



California Public Employees' Retirement System
Customer Account Services Division
Retirement Account Services Section
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Sacramento, CA 94229-2709
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888 CalPERS (or 888-225-7377) phone • (916) 795-4166 fax
www.calpers.ca.gov

May 8, 2013

Richard J. Lewis II

Dear Mr. Lewis

The California Public Employees' Retirement System (CalPERS) has recently completed a review of the compensation reported by the City of San Bernardino (City) on your behalf and has found compensation that does not comply with the California Public Employees' Retirement Law (PERL).

The compensation in question has been identified by the City as "Temporary Upgrade Pay", reported each pay period as special compensation in the amount of \$1,560.50. The City has provided the "Settlement and General Release Agreement" (Settlement Agreement) as well as internal City memorandums from the City Attorney's Office and Finance Department.

By way of background, you held the position of Fire Captain however; you in conjunction with the San Bernardino Professional Firefighters Union, Local 891, came to an agreement with the City to provide you the compensation and benefits of a Battalion Chief.

The City sought direction from CalPERS on how to report this compensation. Based on the information provided, Compensation Review analyst Carlous Johnson, responded via letter dated July 5, 2007 instructing the City as follows:

"Since Mr. Lewis will retain his current position title of Fire Captain, the compensation at the Battalion Chief's position should be treated as temporary up-grade pay, and reported as special compensation."

The City followed Mr. Johnson's instructions and began reporting the difference between the payrate of Fire Captain and Battalion Chief as special compensation identified as Temporary Upgrade Pay. After further review of the documentation provided by the City, it has been determined that the special compensation identified as "Temporary Upgrade Pay" does not qualify as reportable compensation for retirement purposes.



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The PERL includes provisions that address errors made by an employer and/or CalPERS and mandates corrections in certain instances. Government Code Section 20160¹ outlines the criteria for correcting errors and omissions and requires the board to correct all actions taken as a result of errors or omissions of any contracting agency or this system.

Corrections of errors or omissions made pursuant to Section 20160 subsection (a)(3)(e) and subsection (b) shall be such that the status, rights, and obligations of all parties are adjusted to be the same that would have been, if the act that would have been taken, but for the error or omission, was taken at the proper time.

All compensation reported to CalPERS must meet the definition of "compensation earnable" as defined in Section 20636 which defines compensation earnable as the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g).

For this compensation to be reported as special compensation it must meet the criteria delineated in Section 20636(c) and the California Code of Regulations (CCR) 571(b).

With the documentation provided by the City, it is CalPERS' understanding, that you were not working in the capacity of a Battalion Chief rather, only receiving the benefits of the position.

Therefore, the Temporary Upgrade Pay reported by the City does not meet all criteria listed specifically, Section 20636(c)(3) which reads:

"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." (Emphasis added)

Not only does the benefit not meet the definition of compensation earnable, it also fails to meet the definition of "Temporary Upgrade Pay" as defined in CCR Section 571(a)(3) that states:

"Compensation to employees who are required by their employer or governing board or body to **work in an upgraded position/classification of limited duration.**" (Emphasis added)

As previously stated, you did not perform the duties of Battalion Chief and the settlement agreement suggested the Temporary Upgrade Pay was indefinite. These stipulations contradict the definition of Temporary Upgrade Pay hence make the benefit non-reportable compensation.

¹ All further references are the California Government Code unless otherwise specified.

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In addition to the Temporary Upgrade pay, you also received the Value of Employer Paid Member Contributions (EPMC) as special compensation as per "Resolution No. 2007-345: Resolution of the City of San Bernardino Establishing A Management and Confidential Employee Compensation and Benefits Plan and Repealing Resolution No. 2005-242" (Management Resolution). The Value of EPMC cannot be reported as special compensation to be used in your retirement calculation because it is not offered to your classification of Fire Captain.

Your retirement calculation was completed excluding the Temporary Upgrade Pay and value of EPMC.

CalPERS has respectfully requested the City reverse out all Temporary Upgrade and EPMC payments from our payroll system to recover the contributions paid on these benefits.

You have the right to appeal the decision referred to in this letter if you desire to do so, by filing a written appeal with CalPERS, in Sacramento, within **thirty days of the date of the mailing of this letter**, in accordance with Government Code section 20134 and sections 555-555.4, Title 2, California Code of Regulations. An appeal, if filed, should set forth the factual basis and legal authorities for such appeal. A copy of the applicable statute and Code of Regulations sections are included for your reference. If you file an appeal, the Legal Office will contact you and handle all requests for information.

Your appeal will be set for hearing with the Office of Administrative Hearings (OAH). The assigned CalPERS attorney will contact you to coordinate a hearing date. Depending on the current caseload of the OAH and the assigned attorney, the hearing date may be set several months after the case is opened. The OAH will typically offer its earliest available hearing date that meets the schedule of both parties.

If you choose not to be represented by an attorney, the assigned CalPERS lawyer will be in direct communication with you during the appeal process. If you do hire an attorney, please let CalPERS know immediately so our attorney can work directly with him or her.

Enclosed is an informational brochure on the General Procedures for Administrative Hearings.

After the hearing is completed, the Administrative Law Judge will issue a Proposed Decision in approximately 30 days. The CalPERS Board of Administration will then make a determination whether to accept or reject that Proposed Decision. If the Board rejects the Proposed Decision, they will hold a Full Board Hearing in order to review the entire hearing record again before finalizing their decision.

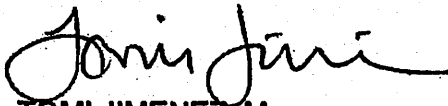
Your appeal should be mailed to the following address:

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**KAREN DEFRANK, Division Chief
Customer Account Services Division
P.O. Box 942709
Sacramento, CA 94229-2709**

If you have any questions or concerns regarding this matter please contact Michelle Balzouman, Manager, at 888 CalPERS or (888-225-7377).

Sincerely,



**TOMI JIMENEZ, Manager
Compensation and Employer Review
Customer Account Services Division**

Enclosure

**cc: Karen DeFrank, Division Chief
Georgia Chamberlain, City of San Bernardino**