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 Final Compensation Calculation of:

JILL C. PETERSON,
Respondent,

and

CALIFORNIA STATE UNIVERSITY,
SACRAMENTO,
Respondent.

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 6, 2019, in Sacramento, California.

Charles H. Glauberman, Senior Attorney, represented complainant, Renee Ostrander, Chief, Employer Account Management Division, California Public Employees’ Retirement System, State of California (CalPERS).

Jill C. Peterson, respondent, represented herself.

No appearance was made by or on behalf of respondent, California State University, Sacramento (CSUS). Based on proof of compliance with Government Code section 11509, the matter proceeded as a default against respondent CSUS pursuant to Government Code section 11520, subdivision (a).

The matter was submitted on June 6, 2019.¹

¹ A day after the hearing, CalPERS requested that the record be reopened to permit the parties to file closing briefs. Ms. Peterson opposed the motion on several grounds, representing that she would be out of state on vacation for approximately one month and would not be able to file a brief. By separate order, CalPERS's motion was denied.
ISSUE

Should a merit bonus of $7,981 paid by CSUS to Ms. Peterson in June 2015 be included in calculating the amount of her service retirement payment?

FACTUAL FINDINGS

Background

1. CalPERS manages a fund that provides pension and health benefits for public employees, retirees, and their families. Retirement benefits are provided under defined benefit plans. A member’s contribution to the fund is determined by applying a fixed percentage to the member’s compensation. A state agency’s contribution is determined by applying a contribution rate to the agency’s payroll. Using certain actuarial assumptions, the Board of Administration (Board) sets employer contribution rates on an annual basis.

2. Ms. Peterson became a member of CalPERS by virtue of her employment with the Department of Fair Employment and Housing on July 10, 2000. On May 7, 2012, she began employment with CSUS as University Counsel, which carried the job classification of Administrator III. By virtue of her employment, Ms. Peterson is a state miscellaneous member of CalPERS.

3. On August 11, 2017, CalPERS received Ms. Peterson’s application for service retirement. CalPERS accepted her application, and she retired from service effective November 1, 2017.

4. On January 24, 2018, Brad Hanson, Assistant Division Chief, Compensation and Contribution Services, notified Ms. Peterson and CSUS that CalPERS completed a review of compensation reported by CSUS on Ms. Peterson’s behalf and had determined that a merit bonus in the amount of $7,981 reported in June 2015 did not comply with the Public Employees’ Retirement Law (PERL). The letter provided the following reasons for CalPERS’s determination:

   First, CSUS was unable to provide documentation to substantiate that the June 2015 bonus met the specific criteria outlined in the CSU Merit Bonus Program.

   Next, CalPERS cited California Code of Regulations, title 2, section 571, which is specific to public agency and school employers, and stated it uses the regulation as a “guide when clarifying the intent of the PERL relative to state compensation.” That regulation provides an affirmative list of reportable items and a list of requirements each item must meet to be deemed compensation earnable. While the merit bonus Ms. Peterson received is

   All future references to “Regulation” are to provisions contained in Title 2 of the California Code of Regulations.
congruent with the definition of a “bonus” prescribed in Regulation 571, subdivision (a)(1), the requirements of special compensation set forth in subdivision (b) were not satisfied. Specifically, the bonus was not historically consistent, was reported only during Ms. Peterson's final compensation period, and created an unfunded liability over and above CalPERS’s actuarial assumptions.

CalPERS requested that CSUS reverse the identified compensation, after which CalPERS would credit CSUS with any contributions. In addition, CalPERS requested that CSUS discontinue any future reporting to CalPERS of this type of compensation.

The letter provided Ms. Peterson and CSUS with the right to appeal.

5. Ms. Peterson timely appealed and requested an administrative hearing. On February 7, 2019, complainant filed the statement of issues in her official capacity. In the statement of issues, complainant stated that CalPERS’s determination that the merit bonus did not qualify as compensation earnable and should not be included in the calculation of retirement benefits was based on the following: Ms. Peterson’s merit bonus did not meet the specific criteria outlined in the CSUS Merit Bonus Program; CSUS failed to provide CalPERS with documentation substantiating/establishing how superior performance was measured for her bonus, or the metrics it used to determine the bonus; and the bonus did not qualify as allowable special compensation because it was not historically consistent, was reported only in Ms. Peterson’s final compensation period, was final settlement pay, and would create an unfunded liability over and above CalPERS’s actuarial assumptions.

Evidence Regarding Ms. Peterson’s Bonus

6. On January 30, 2009, Gail E. Brooks, California State University (CSU) Vice Chancellor for Human Resources, issued an updated policy entitled Management Personnel Plan (MPP) Merit Bonus Program. Under that program, CSU presidents possessed the discretionary authority to award a merit bonus to MPP employees if: 1) an employee met specific measurable standards that were spelled out at the beginning of an evaluation period that indicated a merit bonus pay adjustment would be provided if specific actions were met, and 2) the employee met a specific stated objective that was both articulated in advance and was measurable.

7. On January 6, 2015, CSUS President Alexander Gonzalez issued a memorandum to Ms. Peterson outlining an agreement for payment of a merit bonus under the MPP Merit Bonus Program. The proposed objectives required Ms. Peterson to convene and oversee a working group to inventory/evaluate campus compliance and to make recommendations regarding what, if any, campus-wide oversight for compliance should be established. In addition, Ms. Peterson was directed to establish a Clery Compliance Officer

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and organize a committee to work towards full compliance with the Clery Act.\(^3\) If by June 15, 2015, Ms. Peterson met the proposed objectives as determined by the President, her bonus would be in an amount equal to five percent of her salary.

8. On May 27, 2015, Ms. Peterson sent President Gonzalez a report outlining the progress she had made in achieving both proposed objectives. In response, on June 9, 2015, President Gonzalez sent a memo to Christine Lovely, Vice President for Human Resources, requesting an MPP bonus be issued to Ms. Peterson in an amount equal to five percent of her salary. On June 22, 2015, Ms. Lovely notified President Gonzalez that a $7,981 bonus for Ms. Peterson had been processed. In June 2015, CSUS reported to CalPERS that the merit bonus provided to Ms. Peterson was special compensation.

**CalPERS's Calculation of Ms. Peterson's Final Compensation**

9. Dominic Trillo, Associate Governmental Analyst, has worked for CalPERS for the past 14 years. He is assigned to the Compensation Review Unit, where one of his responsibilities is to review special compensation issues. Mr. Trillo reviewed the merit bonus CSUS had reported to CalPERS as special compensation. He requested and received documents from CSUS relating to the bonus and concluded that the bonus properly identified performance goals and objectives that Ms. Peterson had satisfied. The bonus occurred during Ms. Peterson's final compensation period, which was the highest annual compensation she received in the 36-month period preceding the effective date of her retirement. The bonus was not historically consistent for Ms. Peterson, meaning that it was the only merit bonus she had received.

Regulation 571, subdivision (a), exclusively identifies and defines special compensation items for members of contracting agencies and school employers. Under subdivision (a)(1), if a bonus is provided only during the member's final compensation period, it is deemed "final settlement pay" and is to be excluded in calculating final compensation. Mr. Trillo acknowledged the list of special compensation items does not explicitly apply to state members, but CalPERS uses it as "guidance" for state members. Because the merit bonus was provided only during her final compensation period, CalPERS classified the bonus as "final settlement" pay. Mr. Trillo acknowledged there was no evidence indicating the merit bonus Ms. Peterson received was paid in connection with or in anticipation of her retirement.

