ATTACHMENT A

THE PROPOSED DECISION
In the Matter of the Appeal Regarding the Final Compensation Calculation of:

RANDALL C. CHAMPION,
    Respondent,

And

CONTRA COSTA FIRE PROTECTION DISTRICT,
    Respondent.

PROPOSED DECISION

Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 12, 2019, in Sacramento, California.

Preet Kaur, Senior Staff Attorney, represented complainant Renee Ostrander, in her official capacity as Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS).

Steven W. Welty, Attorney at Law, Mastagni Holstedt, represented respondent Randall Champion.

No appearance was made by or on behalf of respondent Contra Costa Fire Protection District and the matter proceeded as a default against that respondent pursuant to Government Code section 11520.

Evidence was received and the record was held open to allow the parties to submit written closing briefs. On May 24, 2019, OAH received closing briefs from complainant and respondent, which were marked as Exhibits 17 and L, respectively. The record was closed, and the matter was submitted for decision on May 24, 2019.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED June 24, 2019

K. Pasley
ISSUE

Should “Fire Investigation Standby” pay be included in the calculation of respondent’s final compensation for purposes of calculating his CalPERS retirement benefit?

FACTUAL FINDINGS

1. On October 24, 2018, complainant made and filed the Statement of Issues in her official capacity.

2. Contra Costa County Employee Retirement Association (CCCERA) and CalPERS are reciprocal retirement systems. This reciprocity allows members to move from one public employer to another within a specific time frame without losing retirement or related benefits. Due to concurrent retirement with CalPERS, the compensation provided by CCCERA is subject to the statutes and regulations of the California Public Employees’ Retirement Law (PERL). (Gov. Code, § 20000 et seq.)

3. Respondent was employed by the Contra Costa County Fire Prevention District (District) as a Fire Prevention Captain. By virtue of his employment, respondent has reciprocity rights for concurrent retirement with CCCERA and CalPERS.

4. On July 17, 2017, respondent signed an application for concurrent service retirement with CalPERS and CCCERA. Respondent retired for service, effective September 30, 2017, with 15.583 years of service credit. He has been receiving a retirement allowance from that date.

5. CalPERS is a prefunded, defined benefit retirement plan. Benefits for its members are funded by member and employer contributions, and by interest and other earnings on those contributions. The amount of a member’s contribution is determined by applying a fixed percentage to the member’s compensation. A public agency’s contribution is determined by applying a rate to the payroll of the agency. Using certain actuarial assumptions specified by law, the CalPERS Board of Administration sets the employer contribution rate on an annual basis.

6. 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 staff 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.

1 The Statement of Issues states respondent had 14.479 years of service credit at the start of retirement. However, the evidence established his service credit as 15.583 years.
7. After receiving respondent’s application for service retirement, CalPERS Compensation Review Unit (CRU) began a review of his payroll, as reported by CCCERA, to determine what amounts and items were allowed under the PERL, and therefore should be included in his compensation earnable and used for purposes of calculating his service retirement allowance. When CRU performed its review, it found that CCCERA reported to CalPERS a $482.24 monthly amount as special compensation identified as “Fire Investigation Standby” pay. CalPERS determined the standby pay did not meet the definition of special compensation under the PERL.

8. By letter dated January 31, 2018, CalPERS notified both respondent and CCCERA of CalPERS’ determination and advised them of their appeal rights. By letter dated February 18, 2018, respondent filed a timely appeal and requested an administrative hearing.

Respondent’s Evidence

9. Respondent was employed by the City of Benicia as a firefighter paramedic from July 1987 until May 1993, and thereafter served as a police officer until November 2001. On November 5, 2001, respondent was hired by the Contra Costa County Fire Protection District (District) as a Fire Investigator. In June 2009, he promoted to Fire Prevention Captain and remained in that position until his retirement on September 30, 2017. By virtue of this employment, respondent became a local safety member of CCCERA, effective December 1, 2001.

10. Respondent was assigned to the Fire Investigation Unit (FIU). The primary function of the FIU is to conduct criminal investigations into the origin and cause of suspicious fires where arson or intentional ignition was possible. Every member of the FIU was required to complete special training and education including: Fire Investigation 1A (40 hours); Fire Investigation 1B (40 hours); Fire Investigation 2A (40 hours); Fire Investigation 2B (40 hours); and Penal Code section 832 Arrest and Firearms Course (40-80 hours).

11. The Memorandum of Understanding (MOU) between the District and the International Association of Firefighters, Local 1230, effective 2014-2017, provides in relevant part:

5.12 Fire Investigation Unit

A. Fire Investigation Off-Duty Standby Differential. Represented members assigned to participate in the Fire Investigation Off-Duty Standby Team will receive a monthly pay differential of 5% of their base pay. To be eligible for this differential, the employee must be on-call for the Fire Investigation Off-Duty Standby Team at least ten (10) days per month and must have their schedule approved by the Fire Marshall, or his designee.
12. As Fire Prevention Captain, respondent’s duties included supervising Fire Investigators, conducting investigations as the primary investigator, and testifying as an expert in criminal proceedings. Respondent’s work schedule consisted of four 10-hour days per week. As Fire Prevention Captain, he was also required to be “on call” at least 10 days per month pursuant to an “on call” schedule approved by the Fire Marshall. The “on call” Fire Prevention Captain was required to respond to fire scenes and lead the investigation when no Fire Investigator was available or anytime the fire was rated two-alarm or greater. Respondent’s “on call” schedule overlapped with his regular work schedule approximately 38 percent of the time. When he was required to respond to a fire scene while off-duty, respondent received overtime pay.

Special Compensation under the PERL

13. Under the PERL, special compensation includes 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 received by a member pursuant to an MOU or labor policy, to “similarly situated members of a group or class of employment that is in addition to payrate,” and shall be “for services rendered during normal working hours” and which are part of the employee’s “normally required duties.” (Gov. Code, § 20636, subd. (c)(1)-(3); Cal. Code Regs., tit. 2, § 571, subd. (b)(3)-(4).) Special compensation does not include final settlement pay, payments made for additional services rendered outside of normal working hours, or “compensation for additional services outside of regular duties, such as standby pay, callback pay, . . . and bonuses for duties performed after the member’s regular work shift.” (Gov. Code, § 20636, subds. (c)(7) and (g)(4)(l).)

14. The Board adopted California Code of Regulations, title 2, section 571, subdivision (a), which exclusively identifies what constitutes special compensation which must be reported to CalPERS. The Board has determined that each of the items listed under this subdivision meets the standards listed under section 571, subdivision (b). Only items listed in subdivision (a) have been affirmatively determined to be special compensation; all items of special compensation reported to CalPERS are subject to review for continued conformity with the standards under subdivision (b). (Cal. Code Regs., tit. 2, § 20636, subd. (c).)

15. “Fire Investigator Premium” is an item recognized as special compensation under subdivision (a). It is defined as “compensation to ‘fire investigation’ personnel who are routinely and consistently assigned to investigate causes of destructive burning.” (Cal. Code Regs., tit. 2, § 571, subd. (a)(3).)

CalPERS' Determination

16. Pha Moua is an associate governmental program analyst in the CRU at CalPERS. Ms. Moua’s duties include performing base compensation calculations and determining whether the final compensation reported to CalPERS is accurate. She reviewed the compensation reported by CCCERA for respondent. Ms. Moua testified at hearing.
17. In reviewing respondent’s compensation as reported by CCCERA, Ms. Moua determined that the “fire investigation standby” pay did not qualify as special compensation under the PERL. Specifically, the standby pay was not for “services rendered during normal working hours” and were not part of respondent’s “normally required duties.” Ms. Moua pointed out that the MOU expressly states it is for “off-duty” hours.

Respondent’s Argument

18. Respondent contends the standby pay qualifies as special compensation which should be included in the calculation of respondent’s final compensation. Particularly, respondent argues the standby pay is for “special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions” that are unique to employees in the FIU. Notwithstanding the inclusion of “off-duty” in the MOU, the standby pay is for services rendered during normal working hours, as respondent’s “on-call” schedule overlapped with his normal working hours approximately 38 percent of the time, and he received overtime pay if called during off-duty hours. Respondent was also required to be “on call” as part of his regular job duties. Finally, the standby pay qualifies as “Fire Investigator Premium” because respondent was required to investigate the cause of fires. Alternatively, respondent argues that because he was on call during normal working hours 38 percent of the time, the “Fire Investigation Standby” pay be prorated as special compensation accordingly.

Discussion

19. Respondent has the burden of proving the “Fire Investigation Standby” qualifies as special compensation which should be included in the calculation of respondent’s final compensation. He failed to meet that burden. While respondent’s on-call hours overlapped with his normal working hours 38 percent of the time, the majority of time he was assigned to be on-call was while he was off-duty. Moreover, the MOU explicitly states that the standby pay is for “off-duty” hours.

20. The “Fire Investigation Standby” pay also does not qualify as special compensation under the definition of “Fire Investigator Premium” under subdivision (a) of section 571, because it compensates for services rendered while off-duty. On the contrary, standby pay is explicitly excluded as special compensation under the PERL. (Gov. Code, § 20636, subdivision (g)(4)(I).) Respondent presented no legal authority that would allow a prorated special compensation determination based on the percentage of on-call hours worked during normal working hours.

21. When all the evidence is considered, CalPERS properly excluded the “Fire Investigation Standby” pay from respondent’s final compensation earnable for purposes of calculating his retirement benefits.
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 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 shall be reported in accordance with section 20636 and shall not exceed compensation earnable, as defined in section 20636. (Gov. Code, § 20630, subds. (a) & (b).)

3. “Compensation earnable” is composed of (1) pay rate, and (2) special compensation, as defined in Government Code section 20636.

4. “Pay rate” 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. “Pay rate” for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e). (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 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).” (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).)
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).) Special compensation and pay rate specifically do 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, subd. (g)(4)(I).)

8. 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) are:

(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 PERS’ 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 Cause and Analysis

9. 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.}

10. Respondent did not meet his burden to establish that compensation he received for Fire Investigation Standby is properly included as compensable earnable for the purpose of calculating his retirement benefits. Respondent’s pay for this component is specifically excluded by the PERL. (Gov. Code, § 20636, subd. (g)(4)(I).) Accordingly, CalPERS correctly determined that respondent’s “Fire Investigation Standby” pay is not compensation earnable for purposes of calculating his retirement benefits.

ORDER

CalPERS’ determination is upheld. The appeal of respondent Randall C. Champion to include Fire Investigation Standby pay in his compensation earnable is denied.

DATED: June 24, 2019

Tiffany L. King
Administrative Law Judge
Office of Administrative Hearings