STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

George Whaite (Respondent) was employed by the County of Madera (Respondent County) from 1985 to 2007, as a Social Worker. He retired as a Social Worker Supervisor I in 2013.

The 2000-2002 Memorandum of Understanding (MOU), between Respondent County and the Professional Employees of Madera County (COMPA) provided an item of payment entitled the "Protective Services Assignments" compensation effective October 1, 2000:

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.

The 2005-2007 MOU between the County and Management Association of Madera County (MAMC) also provided an item of payment entitled "Child Protective/Adult Protective Services Differential", which was similar to the "Protective Services Assignments," but the language was slightly altered to state:

[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 at two (2) salary ranges higher (5%) for the duration of the assignment.

On April 28, 2004, Kathy Taylor, Director of Human Resources of Respondent County, sent a letter to Beth Brackenberry at CalPERS. The letter was sent to CalPERS in an attempt to clarify that the "Child Protective/Adult Protective Services Differential" is not call-back or stand-by pay. In the letter, Ms. Taylor states that:

You have indicated that you 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.

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.

There is no record that CalPERS ever changed its determination or informed the County that the "Child Protective/Adult Protective Services Differential" qualified as an item of "special compensation." Nonetheless, the County continued to report the "Child Protective/Adult Protective Services Differential" to CalPERS as an item of "special compensation" until October 2013, when CalPERS staff discovered the erroneous reporting while conducting a review of the payroll and special compensation reported on behalf of Respondent and reminded the County to stop the reporting.

The January 1, 2013 to December 31, 2013 MOU between the County and MAMC included the "Child Protective/Adult Protective Services Differential." Respondent was part of this bargaining unit.

On July 23, 2013, Respondent signed an application for service retirement. Upon review of his application, CalPERS determined that the "Child Protective/Adult Service Differential" had been incorrectly reported by Respondent County and could not be included in the calculations of Respondent's pension benefits because it failed to meet the definition of "compensation earnable", as either "payrate" or "special compensation" under, California Code of Regulations, title 2, section 571, subdivisions (a)(1) and (b).

CalPERS notified Respondents of its determination on January 8, 2014. Respondents appealed this determination and exercised their respective rights to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH).

Respondent represented himself at the hearing. Prior to the hearing, CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. Respondent County was represented by counsel. The hearing on the matter was held on July 26, 2016, February 13, 2017 and June 5, 2017.

The sole issue for determination in this matter was whether the "Child Protective/Adult Protective Services Differential" reported by Respondent County constituted "special compensation" to be included in Respondent's final compensation for purposes of calculating his retirement allowance.

The PERL defines "compensation earnable" as the compensation paid by the employer as "payrate" and "special compensation". (Government Code section 20636, subd. (b).) "Payrate" is defined as 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. (Government Code section 20636, subd. (b).) A similar definition applies to members who are not considered to be in a group or class.

"Special compensation" is generally defined as payments received by a member for
special skills, knowledge, abilities, work assignment, workdays, or other work conditions. Special compensation must be paid pursuant to a written labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment, in addition to payrate. (Government Code section 20636, subd. (c).) The CalPERS Board of Administration (Board), pursuant to statutory mandate, has specifically and exclusively identified what constitutes "special compensation" and under what conditions payments to a member may qualify as "special compensation". (See, Government Code section 20636, subd. (c)(6); California Code of Regulations, title 2, section 571.)

In addition to being an item that is listed under section 571, subd. (a), the compensation must also meet the requirements set forth under section 571, subd. (b) to be "special compensation."

At the hearing, Respondent County presented the testimony of the Director of Human Resources and the Deputy Administrative Officer of Respondent County. Respondent also testified at the hearing on his own behalf. Respondent testified concerning his job duties, which included responding to emergencies, potential exposure to hazardous substances, and training staff.

At the hearing, Respondent County argued that the "Child Protective/Adult Protective Services Differential" met the definition of eight separate items of "special compensation," listed under section 571, subd. (a)(1), including management incentive pay, off-salary-schedule pay, confidential premium, hazard premium, lead worker/supervisor premium, safety officer training/coordinator premium, shift differential, and training premium. Respondent County argued that although the MOUs did not explicitly reference or contain these items of "special compensation," the "Child Protective/Adult Protective Services Differential" qualifies as an item of "special compensation" under each of the definitions because the job duties performed by Respondent met the definition of these items of "special compensation."

The ALJ disagreed with this argument, noting it is "legally incorrect." The ALJ held that for compensation to constitute an item of "special compensation" listed under section 571, subd. (a)(1), it must be contained in a labor policy or agreement. (section 571, subd. (b).) The ALJ also held that that since none of the eight items of "special compensation" claimed by Respondents were included in the MOU as required by section 571, subd. (b), they may not be included in the calculation of final compensation.

The ALJ also noted that "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." Based on this, the ALJ found that since the "Child Protective/Adult Protective Services Differential" is not listed

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1 Hereinafter referred to as "section 571".
as an item of “special compensation” under section 571, subd. (a)(1), it cannot constitute an item of special compensation.

Respondents also argued that CalPERS is barred, by the doctrines of laches and estoppel, from asserting that the “Child Protective/Adult Services Differential” does not constitute an item of “special compensation.” The ALJ disagreed with Respondents and held that there was no evidence demonstrating CalPERS unreasonably delayed in notifying Respondent County that the “Child Protective/Adult Protective Services Differential” does not constitute an item of “special compensation.” The ALJ found that based on Kathy Taylor's April 28, 2004 letter, Respondent County was notified by CalPERS, as early as 2004, that CalPERS will not accept the “Child Protective/Adult Protective Services Differential” as “special compensation.”

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondents’ appeals. The ALJ found that the “Child Protective/Adult Protective Services Differential” cannot be included in the calculation of Respondent’s pension benefits because it does not comply with the statutory and regulatory definitions of “special compensation” and compensation earnable.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

December 20, 2017

PREET KAUR
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