ATTACHMENT A

THE PROPOSED DECISION
PROPOSED DECISION

Administrative Law Judge Karen Reichmann, State of California, Office of Administrative Hearings, heard this matter on May 14, 2019, in Oakland, California.

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

Steven Kaiser, Attorney at Law, Messing, Adams & Jasmine LLP, represented respondent Kimberly F. Garl, who was present.

No appearance was made on behalf of the Sonoma County Employees’ Retirement Association.

The record was left open for the filing of briefs. The briefs were timely submitted and marked for identification as follows: respondent’s opening brief is exhibit F; CalPERS’s brief is exhibit 14; and respondent’s reply brief is exhibit G.

The matter was submitted for decision on June 7, 2019.
ISSUE

Did CalPERS err by excluding compensation received for “standby time,” “deferred compensation,” “cash allowance,” and “vacation buyback” from its calculation of respondent’s final compensation?

FACTUAL FINDINGS

1. Respondent Kimberly Gari was employed by the California Department of Transportation from October 16, 1990 through January 8, 2000. By virtue of this employment, respondent became a state miscellaneous member of CalPERS.

2. On January 11, 2000, respondent began employment with the County of Sonoma. By virtue of this employment, respondent became a member of the Sonoma County Employees’ Retirement Association (SCERA).

3. CalPERS and SCERA are reciprocal retirement systems. Both systems calculate the member’s retirement benefit based in part on the member’s “final compensation.” Individuals with reciprocity rights are entitled to have their monthly benefit calculated based on the highest final compensation earned while working under either system, as long as they retire simultaneously from both systems. Reciprocal retirement systems may, however, have varying rules for determining a member’s final compensation.


Respondent requested a retirement estimate from CalPERS when she submitted her application. On December 18, 2017, the Retirement Estimate Unit, Benefit Services Division, sent respondent a letter enclosing an estimate. The letter stated that the estimate was based on the “assumption” that her final monthly compensation would be $8,830.81. The letter advised that the estimate was “based on the information you provided us and may not be consistent with the information CalPERS has on file.”

5. Respondent retired for service from both retirement systems effective March 13, 2018. She has been receiving monthly retirement benefits from both systems since that time.

6. On April 6, 2018, CalPERS sent respondent a letter notifying her of her monthly retirement benefit. CalPERS calculated respondent’s final compensation at $6,999.20. This yielded a monthly retirement benefit of $1,424.53, which was approximately $400 less than the amount in the December 18, 2017 estimate.

7. On June 27, CalPERS sent respondent a letter explaining its determination that certain items reported as compensation by the county could not be credited as to her
final compensation for purposes of determining her CalPERS retirement benefit. Respondent filed a timely appeal, and this hearing ensued.

8. Jennifer Sandness is an Associate Government Program Analyst for CalPERS who testified at hearing. Sandness was assigned to determine respondent’s final compensation. Sandness explained that CalPERS typically receives payroll information from reciprocal retirement systems only upon a member’s retirement.

Sandness sent a Retirement Salary Request form to SCERA requesting information regarding respondent’s final compensation. It was returned by Lisa Hogan, Senior Retirement Benefits Specialist, and received by CalPERS on March 18, 2018. SCERA reported respondent’s final compensation as $8,947.48. SCERA provided a completed “Breakdown of Components of Final Average Compensation” form. On this form, SCERA reported respondent’s “Payrate/Base Pay” as $84,277.91 annually ($40.38/hour). SCERA reported that respondent received five types of “special compensation” in addition to the base pay, described as: 1) $7,200.56 in “cash allowance;” 2) $421.33 in “deferred compensation;” 3) $11,553.12 in “Stand by Time;” 4) $3,230.40 in “Vacation Buyback;” and $686.46 in “Holiday Compensation Over Cap Payment.”

9. SCERA provided a wage schedule for respondent’s position, which reflected a maximum salary of $40.38 per hour. SCERA also provided a copy of the memorandum of understanding (MOU) between the county and respondent’s bargaining representative, which was in effect during the relevant period. The MOU provides definitions of the items of special compensation.

The four disputed items are defined in the MOU as follows:

a. **Cash Allowance.** Section 8.21 of the MOU states:

The County shall pay each permanent full and part time employee, in addition to their hourly regular earning rate from the salary schedule, a cash allowance of $3.45 per pay status hour that the employee is in paid status excluding overtime, up to a maximum of 80 hours in a pay period (or approximately a maximum of $600.00 per month)

Such hourly cash allowance is compensation for services rendered in that pay-period and shall be taken into account for the purposes of computing employees final compensation for pension purposes as well as all usual taxation as their regular

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1 At hearing, respondent conceded that compensation for “holiday compensation over cap payment” should not be included in her final compensation and withdrew any challenge as to this item.
earning rate from the salary schedule. It shall not be included on the salary schedule and shall not be impacted by future increases on the salary schedule. It is not intended as a supplement toward medical, dental or any other insurance or benefit.

b. **Deferred Compensation.** Sections 8.20-8.20.6 of the MOU discuss deferred compensation. These sections provide, in pertinent part:

The County agrees to maintain the current voluntary deferred compensation plan for bargaining unit members eligible under Federal law and the rules of the deferred compensation plan.

County paid deferred compensation under this Subsection shall be included in the calculations of the retirement contributions.

c. **Vacation Buyback.** Section 15.8 of the MOU provides:

Each employee may request and receive payment at the base hourly rate for up to eighty (80) hours of accrued vacation in a twelve month period provided that there is a minimum remaining vacation balance of eighty (80) hours following payment.

d. **Standby Time.** Section 9.2 of the MOU define Standby Time as follows:

Standby duty requires that an employee designated by the appointing authority be ready to respond as soon as possible, be reachable by telephone or pager, be able to report to work in a reasonable amount of time, and refrain from activities which might impair his/her ability to perform assigned duties. An employee who is released from duty and is assigned by the department to be on standby shall be eligible for standby pay. Standby time is not to be construed as work time. No employee shall be paid for standby duty and other compensable duty simultaneously.

10. Sandness reviewed these documents to determine if all reported compensation items comply with the law. She also contacted Hogan with questions regarding the Holiday Compensation payment. Sandness concluded that the five items identified by SCERA as special compensation did not qualify to be part of respondent's final compensation for purposes of calculating her CalPERS retirement benefit.

Sandness explained that for compensation to be included in the calculation of final compensation, it must fall under one of two categories: base payrate or special compensation. There are statutes and regulations that define base payrate and special
compensation. Sandness concluded that the four disputed items of compensation could not be considered part of base payrate because they are not included in the salary schedule for respondent’s position. She further concluded that these four items could not be considered special compensation, because they are not included on the exclusive list of creditable special compensation items set forth in California Code of Regulations, title 2, section 571, subdivision (a).

11. Respondent’s last position with the county was Engineering Technician IV. Respondent was responsible for all county-owned traffic signals. During the relevant time period, respondent was required to be on “standby duty” at all times, unless she was sick or on vacation, in which case another individual was assigned in her place. She carried a county-issued telephone and was the contact person in the county in case there was an after-hours issue with a traffic signal. Respondent explained that all employees under the MOU received a $3.45 per hour “cash allowance.” She believed this to be a salary increase given to compensate for increased cost of living. Respondent explained that she made voluntary deferred compensation contributions and that the county matched 4%. Respondent sold vacation during her highest earning year, which was the basis for the “vacation buyback” compensation. Deferred compensation and vacation buyback were available to all employees under the MOU.

12. Respondent contests the decision by CalPERS to exclude the four items from the calculation of her final compensation. Respondent was surprised that these items were not credited to her by CalPERS, because SCERA included these items in its determination of her final compensation and calculation of her retirement benefit. Respondent is frustrated that she was not notified of the actual amount of her retirement benefit until after she had retired, and stated that she might not have retired had she known that she would not be receiving the benefit that she anticipated.

LEGAL CONCLUSIONS

1. The burden of proof is on the applicant to prove entitlement to a retirement benefit. (McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051.)

2. A member’s retirement benefit is calculated based on the final compensation. When an employee with reciprocal retirement rights retires, each retirement system determines final compensation based on its own laws. (Stillman v. Board of Retirement of Fresno County Employees’ Retirement Assn. (198 Cal.App.4th 1355, 1361-64.) In determining final compensation, CalPERS applies the Public Employees’ Retirement Law (Government Code section 20000 et seq.) and related regulations.

3. Government Code section 20636, subdivision (a), provides that final compensation (referred to as “compensation earnable”) is based on base payrate and qualifying special compensation.
4. "Payrate" is defined in Government Code section 20636 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, pursuant to publicly available pay schedules."

5. Respondent contends that the four disputed items should be included as part of her base payrate. She contends that the items are defined in the MOU, and that the MOU satisfies the requirement of a "publicly available pay schedule." This contention is not persuasive. The MOU contains various negotiated items of compensation but does not contain a "list, catalog, or inventory of the rate of pay or base pay of one or more employees." (Tanner v. CalPERS (2016) 248 Cal.App.4th 743, 755.) Even assuming that the MOU qualifies as a pay schedule, the four disputed items cannot be considered as part of respondent’s base payrate.

a. Standby Pay. Respondent testified that she received standby pay for carrying a cell phone during non-work hours. Standby pay cannot qualify as payrate because it was not paid for services rendered "during normal working hours."

b. Vacation Buyback. Respondent received compensation for unused vacation hours. This compensation cannot be considered base payrate because it was not compensation for services rendered during normal working hours.

c. Deferred Compensation. SCERA reported $421.33 in employer paid "deferred compensation." Respondent explained that the contribution matched her voluntary contribution. This compensation was not for services rendered during normal working hours and cannot be credited as part of base payrate.

d. Cash Allowance. The MOU provided that covered employees receive a cash allowance of $3.45 for every hour worked up to a maximum of 80 hours per two-week pay period. The MOU states: "Such hourly cash allowance is compensation for services rendered in that pay-period and shall be taken into account for the purposes of computing employees final compensation for pension purposes as well as all usual taxation as their regular earning rate from the salary schedule. It shall not be included on the salary schedule and shall not be impacted by future increases on the salary schedule."

The MOU distinguishes the cash allowance from salary schedule and specifically states that it shall not be included on the salary schedule. Accordingly, although cash allowance was provided for services rendered during normal working hours, it cannot be included in respondent’s base payrate.

6. The MOU’s directive that the hourly cash allowance shall be included in an employee’s final compensation cannot be construed to apply to CalPERS. CalPERS was not a party to the MOU and is not bound by the MOU, especially if provisions of the MOU circumvent state law. (Molina v. Board of Administration (2011) 200 Cal.App.4th 53, 64-
Accordingly, CalPERS did not err in determining that the hourly cash allowance was not part of respondent’s base pay rate.

7. Respondent was credited with a payrate of $40.38 per hour, the maximum salary listed on the payscale for her position. Respondent’s contention that the four disputed items must be considered as part of her base pay rate is rejected.

8. Government Code section 20636, subdivision (c), defines special compensation as “payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.” California Code of Regulations, title 2, section 571, subdivision (a), “exclusively identifies and defines special compensation items for members employed by contracting agency and school employers.” Section 571, subdivision (b)(4), provides that only compensation for work performed during normal hours of employment can count towards final compensation. Sandness explained her analysis and determination that the four disputed items cannot qualify as creditable special compensation because the items are not included in the exclusive list of special compensation items set forth in section 571. Respondent does not challenge this analysis in her briefs. A review of section 571 establishes that Sandness did not err in her determination. In addition, as set forth above, three of the disputed items were not compensation for work performed during normal hours of employment. CalPERS properly concluded that the four disputed compensation items cannot be credited to respondent as items of special compensation.

9. Respondent has not demonstrated that CalPERS erred in calculating her final compensation. The appeal should be denied.

ORDER

Respondent Kimberly F. Garl’s appeal is denied.

DATED: June 24, 2019

Karen E. Reichmann
Administrative Law Judge
Office of Administrative Hearings