ATTACHMENT A
THE PROPOSED DECISION
BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Appeal Regarding the Final Compensation Calculation of:
GEORGE P. WHAITE,
Respondent,
and
COUNTY OF MADERA,
Respondent.

Case No. 2015-0613
OAH No. 2015110220

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 26, 2016, February 13, 2017, and June 5, 2017, in Fresno, California.

Preet Kaur, Staff Attorney, represented the California Public Employees’ Retirement System (CalPERS).

George P. Whaite (respondent Whaite or Mr. Whaite) appeared on his own behalf.

Mark W. Waterman and Meera H. Bhatt, Attorneys at Law, of Lozano Smith, LLP, represented the County of Madera (respondent County or County).

Evidence was received and the record remained open for parties to simultaneously submit written closing arguments. Initial closing arguments were received from CalPERS, Mr. Whaite, and County on August 18, 2017, and marked for identification as Exhibits 19, Q, and R, respectively. Rebuttal arguments were received from CalPERS and County on September 18, 2017, and marked for identification and Exhibits 20 and S, respectively. The record was closed and the matter was submitted on September 18, 2017.
ISSUE

Whether respondent Whaite’s “Child Protective/Adult Services Differential” compensation can be included in the calculation of his final compensation?

FACTUAL FINDINGS

Preliminary Matters

1. The Statement of Issues was made and filed on October 22, 2015, by Renee Ostrander, Chief of the Employer Account Management Division, in her official capacity.

2. Respondent County contracted with the CalPERS Board of Administration for retirement benefits for its eligible employees. The provisions for local public agencies contracting with CalPERS are set forth in the Public Employees’ Retirement Law (PERL). (Gov. Code, § 20000 et seq.)

3. Respondent Whaite was employed by respondent County as a Social Worker II and III from 1985 to 2007, when he was promoted to the position of Social Worker Supervisor I. He retired in 2013 as a Social Worker Supervisor I. By virtue of his employment, Mr. Whaite was a miscellaneous member of CalPERS subject to the provisions of the PERL.

4. On or about July 23, 2013, Mr. Whaite signed an application for service retirement. Mr. Whaite retired for service effective November 1, 2013, with 29.15 years of service credit. He has been receiving a retirement allowance from that date.

5. CalPERS is a pre-funded, defined benefit retirement plan. The amount of a member’s service retirement allowance is calculated by applying a percentage figure, based upon the member’s age on the date of retirement, to the member’s years of service and the member’s “final compensation.” In computing a member’s retirement allowance, CalPERS may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member’s final compensation for purposes of calculating the retirement allowance.

6. During a review of Mr. Whaite’s payroll records, CalPERS found that respondent County had reported special compensation payments identified as “Child Protective/Adult Services Differential” during Mr. Whaite’s final compensation period of October 1, 2012, through September 30, 2013. CalPERS determined that the compensation reported by respondent County as “Child Protective/Adult Services Differential” is not appropriately included in the calculation of Mr. Whaite’s final compensation.

7. On January 8, 2014, CalPERS sent separate letters to Mr. Whaite and respondent County notifying them of its determination that the compensation reported by
respondent County as Child Protective/Adult Services Differential is not appropriately included in the calculation of Mr. Whaite’s final compensation because it does not meet the definition of “compensation earnable” as either “pay rate” or “special compensation.” By letters dated February 5 and 7, 2014, respondent County and Mr. Whaite, respectively, filed timely appeals and requests for an administrative hearing.

Child Protective/Adult Services Differential Pay

8. The compensation identified as Child Protective/Adult Services Differential is described in a Memorandum of Understanding between the County of Madera and the Mid-Management Employees of Madera County (MOU) for the term January 1, 2013 - December 31, 2013. As a Social Worker Supervisor I, Mr. Whaite was part of this bargaining unit. MOU section 33.01.00 identifies Child Protective/Adult Protective Services Differential as follows:

Employees in the classification of Social Worker Supervisor I/II and Program Manager, who are subject to emergency response for Child and Adult Protective Services assignments, shall be compensated approximately (5%) on the salary charts for the duration of the assignment.

An essentially identical provision in the MOU effective January 1, 2005, provided for Child Protective/Adult Services Differential. The only difference from the December 31, 2013 MOU is in the final clause which, in the January 1, 2005 MOU reads as follows: “...shall be compensated at two (2) salary ranges higher (5%) for the duration of the assignment.”

9. The MOU effective October 1, 2000, identified a similar compensation for the Social Worker Class (as distinct from the Social Worker Supervisor class) entitled “Protective Services Assignments.” As a Social Worker, Mr. Whaite was part of this bargaining unit. The October 1, 2000 MOU provided as follows:

Social Worker Class Series assigned to Child Protective Services and/or Adult Protective Services and subject to participation in emergency response, shall be compensated at two (2) ranges higher (5.00%) for the duration of the assignment. This differential shall be effective at the same time of implementation of any cost of living increase for the year 2000. (October 1, 2000)

10. The central dispute between CalPERS and respondents regarding the Child Protective/Adult Services Differential is whether it constitutes “special compensation” to be counted as a component of “compensation earnable” for purposes of calculating retirement benefits. Compensation earnable is composed of: (1) pay rate, and (2) special compensation, as defined in Government Code section 20636. None of the parties contend
that the Child Protective Services/Adult Protective Services pay qualifies as normal “pay rate.”

Prior Communications Regarding Special Compensation

11. On April 28, 2004, Kathy Taylor, Director of Human Resources, Madera County, sent a letter to Beth Brackenberry at CalPERS. The letter states in part as follows:

Per your request, this correspondence serves to clarify the special assignment pay currently being provided to Madera County employees who are assigned to the Adult Protective Service or Child Protective Service Programs of the Madera County Department of Social Services.

You have indicated that you cannot consider this to be a part of regular monthly compensation unless it falls within the provisions of “Special Assignment Pay” as specified by California Public Employees’ Retirement Law.

I believe that this assignment meets the definition of “Confidential Premium” defined by CalPERS. “Confidential Premium – Compensation to rank and file employees who are routinely and consistently assigned to sensitive positions requiring trust and discretion.” I know of few other assignments outside of law enforcement where the daily duties are of such a sensitive nature and require such a high level of trust and discretion.

I am available to discuss this matter further or provide any further documentation you require. I look forward to resolving this issue so that the contributions deposited with you on behalf of employees in these assignments will not be further contested.

12. Ms. Taylor testified in her capacity as the former Director of Human Resources in Madera County for 13 years. She retired from the County in 2009. One of her responsibilities was to ensure compliance with CalPERS regulations. The purpose of her April 28, 2004 letter was to explain to CalPERS why the Adult Protective Service or Child Protective Service pay qualified as special compensation, which was reportable to CalPERS for purposes of calculating final compensation and retirement benefits. Ms. Taylor believes she did not receive a response from Ms. Brackenberry, and does not recall any further conversation or correspondence with CalPERS about this.
13. The County reported the Child Protective/Adult Services Differential pay to CalPERS, in addition to regular pay, from 2003 to 2013. Both amounts were combined for the employee and County contributions to CalPERS. During her tenure as Director of Human Resources, the County did not receive any notice from CalPERS that the Child Protective/Adult Services Differential pay was not creditable. Based on the absence of any response from CalPERS to her letter or regarding the compensation reported by County, Ms. Taylor understood there was no dispute regarding the creditability of the Child Protective/Adult Services Differential pay as special compensation.

14. Adrienne Calip testified in her capacity as the Deputy Administrative Officer for Madera County. She has been employed by the County since 2004. The County reported Child Protective/Adult Services Differential pay to CalPERS along with regular pay for approximately 10 years, up until October 2013. The County stopped reporting the amounts as special compensation because it received notice from CalPERS in September 2013, that the pay was not properly included as special compensation. Ms. Calip testified that if CalPERS had notified the County earlier, the Department of Social Services could have requested that the County Board of Supervisors negotiate a different pay package that complied with CalPERS requirements for special compensation.

15. Eleanor Valdez was employed as a Payroll Technician in the County Auditor-Controller Department. She is now deceased and did not testify. On September 24, 2013, she wrote an email to Ms. Calip stating: “I made contact with PERS prior to the development of the code [Child Protective/Adult Services Differential pay] and was given the go-ahead to include it as special compensation and PERSABLE.” On April 26, 2013, Ms. Valdez wrote an email to Ms. Calip and Linda Ely, Personnel Technician at Madera County Human Resources, stating: “I had communication with PERS, prior to the implementation of the CDH, regarding its classification and/or if this met with the PERS requirements? I was informed at the time that it did under Special Pay, where it is still classified to date and have had no issues with this code.” These emails were admitted as administrative hearsay pursuant to Government Code section 11513, subdivision (d), only “for the purpose of supplementing or explaining other evidence but . . . shall not be sufficient in itself to support a finding . . . .”

George P. Whaite’s Compensation and Related Job Responsibilities

16. Beginning in 2004, Mr. Whaite received Adult Protective Service/Child Protective Service pay consistent with the MOUs. CalPERS did not notify Mr. Whaite that the Child Protective/Adult Services Differential pay might not be included as special compensation until October 15, 2013, when Mr. Whaite called CalPERS because he noticed that their calculation of his approved retirement benefits did not include the five percent special compensation. Mr. Whaite’s pension benefits are approximately $200 less than he expected because of CalPERS’s exclusion of the Child Protective/Adult Services Differential pay. Mr. Whaite testified that if he had known the pay would not be included as special compensation, he would have worked for another year or two to bring his retirement benefits up by five percent.
17. To qualify for the Child Protective/Adult Services Differential pay under the MOU, Mr. Whaite and others in his class were required to respond to emergencies involving children and adults, most commonly elders. The purpose of the emergency response was to provide services for people who potentially could not care for themselves. In fulfilling these responsibilities, Mr. Whaite and others in his class were frequently exposed to physical risk. The risks included exposure to hazardous substances such as garbage, human waste, roaches, vermin, and persons who were under the influence of alcohol or controlled substances. In each of these situations, responders were expected to exercise independent judgment. The work required special training and knowledge regarding state laws and regulations. In his capacity as a Social Worker Supervisor, Mr. Whaite continued to respond to emergencies, and provided training to social workers regarding emergency responses. Mr. Whaite provided these services during normal working hours and during regular on-call rotations.

Discussion

18. Government Code section 20630 defines “compensation” as 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 holidays, sick leave, industrial disability leave, vacation, compensatory time off, and leave of absence. Compensation is reported to CalPERS in accordance with section 20636 and may not exceed “compensation earnable” as defined in section 20636. (Gov. Code, § 20630, subds. (a) & (b).) The specific issue in this matter is whether the “Child Protective/Adult Services Differential” qualifies as “special compensation.”

Special Compensation

19. “Special compensation” includes payment for “special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.” (Gov. Code, § 20636, subd. (c)(1).) However, “special compensation” is “limited to that which is received by a member pursuant to a labor policy or agreement . . . .” (Gov. Code, § 20636, subd. (c)(2).) Moreover, “special compensation” does not include “[o]ther payments the board has not affirmatively determined to be special compensation.” (Gov. Code, § 20636, subd. (c)(7)(C).)

20. A determination of whether Child Protective/Adult Services Differential pay qualifies as “special compensation” turns largely on whether the MOU contains any items of special compensation as defined under the applicable statutes and regulations. Payment made by an employer to an employee “is not special compensation unless regulations promulgated by the board specifically determine that value to be ‘special compensation.’” (Gov. Code, § 20636, subd. (c)(5).) California Code of Regulations, title 2, section 571, subdivision (a), provides an extensive list of compensation items with accompanying descriptions that “exclusively identifies and defines special compensation . . . that must be reported to CalPERS if they are contained in a written labor policy or agreement.” “Only items listed in [subdivision] (a) have been affirmatively determined to be special
compensation.” (Cal. Code Regs., tit. 2, § 571, subd. (c).) Moreover, “if any item of special compensation is not listed in [subdivision] (a), or is out of compliance with [subdivision] (b) . . . then it shall not be used to calculate final compensation for that individual.” (Cal. Code Regs., tit. 2, § 571, subd. (d).)