In addition, CalPERS concluded the bonus was not historically consistent with prior payments for the job classification, which is a requirement of Regulation 571, subdivision (b). Mr. Trillo noted that management classifications in the CSU system are extremely broad, and Ms. Peterson’s classification as an Administrator III could cover a number of different jobs throughout the system. Mr. Trillo did not attempt to determine whether other

\(^3\) The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) is a federal law enacted to provide accurate and complete information about crime and campus safety.
individuals in the Administrator III classification had received merit bonuses. He did not attempt to determine whether other administrators at CSUS received merit bonuses. However, he reviewed the University Counsel position across the 23 CSU campuses and found Ms. Peterson was the only person holding that position who received a merit bonus. He also testified that CalPERS identified a trend within the CSU system that suggested merit bonuses were only awarded to employees during their final compensation period. According to Mr. Trillo, the lack of historical consistency of the bonus creates an unfunded liability over and above CalPERS actuarial assumptions. When payment of a retirement allowance is greater than expected, the increase in the amount of the member’s service retirement results in an unfunded liability.

10. On December 6, 2017, CSU issued “Technical Letter HR/Salary 2017-21” (technical letter) to all campus human resources officers updating instructions for processing MPP bonuses. The letter noted that CalPERS had recently finalized regulations that clarified what was considered pensionable compensation for new members hired after January 1, 2013 (PERPA members). In accordance with these regulations, the Chancellor’s Office determined that effective July 1 2017, MPP Merit Bonuses would no longer be considered compensation for retirement purposes. For CalPERS members hired before January 1, 2013 (classic members), only payments processed after July 1, 2017, were required to be corrected. For PERPA members, all MPP bonuses needed to be corrected.

Mr. Trillo testified that CalPERS consulted with the Chancellor’s Office to revise its policy regarding the MPP Merit Bonuses.

Ms. Peterson’s Evidence

11. Scott Oleinik, Benefits Manager at CSUS, testified. Mr. Oleinik is responsible for liaising with CalPERS regarding issues affecting CSUS employees. CSUS treated the bonus paid to Ms. Peterson as special compensation and reported it to CalPERS as such. Mr. Oleinik received Mr. Trillo’s request for documents related to Ms. Peterson’s bonus. Mr. Oleinik provided Mr. Trillo with the requested documentation; he never received any follow-up communications from Mr. Trillo or CalPERS.

12. Christine Lovely, currently Associate Vice Chancellor and Chief Human Resources Officer at University of California, Davis, testified. She previously served as Vice President for Human Resources at CSUS. Ms. Lovely was responsible for reviewing requests for merit bonuses for CSUS administrators and ensured that the qualifying criteria were satisfied. The documentation Ms. Lovely reviewed that related to the merit bonus provided to Ms. Peterson was consistent with other bonuses awarded to CSUS administrators.

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LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, at fn. 5.)

2. With regard to pension legislation, pension provisions shall be liberally construed and all ambiguities must be resolved in favor of the pensioner. This rule of liberal construction is applied for the purpose of effectuating obvious legislative intent and should not blindly be followed so as to eradicate the clear language and purpose of a statute. (In re Retirement Cases (2003) 110 Cal.App.4th 426, 473.)

The Public Employees' Retirement Law

3. CalPERS is a “prefunded, defined benefit” retirement plan. (Oden v. Bd. of Administration (1994) 23 Cal.App.4th 194, 198.) The formula for determining a member’s retirement benefit takes into account: the years of service, a percentage figure based on the age on the date of retirement; and “final compensation.” (Gov. Code, §§ 20037, 21350, 21352 and 21354; City of Sacramento v. Public Employees Retirement System (1991) 229 Cal.App.3d 1470, 1479.)

4. “Final Compensation” means the highest annual average compensation earnable by a member during any consecutive 36-month period of employment preceding the effective date of his or her retirement. (Gov. Code, § 20037.)

5. “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).)

6. 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) 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).

(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 under Section 201 and following of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

(7) Special compensation does not include any of the following:

(A) Final settlement pay.

(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

(C) Other payments the board has not affirmatively determined to be special compensation.

(f) As used in this part, “final settlement pay” means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay.

(g) (1)
(3) Notwithstanding subdivision (c), “special compensation” for state members shall mean all of the following:

(A) The monetary value, as determined by the board, of living quarters, board, lodging, fuel, laundry, and other advantages of any nature furnished to a member by his or her employer in payment for the member’s services.

(B) Compensation for performing normally required duties, such as holiday pay, bonuses (for duties performed on regular work shift), educational incentive pay, maintenance and noncash payments, out-of-class pay, marksmanship pay, hazard pay, motorcycle pay, paramedic pay, emergency medical technician pay, Peace Officer Standards and Training (POST) certificate pay, and split shift differential.

(C) Compensation for uniforms, except as provided in Section 20632.

(D) Other payments the board may determine to be within “special compensation.”

(4) “Payrate” and “special compensation” for state members do not include any of the following:

(G) Final settlement pay.

(L) Other payments the board may determine are not “payrate” or “special compensation.”

(6) (A) Subparagraph (B) of paragraph (3) prescribes that compensation earnable includes compensation for performing normally required duties, such as holiday pay, bonuses (for duties performed on regular work shift), educational incentive pay, maintenance and noncash payments, out-of-class pay, marksmanship pay, hazard pay, motorcycle pay, paramedic pay, emergency medical technician pay, POST certificate pay, and split shift differential; and includes compensation for uniforms, except as provided in Section 20632; and subparagraph (l) of
paragraph (4) excludes from compensation earnable compensation for additional services outside regular duties, such as standby pay, callback pay, court duty, allowance for automobile, and bonuses for duties performed after regular work shift.

(B) Notwithstanding subparagraph (A), the Department of Human Resources shall determine which payments and allowances that are paid by the state employer shall be considered compensation for retirement purposes for an employee who either is excluded from the definition of state employee in Section 3513, or is a nonelected officer or employee of the executive branch of government who is not a member of the civil service.

(C) Notwithstanding subparagraph (A), the Trustees of the California State University shall determine which payments and allowances that are paid by the trustees shall be considered compensation for retirement purposes for a managerial employee, as defined in Section 3562, or supervisory employee as defined in Section 3580.3...

California Code of Regulations, title 2, section 570 provides:

"Final settlement pay" means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

For example, final settlement pay may consist of severance pay or so-called “golden parachutes”. It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.

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

Bonus - Compensation to employees for superior performance such as “annual performance bonus” and “merit pay”. If provided only during a member’s final compensation period, it shall be excluded from final compensation as “final settlement” pay. A program or system must be in place to plan and identify performance goals and objectives.

(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 as defined at Government Code section 20049, provided that the document:

(A) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

(B) Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;

(C) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

(D) Indicates an effective date and date of any revisions;

(E) Is retained by the employer and available for public inspection for not less than five years; and

(F) Does not reference another document in lieu of disclosing the item of special compensation;

(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.

(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.

Discussion

9. The issue in this case is limited to whether the $7,981 merit bonus CSUS paid to Ms. Peterson in June 2015 is “special compensation” that should be included in the calculation of her final compensation. The statement of issues identifies the following reasons CalPERS determined that the $7,981 merit bonus should not be included in the calculation of Ms. Peterson’s retirement benefits: (1) the merit bonus Ms. Peterson received did not meet the specific criteria outlined in the CSUS Merit Bonus Program; (2) it constituted “final settlement pay;” (3) it was not historically consistent; (4) it was only reported in Ms. Peterson's final compensation period; and (5) it would create an unfunded liability over and above CalPERS’s actuarial assumptions.

4 The statement of issues alleged that CSUS failed to provide CalPERS with documentation substantiating/establishing how superior performance was measured for Ms. Peterson’s bonus or documentation that there was a program or system with metrics for determining Ms. Peterson’s bonus. (Statement of Issues at pp.13-14.) However, the statement of issues also stated, “Although CalPERS did not receive substantiating documents, this bonus met CSUS Merit Bonus MPP requirements.” (Id. at p.4, fn. 2.)
10. Ms. Peterson argues that pursuant to Government Code section 20636, subdivision (g)(6)(C), the CSU trustees are granted independent authority to determine what payments will be included in a managerial employee’s retirement calculation. Ms. Peterson cites the CSU December 2017 technical letter, which instructed that payments under the MPP Merit Bonus Program would no longer be considered for retirement purposes. The technical letter provided instructions for correcting prior payments, distinguishing between classic members and PERPA members. For classic members such as Ms. Peterson, only payments made after June 30, 2017, needed to be corrected. This, respondent argues, reflects CSU’s intent to allow bonuses given to classic members before July 1, 2017, to continue to be treated as retirement pay and included in the member’s final compensation.

In addition, Ms. Peterson contends that Regulations 570 and 571 do not apply to CSU because Government Code section 20636, subdivision (g)(6)(C), provides CSU with independent authority to determine which payments and allowances to managerial employees are considered special compensation.

CSU IS NOT DELEGATED EXCLUSIVE AUTHORITY TO DETERMINE WHAT CONSTITUTES COMPENSATION EARNABLE

11. Ms. Peterson’s argument that Government Code section 20636, subdivision (g)(6)(C), provides the CSU trustees independent and exclusive authority to determine what payments to managerial employees are to be considered compensation is unpersuasive. A review of the structure of Section 20636 is instructive.

Section 20636, subdivision (c), outlines rules of special compensation for all members. It must be payment for “special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions” (id. at subd. (c)(1)) and is limited to that which is received, pursuant to a labor policy or agreement, by similarly situated members of a group or class of employment (id. at subd. (c)(2)). CalPERS is granted the authority to promulgate regulations that delineate more specifically and exclusively what constitutes special compensation. (Id. at subd. (c)(6).) The subdivision lists certain items that are not considered special compensation, including, “final settlement pay.” (Id. at subd. (c)(7).)

Subdivision (f) defines “final settlement pay” as “cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment.” In addition, the statute authorizes the Board to “promulgate regulations that delineate more specifically what constitutes final settlement pay.” (Ibid.)

Subdivision (g)(3), in turn, provides: “Notwithstanding subdivision (c), “special compensation” for state members shall mean all of the following . . . .” Thus, this subdivision provides special rules for state members that are different than those applicable

5 As an Administrator III covered by the MPP, she was designated as “management” or “supervisory” employee. (Cal Code Regs., tit. 5, § 42720, subd. (a).)
to members generally as outlined in subdivision (c). Included in the list of items expressly identified as special compensation for state members are bonuses (for duties performed on regular work shift) (id. at subd. (g)(3)(B)) and “[o]ther payments the board may determine to be within ‘special compensation’” (id. at subd. (g)(3)(D)). Items not included as special compensation include “[f]inal settlement pay” (id. at subd. (g)(4)(G)) and “[o]ther payments the board may determine are not ‘payrate’ or ‘special compensation’” (id. at subd. (g)(4)(L)).

Subdivision (g)(6)(C), provides:

Notwithstanding subparagraph (A) [subdivision (g)(6)(A)], the Trustees of the California State University shall determine which payments and allowances that are paid by the trustees shall be considered compensation for retirement purposes for a managerial employee, as defined in Section 3562, or supervisory employee as defined in Section 3580.3.

Subdivision (g)(6)(A), in turn, provides:

Subparagraph (B) of paragraph (3) [subdivision (g)(3)(B)] prescribes that compensation earnable includes compensation for performing normally required duties, such as holiday pay, bonuses (for duties performed on regular work shift), educational incentive pay, maintenance and noncash payments, out-of-class pay, marksmanship pay, hazard pay, motorcycle pay, paramedic pay, emergency medical technician pay, POST certificate pay, and split shift differential; and includes compensation for uniforms, except as provided in Section 20632; and subparagraph (I) of paragraph (4) excludes from compensation earnable compensation for additional services outside regular duties, such as standby pay, callback pay, court duty, allowance for automobile, and bonuses for duties performed after regular work shift.

12. Ms. Peterson’s assertion that subdivision (g)(6)(C) provides CSU independent and exclusive authority to determine what payments constitute compensation for retirement purposes ignores the phrase, “[n]otwithstanding subparagraph (A).” The authority granted to CSU in subparagraph (g) must be read within the context of subparagraph (A). Subparagraph (A) addresses a fairly narrow issue, i.e., whether compensation for certain specified duties are “normally required” or instead are “outside regular duties.” Read together, subparagraph (C) thus grants to CSU the authority to determine which payments and allowances within the scope of subparagraph (A) shall be considered compensation for managerial and supervisory employees. However, the authority of the CSU trustees remains limited by all other provisions contained in Section 20636 and the PERL. Moreover, Ms. Peterson’s interpretation that CSU has unfettered authority to determine what is considered compensation earnable would produce absurd results and clearly contradict legislative intent.
For example, under her interpretation, CSU could determine that “final settlement pay” is compensation for retirement purposes. This would defeat the clear legislative intent of the statute to combat pension spiking.

The management and control of the retirement system is vested with the Board. (Gov. Code, § 20120; Marzec v. Public Employees’ Retirement System (2015) 236 Cal.App.4th 889, 896.) Within Section 20626, the legislature explicitly grants to the Board the authority to promulgate regulations that delineate more specifically and exclusively what constitutes special compensation and “final settlement pay.” (Id. at subds. (c)(6) & (f).) In addition, specific to state members, special compensation includes “[o]ther payments the Board may determine to be within “special compensation.”” (Id. at subd. (g)(3)(D). Special compensation does not include “[o]ther payments the board may determine are not ‘payrate’ or ‘special compensation.’” (Id. at subd. (g)(4)(L)). Subdivision (g)(6)(C) does not grant the CSU trustees the authority to make determinations as to matters that the statute delegates specifically to the Board.

In this case, when Ms. Peterson received her bonus in June 2015, the CSU trustees identified it as special compensation. However, the bonus Ms. Peterson received was subject to other provisions and limitations within Section 20636, and the Board has the sole authority to determine whether or not it was not special compensation. (Id. at subd. (g)(4)(L).) Two of those other provisions, Regulations 570 and 571 (discussed below), promulgated by the Board under the authority of Section 20636, are thus applicable to Ms. Peterson’s merit bonus.

**THE BONUS SATISFIED THE REQUIREMENTS OF THE CSUS MPP MERIT BONUS PROGRAM**

13. As to CalPERS’s first identified reason for excluding the MPP bonus, at hearing, complainant admitted that the bonus CSUS paid to Ms. Peterson satisfied the requirements of CSUS’s MPP Merit Bonus Program. Contrary to the allegation in the statement of issues, CSUS did in fact provide CalPERS with substantiating documentation regarding Ms. Peterson’s bonus and the program in general. Thus, it is uncontested that there was a program or system in place to “plan and identify performance goals and objectives” and Ms. Peterson’s bonus satisfied this plan. (Cal. Code Regs., tit. 2, § 571, subd. (a)(1).)

**THE BONUS WAS NOT FINAL SETTLEMENT PAY**

14: CalPERS contends that the bonus Ms. Peterson received constituted “final settlement pay.” Final settlement pay is defined by statute as “pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment.” (Id. at

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6 This determination is consistent with Section 20636, subdivisions (g)(3)(B) and (g)(6)(A), wherein bonuses (performed during working hours) are designated as compensation earnable.
subd. (f.) Regulation 570 provides examples of final settlement pay that include severance pay or so-called “golden parachutes,” and such payments that may take the shape of bonuses. Ms. Peterson received her bonus in June 2015. She submitted her application for retirement in August 2017, over two years later. The bonus was received for Ms. Peterson’s work in establishing and leading committees related to campus compliance issues and the Clery Act. She did not receive the bonus “in connection with, or in anticipation of, a separation from employment.” As such, the bonus is not final settlement pay.

THE BONUS WAS PAID EXCLUSIVELY DURING THE FINAL COMPENSATION PERIOD AND CANNOT BE INCLUDED AS SPECIAL COMPENSATION

15. Regulation 571, subdivision (a), exclusively identifies and defines special compensation items for members employed by contracting agencies and school employers. The regulation identifies bonuses as special compensation, but it excludes bonuses in calculating final compensation if the bonus is provided only during a member’s final compensation period. (Id. at subd. (a)(1).) CalPERS concedes that the exclusive list of items identified as special compensation contained in subdivision (a) does not expressly apply to state members, such as Ms. Peterson. However, CalPERS contends that the provision should serve as “guidance” in determining whether Ms. Peterson’s bonus should be considered as compensation earnable. Because the only bonus Ms. Peterson received was during her final compensation period, CalPERS contends that it should be excluded from final compensation as final settlement pay.

Reliance on subdivision (a) as “guidance” is not required as the remaining provisions within Regulation 571 are not expressly limited to local and school members. Regulation 571, subdivisions (c) and (d), provide:

Only items listed in subsection[7] (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).

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.

Unlike subdivision (a), subdivisions (c) and (d) are not expressly applicable only to employees of contracting agencies or school employers. Whether a state or local member, all items of special compensation must conform to the standards of subdivision (b). If an item is not, then it may not be used to calculate final compensation. CalPERS asserts that Ms. Peterson’s merit bonus failed to comply with three provisions listed in subdivision (b).

7 All references to “subdivision” are synonymous with “subsection.”
First, it alleges that the bonus was not "historically consistent with prior payments for the job classification. (Id. at subd. (b)(6).) The evidence does not support this contention. Although the merit bonus was not historically consistent for Ms. Peterson, as it was the first, and only, merit bonus she received, the requirement is for the payment to be historically consistent within the job classification. Ms. Peterson's job classification, Administrator III, is extremely broad and includes numerous positions within the CSU system that have varying responsibilities. There was insufficient evidence to establish that merit bonuses had not been historically paid for the job classification. The fact that the CSU system developed a plan by which campus presidents could provide MPP merit bonuses indicates at least some level of historic consistency.

Next, CalPERS contends that the bonus creates "an unfunded liability over and above PERS' actuarial assumptions." (Id. at subd. (b)(9).) There was insufficient evidence to support this determination. Although Mr. Trillo testified generally about actuarial assumptions, it was not established that this particular bonus was an unfunded liability. For the same reasons that CalPERS failed to show that the bonus was not historically consistent for the job classification, it failed to establish that merit bonuses for Administrator IIIs across the CSU system have not been included in CalPERS's actuarial assumptions.

Finally, CalPERS alleges that the merit bonus was paid "exclusively in the final compensation period." (Id. at subd. (b)(7).) Ms. Peterson received the bonus in June 2015, less than three years before she retired, and during her final compensation period. (Gov. Code, § 20037.) Because the bonus was received exclusively during the final compensation period, it may not be used to calculate her final compensation. (Id. at subd. (d).)

Cause Exists to Affirm CalPERS's Determination that the Bonus Ms. Peterson Received Cannot be Included in the Calculation of Her Final Compensation

16. The Legislature vested in CalPERS the authority and discretion to determine what payments are, and are not, considered to be special compensation. (Gov. Code, § 20636, subs. (g)(3)(D) & (g)(4)(L).) In the exercise of this authority, CalPERS promulgated Regulation 571, which excludes from special compensation bonuses received exclusively during the final compensation period. Regulation 571, subdivisions (c) and (d), in conjunction with subdivision (b)(7), prohibit the $7,981 bonus Ms. Peterson received in June 2015 from being considered as special compensation, and in turn, compensation earnable. Accordingly, Ms. Peterson's appeal is denied.
ORDER

Respondent Jill C. Peterson’s appeal is denied. CALPERS’s decision to exclude the $7,981 bonus from the calculation of Ms. Peterson’s final compensation is affirmed.

DATED: July 5, 2019

ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings