

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:

TERRY SMITH,

Respondent,

and

CITY OF NEEDLES,

Respondent.

Case No. 2014-0341

OAH No. 2014110331

PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 20, 2015, in San Bernardino, California.

Wesley E. Kennedy, Senior Staff Counsel, represented Petitioner Karen DeFrank, Chief, Customer Account Services Division, California Public Employees' Retirement System, State of California.

Terry Smith, respondent, represented himself and was present throughout the administrative proceeding.

No appearance was made by or on behalf of the City of Needles.

On August 20, 2015, the matter was submitted.

ISSUE

The issue to be determined is whether "on-call pay" received by respondent Terry Smith during his employment at a wastewater treatment plant with the respondent City of Needles should be included as an item of "final compensation" by CalPERS in calculating respondent Terry Smith's service retirement allowance.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

September 29, 2015
Ruthie K. Schrey

FACTUAL FINDINGS

Preliminary Matters

1. The California Public Employees' Retirement System (CalPERS) was created by the Public Employees' Retirement Law. (PERL, Gov. Code § 20000 et seq.¹) The system provides retirement benefits for state employees, and is authorized to enter into contracts with local public entities to provide retirement benefits for their employees. (Gov. Code, § 20460.) When a local public entity contracts with CalPERS, the entity and its employees become subject to the terms of the PERL. (Gov. Code § 20506.)

2. Respondent Terry Smith was employed for 23 years by the City of Needles as an Acting Chief Plant Operator and as a Technician for a wastewater treatment plant and collection system. By reason of his employment, Mr. Smith was a local miscellaneous member of CalPERS. The City of Needles is a public entity contracting with CalPERS for retirement benefits for eligible employees.

3. On October 23, 2012, Mr. Smith signed an application for service retirement with CalPERS. Mr. Smith retired from the City of Needles effective December 29, 2012, with 23 years of service credit and has been receiving his retirement allowance from that date.

4. The amount of a CalPERS member's service retirement allowance is calculated from a statutory formula applying a percentage figure, based upon the member's age on the date of retirement, to the member's years of service and the member's "final compensation" as set out in PERL.

5. The Board of Administration (board) is the trustee/administrator of CalPERS and has the jurisdiction and obligation to determine a variety of matters, including a retired member's "final compensation." The board periodically reviews contracting public entities to ensure the accuracy of the calculation of a retired member's "final compensation."

Mr. Smith's Job Duties

6. Mr. Smith is 61 years old and has worked for the City of Needles at the wastewater treatment plant for 23 years. He testified that he worked on a full-time basis providing active duty, as well as providing "on-call" duty. Mr. Smith testified that he worked as the Acting Chief Plant Operator at the wastewater treatment facility for about seven years. Prior to holding that position, he worked as a Technician II at the plant. Prior to holding the position of Technician II, he worked as a Technician I. Prior to his Technician I title, he worked for 18 months as an Operator-in-Training, which was his first job with the City of Needles. When he worked as a Technician I, he worked "on-call" for about 4 hours per weekend every third weekend. When he was a Technician II he worked "on-call" about

¹ All statutory references are to the Government Code, unless otherwise noted.

4 hours per weekend every weekend. When he became the Acting Chief Plant Operator he worked "on-call" about 16 hours per week every other week. Mr. Smith's on-call duty was provide outside of the normal business hours of the water treatment plant. The on-call duty he performed was in addition to his active duty 40 hour work week.

The City of Needles's Memorandum of Understanding dated January 22, 2013, describes "on-call" work as work from employees who are released from active duty but are required to leave notice where they can be reached and be available to return to active duty when required. The memorandum states that "while assigned to on-call duty, an employee shall be free to use the time for his or her own purposes." The pay provided to the employee for on-call duty at the rate of 16 hours for one work week of on-call duty with an additional four hours of compensation if one of the specifically listed holidays in the memorandum falls within the week that the employee is on-call. The memorandum further explains that "weekend" is defined as close of business Friday through open of business on Monday.

7. Mr. Smith testified that at the time of his retirement he believed that on-call duty pay was treated as his regular active duty pay, but admitted that he did not have an understanding of the requirements of PERL with regard to the calculation of "final compensation."

The Testimony of Lolita Lueras

8. Lolita Lueras is a Staff Services Manager I for CalPERS working in the compensation review unit. She has held that position for about six and a half weeks. Prior to this position, she worked in the compensation review unit as a Retirement Program Specialist II for five years. In her duties as a Retirement Program Specialist, Ms. Lueras was tasked with reviewing all payroll information to ensure that the payments used in the calculation of retirement allowance comply with the requirements of PERL. Ms. Lueras reviewed respondent Smith's payroll documents and all other information in his files in preparation for her testimony. Ms. Lueras testified that the initial determination of respondent Smith's retirement allocation was made by Kristen Willis, one of her colleagues in the compensation review unit who no longer works for CalPERS.

9. Ms. Lueras testified that while PERL utilizes a statutory formula to calculate a member employee's service retirement allowance based upon the member's "final compensation." Not all compensation paid by a public entity member to an employee is considered in the statutory formula. Specifically, under PERL only "compensation earnable" as defined in section 20636 is included in the calculation. Pursuant to this section, the "compensation earnable" includes both the "payrate" and "special compensation" of the employee. Ms. Lueras further stated that "payrate" compensation is the base pay for an employee for their regular duties during normal working hours. She further explained that "special compensation" consists of payments made to the employee that are in addition to their base pay. Items of allowable "special compensation" are specifically listed in the California Code of Regulations, and on-call pay is not specifically listed in the applicable section. Additionally, she stated that the California Code or Regulations also provides a list

of criteria to determine whether an employee's pay could fall within the category of special compensation. According, to Ms. Lueras, on-call pay would not qualify as special compensation because it does not meet the listed criteria.

Ms. Lueras also testified that even if respondent Smith's on-call was not excluded because it does not meet the criteria to be considered "special compensation," it would still be excluded pursuant to Section 20635, which excludes overtime compensation defined as hours worked in excess of the hours of work considered normal for employees on a full-time basis.

10. Ms. Lueras testified that a review of the payroll records for Mr. Smith provided by the City of Needles show that his on-call pay was listed in his payroll records as "special compensation." However, the manual calculation completed by her division to determine respondent Smith's final compensation shows that the final compensation calculated does not include the amounts listed on respondent Smith's payroll records under "special compensation." Accordingly, respondent Smith's service retirement allowance does not include his on-call pay.

Testimony of Genevieve DeLeon

11. Genevieve DeLeon is the Human Resources Specialist for the City of Needles. She testified that she provided portions of the City of Needles's Memorandum of Understanding dated January 22, 2013, to Kristen Willis in response to CalPERS's request for the document to assist in the calculation of respondent Smith's service retirement allowance. She also testified that she provided Ms. Willis with the City of Needles permanent hourly range of salaries for employees of the City of Needles, as well as position salary ranges. Ms. DeLeon identified those documents she sent to Ms. Willis as the same as those referenced and discussed by Ms. Lueras.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Government Code section 20128 provides in part:

. . . [T]he board may require a member . . . to provide information it deems necessary to determine this system's liability with respect to, and an individual's entitlement to, benefits prescribed by this part.

2. Mr. Smith has the initial burden to establish that he was entitled to a CalPERS service retirement and the amount of the retirement allowance. (Evid. Code, § 500; Evid. Code, § 550.) The standard of proof is a "preponderance of the evidence." (Evid. Code, § 115.)

Applicable Statutes and Regulations

3. Government Code section 20630 provides in part:

(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:

[¶] . . . [¶]

(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 20635 provides:

When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service. For the purposes of this part, overtime is the aggregate service performed by an employee as a member for all employers and in all categories of employment in excess of the hours of work considered normal for employees on a full-time basis, and for which monetary compensation is paid.

If a member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full time, the position with the highest payrate or base pay shall be reported to this system. This provision shall apply only to service rendered on or after July 1, 1994.

5. Government Code section 20636 provides in 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).

(2) "Payrate" shall include an amount deducted from a member's salary for any of the following:

(A) Participation in a deferred compensation plan.

(B) Payment for participation in a retirement plan that meets the requirements of Section 401(k) of Title 26 of the United States Code.

(C) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of Title 26 of the United States Code.

(D) Participation in a flexible benefits program.

(3) The computation for a leave without pay of a member shall be based on the compensation earnable by him or her at the beginning of the absence.

(4) The computation for time prior to entering state service shall be based on the compensation earnable by him or her in the position first held by him or her in state service.

(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.

(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

(5) The monetary value of a service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. 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 under Section 201 and following of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

(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.

(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.

(e) (1) As used in this part, “group or class of employment” means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class.

(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

(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.

[¶] . . . [¶]

6. California Code of Regulations, title 2, section 570.5 provides in part:

(a) For purposes of determining the amount of “compensation earnable” pursuant to Government Code Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

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

(2) Identifies the position title for every employee position;

(3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

(4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;

(5) 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;

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

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

(8) Does not reference another document in lieu of disclosing the payrate.

(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:

(1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;

(2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;

(3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;

(4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer.

7. California Code of Regulations, title 2, section 571 provides in part:

(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:

[¶] . . . [¶]

(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 [sic] 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.

Evaluation of the Evidence

8. Mr. Smith admits that his on-call pay was obtained from his work done outside of normal business hours in his positions with the wastewater treatment plant and was in addition to his base pay for his normal work hours. Furthermore, despite the fact that his on-call pay was listed in his payroll records as "special compensation," the on-call pay did not qualify as "special compensation" under the applicable California Code of Regulations (Cal. Code of Regs., tit. 2, § 571.) because it was not specifically listed under subsection (a), which "exclusively identifies and defines" special compensation items. Furthermore, the on-call pay did not meet the criteria listed in subsection (b) of that regulation which requires that the pay be obtained from work "performed during normal hours of employment" in order to qualify as "special compensation" for the purposes of calculating "final compensation."

Additionally, pursuant to section 20635, because the on-call pay is in excess of the hours of work considered normal for employees on a full-time basis, it would fall within the definition of overtime compensation and is therefore excluded from computations of "final compensation" for a determination of respondent Smith's service retirement allowance.

Cause Exists to Affirm CalPERS' Final Compensation Determination

9. Cause exists to affirm the final compensation determination by CalPERS of Mr. Terry Smith's service retirement allocation with the exclusion of his on-call compensation as part of the final compensation. Based upon the evidence and the statutory requirements, on-call compensation does not qualify as "special compensation" or as

“payrate” compensation for purposes of determination of “compensation earnable” for the calculation of respondent Smith’s service retirement allowance.

ORDER

CalPERS’ determination that on-call pay received by respondent Terry Smith from respondent City of Needles should be excluded as an item of “final compensation” for the purpose of calculating respondent Terry Smith’s service retirement allowance is affirmed.

DATED: September 21, 2015.


DEBRA D. NYE-PERKINS
Administrative Law Judge
Office of Administrative Hearings