

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Calculation of Final
Compensation of:

CARLOS SANCHEZ,

Respondent

and

CITY OF SANGER,

Respondent.

Case No. 2011-1098

OAH No. 2012050809

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on December 6, 2012, in Fresno, California.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Respondent Carlos Sanchez represented himself.

No appearance was made by or on behalf of respondent City of Sanger (City).

Evidence was received, the record was closed, and the matter was submitted for decision on December 6, 2012.

SUMMARY

The sole issue to be determined on appeal is whether the employer-paid deferred compensation and flexible benefit compensation can be included as "special compensation" in Mr. Sanchez's reportable compensation. For the reasons discussed below, neither item was included in Mr. Sanchez's payrate and neither qualifies as "special compensation."

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED December 27 20 12

J. P. O'Connell

Therefore, CalPERS properly excluded both items from his reportable compensation and its calculation of his retirement benefit.

FACTUAL FINDINGS

Procedural Background

1. The Statement of Issues was filed on August 24, 2012, by Marion Montez, Assistant Division Chief of the Customer Account Services Division, CalPERS, in her official capacity.
2. The City was properly served with the Statement of Issues and Notice of Hearing pursuant to Government Code section 11505, subdivision (c).
3. This matter was called on the date and at the time and location specified in the Notice of Hearing. No one appeared for or on behalf of the City, and an evidentiary hearing on its rights and responsibilities in this matter was conducted as a default proceeding against the City pursuant to Government Code section 11520.

Factual Background

4. Mr. Sanchez was employed as the City's Administrative Services Director from July 1, 1996, through January 31, 2010. During his employment, he was a member of CalPERS pursuant to a contract between the City and CalPERS.¹ The contract provided for a three-year "final compensation period" for purposes of calculating members' retirement benefits.
5. Mr. Sanchez was a member of the Sanger City Executive Staff Organization (Executive Staff), the exclusive employee organization for the City's Fire Chief; Police Chief; Administrative Services Director; Director of Development Services; Public Works Director; Parks, Recreation & Community Services Director; City Clerk; and Finance Director pursuant to Government Code section 3500 et seq.² In addition to being a member

¹ Government Code section 20460 provides: "Any public agency may participate in and make all or part of its employees members of this system by contract entered into between its governing body and the board pursuant to this part. However, a public agency may not enter into the contract within three years of termination of a previous contract for participation."

² The Police Chief became a member of the Executive Staff with the adoption of the Memorandum of Understanding (MOU) that was effective January 1, 2004. The Finance Director became a member of the Executive Staff with the adoption of the MOU that was effective July 16, 2009.

of the Executive Staff, he was the vice president of the organization and participated in negotiating the terms of the applicable MOU's.

6. The first applicable MOU took effect January 1, 2004. It expired June 30, 2007, after being extended for one year on November 16, 2006. The MOU specified a payrate of \$6,304 to \$7,663 per month for Mr. Sanchez. That payrate was increased to \$6,619 to \$8,046 per month, effective December 24, 2005, and \$6,950 to \$8,448 per month, effective June 24, 2006.

7. In addition to specifying the above payrates, the MOU provided the following additional benefits:

Upon three (3) consecutive "Outstanding" performance evaluations Employee shall receive 2.5% of salary to be used for deferred compensation. Thereafter, only with successive "Outstanding" performance evaluations shall Employee continue to receive 2.5%.

[¶]...[¶]

City shall provide \$747 to each Employee annually to be utilized as salary, deferred compensation or for insurance.

[¶]...[¶]

Employees eligible to retire from City service under a non-disability retirement at 75% or more of base pay, shall be eligible, for each year that they are given an overall performance evaluation of "Outstanding," to receive, in addition to any other compensation and without regard to the maximum salary authorized for the employee's position, longevity incentive pay in the amount of five (5%) percent per year, up to a maximum of 25%.

8. The City and the Executive Staff negotiated another MOU that took effect July 1, 2007, and expired July 15, 2009.³ The MOU made no changes to the payrate for Mr. Sanchez that was effective June 24, 2006. It also contained the same language about deferred compensation and longevity incentive pay as the previous MOU. And while the

³ The MOU was originally supposed to expire June 30, 2010. However, the MOU expressly provided for the reopening of negotiations between the City and the Executive Staff "in the event the City grants a COLA or other across-the-board increase in compensation during the term of this agreement." Negotiations were reopened, and the parties agreed on the terms of the MOU discussed below.

new MOU continued to offer flexible benefit compensation, it: 1) limited the benefit to employees hired prior to July 1, 2007; 2) set the amount of the benefit as a percentage of salary (10 percent), as opposed to a specific dollar amount; and 3) expanded the manner in which the benefit could be used to include contributions to a 401(a) retirement plan.

9. The final MOU applicable to this appeal took effect July 16, 2009, and was effective the remainder of Mr. Sanchez's employment with the City. No changes were made to Mr. Sanchez's payrate. However, deferred compensation, flexible benefits compensation, and longevity incentive pay were each discontinued.

