

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues of:

ALBERT TROMP,

Respondent,

And

CITY OF EL MONTE,

Respondent.

Case No. 2014-0695

OAH No. 2014080834

PROPOSED DECISION

This matter, consolidated for hearing with OAH case numbers 2014080186, 2015050226, 2015050218, 2014080189, 2015050236, 2015050222, 2015050224, and 2015050330, came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on December 7, 2015.

At the hearing, Wesley E. Kennedy, Senior Staff Attorney, represented Complainant Renee Ostrander, Acting Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS). Preet Kaur, Senior Staff Attorney, filed Complainant's post-hearing written arguments.

Albert Tromp (Respondent) represented himself.

Frances E. Rogers, Attorney at Law, represented City of El Monte (Respondent City).

Respondent worked for Respondent City as a police sergeant until his retirement on November 3, 2012. From July 1, 2010, until June 30, 2011, Respondent received Master Officer Pay (MOP), which increased his salary by seven percent. CalPERS concluded that the MOP was not a recognized special compensation item that could be included in the calculation of Respondent's pension allowance, or in the language often used at the hearing, it concluded that the MOP is not "pensionable." In its view, the MOP does not meet the definition of special compensation because CalPERS did not specifically designate the item as one of special compensation in a regulation and because it fails to meet other specific criteria of special

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED April 28 20 16

Maureen Berg

compensation items. CalPERS argues that the MOP is actually final settlement pay given as a retirement incentive to the most senior peace officers employed by Respondent City, which pay is not pensionable. Respondents disagree and assert the MOP should be included in the calculation of Respondent's service retirement allowance because it is an item of special compensation that meets all statutory and regulatory requirements. Respondents also argue that CalPERS waived some of its arguments by failing to place Respondents on notice regarding the basis of CalPERS's determination. As set forth in this Proposed Decision, while the MOP meets several of the requirements of special compensation, it must be excluded from Respondent's pension calculation because it fails to meet the definition of a payment CalPERS has affirmatively determined to be special compensation.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument and for the filing of objections to the receipt of Exhibits 40 and 41. No objections were received by the February 29, 2016 deadline, and Exhibits 40 and 41 are received in evidence.

On March 11, 2015 Respondent City filed closing argument entitled "City of El Monte Closing Brief" and a "City of El Monte's Administrative Authorities in Support of the City of El Monte's Closing Brief." On March 11, 2016, Complainant filed "CalPERS Prehearing Position Statement." On March 25, 2016, Respondent City filed "City of El Monte's Reply to CalPERS' Pre-hearing Position Statement" and Complainant filed "CalPERS Reply Brief." Respondent was given the opportunity to present closing argument if he disagreed with the position taken by Respondent City, but did not file a closing argument. Respondents' interests are aligned and references to Respondents' positions or arguments include both respondents.

The matter was submitted for decision on March 25, 2016.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. The Statement of Issues extensively quotes from Government Code¹ section 20636, and from California Code of Regulations (CCR), title 2, sections 570 and 571. It concludes with paragraph XI: "This appeal is limited to the issue of whether CalPERS correctly excluded [MOP] from the final compensation calculation of [Respondent]." (Exh. 1, at p. 9.)
3. Respondent City contracts with CalPERS for retirement benefits for eligible employees pursuant to the Public Employees' Retirement Law (PERL), section 20000 et seq.
4. Respondent was employed by Respondent City as a police sergeant. By virtue of his employment, Respondent is a local safety member of CalPERS.

¹ All further statutory references are to the Government Code.

5. Respondent started working for Respondent City in 1984, and retired effective November 3, 2012.

6. Respondent City was experiencing financial difficulties during the period of 2009 and 2010. It was able to obtain agreements with representatives of its employees to defer scheduled pay raises and to reduce other financial obligations. An agreement with El Monte Police Officers' Association (EMPOA), the collective bargaining representative of police officers and sergeants, Side Letter Agreement #1, approved July 16, 2009, deferred for one year a four-percent salary increase due on July 1, 2009, and decreased employer contributions for employee medical insurance for one year.

7. Respondent's police sergeant position was covered by a collective bargaining unit represented by the EMPOA. The July 1, 2007 to December 31, 2010 Memorandum of Understanding (MOU) between Respondent City and EMPOA was amended by Side Letter Agreement #3 dated June 24, 2010. Side Letter Agreement #3 contained the following provision:

"Master Officer Program – To reward the highest experienced officers, for a twelve month trial period, commencing July 1, 2010, the City will provide Master Officer Pay of 6% for Officers and 7% for Sergeants. To qualify for this pay, the employee must have at least 27 years of service and possess an Advanced Certificate issued by Peace Officers Standards and Training (POST). Unless renewed by the City, this Program will terminate on June 30, 2011." (Exh. 38, at p. 1.)

8. EMPOA unit employees are eligible to receive other items of compensation above their base salary. For instance, the MOU contains pay for "Bonus" assignments, including a "Bonus Assignment of Canine Handler." (Exh. 35, at p. 8.) They can also receive "Lead Agent" pay, which pay was started in 2008. In this regard, the MOU provides: "[E]ffective January 1, 2008 unit employees who are qualified and appointed as Lead Agent shall receive six and one-half percent (6 ½ %) above base salary." (Exh. 35, at p. 8.) While there was no testimony regarding the status of the Bonus pay, CalPERS witness Jennifer Sandness of the Compensation Review Unit, testified that Lead Agent pay can be counted toward compensation earnable.

9. From July 1, 2010, until June 30, 2011, Respondent received MOP, which increased his salary by seven percent. The pay was reported by Respondent City to CalPERS as pensionable special compensation.

10. By letter dated July 11, 2013, CalPERS informed Respondent that it would not include MOP in the calculation of his compensation earnable. CalPERS wrote: "The [MOP] reported on your behalf was limited for a one (1) year period and therefore: (1) it was not historically consistent with prior payments for the job classification and (2) created the conditions for an unfunded liability. Furthermore, it is considered final settlement pay as defined under [Government Code] §20636(f) and CCR §570 because it was only available to select employees who had at least 27 years of service and was reported solely in the final

compensation period. Based on this, the [MOP] as defined in the above side letter is not in compliance [with] CCR §571(b)." (Exh. 3, at p. 4.)

11. On December 24, 2013, Respondent appealed CalPERS's determination.

LEGAL CONCLUSIONS

1. A CalPERS 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.

[¶] . . . [¶]

“(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. . . .”

4. As directed by the Legislature in section 20636, subdivision (f), CalPERS has promulgated regulations more specifically defining final settlement pay. CCR, title 2, section 570 provides:

“ ‘Final settlement pay’ means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

“For example, final settlement pay may consist of severance pay or so-called ‘golden parachutes.’ It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

“Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.”

5. CalPERS has affirmatively determined certain items to be special compensation. CCR, title 2, section 571, states in pertinent 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:

“(1) INCENTIVE PAY

[¶] . . . [¶]

“Master Police Officer - Compensation to local police officers, county peace officers and school police or security officers who meet specified requirements, years of employment, performance standards, education, Peace Officer Standard Training (POST), and perform a specialty assignment.

[¶] . . . [¶]

“(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 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.”

6. As noted above, section 20636, 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 20636, 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 MOP paid to Respondent can be considered part of compensation earnable. Compensation earnable is composed of an employee's payrate and special compensation. (§20636, subd. (a).) Inasmuch as there is no contention that the MOP is part of Respondent's payrate, the answer turns on whether the pay constitutes special compensation.

7. The MOP meets general requirements of special compensation, as set forth in legal conclusion numbers 7, 8 and 9. It constitutes “a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions” under section 20636, subdivision (c)(1), because it was paid to police officers, who possessed certain qualifications, for performing their work duties. (Factual Findings 4, 5, 7, and 9.) By its terms, Side Letter Agreement #3 was entered into “To reward the highest experienced officers.” However, the provision did not exempt the officers from work, and they still had to perform their duties in order to earn the MOP.

8. The MOP was provided to represented employees pursuant to a collective bargaining agreement, as required by section 20636, subdivision (c)(2). (Factual Finding 7.) The statute requires that the benefit be provided to “similarly situated members of a group or class.” (*Ibid.*) Complainant argues that this requirement has not been met because the benefit was available only to a limited number of individuals, namely, those with 27 years of service or more. This argument is unpersuasive. The benefit was indeed provided to similarly situated members of a group or class, i.e., peace officers employed by Respondent City, but in order to actually receive the added compensation, members of the group had to meet the MOP requirements, which included time in service as well as training requirements. Complainant does not argue that qualifications or requirements may not be attached to a benefit before members of a group or class can take advantage of it. Analogously, Respondent City peace officers had to meet specified requirements before they could to obtain Lead Agent pay or Bonus pay under the MOU.

9. The MOP was to be paid for “services rendered during normal working hours,” as required by section 20636, subdivision (c)(3). (Factual Findings 7 and 9.) Nothing on the face of the MOU provision defines the added compensation as overtime pay or any other pay for work performed outside normal work hours.

10. In addition to setting forth general requirements for inclusion in the definition of special compensation, the Legislature created specific exclusions. Two of the exclusions are potentially applicable to the MOP. The Legislature specifically excluded from the definition of

special compensation “final settlement pay” (§ 20636, subd. (c)(7)(A)) and “other payments the board has not affirmatively determined to be special compensation” (§ 20636, subd. (c)(7)(C)).

11. As set forth in CCR, title 2, section 571, subdivision (a)(1), CalPERS has affirmatively determined that a type of incentive pay, called “Master Police Officer” pay, constitutes special compensation, if it otherwise meets the requirements of CCR, title 2, section 571, subdivision (b). This Master Police Officer item is the closest approved payment to the MOP, and unless the MOP meets the regulatory definition of Master Police Officer pay, the MOP must be excluded from special compensation under section 20636, subdivision (c)(7)(C). The definition of Master Police Officer pay is set forth in legal conclusion number 5, and the plain language of the regulation, which includes the word “and,” dictates that all elements of the definition must be met.

12. The MOP contains qualification requirements pertaining to years of employment and training, as mandated by CCR, title 2, section 571, subdivision (a)(1). However, it does not contain performance standards and does not involve a specialty assignment. Based on the plain language of the side agreement, set forth in factual finding number 7, a member is not required to perform any assignment he or she was not already performing in exchange for his or her payrate. Moreover, the side letter creating the MOP does not contain a stated basis for measuring or assessing performance. Accordingly, the MOP fails to meet the requirements of the Master Police Officer incentive category to be included in the definition of compensation earnable.²

13. Respondents argue that Respondent was not on notice that CalPERS considered the failure of the MOP to include performance standards or specialty assignments a basis for excluding the MOP from special compensation. This argument is unpersuasive since the determination letter and the Statement of Issues, set forth in factual finding numbers 10 and 2, respectively, quoted the definition of Master Police Officer contained in CCR, title 2, section 570, subdivision (a), and specifically referred to the regulation in articulating that the MOP did not constitute special compensation, as.

14. In addition to affirmatively determining which items are included in special compensation, CalPERS has set forth the characteristics that must be present in these items: the item must be historically consistent with prior payments for the job classification (CCR, tit. 2, § 571, subd. (b)(6)); it must not be paid exclusively in the final compensation period (CCR, tit. 2, § 571, subd. (b)(7)); it must not constitute final settlement pay (CCR, tit. 2, § 571, subd. (b)(8)); and it must not create an unfunded liability over and above [CalPERS]’ actuarial assumptions

² Respondents correctly point out that some items of special compensation, such as educational incentive pay and longevity pay, do not require the performance of a specialty assignment. However, the MOP was not structured to be, and no argument has been presented that it should be, treated as one of these other special compensation items. The Master Police Officer category remains the most applicable of those affirmatively determined by CalPERS to be special compensation.

(CCR, tit. 2, § 571, subd. (b)(9).) These proscriptions cannot be used to exclude the MOP from being part of special compensation, as set forth in legal conclusion numbers 15, 16, 17 and 18.

15. While Respondent City had not previously paid the MOP, it had paid other items of compensation beyond base salary, including Lead Agent pay, and, therefore, the MOP is historically consistent with prior payments for the job classification. The fact that Respondent received the MOP on the item's first and only year does not negate the historical consistency. To conclude otherwise would mean that an employer could never create a new item of special compensation even if it met all other criteria, a construction of the regulation that would lead to an absurd result and that would render several other provisions surplusage. In fact, as set forth in factual finding number 8, Lead Agent pay commenced approximately two-and-one-half years before the MOP and has been treated as part of compensation earnable. The MOP is thus historically consistent with prior payments for the job classification, as required by CCR, title 2, section 571, subdivision (b)(6).

16. Respondent did not receive the MOP in his last year of employment. In any event, the benefit was not structured to be paid only in the last year of employment, and Respondent in fact continued to work for Respondent City even after he no longer received the MOP. Accordingly, the MOP cannot be excluded from special compensation on the basis that it was paid exclusively in the final compensation period, as proscribed by CCR, title 2, section 571, subdivision (b)(7).

17. The evidence does not establish that the MOP created unfunded liabilities over and above CalPERS' actuarial assumptions in violation of CCR, title 2, section 571, subdivision (b)(9). While the MOP increased Respondent City's retirement payment obligations, no evidence was presented about the other side of the ledger, and, therefore, it was not established that Respondent City would be unable to meet its obligations due to inclusion of MOP in its police officers' special compensation.

18. As set forth in legal conclusion numbers 3 and 4, final settlement pay is pay awarded in connection with or in anticipation of a separation from employment. It cannot be disputed that Respondent City had financial difficulties at the time it entered into Side Letter Agreement #3. In addition, some of the individual respondents believed that the MOP was intended to motivate senior officers to retire. However, the MOP was never expressly structured as a golden parachute or any other retirement incentive, and members could have continued to work after June 30, 2011. Individual perceptions that the MOP was a retirement incentive due to Respondent City's financial condition constitute mere speculation.

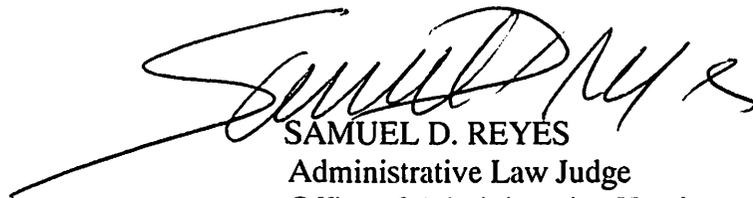
19. CalPERS has the duty and the power to correct mistakes made in the calculation of a retirement allowance. (§§ 20160, subd. (b), 20164.) Moreover, "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled." (Gov. Code, § 20163, subd. (a).)

20. By reason of the foregoing factual findings and legal conclusions, the MOP is not part of special compensation and CalPERS cannot include it in calculating Respondent's retirement allowance. Notwithstanding the many special compensation criteria the MOP meets, it fails to conform to the definition of Master Police Officer pay set forth in CCR, title 2, section 571, subdivision (a)(1). Since all criteria, including that one, must be met, MOP is not special compensation, and must be excluded from the calculation of Respondent's retirement allowance.

ORDER

The appeal of Respondent Albert Tromp is denied.

DATED: 4/21/16


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues of:

GEORGE HOPKINS,

Respondent,

and

CITY OF EL MONTE,

Respondent.

Case No. 2014-0070

OAH No. 2014080189

PROPOSED DECISION

This matter, consolidated for hearing with OAH case numbers 2014080186, 2015050226, 2015050218, 2015050236, 2015050222, 2015050224, 2014080834, and 2015050330, came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on December 7, 2015.

At the hearing, Wesley E. Kennedy, Senior Staff Attorney, represented Complainant Karen DeFrank, Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS). Preet Kaur, Senior Staff Attorney, filed Complainant's post-hearing written arguments.

George Hopkins (Respondent) represented himself.

Frances E. Rogers, Attorney at Law, represented City of El Monte (Respondent City).

Respondent worked for Respondent City as a police captain until his retirement on June 30, 2011. From July 1, 2010, until June 30, 2011, Respondent received Master Officer Pay, (MOP) which increased his salary by seven percent. CalPERS subsequently concluded that the MOP was not a recognized special compensation item that could be included in the calculation of Respondent's pension allowance, or in the language often used at the hearing, it concluded that the MOP is not "pensionable." In CalPERS's view, the MOP does not meet the definition of special compensation because CalPERS did not specifically designate the item as one of special compensation in a regulation and because it fails to meet other specific criteria of special

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED April 28, 2016

Mailee George

compensation items. CalPERS argues that the MOP is actually final settlement pay given as a retirement incentive to the most senior peace officers employed by Respondent City, which pay is not pensionable. Respondents disagree and assert the MOP should be included in the calculation of Respondent's service retirement allowance because it is an item of special compensation that meets all statutory and regulatory requirements. Respondents also argue that CalPERS waived some of its arguments by failing to place Respondents on notice regarding the basis of CalPERS's determination. As set forth in this Proposed Decision, while the MOP meets several of the requirements of special compensation, it must be excluded from Respondent's pension calculation because it fails to meet the definition of a payment CalPERS has affirmatively determined to be special compensation.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument and for the filing of objections to the receipt of Exhibits 40 and 41. No objections were received by the February 29, 2016 deadline, and Exhibits 40 and 41 are received in evidence.

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The matter was submitted for decision on March 25, 2016.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. The Statement of Issues extensively quotes from Government Code¹ section 20636, and from California Code of Regulations (CCR), title 2, sections 570 and 571. It concludes with paragraph XI: "This appeal is limited to the issue of whether CalPERS correctly excluded [MOP] from the final compensation calculation of [Respondent]." (Exh. 6, at p. 10.)
3. Respondent City contracts with CalPERS for retirement benefits for eligible employees pursuant to the Public Employees' Retirement Law (PERL), section 20000 et seq.
4. Respondent was employed by Respondent City as a police captain. By virtue of his employment, Respondent is a local safety member of CalPERS.

¹ All further statutory references are to the Government Code.

5. Respondent started working for Respondent City in 1980, and retired effective June 30, 2011.

6. Respondent City was experiencing financial difficulties during the period of 2009 and 2010. It was able to obtain agreements with representatives of its employees to defer scheduled pay raises and to reduce other financial obligations. An agreement with El Monte Police Officers' Association (EMPOA), the collective bargaining representative of police officers and sergeants, Side Letter Agreement #1, approved July 16, 2009, deferred for one year a four-percent salary increase due on July 1, 2009, and decreased employer contributions for employee medical insurance for one year.

7. The July 1, 2007 to December 31, 2010 Memorandum of Understanding (MOU) between Respondent City and EMPOA, the collective bargaining association of police officers and sergeants, was amended by Side Letter Agreement #3 dated June 24, 2010. Side Letter Agreement #3 contained the following provision:

“Master Officer Program – To reward the highest experienced officers, for a twelve month trial period, commencing July 1, 2010, the City will provide Master Officer Pay of 6% for Officers and 7% for Sergeants. To qualify for this pay, the employee must have at least 27 years of service and possess an Advanced Certificate issued by Peace Officers Standards and Training (POST). Unless renewed by the City, this Program will terminate on June 30, 2011.” (Exh. 38, at p. 1.)

8. EMPOA unit employees are eligible to receive other items of compensation above their base salary. For instance, the MOU contains pay for “Bonus” assignments, including a “Bonus Assignment of Canine Handler.” (Exh. 35, at p. 8.) They can also receive “Lead Agent” pay, which pay was started in 2008. In this regard, the MOU provides: “[E]ffective January 1, 2008 unit employees who are qualified and appointed as Lead Agent shall receive six and one-half percent (6 ½ %) above base salary.” (Exh. 35, at p. 8.) While there was no testimony regarding the status of the Bonus pay, CalPERS witness Jennifer Sandness of the Compensation Review Unit, testified that Lead Agent pay can be counted toward compensation earnable.

9. Respondent was in a bargaining unit represented by the Police Mid-Management Association (PMMA). PMMA and Respondent City had negotiated what is referred to as a “me too” clause in Side Letter Agreement #3 to the July 1, 2007, to December 31, 2010 Memorandum of Understanding between the parties, effective June 24, 2010, which stated: “[E]ffective July 1, 2010, PMMA members shall be guaranteed the equivalent if any other City employee, who belongs to a Bargaining Unit, receives any deferred raises or benefits contractually agreed upon in their existing MOU or Side Letter Agreements.” (Exh. A.) Respondent received the MOP benefit by virtue of the “me too” clause.

10. From July 1, 2010, until June 30, 2011, Respondent received MOP, which increased his salary by seven percent. The pay was reported by Respondent City to CalPERS as pensionable special compensation.

11. By letter dated July 11, 2013, CalPERS informed Respondent that it would not include MOP Pay in the calculation of his compensation earnable. CalPERS wrote: "The [MOP] reported on your behalf was limited for a one (1) year period and therefore: (1) it was not historically consistent with prior payments for the job classification and (2) created the conditions for an unfunded liability. Furthermore, it is considered final settlement pay as defined under [Government Code] §20636(f) and CCR §570 because it was only available to select employees who had at least 27 years of service and was reported solely in the final compensation period. Based on this, the [MOP] as defined in the above side letter is not in compliance [with] CCR §571(b)." (Exh. 6, at p. 4.)

12. On August 8, 2013, Respondent appealed CalPERS's determination.

LEGAL CONCLUSIONS

1. A CalPERS 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.

[¶] . . . [¶]

“(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. . . .”

4. As directed by the Legislature in section 20636, subdivision (f), CalPERS has promulgated regulations more specifically defining final settlement pay. CCR, title 2, section 570 provides:

“ ‘Final settlement pay’ means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

“For example, final settlement pay may consist of severance pay or so-called ‘golden parachutes.’ It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

“Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.”

5. CalPERS has affirmatively determined certain items to be special compensation. CCR, title 2, section 571, states in pertinent 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:

“(1) INCENTIVE PAY

[¶] . . . [¶]

“Master Police Officer - Compensation to local police officers, county peace officers and school police or security officers who meet specified requirements, years of employment, performance standards, education, Peace Officer Standard Training (POST), and perform a specialty assignment.

[¶] . . . [¶]

“(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 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.”

6. As noted above, section 20636, 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 20636, 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 MOP paid to Respondent can be considered part of compensation earnable. Compensation earnable is composed of an employee's payrate and special compensation. (§20636, subd. (a).) Inasmuch as there is no contention that the MOP is part of Respondent's payrate, the answer turns on whether the pay constitutes special compensation.

7. The MOP meets general requirements of special compensation, as set forth in legal conclusion numbers 7, 8 and 9. It constitutes “a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions” under section 20636, subdivision (c)(1), because it was paid to police officers, who possessed certain qualifications, for performing their work duties. (Factual Findings 4, 5, 7, 9, and 10.) By its terms, Side Letter Agreement #3 was entered into “To reward the highest experienced officers.” However, the provision did not exempt the officers from work, and they still had to perform their duties in order to earn the MOP.

8. The MOP was provided to represented employees pursuant to a collective bargaining agreement, as required by section 20636, subdivision (c)(2). (Factual Findings 7 and 9.) The statute requires that the benefit be provided to “similarly situated members of a group or class.” (*Ibid.*) Complainant argues that this requirement has not been met because the benefit was available only to a limited number of individuals, namely, those with 27 years of service or more. This argument is unpersuasive. The benefit was indeed provided to similarly situated members of a group or class, i.e., peace officers employed by Respondent City, but in order to actually receive the added compensation, members of the group had to meet the MOP requirements, which included time in service as well as training requirements. Complainant does not argue that qualifications or requirements may not be attached to a benefit before members of a group or class can take advantage of it. Analogously, Respondent City peace officers had to meet specified requirements before they could to obtain Lead Agent pay or Bonus pay under the MOU.

9. The MOP was to be paid for “services rendered during normal working hours,” as required by section 20636, subdivision (c)(3). (Factual Findings 7 and 9.) Nothing on the face of the MOU provision defines the added compensation as overtime pay or any other pay for work performed outside normal work hours.

10. In addition to setting forth general requirements for inclusion in the definition of special compensation, the Legislature created specific exclusions. Two of the exclusions are potentially applicable to the MOP. The Legislature specifically excluded from the definition of special compensation “final settlement pay” (§ 20636, subd. (c)(7)(A)) and “other payments the board has not affirmatively determined to be special compensation” (§ 20636, subd. (c)(7)(C)).

11. As set forth in CCR, title 2, section 571, subdivision (a)(1), CalPERS has affirmatively determined that a type of incentive pay, called “Master Police Officer” pay, constitutes special compensation, if it otherwise meets the requirements of CCR, title 2, section 571, subdivision (b). This Master Police Officer item is the closest approved payment to the MOP, and unless the MOP meets the regulatory definition of Master Police Officer pay, the MOP must be excluded from special compensation under section 20636, subdivision (c)(7)(C). The definition of Master Police Officer pay is set forth in legal conclusion number 5, and the plain language of the regulation, which includes the word “and,” dictates that all elements of the definition must be met.

12. The MOP contains qualification requirements pertaining to years of employment and training, as mandated by CCR, title 2, section 571, subdivision (a)(1). However, it does not contain performance standards and does not involve a specialty assignment. Based on the plain language of the side agreement, set forth in factual finding number 7, a member is not required to perform any assignment he or she was not already performing in exchange for his or her payrate. Moreover, the side letter creating the MOP does not contain a stated basis for measuring or assessing performance. Accordingly, the MOP fails to meet the requirements of the Master Police Officer incentive category to be included in the definition of compensation earnable.²

13. Respondents argue that Respondent was not on notice that CalPERS considered the failure of the MOP to include performance standards or specialty assignments a basis for excluding the MOP from special compensation. This argument is unpersuasive since the determination letter and the Statement of Issues, set forth in factual finding numbers 11 and 2, respectively, quoted the definition of Master Police Officer contained in CCR, title 2, section 570, subdivision (a), and specifically referred to the regulation in articulating that the MOP did not constitute special compensation.

² Respondents correctly point out that some items of special compensation, such as educational incentive pay and longevity pay, do not require the performance of a specialty assignment. However, the MOP was not structured to be, and no argument has been presented that it should be, treated as one of these other special compensation items. The Master Police Officer category remains the most applicable of those affirmatively determined by CalPERS to be special compensation.

14. In addition to affirmatively determining which items are included in special compensation, CalPERS has set forth the characteristics that must be present in these items: the item must be historically consistent with prior payments for the job classification (CCR, tit. 2, § 571, subd. (b)(6)); it must not be paid exclusively in the final compensation period (CCR, tit. 2, § 571, subd. (b)(7)); it must not constitute final settlement pay (CCR, tit. 2, § 571, subd. (b)(8)); and it must not create an unfunded liability over and above [CalPERS]' actuarial assumptions (CCR, tit. 2, § 571, subd. (b)(9).) These proscriptions cannot be used to exclude the MOP from being part of special compensation, as set forth in legal conclusion numbers 15,16, 17, and 18.

15. While Respondent City had not previously paid the MOP, it had paid other items of compensation beyond base salary, including Lead Agent pay, and, therefore, the MOP is historically consistent with prior payments for the job classification. The fact that Respondent received the MOP on the item's first and only year does not negate the historical consistency. To conclude otherwise would mean that an employer could never create a new item of special compensation even if it met all other criteria, a construction of the regulation that would lead to an absurd result and that would render several other provisions surplusage. In fact, as set forth in factual finding number 8, Lead Agent pay commenced approximately two-and-one-half years before the MOP and has been treated as part of compensation earnable. The MOP is thus historically consistent with prior payments for the job classification, as required by CCR, title 2, section 571, subdivision (b)(6).

16. Similarly, while Respondent received the MOP in his last year of employment, the benefit was not structured to be paid only in the last year of employment, and Respondent could have continued to work for Respondent City even after he no longer received the MOP. Accordingly, the MOP cannot be excluded from special compensation on the basis that it was paid exclusively in the final compensation period, as proscribed by CCR, title 2, section 571, subdivision (b)(7).

17. The evidence does not establish that the MOP created unfunded liabilities over and above CalPERS' actuarial assumptions in violation of CCR, title 2, section 571, subdivision (b)(9). While the MOP increased Respondent City's retirement payment obligations, no evidence was presented about the other side of the ledger, and, therefore, it was not established that Respondent City would be unable to meet its obligations due to inclusion of MOP in its police officers' special compensation.

18. As set forth in legal conclusion numbers 3 and 4, final settlement pay is pay awarded in connection with or in anticipation of a separation from employment. It cannot be disputed that Respondent City had financial difficulties at the time it entered into Side Letter Agreement #3. In addition, some of the individual respondents believed that the MOP was intended to motivate senior officers to retire. However, the MOP was never expressly structured as a golden parachute or any other retirement incentive, and members could have continued to work after June 30, 2011. Individual perceptions that the MOP was a retirement incentive due to Respondent City's financial condition constitute mere speculation.

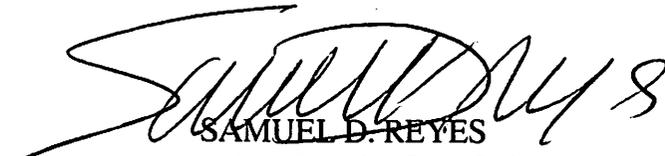
19. CalPERS has the duty and the power to correct mistakes made in the calculation of a retirement allowance. (§§ 20160, subd. (b), 20164.) Moreover, "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled." (Gov. Code, § 20163, subd. (a).)

19. By reason of the foregoing factual findings and legal conclusions, the MOP is not part of special compensation and CalPERS cannot include it in calculating Respondent's retirement allowance. Notwithstanding the many special compensation criteria the MOP meets, it fails to conform to the definition of Master Police Officer pay set forth in CCR, title 2, section 571, subdivision (a)(1). Since all criteria, including that one, must be met, MOP is not special compensation, and must be excluded from the calculation of Respondent's retirement allowance.

ORDER

The appeal of Respondent George Hopkins is denied.

DATED: 4/21/16


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues of:

DAN BURLINGHAM,

Respondent,

and

CITY OF EL MONTE,

Respondent.

Case No. 2014-0071

OAH No. 2014080186

PROPOSED DECISION

This matter, consolidated for hearing with Office of Administrative Hearings case numbers 2015050226, 2015050218, 2014080189, 2015050236, 2015050222, 2015050224, 2014080834, and 2015050330, came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on December 7, 2015.

At the hearing, Wesley E. Kennedy, Senior Staff Attorney, represented Complainant Renee Ostrander, Assistant Division Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS). Preet Kaur, Senior Staff Attorney, filed Complainant's post-hearing written arguments.

Dan Burlingham (Respondent) represented himself.

Frances E. Rogers, Attorney at Law, represented City of El Monte (Respondent City).

Respondent worked for Respondent City as a police lieutenant until his retirement on June 1, 2013. From July 1, 2010, until June 30, 2011, Respondent received Master Officer Pay (MOP), which increased his salary by seven percent. CalPERS concluded that the MOP was not a recognized special compensation item that could be included in the calculation of Respondent's pension allowance, or in the language often used at the hearing, it concluded that the MOP is not "pensionable." In CalPERS's view, the MOP does not meet the definition of special compensation because CalPERS did not specifically designate the item as one of special

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED April 28 20 16

Maureen DeGuz

compensation in a regulation and because it fails to meet other specific criteria of special compensation items. CalPERS argues that the MOP is actually final settlement pay given as a retirement incentive to the most senior peace officers employed by Respondent City, which pay is not pensionable. Respondents disagree and assert the MOP should be included in the calculation of Respondent's service retirement allowance because it is an item of special compensation that meets all statutory and regulatory requirements. Respondents also argue that CalPERS waived some of its arguments by failing to place Respondents on notice regarding the basis of CalPERS's determination. As set forth in this Proposed Decision, while the MOP meets several of the requirements of special compensation, it must be excluded from Respondent's pension calculation because it fails to meet the definition of a payment CalPERS has affirmatively determined to be special compensation.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument and for the filing of objections to the receipt of Exhibits 40 and 41. No objections were received by the February 29, 2016 deadline, and Exhibits 40 and 41 are received in evidence.

On March 11, 2015 Respondent City filed closing argument entitled "City of El Monte Closing Brief" and a "City of El Monte's Administrative Authorities in Support of the City of El Monte's Closing Brief." On March 11, 2016, Complainant filed "CalPERS Prehearing Position Statement." On March 25, 2016, Respondent City filed "City of El Monte's Reply to CalPERS' Pre-hearing Position Statement" and Complainant filed "CalPERS Reply Brief." Respondent was given the opportunity to present closing argument if he disagreed with the position taken by Respondent City, but did not file a closing argument. Respondents' interests are aligned and references to Respondents' positions or arguments include both respondents.

The matter was submitted for decision on March 25, 2016.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. The Statement of Issues extensively quotes from Government Code¹ section 20636, and from California Code of Regulations (CCR), title 2, sections 570 and 571. It concludes with paragraph XI: "This appeal is limited to the issue of whether CalPERS correctly excluded [MOP] from the final compensation calculation of [Respondent]." (Exh. 8, at p. 10.)
3. Respondent City contracts with CalPERS for retirement benefits for eligible employees pursuant to the Public Employees' Retirement Law (PERL), section 20000 et seq.
4. Respondent was employed by Respondent City as a police lieutenant. By virtue of his employment, Respondent is a local safety member of CalPERS.

¹ All further statutory references are to the Government Code.

5. Respondent started working for Respondent City in 1983, and retired effective June 1, 2013.

6. Respondent City was experiencing financial difficulties during 2009 and 2010. It was able to obtain agreements with representatives of its employees to defer scheduled pay raises and to reduce other financial obligations. An agreement with the El Monte Police Officers' Association (EMPOA), the collective bargaining representative of police officers and sergeants, Side Letter Agreement #1, approved July 16, 2009, deferred for one year a four-percent salary increase due on July 1, 2009, and decreased employer contributions for employee medical insurance for one year.

7. The July 1, 2007, to December 31, 2010 Memorandum of Understanding (MOU) between Respondent City and EMPOA, was amended by Side Letter Agreement #3, dated June 24, 2010. Side Letter Agreement #3 contained the following provision:

“Master Officer Program – To reward the highest experienced officers, for a twelve month trial period, commencing July 1, 2010, the City will provide Master Officer Pay of 6% for Officers and 7% for Sergeants. To qualify for this pay, the employee must have at least 27 years of service and possess an Advanced Certificate issued by Peace Officers Standards and Training (POST). Unless renewed by the City, this Program will terminate on June 30, 2011.” (Exh. 38, at p. 1.)

8. EMPOA unit employees are eligible to receive other items of compensation above their base salary. For instance, the MOU contains pay for “Bonus” assignments, including a “Bonus Assignment of Canine Handler.” (Exh. 35, at p. 8.) They can also receive “Lead Agent” pay, which pay was started in 2008. In this regard, the MOU provides: “[E]ffective January 1, 2008 unit employees who are qualified and appointed as Lead Agent shall receive six and one-half percent (6 ½ %) above base salary.” (Exh. 35, at p. 8.) While there was no testimony regarding the status of the Bonus pay, CalPERS witness Jennifer Sandness of the Compensation Review Unit, testified that Lead Agent pay can be counted toward compensation earnable.

9. Respondent was in a bargaining unit represented by the Police Mid-Management Association (PMMA). PMMA and Respondent City had negotiated what is referred to as a “me too” clause in Side Letter Agreement #3 to the July 1, 2007, to December 31, 2010 Memorandum of Understanding between the parties, effective June 24, 2010, which stated: “[E]ffective July 1, 2010, PMMA members shall be guaranteed the equivalent if any other City employee, who belongs to a Bargaining Unit, receives any deferred raises or benefits contractually agreed upon in their existing MOU or Side Letter Agreements.” (Exh. A.) Respondent received the MOP benefit by virtue of the “me too” clause.

10. From July 1, 2010, until June 30, 2011, Respondent received the MOP, which increased his salary by seven percent. The pay was reported by Respondent City to CalPERS as pensionable special compensation.

11. By letter dated August 20, 2013, CalPERS informed Respondent that it would not include the MOP in the calculation of his compensation earnable. The letter referred to the pertinent MOU side-letter provisions, and to the statutory and regulatory provisions governing items of special compensation, namely, section 23636, and CCR, title 2, sections 570 and 571. CalPERS wrote: "The [MOP] reported on your behalf was limited for a one (1) year period and therefore: (1) it was not historically consistent with prior payments for the job classification and (2) created the conditions for an unfunded liability. Furthermore, it is considered final settlement pay as defined under [Government Code] §20636(f) and CCR §570 because it was only available to select employees who had at least 27 years of service and was reported solely in the final compensation period. Based on this, the [MOP] as defined in the above side letter is not in compliance [with] CCR §571(b)." (Exh. 9, at p. 4.)

12. On September 17, 2013, Respondent appealed CalPERS's determination.

LEGAL CONCLUSIONS

1. A CalPERS 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).

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“(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. . . .”

4. As directed by the Legislature in section 20636, subdivision (f), CalPERS has promulgated regulations more specifically defining final settlement pay. CCR, title 2, section 570 provides:

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“For example, final settlement pay may consist of severance pay or so-called ‘golden parachutes.’ It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

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[¶] . . . [¶]

“(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;

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“(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;

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“(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 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.”

6. As noted above, section 20636, 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 20636, 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 MOP paid to Respondent can be considered part of compensation earnable. Compensation earnable is composed of an employee's payrate and special compensation. (§20636, subd. (a).) Inasmuch as there is no contention that the MOP is part of Respondent's payrate, the answer turns on whether the pay constitutes special compensation.

7. The MOP meets general requirements of special compensation, as set forth in legal conclusion numbers 7, 8, and 9. It constitutes “a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions” under section 20636, subdivision (c)(1), because it was paid to police officers, who possessed certain qualifications, for performing their work duties. (Factual Findings 4, 5, 7, 9, and 10.) By its terms, Side Letter Agreement #3 was entered into “To reward the highest experienced officers.” However, the provision did not exempt the officers from work, and they still had to perform their duties in order to earn the MOP.

8. The MOP was provided to represented employees pursuant to a collective bargaining agreement, as required by section 20636, subdivision (c)(2). (Factual Findings 7 and 9.) The statute requires that the benefit be provided to “similarly situated members of a group or class.” (*Ibid.*) Complainant argues that this requirement has not been met because the benefit was available only to a limited number of individuals, namely, those with 27 years of service or more. This argument is unpersuasive. The benefit was indeed provided to similarly situated members of a group or class, i.e., peace officers employed by Respondent City, but in order to actually receive the added compensation, members of the group had to meet the MOP requirements, which included time in service as well as training requirements. Complainant does not argue that qualifications or requirements may not be attached to a benefit before members of a group or class can take advantage of it. Analogously, Respondent City peace

officers had to meet specified requirements before they could to obtain Lead Agent pay or Bonus pay under the MOU.

9. The MOP was to be paid for “services rendered during normal working hours,” as required by section 20636, subdivision (c)(3). (Factual Findings 7 and 9.) Nothing on the face of the MOU provision defines the added compensation as overtime pay or any other pay for work performed outside normal work hours.

10. In addition to setting forth general requirements for inclusion in the definition of special compensation, the Legislature created specific exclusions. Two of the exclusions are potentially applicable to the MOP. The Legislature specifically excluded from the definition of special compensation “final settlement pay” (§ 20636, subd. (c)(7)(A)) and “other payments the board has not affirmatively determined to be special compensation” (§ 20636, subd. (c)(7)(C)).

11. As set forth in CCR, title 2, section 571, subdivision (a)(1), CalPERS has affirmatively determined that a type of incentive pay, called “Master Police Officer” pay, constitutes special compensation, if it otherwise meets the requirements of CCR, title 2, section 571, subdivision (b). This Master Police Officer item is the closest approved payment to the MOP, and unless the MOP meets the regulatory definition of Master Police Officer pay, the MOP must be excluded from special compensation under section 20636, subdivision (c)(7)(C). The definition of Master Police Officer pay is set forth in legal conclusion number 5, and the plain language of the regulation, which includes the word “and,” dictates that all elements of the definition must be met.

12. The MOP contains qualification requirements pertaining to years of employment and training, as mandated by CCR, title 2, section 571, subdivision (a)(1). However, it does not contain performance standards and does not involve a specialty assignment. Based on the plain language of the side agreement, set forth in factual finding number 7, a member is not required to perform any assignment he or she was not already performing in exchange for his or her payrate. Moreover, the side letter creating the MOP does not contain a stated basis for measuring or assessing performance. Accordingly, the MOP fails to meet the requirements of the Master Police Officer incentive category to be included in the definition of compensation earnable.²

13. Respondents argue that Respondent was not on notice that CalPERS considered the failure of the MOP to include performance standards or specialty assignments a basis for excluding the MOP from special compensation. This argument is unpersuasive since the determination letter and the Statement of Issues, set forth in factual finding numbers 11 and 2,

² Respondents correctly point out that some items of special compensation, such as educational incentive pay and longevity pay, do not require the performance of a specialty assignment. However, the MOP was not structured to be, and no argument has been presented that it should be, treated as one of these other special compensation items. The Master Police Officer category remains the most applicable of those affirmatively determined by CalPERS to be special compensation.

respectively, quoted the definition of Master Police Officer contained in CCR, title 2, section 570, subdivision (a), and specifically referred to the regulation in articulating that the MOP did not constitute special compensation.

14. In addition to affirmatively determining which items are included in special compensation, CalPERS has set forth the characteristics that must be present in these items: the item must be historically consistent with prior payments for the job classification (CCR, tit. 2, § 571, subd. (b)(6)); it must not be paid exclusively in the final compensation period (CCR, tit. 2, § 571, subd. (b)(7)); it must not constitute final settlement pay (CCR, tit. 2, § 571, subd. (b)(8)); and it must not create an unfunded liability over and above [CalPERS]' actuarial assumptions (CCR, tit. 2, § 571, subd. (b)(9).) These proscriptions cannot be used to exclude the MOP from being part of special compensation, as set forth in legal conclusion numbers 15, 16, 17, and 18.

15. While Respondent City had not previously paid the MOP, it had paid other items of compensation beyond base salary, including Lead Agent pay, and, therefore, the MOP is historically consistent with prior payments for the job classification. The fact that Respondent received the MOP on the item's first and only year does not negate the historical consistency. To conclude otherwise would mean that an employer could never create a new item of special compensation even if it met all other criteria, a construction of the regulation that would lead to an absurd result and that would render several other provisions as surplusage. In fact, as set forth in factual finding number 8, Lead Agent pay commenced approximately two-and-one-half years before the MOP and has been treated as part of compensation earnable. The MOP is thus historically consistent with prior payments for the job classification, as required by CCR, title 2, section 571, subdivision (b)(6).

16. Respondent did not receive the MOP in his last year of employment. In any event, the benefit was not structured to be paid only in the last year of employment, and Respondent in fact continued to work for Respondent City even after he no longer received the MOP. Accordingly, the MOP cannot be excluded from special compensation on the basis that it was paid exclusively in the final compensation period, as proscribed by CCR, title 2, section 571, subdivision (b)(7).

17. The evidence does not establish that the MOP created unfunded liabilities over and above CalPERS' actuarial assumptions in violation of CCR, title 2, section 571, subdivision (b)(9). While the MOP increased Respondent City's retirement payment obligations, no evidence was presented about the other side of the ledger, and, therefore, it was not established that Respondent City would be unable to meet its obligations due to inclusion of MOP in its police officers' special compensation.

18. As set forth in legal conclusion numbers 3 and 4, final settlement pay is pay awarded in connection with or in anticipation of a separation from employment. It cannot be disputed that Respondent City had financial difficulties at the time it entered into Side Letter Agreement #3. In addition, some of the individual respondents believed that the MOP was intended to motivate senior officers to retire. However, the MOP was never expressly structured as a golden parachute or any other retirement incentive, and members could have

continued to work after June 30, 2011. Individual perceptions that the MOP was a retirement incentive due to Respondent City's financial condition constitute mere speculation.

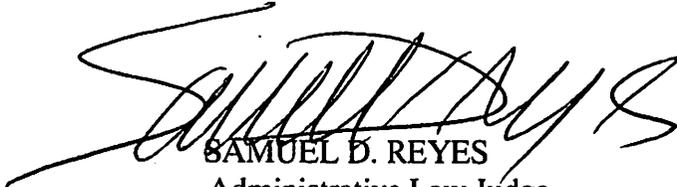
19. CalPERS has the duty and the power to correct mistakes made in the calculation of a retirement allowance. (§§ 20160, subd. (b), 20164.) Moreover, "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled." (Gov. Code, § 20163, subd. (a).)

20. By reason of the foregoing factual findings and legal conclusions, the MOP is not part of special compensation and CalPERS cannot include it in calculating Respondent's retirement allowance. Notwithstanding the many special compensation criteria the MOP meets, it fails to conform to the definition of Master Police Officer pay set forth in CCR, title 2, section 571, subdivision (a)(1). Since all criteria, including that one, must be met, MOP is not special compensation, and must be excluded from the calculation of Respondent's retirement allowance.

ORDER

The appeal of Respondent Dan Burlingham is denied.

DATED: 4/20/16


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues of:

PATRICK REILLY,

Respondent,

And

CITY OF EL MONTE,

Respondent.

Case No. 2014-1277

OAH No. 2015050236

PROPOSED DECISION

This matter, consolidated for hearing with OAH case numbers 2014080186, 2015050226, 2015050218, 2014080189, 2015050222, 2015050224, 2014080834, and 2015050330, came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on December 7, 2015.

At the hearing, Wesley E. Kennedy, Senior Staff Attorney, represented Complainant Renee Ostrander, Assistant Division Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS). Preet Kaur, Senior Staff Attorney, filed Complainant's post-hearing written arguments.

Patrick Reilly (Respondent) did not appear at the hearing.

Frances E. Rogers, Attorney at Law, represented City of El Monte (Respondent City).

CalPERS moved to proceed in default against Respondent, and Respondent City opposed the motion. The motion was denied because Respondent City and other respondents with similar interests were present and because the consolidated matters presented issues common to all respondents.

Respondent worked for Respondent City as a police sergeant until his retirement on July 30, 2011. From July 1, 2010, until June 30, 2011, Respondent received Master Officer Pay (MOP), which increased his salary by seven percent. CalPERS initially included Respondent's

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

April 28 2016
Marlene George

Master Officer Pay in the calculation of Respondent's service retirement allowance, but subsequently concluded the MOP was not a recognized special compensation item that could be included in the calculation of Respondent's pension allowance, or in the language often used at the hearing, it concluded that the MOP is not "pensionable." In CalPERS's view, the MOP does not meet the definition of special compensation because CalPERS did not specifically designate the item as one of special compensation in a regulation and because it fails to meet other specific criteria of special compensation items. CalPERS argues that the MOP is actually final settlement pay given as a retirement incentive to the most senior peace officers employed by Respondent City, which pay is not pensionable. Respondent City disagrees and asserts the MOP should be included in the calculation of Respondent's service retirement allowance because it is an item of special compensation that meets all statutory and regulatory requirements. Respondent City also argues that CalPERS waived some of its arguments by failing to place Respondent on notice regarding the basis of CalPERS's determination. As set forth in this Proposed Decision, while the MOP meets several of the requirements of special compensation, it must be excluded from Respondent's pension calculation because it fails to meet the definition of a payment CalPERS has affirmatively determined to be special compensation.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument and for the filing of objections to the receipt of Exhibits 40 and 41. No objections were received by the February 29, 2016 deadline, and Exhibits 40 and 41 are received in evidence.

On March 11, 2015 Respondent City filed closing argument entitled "City of El Monte Closing Brief" and a "City of El Monte's Administrative Authorities in Support of the City of El Monte's Closing Brief." On March 11, 2016, Complainant filed "CalPERS Prehearing Position Statement." On March 25, 2016, Respondent City filed "City of El Monte's Reply to CalPERS' Pre-hearing Position Statement" and Complainant filed "CalPERS Reply Brief." Respondent's interests are aligned with those of Respondent City and references to Respondents' positions or arguments include both respondents.

The matter was submitted for decision on March 25, 2016.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. The Statement of Issues extensively quotes from Government Code¹ section 20636, and from California Code of Regulations (CCR), title 2, sections 570 and 571. It concludes with paragraph XI: "This appeal is limited to the issue of whether CalPERS correctly excluded [MOP] from the final compensation calculation of [Respondent]." (Exh. 11, at p. 9.)

¹ All further statutory references are to the Government Code.

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

4. Respondent was employed by Respondent City as a police sergeant. By virtue of his employment, Respondent is a local safety member of CalPERS.

5. Respondent started working for Respondent City in 1980, and retired effective June 30, 2011.

6. Respondent City was experiencing financial difficulties during the period of 2009 and 2010. It was able to obtain agreements with representatives of its employees to defer scheduled pay raises and to reduce other financial obligations. An agreement with El Monte Police Officers' Association (EMPOA), the collective bargaining representative of police officers and sergeants, Side Letter Agreement #1, approved July 16, 2009, deferred for one year a four-percent salary increase due on July 1, 2009, and decreased employer contributions for employee medical insurance for one year.

7. Respondent's police sergeant position was covered by a collective bargaining unit represented by EMPOA. The July 1, 2007 to December 31, 2010 Memorandum of Understanding (MOU) between Respondent City and EMPOA was amended by Side Letter Agreement #3 dated June 24, 2010. Side Letter Agreement #3 contained the following provision:

"Master Officer Program – To reward the highest experienced officers, for a twelve month trial period, commencing July 1, 2010, the City will provide Master Officer Pay of 6% for Officers and 7% for Sergeants. To qualify for this pay, the employee must have at least 27 years of service and possess an Advanced Certificate issued by Peace Officers Standards and Training (POST). Unless renewed by the City, this Program will terminate on June 30, 2011." (Exh. 38, at p. 1.)

8. EMPOA unit employees are eligible to receive other items of compensation above their base salary. For instance, the MOU contains pay for "Bonus" assignments, including a "Bonus Assignment of Canine Handler." (Exh. 35, at p. 8.) They can also receive "Lead Agent" pay, which pay was started in 2008. In this regard, the MOU provides: "[E]ffective January 1, 2008 unit employees who are qualified and appointed as Lead Agent shall receive six and one-half percent (6 ½ %) above base salary." (Exh. 35, at p. 8.) While there was no testimony regarding the status of the Bonus pay, CalPERS witness Jennifer Sandness of the Compensation Review Unit, testified that Lead Agent pay can be counted toward compensation earnable.

9. From July 1, 2010, until June 30, 2011, Respondent received MOP, which increased his salary by seven percent. The pay was reported by Respondent City to CalPERS as pensionable special compensation.

10. CalPERS initially included the MOP in calculating Respondent's retirement allowance. However, by letter dated May 14, 2014, CalPERS informed Respondent that it had erred in including the pay in the calculation of compensation earnable and that it would need to recalculate his allowance. CalPERS invited Respondent to submit additional information before it made a final determination.

11. On July 15, 2014, Respondent appealed CalPERS's determination.

12. On August 5, 2014, CalPERS made its final determination to exclude the MOP from the calculation of Respondent's earnable compensation. CalPERS wrote: "The City intentionally limited [MOP] for a one (1) year period. As a result, it was not historically consistent for the job classification and created the conditions for an unfunded liability. Further, the City offered [MOP] to only those members with at least 27 years of service. While CCR § 571 allows Master Police Officer pay, the requirement that employees have a minimum of 27 years of service specifically targets those employees at the end of their career/nearing retirement. During our review, it was confirmed the City experienced significant financial challenges when [MOP] was negotiated further demonstrating the City's attempt to incentivize the retirement of those members. Because [MOP] was only available for one (1) year to employees with at least 27 years of experience during tough financial times, it is considered final settlement pay." (Exh. 13, at p. 3.) The letter informed Respondent that his gross monthly allowance would be reduced, effective September 1, 2014.

LEGAL CONCLUSIONS

1. A CalPERS 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.

[¶] . . . [¶]

“(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. . . .”

4. As directed by the Legislature in section 20636, subdivision (f), CalPERS has promulgated regulations more specifically defining final settlement pay. CCR, title 2, section 570 provides:

“ ‘Final settlement pay’ means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

“For example, final settlement pay may consist of severance pay or so-called ‘golden parachutes.’ It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

“Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.”

5. CalPERS has affirmatively determined certain items to be special compensation. CCR, title 2, section 571, states in pertinent 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:

“(1) INCENTIVE PAY

[¶] . . . [¶]

“Master Police Officer - Compensation to local police officers, county peace officers and school police or security officers who meet specified requirements, years of employment, performance standards, education, Peace Officer Standard Training (POST), and perform a specialty assignment.

[¶] . . . [¶]

“(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 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.”

6. As noted above, section 20636, 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 20636, 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 MOP paid to Respondent can be considered part of compensation earnable. Compensation earnable is composed of an employee's payrate and special compensation. (§20636, subd. (a).) Inasmuch as there is no contention that the MOP is part of Respondent's payrate, the answer turns on whether the pay constitutes special compensation.

7. The MOP meets general requirements of special compensation, as set forth in legal conclusion numbers 7, 8 and 9. It constitutes “a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions” under section 20636, subdivision (c)(1), because it was paid to police officers, who possessed certain qualifications, for performing their work duties. (Factual Findings 4, 5, 7, and 9.) By its terms, Side Letter Agreement #3 was entered into “To reward the highest experienced officers.” However, the provision did not exempt the officers from work, and they still had to perform their duties in order to earn the MOP.

8. The MOP was provided to represented employees pursuant to a collective bargaining agreement, as required by section 20636, subdivision (c)(2). (Factual Finding 7.) The statute requires that the benefit be provided to “similarly situated members of a group or class.” (*Ibid.*) Complainant argues that this requirement has not been met because the benefit was available only to a limited number of individuals, namely, those with 27 years of service or more. This argument is unpersuasive. The benefit was indeed provided to similarly situated

members of a group or class, i.e., peace officers employed by Respondent City, but in order to actually receive the added compensation, members of the group had to meet the MOP requirements, which included time in service as well as training requirements. Complainant does not argue that qualifications or requirements may not be attached to a benefit before members of a group or class can take advantage of it. Analogously, Respondent City peace officers had to meet specified requirements before they could to obtain Lead Agent pay or Bonus pay under the MOU.

9. The MOP was to be paid for “services rendered during normal working hours,” as required by section 20636, subdivision (c)(3). (Factual Finding 7.) Nothing on the face of the MOU provision defines the added compensation as overtime pay or any other pay for work performed outside normal work hours.

10. In addition to setting forth general requirements for inclusion in the definition of special compensation, the Legislature created specific exclusions. Two of the exclusions are potentially applicable to the MOP. The Legislature specifically excluded from the definition of special compensation “final settlement pay” (§ 20636, subd. (c)(7)(A)) and “other payments the board has not affirmatively determined to be special compensation” (§ 20636, subd. (c)(7)(C)).

11. As set forth in CCR, title 2, section 571, subdivision (a)(1), CalPERS has affirmatively determined that a type of incentive pay, called “Master Police Officer” pay, constitutes special compensation, if it otherwise meets the requirements of CCR, title 2, section 571, subdivision (b). This Master Police Officer item is the closest approved payment to the MOP, and unless the MOP meets the regulatory definition of Master Police Officer pay, the MOP must be excluded from special compensation under section 20636, subdivision (c)(7)(C). The definition of Master Police Officer pay is set forth in legal conclusion number 5, and the plain language of the regulation, which includes the word “and,” dictates that all elements of the definition must be met.

12. The MOP contains qualification requirements pertaining to years of employment and training, as mandated by CCR, title 2, section 571, subdivision (a)(1). However, it does not contain performance standards and does not involve a specialty assignment. Based on the plain language of the side agreement, set forth in factual finding number 7, a member is not required to perform any assignment he or she was not already performing in exchange for his or her payrate. Moreover, the side letter creating the MOP does not contain a stated basis for measuring or assessing performance. Accordingly, the MOP fails to meet the requirements of the Master Police Officer incentive category to be included in the definition of compensation earnable.²

² Respondents correctly point out that some items of special compensation, such as educational incentive pay and longevity pay, do not require the performance of a specialty assignment. However, the MOP was not structured to be, and no argument has been presented that it should be, treated as one of these other special compensation items. The Master Police Officer category remains the most applicable of those affirmatively determined by CalPERS to be special compensation.

13. Respondents argue that Respondent was not on notice that CalPERS considered the failure of the MOP to include performance standards or specialty assignments a basis for excluding the MOP from special compensation. This argument is unpersuasive since the determination letter and the Statement of Issues, set forth in factual finding numbers 12 and 2, respectively, quoted the definition of Master Police Officer contained in CCR, title 2, section 570, subdivision (a), and specifically referred to the regulation in articulating that the MOP did not constitute special compensation.

14. In addition to affirmatively determining which items are included in special compensation, CalPERS has set forth the characteristics that must be present in these items: the item must be historically consistent with prior payments for the job classification (CCR, tit. 2, § 571, subd. (b)(6)); it must not be paid exclusively in the final compensation period (CCR, tit. 2, § 571, subd. (b)(7)); it must not constitute final settlement pay (CCR, tit. 2, § 571, subd. (b)(8)); and it must not create an unfunded liability over and above [CalPERS]' actuarial assumptions (CCR, tit. 2, § 571, subd. (b)(9).) These proscriptions cannot be used to exclude the MOP from being part of special compensation, as set forth in legal conclusion numbers 15, 16, 17 and 18.

15. While Respondent City had not previously paid the MOP, it had paid other items of compensation beyond base salary, including Lead Agent pay, and, therefore, the MOP is historically consistent with prior payments for the job classification. The fact that Respondent received the MOP on the item's first and only year does not negate the historical consistency. To conclude otherwise would mean that an employer could never create a new item of special compensation even if it met all other criteria, a construction of the regulation that would lead to an absurd result and that would render several other provisions surplusage. In fact, as set forth in factual finding number 8, Lead Agent pay commenced approximately two-and-one-half years before the MOP and has been treated as part of compensation earnable. The MOP is thus historically consistent with prior payments for the job classification, as required by CCR, title 2, section 571, subdivision (b)(6).

16. Similarly, while Respondent received the MOP in his last year of employment, the benefit was not structured to be paid only in the last year of employment, and Respondent could have continued to work for Respondent City even after he no longer received the MOP. Accordingly, the MOP cannot be excluded from special compensation on the basis that it was paid exclusively in the final compensation period, as proscribed by CCR, title 2, section 571, subdivision (b)(7).

17. The evidence does not establish that the MOP created unfunded liabilities over and above CalPERS' actuarial assumptions in violation of CCR, title 2, section 571, subdivision (b)(9). While the MOP increased Respondent City's retirement payment obligations, no evidence was presented about the other side of the ledger, and, therefore, it was not established that Respondent City would be unable to meet its obligations due to inclusion of MOP in its police officers' special compensation.

18. As set forth in legal conclusion numbers 3 and 4, final settlement pay is pay awarded in connection with or in anticipation of a separation from employment. It cannot be

disputed that Respondent City had financial difficulties at the time it entered into Side Letter Agreement #3. In addition, some of the individual respondents believed that the MOP was intended to motivate senior officers to retire. However, the MOP was never expressly structured as a golden parachute or any other retirement incentive, and members could have continued to work after June 30, 2011. Individual perceptions that the MOP was a retirement incentive due to Respondent City's financial condition constitute mere speculation.

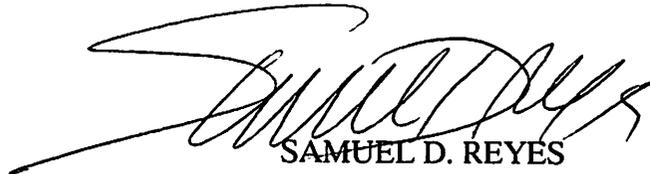
19. CalPERS has the duty and the power to correct mistakes made in the calculation of a retirement allowance. (§§ 20160, subd. (b), 20164.) Moreover, "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled." (Gov. Code, § 20163, subd. (a).) Therefore, CalPERS can make necessary adjustments to Respondent's retirement allowance to correct the mistaken inclusion of the MOP in calculating Respondent's retirement allowance.

20. By reason of the foregoing factual findings and legal conclusions, the MOP is not part of special compensation and CalPERS cannot include it in calculating Respondent's retirement allowance. Notwithstanding the many special compensation criteria the MOP meets, it fails to conform to the definition of Master Police Officer pay set forth in CCR, title 2, section 571, subdivision (a)(1). Since all criteria, including that one, must be met, MOP is not special compensation, and must be excluded from the calculation of Respondent's retirement allowance.

ORDER

The appeal of Respondent Patrick Reilly is denied.

DATED: 4/20/16



SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues of:

RICHARD WILLIAMS,

Respondent,

and

CITY OF EL MONTE,

Respondent.

Case No. 2014-1278

OAH No. 2015050330

PROPOSED DECISION

This matter, consolidated for hearing with OAH case numbers 2014080186, 2015050226, 2015050218, 2014080189, 2015050236, 2015050222, 2015050224, and 2014080834, came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on December 7, 2015.

At the hearing, Wesley E. Kennedy, Senior Staff Attorney, represented Complainant Renee Ostrander, Assistant Division Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS). Preet Kaur, Senior Staff Attorney, filed Complainant's post-hearing written arguments.

Richard Williams (Respondent) represented himself.

Frances E. Rogers, Attorney at Law, represented City of El Monte (Respondent City).

Respondent worked for Respondent City as a police sergeant until his retirement in June 30, 2011. From July 1, 2010, until June 30, 2011, Respondent received Master Officer Pay, which increased his salary by seven percent. CalPERS initially included Respondent's Master Officer Pay in the calculation of Respondent's service retirement allowance, but subsequently concluded that the MOP was not a recognized special compensation item that could be included in the calculation of Respondent's pension allowance, or in the language often used at the hearing, it concluded that the MOP is not "pensionable." In its view, the MOP does not meet the definition of special compensation because CalPERS did not specifically designate the item

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED April 28 20 16

Maureen George

as one of special compensation in a regulation and because it fails to meet other specific criteria of special compensation items. CalPERS argues that the MOP is actually final settlement pay given as a retirement incentive to the most senior peace officers employed by Respondent City, which pay is not pensionable. Respondents disagree and assert the MOP should be included in the calculation of Respondent's service retirement allowance because it is an item of special compensation that meets all statutory and regulatory requirements. Respondents also argue that CalPERS waived some of its arguments by failing to place Respondents on notice regarding the basis of CalPERS's determination. As set forth in this Proposed Decision, while the MOP meets several of the requirements of special compensation, it must be excluded from Respondent's pension calculation because it fails to meet the definition of a payment CalPERS has affirmatively determined to be special compensation.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument and for the filing of objections to the receipt of Exhibits 40 and 41. No objections were received by the February 29, 2016 deadline, and Exhibits 40 and 41 are received in evidence.

On March 11, 2015 Respondent City filed closing argument entitled "City of El Monte Closing Brief" and a "City of El Monte's Administrative Authorities in Support of the City of El Monte's Closing Brief." On March 11, 2016, Complainant filed "CalPERS Prehearing Position Statement." On March 25, 2016, Respondent City filed "City of El Monte's Reply to CalPERS' Pre-hearing Position Statement" and Complainant filed "CalPERS Reply Brief." Respondent was given the opportunity to present closing argument if he disagreed with the position taken by Respondent City, but did not file a closing argument. Respondents' interests are aligned and references to Respondents' positions or arguments include both respondents.

The matter was submitted for decision on March 25, 2016.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. The Statement of Issues extensively quotes from Government Code¹ section 20636, and from California Code of Regulations (CCR), title 2, sections 570 and 571. It concludes with paragraph XI: "This appeal is limited to the issue of whether CalPERS correctly excluded [MOP] from the final compensation calculation of [Respondent]." (Exh. 15, at p. 9.)
3. Respondent City contracts with CalPERS for retirement benefits for eligible employees pursuant to the Public Employees' Retirement Law (PERL), section 20000 et seq.
4. Respondent was employed by Respondent City as a police sergeant. By virtue of his employment, Respondent is a local safety member of CalPERS.

¹ All further statutory references are to the Government Code.

5. Respondent started working for Respondent City in June 1978, and retired effective June 30, 2011. For an unspecified number of years prior to his retirement, Respondent worked as an administrative sergeant, assisting administrative staff.

6. Respondent City was experiencing financial difficulties during the period of 2009 and 2010. It was able to obtain agreements with representatives of its employees to defer scheduled pay raises and to reduce other financial obligations. An agreement with El Monte Police Officers' Association (EMPOA), the collective bargaining representative of police officers and sergeants, Side Letter Agreement #1, approved July 16, 2009, deferred for one year a four-percent salary increase due on July 1, 2009, and decreased employer contributions for employee medical insurance for one year.

7. Respondent's police sergeant position was covered by a collective bargaining unit represented by the EMPOA. The July 1, 2007 to December 31, 2010 Memorandum of Understanding (MOU) between Respondent City and EMPOA was amended by Side Letter Agreement #3 dated June 24, 2010. Side Letter Agreement #3 contained the following provision:

“Master Officer Program – To reward the highest experienced officers, for a twelve month trial period, commencing July 1, 2010, the City will provide Master Officer Pay of 6% for Officers and 7% for Sergeants. To qualify for this pay, the employee must have at least 27 years of service and possess an Advanced Certificate issued by Peace Officers Standards and Training (POST). Unless renewed by the City, this Program will terminate on June 30, 2011.” (Exh. 38, at p. 1.)

8. EMPOA unit employees are eligible to receive other items of compensation above their base salary. For instance, the MOU contains pay for “Bonus” assignments, including a “Bonus Assignment of Canine Handler.” (Exh. 35, at p. 8.) They can also receive “Lead Agent” pay, which pay was started in 2008. In this regard, the MOU provides: “[E]ffective January 1, 2008 unit employees who are qualified and appointed as Lead Agent shall receive six and one-half percent (6 ½ %) above base salary.” (Exh. 35, at p. 8.) While there was no testimony regarding the status of the Bonus pay, CalPERS witness Jennifer Sandness of the Compensation Review Unit, testified that Lead Agent pay can be counted toward compensation earnable.

9. From July 1, 2010, until June 30, 2011, Respondent received MOP, which increased his salary by seven percent. The pay was reported by Respondent City to CalPERS as pensionable special compensation.

10. CalPERS initially included the MOP in calculating Respondent's retirement allowance. However, by letter dated May 14, 2014, CalPERS informed Respondent that it had erred in including the pay in the calculation of compensation earnable and that it would need to recalculate his allowance. CalPERS invited Respondent to submit additional information before it made a final determination.

11. On July 14, 2014, Respondent appealed CalPERS's determination.

12. On August 5, 2014, CalPERS made its final determination to exclude the MOP from the calculation of Respondent's earnable compensation. CalPERS wrote: "The City intentionally limited [MOP] for a one (1) year period. As a result, it was not historically consistent for the job classification and created the conditions for an unfunded liability. Further, the City offered [MOP] to only those members with at least 27 years of service. While CCR § 571 allows Master Police Officer pay, the requirement that employees have a minimum of 27 years of service specifically targets those employees at the end of their career/nearing retirement. During our review, it was confirmed the City experienced significant financial challenges when [MOP] was negotiated further demonstrating the City's attempt to incentivize the retirement of those members. Because [MOP] was only available for one (1) year to employees with at least 27 years of experience during tough financial times, it is considered final settlement pay." (Exh. 17, at p. 3.) The letter informed Respondent that his gross monthly allowance would be reduced, effective September 1, 2014.

LEGAL CONCLUSIONS

1. A CalPERS 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.

[¶] . . . [¶]

“(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. . . .”

4. As directed by the Legislature in section 20636, subdivision (f), CalPERS has promulgated regulations more specifically defining final settlement pay. CCR, title 2, section 570 provides:

“ ‘Final settlement pay’ means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

“For example, final settlement pay may consist of severance pay or so-called ‘golden parachutes.’ It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

“Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.”

5. CalPERS has affirmatively determined certain items to be special compensation. CCR, title 2, section 571, states in pertinent 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:

“(1) INCENTIVE PAY

[¶] . . . [¶]

“Master Police Officer - Compensation to local police officers, county peace officers and school police or security officers who meet specified requirements, years of employment, performance standards, education, Peace Officer Standard Training (POST), and perform a specialty assignment.

[¶] . . . [¶]

“(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 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.”

6. As noted above, section 20636, 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 20636, 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 MOP paid to Respondent can be considered part of compensation earnable. Compensation earnable is composed of an employee's payrate and special compensation. (§20636, subd. (a).) Inasmuch as there is no contention that the MOP is part of Respondent's payrate, the answer turns on whether the pay constitutes special compensation.

7. The MOP meets general requirements of special compensation, as set forth in legal conclusion numbers 7, 8 and 9. It constitutes “a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions” under section 20636, subdivision (c)(1), because it was paid to police officers, who possessed certain qualifications, for performing their work duties. (Factual Findings 4, 5, 7, and 9.) By its terms, Side Letter Agreement #3 was entered into “To reward the highest experienced officers.” However, the provision did not exempt the officers from work, and they still had to perform their duties in order to earn the MOP.

8. The MOP was provided to represented employees pursuant to a collective bargaining agreement, as required by section 20636, subdivision (c)(2). (Factual Finding 7.) The statute requires that the benefit be provided to “similarly situated members of a group or class.” (*Ibid.*) Complainant argues that this requirement has not been met because the benefit was available only to a limited number of individuals, namely, those with 27 years of service or more. This argument is unpersuasive. The benefit was indeed provided to similarly situated members of a group or class, i.e., peace officers employed by Respondent City, but in order to actually receive the added compensation, members of the group had to meet the MOP

requirements, which included time in service as well as training requirements. Complainant does not argue that qualifications or requirements may not be attached to a benefit before members of a group or class can take advantage of it. Analogously, Respondent City peace officers had to meet specified requirements before they could to obtain Lead Agent pay or Bonus pay under the MOU.

9. The MOP was to be paid for “services rendered during normal working hours,” as required by section 20636, subdivision (c)(3). (Factual Findings 7.) Nothing on the face of the MOU provision defines the added compensation as overtime pay or any other pay for work performed outside normal work hours.

10. In addition to setting forth general requirements for inclusion in the definition of special compensation, the Legislature created specific exclusions. Two of the exclusions are potentially applicable to the MOP. The Legislature specifically excluded from the definition of special compensation “final settlement pay” (§ 20636, subd. (c)(7)(A)) and “other payments the board has not affirmatively determined to be special compensation” (§ 20636, subd. (c)(7)(C)).

11. As set forth in CCR, title 2, section 571, subdivision (a)(1), CalPERS has affirmatively determined that a type of incentive pay, called “Master Police Officer” pay, constitutes special compensation, if it otherwise meets the requirements of CCR, title 2, section 571, subdivision (b). This Master Police Officer item is the closest approved payment to the MOP, and unless the MOP meets the regulatory definition of Master Police Officer pay, the MOP must be excluded from special compensation under section 20636, subdivision (c)(7)(C). The definition of Master Police Officer pay is set forth in legal conclusion number 5, and the plain language of the regulation, which includes the word “and,” dictates that all elements of the definition must be met.

12. The MOP contains qualification requirements pertaining to years of employment and training, as mandated by CCR, title 2, section 571, subdivision (a)(1). However, it does not contain performance standards and does not involve a specialty assignment. Based on the plain language of the side agreement, set forth in factual finding number 7, a member is not required to perform any assignment he or she was not already performing in exchange for his or her payrate. Moreover, the side letter creating the MOP does not contain a stated basis for measuring or assessing performance. Accordingly, the MOP fails to meet the requirements of the Master Police Officer incentive category to be included in the definition of compensation earnable.²

² Respondents correctly point out that some items of special compensation, such as educational incentive pay and longevity pay, do not require the performance of a specialty assignment. However, the MOP was not structured to be, and no argument has been presented that it should be, treated as one of these other special compensation items. The Master Police Officer category remains the most applicable of those affirmatively determined by CalPERS to be special compensation.

13. Respondents argue that Respondent was not on notice that CalPERS considered the failure of the MOP to include performance standards or specialty assignments a basis for excluding the MOP from special compensation. This argument is unpersuasive since the determination letter and the Statement of Issues, set forth in factual finding numbers 12 and 2, respectively, quoted the definition of Master Police Officer contained in CCR, title 2, section 570, subdivision (a), and specifically referred to the regulation in articulating that the MOP did not constitute special compensation.

14. In addition to affirmatively determining which items are included in special compensation, CalPERS has set forth the characteristics that must be present in these items: the item must be historically consistent with prior payments for the job classification (CCR, tit. 2, § 571, subd. (b)(6)); it must not be paid exclusively in the final compensation period (CCR, tit. 2, § 571, subd. (b)(7)); it must not constitute final settlement pay (CCR, tit. 2, § 571, subd. (b)(8)); and it must not create an unfunded liability over and above [CalPERS]' actuarial assumptions (CCR, tit. 2, § 571, subd. (b)(9).) These proscriptions cannot be used to exclude the MOP from being part of special compensation, as set forth in legal conclusion numbers 15, 16, 17 and 18.

15. While Respondent City had not previously paid the MOP, it had paid other items of compensation beyond base salary, including Lead Agent pay, and, therefore, the MOP is historically consistent with prior payments for the job classification. The fact that Respondent received the MOP on the item's first and only year does not negate the historical consistency. To conclude otherwise would mean that an employer could never create a new item of special compensation even if it met all other criteria, a construction of the regulation that would lead to an absurd result and that would render several other provisions surplusage. In fact, as set forth in factual finding number 8, Lead Agent pay commenced approximately two-and-one-half years before the MOP and has been treated as part of compensation earnable. The MOP is thus historically consistent with prior payments for the job classification, as required by CCR, title 2, section 571, subdivision (b)(6).

16. Similarly, while Respondent received the MOP in his last year of employment, the benefit was not structured to be paid only in the last year of employment, and Respondent could have continued to work for Respondent City even after he no longer received the MOP. Accordingly, the MOP cannot be excluded from special compensation on the basis that it was paid exclusively in the final compensation period, as proscribed by CCR, title 2, section 571, subdivision (b)(7).

17. The evidence does not establish that the MOP created unfunded liabilities over and above CalPERS' actuarial assumptions in violation of CCR, title 2, section 571, subdivision (b)(9). While the MOP increased Respondent City's retirement payment obligations, no evidence was presented about the other side of the ledger, and, therefore, it was not established that Respondent City would be unable to meet its obligations due to inclusion of MOP in its police officers' special compensation.

18. As set forth in legal conclusion numbers 3 and 4, final settlement pay is pay awarded in connection with or in anticipation of a separation from employment. It cannot be

disputed that Respondent City had financial difficulties at the time it entered into Side Letter Agreement #3. In addition, some of the individual respondents believed that the MOP was intended to motivate senior officers to retire. However, the MOP was never expressly structured as a golden parachute or any other retirement incentive, and members could have continued to work after June 30, 2011. Individual perceptions that the MOP was a retirement incentive due to Respondent City's financial condition constitute mere speculation.

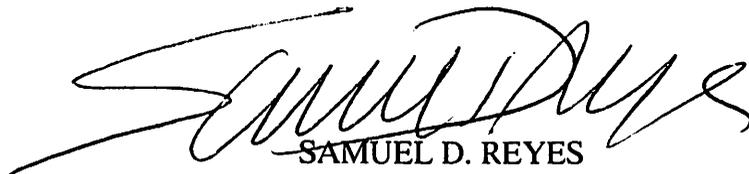
19. CalPERS has the duty and the power to correct mistakes made in the calculation of a retirement allowance. (§§ 20160, subd. (b), 20164.) Moreover, "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled." (Gov. Code, § 20163, subd. (a).) Therefore, CalPERS can make necessary adjustments to Respondent's retirement allowance to correct the mistaken inclusion of the MOP in calculating Respondent's retirement allowance.

20. By reason of the foregoing factual findings and legal conclusions, the MOP is not part of special compensation and CalPERS cannot include it in calculating Respondent's retirement allowance. Notwithstanding the many special compensation criteria the MOP meets, it fails to conform to the definition of Master Police Officer pay set forth in CCR, title 2, section 571, subdivision (a)(1). Since all criteria, including that one, must be met, MOP is not special compensation, and must be excluded from the calculation of Respondent's retirement allowance.

ORDER

The appeal of Respondent Richard Williams is denied.

DATED: 4/21/16


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues of:

DAVID DARROW,

Respondent,

and

CITY OF EL MONTE,

Respondent.

Case No. 2014-1279

OAH No. 2015050226

PROPOSED DECISION

This matter, consolidated for hearing with OAH case numbers 2014080186, 2015050218, 2014080189, 2015050236, 2015050222, 2015050224, 2014080834, and 2015050330, came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on December 7, 2015.

At the hearing, Wesley E. Kennedy, Senior Staff Attorney, represented Complainant Renee Ostrander, Assistant Division Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS). Preet Kaur, Senior Staff Attorney, filed Complainant's post-hearing written arguments.

David Darrow (Respondent) represented himself.

Frances E. Rogers, Attorney at Law, represented City of El Monte (Respondent City).

Respondent worked for Respondent City as a police sergeant until his retirement on June 29, 2011. From July 1, 2010, until June 30, 2011, Respondent received Master Officer Pay (MOP), which increased his salary by seven percent. CalPERS subsequently concluded that the MOP was not a recognized special compensation item that could be included in the calculation of Respondent's pension allowance, or in the language often used at the hearing, it concluded that the MOP is not "pensionable." In CalPERS's view, the MOP does not meet the definition of special compensation because CalPERS did not specifically designate the item as one of special compensation in a regulation and because it fails to meet other specific criteria of special

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

April 28, 2016
Maureen [Signature]

compensation items. CalPERS argues that the MOP is actually final settlement pay given as a retirement incentive to the most senior peace officers employed by Respondent City, which pay is not pensionable. Respondents disagree and assert the MOP should be included in the calculation of Respondent's service retirement allowance because it is an item of special compensation that meets all statutory and regulatory requirements. Respondents also argue that CalPERS waived some of its arguments by failing to place Respondents on notice regarding the basis of CalPERS's determination. As set forth in this Proposed Decision, while the MOP meets several of the requirements of special compensation, it must be excluded from Respondent's pension calculation because it fails to meet the definition of a payment CalPERS has affirmatively determined to be special compensation.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument and for the filing of objections to the receipt of Exhibits 40 and 41. No objections were received by the February 29, 2016 deadline, and Exhibits 40 and 41 are received in evidence.

On March 11, 2015 Respondent City filed closing argument entitled "City of El Monte Closing Brief" and a "City of El Monte's Administrative Authorities in Support of the City of El Monte's Closing Brief." On March 11, 2016, Complainant filed "CalPERS Prehearing Position Statement." On March 25, 2016, Respondent City filed "City of El Monte's Reply to CalPERS' Pre-hearing Position Statement" and Complainant filed "CalPERS Reply Brief." Respondent was given the opportunity to present closing argument if he disagreed with the position taken by Respondent City, but filed no closing argument. Respondents' interests are aligned and references to Respondents' positions or arguments include both respondents.

The matter was submitted for decision on March 25, 2016.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. The Statement of Issues extensively quotes from Government Code¹ section 20636, and from California Code of Regulations (CCR), title 2, sections 570 and 571. It concludes with paragraph XI: "This appeal is limited to the issue of whether CalPERS correctly excluded [MOP] from the final compensation calculation of [Respondent]." (Exh. 19, at p. 9.)
3. Respondent City contracts with CalPERS for retirement benefits for eligible employees pursuant to the Public Employees' Retirement Law (PERL), section 20000 et seq.
4. Respondent was employed by Respondent City as a police sergeant. By virtue of his employment, Respondent is a local safety member of CalPERS.

¹ All further statutory references are to the Government Code.

5. Respondent started working for Respondent City in June 1980, and retired effective June 29, 2011. For an unspecified number of years prior to his retirement, Respondent was in charge of community relations.

6. Respondent City was experiencing financial difficulties during 2009 and 2010. It was able to obtain agreements with representatives of its employees to defer scheduled pay raises and to reduce other financial obligations. An agreement with the El Monte Police Officers' Association (EMPOA), the collective bargaining representative of police officers and sergeants, Side Letter Agreement #1, approved July 16, 2009, deferred for one year a four-percent salary increase due on July 1, 2009, and decreased employer contributions for employee medical insurance for one year.

7. Respondent's police sergeant position was covered by a collective bargaining unit represented by the EMPOA. The July 1, 2007 to December 31, 2010 Memorandum of Understanding (MOU) between Respondent City and EMPOA was amended by Side Letter Agreement #3 dated June 24, 2010. Side Letter Agreement #3 contained the following provision:

"Master Officer Program – To reward the highest experienced officers, for a twelve month trial period, commencing July 1, 2010, the City will provide Master Officer Pay of 6% for Officers and 7% for Sergeants. To qualify for this pay, the employee must have at least 27 years of service and possess an Advanced Certificate issued by Peace Officers Standards and Training (POST). Unless renewed by the City, this Program will terminate on June 30, 2011." (Exh. 38, at p. 1.)

8. EMPOA unit employees are eligible to receive other items of compensation above their base salary. For instance, the MOU contains pay for "Bonus" assignments, including a "Bonus Assignment of Canine Handler." (Exh. 35, at p. 8.) They can also receive "Lead Agent" pay, which pay was started in 2008. In this regard, the MOU provides: "[E]ffective January 1, 2008 unit employees who are qualified and appointed as Lead Agent shall receive six and one-half percent (6 ½ %) above base salary." (Exh. 35, at p. 8.) While there was no testimony regarding the status of the Bonus pay, CalPERS witness Jennifer Sandness of the Compensation Review Unit, testified that Lead Agent pay can be counted toward compensation earnable.

9. From July 1, 2010, until June 30, 2011, Respondent received the MOP, which increased his salary by seven percent. The pay was reported by Respondent City to CalPERS as pensionable special compensation.

10. CalPERS initially included the MOP in calculating Respondent's retirement allowance. However, by letter dated May 14, 2014, CalPERS informed Respondent that it had erred in including the pay in the calculation of compensation earnable and that it would need to recalculate his allowance. CalPERS invited Respondent to submit additional information before it made a final determination.

11. On June 16, 2014, Respondent appealed CalPERS's determination.

12. On August 5, 2014, CalPERS made its final determination to exclude the MOP from the calculation of Respondent's earnable compensation. CalPERS wrote: "The City intentionally limited [MOP] for a one (1) year period. As a result, it was not historically consistent for the job classification and created the conditions for an unfunded liability. Further, the City offered [MOP] to only those members with at least 27 years of service. While CCR § 571 allows Master Police Officer pay, the requirement that employees have a minimum of 27 years of service specifically targets those employees at the end of their career/nearing retirement. During our review, it was confirmed the City experienced significant financial challenges when [MOP] was negotiated further demonstrating the City's attempt to incentivize the retirement of those members. Because [MOP] was only available for one (1) year to employees with at least 27 years of experience during tough financial times, it is considered final settlement pay." (Exh. 21, at p. 3.) The letter informed Respondent that his gross monthly allowance would be reduced, effective September 1, 2014.

LEGAL CONCLUSIONS

1. A CalPERS 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.

[¶] . . . [¶]

“(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. . . .”

4. As directed by the Legislature in section 20636, subdivision (f), CalPERS has promulgated regulations more specifically defining final settlement pay. CCR, title 2, section 570 provides:

“ ‘Final settlement pay’ means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

“For example, final settlement pay may consist of severance pay or so-called ‘golden parachutes.’ It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

“Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.”

5. CalPERS has affirmatively determined certain items to be special compensation. CCR, title 2, section 571, states in pertinent 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:

“(1) INCENTIVE PAY

[¶] . . . [¶]

“Master Police Officer - Compensation to local police officers, county peace officers and school police or security officers who meet specified requirements, years of employment, performance standards, education, Peace Officer Standard Training (POST), and perform a specialty assignment.

[¶] . . . [¶]

“(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 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.”

6. As noted above, section 20636, 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 20636, 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 MOP paid to Respondent can be considered part of compensation earnable. Compensation earnable is composed of an employee's payrate and special compensation. (§20636, subd. (a).) Inasmuch as there is no contention that the MOP is part of Respondent's payrate, the answer turns on whether the pay constitutes special compensation.

7. The MOP meets general requirements of special compensation, as set forth in legal conclusion numbers 7, 8, and 9. It constitutes “a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions” under section 20636, subdivision (c)(1), because it was paid to police officers, who possessed certain qualifications, for performing their work duties. (Factual Findings 4, 5, 7, and 9.) By its terms, Side Letter Agreement #3 was entered into “To reward the highest experienced officers.” However, the provision did not exempt the officers from work, and they still had to perform their duties in order to earn the MOP.

8. The MOP was provided to represented employees pursuant to a collective bargaining agreement, as required by section 20636, subdivision (c)(2). (Factual Finding 7.) The statute requires that the benefit be provided to “similarly situated members of a group or class.” (*Ibid.*) Complainant argues that this requirement has not been met because the benefit was available only to a limited number of individuals, namely, those with 27 years of service or more. This argument is unpersuasive. The benefit was indeed provided to similarly situated members of a group or class, i.e., peace officers employed by Respondent City, but in order to actually receive the added compensation, members of the group had to meet the MOP

requirements, which included time in service as well as training requirements. Complainant does not argue that qualifications or requirements may not be attached to a benefit before members of a group or class can take advantage of it. Analogously, Respondent City peace officers had to meet specified requirements before they could to obtain Lead Agent pay or Bonus pay under the MOU.

9. The MOP was to be paid for “services rendered during normal working hours,” as required by section 20636, subdivision (c)(3). (Factual Findings 7 and 9.) Nothing on the face of the MOU provision defines the added compensation as overtime pay or any other pay for work performed outside normal work hours.

10. In addition to setting forth general requirements for inclusion in the definition of special compensation, the Legislature created specific exclusions. Two of the exclusions are potentially applicable to the MOP. The Legislature specifically excluded from the definition of special compensation “final settlement pay” (§ 20636, subd. (c)(7)(A)) and “other payments the board has not affirmatively determined to be special compensation” (§ 20636, subd. (c)(7)(C)).

11. As set forth in CCR, title 2, section 571, subdivision (a)(1), CalPERS has affirmatively determined that a type of incentive pay, called “Master Police Officer” pay, constitutes special compensation, if it otherwise meets the requirements of CCR, title 2, section 571, subdivision (b). This Master Police Officer item is the closest approved payment to the MOP, and unless the MOP meets the regulatory definition of Master Police Officer pay, the MOP must be excluded from special compensation under section 20636, subdivision (c)(7)(C). The definition of Master Police Officer pay is set forth in legal conclusion number 5, and the plain language of the regulation, which includes the word “and,” dictates that all elements of the definition must be met.

12. The MOP contains qualification requirements pertaining to years of employment and training, as mandated by CCR, title 2, section 571, subdivision (a)(1). However, it does not contain performance standards and does not involve a specialty assignment. Based on the plain language of the side agreement, set forth in factual finding number 7, a member is not required to perform any assignment he or she was not already performing in exchange for his or her payrate. Moreover, the side letter creating the MOP does not contain a stated basis for measuring or assessing performance. Accordingly, the MOP fails to meet the requirements of the Master Police Officer incentive category to be included in the definition of compensation earnable.²

² Respondents correctly point out that some items of special compensation, such as educational incentive pay and longevity pay, do not require the performance of a specialty assignment. However, the MOP was not structured to be, and no argument has been presented that it should be, treated as one of these other special compensation items. The Master Police Officer category remains the most applicable of those affirmatively determined by CalPERS to be special compensation.

13. Respondents argue that Respondent was not on notice that CalPERS considered the failure of the MOP to include performance standards or specialty assignments a basis for excluding the MOP from special compensation. This argument is unpersuasive since the determination letter and the Statement of Issues, set forth in factual finding numbers 12 and 2, respectively, quoted the definition of Master Police Officer contained in CCR, title 2, section 570, subdivision (a), and specifically referred to the regulation in articulating that the MOP did not constitute special compensation.

14. In addition to affirmatively determining which items are included in special compensation, CalPERS has set forth the characteristics that must be present in these items: the item must be historically consistent with prior payments for the job classification (CCR, tit. 2, § 571, subd. (b)(6)); it must not be paid exclusively in the final compensation period (CCR, tit. 2, § 571, subd. (b)(7)); it must not constitute final settlement pay (CCR, tit. 2, § 571, subd. (b)(8)); and it must not create an unfunded liability over and above [CalPERS]' actuarial assumptions (CCR, tit. 2, § 571, subd. (b)(9).) These proscriptions cannot be used to exclude the MOP from being part of special compensation, as set forth in legal conclusion numbers 15, 16, 17, and 18.

15. While Respondent City had not previously paid the MOP, it had paid other items of compensation beyond base salary, including Lead Agent pay, and, therefore, the MOP is historically consistent with prior payments for the job classification. The fact that Respondent received the MOP on the item's first and only year does not negate the historical consistency. To conclude otherwise would mean that an employer could never create a new item of special compensation even if it met all other criteria, a construction of the regulation that would lead to an absurd result and that would render several other provisions surplusage. In fact, as set forth in factual finding number 8, Lead Agent pay commenced approximately two-and-one-half years before the MOP and has been treated as part of compensation earnable. The MOP is thus historically consistent with prior payments for the job classification, as required by CCR, title 2, section 571, subdivision (b)(6).

16. Similarly, while Respondent received the MOP in his last year of employment, the benefit was not structured to be paid only in the last year of employment, and Respondent could have continued to work for Respondent City even after he no longer received the MOP. Accordingly, the MOP cannot be excluded from special compensation on the basis that it was paid exclusively in the final compensation period, as proscribed by CCR, title 2, section 571, subdivision (b)(7).

17. The evidence does not establish that the MOP created unfunded liabilities over and above CalPERS' actuarial assumptions in violation of CCR, title 2, section 571, subdivision (b)(9). While the MOP increased Respondent City's retirement payment obligations, no evidence was presented about the other side of the ledger, and, therefore, it was not established that Respondent City would be unable to meet its obligations due to inclusion of MOP in its police officers' special compensation.

18. As set forth in legal conclusion numbers 3 and 4, final settlement pay is pay awarded in connection with or in anticipation of a separation from employment. It cannot be

disputed that Respondent City had financial difficulties at the time it entered into Side Letter Agreement #3. In addition, some of the individual respondents believed that the MOP was intended to motivate senior officers to retire. However, the MOP was never expressly structured as a golden parachute or any other retirement incentive, and members could have continued to work after June 30, 2011. Individual perceptions that the MOP was a retirement incentive due to Respondent City's financial condition constitute mere speculation.

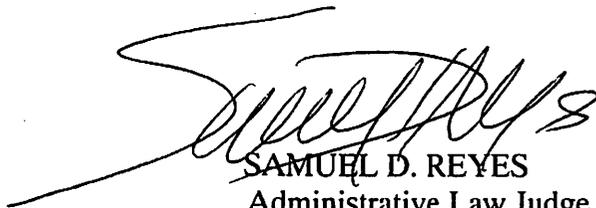
19. CalPERS has the duty and the power to correct mistakes made in the calculation of a retirement allowance. (§§ 20160, subd. (b), 20164.) Moreover, "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled." (Gov. Code, § 20163, subd. (a).) Therefore, CalPERS can make necessary adjustments to Respondent's retirement allowance to correct the mistaken inclusion of the MOP in calculating Respondent's retirement allowance.

20. By reason of the foregoing factual findings and legal conclusions, the MOP is not part of special compensation and CalPERS cannot include it in calculating Respondent's retirement allowance. Notwithstanding the many special compensation criteria the MOP meets, it fails to conform to the definition of Master Police Officer pay set forth in CCR, title 2, section 571, subdivision (a)(1). Since all criteria, including that one, must be met, MOP is not special compensation, and must be excluded from the calculation of Respondent's retirement allowance.

ORDER

The appeal of Respondent David Darrow is denied.

DATED: 4/21/06


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues of:

ROBIN SHERWOOD,

Respondent,

And

CITY OF EL MONTE,

Respondent.

Case No. 2014-1280

OAH No. 2015050224

PROPOSED DECISION

This matter, consolidated for hearing with OAH case numbers 2014080186, 2015050226, 2015050218, 2014080189, 2015050236, 2015050222, 2014080834, and 2015050330, came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on December 7, 2015.

At the hearing, Wesley E. Kennedy, Senior Staff Attorney, represented Complainant Renee Ostrander, Assistant Division Chief, Customer Account Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS). Preet Kaur, Senior Staff Attorney, filed Complainant's post-hearing written arguments.

Robin Sherwood (Respondent) did not appear at the hearing.

Frances E. Rogers, Attorney at Law, represented City of El Monte (Respondent City).

CalPERS moved to proceed in default against Respondent, and Respondent City opposed the motion. The motion was denied because Respondent City and other respondents with similar interests were present and because the consolidated matters presented issues common to all respondents.

Respondent worked for Respondent City as a police detective until his retirement on July 6, 2011. From July 1, 2010, until June 30, 2011, Respondent received Master Officer Pay (MOP), which increased his salary by seven percent. CalPERS initially included Respondent's

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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Master Officer Pay in the calculation of Respondent's service retirement allowance, but subsequently concluded that the MOP was not a recognized special compensation item that could be included in the calculation of Respondent's pension allowance, or in the language often used at the hearing, it concluded that the MOP is not "pensionable." In its view, the MOP does not meet the definition of special compensation because CalPERS did not specifically designate the item as one of special compensation in a regulation and because it fails to meet other specific criteria of special compensation items. CalPERS argues that the MOP is actually final settlement pay given as a retirement incentive to the most senior peace officers employed by Respondent City, which pay is not pensionable. Respondent City disagrees and asserts the MOP should be included in the calculation of Respondent's service retirement allowance because it is an item of special compensation that meets all statutory and regulatory requirements. Respondent City also argues that CalPERS waived some of its arguments by failing to place Respondent on notice regarding the basis of CalPERS's determination. As set forth in this Proposed Decision, while the MOP meets several of the requirements of special compensation, it must be excluded from Respondent's pension calculation because it fails to meet the definition of a payment CalPERS has affirmatively determined to be special compensation.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument and for the filing of objections to the receipt of Exhibits 40 and 41. No objections were received by the February 29, 2016 deadline, and Exhibits 40 and 41 are received in evidence.

On March 11, 2015 Respondent City filed closing argument entitled "City of El Monte Closing Brief" and a "City of El Monte's Administrative Authorities in Support of the City of El Monte's Closing Brief." On March 11, 2016, Complainant filed "CalPERS Prehearing Position Statement." On March 25, 2016, Respondent City filed "City of El Monte's Reply to CalPERS' Pre-hearing Position Statement" and Complainant filed "CalPERS Reply Brief." Respondent's interests are aligned with those of Respondent City and references to Respondents' positions or arguments include both respondents.

The matter was submitted for decision on March 25, 2016.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. The Statement of Issues extensively quotes from Government Code¹ section 20636, and from California Code of Regulations (CCR), title 2, sections 570 and 571. It concludes with paragraph XI: "This appeal is limited to the issue of whether CalPERS correctly excluded [MOP] from the final compensation calculation of [Respondent]." (Exh. 23, at p. 10.)

¹ All further statutory references are to the Government Code.

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

4. Respondent was employed by Respondent City as a police detective. By virtue of his employment, Respondent is a local safety member of CalPERS.

5. Respondent started working for Respondent City in 1983, and retired effective July 6, 2011.

6. Respondent City was experiencing financial difficulties during the period of 2009 and 2010. It was able to obtain agreements with representatives of its employees to defer scheduled pay raises and to reduce other financial obligations. An agreement with El Monte Police Officers' Association (EMPOA), the collective bargaining representative of police officers and sergeants, Side Letter Agreement #1, approved July 16, 2009, deferred for one year a four-percent salary increase due on July 1, 2009, and decreased employer contributions for employee medical insurance for one year.

7. Respondent's detective position was covered by a collective bargaining unit represented by the EMPOA. The July 1, 2007 to December 31, 2010 Memorandum of Understanding (MOU) between Respondent City and EMPOA was amended by Side Letter Agreement #3 dated June 24, 2010. Side Letter Agreement #3 contained the following provision:

"Master Officer Program – To reward the highest experienced officers, for a twelve month trial period, commencing July 1, 2010, the City will provide Master Officer Pay of 6% for Officers and 7% for Sergeants. To qualify for this pay, the employee must have at least 27 years of service and possess an Advanced Certificate issued by Peace Officers Standards and Training (POST). Unless renewed by the City, this Program will terminate on June 30, 2011." (Exh. 38, at p. 1.)

8. EMPOA unit employees are eligible to receive other items of compensation above their base salary. For instance, the MOU contains pay for "Bonus" assignments, including a "Bonus Assignment of Canine Handler." (Exh. 35, at p. 8.) They can also receive "Lead Agent" pay, which pay was started in 2008. In this regard, the MOU provides: "[E]ffective January 1, 2008 unit employees who are qualified and appointed as Lead Agent shall receive six and one-half percent (6 ½ %) above base salary." (Exh. 35, at p. 8.) While there was no testimony regarding the status of the Bonus pay, CalPERS witness Jennifer Sandness of the Compensation Review Unit, testified that Lead Agent pay can be counted toward compensation earnable.

9. From July 1, 2010, until June 30, 2011, Respondent received MOP, which increased his salary by seven percent. The pay was reported by Respondent City to CalPERS as pensionable special compensation.

10. CalPERS initially included the MOP Pay in calculating Respondent's retirement allowance. However, by letter dated April 14, 2014, CalPERS informed Respondent that it had erred in including the pay in the calculation of compensation earnable and that it would need to recalculate his allowance. CalPERS invited Respondent to submit additional information before it made a final determination.

11. On May 7, 2014, Respondent appealed CalPERS's determination.

12. On July 25, 2014, CalPERS made its final determination to exclude the MOP from the calculation of Respondent's earnable compensation. CalPERS wrote: "The City intentionally limited [MOP] for a one (1) year period. As a result, it was not historically consistent for the job classification and created the conditions for an unfunded liability. Further, the City offered [MOP] to only those members with at least 27 years of service. While CCR § 571 allows Master Police Officer pay, the requirement that employees have a minimum of 27 years of service specifically targets those employees at the end of their career/nearing retirement. During our review, it was confirmed the City experienced significant financial challenges when [MOP] was negotiated further demonstrating the City's attempt to incentivize the retirement of those members. Because [MOP] was only available for one (1) year to employees with at least 27 years of experience during tough financial times, it is considered final settlement pay." (Exh. 25, at p. 3.) The letter informed Respondent that his gross monthly allowance would be reduced, effective August 1, 2014.

LEGAL CONCLUSIONS

1. A CalPERS 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:

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[¶] . . . [¶]

“(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. . . .”

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“For example, final settlement pay may consist of severance pay or so-called ‘golden parachutes.’ It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

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[¶] . . . [¶]

“(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 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.”

6. As noted above, section 20636, 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 20636, 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 MOP paid to Respondent can be considered part of compensation earnable. Compensation earnable is composed of an employee's payrate and special compensation. (§20636, subd. (a).) Inasmuch as there is no contention that the MOP is part of Respondent's payrate, the answer turns on whether the pay constitutes special compensation.

7. The MOP meets general requirements of special compensation, as set forth in legal conclusion numbers 7, 8 and 9. It constitutes “a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions” under section 20636, subdivision (c)(1), because it was paid to police officers, who possessed certain qualifications, for performing their work duties. (Factual Findings 4, 5, 7, and 9.) By its terms, Side Letter Agreement #3 was entered into “To reward the highest experienced officers.” However, the provision did not exempt the officers from work, and they still had to perform their duties in order to earn the MOP.

8. The MOP was provided to represented employees pursuant to a collective bargaining agreement, as required by section 20636, subdivision (c)(2). (Factual Finding 7.) The statute requires that the benefit be provided to “similarly situated members of a group or class.” (*Ibid.*) Complainant argues that this requirement has not been met because the benefit was available only to a limited number of individuals, namely, those with 27 years of service or more. This argument is unpersuasive. The benefit was indeed provided to similarly situated

members of a group or class, i.e., peace officers employed by Respondent City, but in order to actually receive the added compensation, members of the group had to meet the MOP requirements, which included time in service as well as training requirements. Complainant does not argue that qualifications or requirements may not be attached to a benefit before members of a group or class can take advantage of it. Analogously, Respondent City peace officers had to meet specified requirements before they could to obtain Lead Agent pay or Bonus pay under the MOU.

9. The MOP was to be paid for “services rendered during normal working hours,” as required by section 20636, subdivision (c)(3). (Factual Findings 7 and 9.) Nothing on the face of the MOU provision defines the added compensation as overtime pay or any other pay for work performed outside normal work hours.

10. In addition to setting forth general requirements for inclusion in the definition of special compensation, the Legislature created specific exclusions. Two of the exclusions are potentially applicable to the MOP. The Legislature specifically excluded from the definition of special compensation “final settlement pay” (§ 20636, subd. (c)(7)(A)) and “other payments the board has not affirmatively determined to be special compensation” (§ 20636, subd. (c)(7)(C)).

11. As set forth in CCR, title 2, section 571, subdivision (a)(1), CalPERS has affirmatively determined that a type of incentive pay, called “Master Police Officer” pay, constitutes special compensation, if it otherwise meets the requirements of CCR, title 2, section 571, subdivision (b). This Master Police Officer item is the closest approved payment to the MOP, and unless the MOP meets the regulatory definition of Master Police Officer pay, the MOP must be excluded from special compensation under section 20636, subdivision (c)(7)(C). The definition of Master Police Officer pay is set forth in legal conclusion number 5, and the plain language of the regulation, which includes the word “and,” dictates that all elements of the definition must be met.

12. The MOP contains qualification requirements pertaining to years of employment and training, as mandated by CCR, title 2, section 571, subdivision (a)(1). However, it does not contain performance standards and does not involve a specialty assignment. Based on the plain language of the side agreement, set forth in factual finding number 7, a member is not required to perform any assignment he or she was not already performing in exchange for his or her payrate. Moreover, the side letter creating the MOP does not contain a stated basis for measuring or assessing performance. Accordingly, the MOP fails to meet the requirements of the Master Police Officer incentive category to be included in the definition of compensation earnable.²

² Respondents correctly point out that some items of special compensation, such as educational incentive pay and longevity pay, do not require the performance of a specialty assignment. However, the MOP was not structured to be, and no argument has been presented that it should be, treated as one of these other special compensation items. The Master Police Officer category remains the most applicable of those affirmatively determined by CalPERS to be special compensation.

13. Respondents argue that Respondent was not on notice that CalPERS considered the failure of the MOP to include performance standards or specialty assignments a basis for excluding the MOP from special compensation. This argument is unpersuasive since the determination letter and the Statement of Issues, set forth in factual finding numbers 12 and 2, respectively, quoted the definition of Master Police Officer contained in CCR, title 2, section 570, subdivision (a), and specifically referred to the regulation in articulating that the MOP did not constitute special compensation.

14. In addition to affirmatively determining which items are included in special compensation, CalPERS has set forth the characteristics that must be present in these items: the item must be historically consistent with prior payments for the job classification (CCR, tit. 2, § 571, subd. (b)(6)); it must not be paid exclusively in the final compensation period (CCR, tit. 2, § 571, subd. (b)(7)); it must not constitute final settlement pay (CCR, tit. 2, § 571, subd. (b)(8)); and it must not create an unfunded liability over and above [CalPERS]' actuarial assumptions (CCR, tit. 2, § 571, subd. (b)(9).) These proscriptions cannot be used to exclude the MOP from being part of special compensation, as set forth in legal conclusion numbers 15, 16, 17 and 18.

15. While Respondent City had not previously paid the MOP, it had paid other items of compensation beyond base salary, including Lead Agent pay, and, therefore, the MOP is historically consistent with prior payments for the job classification. The fact that Respondent received the MOP on the item's first and only year does not negate the historical consistency. To conclude otherwise would mean that an employer could never create a new item of special compensation even if it met all other criteria, a construction of the regulation that would lead to an absurd result and that would render several other provisions surplusage. In fact, as set forth in factual finding number 8, Lead Agent pay commenced approximately two-and-one-half years before the MOP and has been treated as part of compensation earnable. The MOP is thus historically consistent with prior payments for the job classification, as required by CCR, title 2, section 571, subdivision (b)(6).

16. Similarly, while Respondent received the MOP in his last year of employment, the benefit was not structured to be paid only in the last year of employment, and Respondent could have continued to work for Respondent City even after he no longer received the MOP. Accordingly, the MOP cannot be excluded from special compensation on the basis that it was paid exclusively in the final compensation period, as proscribed by CCR, title 2, section 571, subdivision (b)(7).

17. The evidence does not establish that the MOP created unfunded liabilities over and above CalPERS' actuarial assumptions in violation of CCR, title 2, section 571, subdivision (b)(9). While the MOP increased Respondent City's retirement payment obligations, no evidence was presented about the other side of the ledger, and, therefore, it was not established that Respondent City would be unable to meet its obligations due to inclusion of MOP in its police officers' special compensation.

18. As set forth in legal conclusion numbers 3 and 4, final settlement pay is pay awarded in connection with or in anticipation of a separation from employment. It cannot be

disputed that Respondent City had financial difficulties at the time it entered into Side Letter Agreement #3. In addition, some of the individual respondents believed that the MOP was intended to motivate senior officers to retire. However, the MOP was never expressly structured as a golden parachute or any other retirement incentive, and members could have continued to work after June 30, 2011. Individual perceptions that the MOP was a retirement incentive due to Respondent City's financial condition constitute mere speculation.

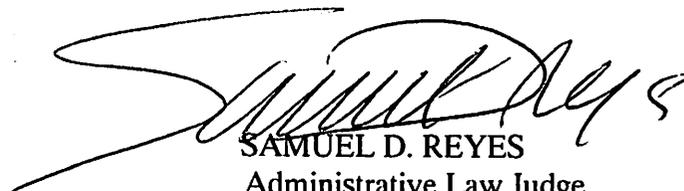
19. CalPERS has the duty and the power to correct mistakes made in the calculation of a retirement allowance. (§§ 20160, subd. (b), 20164.) Moreover, "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled." (Gov. Code, § 20163, subd. (a).) Therefore, CalPERS can make necessary adjustments to Respondent's retirement allowance to correct the mistaken inclusion of the MOP in calculating Respondent's retirement allowance.

20. By reason of the foregoing factual findings and legal conclusions, the MOP is not part of special compensation and CalPERS cannot include it in calculating Respondent's retirement allowance. Notwithstanding the many special compensation criteria the MOP meets, it fails to conform to the definition of Master Police Officer pay set forth in CCR, title 2, section 571, subdivision (a)(1). Since all criteria, including that one, must be met, MOP is not special compensation, and must be excluded from the calculation of Respondent's retirement allowance.

ORDER

The appeal of Respondent Robin Sherwood is denied.

DATED: 4/21/16


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues of:

ROBERT ROACH,

Respondent,

and

CITY OF EL MONTE,

Respondent.

Case No. 2015-0309

OAH No. 2015050222

PROPOSED DECISION

This matter, consolidated for hearing with OAH case numbers 2014080186, 2015050226, 2015050218, 2014080189, 2015050236, 2015050224, 2014080834, and 2015050330, came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on December 7, 2015.

At the hearing, Wesley E. Kennedy, Senior Staff Attorney, represented Complainant Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS). Preet Kaur, Senior Staff Attorney, filed Complainant's post-hearing written arguments.

Robert Roach (Respondent) appeared by his wife and designated Attorney-in-Fact, Elizabeth Roach.

Frances E. Rogers, Attorney at Law, represented City of El Monte (Respondent City).

Respondent worked for Respondent City as a police lieutenant until his retirement on September 11, 2011. From July 1, 2010, until June 30, 2011, Respondent received Master Officer Pay (MOP), which increased his salary by seven percent. CalPERS initially included Respondent's MOP in the calculation of Respondent's service retirement allowance, but subsequently concluded the MOP was not a recognized special compensation item that could be included in the calculation of Respondent's pension allowance, or in the language often used at the hearing, it concluded that the MOP is not "pensionable." In its view, the MOP does not

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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meet the definition of special compensation because CalPERS did not specifically designate the item as one of special compensation in a regulation and because it fails to meet other specific criteria of special compensation items. CalPERS argues that the MOP is actually final settlement pay given as a retirement incentive to the most senior peace officers employed by Respondent City, which pay is not pensionable. Respondents disagree and assert the MOP should be included in the calculation of Respondent's service retirement allowance because it is an item of special compensation that meets all statutory and regulatory requirements. Respondents also argue that CalPERS waived some of its arguments by failing to place Respondents on notice regarding the basis of CalPERS's determination. As set forth in this Proposed Decision, while the MOP meets several of the requirements of special compensation, it must be excluded from Respondent's pension calculation because it fails to meet the definition of a payment CalPERS has affirmatively determined to be special compensation.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument and for the filing of objections to the receipt of Exhibits 40 and 41. No objections were received by the February 29, 2016 deadline, and Exhibits 40 and 41 are received in evidence.

On March 11, 2015 Respondent City filed closing argument entitled "City of El Monte Closing Brief" and a "City of El Monte's Administrative Authorities in Support of the City of El Monte's Closing Brief." On March 11, 2016, Complainant filed "CalPERS Prehearing Position Statement." On March 25, 2016, Respondent City filed "City of El Monte's Reply to CalPERS' Pre-hearing Position Statement" and Complainant filed "CalPERS Reply Brief." Respondent was given the opportunity to present closing argument if he disagreed with the position taken by Respondent City, but did not file a closing argument. Respondents' interests are aligned and references to Respondents' positions or arguments include both respondents.

The matter was submitted for decision on March 25, 2016.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. The Statement of Issues extensively quotes from Government Code¹ section 20636, and from California Code of Regulations (CCR), title 2, sections 570 and 571. It concludes with paragraph XI: "This appeal is limited to the issue of whether CalPERS correctly excluded [MOP] from the final compensation calculation of [Respondent]." (Exh. 27, at p. 10.)
3. Respondent City contracts with CalPERS for retirement benefits for eligible employees pursuant to the Public Employees' Retirement Law (PERL), section 20000 et seq.

¹ All further statutory references are to the Government Code.

4. Respondent was employed by Respondent City as a police lieutenant. By virtue of his employment, Respondent is a local safety member of CalPERS.

5. Respondent started working for Respondent City in 1982, and retired effective September 11, 2011.

6. Respondent City was experiencing financial difficulties during the period of 2009 and 2010. It was able to obtain agreements with representatives of its employees to defer scheduled pay raises and to reduce other financial obligations. An agreement with El Monte Police Officers' Association (EMPOA), the collective bargaining representative of police officers and sergeants, Side Letter Agreement #1, approved July 16, 2009, deferred for one year a four-percent salary increase due on July 1, 2009, and decreased employer contributions for employee medical insurance for one year.

7. The July 1, 2007 to December 31, 2010 Memorandum of Understanding (MOU) between Respondent City and EMPOA, the collective bargaining association of police officers and sergeants, was amended by Side Letter Agreement #3 dated June 24, 2010. Side Letter Agreement #3 contained the following provision:

“Master Officer Program – To reward the highest experienced officers, for a twelve month trial period, commencing July 1, 2010, the City will provide Master Officer Pay of 6% for Officers and 7% for Sergeants. To qualify for this pay, the employee must have at least 27 years of service and possess an Advanced Certificate issued by Peace Officers Standards and Training (POST). Unless renewed by the City, this Program will terminate on June 30, 2011.” (Exh. 38, at p. 1.)

8. EMPOA unit employees are eligible to receive other items of compensation above their base salary. For instance, the MOU contains pay for “Bonus” assignments, including a “Bonus Assignment of Canine Handler.” (Exh. 35, at p. 8.) They can also receive “Lead Agent” pay, which pay was started in 2008. In this regard, the MOU provides: “[E]ffective January 1, 2008 unit employees who are qualified and appointed as Lead Agent shall receive six and one-half percent (6 ½ %) above base salary.” (Exh. 35, at p. 8.) While there was no testimony regarding the status of the Bonus pay, CalPERS witness Jennifer Sandness of the Compensation Review Unit, testified that Lead Agent pay can be counted toward compensation earnable.

9. Respondent was in a bargaining unit represented by the Police Mid-Management Association (PMMA). PMMA and Respondent City had negotiated what is referred to as a “me too” clause in Side Letter Agreement #3 to the July 1, 2007, to December 31, 2010 Memorandum of Understanding between the parties, effective June 24, 2010, which stated: “[E]ffective July 1, 2010, PMMA members shall be guaranteed the equivalent if any other City employee, who belongs to a Bargaining Unit, receives any deferred raises or benefits contractually agreed upon in their existing MOU or Side Letter Agreements.” (Exh. A.) Respondent received the MOP benefit by virtue of the “me too” clause.

10. From July 1, 2010, until June 30, 2011, Respondent received MOP, which increased his salary by seven percent. The pay was reported by Respondent City to CalPERS as pensionable special compensation.

11. CalPERS initially included the MOP in calculating Respondent's retirement allowance. However, by letter dated May 14, 2014, CalPERS informed Respondent that it had erred in including the pay in the calculation of compensation earnable and that it would need to recalculate his allowance. CalPERS invited Respondent to submit additional information before it made a final determination.

12. On June 24, 2014, Respondent appealed CalPERS's determination.

13. On August 5, 2014, CalPERS made its final determination to exclude the MOP from the calculation of Respondent's earnable compensation. CalPERS wrote: "The City intentionally limited [MOP] for a one (1) year period. As a result, it was not historically consistent for the job classification and created the conditions for an unfunded liability. Further, the City offered [MOP] to only those members with at least 27 years of service. While CCR § 571 allows Master Police Officer pay, the requirement that employees have a minimum of 27 years of service specifically targets those employees at the end of their career/nearing retirement. During our review, it was confirmed the City experienced significant financial challenges when [MOP] was negotiated further demonstrating the City's attempt to incentivize the retirement of those members. Because [MOP] was only available for one (1) year to employees with at least 27 years of experience during tough financial times, it is considered final settlement pay." (Exh. 29, at p. 3.) The letter informed Respondent that his gross monthly allowance would be reduced, effective September 1, 2014.

LEGAL CONCLUSIONS

1. A CalPERS 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.

[¶] . . . [¶]

“(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. . . .”

4. As directed by the Legislature in section 20636, subdivision (f), CalPERS has promulgated regulations more specifically defining final settlement pay. CCR, title 2, section 570 provides:

“ ‘Final settlement pay’ means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

“For example, final settlement pay may consist of severance pay or so-called ‘golden parachutes.’ It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

“Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.”

5. CalPERS has affirmatively determined certain items to be special compensation. CCR, title 2, section 571, states in pertinent 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:

“(1) INCENTIVE PAY

[¶] . . . [¶]

“Master Police Officer - Compensation to local police officers, county peace officers and school police or security officers who meet specified requirements, years of employment, performance standards, education, Peace Officer Standard Training (POST), and perform a specialty assignment.

[¶] . . . [¶]

“(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 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.”

6. As noted above, section 20636, 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 20636, 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 MOP paid to Respondent can be considered part of compensation earnable. Compensation earnable is composed of an employee's payrate and special compensation. (§20636, subd. (a).) Inasmuch as there is no contention that the MOP is part of Respondent's payrate, the answer turns on whether the pay constitutes special compensation.

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8. The MOP was provided to represented employees pursuant to a collective bargaining agreement, as required by section 20636, subdivision (c)(2). (Factual Findings 7 and 9.) The statute requires that the benefit be provided to “similarly situated members of a group or class.” (*Ibid.*) Complainant argues that this requirement has not been met because the benefit was available only to a limited number of individuals, namely, those with 27 years of service or more. This argument is unpersuasive. The benefit was indeed provided to similarly situated members of a group or class, i.e., peace officers employed by Respondent City, but in order to actually receive the added compensation, members of the group had to meet the MOP requirements, which included time in service as well as training requirements. Complainant does not argue that qualifications or requirements may not be attached to a benefit before members of a group or class can take advantage of it. Analogously, Respondent City peace officers had to meet specified requirements before they could to obtain Lead Agent pay or Bonus pay under the MOU.

9. The MOP was to be paid for “services rendered during normal working hours,” as required by section 20636, subdivision (c)(3). (Factual Findings 7 and 9.) Nothing on the face of the MOU provision defines the added compensation as overtime pay or any other pay for work performed outside normal work hours.

10. In addition to setting forth general requirements for inclusion in the definition of special compensation, the Legislature created specific exclusions. Two of the exclusions are potentially applicable to the MOP. The Legislature specifically excluded from the definition of special compensation “final settlement pay” (§ 20636, subd. (c)(7)(A)) and “other payments the board has not affirmatively determined to be special compensation” (§ 20636, subd. (c)(7)(C)).

11. As set forth in CCR, title 2, section 571, subdivision (a)(1), CalPERS has affirmatively determined that a type of incentive pay, called “Master Police Officer” pay, constitutes special compensation, if it otherwise meets the requirements of CCR, title 2, section 571, subdivision (b). This Master Police Officer item is the closest approved payment to the MOP, and unless the MOP meets the regulatory definition of Master Police Officer pay, the MOP must be excluded from special compensation under section 20636, subdivision (c)(7)(C). The definition of Master Police Officer pay is set forth in legal conclusion number 5, and the plain language of the regulation, which includes the word “and,” dictates that all elements of the definition must be met.

12. The MOP contains qualification requirements pertaining to years of employment and training, as mandated by CCR, title 2, section 571, subdivision (a)(1). However, it does not contain performance standards and does not involve a specialty assignment. Based on the plain language of the side agreement, set forth in factual finding number 7, a member is not required to perform any assignment he or she was not already performing in exchange for his or her payrate. Moreover, the side letter creating the MOP does not contain a stated basis for measuring or assessing performance. Accordingly, the MOP fails to meet the requirements of

the Master Police Officer incentive category to be included in the definition of compensation earnable.²

13. Respondents argue that Respondent was not on notice that CalPERS considered the failure of the MOP to include performance standards or specialty assignments a basis for excluding the MOP from special compensation. This argument is unpersuasive since the determination letter and the Statement of Issues, set forth in factual finding numbers 13 and 2, respectively, quoted the definition of Master Police Officer contained in CCR, title 2, section 570, subdivision (a), and specifically referred to the regulation in articulating that the MOP did not constitute special compensation.

14. In addition to affirmatively determining which items are included in special compensation, CalPERS has set forth the characteristics that must be present in these items: the item must be historically consistent with prior payments for the job classification (CCR, tit. 2, § 571, subd. (b)(6)); it must not be paid exclusively in the final compensation period (CCR, tit. 2, § 571, subd. (b)(7)); it must not constitute final settlement pay (CCR, tit. 2, § 571, subd. (b)(8)); and it must not create an unfunded liability over and above [CalPERS]' actuarial assumptions (CCR, tit. 2, § 571, subd. (b)(9).) These proscriptions cannot be used to exclude the MOP from being part of special compensation, as set forth in legal conclusion numbers 15, 16, 17 and 18.

15. While Respondent City had not previously paid the MOP, it had paid other items of compensation beyond base salary, including Lead Agent pay, and, therefore, the MOP is historically consistent with prior payments for the job classification. The fact that Respondent received the MOP on the item's first and only year does not negate the historical consistency. To conclude otherwise would mean that an employer could never create a new item of special compensation even if it met all other criteria, a construction of the regulation that would lead to an absurd result and that would render several other provisions surplusage. In fact, as set forth in factual finding number 8, Lead Agent pay commenced approximately two-and-one-half years before the MOP and has been treated as part of compensation earnable. The MOP is thus historically consistent with prior payments for the job classification, as required by CCR, title 2, section 571, subdivision (b)(6).

16. Similarly, while Respondent received the MOP in his last year of employment, the benefit was not structured to be paid only in the last year of employment, and Respondent could have continued to work for Respondent City even after he no longer received the MOP. Accordingly, the MOP cannot be excluded from special compensation on the basis that it was paid exclusively in the final compensation period, as proscribed by CCR, title 2, section 571, subdivision (b)(7).

² Respondents correctly point out that some items of special compensation, such as educational incentive pay and longevity pay, do not require the performance of a specialty assignment. However, the MOP was not structured to be, and no argument has been presented that it should be, treated as one of these other special compensation items. The Master Police Officer category remains the most applicable of those affirmatively determined by CalPERS to be special compensation.

17. The evidence does not establish that the MOP created unfunded liabilities over and above CalPERS' actuarial assumptions in violation of CCR, title 2, section 571, subdivision (b)(9). While the MOP increased Respondent City's retirement payment obligations, no evidence was presented about the other side of the ledger, and, therefore, it was not established that Respondent City would be unable to meet its obligations due to inclusion of MOP in its police officers' special compensation.

18. As set forth in legal conclusion numbers 3 and 4, final settlement pay is pay awarded in connection with or in anticipation of a separation from employment. It cannot be disputed that Respondent City had financial difficulties at the time it entered into Side Letter Agreement #3. In addition, some of the individual respondents believed that the MOP was intended to motivate senior officers to retire. However, the MOP was never expressly structured as a golden parachute or any other retirement incentive, and members could have continued to work after June 30, 2011. Individual perceptions that the MOP was a retirement incentive due to Respondent City's financial condition constitute mere speculation.

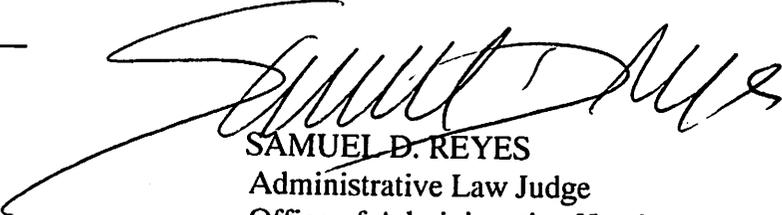
19. CalPERS has the duty and the power to correct mistakes made in the calculation of a retirement allowance. (§§ 20160, subd. (b), 20164.) Moreover, "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled." (Gov. Code, § 20163, subd. (a).) Therefore, CalPERS can make necessary adjustments to Respondent's retirement allowance to correct the mistaken inclusion of the MOP in calculating Respondent's retirement allowance.

20. By reason of the foregoing factual findings and legal conclusions, the MOP is not part of special compensation and CalPERS cannot include it in calculating Respondent's retirement allowance. Notwithstanding the many special compensation criteria the MOP meets, it fails to conform to the definition of Master Police Officer pay set forth in CCR, title 2, section 571, subdivision (a)(1). Since all criteria, including that one, must be met, MOP is not special compensation, and must be excluded from the calculation of Respondent's retirement allowance.

ORDER

The appeal of Respondent Robert Roach is denied.

DATED: 4/24/16



SAMUEL D. REYES

Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues of:

VICTOR HERNANDEZ,

Respondent,

And

CITY OF EL MONTE,

Respondent.

Case No. 2015-0310

OAH No. 2015050218

PROPOSED DECISION

This matter, consolidated for hearing with OAH case numbers 2014080186, 2015050226, 2014080189, 2015050236, 2015050222, 2015050224, 2014080834, and 2015050330, came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on December 7, 2015.

At the hearing, Wesley E. Kennedy, Senior Staff Attorney, represented Complainant Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS). Preet Kaur, Senior Staff Attorney, filed Complainant's post-hearing written arguments.

Victor Hernandez (Respondent) did not appear at the hearing.

Frances E. Rogers, Attorney at Law, represented City of El Monte (Respondent City).

CalPERS moved to proceed in default against Respondent, and Respondent City opposed the motion. The motion was denied because Respondent City and other respondents with similar interests were present and because the consolidated matters presented issues common to all respondents.

Respondent worked for Respondent City as a detective until his retirement on July 25, 2011. From July 1, 2010, until June 30, 2011, Respondent received Master Officer Pay (MOP),

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Marilyn Gray

which increased his salary by seven percent. CalPERS initially included Respondent's MOP in the calculation of Respondent's service retirement allowance, but subsequently concluded that the MOP was not a recognized special compensation item that could be included in the calculation of Respondent's pension allowance, or in the language often used at the hearing, it concluded that the MOP is not "pensionable." In CalPERS's view, the MOP does not meet the definition of special compensation because CalPERS did not specifically designate the item as one of special compensation in a regulation and because it fails to meet other specific criteria of special compensation items. CalPERS argues that the MOP is actually final settlement pay given as a retirement incentive to the most senior peace officers employed by Respondent City, which pay is not pensionable. Respondent City disagrees and asserts the MOP should be included in the calculation of Respondent's service retirement allowance because it is an item of special compensation that meets all statutory and regulatory requirements. Respondent City also argues that CalPERS waived some of its arguments by failing to place Respondent on notice regarding the basis of CalPERS's determination. As set forth in this Proposed Decision, while the MOP meets several of the requirements of special compensation, it must be excluded from Respondent's pension calculation because it fails to meet the definition of a payment CalPERS has affirmatively determined to be special compensation.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument and for the filing of objections to the receipt of Exhibits 40 and 41. No objections were received by the February 29, 2016 deadline, and Exhibits 40 and 41 are received in evidence.

On March 11, 2015 Respondent City filed closing argument entitled "City of El Monte Closing Brief" and a "City of El Monte's Administrative Authorities in Support of the City of El Monte's Closing Brief." On March 11, 2016, Complainant filed "CalPERS Prehearing Position Statement." On March 25, 2016, Respondent City filed "City of El Monte's Reply to CalPERS' Pre-hearing Position Statement" and Complainant filed "CalPERS Reply Brief." Respondent's interests are aligned with those of Respondent City and references to Respondents' positions or arguments include both respondents.

The matter was submitted for decision on March 25, 2016.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. The Statement of Issues extensively quotes from Government Code¹ section 20636, and from California Code of Regulations (CCR), title 2, sections 570 and 571. It concludes with paragraph XI: "This appeal is limited to the issue of whether CalPERS correctly excluded [MOP] from the final compensation calculation of [Respondent]." (Exh. 31, at p. 9.)

¹ All further statutory references are to the Government Code.

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

4. Respondent was employed by Respondent City as a detective. By virtue of his employment, Respondent is a local safety member of CalPERS.

5. Respondent started working for Respondent City in 1980, and retired effective July 25, 2011.

6. Respondent City was experiencing financial difficulties during 2009 and 2010. It was able to obtain agreements with representatives of its employees to defer scheduled pay raises and to reduce other financial obligations. An agreement with the El Monte Police Officers' Association (EMPOA), the collective bargaining representative of police officers and sergeants, Side Letter Agreement #1, approved July 16, 2009, deferred for one year a four-percent salary increase due on July 1, 2009, and decreased employer contributions for employee medical insurance for one year.

7. Respondent's detective position was covered by a collective bargaining unit represented by the EMPOA. The July 1, 2007 to December 31, 2010 Memorandum of Understanding (MOU) between Respondent City and EMPOA was amended by Side Letter Agreement #3 dated June 24, 2010. Side Letter Agreement #3 contained the following provision:

"Master Officer Program – To reward the highest experienced officers, for a twelve month trial period, commencing July 1, 2010, the City will provide Master Officer Pay of 6% for Officers and 7% for Sergeants. To qualify for this pay, the employee must have at least 27 years of service and possess an Advanced Certificate issued by Peace Officers Standards and Training (POST). Unless renewed by the City, this Program will terminate on June 30, 2011." (Exh.38, at p. 1.)

8. EMPOA unit employees are eligible to receive other items of compensation above their base salary. For instance, the MOU contains pay for "Bonus" assignments, including a "Bonus Assignment of Canine Handler." (Exh. 35, at p. 8.) They can also receive "Lead Agent" pay, which pay was started in 2008. In this regard, the MOU provides: "[E]ffective January 1, 2008 unit employees who are qualified and appointed as Lead Agent shall receive six and one-half percent (6 ½ %) above base salary." (Exh. 35, at p. 8.) While there was no testimony regarding the status of the Bonus pay, CalPERS witness Jennifer Sandness of the Compensation Review Unit, testified that Lead Agent pay can be counted toward compensation earnable.

9. From July 1, 2010, until June 30, 2011, Respondent received Master Officer Pay, which increased his salary by seven percent. The pay was reported by Respondent City to CalPERS as pensionable special compensation.

10. CalPERS initially included the MOP in calculating Respondent's retirement allowance. However, by letter dated May 14, 2014, CalPERS informed Respondent that it had erred in including the pay in the calculation of compensation earnable and that it would need to recalculate his allowance. CalPERS invited Respondent to submit additional information before it made a final determination.

11. On June 9, 2014, Respondent appealed CalPERS's determination.

12. On August 5, 2014, CalPERS made its final determination to exclude the MOP from the calculation of Respondent's earnable compensation. CalPERS wrote: "The City intentionally limited [MOP] for a one (1) year period. As a result, it was not historically consistent for the job classification and created the conditions for an unfunded liability. Further, the City offered [MOP] to only those members with at least 27 years of service. While CCR § 571 allows Master Police Officer pay, the requirement that employees have a minimum of 27 years of service specifically targets those employees at the end of their career/nearing retirement. During our review, it was confirmed the City experienced significant financial challenges when [MOP] was negotiated further demonstrating the City's attempt to incentivize the retirement of those members. Because [MOP] was only available for one (1) year to employees with at least 27 years of experience during tough financial times, it is considered final settlement pay." (Exh. 33, at p. 3.) The letter informed Respondent that his gross monthly allowance would be reduced, effective September 1, 2014.

LEGAL CONCLUSIONS

1. A CalPERS 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.

[¶] . . . [¶]

“(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. . . .”

4. As directed by the Legislature in section 20636, subdivision (f), CalPERS has promulgated regulations more specifically defining final settlement pay. CCR, title 2, section 570 provides:

“ ‘Final settlement pay’ means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

“For example, final settlement pay may consist of severance pay or so-called ‘golden parachutes.’ It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

“Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.”

5. CalPERS has affirmatively determined certain items to be special compensation. CCR, title 2, section 571, states in pertinent 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:

“(1) INCENTIVE PAY

[¶] . . . [¶]

“Master Police Officer - Compensation to local police officers, county peace officers and school police or security officers who meet specified requirements, years of employment, performance standards, education, Peace Officer Standard Training (POST), and perform a specialty assignment.

[¶] . . . [¶]

“(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 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.”

6. As noted above, section 20636, 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 20636, 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 MOP paid to Respondent can be considered part of compensation earnable. Compensation earnable is composed of an employee's payrate and special compensation. (§20636, subd. (a).) Inasmuch as there is no contention that the MOP is part of Respondent's payrate, the answer turns on whether the pay constitutes special compensation.

7. The MOP meets general requirements of special compensation, as set forth in legal conclusion numbers 7, 8 and 9. It constitutes “a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions” under section 20636, subdivision (c)(1), because it was paid to police officers, who possessed certain qualifications, for performing their work duties. (Factual Findings 4, 5, 7, and 9.) By its terms, Side Letter Agreement #3 was entered into “To reward the highest experienced officers.” However, the provision did not exempt the officers from work, and they still had to perform their duties in order to earn the MOP.

8. The MOP was provided to represented employees pursuant to a collective bargaining agreement, as required by section 20636, subdivision (c)(2). (Factual Finding 7.) The statute requires that the benefit be provided to “similarly situated members of a group or class.” (*Ibid.*) Complainant argues that this requirement has not been met because the benefit was available only to a limited number of individuals, namely, those with 27 years of service or more. This argument is unpersuasive. The benefit was indeed provided to similarly situated

members of a group or class, i.e., peace officers employed by Respondent City, but in order to actually receive the added compensation, members of the group had to meet the MOP requirements, which included time in service as well as training requirements. Complainant does not argue that qualifications or requirements may not be attached to a benefit before members of a group or class can take advantage of it. Analogously, Respondent City peace officers had to meet specified requirements before they could to obtain Lead Agent pay or Bonus pay under the MOU.

9. The MOP was to be paid for “services rendered during normal working hours,” as required by section 20636, subdivision (c)(3). (Factual Findings 7 and 9.) Nothing on the face of the MOU provision defines the added compensation as overtime pay or any other pay for work performed outside normal work hours.

10. In addition to setting forth general requirements for inclusion in the definition of special compensation, the Legislature created specific exclusions. Two of the exclusions are potentially applicable to the MOP. The Legislature specifically excluded from the definition of special compensation “final settlement pay” (§ 20636, subd. (c)(7)(A)) and “other payments the board has not affirmatively determined to be special compensation” (§ 20636, subd. (c)(7)(C)).

11. As set forth in CCR, title 2, section 571, subdivision (a)(1), CalPERS has affirmatively determined that a type of incentive pay, called “Master Police Officer” pay, constitutes special compensation, if it otherwise meets the requirements of CCR, title 2, section 571, subdivision (b). This Master Police Officer item is the closest approved payment to the MOP, and unless the MOP meets the regulatory definition of Master Police Officer pay, the MOP must be excluded from special compensation under section 20636, subdivision (c)(7)(C). The definition of Master Police Officer pay is set forth in legal conclusion number 5, and the plain language of the regulation, which includes the word “and,” dictates that all elements of the definition must be met.

12. The MOP contains qualification requirements pertaining to years of employment and training, as mandated by CCR, title 2, section 571, subdivision (a)(1). However, it does not contain performance standards and does not involve a specialty assignment. Based on the plain language of the side agreement, set forth in factual finding number 7, a member is not required to perform any assignment he or she was not already performing in exchange for his or her payrate. Moreover, the side letter creating the MOP does not contain a stated basis for measuring or assessing performance. Accordingly, the MOP fails to meet the requirements of the Master Police Officer incentive category to be included in the definition of compensation earnable.²

² Respondents correctly point out that some items of special compensation, such as educational incentive pay and longevity pay, do not require the performance of a specialty assignment. However, the MOP was not structured to be, and no argument has been presented that it should be, treated as one of these other special compensation items. The Master Police Officer category remains the most applicable of those affirmatively determined by CalPERS to be special compensation.

13. Respondents argue that Respondent was not on notice that CalPERS considered the failure of the MOP to include performance standards or specialty assignments a basis for excluding the MOP from special compensation. This argument is unpersuasive since the determination letter and the Statement of Issues, set forth in factual finding numbers 12 and 2, respectively, quoted the definition of Master Police Officer contained in CCR, title 2, section 570, subdivision (a), and specifically referred to the regulation in articulating that the MOP did not constitute special compensation.

14. In addition to affirmatively determining which items are included in special compensation, CalPERS has set forth the characteristics that must be present in these items: the item must be historically consistent with prior payments for the job classification (CCR, tit. 2, § 571, subd. (b)(6)); it must not be paid exclusively in the final compensation period (CCR, tit. 2, § 571, subd. (b)(7)); it must not constitute final settlement pay (CCR, tit. 2, § 571, subd. (b)(8)); and it must not create an unfunded liability over and above [CalPERS]' actuarial assumptions (CCR, tit. 2, § 571, subd. (b)(9).) These proscriptions cannot be used to exclude the MOP from being part of special compensation, as set forth in legal conclusion numbers 15, 16, 17, and 18.

15. While Respondent City had not previously paid the MOP, it had paid other items of compensation beyond base salary, including Lead Agent pay, and, therefore, the MOP is historically consistent with prior payments for the job classification. The fact that Respondent received the MOP on the item's first and only year does not negate the historical consistency. To conclude otherwise would mean that an employer could never create a new item of special compensation even if it met all other criteria, a construction of the regulation that would lead to an absurd result and that would render several other provisions surplusage. In fact, as set forth in factual finding number 8, Lead Agent pay commenced approximately two-and-one-half years before the MOP and has been treated as part of compensation earnable. The MOP is thus historically consistent with prior payments for the job classification, as required by CCR, title 2, section 571, subdivision (b)(6).

16. Similarly, while Respondent received the MOP in his last year of employment, the benefit was not structured to be paid only in the last year of employment, and Respondent could have continued to work for Respondent City even after he no longer received the MOP. Accordingly, the MOP cannot be excluded from special compensation on the basis that it was paid exclusively in the final compensation period, as proscribed by CCR, title 2, section 571, subdivision (b)(7).

17. The evidence does not establish that the MOP created unfunded liabilities over and above CalPERS' actuarial assumptions in violation of CCR, title 2, section 571, subdivision (b)(9). While the MOP increased Respondent City's retirement payment obligations, no evidence was presented about the other side of the ledger, and, therefore, it was not established that Respondent City would be unable to meet its obligations due to inclusion of MOP in its police officers' special compensation.

18. As set forth in legal conclusion numbers 3 and 4, final settlement pay is pay awarded in connection with or in anticipation of a separation from employment. It cannot be

disputed that Respondent City had financial difficulties at the time it entered into Side Letter Agreement #3. In addition, some of the individual respondents believed that the MOP was intended to motivate senior officers to retire. However, the MOP was never expressly structured as a golden parachute or any other retirement incentive, and members could have continued to work after June 30, 2011. Individual perceptions that the MOP was a retirement incentive due to Respondent City's financial condition constitute mere speculation.

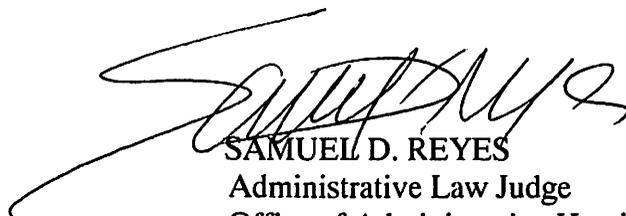
19. CalPERS has the duty and the power to correct mistakes made in the calculation of a retirement allowance. (§§ 20160, subd. (b), 20164.) Moreover, "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled." (Gov. Code, § 20163, subd. (a).) Therefore, CalPERS can make necessary adjustments to Respondent's retirement allowance to correct the mistaken inclusion of the MOP in calculating Respondent's retirement allowance.

20. By reason of the foregoing factual findings and legal conclusions, the MOP is not part of special compensation and CalPERS cannot include it in calculating Respondent's retirement allowance. Notwithstanding the many special compensation criteria the MOP meets, it fails to conform to the definition of Master Police Officer pay set forth in CCR, title 2, section 571, subdivision (a)(1). Since all criteria, including that one, must be met, MOP is not special compensation, and must be excluded from the calculation of Respondent's retirement allowance.

ORDER

The appeal of Respondent Victor Hernandez is denied.

DATED: 4/21/16


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings