

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Gregory Coon (Respondent Coon) established membership with CalPERS through employment with City of Victorville beginning in 1988. In 2009, Respondent Coon established membership in San Bernardino County Employees' Retirement Association (SBCERA) by virtue of his employment with San Bernardino County Fire Department (Respondent County) as an Environmental Specialist IV. SBCERA is an independent retirement system established under County Employment Retirement Law (CERL)(Cal. Gov. Code §31450 *et seq.*) SBCERA has a reciprocal agreement with CalPERS. Reciprocity is "an agreement among public retirement systems to allow members to move from one public employer to another public employer within a specific time limit without losing some valuable retirement and related benefit rights." (*Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 108.) The provisions of SBCERA's reciprocal agreement with CalPERS are subject to the statutes and regulations of the California Public Employees' Retirement Law (PERL). (Gov. Code §20000 *et seq.*)

Respondent Coon retired concurrently from CalPERS and SBCERA effective August 22, 2015. CalPERS receives regular payroll information from state agencies, contracting agencies and reciprocal employers, such as Respondent County, which CalPERS uses to calculate a member's retirement allowance. Reviewing the payroll information submitted by Respondent County with respect to Respondent Coon, CalPERS determined that certain payroll items, by law, could not be included in the calculation of Respondent Coon's final compensation. One such item was identified by Respondent County as "standby pay." CalPERS determined that standby pay could not be included in Respondent Coon's retirement allowance.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. The ALJ presided over a one-day hearing in San Bernardino, California on January 4, 2017. Respondent represented himself at hearing. Neither the County nor SBCERA appeared.

Prior to the hearing, CalPERS explained the hearing process to Respondent Coon and the need to support his case with witnesses and documents. CalPERS provided Respondent Coon with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Coon's questions and provided him with information on how to obtain further information on the process.

CalPERS is a defined benefit plan. When a CalPERS member retires for service, the member's retirement allowance is calculated by applying a percentage figure, based on the member's age at retirement, to the member's years of service and "final compensation," comprised of the member's payrate and any special compensation received. (Gov. Code §20636) Payrate is the normal rate of pay for the member's

position that is paid to other similarly situated members, for full-time work during normal working hours.

Special compensation refers to payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions. By statute, special compensation must be set forth in a labor policy or agreement and available to similarly situated members of a group or class. California Code of Regulations title 2, section 571, contains additional requirements. Subdivision (a) sets forth an exclusive list of special compensation items available to employees of contracting agencies.

Subdivision (b) of 2 C.C.R. 571 lists the specific requirements for any compensation reported and paid as a type of approved special compensation listed in subdivision (a). Compensation paid by contracting agencies that is not listed in subdivision (a) or out of compliance with subdivision (b) will be excluded from the calculation of a member's final compensation. An agency or member seeking to obtain a recalculation of a retirement benefit bears the burden to prove entitlement to the allowance at issue.

At the hearing, a CalPERS staff member testified that the PERL statutes and regulations regarding "compensation earnable" (payrate and special compensation) apply to persons who seek to retire concurrently from CalPERS and a reciprocal retirement system (SBCERA), such as Respondent Coon. Staff testified that CalPERS reviewed the payroll history regarding Respondent Coon submitted by Respondent County to confirm that it constituted acceptable payrate and special compensation upon which Respondent Coon's final compensation could be based. Staff further testified that CalPERS flagged several payroll items for Respondent Coon: Vacation Payout, Call Back Pay, Medical Opt-Out Pay, Retirement Excess Cash Pay, and Standby Pay. CalPERS confirmed that these items were not part of Respondent Coon's payrate, because they were not reported by Respondent County as part of his regularly received salary. Thus, they could only be included in the calculation of Respondent Coon's final compensation if they were acceptable forms of special compensation pursuant to the PERL.

Respondent County submitted records to CalPERS confirming that Respondent Coon received standby pay pursuant to an approved Memorandum of Understanding (MOU). As defined by the MOU, Respondent County issued standby pay to safety personnel who were required to respond to emergencies after their 40-hour work week, on holidays, and on weekends. CalPERS staff testified that standby pay was not payrate because it was not for work performed during normal business hours as required by Government Code section 20636(b)(1). CalPERS staff also testified that standby pay was not special compensation because it was not on the exclusive list of approved special compensation set forth in 2 C.C.R. 571(a). It was also not paid for work performed during normal working hours, as required by 2 C.C.R. 571(b)(4).

At the hearing, Respondent Coon testified that standby duty would begin on Friday at 5:00 p.m. and end on the following Friday at 8:00 a.m. While receiving standby pay, Respondent Coon was required to take his emergency response vehicle home with him and be able to respond to a page from Respondent County within 10 minutes.


Respondent Coon testified that he believed a different rule should apply for standby employees who are responding to safety emergencies, such as he was doing for Respondent County. Respondent Coon also testified that his standby duties were no different than if he were stationed at the fire house.

After considering all documents and testimony, the ALJ upheld CalPERS' determination that the standby pay Respondent Coon received could not be included in the calculation of his final compensation because it was not special compensation within the meaning of Government Code section 20636 and 2 C.C.R. 571. The ALJ held that Respondent Coon received standby pay as compensation for services performed outside of normal working hours. It was not specifically listed under 2 C.C.R. 571 as an accepted form of special compensation, and hours worked outside of normal hours were prohibited overtime pay in violation of Government Code section 20635. Finally, the ALJ cited *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, in support of his conclusion. There, the Court of Appeal upheld CalPERS' determination that a fire division chief's receipt of standby pay for work outside of normal hours was not payrate or special compensation within the meaning of the PERL.

The ALJ concluded that Respondent's appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

March 15, 2017



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