

Memorandum

MEETING DATE

DEC 12 2012

AGENDA ITEM

#10a.

Date: December 12, 2012

To: Board of Retirement
Marilyn Leedom, Retirement Chief Executive Officer

From: Karen Levy, General Counsel

Subject: The Establishment of a Procedure For Assessing and Determining Whether An Element of Compensation Was Paid To Enhance A Member's Retirement Benefit Pursuant to Assembly Bill 340, new Government Code Section 31542

This memorandum summarizes the provision of Assembly Bill 340 regarding the establishment of a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit pursuant to the pension reform legislation enacted in 2012 (Assembly Bill 340; Govt. Code § 31542). This memorandum also proposes a policy setting forth this procedure.

I. Required Establishment of a Procedure For Assessing Possible Enhancements – G.C. § 31542

Pursuant to the newly enacted Government Code Section 31542, effective January 1, 2013, the CCCERA Board of Retirement is required to establish a procedure for assessing and determining whether an element of compensation was paid to enhance a CCCERA member's benefit.

Government Code Section 31542 provides:

(a) The board shall establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit. If the board determines that compensation was paid to enhance a member's benefit, the member or the employer may present evidence that the compensation was not paid for that purpose. Upon receipt of sufficient evidence to the contrary, a board may reverse its determination that compensation was paid to enhance a member's retirement benefits.

(b) Upon a final determination by the board that compensation was paid to enhance a member's retirement benefit, the board shall provide notice of that determination to the member and employer. The member or employer may obtain judicial review of the board's action by filing a petition for writ of mandate within 30 days of the mailing of that notice.



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(c) Compensation that a member was entitled to receive pursuant to a collective bargaining agreement that was subsequently deferred or otherwise modified as a result of a negotiated amendment of that agreement shall be considered compensation earnable and shall not be deemed to have been paid to enhance a member's retirement benefit.

II. RECOMMENDED PROCEDURE

The procedure recommended is similar to that which is currently in place for disability retirements.

First, staff will review all compensation included with the calculation of the member's final compensation to make an initial determination as to whether any item of compensation was paid to enhance the member's retirement benefit. It is not possible to establish a complete set of specific rules for determining whether pension spiking has taken place, so the policy is deliberately general in broadly defining the criteria that staff will consider under applicable law.

Second, if staff concludes that any item of pay was made to enhance the member's retirement benefit, staff will prepare an administrative recommendation to the Board that any such item not be included in the member's benefit calculation. The administrative recommendation will be agendaized for a regularly noticed Board meeting, a copy of the recommendation will be provided to the member and applicable employer. The member and the employer will be given an opportunity to address the Board.

Third, if the Board approves the administrative recommendation, the member and the employer will be given an opportunity to request a hearing de novo before a hearing officer, at which time the member and the employer may present evidence that the compensation at issue was not paid to enhance the member's retirement benefit. The hearing officer will prepare a written recommendation to the Board.

Fourth, the hearing officer's report will be noticed for a regular Board meeting for final decision by the Board of Retirement. The employer and the Board will be given written notice of the Board's decision, and pursuant to the new law, they may seek judicial review by means of a petition for writ of mandate.

Fifth, pending the process described above, CCCERA may process the member's retirement application excluding the item of compensation in dispute, with retroactive adjustments being made if the compensation is ultimately determined to be includable in the pension calculation. This part of the policy will ensure that the member's entire retirement benefit is not delayed pending resolution of a disputed item.



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V. RECOMMENDATION

The new law requires that the Board establish a procedure regarding compensation paid to enhance a member's retirement benefit. Staff recommends that the Board approve and adopt the proposed policy to ensure that CCCERA is in compliance with the new pension law when it goes into effect on January 1, 2013.

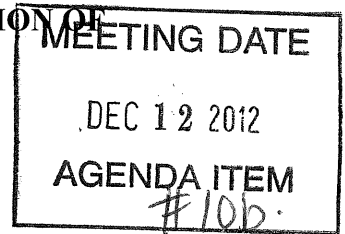


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CONTRA COSTA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

**POLICY REGARDING ASSESSMENT AND DETERMINATION OF
COMPENSATION ENHANCEMENTS**

Adopted: _____



PURPOSE:

The CCCERA Board of Retirement is required to establish a procedure for assessing and determining whether an element of compensation was paid to enhance a CCCERA member's benefit. (Government Code Section 31542, eff. January 1, 2013.) In keeping with this requirement, the Retirement Board has set forth the following procedure.

LEGAL AUTHORITY:

Government Code Section 31542 provides:

- (a) The board shall establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit. If the board determines that compensation was paid to enhance a member's benefit, the member or the employer may present evidence that the compensation was not paid for that purpose. Upon receipt of sufficient evidence to the contrary, a board may reverse its determination that compensation was paid to enhance a member's retirement benefits.
- (b) Upon a final determination by the board that compensation was paid to enhance a member's retirement benefit, the board shall provide notice of that determination to the member and employer. The member or employer may obtain judicial review of the board's action by filing a petition for writ of mandate within 30 days of the mailing of that notice.
- (c) Compensation that a member was entitled to receive pursuant to a collective bargaining agreement that was subsequently deferred or otherwise modified as a result of a negotiated amendment of that agreement shall be considered compensation earnable and shall not be deemed to have been paid to enhance a member's retirement benefit.

POLICY:

The following policies and procedures shall be effective as to the assessment and determination of whether an element of compensation was paid to enhance a member's retirement benefit.

I. STAFF REVIEW AND ASSESSMENT

With respect to all retirement applications with an effective date of retirement on or after January 1, 2013, the Board directs CCCERA staff to review all compensation included within the calculation of the member's final compensation within the meaning of California Government Code Sections 7522.32, 7522.34, 31641, 31462, 31462.1, 31462.11, and 31462.2, as applicable, for the purpose of making an initial assessment as to whether any item of compensation included in final compensation was paid to enhance a member's retirement benefit. In conducting such review and making such initial assessment, staff shall consider:

- a. Whether the item of compensation was earned within the period during which final compensation is to be calculated;
- b. Whether the compensation exceeds a members' base pay, and if so, whether the earnings codes reported are retirement compensable;
- c. Any other factors that cause staff to believe that an item of compensation included in final compensation was paid to enhance a member's retirement benefit; and
- d. Information and explanation provided by the member and the employer in response to CCCERA's request as to the facts and circumstances concerning an item of compensation that staff believes may have been paid to enhance the member's retirement benefit.

A member and the employer shall be given no less than 15 days to respond to such a written request. Staff may conduct such written and oral follow-up communication as staff believes is appropriate in the exercise of reasonable diligence.

If the payment of the member's benefit would be delayed by seeking resolution through the administrative processes set forth herein, CCCERA may process the benefit excluding the compensation in question. If it is later determined the compensation should be included, CCCERA will adjust the benefit retroactive to the effective retirement date.

II. PREPARATION OF WRITTEN ADMINISTRATIVE RECOMMENDATION, AND BOARD ACTION

- a. If after conducting the initial assessment described above, CCCERA staff believes that an item of compensation was paid to enhance a member's retirement benefit, staff shall prepare a written report to the Board of Retirement making an administrative recommendation to the Board that any item not be included in the calculation of the member's retirement benefit. The report shall contain a description of the reasons for staff's recommendation, including the specific facts and circumstances supporting staff's recommendation.
- b. The report shall be noticed and agendized for a regular meeting of the Board, at which time the Board will act upon staff's administrative recommendation.

Before the Board acts, CCCERA, the member, and the employer shall be given an opportunity to be heard by the Board.

- c. Written notice of the Board meeting and a copy of staff's report shall be provided to the member and the employer no later than 10 days before the recommendation is presented to the Board for action.

III. HEARING DE NOVO ON ADMINISTRATIVE RECOMMENDATION

- a. If the Board accepts staff's administrative recommendation, the member and the employer shall be given written notice of their right to make a request, in writing, for a hearing de novo before a hearing officer appointed by CCCERA. A written request for a hearing de novo must be submitted by the member and/or the employer within 10 days after mailing of the notice. The hearing de novo will be conducted within a reasonable amount of time after mailing of the written request for such a hearing.
- b. At the hearing de novo, the member and the employer may present evidence that an item of compensation as described in the administrative recommendation was not paid to enhance the member's retirement benefit, and CCCERA may present evidence to support the information stated in the administrative recommendation.
- c. The hearing officer will, within 10 days after conclusion of the hearing, prepare a written recommendation as to whether the item of compensation was or was not paid to enhance the member's retirement benefit. A copy of the hearing officer's recommendation will be submitted by the hearing officer concurrently to CCCERA, the member, and the employer.

IV. FINAL BOARD ACTION

- a. The hearing officer's written report will be noticed and agendized for the next regular meeting of the Board, provided that the members and the employer must be provided at least 10 days written notice of the meeting.
- b. At the meeting, the Board will make a final decision as to whether the item of compensation was paid to enhance the member's retirement benefit.
- c. CCCERA will provide the member and the employer written notice of the Board's decision with 5 days, which will inform the member and the employer of their right to seek judicial review of the Board's action by filing a petition for writ of mandate within 30 days after the mailing of that notice.
- d. If the Board finds the item of compensation should be included, staff will adjust the member's benefit to include said item, retroactive to the effective date of retirement.
- e. If the payment of the member's benefit would be delayed by seeking resolution through the administrative processes set forth herein, CCCERA may process the benefit excluding the compensation in question. If it is later determined the compensation should be included, CCCERA will adjust the benefit retroactive to the effective retirement date.