



RESOLUTION TITLE: *Alameda* Implementation as Applied to Compensation
Earnable and Pensionable Compensation

RESOLUTION NO. 2020-10-03

WHEREAS, the San Joaquin County Employees' Retirement Association ("SJCERA") and the SJCERA Board of Retirement ("Board") are governed by the County Employees Retirement Law of 1937 (Gov. Code sections 31450, et seq. ("CERL") and the Public Employees' Pension Reform Act of 2013 (Gov. Code sections 7522, et seq.), enacted by Assembly Bill 340 (regular session 2011-2012), effective January 1, 2013 ("PEPRA").

WHEREAS, the Board is required by Government Code sections 31460, 31461 and 31542, to determine *compensation* and *compensation earnable* for SJCERA members ("Tier 1") who are not PEPRA Members and is required by Government Code sections 31460, 31542, and 7522.34, to determine *compensation* and *pensionable compensation* for those individuals who are PEPRA members.

WHEREAS, the Board has taken numerous prior actions to determine retirement eligible compensation for legacy and PEPRA members, but the scope of Assembly Bill 197 (2012-2013) ("AB 197"), as it amended section 31461, and Assembly Bill 340 (2012-2013) ("AB 340") as it enacted section 7522.34 ("Pensionable Compensation Definition") has been unclear in light of pending litigation against other CERL retirement systems who had implemented the PEPRA Exclusions ("AB 197 Litigation"). As such, the Board did not fully implement AB 197 or the Pensionable Compensation Definition while awaiting the outcome of the AB 197 Litigation.

WHEREAS, on July 30, 2020, the California Supreme Court filed its decision in the AB 197 Litigation, in a decision entitled *Alameda County Deputy Sheriff's Assoc. et al., v. Alameda County Employees' Retirement Assn., et al.* (2020) 9 Cal.5th 1032 (the "*Alameda Decision*"). The *Alameda Decision* concludes that all amendments to the definition of compensation earnable in Government Code section 31461, enacted as a result of the PEPRA and related statutory changes to CERL, 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 retirement allowance calculations, either compensation earnable under section 31461, as amended, or pensionable compensation under section 7522.34, that the applicable statutes require them to exclude. 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," or by subdivision (c) of Government Code section 7522.34 to be included in "pensionable compensation," 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 *Alameda Decision* also held that CERL retirement boards have no discretion to include pay items in retirement allowance calculations that are excluded under CERL, PEPRA, or other applicable statutes even without the enactment of PEPRA ("*Alameda Exclusions*"), disapproving of statements to the contrary in footnote no. 6 of *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297 ("*Guelfi*

footnote 6"). As used herein, the term "*Alameda* Exclusions" shall refer to any benefits provided to members that a member may not receive directly in cash, which therefore are deemed "in-kind" benefits that are not "compensation" under Government Code section 31460. For SJCERA, such in-kind benefits are employer payments to deferred compensation plans on behalf of members.

WHEREAS, the Board hereby determines that the *Alameda* Decision and other applicable law require it to change its determinations of certain pay codes for either compensation earnable, pensionable compensation, or both, as resolved below.

WHEREAS, the *Alameda* Decision has resulted in certain excess member contributions (the "Overpaid Contributions") and benefit overpayments (the "Overpayments") attributable to PEPRA Exclusions and *Alameda* Exclusions, which the Board hereby determines should be corrected in accordance with Internal Revenue Code of 1986, as amended or replaced from time to time (the "Code"), Treasury regulations and other applicable Federal tax guidance, including Revenue Procedure 2019-19 (together, "Applicable Tax Law") and the Board's Correction of Errors or Omissions Policy last amended as of April 12, 2019 ("Correction Policy").

WHEREAS, this Resolution is intended to comply with the requirements of Applicable Tax Law and the Correction Policy as applicable.

NOW, THEREFORE BE IT RESOLVED, by the SJCERA Board of Retirement declares the following:

1. The foregoing Recitals are incorporated herein by this reference.
2. SJCERA shall comply with *Alameda's* directives regarding mandatorily excluded pay items, which includes the PEPRA Exclusions, and apply that directive to individuals who retire(d) from SJCERA on or after January 1, 2013 (including those who will retire on or after the date of this Resolution), effective with the first retiree payroll occurring after *Alameda*, that is, as of the SJCERA August retiree payroll, which was paid on September 1, 2020;
3. SJCERA shall comply with *Alameda's* directives regarding the Board's lack of authority to include the *Alameda* Exclusions in compensation, compensation earnable and pensionable compensation, as applicable, and apply that directive to all individuals who retire(d) from SJCERA on or after July 30, 2020, when the Supreme Court overturned *Guelfi* footnote 6 and SJCERA was thus on notice of that statement of law (including those who will retire on or after the date of this Resolution).
4. Overpayments shall be recouped in accordance with Applicable Tax Law and the Correction policy, provided that no recoupment shall be made directly from retirees for any Overpayments as a result of the PEPRA Exclusions having been included in the calculation of a retiree's retirement benefit prior to the issuance of the *Alameda* decision, except as may be required by the Internal Revenue Service to maintain federal tax qualification or a court of competent jurisdiction (any overpayments made on and after the September 1, 2020 payroll would be recouped).
5. SJCERA shall make a corrective distribution (including interest at SJCERA's current assumed rate of return of 7% ("Interest")) on the Overpaid Contributions reported on PEPRA Exclusions to retirees: (i) if such retirees were in active member service anytime on or after January 1, 2013; and (ii) the member's remaining contributions exceed any retirement benefit payments actually paid to the member on the basis of the uncorrected PEPRA Exclusions. In the event no contributions associated with the PEPRA Exclusions remain for a retiree (i.e., any Overpaid Contributions have already been distributed in the form of benefit payments), no corrective distribution of contributions shall be made.

6. SJCERA shall also make a corrective distribution (including Interest) to active and deferred members of Overpaid Contributions that they made on in-kind benefits that constitute *Alameda* Exclusions (i.e, all employer payments to deferred compensation plans on behalf of members), provided such members did not retire by July 30, 2020.

7. SJCERA shall also make a corrective distribution (including Interest) to active and deferred members for Overpaid Contributions reported and or associated with PEPRA Exclusions while in active service from January 1, 2013 through the date of implementation of the corrective distribution.

8. For clarification with respect to all corrective distributions provided for in this Resolution, to the extent a particular payment is permitted to be included in compensation earnable under section 31461 and so long as the timing of the payment did not result in prohibited Overpayments (e.g., "straddling" of years for leave cash outs, which is a "PEPRA Exclusion"), active member contributions attributable to such payments are not Overpaid Contributions. Accordingly, active member contributions will continue to be taken, and will not be refunded, on those leave cash outs because they properly contribute to the payment of the member's future SJCERA retirement allowance's inclusion of leave cash outs in an amount that does not exceed that which may be earned and payable in each 12-month period during the final average compensation period, regardless of when reported or paid.

9. All Overpayments (adjusted for earnings) shall be recouped from members and participating employers, including through payments on the unfunded actuarial liability, in accordance with Applicable Tax Law and recommendations from SJCERA's actuary.

10. Present impacted pay codes as soon as practicable to the Board to ratify exclusions from compensation earnable and pensionable compensation in compliance with *Alameda*, and communicate to SJCERA participating employers that member contributions are no longer to be taken on such pay codes.

11. Inform SJCERA members of the foregoing actions through appropriate means.

12. This resolution supersedes any previous resolutions for employer pay codes of employee compensation relating to compensation earnable and pensionable compensation to the extent they are inconsistent with the foregoing directives.

APPROVED by the Board of Retirement of the San Joaquin County Employees' Retirement Association on the 15th day of October 2020.

AYES:

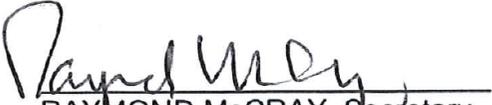
NOES:

ABSENT:

ABSTAIN:


MICHAEL RESTUCCIA, Chair

Attest:


RAYMOND McCRAY, Secretary