ATTACHMENT A

THE PROPOSED DECISION

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BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:	
ROBERT R. TORRES,	Case No. 2014-0677
Respondent,	OAH No. 2014110418
and	
CITY OF GLENDALE,	
Respondent.	

PROPOSED DECISION

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on March 23, 2015.

Rory J. Coffey, Senior Staff Attorney, represented Petitioner Renee Ostrander, Acting Chief, Customer Account Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Scott Ernest Wheeler, Attorney at Law, represented Robert Torres (Respondent).

City of Glendale (Respondent City) did not appear at the hearing.

CalPERS did not include Respondent's Compensation in Lieu of Water Stand-By Assignment Pay (Assignment Pay) in the calculation of Respondent's service retirement allowance. CalPERS concluded that the Assignment pay was not part of Respondent's regular salary or a recognized pensionable special compensation item. Respondent disagrees with such conclusion and asserts the Assignment Pay should have been included in the calculation of his service retirement allowance because it is pensionable special compensation for duties performed during his regular employment. Alternatively, he argues that CalPERS should be estopped from excluding the Assignment Pay in the pension calculation and that CalPERS breached its fiduciary duty in failing to provide Respondent with timely notice that the Assignment Pay was not pensionable.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 5-28-2015
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Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument. On April 21, 2015, Petitioner filed a Post Hearing Brief, which has been marked for identification as Exhibit 9. On April 23, 2015, Respondent filed a Closing Brief, which has been marked for identification as Exhibit C. No reply closing argument was received by the April 27, 2015 deadline. The matter was submitted for decision on April 27, 2015.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.

2. Respondent was employed by Respondent City as a Water System Equipment Operator. By virtue of his employment, Respondent is a Local Miscellaneous member of CalPERS.

3. Respondent City contracts with CalPERS for retirement benefits for eligible employees pursuant to the Public Employees' Retirement Law (PERL), Government Code[1] section 20000 et seq.

4. Respondent started working for Respondent City in 1983, and retired effective July 2, 2013. During Respondent's last year of work, his duties included operating heavy equipment, repairing and replacing water pipes, cleaning debris, testing water samples for chlorine content, and calling laboratory personnel for testing water samples for the presence of bacteria.

5. In his last year of work, Respondent's regular work hours were 6:30 a.m. to 4:00 p.m. He worked a 9/80 (nine days, 80 hours every two weeks) work schedule, that allowed him to have every other Friday off.

6. In 2011, Respondent received a Water Distribution Certificate, Level D3, issued by the California Department of Health Services. His supervisor had informed him that the certificate was required to qualify him to perform a special assignment. Once Respondent obtained the certificate, the supervisor gave him the special assignment. In the assignment, which occurred one week each month, Respondent had to be on call after his regular hours of work, from 4:00 p.m. to 6:30 a.m., to report to emergency calls for service. If he was actually called to a site, Respondent performed his regular duties and was paid overtime. He received the Assignment Pay for performing the special assignment, and his supervisor told him that the Assignment Pay would count toward his pension.

7. In January 2012, Respondent started receiving Assignment Pay at the rate of $650 per month, which was in addition to his base salary and in addition to overtime pay.

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[1] All further statutory references are to the Government Code.

8. Respondent paid retirement contributions on the Assignment Pay and expected the Assignment Pay to count in the calculation of his retirement allowance. He knew of four other workers who had received the $650 per month and had tried hard to obtain the certification that would lead to the additional compensation. Respondent testified that he would not have retired had he believed that the $650 would not be taken into account in arriving at his pension allowance and that he may have taken a retirement incentive offered by Respondent City about six months before his actual retirement.

9. At the time of his retirement, Article Two, subdivision X (B) of the collective bargaining agreement between Respondent City and Respondent's collective bargaining representative, stated: "Compensation in Lieu of Water Stand-By Assignment Pay. Unit employees shall receive an assignment pay of six hundred fifty dollars ($650.00) per month over their base salary in lieu of any other stand-by assignment pay for this classification." (Exh. 8, at p. 2.)

10. Respondent City regularly reported Respondent's pay to CalPERS so that the agency could calculate Respondent's compensation and pension allowance. Respondent City reported the $650 per month as "special compensation" and as a "Water Certification Premium." In the reports, Respondent City treated the $650 monthly payment as pensionable, which could be counted toward calculation of Respondent's retirement allowance.

11. Effective his retirement date, Respondent started receiving a service retirement allowance based on a calculation that treated the Assignment Pay as pensionable compensation.

12. Since September 2011, the compensation reports from Respondent City, as well as those from other contracting agencies and State agencies, have been submitted electronically to CalPERS. CalPERS does not routinely review the reports for accuracy or compliance with PERL. CalPERS conducts investigations, as it did here, if the data raises a "red flag." In this case, a review was triggered by Respondent's receipt of the special compensation during his last year of employment.

13. Retirement Program Specialist Karen Zimmerman conducted the review. She spoke to staff at Respondent City and obtained additional information from Respondent City, including a copy of the collective bargaining agreement. CalPERS concluded that the $650 was not special compensation for additional duties performed during a member's regular work hours, and that it should not have been included in the compensation used to calculate Respondent's retirement allowance. Rather, CalPERS concluded that the funds constituted compensation for Respondent performing duties outside his regular hours. In this case the pay was for being on call outside normal working hours, which cannot be used to increase a retirement allowance. Accordingly, the $650 per month was not included in the calculation of compensation or compensation earnable, as the terms are defined in sections 20630 and 20636, respectively.

14. On November 27, 2013, CalPERS notified Respondent of its conclusions. Respondent thereafter filed an appeal.

LEGAL CONCLUSIONS

1. A member's retirement allowance is calculated by applying a percentage figure, based on the member's years of service on the date of retirement, to the member's years of service and the member's "final compensation." (§§ 20037 and 21354).

2. 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."

3. Section 20636 provides, in pertinent part:

"(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.

"(2) Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e).

"(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.

[¶] . . . [¶]

"(7) Special compensation does not include any of the following:

"(A) Final settlement pay.

"(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

"(C) Other payments the board has not affirmatively determined to be special compensation.

[¶] . . . [¶]

"(f) As used in this part, 'final settlement pay' means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay. . . ."

4. In pertinent part, CalPERS has regulatorily defined special compensation as follows:

"(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:

[¶] . . . [¶]

"(4) SPECIAL ASSIGNMENT PAY

[¶] . . . [¶]

"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. As noted above, section 20630, subdivision (a), defines compensation as "remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours," and section 20630, subdivision (b), limits the compensation which can be counted toward calculation of a retirement allowance to what is deemed "compensation earnable." At issue in this case is whether the Assignment Pay credited to Respondent can be considered part of compensation earnable.

Inasmuch as there is no issue regarding whether the Assignment Pay is part of Respondent's payrate, the answer turns on whether the pay constitutes "special compensation." As defined in section 20636, special compensation to a member must be a payment received for "special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions," (subd. (c)(1)), as required by a labor agreement or law (subd. (c)(2)), for "services rendered during normal working hours," (subd. (c)(3)), and affirmatively determined by CalPERS to constitute special compensation (subd. (c)(7)(C)). None of these requirements are met in Respondent's case.

While the Water Distribution Certificate, Level D3, was required for promotion and to perform the special assignment, the Assignment Pay was not given for holding the certificate or for qualifications that the certificate recognized. It was given for performing the special assignment as described in factual finding number 6. In addition, the collective bargaining agreement provides for pay "in lieu of stand-by pay," not for possessing special skills, knowledge, abilities or for specified work assignments or conditions. Moreover, the special assignment was performed outside Respondent's normal working hours, as set forth in factual finding numbers 5 and 6.

In its reports to CalPERS, Respondent City classified the Assignment Pay as Water Certification Premium, one of the items affirmatively determined by CalPERS to constitute special compensation. However, this premium is paid to miscellaneous employees who are routinely and consistently assigned to test local water quality for compliance with governmental health standards, a description that does not match Respondent's duties. While Respondent did test water samples for chlorine content, his job title and duties indicate that he was routinely and consistently assigned to operate heavy equipment, repair and replace water pipes, and clean debris. The routine and consistent water quality testing seems to have been performed by the laboratory personnel that Respondent could call upon for assistance.

In sum, the special assignment for which he received the Assignment Pay of $650 per month required Respondent to make himself available, or stand by, from 4:00 p.m. to 6:30 a.m., outside his regular working hours, to perform his usual duties, typically in response to emergency requests. While on the stand by special assignment, if he actually went to a worksite or performed other work at the site, Respondent was paid overtime. In these circumstances, the Assignment Pay does not constitute special compensation and cannot be included in the earnable compensation calculation.

6. The court in *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522 (*Pleasanton*) reached the same result in analogous circumstances. In *Pleasanton*, the court declined to classify as special compensation a retired firefighter division chief's pay for performing work on a "back-up schedule." The member in question worked a regular 40-hour workweek, Monday through Friday, 8:00 a.m. to 5:00 p.m. On the back-up schedule, the member was required to be available to report for emergencies during certain times after work. He received a 7.5% pay increment for being on the back-up schedule. The court concluded that the 7.5% pay increment was for being available to work on standby basis outside his normal working hours, and rejected the member's arguments to classify the payment as falling within specific categories affirmatively determined by CalPERS to constitute special compensation, namely, holiday pay, shift differential pay, or training premium pay.

7. The doctrine of equitable estoppel is available in certain circumstances to those who detrimentally rely on representations made by another. In order for equitable estoppel to apply, the following requirements must be met: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true facts; and (4) he must rely upon the conduct to his injury." (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Although the doctrine can be applied against the government "where justice and right require it," it cannot be applied against the government where to do so would effectively nullify a "strong rule of policy, adopted for the benefit of the public . . . ." (*City of Long Beach v. Mansell, supra,* 3 Cal.3d 462, at p. 493.) Nor can estoppel be applied where to do so would enlarge the power of a governmental agency or expand the authority of a public official. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.)

Respondent may not avail himself of the equitable estoppel doctrine to obtain relief. While Respondent City treated the Assignment Pay as pensionable and reported it as such to CalPERS, CalPERS was not aware of the true facts until after it investigated the matter following Respondent's retirement. Mere receipt of the compensation reports from Respondent City did not make CalPERS aware of all the facts. Nor did CalPERS make any specific representations regarding the nature of the Assignment Pay upon which Respondent could have reasonably rely. Moreover, since the Assignment Pay received by Respondent cannot be characterized as special compensation (legal conclusion numbers 1 through 5), granting the relief that Respondent seeks would expand CalPERS' authority beyond that permitted by law.

8. The court in *Pleasanton* rejected similar equitable estoppel arguments. The court initially concluded that equitable estoppel was not available in that case because, as a matter of law, section 20636 deprived CalPERS of the legal authority to classify the stand by pay in that case as pensionable compensation. (*Pleasanton*, *supra*, 211 Cal.App.4th 522, at p. 543.) The same conclusion is required in this case, as the same statute, section 20636, precludes a finding that the Assignment Pay is pensionable compensation.

The *Pleasanton* court also concluded, in circumstances similar to those present in this case, that other elements of equitable estoppel were not present. There was no evidence that CalPERS knew about the existence of or the nature and purpose of the extra pay or that it was "careless or culpable" in failing to acquire such knowledge. (*Ibid.*) In addition, the court noted, one of the parties seeking to estop CalPERS, the city in that case, could not establish that it was ignorant of the true facts or that it could not have acquired the requisite knowledge following reasonable inquiry. (*Id.*, at pp. 543-544.)

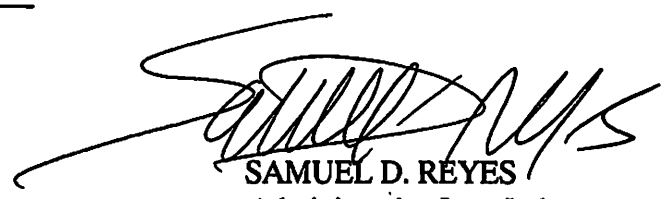
9. Respondent further argues that CalPERS breached its fiduciary duty to him by failing to provide him with timely notice that the Assignment Pay was not pensionable. This argument is not persuasive. As the court in *Pleasanton* concluded in the face of the same argument, which it deemed another way of restating the equitable estoppel claim: "[P]ERS's fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. PERS has a duty to follow the law. As stated in *City of Oakland*, the policy reflected in the constitutional provision is to 'ensure the rights of members and retirees to their full, earned benefits.' [citation omitted] It does not authorize an order compelling PERS to pay greater benefits than section 20636 allows, either by estoppel or as a tort damages for an inadvertent failure to timely correct a contracting agency's error. . . ." (*Pleasanton*, *supra*, 211 Cal.App.4th 522, at p. 544.)

10. By reason of the foregoing factual findings and legal conclusions, the Assignment Pay is not part of earnable compensation and CalPERS may reduce Respondent's retirement allowance to correct the error.

ORDER

The appeal of Respondent Robert Torres is denied.

DATED: 5/26/15



SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings