") employees. This legislation, in part, addressed pay elements that can be added to base salary for purposes of determining final compensation.

In order to implement PEPRA, on November 7, 2012, the Board discussed and passed two Resolutions adopting pay codes, one for the new PEPRA "pensionable compensation", and one for "compensation earnable" (the original Resolution was adopted following the 1997 California Supreme Court's decision in the Ventura case). In November 2012, it was explained to the Board that MCERA staff had worked closely with our counterparts in the SACRS system, CalPERS, and with County staff to review the pay codes to try to ensure compliance with PEPRA. However, it was noted that the review of the PEPRA legislation was a very fluid and complex situation by all of those tasked with the

interpretation and operational implementation of the pension reform legislation. It was specifically discussed that interpretations of the PEPRA legislation might change, and that, if necessary, staff would return to the Board.

In fact, the Resolutions adopted by the Board state:

Further Resolved that the above listed determinations by the Board of what is included or not included in pensionable compensation, shall be in effect until such time as this Board, the Legislature or the Courts take action that as a matter of law requires a different determination.

Despite its action in November 2012, at the December 3, 2012 meeting, the Board directed staff to bring back for further discussion and possible action whether standby pay and on call pay should be included as pensionable for Legacy members. The November 2012 Resolution passed by the Board continued the long-established past practice of including them. At the December 12, 2012 meeting, the Board had a robust discussion of this, which is summarized in the attached memo of the same date. The Board made no changes to the Resolutions it passed in November. Copies of the Resolutions and Board memos are attached.

III. MARIN CERA COURT DECISION

As the Board has been made aware from time to time, following the implementation of PEPRA by various systems, Marin CERA and Contra Costa CERA were sued by various unions, who claimed that their members' vested rights were impaired by board decisions that prospectively excluded certain pay code items (including standby and on call pay) from final compensation for Legacy members that had previously been included. Last month, the California Court of Appeal issued a published decision in the Marin CERA case. The court rejected the unions' vested right argument. This decision will become final on September 26, 2016, unless a Petition for Review is applied for and granted by the California Supreme Court.

IV. POSSIBLE NEXT STEPS

Under the 37 Act, the Retirement Board is tasked with determining what pay elements should be included as pensionable. Once the Marin decision becomes final, staff and counsel could agendize an action item regarding pay codes for Legacy members for the Board to consider. However, it should be noted that the Contra Costa CERA case is still pending in the Court of Appeal. At this time, it is not known if that decision will be inconsistent with the Marin decision.

There has been discussion and articles about the potential breadth of the Marin CERA decision and its possible impacts of vested rights in areas other than pay codes, for example, as to pension formulas. It is important to recognize, however, that those are benefit issues for plan sponsors to consider.

**MENDOCINO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION
RESOLUTION 2016 – 01**

**TO SUPERSEDE RESOLUTION 2014-05 DEFINING COMPENSATION EARNABLE
PURSUANT TO GOVERNMENT CODE §31461 FOR MEMBERS WHO ARE NOT
SUBJECT TO GOVERNMENT CODE §7522.34 (NON-PEPRA MEMBERS)**

WHEREAS, for those current members who became active members prior to January 1, 2013, and those members who became active members on or after January 1, 2013, but who are not subject to Government Code §7522.34 of the California Public Employees' Pension Reform Act, the determination of compensation earnable for remuneration earned by those members is governed by Government Code §31461; and

WHEREAS, Government Code §31461 provides that compensation earnable by a member means the average compensation as determined by the Board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay; and

WHEREAS, Government Code §31461 provides that this Board determine which items of remuneration earned by members shall constitute "compensation earnable"; and

WHEREAS, the Board has reviewed the current pay items and has determined which of those items are to be included in "compensation earnable" and which items are not to be included; and

WHEREAS, it is necessary for this Board from time to time to amend its determinations of compensation earnable due to changes in the compensation schedules of MCERA employers or changes in the law; Therefore be it

RESOLVED that effective May 18, 2016, resolution number 2014-05 is superseded, and pursuant to Government Code §31461 as interpreted by the courts, the Board hereby makes the following determinations as to what is included in "compensation earnable" and items of remuneration that are not included:

1. Compensation earnable shall include:

| Pay Code | Description |
|-----------------|--|
| 303 | Vacation Pay-Out Non Management |
| 304 | Vacation Pay-Out Management |
| 406 | Shift PM |
| 407 | Shift AM |
| 409 | Supervisor Shift |
| 417 | 32.50 Bilingual |
| 418 | 18.00 Bilingual |
| 422 | Confidential 5% |
| 424 | On Call Regular – Probation |
| 427 | On Call Weekend/Holiday – Probation |
| 434 | Clothing Allowance - Probation |
| 435 | Supplemental Pay to similarly situated members in the same grade or class. |
| 437 | Retroactive Longevity |

| Pay Code | Description |
|-----------------|------------------------------------|
| 438 | 2.5% Longevity |
| 439 | 5% Longevity |
| 440 | On Call Regular – SEIU |
| 441 | On Call Weekend/Holiday – SEIU |
| 443 | 7.5% Longevity |
| 444 | 10% Longevity |
| 445 | Car Allowance |
| 452 | Retroactive Salary Adjustment |
| 456 | Board Of Supervisor Auto Allowance |
| 457 | BA Incentive |
| 514 | Standby Pay |
| 515 | Animal Handler |
| 520 | Field/Specialized Training |
| 523 | Bilingual 5% MCLEMA |
| 525 | Uniform Allowance |
| 528 | Covelo Housing |
| 529 | Covelo Bonus |
| 530 | Officer In Charge |
| 531 | Officer In Charge Level 2 |
| 532 | Detective/Investigator Premium |
| 556 | AA/AS/Supv Incentive MCLEMA |
| 557 | Supv Incentive MCLEMA |
| 558 | 10% B/A Incent |
| 559 | AA/AS DSA 3% |
| 567 | Bilingual 3% MCLEMA |
| 926 | Uniform Non-Cash |

2. Pursuant to Government Code §31461(b) compensation earnable, shall not include in any case the following:

A. Any compensation determined by the Board to have been paid to enhance a member's retirement benefit under that system. That compensation may include:

(1) Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to a third party other than the retirement system for the benefit of the member, and which was converted to and received by the member in the form of a cash payment in the final average salary period.

(2) Any one-time or ad hoc payment made to a member, but not to all similarly situated members in the member's grade or class.

(3) Any payment that is made solely due to the termination of the member's employment, but is received by the member while employed, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period regardless of when reported or paid.

B. Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, in an amount that exceeds

that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.

C. Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.

D. Payments made at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.

3. Pursuant to Government Code §31641(c), the terms listed above in paragraph 2 are intended to be consistent with and not in conflict with the holdings in *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734 and *In re Retirement Cases* (2003)110 Cal.App.4th 426.

FURTHER RESOLVED that the above listed determinations by the Board of what is included or not included in compensation earnable, shall be in effect until such time as action taken by the Board or action by the Legislature or the Courts as a matter of law requires a different determination.

The foregoing resolution introduced by Board Member Craig Walker, seconded by Board member Tim Knudsen, and carried this 18th day of May, 2016, by the following vote:

Ayes: Kathryn Cavness, John Sakowicz, Supervisor Dan Gjerde, Craig Walker, Tim Knudsen, Shari Schapmire, and Randy Goodman.

Noes: 0.

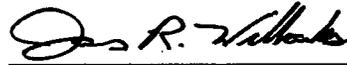
Abstain: 0.

Absent: Jerilyn Harris and Ted Stephens.

WHEREUPON, The Chair declared said Resolution adopted, and SO ORDERED.



Randy Goodman
Board of Retirement Chair



James R. Wilbanks, Ph. D.
Retirement Administrator

**MENDOCINO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION
RESOLUTION 2016-02**

**TO SUPERSEDE RESOLUTION 2014-06 DEFINING PENSIONABLE COMPENSATION
PURSUANT TO GOVERNMENT CODE §7522.34 FOR MEMBERS WHO ARE NOT
SUBJECT TO GOVERNMENT CODE §31461 (PEPRA MEMBERS)**

WHEREAS, for those members who became active members on or after January 1, 2013, and who are subject to the California Public Employees' Pension Reform Act contained in Government Code §7522 et seq., the determination of their pensionable compensation is governed by Government Code §7522.34; and

WHEREAS, the pensionable compensation for those employee members who are subject to Government Code §7522.34 shall be 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; and

WHEREAS, the Board has reviewed the current pay items and has determined which of those items are to be included in "pensionable compensation" and which items are not to be included; and

WHEREAS, it will be necessary for this Board, from time to time, to amend its determinations of pensionable compensation due to changes made by MCERA employers in their compensation schedules as well as changes in the law; Therefore be it

RESOLVED, that effective May 18, 2016, resolution number 2014-06 is superseded and pursuant to Government Code §7522.34, the Board hereby makes the following determinations as to what is included in "pensionable compensation" and items of remuneration that are not included:

1. Pensionable compensation shall include:

| Pay Code | Description |
|-----------------|-------------------------------|
| 406 | Shift PM |
| 407 | Shift AM |
| 409 | Supervisor Shift |
| 417 | 32.50 Bilingual |
| 418 | 18.00 Bilingual |
| 422 | Confidential 5% |
| 437 | Retroactive Longevity |
| 438 | 2.5% Longevity |
| 439 | 5% Longevity |
| 443 | 7.5% Longevity |
| 444 | 10% Longevity |
| 452 | Retroactive Salary Adjustment |
| 457 | BA Incentive |
| 515 | Animal Handler |

| Pay Code | Description |
|-----------------|--------------------------------|
| 520 | Field/Specialized Training |
| 523 | Bilingual 5% MCLEMA |
| 529 | Covelo Bonus |
| 530 | Officer In Charge |
| 531 | Officer In Charge Level 2 |
| 532 | Detective/Investigator Premium |
| 556 | AA/AS/Supv Incentive MCLEMA |
| 557 | Supv Incentive MCLEMA |
| 558 | 10% B/A Incent |
| 559 | AA/AS DSA 3% |
| 567 | Bilingual 3% MCLEMA |

2. Pensionable compensation, at a minimum, shall not include, in any case, the following pay items.

A. The following pay codes are not included:

| Pay Code | Description |
|-----------------|---|
| 303 | Vacation Pay-Out Non Management |
| 304 | Vacation Pay-Out Management |
| 424 | On Call Regular – Probation |
| 427 | On Call Weekend/Holiday – Probation |
| 434 | Clothing Allowance – Probation |
| 435 | Supplemental Pay to Similarly Situated Members in the Same Grade or Class |
| 440 | On Call Regular – SEIU |
| 441 | On Call Weekend/Holiday – SEIU |
| 445 | Car Allowance |
| 456 | Board Of Supervisor Auto Allowance |
| 514 | Standby Pay |
| 525 | Uniform Allowance |
| 528 | Covelo Housing |
| 926 | Uniform Non-Cash |

B. Pursuant to Government Code §7522.34, pensionable compensation does not include the following:

1. Any compensation determined by the Board to have been paid to increase a member's retirement benefit.
2. Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to a third party other than the retirement system for the benefit of the member and which was converted to and received by the member in the form of a cash payment.
3. Any one-time or ad hoc payments made to a member.
4. Severance or any other payment that is granted or awarded to a member in connection with or in anticipation of a separation from employment, but is received by the member while

employed.

5. Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, regardless of when reported or paid.
 6. Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.
 7. Any employer-provided allowance, reimbursement, or payment, including, but not limited to, one made for housing, vehicle, or uniforms.
 8. Compensation for overtime work, other than as defined in Section 207(k) of Title 29 of the United States Code.
 9. Employer contributions to deferred compensation or defined contribution plans.
 10. Any bonus paid in addition to the compensation described in subdivision (a) of Government Code §7522.34.
 11. Any other form of compensation the Board determines is inconsistent with the requirements of subdivision (a).
 12. Any other form of compensation that this Board determines should not be pensionable compensation.
3. Pursuant to Government Code §7522.10, whenever pensionable compensation, as defined in §7522.34, is used in the calculation of a benefit, the pensionable compensation shall be subject to the monetary limitations set forth in subdivision §7522.10.

FURTHER RESOLVED that the above listed determinations by the Board of what is included or not included in pensionable compensation, shall be in effect until such time as this Board, the Legislature or the Courts take action that as a matter of law requires a different determination.

The foregoing resolution introduced by Board Member Tim Knudsen, seconded by Board member John Sakowicz, and carried this 18th day of May, 2016, by the following vote:

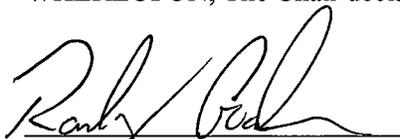
Ayes: Kathryn Cavness, John Sakowicz, Supervisor Dan Gjerde, Tim Knudsen, Shari Schapmire, and Randy Goodman.

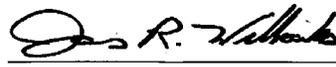
Noes: 0.

Abstain: Craig Walker.

Absent: Jerilyn Harris and Ted Stephens.

WHEREUPON, The Chair declared said Resolution adopted, and SO ORDERED.


Randy Goodman
Board of Retirement Chair


James R. Wilbanks, Ph. D.
Retirement Administrator

Richard A. White, Jr.
Retirement Administrator



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MENDOCINO COUNTY
EMPLOYEES' RETIREMENT ASSOCIATION
625-B KINGS COURT
UKIAH, CALIFORNIA 95482-5027

Date: November 7, 2012
To: Board of Retirement
From: Richard White, Retirement Administrator
Subject: MCERA Resolutions resulting from Pension Reform Legislation

Introduction:

Governor Brown and Democratic lawmakers announced the long-anticipated comprehensive public employee pension reform plan on August 28, 2012 which went to the Legislature's conference committee that evening where the plan was approved. The plan will be carried as AB 340 and Assembly Bill 197 and is known as the California Public Employees' Pension Reform Act of 2013 (PEPRA). The bill was passed by the Legislature and the Governor signed the bill on September 12, 2012. The effective date for implementation of PEPRA is January 1, 2013.

As discussed with the Board at the October meeting, the PEPRA legislation impacts a number of areas of public employee pension benefits for current and future employees. One of the significant areas addressed in the legislation are the pay elements that are added to base salary for the purpose of determining final compensation. These pay elements are somewhat unique to 1937 Act systems such as Mendocino and have been the subject of litigation and legislation around the State over the course of the past fifteen or so years.

Mendocino CERA passed a resolution in 1998 which codified the pay elements available to members of the retirement association. In essence, PEPRA confirmed what MCERA is already doing in calculating compensation earnable for current members. For current employees who retire on or after 1-1-13, the same items of compensation are included and excluded as those who retire on or before 12-31-12. The Board is being asked to pass an updated resolution which complies with the new PEPRA legislation as passed under AB 197. The new resolution will supersede the 1998 resolution.

The Board is being asked to pass an additional resolution that will define the pay elements included for new members of the retirement association on or after January 1, 2013. The PEPRA legislation changed pay elements of pensionable compensation for new members and this resolution codifies the changes reflected in the legislation passed as AB 340.

MCERA staff has worked closely with our counterparts in the SACRS systems, CalPERS and with County staff to review the pay elements, pay codes and ensure the compliance with the PEPRA legislation. It should be noted that the review of the PEPRA legislation continues to be a very fluid situation by all of those tasked with the interpretation and operational implementation of the pension reform legislation. We have previously mentioned this and it continues to be so. In fact, staff expects to have a very meaningful series of discussions about the legislation at the SACRS Fall Conference which takes place the week of November 13-16, 2012.

The information and interpretations of the PEPRA legislation might change and staff will return to the Board in that event. Staff is comfortable with the resolutions before you and we believe they are based upon the best information that the staff has available to us at this point. These resolutions are what we think the right answer is today and staff is recommending that the Board adopt these resolutions at today's meeting because it will assist the County with the timing of their workload necessary to implement their payroll system to deal with the pension reform legislation.

Also, it is anticipated that the Board of Supervisors will be discussing the PEPRA legislation and pension tiers at their meeting on November 13, 2012 and I will be participating in the agenda item as a member of the county working group.

Recommended action: Approve and adopt Resolution 2012-06 and 2012-07.

Richard A. White, Jr.
Retirement Administrator



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MENDOCINO COUNTY
EMPLOYEES' RETIREMENT ASSOCIATION
625-B KINGS COURT
UKIAH, CALIFORNIA 95482-5027

Date: December 3, 2012
To: Board of Retirement
From: Richard White, Retirement Administrator
Subject: Public Employee Pension Reform Act (PEPRA) Update

As mentioned at your November 7, 2012 Board meeting, the implementation of the PEPRA legislation is a very fluid process and the Board was informed that the interpretations of the PEPRA legislation might change and that staff would return to the Board with additional information. Since your last Board meeting staff attended the SACRS Fall Conference and has had ongoing discussions with other 37 Act systems. The following is a summary of the significant issues. The Board can amend the Resolutions adopted November 7, 2012 if it chooses to do so.

1. **Compensation Earnable & Pensionable Compensation.** At your November 7, 2012 meeting, the Board passed two Resolutions, one for current members ("Compensation Earnable") of MCERA and one for new members ("Pensionable Compensation") hired on or after January 1, 2013, concerning pay elements that are added to base salary for the purpose of determining final compensation.
 - a. Standby pay for current employees. The Board included standby pay as a pay element for current employees in the Resolution which was consistent with past practice. The practice has been to include standby pay and doing so arguably has created an expectation that it would continue. However, PEPRA states that payments for additional services rendered outside of normal working hours shall not be included. The systems are split fairly evenly on whether or not to include this as compensation earnable.
 - b. Base pay for new employees. The Board accepted the inclusion of certain pay elements as pensionable compensation for new employees. At the SACRS conference we learned that CalPERS and a couple of 37 Act systems may interpret the language very strictly and may not provide for any pay elements to be included in pension calculations. This interpretation is based on section 7522.34(a) that refers to "base pay." However, subsection (c) of that section goes on to specifically exclude a list of several items from "Pensionable Compensation." If the real intent was to limit it to base pay there would have been no need for the legislature to include subdivision (c).

2. **Single rate.** The Board confirmed the Segal recommendation to use a single rate instead of the current practice of entry age based rate. The rationale was that Segal believes that using the same single rate methodology for both the new employees and the employer would provide more clarity as to how the Normal Cost contribution rate is shared between the two. Almost every system is going with a single rate. The concern is that PEPRA is ambiguous as to whether a single rate may be used.

A report from the SACRS Legislative Committee indicated that there is a potential for clean up legislation to confirm the use of a single rate methodology.

3. **Board of Supervisors.** The Board of Supervisors received a PEPRA presentation and an actuarial report on new pension tiers at their November 13, 2012 meeting. The presentation was an informational item which did not result in any action being taken, though it is anticipated the Board will take action at their December 11th meeting.

In preparation for the Board of Supervisor action it will be necessary to schedule a 'special meeting' of the Board of Retirement in order to take formal action on adopting the contribution rates for the new pension tier. The special meeting is necessary because it will not be possible for the actuary to produce these rates in time for your December meeting and the regularly scheduled January meeting will be later than is desired by the Board of Supervisors and County Executive Office.

4. **California Legislature and Governor Brown.** At the SACRS Conference staff learned that there are efforts currently underway to inform the Legislature of the need for certain 'clean-up' elements within the PEPRA legislation when the new session begins on December 3, 2012. There was not a clear indication given by the SACRS Legislative Committee on either the components of the legislative fixes or of the likely chance of getting it through the Legislature or the Governor's office. We will continue to monitor the situation.

Richard A. White, Jr.
Retirement Administrator



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MENDOCINO COUNTY
EMPLOYEES' RETIREMENT ASSOCIATION
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Date: December 12, 2012
To: Board of Retirement
From: Richard White, Retirement Administrator
Jeff Berk, Legal Counsel
Subject: Compensation earnable element

Introduction:

At the December 3, 2012 meeting, the Board directed staff to return with a discussion of whether “on-call” and “stand-by” pay should continue to be treated as pensionable for current employees following the passage of PEPRA. This memo is intended to provide a brief summary of this issue.

Following the California Supreme Court’s Ventura decision, most, if not all systems, included stand-by pay as pensionable. This Board did just that in 1998, when it passed a Resolution that codified various pay elements available to members, including stand-by. As part of the implementation of PEPRA, last month the Board considered and approved Resolution 2012-06, which defined compensation earnable for current employees and included both on call and stand-by pay. At the time, staff informed the Board that many systems had not yet adopted such Resolutions and that there were several issues that presented some ambiguity.

To provide some perspective on materiality, County employees are compensated \$2.50 per hour when required by the County to be “on call” or “standby” as part of their official duties. A very cursory review shows that in 2011 there were 62 members who received an average of \$147 per month for on call pay and 12 members who received an average of \$171 per month for stand-by.

PEPRA defines “compensation earnable” to exclude “payments for additional services rendered outside of normal working hours.” There is no legislative history to help define what this means. Courts have consistently found that payments in the nature of overtime are not pensionable. Some systems have concluded that standby pay is in the nature of overtime and should be excluded.

Other systems have not reached that conclusion. Moreover, at a SACRS-sponsored conference on PEPRA in September, the systems were provided a “post legislative history” by staff aides for the legislators who drafted PEPRA. They said that “very little is changing for current members,” but that “the two main differences are . . . terminal pay [and] anything paid to enhance a member’s retirement benefit.” There was no mention of changing the treatment of stand-by pay.

PEPRA also states that it is intended to be consistent with two court decisions that followed Ventura, Salas and In Re Retirement Cases. Although these cases did not specifically address stand-by pay, they did narrow Ventura somewhat as to what items may be pensionable. On the other hand, there is language in PEPRA that suggests that the Legislature was mindful of vested rights issues, which may call for the continuation of an item that has been pensionable.

Given the above analysis and arguments that can be made both ways as to whether these items should continue to be included or not, it is not surprising that about half of the 37 Act systems have now included stand-by pay as pensionable and half have not.

Recommended action: Take appropriate action

Attachments