21. Respondents contend that Child Protective/Adult Services Differential pay pursuant to the MOU meets the definition of eight separate items of special compensation, as enumerated in section 571, subdivision (a). The enumerated items of special compensation claimed by respondents are set forth in section 571, subdivision (a), as follows:

Management Incentive Pay - Compensation granted to management employees in the form of additional time off for extra pay due to the unique nature of their job. . . .

Off-Salary-Schedule Pay - Compensation in addition to base salary paid in similar lump-sum amounts to a group or class of employees. . . .

Confidential Premium - Compensation to rank and file employees who are routinely and consistently assigned to sensitive positions requiring trust and discretion.

Hazard Premium - Compensation to employees who are routinely and consistently exposed to toxic, radioactive, explosive or other hazardous substances or perform hazardous activities to implement health or safety procedures.

Lead Worker/Supervisor Premium - Compensation to employees who are routinely and consistently assigned to a lead or supervisory position over other employees, subordinate classifications, or agency-sponsored program participants.

Safety Officer Training/Coordinator Premium - Compensation to employees who are routinely and consistently assigned to instruct personnel and safety procedures.

Shift Differential - Compensation to employees who are routinely and consistently scheduled to work other than a standard “daytime” shift, e.g. graveyard shift, swing shift, shift change, rotating shift, split shift or weekends.

Training Premium - Compensation to employees who are routinely and consistently assigned to train employees.
22. Even though the MOU does not explicitly reference or contain any of these items of special compensation, respondents contend that Child Protective/Adult Services Differential pay qualifies as special compensation under each of these eight definitions because, they argue, the actual job responsibilities related to the pay meet the definitions of the eight items of special compensation. Respondents’ argument is legally incorrect. The regulations clearly specify that all items of special compensation listed in subdivision (a) must be contained in a labor policy or agreement. (Cal. Code Regs., tit. 2, § 571, subd. (b).) Moreover, “if an item of special compensation is not listed in [subdivision] (a), or is out of compliance with any of the standards in [subdivision] (b) . . . then it shall not be used to calculate final compensation for that individual.” (Cal. Code Regs., tit. 2, § 571, subd. (d).) Because the items of special compensation claimed by respondents are not included in the MOU as required by section 571, subdivision (b), they may not be included in the calculation of final compensation.

23. Respondents strenuously argue that such a result elevates form over substance. This argument fails to recognize that it is the substance of the statutory and regulatory definitions of “special compensation” to require that the items be listed in a labor agreement – in this instance the MOU. A clear benefit of this requirement is that it provides clarity in advance regarding what shall be treated as special compensation, and optimally prevents after-the-fact arguments about whether the compensation qualifies as “special compensation” based on the job duties.

24. Respondents introduced evidence that the Child Protective/Adult Services Differential responsibilities satisfy the descriptions of all eight items of special compensation, and on this basis argued that it should be treated as special compensation. This argument misses the essential point, as discussed above, that the governing statutes and regulations specifically require that items of special compensation be included in the labor agreement. Given that the MOU does not specifically list or describe any of the eight items of special compensation urged by respondents, it is not necessary to make any findings whether the job duties, as distinct from the language of the MOU, match the descriptions of any items of special compensation listed in section 571, subdivision (a).

Laches and Equitable Estoppel

25. Respondents contend that CalPERS is barred by both the defenses of laches and estoppel from asserting that the Child Protective/Adult Services Differential is not appropriately included in the calculation of Mr. Whaite's final compensation. The defense of laches requires unreasonable delay plus either acquiescence in the act about which CalPERS complains or prejudice to respondents due to the delay. (Golden Gate Water Ski Club v. County of Contra Costa (2008) 165 Cal.App.4th 249, 263.) The defense of equitable estoppel requires that the party to be estopped must be apprised of the facts and must intend their conduct will be acted upon; and that the other party must be ignorant of the true facts and must have relied upon the conduct to his injury. (Id. at p. 257.) The elements necessary to support a defense of laches or estoppel are not present in this matter.
26. Regarding laches, the evidence does not support a finding that CalPERS unreasonably delayed in notifying the County of its position that the Child Protective/Adult Services Differential cannot be included as special compensation. The letter from Ms. Taylor dated April 28, 2004, to CalPERS clearly outlines Ms. Taylor’s understanding of what CalPERS had told her— which was that CalPERS “. . . cannot consider this to be part of regular monthly compensation unless it falls within the provisions of ‘Special Assignment Pay’ as specified by California Public Employees’ Retirement Law.” The evidence does not support a finding that CalPERS ever changed its position in this regard, or that it ever interpreted the PERL or the related regulations to mean that Child Protective/Adult Services Differential pay was reportable as special compensation. Respondents assert that the emails from Ms. Valdez in September, 2013, show that CalPERS gave approval to the County to include Child Protective/Adult Services Differential as special compensation. These emails were admitted as administrative hearsay for the purposes of supplementing or explaining other evidence, but are not in themselves sufficient to support a factual finding. These emails may explain the County’s understanding, which led them to report the Child Protective/Adult Services Differential pay as special compensation. The emails are not, however, sufficient to support a factual finding that a CalPERS representative in fact told Ms. Valdez what is represented in her emails. Nor is there evidence sufficient to support a finding that CalPERS changed its position at any time between 2004 and 2013. Rather, the evidence is that CalPERS expressed its disapproval, and that the County never resolved its differences with CalPERS, as expressed in Ms. Taylor’s April, 2004, letter.

27. Regarding respondents’ claim of equitable estoppel, the evidence does not support a finding that the County was ignorant of the fact that CalPERS had determined as early as 2004 not to accept Child Protective/Adult Services Differential pay as special compensation. Again, this point is clear in Ms. Taylor’s April, 2004, letter. Given this fact, it cannot be said that respondents “did not have actual knowledge of the true facts [and] did not have notice of facts sufficient to put a reasonably prudent man upon inquiry, the pursuit of which would have led to actual knowledge.” (Banco Mercantil v. Sauls, Inc. (1956) 140 Cal.App.2d 316, 323.) The County was on notice as of April, 2004, that the Child Protective/Adult Services Differential pay might not be pensionable. Under these circumstances, County’s submission and CalPERS’s receipt of contributions for Child Protective/Adult Services Differential pay for approximately nine years until 2013, does not support an estoppel remedy.

28. Moreover, the defenses of estoppel and laches are not available if an important public policy adopted for the benefit of the public would be nullified. (Golden Gate Water Ski Club, supra, 165 Cal.App.4th at p. 263, quoting Feduniak v. California Coastal Com. (2007) 148 Cal.App.4th 1346, 1381 [“[A]s with estoppel, laches is not available where it would nullify an important policy adopted for the benefit of the public. [Citations.]”]) Thus, the court of appeal determined in a CalPERS matter “. . . that estoppel does not apply to contravene statutory requirements.” (Chaidez v. Board of Administration of California Public Employees’ Retirement System (2014) 223 Cal.App.4th 1425, 1432.) This holding is consistent with the principle that estoppel is not available where “[p]ublic interest and policy would be adversely affected . . . [and] [m]anifestly, it would have a disruptive effect on the
administration of the retirement system.” *(Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 584.)

29. CalPERS, as a government agency, may be excepted from the doctrine of equitable estoppel and laches where the defense is being used to provide respondent a benefit otherwise unavailable under the express provisions of the PERL and related regulations. *(Chaidez, supra,* 223 Cal.App.4th at pp. 1431-1432.) This is an instance where the PERL and related regulations clearly prohibit the County from including the Child Protective/Adult Services Differential as an item of special compensation. Were CalPERS to allow the County to do so, it would be assuming powers not granted to it by the Legislature. To the extent that it would allow members to have higher retirement benefits than permitted by the statutory formula, application of estoppel would be adverse to public interest or policy, and inconsistent with the fiduciary duty the Board of Administration owes to the trust fund it administers and to its beneficiaries. For the reasons stated above, neither the doctrine of equitable estoppel nor laches is available to respondents as a defense.

**Breach of Fiduciary Duty**

30. Respondent’s claim that CalPERS breached a fiduciary duty to provide timely and accurate information regarding its exclusion of Child Protective/Adult Services Differential pay as an item of special compensation. Respondents claim that the appropriate remedy is to require CalPERS to include Child Protective/Adult Services Differential pay in the calculation of final retirement benefits for Mr. Whaite and all other County employees and retirees who received such pay. This argument is fundamentally defective. CalPERS owes a fiduciary duty to all its members. For the reasons discussed above, it would violate this fiduciary duty and public policy if CalPERS were to provide compensation to any member in violation of the PERL and related regulations. CalPERS’s determination that Child Protective/Adult Services Differential pay does not qualify for special compensation is consistent with its fiduciary duty to its members. The remedy requested by respondents would violate that fiduciary duty. This being so, it is not necessary to make any finding whether CalPERS breached a fiduciary duty of timely communication with respondents.

**LEGAL CONCLUSIONS**

**Applicable Statutes and Regulations**

1. CalPERS is a “prefunded, defined benefit” retirement plan. *(Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198). The formula for determining a member’s retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) “final compensation” (Gov. Code, §§ 20037, 21350, 21352, 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)
2. Government Code section 20630 defines "compensation" as the "remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours . . . ." (Gov. Code, § 20630, subd. (a).) "Compensation shall be reported in accordance with section 20636 and shall not exceed compensation earnable, as defined in section 20636." (Gov. Code, § 20630, subd. (b).)

3. "Compensation earnable" is composed of: (1) pay rate, and (2) special compensation. (Gov. Code, § 20636, subd. (a).)

4. "Pay rate" is defined as "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." (Gov. Code, § 20636, subd. (b)(1).)

5. "Special compensation" of a member "includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions." (Gov. Code, § 20636, subd. (c)(1).)

   "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 pay rate." (Gov. Code, § 20636, subd. (c)(2).)

   "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." (Gov. Code, § 20636, subd. (c)(3).)

   "The monetary value of a service or non-cash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determined that value to be special 'compensation.'" (Gov. Code, § 20636, subd. (c)(5).)

6. "The board shall promulgate regulations that delineate more specifically and exclusively what constitutes 'special compensation' as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee . . . shall be included as special compensation and appropriately defined in those regulations." (Gov. Code, § 20636, subd. (c)(6).)

7. Special compensation does not include: "(A) Final settlement pay, (B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise, or (C) Other payments the board has not affirmatively determined to be special compensation." (Gov. Code, § 20636, subd. (c)(7).)
8. A "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. (Gov. Code, § 20636, subd. (e)(1).)

9. California Code of Regulations, title 2, section 571 exclusively identifies and defines special compensation items for members employed by a contracting agency that must be reported to CalPERS if they are contained in a written labor policy or agreement. (Cal. Code Regs., tit. 2, § 571, subd. (a).)

The Board has determined that all items of special compensation listed in subsection (a) must be: (1) contained in a written labor policy or agreement; (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 CalPERS' actuarial assumptions. (Cal. Code Regs., tit. 2, § 571, subd. (b).)

"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)." (Cal. Code Regs., tit. 2, § 571, subd. (c).)

"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." (Cal. Code Regs., tit. 2, § 571, subd. (d).)

**Legal Conclusions**

10. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement, absent a statutory provision to the contrary. (Greatorex v. Board of Administration (1979) 91 Cal.App.3d 54, 57.)

11. Respondents Whaite and County did not meet their burden to establish that Child Protective/Adult Services Differential pay is properly included as compensation earnable for the purpose of calculating Mr. Whaite's retirement benefits.

12. Based on the law and the evidence as a whole, CalPERS correctly determined that the Child Protective/Adult Services Differential pay cannot be included in either payrate or special compensation. Any assertions advanced by respondents at the hearing or in closing briefs, and not addressed above, are found to be without merit and are rejected.
ORDER

The appeal of respondents George P. Whaite and the County of Madera to include Child Protective/Adult Services Differential pay as compensable earnable, for purposes of calculation of Mr. Whaite's final service retirement allowance, is DENIED.

DATED: October 16, 2017

TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings