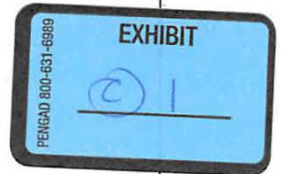


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10 BOARD OF ADMINISTRATION

11 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

12 In the Matter of the Calculation of Final)	AGENCY CASE NO. 2014-0256
13 Compensation of)	OAH NO.
14 RICHARD LEWIS,)	STATEMENT OF ISSUES
15 Respondent,)	Hearing Date:
16 and)	Hearing Location:
17 CITY OF SAN BERNARDINO,)	Prehearing Conf.: None Scheduled
18 Respondent.)	Settlement Conf.: None Scheduled

19 The California Public Employees' Retirement System (CalPERS) states:

20 I

21 CalPERS makes and files this Statement of Issues in its official capacity as such
22 and not otherwise.

23 II

24 Respondent Richard Lewis (respondent Lewis) was employed by respondent
25 City of San Bernardino (respondent City), commencing March 30, 1981. By virtue of

1 his employment as a Fire Captain, respondent Lewis is a local safety member of
2 CalPERS.

3 On or about October 10, 2012, respondent Lewis signed an application for
4 service pending industrial disability retirement. Respondent Lewis retired for industrial
5 disability effective November 30, 2012, with 30.342 years of service credit, and has
6 been receiving his retirement allowance from that date.

7 Respondent City of San Bernardino is a public agency contracting with
8 CalPERS for retirement benefits for its eligible employees. The provisions of
9 respondent City's contract with CalPERS are contained in the Public Employees'
10 Retirement Law (PERL). (Cal. Gov. Code, §§ 20000 et seq.)

11 CalPERS is a defined benefit plan. Benefits for its members are funded by
12 member and employer contributions, and by interest and other earnings on those
13 contributions. The amount of a member's contributions is determined by applying a
14 fixed percentage to the member's compensation. A public agency's contribution is
15 determined by applying a rate to the payroll of the agency. Using certain actuarial
16 assumptions specified by law, the CalPERS Board of Administration sets the employer
17 contribution rate on an annual basis.

18 III

19 The amount of a member's service retirement allowance is calculated by
20 applying a percentage figure, based upon the member's age on the date of retirement,
21 to the member's years of service and the member's "final compensation." In
22 computing a member's retirement allowance, CalPERS staff may review the salary
23 reported by the employer for the member to ensure that only those items allowed
24 under the PERL will be included in the member's "final compensation" for purposes of

1 calculating the retirement allowance.

2 IV

3 CalPERS staff performed a routine review of compensation reported by
4 respondent City for respondent Lewis. Documentation was requested from respondent
5 City regarding "Temporary Upgrade Pay", paid semi-monthly in the amount of
6 \$1,560.50, and the value of Employer-Paid Member Contributions in the amount of
7 9%. Respondent City provided a settlement agreement dated March 22, 2007, which
8 provides in pertinent part:

9 In consideration of the promises, covenants, and conditions
10 hereinafter set forth, IT IS AGREED AS FOLLOWS: [¶] . . . [¶]

11 2. OTHER SUBSTANTIVE TERMS OF THE SETTLEMENT, As
12 further consideration for this settlement, the parties agree to as
13 follows:

- 14 a) Mr. Lewis will be paid back pay from [October 5, 2004]
15 to the present, less required tax withholdings. The back
16 pay shall consist of the difference between Mr. Lewis'
17 actual pay as Captain for all regular hours, and what
18 Mr. Lewis would have been paid during such period for
19 such hours had he been a Battalion Chief.
- 20 b) Mr. Lewis shall be compensated from the date of this
21 agreement forward as if he had been promoted to the
22 position of Battalion Chief (including all current and/or
23 future benefits granted to Battalion Chiefs) with
24 exception listed in subsection c, below.
- 25 c) Mr. Lewis shall be compensated for all future overtime
hours at the Captain rate; to wit, time and one half (1.5)
the regular rate of pay Lewis would receive for Fire
Captains of Mr. Lewis' experience and length of
service. [¶] . . . [¶]

V

The following provisions of the Government Code are relevant to calculation of
final compensation:

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Section 20630 provides:

(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.

Section 20631 provides:

A contracting agency may report an amount for each member that is equal to a uniformly applied percentage of salary in lieu of computing and reporting the actual compensation attributable to each individual member if the contracting agency has agreed in a memorandum of understanding reached pursuant to Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 that the aggregate amount to be reported by the contracting agency for all members within a membership classification bears a reasonable relation to the aggregate amount that would otherwise be required to be reported pursuant to Section 20636.

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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.

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(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 et seq. 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.

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

(C) Any 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 any 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. [¶] . . . [¶]

VI

The following regulations, promulgated by the Board of Administration through California Code of Regulations, Title 2, Division 1, Chapter 2, Subchapter 1, Article 4, are relevant to this appeal:

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Section 569 provides, in pertinent part:

A contracting agency or school employer that pays all or a portion of normal member contributions based on compensation earnable, as Employer Paid Member Contributions (EPMC), must conform to the "group or class" requirements in Section 20691 of the Government Code and these regulations.

(a) Specifically, the payment of EPMC must be:

- (1) Authorized in a written labor agreement;
- (2) Based on earnings for normally-required duties;
- (3) Based on earnings for normal hours of employment;
- (4) Paid periodically, along with the earnings on which it is based;
- (5) Based on earnings that are historically consistent; and
- (6) Not final settlement pay. [¶] . . . [¶]

Section 570.5 provides:

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;

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(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.

Section 571 provides:

(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 [¶] . . . [¶]

Value of Employer-Paid Member Contributions (EPMC) -
The full monetary value of employer-paid member

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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.

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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. [¶] . . . [¶]

(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. [¶] . . . [¶]

(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 meeting laws;

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(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 items 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.

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VII

CalPERS determined that the "Temporary Upgrade Pay" and the value of Employer Paid Member Contributions are not considered "compensation earnable" for respondent. Therefore, both items are not eligible to be included in the calculation of respondent Lewis' final compensation.

VIII

By letter dated May 8, 2013, respondent Lewis was notified of CalPERS' determination and was advised of his appeal rights.

IX

By letter dated July 8, 2013, respondent Lewis filed a timely appeal, and has requested an administrative hearing.

X

This appeal is limited to the issue of whether "Temporary Upgrade Pay" and the value of Employer Paid Member Contributions can be included in the calculation of respondent Lewis' final compensation.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Dated: APR 22 2014 BY Karen DeFrank
KAREN DeFRANK, Chief
Customer Account Services Division