10. During his last three years of employment with the City, Mr. Sanchez's payrate was \$8,448 per month.

11. On January 1, 2010, Mr. Sanchez signed a Service Retirement Election Application (Application) and submitted it to CalPERS. He designated February 1, 2010, as the effective date of his retirement.

CalPERS' Determination of Reportable Compensation

12. Cherise Canning is a Compensation Review Analyst employed in CalPERS' Employer Services Division. Her duties include performing base compensation calculations and determining whether the compensation reported to CalPERS is accurate. After receiving Mr. Sanchez's Application, Ms. Canning reviewed the Payroll Detail Information (Payroll Detail) provided by the City, which covered the period from July 2006 through January 2010. The Payroll Detail showed Mr. Sanchez's monthly payrate, as well as items of compensation the City reported as "special compensation." Ms. Canning was unable to determine the propriety of all the items reported and contacted the City for clarification. Specifically, she inquired about special compensation reported from February 2007 through January 2010.

13. Ms. Canning received no response from the City after multiple requests for information. Therefore, so as to not delay payment of Mr. Sanchez's retirement benefits, she directed the "benefits section" at CalPERS to calculate his benefits based solely on the payrate reported by the City and without regard to any of the reported items of special compensation.

14. Eventually, Barbara Mergan, the City Clerk and Assistant Personnel Officer for the City, responded to Ms. Canning's inquiries and explained the following items of special compensation which, according to the Payroll Detail, were paid on the following dates:

a: Employer paid member contribution to CalPERS:⁴ July 2006 through July 2007 (\$308.04),⁵ July 2007 through August 2008 (\$335.54), September 2008 through July 2009 (\$249.25), and August 2009 through January 2010 (\$245.40);

b: Merit pay, bilingual pay, and deferred compensation: July 2006 through July 2007 (\$565.36); and

c: Merit pay, bilingual pay, deferred compensation, and flexible benefit: July 2007 through July 2009 (\$955.27).

15. Additionally, Ms. Mergan explained through an exchange of emails with Ms. Canning that Mr. Sanchez's flexible benefit compensation was not a salary deduction, but a premium that was added to his base pay. Ms. Mergan also stated that the amount of Mr. Sanchez's deferred compensation contribution was added to his base salary, taken as a salary deduction, and paid to his deferred compensation account. But the publicly available pay schedules applicable to Mr. Sanchez's position during the relevant time period showed a maximum monthly salary of \$8,448, and neither the flexible benefit compensation nor the deferred compensation was included in any of those pay schedules. Furthermore, the City reported both items as "special compensation" on the Payroll Detail, rather than base salary.

16. On February 28, 2011, CalPERS sent Mr. Sanchez correspondence advising him that it had determined that the flexible benefit compensation he received did not qualify as reportable compensation. Therefore, CalPERS excluded the amount of that compensation from the calculation of his monthly retirement benefit. The correspondence also informed Mr. Sanchez of his right to appeal CalPERS' determination.

17. On March 23, 2011, Mr. Sanchez sent correspondence to Lori McGartland, Chief of CalPERS Employer Services Division, appealing CalPERS' determination. He argued:

In the Memorandum of Understanding (MOU) that determines my compensation with the City of Sanger, it provided for a salary option among four options for a 10 percent flexible benefit compensation. I elected the salary option. The other three options were deferred compensation, for insurance, or for a 401(a) retirement plan. My appeal position is that this election modifies my normal monthly rate of pay. The schedules provided to CalPERS should have reflected the modification

⁴ A contracting agency may pay all or a portion of its member-employees' contributions to CalPERS. (Gov. Code, § 20691.)

⁵ The amounts listed in parenthesis correspond to separate line item entries for special compensation on the Payroll Detail during the applicable time period. The evidence did not establish whether each entry reflected a separate pay period.

created by the salary compensation option scheduled in the MOU. The MOU is a publicly available document that determines my salary for services rendered on a full-time basis during normal working hours....

Mr. Sanchez concluded his correspondence by stating:

The salary option is either special compensation as defined in Government Code section 20636(c)(1) or becomes part of the payrate as defined in Government Code section 203636(b)(1) [*sic*]. Note that the MOU is a publicly available document and schedules the salary option in descriptive terms. If the salary compensation does not qualify as special compensation, then my top salary step is modified by this salary compensation and should be reported as part of the monthly payrate.

18. On June 23, 2011, CalPERS sent Mr. Sanchez an amended denial letter informing him of its determination that the City's payments for deferred compensation did not qualify as reportable compensation and were being excluded from the calculation of his monthly retirement benefit. The correspondence also informed him of his appeal rights.

19. Mr. Sanchez did not respond to CalPERS' June 23, 2011 correspondence. At hearing, CalPERS presented evidence in support of its position that the flexible benefit compensation and deferred compensation did not constitute reportable compensation, and did not raise any argument over Mr. Sanchez not filing a separate appeal from the amended denial letter. Therefore, the Board has jurisdiction to review both denial letters from CalPERS.

Mr. Sanchez's Contentions

20. Mr. Sanchez testified at hearing and explained he did not realize the importance of "publicly available pay schedules" in terms of CalPERS' calculation of a member's retirement benefits. Had he understood the importance of such documents when he negotiated the terms of the applicable MOU's, he would have focused his efforts more on the attached pay schedules than on the language in the body of the MOU. While he admitted he should have familiarized himself with the laws pertaining to the calculation of a member's retirement benefits and was hesitant to "point fingers," he felt the City Clerk had a duty to be familiar with such laws as the Assistant Personnel Officer. Had she been familiar with the applicable law, he believed the pay schedules would have more accurately reflected the parties' intent with regard to the amounts of the employees' payrates. Mr. Sanchez pointed to the delay in Ms. Mergan's response to Ms. Canning's inquiries as further evidence of Ms. Mergan's lack of appropriate training. Mr. Sanchez also argued that the flexible benefits compensation could qualify as longevity pay because it was offered only to those employees hired prior to July 1, 2007. But the MOU's that provided flexible benefits compensation also had a separate provision for longevity pay.

21. Mr. Sanchez's testimony was not persuasive. To the extent his testimony can be construed as asserting a claim of estoppel, such defense fails for lack of evidence as explained in Legal Conclusion 8. He introduced no evidence of privity between the City and CalPERS.

LEGAL CONCLUSIONS

Background

1. The appellate court in *Oden v. Board of Administration of the Public Employees' Retirement System* (1994) 23 Cal.App.4th 194, described CalPERS as follows:

The Public Employees' Retirement Law (PERL, Gov. Code, § 20000 et seq.) establishes PERS, a retirement system for employees of the state and participating local public agencies. PERS is a prefunded, defined benefit plan which sets an employee's retirement benefit upon the factors of retirement age, length of service, and final compensation. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478 [280 Cal.Rptr. 847].) Retirement allowances are therefore partially based upon an employee's compensation. An employee's compensation is not simply the cash remuneration received, but is exactly defined to include or exclude various employment benefits and items of pay. ([former] § 20022.)⁶ The scope of compensation is also critical to setting the amount of retirement contributions, because PERS is funded by employer and employee contributions calculated as a percentage of employee compensation.⁷ (*City of Sacramento v. Public Employees Retirement System, supra*, at p. 849.)

(*Id.*, at p. 198.)

⁶ Predecessor statute to Government Code section 20630.

⁷ To clarify:

PERS determines employer contribution rates based on compensation figures and actuarial assumptions. PERS periodically adjusts employers' rates of contribution to compensate for any inaccuracy in those assumptions. Employee contributions, in contrast, are fixed by statute.

(*Hudson v. Board of Administration of the Public Employees' Retirement System* (1997) 59 Cal.App.4th 1310, 1316.)

Burden of Proof

2. Mr. Sanchez has the burden of proving that the deferred compensation and flexible benefits compensation that he received qualify as “special compensation.” (See, *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn. 5.)

Applicable Law

3. Government Code section 20630 defines “compensation” as follows:

(a) As used in this part, “compensation” means the remuneration paid out of funds controlled by the employer in payment for the member’s services performed during normal working hours or for time during which the member is excused from work because of any of the following:

(1) Holidays.

(2) Sick leave.

(3) Industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code, Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or Section 44043 or 87042 of the Education Code.

(4) Vacation.

(5) Compensatory time off.

(6) Leave of absence.

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.

4. Government Code section 20636 defines “compensation earnable,” as is relevant here, as follows:

(a) “Compensation earnable” by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b)(1) “Payrate” means the normal monthly rate of pay or base

pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. "Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e).

[¶]...[¶]

(c)(1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions....

5. California Code of Regulations, title 2, section 571, contains the *exclusive* listing of items that may be considered "special compensation" for employees of contracting agencies. (See, Gov. Code, § 20636, subd. (c)(6) ["The board shall promulgate regulations that delineate more specifically and *exclusively* what constitutes 'special compensation' as used in this section...."]; italics added.)

(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement:

(1) INCENTIVE PAY

Bonus – Compensation to employees for superior performance such as "annual performance bonus" and "merit pay." If provided only during a member's final compensation period, it shall be excluded from final compensation as "final settlement" pay. A program or system must be in place to plan and identify performance goals and objectives.

Dictation/Shorthand/Typing Premium – Compensation to clerical employees for shorthand, dictation or typing at a specified speed.

Longevity Pay – Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.

Management Incentive Pay – Compensation granted to

management employees in the form of additional time off or extra pay due to the unique nature of their job. Employees within the group cannot have the option to take time off or receive extra pay. This compensation must be reported periodically as earned and must be for duties performed during normal work hours. This compensation cannot be for overtime, nor in lieu of other benefits excluded under the statutes, nor for special compensation not otherwise listed in this Section 571.

Marksmanship Pay – Compensation to local police officers, county peace officers and school police or security officers who meet an established criterion such as “certification” as a marksperson.

Master Police Officer – Compensation to local police officers, county peace officers and school police or security officers who meet specified requirements, years of employment, performance standards, education, Peace Officer Standard Training (POST), and perform a specialty assignment.

Physical Fitness Program – Compensation to local safety members and school security officers who meet an established physical fitness criterion.

Value of Employer-Paid Member Contributions (EPMC) – The full monetary value of employer-paid member contributions (EPMC) paid to CalPERS and reported as an item of special compensation on behalf of all members in a group or class.

The value of EPMC is calculated on all “compensation earnable” excluding the special compensation of the monetary value of EPMC paid to CalPERS by the employer under Government Code section 20636(c)(4), thus eliminating a perpetual calculation.

(A) A resolution or ordinance of the governing body must be provided to CalPERS indicating the group or class, effective date, and the percent or amount of EPMC being paid and reported as an item of special compensation. The resolution or ordinance must be formally adopted by the employer’s governing body, and submitted to CalPERS for review and approval.

(B) The resolution or ordinance must specify that the value of EPMC will be reported as an item of special compensation

consistently, for all members in the affected group or class of employment – except that the employer’s governing body may elect a “time-in-grade exception” which shall only apply to persons newly-hired into the pertinent group or class of employment.

(C) To be classified as “newly-hired,” a member of the group or class must not have been previously hired or retained by the employer in any capacity whatsoever.

(D) The time-in-grade exception must be elected in the same resolution or ordinance, or by amendment thereto, as adopted by the employer’s governing body for the purpose of paying and reporting the value of EPMC, pursuant to this Section 571. The exception can only be used for the value of EPMC, and not for any other item of special compensation.

1. The time-in-grade exception must be applied consistently to all newly-hired employees in the pertinent group or class.

2. The time-in-grade requirement may be incremental, not to exceed a total of five (5) years. For example, the initial requirement may be three years for paying fifty percent (50%) with increases of twenty-five percent (25%) for each additional year of time-in-grade.

3. Once the initial time-in-grade requirement has been met by a newly-hired employee, the employer shall begin paying and reporting the value of EPMC for him or her to the same extent as for all others in the pertinent group or class.

(E) To implement the time-in-grade exception, the employer’s governing body must acknowledge that it may experience an upward adjustment to its employer contribution rate. The acknowledgment must be included in the resolution or ordinance by which the employer’s governing body elected to pay and report EPMC as an item of special compensation, by adoption or amendment thereto.

(F) The full terms of the resolution or ordinance by which the employer’s governing body elects to pay and report the value of EPMC as an item of special compensation – along with any time-in-grade exception for newly-hired employees – must be incorporated into the written labor agreement that pertains to the affected group or class of employment.

The time-in-grade exception from paying and reporting the value of EPMC as an item of special compensation pursuant to this Section 571, is separate and apart from the time-in-grade exception from paying EPMC pursuant to Section 569 of these regulations. Both of these exceptions are separate and apart from, nor do they apply to, the process for converting EPMC to payrate during the period of final compensation, pursuant to Section 20692 of the Government Code.

Off-Salary-Schedule Pay – Compensation in addition to base salary paid in similar lump-sum amounts to a group or class of employees. These payments are routinely negotiated through collective bargaining in lieu of increases to the salary schedule. These payments are based on a similar percent of scheduled salary not to exceed six percent (6%) per fiscal year. The contracting agency or school employer may adopt similar action for non-represented groups or classes of employment as were negotiated through collective bargaining.

(2) EDUCATIONAL PAY

The items of special compensation outlined below do not include reimbursement to an employee for the cost of an application or test, books, tuition or travel.

Applicator's Differential – Compensation to employees who are required to maintain a Qualified Pesticide Applicator's Certificate.

Certified Public Accountant Incentive – Compensation to miscellaneous employees passing an exam and receiving a license as a Certified Public Accountant.

Educational Incentive – Compensation to employees for completing educational courses, certificates and degrees which enhance their ability to do their job. A program or system must be in place to evaluate and approve acceptable courses. The cost of education that is required for the employee's current job classification is not included in this item of special compensation.

Emergency Medical Technician Pay – Compensation to safety employees who obtain and maintain an emergency medical technical (EMT) certification.

Engineering Registration Premium – Compensation to engineers who have taken and passed a California engineering proficiency exam and are registered with the State of California.

Government Agency Required Licenses – Compensation to employees receiving and maintaining a license required by government or regulatory agencies to perform their duties.

International Conference of Building Officials (ICBO) Certificate – Compensation to building inspectors who obtain and maintain an International Conference of Building Officials (ICBO) certificate in one or more certified areas.

Mechanical Premium (Brake Adjustment License, SMOG Inspector License) – Compensation to employees who obtain and maintain state-required mechanical licenses.

National Institute of Automotive Service Excellence (NIASE) Certificate – Compensation to mechanics who obtain and maintain a National Institute of Automotive Service Excellence (NIASE) certificate.

Notary Pay – Compensation to clerical employees who obtain and maintain a notary public certificate from the State of California or are deputized by an agency's chief administrative officer to sign legal or financial documents for the agency.

Paramedic Pay – Compensation to employees who obtain and maintain certification in auxiliary medical techniques.

Peace Officer Standard Training (POST) Certificate Pay – Compensation to local police officers, county peace officers and school police or security officers who obtain Peace Officer Standard Training (POST) certification.

Reading Specialist Premium – Compensation to certificated employees who have obtained special training and provide literacy instruction as part of their teaching duties.

Recertification Bonus – Compensation to local firefighters who obtain and maintain a fire safety and prevention certificate for a specified period of time.

Special Class Driver's License Pay – Compensation to school bus drivers or street maintenance employees who are required to

obtain and maintain a special class driver's license to perform their duties.

Undergraduate/Graduate/Doctoral Credit – Compensation to school district employees who are required to obtain a specified degree.

(3) PREMIUM PAY

Temporary Upgrade Pay – Compensation to employees who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration.

(4) SPECIAL ASSIGNMENT PAY

Accountant Premium – Compensation to rank and file employees who are routinely and consistently responsible for developing the employer's budget.

Administrative Secretary Premium – Compensation to an administrative secretary responsible for coordinating meetings, plans and other specialized activities for the governing body of the contracting agency or school employer.

Aircraft/Helicopter Pilot Premium – Compensation to safety employees who are routinely and consistently assigned as aircraft/helicopter pilots.

Asphalt Work Premium – Compensation to miscellaneous employees who are routinely and consistently assigned to mix, transport and/or apply a tar-like substance for sidewalks, roads, roofs and/or parking lots.

Audio Visual Premium – Compensation to miscellaneous employees who are routinely and consistently responsible for operating audio visual equipment.

Auditorium Preparation Premium – Compensation to school employees who are routinely and consistently assigned to prepare auditorium(s), i.e. setting up stages, lighting, props and chairs for performing arts purposes.

Bilingual Premium – Compensation to employees who are routinely and consistently assigned to positions requiring communication skills in languages other than English.

Branch Assignment Premium – Compensation to employees who are routinely and consistently assigned to a branch office or work site that is identified as “rural” or “remote” in the written labor agreement.

Canine Officer/Animal Premium – Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to handle, train and board a canine or horse. Compensation shall not include veterinarian fees, feed or other reimbursable expenses for upkeep of the animal.

Cement Finisher Premium – Compensation to miscellaneous employees who are routinely and consistently assigned to finish cement work, e.g. watering, brushing or surfacing.

Circulation Librarian Premium – Compensation to library staff who are routinely and consistently assigned to the circulation desk of the library.

Computer Operations Premium – Compensation to employees who have special knowledge of computer processes and applications.

Confidential Premium – Compensation to rank and file employees who are routinely and consistently assigned to sensitive positions requiring trust and discretion.

Contract Administrator Coordinator Premium – Compensation to school employees who routinely and consistently coordinate administrative contracts for instruction or facility maintenance.

Crime Scene Investigator Premium – Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to analyze and explore a crime scene.

Critical Care Differential Premium – Compensation to nursing staff who are routinely and consistently assigned to critical and intensive medical or psychological care areas.

D.A.R.E. Premium – Compensation to local police officers, county peace officers and school police or security officers who routinely and consistently provide training to students on drug abuse resistance.

Detective Division Premium – Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to a detective or investigative division or intelligence duties.

Detention Services Premium – Compensation to employees who are routinely and consistently assigned to areas where criminally charged persons are confined and nursing staff who are routinely and consistently assigned to an adult facility where criminally charged persons are confined.

DUI Traffic Officer Premium – Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to enforce Driving Under the Influence (DUI) of alcohol or drug laws.

Extradition Officer Premium – Compensation to local police officers and county peace officers who are routinely and consistently assigned to return a person to the custody of another jurisdiction.

Fire Inspector Premium – Compensation to “fire inspector” personnel who are routinely and consistently assigned to inspect buildings and other permanent structures for compliance with governmental safety standards.

Fire Investigator Premium – Compensation to “fire investigation” personnel who are routinely and consistently assigned to investigate causes of destructive burning.

Fire Prevention Assignment Premium – Compensation to rank and file local firefighters who are routinely and consistently assigned to specific fire inspections and investigative work during normal hours of employment that may differ from the work schedule of fire suppression personnel.

Fire Staff Premium – Compensation to rank and file local firefighters who are routinely and consistently assigned to administrative work during normal hours of employment that may differ from the work schedule of fire suppression personnel.

Flight Time Premium – Compensation to safety employees for time spent as co-pilot or crew on work related air missions.

Float Differential Premium – Compensation for nurses not specifically assigned to a specific station.

Front Desk Assignment (Jail) – Compensation to employees staffing a jail who are routinely and consistently assigned the duty of responding to questions from the public.

Fugitive Officer Premium – Compensation to local police officers and county peace officers who are routinely and consistently assigned to pursue persons who have or are fleeing from justice.

Gang Detail Assignment Premium – Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to enforce laws relating to a group of individuals banded together for unlawful activities.

Grading Assignment Premium – Compensation to employees who are routinely and consistently assigned to inspect the degree of rise or descent of a sloping surface.

Hazard Premium – Compensation to employees who are routinely and consistently exposed to toxic, radioactive, explosive or other hazardous substances or perform hazardous activities to implement health or safety procedures.

Heavy/Special Equipment Operator – Compensation to employees who are routinely and consistently assigned to operate heavy equipment or specialized equipment.

Height Premium – Compensation to employees who are routinely and consistently required to work on ladders or mechanical devices at heights over 40 feet.

Housing Specialist Premium – Compensation to city housing specialists who are routinely and consistently assigned to perform administrative functions of the housing division.

Juvenile Officer Premium – Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to enforce laws that restrict the activities of juveniles.

Lead Worker/Supervisor Premium – Compensation to

employees who are routinely and consistently assigned to a lead or supervisory position over other employees, subordinate classifications, or agency-sponsored program participants.

Library Reference Desk Premium – Compensation to library staff who are routinely and consistently assigned to provide direction or resources to library patrons.

Maintenance Premiums:

Gas Maintenance Premium – Compensation to maintenance employees who are routinely and consistently assigned to inspect gas construction, repair instruments or perform pipeline welder duties.

Plumber Irrigation System Premium – Compensation to plumbers who are routinely and consistently assigned as irrigation systems plumbing specialists.

Refuse Collector Premium – Compensation to maintenance employees who are routinely and consistently assigned to collect refuse.

Street Lamp Replacement Premium – Compensation to maintenance employees who are routinely and consistently assigned to replace street lamps from an aerial bucket.

MCO Instructor Premium – Compensation to miscellaneous employees who are routinely and consistently assigned to train Motor Coach Operators, i.e. bus drivers.

Motorcycle Patrol Premium – Compensation to local police officers and county peace officers who are routinely and consistently assigned to operate and/or patrol on motorcycle.

Mounted Patrol Premium – Compensation to local police officers and county peace officers who are routinely and consistently assigned to patrol on horseback.

Narcotic Division Premium – Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to drug enforcement.

Paramedic Coordinator Premium – Compensation to paramedics

who are routinely and consistently assigned to coordinate training activities in auxiliary medical techniques.

Park Construction Premium – Compensation to groundskeepers who are routinely and consistently assigned to build park equipment.

Park Maintenance/Equipment Manager Premium – Compensation to park maintenance employees who are routinely and consistently assigned to equipment management and other administrative duties.

Parking Citation Premium – Compensation to employees who are routinely and consistently assigned to read parking meters and cite drivers who have violated parking laws.

Patrol Premium – Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to patrol detail.

Police Administrative Premium – Compensation to rank and file police officers, county peace officers and school police or security officers who are routinely and consistently assigned to police administration to provide support for the police chief and command staff in the operation of the police department.

Police Investigator Premium – Compensation to rank and file local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to analyze crimes or investigative accidents.

Police Liaison Premium – Compensation to rank and file local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to function as a liaison between special persons, groups or courts and the police/sheriff department.

Police Polygraph Officer - Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to administer and interpret polygraph exams.

Police Records Assignment Premium – Compensation to employees who are routinely and consistently assigned to the police records division.

Rangemaster Premium – Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to supervise the target range facilities and all related activities.

Refugee Arrival Cleanup Premium – Compensation to employees who are routinely and consistently assigned to cleanup from activities directly related to refugee arrival flights.

Safety Officer Training/Coordinator Premium – Compensation to employees who are routinely and consistently assigned to instruct personnel in safety procedures.

Sandblasting Premium – Compensation to miscellaneous employees who are routinely and consistently assigned to operate sandblasting equipment.

School Yard Premium – Compensation to part-time school district employees who are routinely and consistently assigned to supervise students during recreation.

Search Pay Premium – Compensation to employees who are routinely and consistently assigned to search and process prisoners in the induction area of jails.

Severely Disabled Premium – Compensation to school instructional aides who are routinely and consistently assigned to work with severely disabled students.

Sewer Crew Premium – Compensation to laborers who are routinely and consistently assigned to repair and maintain sewer systems.

Shift Differential – Compensation to employees who are routinely and consistently scheduled to work other than a standard “daytime” shift, e.g. graveyard shift, swing shift, shift change, rotating shift, split shift or weekends.

Solo Patrol Premium – Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to patrol alone in vehicles.

Sprinkler and Backflow Premium – Compensation to groundskeepers who are routinely and consistently assigned to

repair large sprinkler head controllers, valves and backflow prevention devices.

Tiller Premium – Compensation to local firefighters who are routinely and consistently assigned to operate the tiller on an aerial ladder.

Tire Technician Premium – Compensation to equipment attendants who are routinely and consistently assigned to work on heavy duty tires, e.g. for buses and large construction equipment.

Traffic Detail Premium – Compensation to employees who are routinely and consistently assigned to direct traffic.

Training Premium – Compensation to employees who are routinely and consistently assigned to train employees.

Tree Crew Premium – Compensation to maintenance workers who are routinely and consistently assigned to remove, prune, or otherwise care for trees.

Utility Meter Premium – Compensation to miscellaneous employees who are routinely and consistently assigned to re-read utility meters, repair or set and install meters.

Utilities Systems Operation Premium – Compensation to maintenance or carpenter employees who are routinely and consistently assigned to planner duties in the maintenance division.

Water Certification Premium – Compensation to miscellaneous employees who are routinely and consistently assigned to test local water quality for compliance with governmental health standards.

(5) STATUTORY ITEMS

Fair Labor Standards Act (FLSA) – Compensation paid for normal full-time work schedule including premium pay required by FLSA. For example, a firefighter's normal work schedule is 56 hours per week. FLSA states premium pay must be paid on all hours worked above 53 hours per week up to what is considered normal for employees on a full-time basis. In this example, the firefighter works 56 hours in a normal work week.

Therefore compensation would be reported for 53 hours per week and FLSA premium pay would be reported for 3 hours per week. Any work performed above 56 hours per week would be considered overtime and would not be reported to PERS.

Holiday Pay – Additional compensation for employees who are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays. If these employees are paid over and above their normal monthly rate of pay for approved holidays, the additional compensation is holiday pay and reportable to PERS.

For those employees with written labor agreements providing holiday credit and allowing employees to cash out accumulated holiday credit, the cash out must be done at least annually and reported in the period earned. If a written labor agreement allows an employee to accumulate holiday credit beyond the year in which it is earned and an employee later elects to cash out accumulated holiday credit, it is not compensation for PERS purposes.

If an employee utilizes the cash out option only during his/her final compensation period, it will be considered final settlement pay and excluded from reportable compensation. If the cash out option is also utilized near his/her final compensation period, it may still be excluded based upon a review of the contracting agency or school employer's experience relating to: the number of employees in the group with this option; the number of employees who exercise this option; the frequency with which employees exercise this option; whether or not the cash out is paid periodically, and in a manner that is historically consistent; and whether or not the cash out would create an unfunded liability over and above PERS' actuarial assumptions. This review will be conducted by PERS on a case-by-base basis.

Uniform Allowance – Compensation paid or the monetary value for the purchase, rental and/or maintenance of required clothing, including clothing made from specially designed protective fabrics, which is a ready substitute for personal attire the employee would otherwise have to acquire and maintain. This excludes items that are solely for personal health and safety such as protective vests, pistols, bullets, and safety shoes.

(b) The Board has determined that all items of special compensation listed in subsection (a) are:

(1) Contained in a written labor policy or agreement as defined at Government Code section 20049, provided that the document:

(A) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

(B) Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;

(C) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

(D) Indicates an effective date and date of any revisions;

(E) Is retained by the employer and available for public inspection for not less than five years; and

(F) Does not reference another document in lieu of disclosing the item of special compensation;

(2) Available to all members in the group or class;

(3) Part of normally required duties;

(4) Performed during normal hours of employment;

(5) Paid periodically as earned;

(6) Historically consistent with prior payments for the job classification;

(7) Not paid exclusively in the final compensation period;

(8) Not final settlement pay; and

(9) Not creating an unfunded liability over and above PERS' actuarial assumptions.

(c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special

compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).

(d) If an item of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual.

(Cal. Code of Regs., tit. 2, § 571.)

Legal Analysis

6. Mr. Sanchez's monthly retirement benefit is calculated based on the following factors: his age at retirement, his total number of years of service with the City, and his final compensation. The sole factor relevant to this appeal is his final compensation. The City contracted with CalPERS for a three-year final compensation period for its employees. Therefore, the relevant period is from February 1, 2007, through January 31, 2010.

7. "Final compensation" consists of two variables – the retiree's payrate and any special compensation paid by his employer. Mr. Sanchez's payrate during his final three years of employment was \$8,448 per month. Neither the deferred compensation nor the flexible benefits compensation was included in his payrate because neither was included in "publicly available pay schedules." (Gov. Code, § 20636, subd. (b)(1).) Furthermore, the language in the MOU's that provided for deferred compensation is clear that such benefit would be paid *on top of* base salary, rather than as a part of base salary. The fact that the actual contribution to Mr. Sanchez's deferred compensation plan was deducted from his salary and paid by the City does not make the deferred compensation a part of his base salary pursuant to Government Code section 20636, subdivision (b)(2)(A). (*Oden v. Board of Administration of the Public Employees' Retirement System, supra*, 23 Cal.App.4th 194, 201 ["Statutory definitions delineating the scope of PERS compensation cannot be qualified by bargaining agreements."])

And while the City reported the deferred compensation and flexible benefits compensation to CalPERS as "special compensation," neither qualifies as incentive pay, educational pay, premium pay, special assignment pay, or payment for statutory items under California Code of Regulations, title 2, section 571, subdivision (a). Furthermore, the flexible benefits compensation was not "available to all members in the group or class." (Cal. Code of Regs., tit. 2, § 571, subd. (b)(2).) Such benefits were not available, at least for most of the applicable period, to members who were hired after July 1, 2007. Therefore, neither item qualifies as "special compensation." CalPERS therefore properly excluded both from Mr. Sanchez' reportable compensation and its calculation of his monthly retirement benefit. (Cal. Code of Regs., tit. 2, § 571, subd. (d) ["If an item of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection

(b) as reported for an individual, then *it shall not be used to calculate final compensation for that individual.*”]; italics added.)

8. Any claim that CalPERS is estopped from excluding the deferred compensation and flexible benefits compensation from Mr. Sanchez’s reportable compensation and the calculation of his monthly retirement benefit because the City agreed to pay those items as supplements to base salary fails for a lack of evidence. (See, e.g., *Hudson v. Board of Administration of the Public Employees’ Retirement System* (1997) 59 Cal.App.4th 1310.) In *Hudson*, the City of Colton agreed to convert employer-paid benefits, such as health and life insurance, to salary increases for any employee who agreed to retire within 12 months. Appellants were former employees of the City who accepted the City’s offer, had their employer-paid benefits converted to salary, and retired within 12 months. In calculating appellants’ respective retirement benefits, however, CalPERS excluded the converted benefits from their reportable compensation. On appeal, the appellate court rejected appellants’ contention that CalPERS was estopped from excluding the converted benefits from reportable compensation based on the City’s conduct. Describing the applicable law, the appellate court said:

“The acts of one public agency will bind another public agency only when there is privity, or an identity of interests between the agencies.” (Citation.) Privity requires that the party to be estopped be “so identified in interest with another that he represents the same legal right.” (Citation.) Where two public agencies’ interests conflict, there is no privity. (Citation.)

(*Id.*, at p. 1330.)

Mr. Sanchez introduced no evidence to show privity between the City of Sanger and CalPERS. (Factual Finding 21.) Besides, the additional basis on which the appellate court in *Hudson* rejected appellants’ claim of estoppel is equally applicable:

“[E]stoppel will not be applied against the government if to do so would nullify a strong rule of policy adopted for the benefit of the public.” (Citation.) PERS’s desire to maintain the actuarial soundness of the system it administered reflected not only its own interest but also a recognized public policy. “[T]he Legislature intended to create and maintain the PERS on a sound actuarial basis ...” (Citation.)

Additionally, public policy disfavors permitting a contracting employer, such as the City, to determine what elements of its compensation package should be considered compensation for retirement purposes. “[P]ublic agencies are not free to define their employee contributions as compensation or not compensation under PERL – the Legislature makes those

determinations.” (Citation.) Allowing the City to estop PERS would, in effect, permit the City to usurp PERS’s statutory authority to determine compensation for retirement purposes. “To find an estoppel by privity in this context could have the pernicious effect of inducing subordinate governmental entities to disregard the rule of law.” (Citation.)

(*Hudson v. Board of Administration of the Public Employees’ Retirement System, supra*, 59 Cal.App.4th at pp. 1331-1332.)

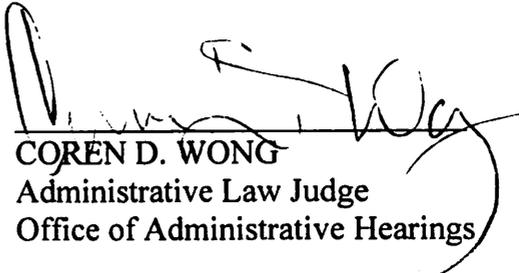
Conclusion

9. CalPERS correctly determined that Mr. Sanchez’s reportable compensation for purposes of calculating his retirement benefits does not include amounts paid to him for deferred compensation or as flexible benefits compensation. Neither item was included in publicly available pay schedules. Nor does either qualify as “special compensation.” Therefore, CalPERS’ adjusted Mr. Sanchez’s reportable compensation in a manner consistent with the PERL. (Gov. Code, § 20636; Cal. Code of Regs., tit. 2, §§ 570.5; 571.)

ORDER

The appeal of respondent Carlos Sanchez to include deferred compensation and flexible benefits compensation in his reportable compensation for purposes of calculating his final service retirement allowance is DENIED.

DATED: December 18, 2012


COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings