

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal of Final  
Compensation of:

ANDREW MILLER,

Respondent,

and

CITY OF MONTEREY,

Respondent.

Case No. 2014-1236

OAH No. 2015100121

**PROPOSED DECISION**

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on February 2, 2016, in Salinas, California.

Kevin Kreutz, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Andrew Miller represented himself and was present throughout the administrative hearing.

No appearance was made by or on behalf of respondent City of Monterey. Upon proof of compliance with Government Code sections 11505 and 11509, the matter proceeded as a default against the City of Monterey pursuant to Government Code section 11520.

The matter was submitted for decision on February 2, 2016.

**ISSUE**

Should the additional compensation received by Fire Chief Andrew Miller during his last year of employment with the City of Monterey for assuming duties of an Assistant City Manager be included in his "final compensation" for the purpose of calculating his CalPERS service retirement benefits?

**CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM**

FILED Feb. 22 2016  
[Signature]

## FACTUAL FINDINGS

1. Renee Ostrander, Chief of the Employer Account Management Division of CalPERS, filed the statement of issues in her official capacity.

2. The City of Monterey, a public entity, contracted with CalPERS to provide retirement benefits to its eligible employees. The contract between the City of Monterey and CalPERS is subject to the Public Employee Retirement Law (PERL). (Gov. Code, §§ 20000 et seq.) CalPERS 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. A public agency's contribution is determined by applying a rate to the payroll of the agency.

3. Andrew Dufort Miller (respondent) was employed by the City of Monterey as its Fire Chief. By virtue of his employment, respondent was a local safety member of CalPERS.

4. On March 11, 2013, respondent signed an application for service retirement. Respondent retired for service effective July 9, 2013, with 30.231 years of credited service.

5. A disagreement exists concerning the amount of respondent's final compensation for purposes of calculating his CalPERS service retirement allowance. On January 27, 2014, CalPERS informed respondent and the City of Monterey, that \$472.71 paid semi-monthly to respondent for additional duties during his last 13 months of employment, and reported as special compensation, did not qualify as compensation to be included in the calculation of his retirement allowance. Respondent and the City of Monterey appealed the decision and this hearing followed.

### *Respondent's Work History*

6. Respondent began working as a firefighter with the California Department of Forestry and Fire Protection. After approximately nine months, he transferred to the North County Fire Protection District of Monterey County, where he worked for approximately one year. Respondent then worked for five years with the Aromas Tri-County Fire District. Respondent worked for approximately 25 years for the Pacific Grove Fire Department, promoting in rank from firefighter to Fire Chief.

7. In the mid-2000's, while the Pacific Grove Fire Chief, respondent developed a relationship with the Carmel-by-the-Sea Fire Department. The two fire departments reached an arrangement through which they shared administrative duties. In 2008 or 2009, the City of Monterey considered the opportunity to save resources by regionalizing fire services with neighboring jurisdictions. The City of Monterey and the City of Pacific Grove began sharing fire services in December 2008. Respondent was on the team that implemented the changes; a former Monterey Assistant City Manager, Jim Thomson, was hired to lead the effort. After

the merger of the Pacific Grove and Monterey fire services, respondent was hired by the City of Monterey as the Assistant Fire Chief effective December 16, 2008. He was promoted to Fire Chief effective December 17, 2010.

8. The Monterey Fire Chief is a member of the executive management employee staff. As Fire Chief, respondent was an exempt employee, and not a member of the Management Employees' Association; however, pursuant to Resolution No. 10-087 C.S., passed by the Monterey City Council on June 15, 2010, executive management employees were entitled to receive changes in salaries and benefits received by the members of the Management Employees' Association. The Memorandum of Understanding (MOU) between the City of Monterey and the Management Employees' Association states at Section 18, that employees assigned to work at a higher level were eligible for additional compensation. Section 19 provides that employees could receive a temporary pay adjustment of between two percent and 20 percent for special assignment pay. The MOU does not contain the percentage increase respondent was going to receive, nor does it describe the eligibility criteria. In order to determine the percentage increase respondent received, or when it was received, a member of the public would need to refer to other documents.

9. In 2012, the City of Monterey began looking at the possibility of merging its fire services with the Monterey Regional Airport Fire District. Thomson was no longer available to lead the merger, and the City Manager asked respondent to assume the role. Respondent agreed. He remained the Fire Chief, but assumed new duties as an interim Assistant City Manager. Respondent delegated some of his regular duties to other fire department employees, and took on the merger project. In exchange for taking on the additional duties, respondent was given a seven percent increase in compensation as special assignment pay. The job description of Fire Chief states that the monthly compensation for the position is \$13,506 (or \$6,753 bimonthly). As of June 1, 2012, respondent's pay was increased from \$6,753 to \$7,225.71. The salary schedule for the semi-monthly pay of an Assistant City Manager position was \$7,316.

10. The City of Monterey did not change respondent's job classification. A Personnel Action Form dated May 30, 2012, identified respondent's position as Fire Chief, but provided him with the seven percent salary increase as "special assignment pay," effective June 1, 2012. Respondent, as Fire Chief, assumed duties related to fire services consolidation normally assigned to an Assistant City Manager. The City of Monterey reported respondent's special assignment pay to CalPERS during the 13 months he worked in this capacity as "Special Compensation." The City of Monterey expected respondent's increased earnings to be included when CalPERS calculated his retirement allowance.

11. Respondent performed excellent work, and completed the merger, which was very beneficial to the City of Monterey. Respondent retired shortly after the project was completed.

*Rejection of Respondent's Special Assignment Pay in Final Compensation*

12. The amount of a member's service retirement is calculated by applying a percentage figure, based on the member's age on the date of retirement, to the member's years of service and the member's "final compensation." In computing a member's retirement allowance, CalPERS staff review the salary reported by the employer for the member to ensure that only those items allowed under PERL are included in the member's final compensation for purposes of calculating the retirement allowance.

13. CalPERS reviewed respondent's payroll records in calculating his retirement allowance. For the final year of respondent's employment (June 2012 through June 2013), the City of Monterey had reported respondent's monthly compensation as \$13,506 for his position as Fire Chief, and special compensation at a rate of \$777.70 semi-monthly. Of the \$777.70 reported as special compensation, \$472.71 constituted the seven percent increase paid to respondent as special assignment pay.

14. On June 28, 2013, Michele Maloney, the Benefits Manager for the City of Monterey, wrote to CalPERS concerning the special compensation pay reported for respondent. Maloney stated that, effective June 1, 2012, respondent had received seven percent of his base salary as out-of-class pay for performing out-of-class duties. Maloney stated:

I hope that this letter demonstrates to you the nature of [respondent's] out-of-class assignment. Also, that these same duties/projects were previously performed by an employee receiving the pay of an Assistant City Manager. The current Assistant City Manager salary is \$14,632 per month. This amount is slightly above the monthly rate that [respondent] is receiving for both base salary and out-of-class pay combined (14,451.42 per month).

15. CalPERS determined that the special assignment pay received for the additional duties performed should not be included in respondent's final compensation.

16. On January 27, 2014, CalPERS wrote to respondent and the City of Monterey regarding its conclusions. CalPERS determined that the out-of-class pay did not constitute special compensation as defined in PERL and the implementing regulations. CalPERS therefore excluded the \$472.71 from its calculation of respondent's retirement allowance. Respondent and the City of Monterey appealed, and this hearing followed.

17. At hearing, CalPERS senior analyst Sam Camacho testified that the special assignment paid to respondent, if included in his final compensation, would create an unfunded liability.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. A party seeking to obtain a recalculation of a retirement benefit has the initial burden to establish the amount of the retirement allowance he or she is entitled to receive. (Evid. Code, § 500; Evid. Code, § 550; *Greator v. Board of Administration* (1979) 91 Cal.App.3d 54, 57.) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

### *Introduction*

2. PERL establishes a retirement system for employees of the State of California and participating local agencies. (*Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310, 1316.) By virtue of his employment as Fire Chief for the City of Monterey, respondent was a local safety member of CalPERS. (Factual Finding 3.)

3. Members of CalPERS, once vested, participate in a pre-funded defined benefit retirement plan, which supplies a monthly retirement allowance based on years of service, final compensation and age at retirement. 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. A public agency's contribution is determined by applying a rate to the payroll of the agency. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)

4. Article XVI, section 17, of the California Constitution provides that "the assets of a public pension or retirement system are trust funds and shall be held for the exclusive purpose of providing benefits to participants . . . and defraying reasonable expense of administering the system." Public policy requires that the Board of Administration (Board) treat members consistently and that it protect the funds entrusted to it for the benefit of future retirees.

### *Calculation of Respondent's Retirement Allowance*

5. The issue here is whether to include respondent's special assignment pay in his final compensation and retirement allowance calculation. An employee's final compensation is not simply the cash remuneration received; it is defined by the Legislature in applicable statutes and regulations. The definition of "final compensation" under PERL is not subject to change based on bargaining agreements, the Board's characterization, or the intent of the employer or employee. (*Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 585.)

6. Respondent argues that his final compensation should include the bimonthly pay of \$472.71 that he received for performing duties as an Assistant City Manager while he was leading the fire services consolidation effort. Respondent considers the extra pay to constitute "temporary upgrade pay" as defined in California Code of Regulations, title 2, section 571, subdivision (a)(3), which constitutes "special compensation" that is included in a member's final compensation.

CalPERS argues that this extra pay did not qualify as special compensation; rather, it argues that the extra pay for these services constitutes "out-of-class pay" pursuant to Government Code section 20635, and that it is excluded as special compensation pursuant to Government Code section 20636 and California Code of Regulations, title 2, section 571, subdivision (b).

#### THE DEFINITION OF COMPENSATION

7. When a public agency reports compensation to CalPERS, it must only report an employee's "compensation earnable." (Gov. Code, § 20630.) Compensation earnable is comprised of the member's payrate and special compensation; Government Code section 20636, subdivision (a), provides:

"Compensation earnable" by a member means the payrate and special compensation of a member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

#### PAYRATE

8. Government Code section 20636, subdivision (b)(1), defines payrate as follows:

"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) or subdivision (e).

During respondent's final year of service, his bimonthly payrate was \$6,753, the published salary of the Fire Chief. (Factual Findings 9 and 13.)

## SPECIAL COMPENSATION

9. Special compensation is defined in Government Code section 20636, subdivision (c)(1), as follows:

Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

The definition of special compensation is defined further in Government Code section 20636, subdivisions (c)(2) through (d), and in regulations adopted by the Board.

10. California Code of Regulations, title 2, section 571, subdivision (a), defines special compensation as limited exclusively to the list contained in the regulation. Subdivision (a)(3) identifies special compensation as including "temporary upgrade pay." Subdivision (a)(3) defines temporary upgrade pay as:

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

Respondent asserts that his pay increase for assuming the duties to lead the fire services consolidation effort constituted temporary upgrade pay. However, the City of Monterey did not upgrade his classification to that of Assistant City Manager. (Factual Finding 10.) And, respondent agreed to assume the extra duties; he was not required to do so. (Factual Finding 9.) Therefore, respondent's pay increase does not qualify as temporary upgrade pay.

11. California Code of Regulations, title 2, section 571, subdivision (b)(1), requires that all items of special compensation must be contained in a written labor policy or agreement that indicates the conditions for payment of special compensation. Items such as the percentage increase being paid and the eligibility criteria are items that must be included in the labor policy or agreement to allow for transparency. In addition, subdivision (b)(1) requires that the labor agreement not reference other documents to meet these requirements. Subdivision (b)(1) further requires that the special compensation be historically consistent with prior payments for the job classification, that it not be paid exclusively in the final compensation period, and that it not create an unfunded liability over and above actuarial assumptions.

The Memorandum of Understanding that permitted respondent to receive special assignment pay did not contain the percentage increase or the eligibility criteria, and requires reference to other materials. (Factual Finding 8.) In addition, there is no evidence that the special compensation was historically consistent with prior payments to the Fire Chief. Respondent received the special pay during the last 13 months of his employment only. (Factual Findings 13 and 14.) Finally, the increase in pay created an unfunded liability for the fund. (Factual Finding 17.) For these reasons, respondent's special assignment pay does not meet the definition of special compensation under section 571, subdivision (b)(1).

12. Section 571, subdivision (d), provides that only items listed in subdivision (a), or meeting the requirements of subdivision (b), may be used to calculate a member's final compensation. Respondent's special assignment pay therefore does not qualify as special compensation.

13. Respondent's out-of-class pay increase is also excluded from final compensation pursuant to Government Code section 20635. Government Code section 20635 provides in pertinent part:

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. . . .

Respondent rendered service in two positions: Fire Chief and interim Assistant City Manager. His full time position was that of Fire Chief, and he received additional compensation for assuming part-time duties as interim Assistant City Manager. Pursuant to Government Code section 20635, compensation for his additional duties is excluded from final compensation and his retirement allowance calculation.

### *Conclusion*

14. Respondent was paid for the full time position of Fire Chief. He received special assignment pay to perform the duties of an Assistant City Manager on a temporary basis. Pursuant to Government Code sections 20630, 20635, 20636, and California Code of Regulations, title 2, section 571, respondent's special assignment pay does not qualify as special compensation, and should not be included in his final compensation. CalPERS properly excluded respondent's special assignment pay from his retirement allowance calculation. Therefore, the appeals of respondent and the City of Monterey will be denied.

ORDER

The appeals of Andrew Miller and the City of Monterey are denied.

DATED: February 16, 2016

DocuSigned by:

*Jill Schlichtmann*

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JILL SCHLICHTMANN  
Administrative Law Judge  
Office of Administrative Hearings