



BOARD OF RETIREMENT

Staff Report

File #: 22-225

Agenda Date: 6/2/2022

Agenda #: 11.

FROM: Debby Cherney, Chief Executive Officer

SUBJECT: AB 2493 - County Employees' Retirement: Disallowed Compensation /Benefit Adjustments

RECOMMENDATION:

Approve the submission of a letter of concern or opposition to the California State Legislature regarding AB 2493 - County Employees' Retirement: Disallowed Compensation /Benefit Adjustments.

BACKGROUND:

Assembly Member Chen introduced AB 2493 on February 17, 2022. If passed and signed into law as currently drafted, the bill will add section 31541.2 to the County Employees' Retirement Law of 1937 (CERL). The purpose of the bill is to provide relief to retired sworn safety members of county retirement systems whose retirement allowances are adjusted by plan implementation of the Public Employees' Pension Reform Act (PEPRA).

The language of the bill is similar to a bill passed in 2021 (SB 278) that provided relief to all CalPERS retirees whose retirement allowances were reduced due to error or omission, as defined in the statute. In the Senate Floor analysis on that bill, the bill identified that "According to CalPERS, in 2019 and 2020, there were a total of 18 adjustments due to disallowed compensation in the system." SB 278 was clearly targeting the "once in a blue moon" type error. The legislation itself also focused on CalPERS seeking "repayment of the purported overpayment directly from" retirees, as well as "substantial future reduction" in a retiree's monthly allowance.

By contrast, while the language of AB 2493 is similar, there are some striking contrasts to SB 278, most notably that the bill takes aim at all pay items that were disallowed as a direct result of the Supreme Court's decision in *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* (2020) 9 Cal.5th 1032 (*Alameda*). Those are not "once in a blue moon" errors; they are numerous, and they range from very small adjustments to larger ones. Notably too, the SBCERA Board has not authorized the recoupment of any overpaid amounts from retirees for the period preceding *Alameda*. Accordingly, that policy concern regarding the recoupment of years of overpayments from retirees does not exist with respect to SBCERA's implementation of *Alameda*. Nevertheless, AB 2493 would require a different approach to corrections that SBCERA has already implemented and is implementing. SBCERA anticipates that as many as 4,400 refunds will be paid ultimately on disallowed pay items as a result of *Alameda*, of which roughly 50% are safety members. Although AB 2493 is limited to public safety, if passed, it could be expanded to general members in a subsequent bill.

Administrative and Policy Problems with AB 2493:

AB 2493 requires that employers pay a penalty to retired members of a county retirement system operating under the CERL when the member's retirement allowance is reduced after July 30, 2020 due to the implementation of PEPRA compensation earnable limits. The retirement systems are required to provide an actuarial calculation of the penalty amount based on the formula provided in the bill. There is no mechanism in the bill to reimburse the retirement system for the actuarial calculations.

Following are specific concerns about the bill:

- Subsection (c) (3) (B) describes payments the employer shall make when a retired member's benefit is adjusted due to compensation that has been disallowed by the Board of Retirement. Subsection ii requires the employer to pay a penalty to the affected retirees based on an actuarial calculation. The actuarial calculations required may impose significant costs on the retirement system. In theory, state mandates on local government require reimbursement, but that rarely happens.
- The penalty imposed on the employer defeats the purpose of PEPRA. The court in *Alameda* stated county retirement boards do not have the authority to not follow the compensation limits imposed by PEPRA. The retirement boards should have imposed PEPRA limitations upon passage of the legislation effective January 1, 2013. Retired members whose benefits were initially based on disallowed compensation received benefits that were not authorized by statute, and those overpayments are thus reasonably characterized as a windfall of retirement, and ultimately, taxpayer funds. As noted, SBCERA attempted to minimize the impact on retirees by not collecting overpayments for pre-August 2020 time periods from affected retirees, but payment of further benefits in violation of PEPRA's mandates is contrary to sound public policy.
- Subsection (c) of proposed section 31541.2 is confusing when it states "This section shall also apply to determinations made on or after July 30, 2020, if an appeal has been filed and the sworn peace officer or firefighter, the retired sworn peace officer or firefighter, survivor, or beneficiary has not exhausted their administrative or legal remedies." Does this subsection limit application only to those members who filed an appeal?
- Subsection (c) (3) (A) (ii) refers to "compensation [that] was agreed to in a memorandum of understanding or collective bargaining agreement between the employer and the recognized employee organization as compensation for pension purposes and the employer and the recognized employee organization did not knowingly agree to compensation that was disallowed."

The Board of Retirement, not the employer or recognized employee organization, determines whether an element of pay is compensation earnable under Government Code section 31461 (a). This provision appears to be in conflict with the constitutional provision that gives the Board of Retirement plenary authority over retirement fund assets and charges the Board

of Retirement with administration of the retirement system. Furthermore, is SBCERA to follow the plain language of this provision and thus not implement the statute because memoranda of understandings do not address pensionability of pay items? Or, is SBCERA to conduct further administrative hearings on this topic, in addition to the approximately one dozen administrative appeals that Hearing Officers and/or the Board already have heard regarding *Alameda* implementation topics?

- Subsection (d) allows an employer to submit proposed or adopted portions of Memoranda of Understanding regarding items of compensation. Generally, the retirement system is not a party to MOU negotiations. This section imposes additional duties on the retirement system and expends retirement system funds for purposes other than payment of retirement benefits and necessary administrative costs.
- References to the California Code of Regulations in subsection (d) (2) are regulations pertaining to CalPERS. CalPERS has different statutes pertaining to compensation earnable and pensionable compensation. The cited regulations do not currently apply to county retirement systems that are required to promulgate their own policies and regulations pursuant to Government Codes sections 31525, 31526, 31527, and otherwise. Certain pay items that SBCERA includes in compensation earnable, such as certain annual leave cashouts are pensionable under CERL as currently implemented by SBCERA, but not under these CalPERS regulations. How would SBCERA reconcile those differences if this statute were enacted?
- Subsection (f) imposes a duty on the retirement system to meet and confer in good faith with an employee organization regarding the impact of disallowed compensation. The retirement system is not a party to labor negotiations. This subsection imposes additional duties on the retirement system and expends retirement system funds for purposes other than payment of retirement benefits and necessary administrative costs.

Staff recommends that the Board consider allowing the submission of a letter of concern or opposition to the bill's author. The California State Association of Counties (CSAC) has already submitted an opposition letter, a copy of which is attached as Exhibit A. Staff is informed that other statewide associations are likely to also submit letters of opposition.

BUDGET IMPACT:

None. However, if the bill is passed and signed into law, there will be significant costs on both SBCERA and its participating employers with safety members.

STRATEGIC PLANNING GOAL/OBJECTIVE:

Prudent Fiscal Management

COMMITTEE REVIEW:

This item was not reviewed by a committee.

STAFF CONTACT:

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ATTACHMENTS:

Exhibit A: CSAC Letter of Opposition