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:

DAVID V. DELAY,

Respondent,

and

BIG BEAR CITY COMMUNITY SERVICES DISTRICT,

Respondent.

Agency Case No. 2017-0874
OAH No. 2018020667

PROPOSED DECISION


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

David V. Delay, respondent, represented himself.

No appearance was made by or on behalf of respondent Big Bear City Community Services District (BBCCSD).

The matter was submitted on July 25, 2018.
ISSUE

Should the $100 fixed-amount stipends Mr. Delay received while he was the Duty Officer, a position that required him to be on standby for various 24-hour periods, be included in the calculation of his final compensation for retirement purposes?

FACTUAL FINDINGS

1. Mr. Delay is a member of CalPERS by virtue of his employment with the BBCCSD. Mr. Delay worked as a firefighter in various ranks, and retired as a battalion chief. By virtue of his employment, Mr. Delay is a local safety member of CalPERS.

2. On May 28, 2013, Mr. Delay signed his application for a service retirement. His service retirement became effective August 24, 2013, with 30.388 years of service credit. The years of service credit are not in dispute.

3. 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.)

4. When CalPERS calculated Mr. Delay’s final compensation based on employer reports, it determined his final compensation was $9,984.93. Mr. Delay has been receiving a monthly benefit allowance based on that final compensation amount since his effective retirement date.

5. In 2017, CalPERS conducted a routine audit of 67 CalPERS agencies, specifically designed to review how employers are reporting special compensation for their employees. The purpose of the audit was to ensure the accuracy of special compensation reporting by employers, and in turn, to ensure that CalPERS members were having their final compensation calculated correctly.

In the audit, one of the items identified as commonly reported for BBCCSD firefighters was “Fire Protection Assignment” pay. The audit specifically looked at Fire Protection Assignment Pay for the Fire Chief, and determined the following:

1 Special compensation, a component of compensation earnable, is applicable for classic members and is defined by Government Code sections 20636 and 20636.1 and California Code of Regulations, title 2, section 571.
The Agency reported overtime earnings of $4,968 under the special compensation category Fire Protection Assignment Pay for the Fire Chief in the pay period ending January 24, 2014. Specifically, the Agency reported Strike Team Assignment Pay of $4,668 and On-Call pay of $300 as special compensation. These additional compensation items were for services performed outside of normally required duties and for duties performed outside of normal business hours, qualifying the pays as overtime as defined in Government Code section 20635. Additionally, Government Code section 20636 and California Code of Regulations [title 2] section 571 define special compensation as payment for a member’s services performed during normal working hours. Therefore, the pay was not reportable as special compensation.

As a result of the audit, CalPERS began checking various employees that had special compensation included in their final compensation calculations to ensure accuracy and compliance with the Public Employees’ Retirement Law (PERL).

6. Upon reviewing the special compensation reported for Mr. Delay by the BBCCSD, CalPERS noted many listings for “Fire Protection Assignment Premium.” The many entries for that item reported as special compensation were reported in increments of $100. After gathering documents from Mr. Delay and the BBCCSD regarding precisely what activities were included in the Fire Protection Assignment Premium reported by the BBCCSD, CalPERS determined that the reported amounts were actually for On-Call Duty Officer pay, which does not qualify as special compensation under the PERL, and not Fire Protection Assignment Premium pay, which would have qualified as special compensation under the PERL.

7. A November 24, 2008, memorandum from the Fire Chief explains the On-Call Duty Officer pay as a fixed stipend of $100 per 24 hour period of coverage in addition to the base wage received for a standard 40-hour workweek. As Mr. Delay explained, for example, if he were working an 8-hour workday beginning at 8:00 a.m., but was also the on-call duty officer, his on-call duty officer rotation would begin at 8:00 a.m. but when the end of the standard work-day arrived, he would still be the on-call duty officer until 8:00 a.m. the following day. Mr. Delay said the expectations of the on-call duty officer varied from administrative tasks to field tasks; anything could be asked of the on-call duty officer. Moreover, when one was assigned to this rotation, he or she would be required to remain in the applicable district and available for quick response. If called, the on-call duty officer could not refuse to respond.

8. On March 20, 2017, CalPERS notified Mr. Delay that after reviewing his final compensation, it determined that the On-Call Duty Officer Pay reported between June 1, 2012, through May 30, 2013, did not qualify as special compensation under the PERL, and as such, could not be included as compensation earned for purposes of determining his final
compensation. CalPERS advised Mr. Delay that his final compensation would be adjusted from $9,984.93 to $9,040.58, thus reducing his monthly benefit allowance by 791.47, to $7,463.36, effective May 1, 2017. Additionally, CalPERS calculated the amount it overpaid to Mr. Delay as a result of the erroneous inclusion of the special compensation from the time he service retired to the time the letter was sent, as $33,994.42. CalPERS also wrote that it applies the statute of limitations in accordance with Government Code section 20164 to write-off overpayments that occurred more than three years from the date of discovery; thus, it reduced the amount of overpayment to $28,341.48. CalPERS has been taking amounts out of Mr. Delay’s monthly benefit allowance to recoup the latter amount.

9. By letter dated April 1, 2017, Mr. Delay appealed CalPERS’s determination that the On-Call Duty Officer Pay he received would not be included in the calculation of his final compensation. In his appeal letter, Mr. Delay discussed the nature of his On-Call Duty Officer responsibilities, which were required as a condition of his position, and limited what he could and could not do during the 24 hours that he was on-call.

10. Complainant filed the statement of issues alleging that the On-Call Duty Officer Pay was not special compensation under applicable law and should not be included in the calculation of Mr. Delay’s final compensation; this hearing ensued.

11. Pha Moua, an Associate Governmental Program Analyst for CalPERS in the Compensation and Compliance Review Unit, testified at the hearing. Ms. Moua explained how, following the above-referenced audit, CalPERS discovered that the Fire Protection Assignment Premium had been incorrectly coded by Mr. Delay’s employer as compensable when it was, in fact, not. She explained that, although “Fire Protection Assignment Premium” is allowed under California Code of Regulations, title 2, section 571, subdivision (a), the duties for a position of that nature as outlined in that provision does not include on-call or standby duties. Ultimately, because the special compensation was not properly reported by Mr. Delay’s employer, it was “backed out” of his final compensation calculation, resulting in a reduction of the final amount authorized to be used to calculate final compensation.

12. Mr. Delay testified that he did not consider the Duty Officer position to be “on-call” and that it occurred, partly, during his normal working hours. He testified that the position announcement specifically required special knowledge, skills, and abilities to be able to serve in that position. He noted that the position was not voluntary; it was mandatory and required for persons in the position of Battalion Chief. He explained that while serving as the Duty Officer, individuals were limited in what they could do with their own time. They had to be ready to respond to any location within the district if called, and had to

\[\text{\textsuperscript{2}} \text{California Code of Regulations, title 2, section 571, subdivision (a), describes “Fire Prevention Assignment Premium” pay as “compensation to rank and file local firefighters who are routinely and consistently assigned to specific fire inspections and investigative work during normal hours of employment that may differ from the work schedule of fire suppression personnel.”}\]
remain-clear headed. When he was Duty Officer, he could not travel, could not consume alcoholic beverages, and essentially, “the time was not his own.” He said the Duty Officer position was a 24 hour rotation, so it overlapped with regular working hours and was not considered overtime.

13. Mr. Delay provided a Big Bear City Fire Department and BBCCSD Manual of Operations description for the Duty Officer. The document specified the duties that would be required of a Duty Officer and sets forth the knowledge and training that a person acting in that capacity must have. The document explains that the Duty Officer would be rotated according to a schedule for both agencies, as it is a shared on-call position. The document also states that if there are no full-time personnel available to cover the position, “the detail may be offered to the Paid Call Battalion Chief(s).” Put another way, if there were no individuals available to serve in the standby/on-call position, the position would be covered by the Battalion Chief working during his or her normal working hours. Finally, and perhaps most important, the document states:

The Duty Officer shall receive **standby pay** (standby pay will be based on minimum wage for each 24 hour Duty Officer coverage). The Duty Officer shall also receive overtime compensation . . . for hours of emergency work required in accordance with the organization’s policy. . . . [Emphasis added].

**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. When a party seeks to use Government Code section 20160 to correct an error or omission, the party seeking to correct the error has the burden of presenting documentation or other evidence establishing the right to correction by a preponderance of the evidence. (Gov. Code, § 21060, subd. (d); 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. Special compensation does not include “compensation for additional services outside regular duties, such as standby pay, callback pay, court duty, allowance for automobiles, and bonuses for duties performed after the member’s regular work shift.” (Gov. Code, § 20636, subdivision (g)(4)(I).”

7. 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

8. Mr. Delay’s final compensation is determined by the means of his payrate and any special compensation. (Gov. Code, § 20636, subd. (a).) Mr. Delay received a fixed rate of $100 for “standby pay” according to the official document that outlines the duties for being placed on Duty Officer status. Although the hours sometimes overlapped with normal working hours, the Duty Officer status ran for a 24-hour period, and covered hours well outside the normal working hours. Based on all the evidence presented, it is clear that the Duty Officer position was an on-call or standby position outside of Mr. Delay’s normal working hours.³ CalPERS properly determined that the “standby” or “on call” pay did not constitute compensation earnable under applicable law.

In City of Pleasanton v. Bd. of Administration (2012) 211 Cal.App.4th 522, the court reached a similar conclusion. In that case, the Battalion Chief worked a standard 40 hour workweek, and was also assigned multiple 24-hour rotational shifts on given days to remain on standby in case of an emergency or any other task that might be required. The Battalion Chief in Pleasanton argued that because he was required to be available as a backup division

³ The description of the duties for this position also do to show that the Duty Officer position qualified under any other category of special compensation listed in California Code of Regulations, title 2, section 571.
chief on a regular schedule (three 24-hour shifts in each nine days), these backup duty
periods were part of his "normal working hours" for purposes of Government Code section
20636. The court rejected that argument, and held that standby hours are hours in that
respect were meant to compensate for work performed above and beyond the normal
working hours, and thus, could not be considered special compensation. Specifically, the
court held:

In our view, [the Battalion Chief's] position that his "normal working hours" included his standby schedule does not reflect a
reasonable interpretation of the statute or of the standby pay provision of his labor agreement. It would mean [the Battalion
Chief's] "normal" workweek was not 40 hours, but over 60 hours—a difference of more than 50 percent. Yet for the
additional 20–plus hours added to his normal workweek he was only being compensated at a small fraction of his base salary.
Consistent with the testimony of the witnesses, and the unambiguous language of [the Battalion Chief's] compensation plan, we think it is more reasonable to view the 7.5 percent pay increment as compensation to [the Battalion Chief's] for being available to work on a standby basis outside of his normal working hours.

_Pleasanton, supra, 211 Cal.App.4th at p. 539_ [italics in original]. The case is on point, and leads to the same conclusion here.

Mr. Delay contends that the standby pay should be considered special compensation because he was required to have special skills, knowledge, and abilities; to serve in the position on a rotational basis; and to limit his personal activities while on-call. Mr. Delay’s belief that his retirement compensation should reflect this additional compensation is understandable considering the commitment that his standby rotations required. However, this position conflates the concepts of job descriptions/requirements with the statutory definitions/exclusions identified under the special compensation category in the PERL. Regardless of the commitments or requirements of this position, the decision to exclude standby pay from the calculation of final compensation is the sole province of the Legislature, who decided not to list on-call or standby pay in the exclusive list of items identified as special compensation.

Finally, Mr. Delay argued that it was unfair that CalPERS could decide long after he retired—several years, in fact, to not only lower his monthly benefits allowance but also require him to pay a substantial amount of money back to CalPERS. In essence, he makes an estoppel argument. The elements of equitable estoppel are (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury; the detrimental reliance must be reasonable. (_Schafer v. City of Los Angeles_ (2015)
At first glance, it appears that CalPERS should be estopped from retroactively applying any cuts to Mr. Delay’s retirement benefits. Through no fault of CalPERS, the final compensation was erroneously calculated. Mr. Delay relied on the representations that his final compensation would be a certain amount, and retired after many decades of service from his employment. In that respect, the elements of estoppel are satisfied.

An additional requirement, however, applies in cases involving equitable estoppel against the government. In such a case, the court must weigh the policy concerns to determine whether the avoidance of injustice in the particular case justifies any adverse impact on public policy or the public interest. (Schafer, supra, 237 Cal.App.4th at p. 1261.) Even if the four elements of equitable estoppel are satisfied, the doctrine is inapplicable if the court determines that the avoidance of injustice in the particular case does not justify the adverse impact on public policy or the public interest. (Ibid.) In this case, it is in the public interest for CalPERS to be fiscally responsible – and accurate – in its administration of retirement benefits. It is also in the public interest to maintain the integrity of the retirement fund by avoiding erroneous overpayments. Therefore, estoppel does not apply.

Finally, CalPERS is required to correct a mistake regardless of when it uncovers the mistake, under Government Code section 21060. The Legislature contemplated situations in which CalPERS might have to correct an error adverse to a retired member when it enacted Government Code section 20164, subdivision (b). That section permits CalPERS to collect erroneously paid benefits no later than three years from the date of payment. CalPERS considered this statute of limitations, and reduced the amount of erroneously paid benefits paid to Mr. Delay from $33,994.42 to $28,341.48. Accordingly, CalPERS has already minimized the adverse impact on Mr. Delay – to the extent permitted by law – and no statute or regulation allows the amount to be forgiven or reduced any further.

ORDER

David Delay’s appeal from CalPERS’s determination to exclude the On-Call Duty Officer pay (previously identified by his employer as Fire Assignment Premium pay) from the calculation of his final compensation is denied. All items identified as Fire Assignment Premium pay reported from June 1, 2012, to May 30, 2013, shall be considered On-Call Duty Officer pay and shall not be included in Mr. Delay’s final compensation for purposes of calculating his service retirement allowance.

DATED: August 2, 2018

KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings