

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues
Against:

MICHAEL K. FLAHERTY and
CITY OF HERMOSA BEACH,

Respondents.

Case No. 2012-0069

OAH No. 2014040643

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on October 2, 2014, in Glendale.

Elizabeth Yelland, Senior Staff Attorney, represented Complainant Karen DeFrank.

Respondent Michael K. Flaherty represented himself. No appearance was made by or on behalf of the City of Hermosa Beach.

The record remained open after the hearing for Complainant to submit a copy of a Precedential Decision the ALJ agreed to take official notice of (exhibit 20) during the hearing, and for Respondent to submit a written response to the Precedential Decision, as well as Complainant's closing argument brief (exhibit 21) submitted during the hearing. The Precedential Decision was received, but Respondent did not submit a response to exhibits 20 or 21. The record was closed and the matter submitted for decision on October 16, 2014.

FACTUAL FINDINGS

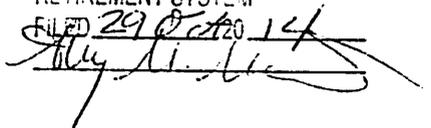
Parties and Jurisdiction

1. The Statement of Issues was filed by Complainant in her official capacity as the Chief of the Customer Account Services Division for the California Public Employees' Retirement System (PERS).

2. Respondent was employed by the City of Hermosa Beach (the City) as its Public Works Superintendent. By virtue of this employment, Respondent was a local miscellaneous member of PERS. Respondent timely appealed the Statement of Issues and requested the hearing that ensued.

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3. The City is a public agency contracting with PERS for retirement benefits for its eligible employees. By a letter dated May 19, 2014, the City informed PERS that it would not participate in the hearing.

4. PERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions, and by interest and other earnings on those contributions. The amount of a member's contributions is determined by applying a fixed percentage to the member's compensation. An employer's contribution is determined by applying a rate to its payroll. Using certain actuarial assumptions specified by law, the PERS Board of Administration (the Board) annually sets the employer contribution rate.

5. Respondent submitted a retirement application in August 2010 with an effective date of October 2010. After much subsequent correspondence between the parties, which is described in greater detail below, on September 9, 2011, PERS notified Respondent in writing that it considered the "Public Works Superintendent Premium Pay" component of his compensation paid by the City to be compensation for services rendered outside of normal working hours, and that by law it could not be considered compensation earnable for purposes of calculating his retirement benefit. Respondent submitted a written appeal to contest that determination, which led to the filing of the Statement of Issues described above.

6. As described in greater detail below, the sole issue to be decided in this case is whether Respondent's "Public Works Superintendent Premium Pay" (Premium Pay) can be included in the calculation of his final compensation for purposes of his retirement benefit.

Respondent's Employment with the City

7. Respondent first became employed by the City as a part-time employee on April 9, 1973. He remained in that capacity until April 9, 1974. Respondent testified that he was paid hourly for that work and received no benefits.¹

8. Respondent became employed full-time with the City on a date not established in 1974. He held various positions over the years, and retired from employment with the City in October 2010 as its Public Works Superintendent. It was not established when Respondent became the City's Public Works Superintendent, but that fact is not necessary to resolve the issue presented in this case.

¹ In 1987, Respondent requested PERS to count this period as additional service credit, which PERS denied because he had failed to submit sufficient verification. (Ex. A.) Respondent reiterated this request in 2007, which was again denied by PERS because he had been "compensated on a hourly basis." (Ex. 16, p. 11.) During the hearing, Respondent argued he should be given credit for this additional time. Respondent did not appeal from PERS' two prior denials of this request, and he did not discuss or contest this issue in connection with the instant appeal. Therefore, this issue will not be considered in this case and Respondent may pursue any rights he has in that regard in a separate action against the City and/or PERS.

9. On a date not established, but in or around 2001, the City and the bargaining unit representing the City's professional and administrative employees (including Respondent) executed a Memorandum of Understanding (MOU) in which the Public Works Superintendent was entitled to receive Premium Pay in addition to base compensation.

10. The last MOU governing Respondent's compensation before he submitted his retirement application was dated July 1, 2009, through June 30, 2010. That MOU defined the Premium Pay as follows:

An employee classified as the Public Works Superintendent shall be eligible to receive a ten percent (10%) monthly premium above the salary base for duties performed in maintaining an emergency "call out" program for the Public Works Department. The duties shall include responding to emergency after hours calls from Police Dispatch or other appropriate Department, and coordinating work crews to respond to the emergency.

This premium is compensation for all nonscheduled after hours duties. (Emphasis added.)

11. On July 1, 2012, a new MOU was entered into between the City and the bargaining unit representing the City's professional and administrative employees. While Respondent was not subject to the terms of this MOU (he had retired before its effective date), the MOU states in bold that "Public Works Superintendent Premium Pay [is] (Not reportable to PERS) (emphasis in original)." That MOU also states that Premium Pay "shall not be reported to PERS as employee compensation and is thus not 'PERSable'."

12. PERS requested any additional information from the City concerning the Premium Pay provision. The City indicated that it had nothing to supplement the two aforementioned MOUs.

13. PERS periodically mails information to its contracting employers, including pamphlets and circular letters. Those documents are always available to all employers at employer seminars and at any other time upon request.

14. For example, in March 2003, PERS mailed Circular Letter No. 200-090-03 to the City, which specifically stated that overtime is not reportable to PERS. In October 2007 and April 2010, PERS also provided the City with pamphlets containing information regarding what constitutes reportable compensation. Both pamphlets list overtime as an item that is not reportable to PERS.

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Respondent Retires

15. On April 7, 2010, Respondent requested PERS for an unofficial estimate of his final compensation. Based on the information provided to PERS by the City, Respondent was advised that his final compensation was \$8,474.53, which included the Premium Pay.

16. On April 20, 2010, Respondent requested PERS to review the compensation reported for him by the City and to provide him with an official estimate. In the process of reviewing Respondent's final compensation, PERS staff discovered that components of his reported compensation contained "special compensation" which exceeded the normal parameters for reportable compensation. The special compensation included the Premium Pay, as well as Longevity Pay, Merit Pay and employer paid member contribution (EPMC) pay. Respondent's estimate request was sent to PERS' Compensation Unit for review.

17. During the course of reviewing Respondent's payroll transcripts, PERS' Compensation Unit conferred with the City regarding Respondent's special compensation.

18. On August 16, 2010, Respondent signed and submitted his application for service retirement at PERS' Glendale Regional Office. Respondent was accompanied by his wife. Respondent requested that his retirement be effective October 5, 2010. It was not established whether Respondent was given an estimate of his final compensation or monthly retirement benefit amount during that visit.

19. On September 1, 2010, PERS staff determined to exclude the Premium Pay, because it was considered to be overtime pay that may not be included as final compensation, and the Merit Pay, for reasons not relevant to this case.

20. On September 2, 2010, PERS mailed to Respondent an official estimate excluding the Merit Pay and Premium Pay from his compensation. Respondent's estimated final compensation was calculated to be \$7,842.16.

21. On September 8, 2010, Respondent called PERS to inquire about the reduction of his final compensation amount. PERS staff was unable to contact Respondent about the reductions after several attempts.

22. Effective October 5, 2010, Respondent retired from service with 36.411 years of service credit.

23. On October 26, 2010, Respondent was placed on the retirement roll with a stated final compensation of \$8,417.48, an amount which included the Premium Pay and Merit Pay. In light of the fact that the Compensation Unit had previously excluded the Premium Pay and Merit Pay, it was not established why Respondent was advised that he was being given credit for those payments in his final compensation. Based on these calculations, Respondent was advised that his monthly retirement benefit would be \$7,040.38.

24. On November 2, 2010, PERS Retirement Program Specialist II Jennifer Sandness reviewed Respondent's file and determined that the Premium Pay and Merit Pay should be excluded from his final compensation. Ms. Sandness decided to allow the Longevity Pay and a portion of the EPMC pay for reasons not relevant to this case.

25. On March 28, 2011, PERS sent a letter to Respondent advising him that his final compensation had been adjusted to \$7,756.36. This final compensation amount excluded the Premium Pay and Merit Pay. Respondent was given credit for two additional years of service credit from a Golden Handshake provided to him by the City in connection with his retirement. Based on those adjustments, Respondent's new monthly retirement benefit was \$6,843.75.

26. On April 21, 2011, Respondent contacted PERS to request additional review of the above-described adjustments which resulted in a decrease of his final compensation and monthly benefit amounts. PERS contacted the City for further information.

27. On July 22, 2011, and after receiving further information from the City, PERS determined that Respondent's Merit Pay was reportable and could be used in calculating his final compensation. However, PERS maintained that the Premium Pay could not be used because it was compensation for services rendered outside of normal working hours and thus constituted overtime that could not be included in his final compensation.

28. On July 28, 2011, PERS sent a letter to Respondent informing him that he would receive credit for Merit Pay, but not for the Premium Pay. Respondent's final compensation was \$8,063.36. Including the credit for two years of additional service through the Golden Handshake, Respondent was given credit for 38.403 years of service. Respondent's new monthly retirement benefit was \$7,113.10.

29. On September 9, 2011, PERS sent a letter to Respondent notifying him that his Premium Pay was deemed to be compensation for services rendered outside of normal working hours, and therefore could not be considered in his final compensation. Respondent was advised of his appeal rights. The exclusion of the Premium Pay from his final compensation was the only issue outlined in that letter. By a letter dated October 7, 2011, Respondent timely submitted an appeal from that decision, as described above. In his letter, Respondent did not dispute the partial exclusion of his EPMC pay.

Respondent's Contentions

30. Respondent testified that he typically worked 60 hours per week before the Premium Pay provision was added to the MOU. Most of the excess time was spent responding to after hours emergencies involving City infrastructure, such as streets and sewers. Respondent requested and was paid overtime for that work. In order to deal with that recurring situation, the Premium Pay provision was added to the MOUs.

31. Respondent concedes that part of the Premium Pay represents overtime compensation. However, he testified that he had to spend a great deal of time during regular work hours to establish, implement and maintain the emergency call out program. According to him, that activity represented at least 50 percent of his compensation.

32. Respondent also testified that the Premium Pay provision had been in MOUs for the last ten years before he retired and that the City had made contributions to PERS based on that compensation. Respondent testified that he had been led to believe, through that process, that the Premium Pay was considered by PERS as reportable compensation. Respondent questioned why PERS had not addressed this issue before he retired. During the process of this appeal, PERS requested the City to reverse all Premium Pay payments reported to PERS. The City has elected not to do so while this appeal is pending.

33. Ms. Sandness testified that the Premium Pay issue had not been addressed before because PERS files showed that Premium Pay was not considered in the retirement calculation for any other employee of the City before Respondent retired. In addition, Ms. Sandness testified that PERS receives millions of lines of payroll information each month from its participating member agencies and that PERS does not have sufficient personnel to compare the payroll information with all of the involved MOUs to insure that all legal requirements have been met. Thus, PERS generally is able to review and verify items of Special Compensation, such as Respondent's Premium Pay, only after a member requests an estimate of benefits and/or submits a retirement application.

34. Respondent testified that although his interactions with PERS staff were always professional and comfortable, the various statements he received from PERS concerning his final compensation described above were inconsistent and misleading.

35. Respondent contends that he selected the Option 3W Retirement Payment Option, in large part, because when he made that selection in August 2010, he had been advised by PERS in the unofficial estimate that his final compensation would be \$8,474.53, which included the Premium Pay. Respondent argued in his October 2011 appeal letter that if the Premium Pay is ultimately excluded from his final compensation calculation, he should be allowed to review and modify his Retirement Payment Option if need be. Respondent did not indicate what other option he would consider or why.

36. Respondent testified that the timing of his retirement was also based, in large part, on PERS' unofficial estimate that his final compensation would be \$8,474.53. The fact that PERS had never characterized the Premium Pay as overtime before he retired supported his conclusion that he would receive credit for the Premium Pay. Respondent testified that had he known PERS would ultimately exclude the Premium Pay from his final compensation, he would have reconsidered retiring and instead worked a few additional years to make up the difference. Although the date when the City offered Respondent the two-year Golden Handshake was not established, Respondent testified that the offer was made about the same time that he was considering retirement.

37. Finally, Respondent testified that when he realized PERS was contesting the Premium Pay, he inquired with the City about getting his former job back. He was advised that, consistent with the City's Golden Handshake plan, a junior employee with a lower salary had already been hired and the position was no longer available. Respondent testified that he no longer has any way to address the reduced retirement benefit that has resulted from the exclusion of his Premium Pay.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476.)

2. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, the court considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found "the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence."

3. In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

4. Thus, in this case, Respondent has the burden by a preponderance of the evidence of establishing that his Premium Pay should be included in the calculation of his final compensation for purposes of his retirement benefit. This is the sole issue to be decided in this case because that was the only issue discussed in PERS' proposed decision letter of September 9, 2011, and the only issue raised by Respondent during his interactions with PERS' staff leading up to the issuance of that letter that had not been resolved in his favor. Other issues raised by Respondent for the first time in his October 2011 appeal letter or during the hearing are not considered in this decision for the reasons explained.

Compensation Generally

5. The Public Employees' Retirement Law (PERL), found at Government Code section 20000 et seq., governs this case.

6. The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on age on the date of retirement; and (3) "final compensation." (Gov. Code, §§ 20037, 21350, 21352, 21354.5; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.) The issue presented in the case relates to the computation of Respondent's final compensation.

7. Final compensation is determined, in part, by determining a member's compensation earnable. Government Code section 20630 generally defines compensation as "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 holidays, sick leave, industrial disability leave, vacation, compensatory time off, and leave of absence."

8. "Compensation earnable" is composed of (1) payrate, plus (2) special compensation. (Gov. Code, § 20636.)

9. 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." (Gov. Code, § 20636, subd. (b)(1).) Payrate for a member who is not in a group or class, means "the monthly rate of pay of the member, paid in cash pursuant to publicly available schedules, for services rendered on a full-time basis during normal working hours." (Gov. Code, § 20636, subd. (b)(1).)

Special Compensation and Overtime

10. Special compensation includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions. (Gov. Code, § 20636, subd. (c)(1).)

11. Special compensation shall be for services rendered during normal working hours and the employer shall identify and report the pay period in which the special compensation was earned. (Gov. Code, § 20636, subd. (c)(3).) In addition, the Board may promulgate regulations that delineate more specifically and exclusively what constitutes special compensation. (*Id.*) "A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee . . . shall be included as special compensation and appropriately defined in those regulations." (Gov. Code, § 20636, subd. (c)(6).)

12. Government Code section 20635 excludes compensation for overtime for purposes of calculating final compensation. Overtime is defined as "aggregate service performed by an employee . . . in excess of the hours of work considered normal for employees on a full time basis, and for which monetary compensation is paid."

13. Similarly, special compensation does not include "(B) [p]ayments made for additional services rendered outside of normal working hours, . . . or (C) [o]ther payments the board has not affirmatively determined to be special compensation." (Gov. Code, § 20636, subd. (c)(7).)

14. In addition, California Code of Regulations, title 2 (Regulation), section 571, subdivision (a), exclusively identifies and defines special compensation items for members employed by a contracting agency that must be reported to PERS if they are contained in a written labor policy or agreement. The Board has determined that all items of special compensation listed in Regulation 571, subsection (a), must include several elements, including that it be part of normally required duties and performed during normal hours of employment. (Cal. Code Regs., tit. 2, § 571, sub. (b).)

15. Regulation 571, subsection (c), states, "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)." Regulation 571, subsection (d), states that, "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."

Respondent's Premium Pay

16. In this case, PERS properly determined that Premium Pay should be excluded from calculating Respondent's final compensation. Government Code sections 20630, 20635, 20636, as well as Regulation 571, prohibit an employer from reporting compensation for work performed outside of normal working hours. According to his MOU with the City, Respondent was paid Premium Pay for "responding to emergency after hours calls from Police Dispatch, or other appropriate Department, and coordinating work crews to respond to the emergency." The MOU also stated that the Premium Pay was "compensation for all non-scheduled after hours duties." The definition of Premium Pay in the MOU strongly signals this component of Respondent's compensation was for work done outside of normal working hours. In the years leading up to Respondent's retirement, the City was provided with pamphlets and a circular explaining that "Reportable Compensation" did not include overtime. Although the MOU executed after Respondent's retirement does not apply to him, it still supports PERS' position that Premium Pay is not reportable.

17. Respondent's arguments are not persuasive that his Premium Pay was reportable compensation. First, he contends the requirements for maintaining an emergency call out program took place during normal working hours and represented at least 50 percent of his time. However, PERS requested documentation from the City to support Respondent's assertion and received nothing supplementing the MOUs. Respondent presented no evidence corroborating or quantifying his testimony. Although it is plausible that establishing and maintaining the emergency call out program took some effort during regular work hours, it is also reasonable to conclude that the bulk of the activity occurred during emergency after hours incidents. Under these circumstances, Respondent has failed to rebut the otherwise clear indication established in the MOU that the Premium Pay was overtime. Second, Respondent questions why PERS did not address the Premium Pay issue during the ten years it was in his MOU. PERS' silence, standing alone, cannot be construed as anything. The issue was never addressed before Respondent retired because the issue never needed to be

addressed. Ms. Sandness adequately explained that with so much data being submitted to PERS each month, it is not feasible to compare the reported compensation with all member agencies' MOUs.

18. PERS has correctly determined that Respondent's compensation earnable for purposes of calculating his final compensation and, in turn, his retirement benefits, cannot include amounts previously paid to him as Premium Pay, pursuant to Government Code sections 20630, 20635, 20636, and Regulation 571. (Factual Findings 1-37.)

Respondent's Estoppel Argument

19. Respondent raised an estoppel argument when he testified that, had he known PERS would exclude his Premium Pay from his final compensation, he would not have retired when he did, or he would have selected a different retirement benefit option. Supporting his contention are the facts that he received an unofficial estimate which included his Premium Pay before he retired, and that when he actually retired and was placed on the retirement roll, he was again given credit for the Premium Pay for reasons not established. Respondent concluded by testifying that he relied on those statements to his detriment and is no longer able to remedy the situation because his former job is no longer available.

20. The requisite elements for equitable estoppel are the same whether applied against a private party or the government: (1) the party to be estopped was apprised of the facts, (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended, (3) the party asserting estoppel was ignorant of the facts, and (4) the party asserting estoppel suffered injury in reliance on the conduct. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

21. Respondent's estoppel argument is problematic because appellate courts have held that "estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing." (*Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 870.) In *Medina*, the court found estoppel was not available because the involved retirement board lacked authority to classify as safety members employees whose duties did not encompass being a police officer and did not otherwise meet the statutory definition of safety members. Similarly, in *City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, a trial court awarded increased retirement benefits to a PERS member based on the trial court's reading of the law and, alternatively, based on equitable estoppel. The court of appeal found that the trial court had misapplied the law and it also reversed the trial court's equitable estoppel ruling, explaining: "Because we disagree with the trial court's conclusion, and find section 20636 did at all times preclude PERS from treating Linhart's standby pay as pensionable compensation, we hold any award of benefits to Linhart based on estoppel is barred as a matter of law." (*Id.* at p. 543.)

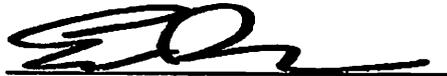
22. As discussed above, Respondent's Premium Pay cannot be considered part of his final compensation because it was overtime pay that is statutorily excluded from such consideration. Since the City and PERS had no legal authority to treat Respondent's Premium Pay as reportable compensation, statements or actions to the contrary therefore may not support an estoppel claim. (Factual Findings 1-37; Legal Conclusions 1-21.)

23. Respondent raised the issue of possibly modifying his retirement option since PERS has modified the components and amount of his final compensation after his retirement became effective. However, Respondent did not raise that issue until his letter appealing PERS' proposed decision excluding his Premium Pay. During the hearing, Respondent did not indicate what other option he may consider or why. Under these circumstances, a decision in this regard cannot be made in this case. Respondent is encouraged to contact PERS and determine his rights to modify his retirement option.

ORDER

PERS' determination is upheld. The appeal of Respondent Michael K. Flaherty to include Premium Pay in his compensation earnable is denied.

DATED: October 27, 2014



ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings