

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Calculation of Final
Compensation of:

GREGORY G. COON,

Appellant/Respondent,

and

COUNTY OF SAN BERNARDINO, SAN
BERNARDINO COUNTY EMPLOYEES'
RETIREMENT ASSOICATION,

Respondents.

Agency Case No. 2016-0507

OAH No. 2016080198

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on January 4, 2017.

Kevin Kreutz, Senior Staff Attorney, represented complainant, Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS), State of California.

Gregory G. Coon, respondent, represented himself.

No appearance was made by or on behalf of respondents San Bernardino County and San Bernardino County Employees' Retirement Association (SBCERA).

The matter was submitted on January 4, 2017.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED February 1, 2017

Summer Haylett

ISSUE

Should pay Mr. Coon received while he was on "standby" be included in the calculation of his final compensation for retirement purposes?

FACTUAL FINDINGS

Background

1. Mr. Coon is a member of CalPERS by virtue of his employment with the State of California on July 16, 1984. In 1988, he began working for the City of Victorville, which is also a CalPERS contract agency.

2. On August 1, 2009, Mr. Coon became a member of SBCERA by virtue of his employment by the San Bernardino County Fire Department (County) as an Environmental Specialist IV.

3. SBCERA is an independent, employer-defined benefit plan that administers the County's retirement plan, and has a reciprocal agreement with CalPERS. Thus, a member's total accrued years of service for purposes of calculating final compensation under CalPERS laws includes the years of service the member worked at SBCERA. The provisions of SBCERA's agreement with CalPERS are subject to the statutes and regulations of the Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.)

4. On June 15, 2015, CalPERS received Mr. Coon's application for service retirement. His service retirement became effective August 22, 2015.

5. A member's service retirement allowance is calculated by applying a formula that involves the member's age at retirement, the member's years of service with CalPERS, and the member's "final compensation," which is defined as "the remuneration paid out of funds controlled by the employer in payment of the member's services performed during normal working hours or for the time during which the member is excused. . . ." (Gov. Code, § 20630.) By statute, "final compensation" is the employee's "payrate" and any "special compensation." (Gov. Code, § 20636.)

6. On December 22, 2015, CalPERS notified Mr. Coon and SBCERA that after reviewing Mr. Coon's final compensation, it determined that certain payments could not be included in calculating his final compensation under the PERL.

7. By letter dated January 19, 2016, Mr. Coon appealed CalPERS's determination that "standby pay" he received would not be included in the calculation of his

final compensation.¹ In his appeal letter, Mr. Coon discussed the nature of his standby responsibilities, which required that he take emergency response vehicles home and respond to emergencies within 10 minutes of being paged. Mr. Coon claimed that the requirements of working standby were similar to what would be required if he were working from a fire station.

8. Complainant filed the statement of issues in her official capacity. This hearing ensued.

Mr. Coon's Employment Agreement with San Bernardino County

9. Mr. Coon began working for the Victorville Fire Department in 1988. In 2009, the city disbanded its fire department and contracted with the County for fire protection. At that time, Mr. Coon was in charge of the city's hazardous materials unit. In 2009, he was hired by the County as an Environmental Specialist IV.

10. Mr. Coon testified that the position of Environmental Specialist IV was created specifically for him, and is not contained in the memorandum of understanding between the County and SBCERA. Mr. Coon worked in this position for six years before he retired. He worked a ten-hour four-day work week responding to hazardous material emergencies in the county. In addition to his 40-hour work week, he and the other eight members of his team rotated duty assignments to respond to emergencies after hours, on holidays, and on weekends. The schedule for this response duty would be set a year in advance. The response duty coverage would begin on Friday at 5:00 p.m. and end the following Friday at 8:00 a.m. Mr. Coon received \$20 an hour as standby pay.

The standby duty required him to take an emergency response vehicle home and respond to a page within 10 minutes. While on response duty, Mr. Coon was required to conduct daily checks of the vehicle and equipment, the same type of checks required if he were stationed at a fire station. Whenever he left home, he had to take his emergency vehicle and wear his uniform. While on standby, he would receive pages and phone calls to respond to emergencies throughout the county.

Mr. Coon believes the calculation of his CalPERS retirement allowance should include the standby pay he received while on response duty. He maintained that in order to be on the hazardous material response team, he had to possess specialized training and experience, which is a condition for receiving special compensation. He believes there should be a different rule for standby safety employees who respond to life, health, and environmental emergencies, and those who might receive standby pay for other less significant tasks such as responding to lockouts. He contended that his responsibilities were

¹ Mr. Coon did not appeal CalPERS's determination that other pay, identified as Vacation Payout, Call Back Pay, Medical Opt-Out Pay, and Retirement – Excess Cash Pay, were not to be included in the calculation of final compensation. At the hearing, Mr. Coon confirmed he was not appealing this determination.

no different than if he had been stationed at a fire station, and this should be reflected in his final pay. He would not have retired when he did had he known that standby pay would not be included.

CalPERS Evidence

11. Amy Baquera is employed by CalPERS as an associate government program analyst. She was previously employed by CalPERS as a retirement program specialist. Ms. Baquera was familiar with PERL and Mr. Coon's claim.

12. Ms. Baquera explained how a member's final compensation is calculated. By statute, it only includes the member's payrate and special compensation. The payrate is the base pay for services rendered during working hours determined from a public pay scale. Special compensation is defined by an exclusive list contained in regulations.

13. Ms. Baquera testified that CalPERS did not include Mr. Coon's standby pay in the final compensation because it is neither part of his payrate nor is it special compensation. Under Government Code section 20636, subdivision (b)(1), the payrate is only pay for services rendered during normal working hours. Ms. Baquera noted that Mr. Coon's standby pay was outside his normal working hours and cannot be considered as part of the payrate.

14. In determining whether standby pay could be considered special compensation, she reviewed the memorandum of understanding (MOU) between the County and SBCERA. Although Mr. Coon's job title was not reflected in the MOU, she considered his position similar to those positions that were covered, namely Hazardous Materials Specialist IV. Section 20636, subdivision (c)(2) requires that special compensation be received as part of a labor policy or agreement to similarly situated members of a group or class. If an individual is not part of a group or class, the statute requires CalPERS to limit special compensation to what is received by similarly situated members in the closest related group or class.

The MOU provides information about the standby pay Mr. Coon received. Standby duty requires the employee to return a call or page within ten minutes. After being told to report to work, the employee is required to arrive at the worksite no later than the time it takes to commute between the employee's home and the work site. Standby compensation ceases once the employee begins work. Ms. Baquera testified that the provision makes clear that standby pay is for outside of working hours and cannot be earned while at work. In Mr. Coon's case, CalPERS determined standby pay was not special compensation because it is not listed in the special compensation items under California Code of Regulations, title 2, section 571, subdivision, (a). Moreover, standby pay is for work that is not performed during normal working hours, a requirement for special compensation under subdivision (b)(4).

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LEGAL CONCLUSIONS

The Public Employees' Retirement Law – Decisional Authority re Compensation Earnable

1. Members of CalPERS, once vested, participate in a defined benefit retirement plan that provides a monthly retirement allowance under a formula comprising factors such as final compensation, service credit (i.e., the credited years of employment), and a per-service-year multiplier. The retirement allowance consists of an annuity (funded by member contributions deducted from the member's paycheck and interest thereon) and a pension (funded by employer contributions and which must be sufficient, when added to the annuity, to satisfy the amount specified in the benefit formula). (*In re Marriage of Sonne* (2010) 185 Cal.App.4th 1564, 1568.) The determination of what benefits and items of pay constitute compensation is crucial to the computation of an employee's ultimate pension benefits. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.)

Burden and Standard of Proof

2. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greator v. Bd. of Administration* (1979) 91 Cal.App.3d 54). In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Statutory and Regulatory Authority

3. "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 for specified reasons (Gov. Code, § 20630, subd (a).)

4. Government Code section 20635 provides:

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

5. Government Code section 20636 provides in part:

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

(b)(1) "Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. . . .

[¶] . . . [¶]

(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.

[¶] . . . [¶]

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section

(7) Special compensation does not include any of the following:

[¶] . . . [¶]

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

(C) Any other payments the board has not affirmatively determined to be special compensation

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

(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement:

(1) INCENTIVE PAY . . .

(2) EDUCATIONAL PAY . . .

(3) PREMIUM PAY . . .

(4) SPECIAL ASSIGNMENT PAY . . .

(5) STATUTORY ITEMS . . .

(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 . . .

[¶] . . . [¶]

(4) Performed during normal hours of employment;

[¶] . . . [¶]

(c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).

(d) If an items [sic] of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual.

Evaluation

7. Mr. Coon's final compensation is determined by the means of his payrate and any special compensation. (Gov. Code, § 20636, subd. (a).) Mr. Coon received standby pay as compensation for services provided outside of normal working hours in addition to his base pay. CalPERS properly determined that the standby pay did not constitute his payrate, as defined under Government Code section 20636, subdivision (b)(1), because it was not paid for services rendered during normal working hours.

Furthermore, CalPERS properly determined that the standby pay was not special compensation. As previously noted, it was not rendered for services during normal working hours, a statutory and regulatory requirement. (Gov. Code, § 20636, subd. (c)(3) & (c)(7)(B); Cal. Code, Regs., tit. 2, § 571, subd. (b)(4).) Moreover, standby pay is not specifically listed under Regulation 571, subdivision (a), which "exclusively identifies and defines" special compensation items. Finally, pursuant to Government Code section 20635, because the standby pay is in excess of the hours of work considered normal for employees on a full-time basis, it would fall within the definition of overtime compensation and is therefore excluded from computation of Mr. Coon's final compensation.

In *City of Pleasanton v. Bd. of Administration* (2012) 211 Cal.App.4th 522, the court reached a similar conclusion relating to standby pay for a fire division chief, who was assigned certain periods of time to be available to respond to emergencies. CalPERS found that since the standby pay was for work outside the chief's normal working hours, it could not be considered special compensation. The court agreed and affirmed that the standby pay was not part of the final compensation calculation.

Respondent contends that the standby pay should be considered special compensation because he was required to have special skills, knowledge, and abilities, as identified in Government Code section 20636, subdivision (c)(1). Mr. Coon's belief that his retirement compensation should reflect this additional compensation is understandable considering the commitment that his standby rotations required. However, the decision to exclude standby pay from the calculation of final compensation is the sole province of the Legislature, not CalPERS. The statutory requirement that special compensation be rendered during normal working is unambiguous, and CalPERS is therefore without legal authority to deviate from the statutory requirement. As such, Mr. Coon's appeal is denied.


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ORDER

Mr. Coon's appeal from CalPERS's determination excluding standby pay from the calculation of compensation is denied. Standby pay shall not be included in Mr. Coon's final compensation for purposes of calculating his service retirement allowance.

Dated: January 30, 2017

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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings