

AMENDED SBCERA Resolution No. 2020-8.01

APPROVAL OF APPEALS PROCESS FOR BENEFIT DETERMINATIONS ARISING OUT OF THE ALAMEDA SUPREME COURT DECISION

WHEREAS, on July 30, 2020, the California Supreme Court issued the “*Alameda* Decision”. The *Alameda* Decision overturns certain legal and equitable determinations of the First DCA in *Alameda Sheriffs’* and concludes that all amendments to the definition of Compensation Earnable in Government Code section 31461, enacted as a result of the Public Employees’ Pension Reform Act of 2013 and related statutory changes to CERL (“PEPRA”), effective January 1, 2013 are constitutional, and that CERL retirement boards may not be contractually bound or estopped by settlement agreements, board resolutions, or other similar actions, from implementing those amendments. The *Alameda* Decision further determines that CERL retirement boards may not include items in compensation earnable that sections 31460 and/or 31461 require them to exclude.

WHEREAS, on August 6, 2020, the Board adopted Resolution 2020-05 to comply with the *Alameda* Decision’s directives regarding mandatorily excluded pay items required by amendments to Government Code section 31461, effective January 1, 2013 (“PEPRA Exclusions”), and applied that directive to all retiree payroll for individuals who retired on or after PEPRA’s effective date of January 1, 2013. Effective with the August 2020 payroll, SBCERA will recalculate and adjust amounts paid to such retirees if their retirement allowances previously included the PEPRA Exclusions.

WHEREAS, as used herein, the term “PEPRA Exclusions” shall refer to any payments that are not permitted by subdivision (b)(2), (3) or (4) of Government Code section 31461 to be included in “compensation earnable,” including, among other items,

payments received by the member for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

WHEREAS, the Board, through Resolution 2020-5, directed staff to notify the affected members of the Board implementation of the *Alameda* decision, specifically the affected retirees with PEPRA exclusions in their final average compensation.

WHEREAS, the notice sent to the affected members provided a right to appeal the (1) recalculation of or other numeral data provided in the notice or (2) exclusion of any of the items identified for removal from final average compensation on the basis that the benefit was both “compensation” and “compensation earnable,” because, for example, pay was for services rendered within “normal working hours” of “persons in the same grade or class of positions during the position, and at the same rate of pay,” as the affected member was in at the time he or she rendered service, and thus should not have been excluded under subdivision (b)(3) of Government Code section 31461.

WHEREAS, the Board adopted Benefits Policy No. 025 regarding Benefit Appeals prescribing the process of a member to appeal a Board’s determination concerning benefits.

WHEREAS, it is the Board’s intent to ensure due process, as well as an expedient determination concerning an appeal brought by an affected member or SBCERA participating employer on behalf of its employees (SBCERA member) for purposes specifically related to an appeal of PEPRA excluded items, incorrect data included into the calculation of a member’s benefit, or the assertion the member actually was retired from SBCERA before the effective date of the law that SBCERA is applying to him or her. This Resolution prescribes steps of an appeal.

THEREFORE BE IT RESOLVED, that effective as of October 1, 2020, and as amended on December 3, 2020, the following actions are authorized by the BOARD and required of SBCERA:

1. The sole issue(s) for determination on the foregoing administrative appeals are as follows:

a. Whether the pay was “compensation” under Government Code section 31460 and “compensation earnable” under Government Code section 31461. For example, was the pay for services rendered within the “normal working hours” of a member’s position and of “persons in the same grade or class of positions during the period [the member rendered services] at the same rate of pay,” such that it is not mandatorily excluded under subdivision (b)(3) in Government Code section 31461.

b. Whether SBCERA calculations or other numerical data provided above are incorrect.

c. Whether the member actually was retired from SBCERA before the effective date of the law that SBCERA is applying to him or her.

The Board’s policy decisions implementing the law set forth in the *Alameda* decision are not administratively appealable issues, but rather are subject only to judicial review under Code of Civil Procedure section 1085.

2. Within 30 days of the postmark of the notice letter, the member shall submit an appeal request to the Chief Executive Officer and specify the basis for such appeal, using the form which will be made available on the SBCERA website. In addition, the member shall also provide supporting materials, if any, as part of their appeal to the CEO. If no appeal is received within the time prescribed, then the right to appeal has expired

and the member has waived the right to administratively appeal the determination of the issues set forth above. In the event the member requests an extension to submit an appeal, the CEO may provide an extension of not more than 30 days. In the event, a member or member group requests an extension beyond the initial 30 days, such request for an extension of time to submit an appeal or additional documentation, shall be granted by the CEO upon a showing of good cause and such extension may be for a reasonable period of time, but not to exceed 120 days. Good cause shall be determined by a careful review of relevant facts and circumstances provided by the member or member group that provides substantial grounds to support the grant of an extension. To establish good cause, the requester must show both relevance to the appeal and specific facts justifying the delay in submitting the appeal and/or documentation.

2.3. If an SBCERA participating employer files an appeal on behalf of its employees, then the appeal, specifying the basis for such appeal, with supporting materials, if any, shall be submitted to the CEO.

3.4. If there are members of the same grade and class of position appealing the same PEPPRA excluded item, then such appeal may be grouped together by SBCERA for purposes of analyzing the excluded item and a final determination of these appeals.

4.5. Within ~~60 days of receipt of the appeal~~ a reasonable period of time of receipt of the appeal, but not longer than 120 days after staff has received all relevant information from both the member or employer, the CEO or designee shall provide a written determination concerning the appeal.

a. If, based on a finding of facts and conclusions of law, it is determined that the excluded item is for services rendered within a member's "normal working hours"

and is provided to persons in the same grade or class of positions and at the same rate of pay at the time the member rendered services, then such pay item shall be placed on the agenda at Board's regular meeting for approval of staff's determination that the item is to be included in the members' compensation earnable. In addition, staff shall notify any member affected by this determination and recalculate the benefit accordingly.

b. In alternative, if based on a finding of facts and conclusions of law it is determined that the excluded item is for services rendered **outside** a member's "normal working hours" and/or is not provided to persons in the same grade and class of positions at the time the member rendered services, at the same rate of pay, then the affected member, or in the case where the determination affects a group of members with the same PEPRAs excluded items and such appeals have been grouped together, shall be referred to an Administrative Hearing.

c. If the issue on appeal is the question presented in Section 1.c. above, if the based on the findings of facts and conclusions of law the member actually was retired from SBCERA before the effective date of the law that SBCERA is applying to him or her, then staff shall recalculate the member's benefit. However, if the findings do not support a conclusion that the member actually was retired from SBCERA before the effective date of law that SBCERA is applying to him or her, then such matter shall be referred to an Administrative Hearing.

5.6. Where such appeal affects a group of members with the same PEPRAs excluded items and such persons are all part of the same grade and class of positions, then an Administrative Hearing may, upon direction by SBCERA, be conducted with all affected members of the group.

~~6.7.~~ The Administrative Hearing shall consist of a selected hearing officer, SBCERA's counsel, and the member or group of members with their counsel, if any or in the case of a participating employer appeal, the participating employer may have their counsel represent the entity on behalf of its employees in the administrative hearing. The issues to be disposed of are set forth in paragraph 1 above. The Administrative Hearing shall be conducted within ~~69~~0 days of assignment of a hearing officer.

~~7.8.~~ The Rules regarding a Formal Hearing set forth in SBCERA *Procedures for Disability Retirement Applications and Formal Hearings* (November 7, 2019) shall govern the Administrative Hearing process except that the time prescribed for the submission of prehearing statements, closing briefs, and issuance of subpoena(s) shall be modified as follows:

a. Member, Participating Employer on behalf of its employees, or Group of Members' pre-hearing statement served and filed not later than the 30th day following the assignment of a hearing officer.

b. SBCERA's pre-hearing statement served and filed not later than the 60th day following the assignment of a hearing officer.

c. A request for the issuance of a subpoena shall be requested no later than the 60th day following the assignment of a hearing officer and served on the witness no later than the ~~15~~th day prior to the hearing. The requesting party is responsible for any fees or costs associated with the service of the subpoena or the appearance of the witness at the hearing.

d. Closing briefs of the parties are due not later than the 30th day after the close of the hearing.

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e. In all cases, the assigned hearing officer not later than the 30th day after the submission of the closing briefs, shall submit a Proposed Findings of Fact and Recommended Decision.

8.9. Rule 30 of the *Procedures* shall govern the action by the Board and any judicial review of the decision shall be subject to Code of Civil Procedure section 1085. *Shelden v. Marin County Employees' Retirement Association* (2010) 189 Cal. App. 4th 458

IN WITNESS WHEREOF, the above Resolution for SBCERA is hereby adopted by the BOARD on this 1st3rd day of October-December 2020.

SAN BERNARDINO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

By: _____
Janice Rutherford, Chair

* * * * *

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, **Deborah S. Cherney**, Secretary to the BOARD of SBCERA, hereby certify the foregoing to be a full, true and correct copy of the record of the action taken by the BOARD, by vote of the members present, as the same appears in the Official Minutes of said Board at its meeting of October 1, 2020December 3, 2020.

Deborah S. Cherney