

March 27, 2023

Board of Retirement
Ventura County Employees' Retirement Association
1190 South Victoria Avenue, Suite 200
Ventura, CA 93003

SUBJECT: REVIEW AND DISCUSSION OF PROPOSED RESOLUTION TO IMPLEMENT CHANGES TO COMPENSATION EARNABLE RESOLUTION IN COMPLIANCE WITH THE CALIFORNIA SUPREME COURT DECISION, *ALAMEDA COUNTY SHERIFF'S ASSOC. ET AL., V. ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSN., ET AL (2020) 9 Cal.5th 1032 ("Alameda")* FOLLOWING GOVERNOR NEWSOM VETO OF ASSEMBLY BILL 826, IN ADVANCE OF ANTICIPATED ACTION ON APRIL 17, 2023

Dear Board Members:

Staff is providing the attached Resolution for review and discussion, in advance of formal proposed adoption on April 17, 2023. Ms. Ashley Dunning of Nossaman, VCERA's fiduciary counsel, will present the Resolution and take the Board through each provision, and she and staff will answer any questions.

Background

On October 12, 2020, the Board of Retirement adopted a Resolution to implement changes to compensation earnable in compliance with the California Supreme Decision, *Alameda County Sheriff's Assoc. et al., v. Alameda County Employees' Retirement Assn., et al (2020) 9 Cal.5th 1032 ("Alameda")*. The Board adopted the proposed Resolution, but deferred action on the "Alameda Exclusions" (paragraphs 3, 6, and 9), pending a filing of a complaint for declaratory relief with the Court. The County of Ventura demurred, and on July 2, 2021, the Court sustained the demurrer, finding that no cause of action existed because the Board declined to adopt the controversial paragraphs of the Resolution. Thus, the declaratory relief effort did not provide the guidance the Board was hoping to receive.

In the 2021 legislative session, SEIU and the County of Ventura sponsored Assembly Bill 826. The bill was an effort to find a legislative solution to ultimately allow the non-cashable in-kind portion of flex credit to be included in compensation earnable so that VCERA Legacy members could include the full amount of flex credit in the compensation used to calculate their retirement benefits. However, the bill met with opposition, and encountered obstacles, even after amendment to make it a "Ventura-only" bill. It eventually went into inactive status and so no legislative change was made in 2021.

Staff returned to the Board with an update on September 13, 2021, indicating intent to bring a recommendation at the following meeting. The Board had received letters from the County of Ventura and other stakeholders, requesting the Board delay any action to exclude non-cashable flex credit to allow the County more time to discuss the bill with SEIU, with the goal of being considered in January 2022. The Board made the following decision:

Take No Action at This Time, and Direct Staff to Provide the Board with Any and All Updates on the Issue; Bring the Item Back at the December 2021 Business Meeting for Reevaluation on Potential Action in January 2022.

AB 826 went back into active status during the 2022 legislative session. It was amended significantly to place a sunset provision on continued inclusion of full flex credit. The amended bill would have allowed VCERA Legacy members who retired on or before December 31, 2025, to include the entire flex credit allowance amount in their compensation used to calculate retirement benefits. This provision would have created a “window period”, in that the noncashable “in-kind” portion of the benefit, now recognized under *Alameda* as being outside the discretion of the Board to include, would nevertheless be allowed continued temporary inclusion but ultimately be excluded after that date. However, on September 29, 2022, Governor Newsom vetoed AB 823, saying in part:

“... this bill would inappropriately incentivize noncompliance with the Public Employees’ Pension Reform Act (PEPRA). The provisions, while more narrow than prior iterations, attempt to circumvent recent court decisions, undermine the intent of the PEPRA, and expose the local governments to increased costs and litigation.”

The veto letter from the Governor is attached.

Staff returned to the Board on October 24, 2022, following the veto of AB 826, again recommending adoption of the then-proposed Resolution to exclude the non-cashable portion of flex credit from compensation earnable, in accordance with *Alameda*. At that meeting, the Board of Retirement received multiple requests from the County and labor organizations to delay adoption of the Resolution until April of 2023, to allow for negotiate possible alternative benefits to help mitigate the impact of the compensation earnable reduction.

Retroactivity

In a letter dated October 14, 2022, County CEO Sevet Johnson, and Shawn Atin, Human Resources Director requested that the Board further delay action, and suggested that any exclusion should not go into effect until or impact anyone who retires prior to April 1, 2023. Staff has advised that such an action would create a window period – the very thing the Governor rejected with the veto of AB 826. The Board has since been briefed by VCERA’s tax counsel regarding the issue of retroactivity, and the risks of adopting an effective date later than that of July 30, 2020.

New Flex Credit Benefit Structure

The proposed Resolution has seen some changes since the October meeting, mainly to address the County of Ventura’s recent changes to the benefit structure, specifically to the consequences of opting out of a County or Union-sponsored healthcare plan. These changes have been adopted by the Board of Supervisors for five (5) Memorandums of Agreement (MOAs), and several other MOAs are still in the

negotiation stage. The new Benefits Program allowance structure will be implemented as soon as administratively possible; it provides a new “Medical Plan Opt-Out Option” for members who opt out, in which they do not receive a Flexible Credit Allowance (FCA), nor are they charged an Opt-Out Fee, but rather they receive an Opt-Out Allowance, while other members who opt in continue to receive an FCA. Under this new structure, the Opt-Out Allowance is the Maximum Baseline Cashable Amount that all similarly-situated members of a member’s grade or class may receive thereunder in a given plan year and is not subject to variation by a member’s ad hoc election each year that is unrelated to their job duties. The Opt-Out Allowance, therefore, is the maximum amount that may be included in compensation earnable.¹ The current proposed Resolution addresses pensionability under the new structure.

Conclusion

The VCERA Board of Retirement delayed the exclusion of the non-cashable portion of flex credit for Legacy members, first to attempt to resolve through litigation, then to await the outcome of AB 826. The Governor’s veto of the bill marked the end of potential legislative efforts to include the in-kind portion of flex credit for VCERA members. Staff has been directed to return to the Board with a proposed Resolution at the April 17, 2023, meeting. The Resolution is being presented to the Board today for advanced review.

Staff will be pleased to answer any questions the Board may have at its March 27, 2023, Business Meeting.

Sincerely,



Linda Webb
Retirement Administrator

¹ See VCERA General Counsel Memorandum of Jan. 31, 2023, Re: PENSIONABILITY ANALYSIS OF FLEXIBLE BENEFITS PROGRAM ALLOWANCES AS TO LEGACY MEMBERS UNDER CURRENT AND PENDING STRUCTURE