



ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION
BOARD OF RETIREMENT - Special Meeting
MINUTES

Thursday, December 17, 2015

Chair Elizabeth Rogers called the meeting to order at 2:45 p.m.

Trustees Present: Dale Amaral
Ophelia Basgal
Tarrell Gamble
Liz Koppenhaver
Elizabeth Rogers
Donald White
George Wood
Darryl Walker (*Alternate*)
David Safer (*Alternate*)

Trustees Excused: Annette Cain-Darnes
Keith Carson

Staff Present: Margo Allen, Fiscal Services Officer
Victoria Arruda, Human Resource Manager
Angela Bradford, Executive Secretary
Sandra Duenas, Benefits Manager
Joseph Fletcher, Chief Counsel
Kathy Foster, Interim Chief Executive Officer
Latrena Walker, Project and Information Services Manager

Staff Excused: Harsh Jadhav, Chief of Internal Audit
Betty Tse, Chief Investment Officer

BENEFITS APPEAL HEARING:

- **Appeal by *Rosalina Neeley* of staff determination.**

Joseph Fletcher, ACERA Chief Counsel, reported that this appeal is before the Board as a result of a Superior Court order in which Ms. Neeley successfully challenged the Board's previous decision on her appeal. Per the Court's Order, the matter was remanded to ACERA for the Board's reconsideration. Mr. Fletcher reported that he appointed Ashley Dunning, ACERA's Fiduciary Counsel, to serve as the Board's counsel for the matter and appointed Marguerite Malloy, ACERA Associate Counsel, to serve as ACERA's advocate and assist Staff with presentation of this matter. Mr. Fletcher referred to Ms. Dunning's December 17, 2015 memo addressing the issues, analyses, and the next steps involved in this matter.

Chairperson Rogers opened the hearing. Before presentation of the facts in this matter, the participants introduced themselves as follows:

1) Mary Ellyn Gormley, Assistant Alameda County Counsel; 2) Monna Radulovich of Wiley Price & Radulovich, IIP, Representative for the Superior Courts of Alameda; 3) Charles Woodson, Counsel for Rosalina Neeley (Ms. Neeley was also present); 4) Ashley Dunning of Nossaman, LLP, Counsel for the Board of Retirement; 5) Thuhang Hoang, ACERA Assistant Benefits Manager; and 6) Marguerite Malloy, ACERA Associate Counsel.

Ms. Hoang described two options prepared by Staff and presented to Ms. Neeley and stated that the calculations were generated using the same methodology applied whenever a member seeks to purchase service credit. Ms. Hoang reported that Staff met with Ms. Neeley on December 10, 2015 to review the options and to ensure that she understood the calculations for each option presented. After a brief discussion regarding ACERA's interest crediting and redeposit process, Ms. Hoang outlined Option 1 which would allow Ms. Neeley to acquire service credit for the missing period of approximately 4.1 years (1981 to 1985) as Tier I service, and the remaining 28 years of service would remain under Tier II service. Option 2 would allow Ms. Neeley to acquire service credit for the missing period of 4.1 years as Tier I and then she could convert the remaining 28 years of service to Tier I. Based on Ms. Neeley's option choice, the County and the Courts are required, and are prepared, to pay the designated employer contributions and interest due and payable to ACERA.

It was noted that the reason the Court remanded this matter to ACERA was because the Court did not follow how ACERA generated the interest and related calculations and the Court ordered ACERA to apply the *Barrett* case in this matter. Trustee Rogers outlined, and Ms. Malloy clarified, how ACERA arrived at its calculations.

Ms. Malloy reported that employee's wage information is forwarded to ACERA by the employer and that ACERA did not receive any retirement contributions from Ms. Neeley or from her employer until 1985. It was noted that Ms. Neeley did not address the issue of contributions for the pre-1985 period over 30 years. It was noted that ACERA also provided Ms. Neeley with numerous notifications and Member Statements from 2001 to 2012, which reflected her membership start date, Tier II statute and withholdings of member and employer contributions and interest. Ms. Malloy reported that due to the creation of Tier II, ACERA provided notices and information to its members (including Ms. Neeley), employers, and union organizations regarding the impact it would have on member contributions. Ms. Malloy explained that in the *Barrett* case, the employer misclassified general members as miscellaneous instead of safety members for over a 20 year period. As a result, general members filed a Writ of Mandate requesting reclassification and the Court concluded that the general members were, in fact, misclassified, but would be *required to pay arrearages in member contributions and interest for over the 20 year period*. It was noted that any benefit that Ms. Neeley would receive by making the required payments to acquire service credit would result in a lifetime enhancement to her benefit.

Charles Woodson, counsel for Ms. Neeley, then responded. Mr. Woodson stated that he spoke with County Representatives to determine whether or not ACERA ever received Ms. Neeley's signed 140 Form in 1981 (Administrative Record (AR) 367) when she became a full-time employee. Mr. Woodson further stated that in 2013, two 140 Forms were presented to the Board, which were dated 1981 and 1985, respectively - both Forms were signed by an Amelia Carlson, Alameda County Payroll Clerk. Mr. Woodson stated that the Form was revised in 1983 and in 1985, upon Ms. Neeley's enrollment into ACERA, the 1983 Form was the Form presented to the Board, marked AR367 (Form 140-2).

Mary Ellyn Gormley, counsel for the County, reported that she represented the County at the December 2013 Operations Committee meeting and stated that ACERA had two Forms in its files, marked AR367 (Form 140-2 dated 1981) and AR368 (Form 140-1 dated 1985). The Form marked AR367 was generated by the County on September 27, 1981 and indicated that as of September 25, 1981, Ms. Neeley's status changed from part-time to full-time status (changed from working 3.7 hours v. 7.5 hours) and was eligible for ACERA membership. It was noted that a copy of the Form was located in ACERA's files - the County did not have records of this Form in its files. The Form marked AR368 (Form 140-1 is dated November 3, 1985, generated by the County, and reflected Ms. Neeley's promotion. It was noted that both Forms were signed by a Ms. Amelia Carlson, Alameda County Payroll Clerk. Ms. Gormley stated that during the 2013 discussion, it was suggested that perhaps the County did not forward Ms. Neeley's 140 Form dated 1981 until 1985. However, after closer examination of the Forms, Ms. Gormley pointed out that the Form marked AR367 (Form 140-2), below Ms. Carlson's signature, reflected a revision in March 1981, which is the Form that was used. The Form marked AR368, below Ms. Carlson's signature, reflected a revision in June 1983. Therefore, the Form marked AR367 (Form 140-2) was generated and possibly forwarded to ACERA in September 1981.

After an explanation of the process for purchasing service credit, it was noted that Ms. Neeley signed a 140 Form that read, "...date of entry November 17, 1985." Ms. Malloy indicated that ACERA did not receive the Form marked AR367 (140-2 dated 1981), which is not signed by ACERA Staff, until 1985 along with the Form marked AR368, which included a note from ACERA Staff that read "...called Ms. Carlson to obtain the employee's Membership Enrollment Questionnaire" – the Questionnaire is retained by the employer.

Ashley Dunning presented her December 17, 2015 non-privileged memo which addressed the following issues: **1)** What is the proper legal bases for determining the amount of member contributions and interest that Ms. Neeley may be required by ACERA's Board to pay for service credit for the missing period of contributions (September 27, 1981 to November 16, 1985), which pursuant to the Court Order must be made per the *Barrett* matter; and **2)** In what manner may the ACERA Board exercise its discretion to determine whether Ms. Neeley should be required to pay lesser amounts, which per the Court Order, must also "afford Ms. Neeley the opportunity, if she wishes, to apply to the County for the funding of all or a portion of the amounts required to be paid by her."

In her memo, Ms. Dunning opined on the legal authority the Board should rely upon and described the type of discretionary authority the Board has. Ms. Dunning explained that under *Barrett*, ACERA's Board may require Ms. Neeley to pay: (i) the normal cost contributions that she would have been required to pay ACERA had she been enrolled in ACERA membership during the missing period; (ii) the interest that ACERA credited to member accounts, compounded semi-annually, as provided by Government Code (GC) sections 31472, 31611, 31615, and 31619 which are provisions that the ACERA Board, as an Article 5.5 County, must rely upon regarding interest crediting, and (iii) if Ms. Neeley chooses to exercise her right to convert all of her Tier II service credit to Tier I service credit, then also the additional normal cost contributions that she would have been required to pay for all periods following the missing period for that more valuable benefit, plus interest on those amounts crediting at the same rates as provided for the missing period. The cost information is detailed in ACERA's November 5, 2015 chart.

Ms. Dunning further opined that the Board should issue a written *Findings of Fact and Statement of Decision* that articulates the legal and factual bases for its determinations, and also observed that the Court specifically noted the following: "...that ACERA must afford Ms. Neeley the opportunity, if she wishes, to apply to the County for the funding of all or a portion of the amounts required to be paid by her." Ms. Dunning advised that the Board must now determine what amount it will require Ms. Neeley to pay to be afforded service credit for the missing period. Ms. Dunning outlined the possible equitable and discretionary determinations the Board may apply in this matter.

Monna Radulovich, counsel for the Court, informed the Board that Ms. Neeley did not become a Tier II Superior Court employee until January 2001 and that it was never brought to the Court's attention that there was an error with respect to Ms. Neeley's retirement benefit until she was laid-off in June 2009. Ms. Radulovich identified documents that reflected Ms. Neeley's entry date as of 1985. It was noted that one of the documents (Exhibit 6) read, "...please review this carefully and bring any errors to our attention..." These types of documents were provided to Ms. Neeley on an annual basis. There is also a copy of a paystub dated 1999 that identified Ms. Neeley as "Retirement 2", which refers to Tier II.

Mr. Woodson indicated that in 2009, Ms. Neeley's employer sent a letter regarding the missing period of contributions to ACERA Staff. Mr. Woodson expressed that ACERA Staff did not respond to the letter until 2011. However, Mr. Woodson did agree that Ms. Neeley does bear some responsibility and should be responsible for paying arrears contributions and interest for the missing period. However, the compounded interest for the missing period, and thereafter, should not be included in Staffs' calculations.

Ms. Malloy explained that ACERA Staff received several phone calls from Ms. Neeley over a two-year period wherein she constantly changed her requests regarding the type of calculations she wanted Staff to perform and asked Staff not to communicate with her directly, but to communicate with her through her employer.

Board members expressed their views regarding the fact that the adoption of Tier II was a significant event in Alameda County and that Ms. Neeley knew or should have known that she would be a member of this less valuable tier with a membership date in 1985. Board members also expressed that it would not be equitable or prudent to permit Ms. Neeley to obtain service credit for less than the cost that is required of other ACERA members who pay their full contributions on time when they are deducted from their salary. Board members also noted that Ms. Neeley is currently retired, and typically retired members are not permitted to obtain additional service credit but that given the equities here and in consideration of all of the facts and circumstances, Ms. Neeley should be afforded options to obtain additional service credit as provided in Options 1 and 2.

The hearing was closed at which time the Board recessed into Closed Executive Session to confer with its counsel.

ADJOURNMENT INTO CLOSED EXECUTIVE SESSION:

Pursuant to Government Code §54956.9 Conference with Legal Counsel- Existing Litigation:

- *Neeley v. ACERA*, Alameda County Superior Court Case No. RG 14718687

RECONVENE INTO OPEN SESSION TO REPORT ON ACTION TAKEN IN CLOSED EXECUTIVE SESSION:

The Board reconvened into Open Session and announced the following:

15-167

It was moved by George Wood and seconded by Liz Koppenhaver that the Board act pursuant to *Barrett*, and Gov. Code §§ 31472, 31611, 31615 and 31619, and other applicable law, and afford Ms. Neeley the ability to obtain Tier II service credit for the missing period, and, if she chooses, also to convert all of her subsequent Tier II service credit to Tier I service credit, provided that she deposit with ACERA the normal cost contributions she would have been required to pay during the missing period, and if she chooses option 2, also for all periods following the missing period for that Tier I benefit, plus interest on those amounts credited at the same rates as ACERA credited to member accounts for all of the specific time periods at issue, compounded semiannually as provided by statute. That cost information, including applicable interest crediting rates, is included in the ACERA Chart that was enclosed in Ms. Malloy's 11/5/15 letter to Mr. Woodson. This decision is also conditioned on Ms. Neeley's former employer(s) paying the necessary employer contributions, plus interest, to ACERA for the applicable periods, depending upon which option Ms. Neeley chooses. The Board directed Ms. Dunning to draft a proposed *Findings of Fact and Statement of Decision* that articulates the legal and factual bases for the Board's discretionary determination on this point and to seek comments from all counsel. The proposed *Findings of Fact and Statement of Decision* will be considered at the Board's January 2016 meeting.

The *Statement* will specifically articulate how the Board is exercising its discretion with respect to the determination of both the member and employer contribution amounts due, including interest owed, by each to *ACERA* and related matters. The motion carried 5 Yes (*Amaral, Basgal, Koppenhaver, Rogers, Wood*), 1 Opposed (*Gamble*).

PUBLIC INPUT

- None

ADJOURNMENT:

The meeting adjourned at approximately 4:43 p.m.

Respectfully Submitted,



Kathy Foster
Interim Chief Executive Officer

1/21/16

Date Adopted