

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 the Final
Compensation Calculation of:**

JONATHAN L. MICHAELSON, Respondent

and

**SAN RAMON VALLEY FIRE PROTECTION DISTRICT; CONTRA
COSTA COUNTY EMPLOYEES' RETIREMENT SYSTEM,
Respondents.**

Agency Case No. 2019-0140

OAH No. 2019040482

PROPOSED DECISION

Karen Reichmann, Administrative Law Judge, Office of Administrative Hearings,
State of California, heard this matter on June 19, 2019, in Oakland, California.

Rory J. Coffey, Senior Attorney, represented the California Public Employees'
Retirement System.

Brittany C. Jones, Attorney at Law, represented respondent Jonathan Michaelson
(respondent), who was present throughout the hearing.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED October 3 20 19


No appearance was made by or on behalf of the San Ramon Valley Fire Protection District or the Contra Costa County Employees' Retirement System.

The record remained opened for the filing of closing briefs. Respondent's brief was timely filed and marked as exhibit G. CalPERS did not submit a closing brief. On September 20, 2019, CalPERS filed a request to submit additional materials; the request and attached materials were marked as exhibit 15. Respondent filed an objection to the untimely submission of additional evidence; the objection has been marked for identification as exhibit H. Respondent's objection is sustained, and exhibit 15 was not considered.

The record was deemed submitted for decision on September 9, 2019.

ISSUE

Did CalPERS err by excluding from its calculation of respondent's final compensation payments made to respondent for: 1) employer-paid retirement contributions, and 2) day differential?

FACTUAL FINDINGS

1. Respondent Jonathan Michaelson was employed by the City of Pleasanton from February 26, 1996 through September, 1999. By virtue of this employment, respondent became a member of CalPERS.

2. In September 1999, respondent began employment with the San Ramon Valley Fire Protection District (SRVFPD). By virtue of this employment, respondent became a member of the Contra Costa County Employees' Retirement Association

(CCCERA). Respondent was hired as a firefighter/paramedic. In 2014, he promoted to EMS Captain.

3. CalPERS and CCCERA are reciprocal retirement systems. Both systems calculate the member's retirement benefit based in part on the member's final compensation. Final compensation is also referred to as "compensation earnable." Individuals with reciprocity rights are entitled to have their monthly retirement benefit from each retirement system calculated based on the highest final compensation earned while working under either system. Reciprocal retirement systems may, however, have varying rules for determining a member's final compensation. Calculation of final compensation for CalPERS members is governed by the Government Code and the California Code of Regulations.

4. Respondent submitted an application for service retirement to CalPERS on February 27, 2018, with an effective retirement date of March 30, 2018. CalPERS Compensation Review Analyst Pha Moua was assigned to confirm reciprocity and determine respondent's final compensation.

5. Moua contacted CCCERA for validation of respondent's final compensation. On April 26, 2018, CalPERS received a completed "Retirement Salary Request" form from CCCERA. The form provided that respondent's final average monthly compensation for the year of March 30, 2017 through March 29, 2018 was \$15,041. The breakdown of compensation reflected payment for "Payrate/Base Pay" and payment for "Special Compensation." Special compensation items included "Retirement Allotment" for each month and "Day Differential" for the first three

months of the relevant time period¹. The monthly Retirement Allotment was between \$1,045.60 and \$1,153.21. Respondent received \$756 for Day Differential for March 2017, and \$817 per month for April and May 2017.

6. In order to analyze whether these items qualified as pensionable compensation, Moua requested and received labor agreements for the relevant period. After reviewing a Memorandum of Understanding (MOU) and a Letter of Understanding (LOU) between respondent's employer and respondent's labor union, Moua concluded that compensation for Retirement Allotment and Day Differential did not qualify as compensation earnable under the laws and regulations governing the calculation of CalPERS pension benefits.

7. CalPERS sent a letter to respondent dated May 11, 2018, explaining its determination that pay for Retirement Allotment and Day Differential did not meet the definition of compensation earnable and that these items would be excluded from the calculation of his final compensation. Respondent filed an appeal on May 29, 2018.

8. Regarding the Retirement Allotment payments, the MOU provides:

For both public safety and non-public safety classic employees, the District shall continue to pay 100% of the employee retirement Basic Contribution Rate, which is a percent designated by CCCERA based on the employee's age of entry at the date of hire. The amount of the

¹ There were other items of special compensation which are not at issue in this proceeding.

employee retirement Basic Contribution Rate paid by the District to CCCERA is considered a part of salary and appears on the paycheck as a taxable earning. The parties intend to continue the District's "pick-up" of the employee retirement Basic Contribution Rate after the expiration of this Agreement, for so long as legally permitted.

The LOU contains similar language. Moua concluded that even though the MOU and LOU provide that the Retirement Allotment payments are "considered a part of salary," these payments could not be considered payrate because they are not included in the salary schedule for respondent's position. Moua explained at hearing that employer-paid contributions to retirement can sometimes qualify as special compensation, but only if they were paid to CalPERS; here they were paid to CCCERA.

9. The LOU provided that "Effective July 1, 2015 the new 40-hour EMS Captain classification salary is established and compensation is set equal to the compensation for the Captain classification assigned to the 24 hour Suppression Line."

10. Moua contacted Natalie Korthamar-Wong, Director of Human Resources at SRVFPD, for additional information regarding the three Day Differential payments made to respondent. Korthamar-Wong explained that Day Differential was paid to the 40-hour EMS Captain and 40-hour Battalion Chief classifications in order to make their compensation equal to a shift captain. She wrote:

A 40-hour employee does not receive holiday in-lieu pay because the employee follows the District's holiday schedule and the 40-hour employee does not receive FLSA [Fair Labor Standards Act] pay. In order to keep the

compensation equal between the 40-hour and shift positions, the sum of holiday pay and FLSA pay is paid to the 40-hour EMS positions. Those two pay components added together is what we call the Day Differential. In 2017, the District rolled the Day Differential into the base pay so it technically no longer exists as a separate differential.

Korthamar-Wong explained at hearing that the 40-hour assignments were negotiated to be paid the same as fire suppression captain assignments who worked 48 hour shifts, in order to attract candidates for the positions. She noted that the Day Differential payments qualified as payrate for purposes of calculating respondent's final compensation for his CCCERA retirement benefits. Korthamar-Wong disagrees with CalPERS's determination not to include Retirement Allotment and Day Differential pay in the calculation of respondent's final compensation.

11. In June 2017, a new salary schedule was adopted which increased the salary of the EMS Captain and the day differential was eliminated for this position. Thus, respondent received day differential pay for only three months of his final compensation year, March, April, and May 2017.

12. Respondent believes he is entitled to have the disputed items included in his final compensation. He testified that he is aware of another individual similarly situated whose Retirement Allotment compensation was included in his final compensation. Moua confirmed this in her testimony. There was no other evidence about this individual.

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.* (2011) 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 compensation earnable is based solely on base payrate and qualifying special compensation. Not all compensation lawfully paid to a member qualifies as compensation earnable.

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. 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." Subdivision (b) sets forth that all items of special compensation must be contained in a written labor policy or agreement, which must meet certain specified criteria.

6. Respondent's employer reported to CalPERS a monthly Retirement Allotment, which was between \$1,045.60 and \$1,153.21. Respondent contends that this payment qualifies as payrate, or alternatively as special compensation. Respondent's contentions are unpersuasive. The Retirement Allotment is not part of payrate as it was not included in the publicly available pay schedules for the relevant time period. Respondent received the maximum salary for the position of EMS Captain as reflected on the salary schedules. The payment for Retirement Allotment cannot be considered as payrate, notwithstanding the language in the MOU and LOU directing that it is "part of salary."

The Retirement Allotment paid by SRVFPD to CCCERA to pay the employee contribution for respondent does not qualify as special compensation for purposes of calculating his CalPERS pension. Government Code section 20636, subdivision (c)(4) provides that:

Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

Government Code section 20021 defines "board" as the Board of Administration of the Public Employees' Retirement System. Pursuant to California Code of Regulations, title 2, section 571, employer-paid member contributions "paid to CalPERS" may be reportable as special compensation. The Retirement Allotment payments were made to CCCERA. While they may constitute pensionable earnings for purposes of calculating respondent's CCCERA pension, they do not qualify as such for purposes of calculating his CalPERS pension.

7. Day Differential cannot qualify as special compensation. The evidence established that Day Differential was paid to respondent because he did not qualify for holiday in-lieu pay and FLSA pay because he worked a regular 40-hour daytime schedule. California Code of Regulations, title 2, section 571, subdivision (a)(4), provides that "Shift Differential" is an allowable item of special compensation. Shift Differential is defined as "Compensation to employees who are routinely and consistently scheduled to work other than a standard 'daytime' shift, e.g. graveyard shift, swing shift, shift change, rotating shift, split shift or weekends." Respondent worked a standard daytime shift. The Day Differential was paid because he was not eligible for certain compensation paid to employees working a 56-hour shift. The Day Differential does not meet the definition of "Shift Differential."

8. Respondent contended that Day Differential qualifies as special compensation under the category of "Fire Staff Premium." California Code of Regulations, title 2, section 571, subdivision (a)(4), defines Fire Staff Premium as, "Compensation to rank and file local firefighters who are routinely and consistently assigned to administrative work during normal hours of employment that may differ from the work schedule of fire suppression personnel." Respondent held the position of captain; he was not a rank and file firefighter. Accordingly, the Day Differential

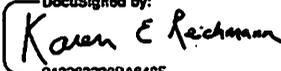
payment he received does not qualify as Fire Staff Premium. The Day Differential was properly excluded from respondent's final compensation.

9. Respondent failed to establish that either Retirement Allotment or Day Differential payments should have been included in the calculation of compensation earnable.

ORDER

The appeal of respondent Jonathan Michaelson is denied. Compensation from the SRVFPD for Retirement Allotment and Day Differential shall not be included in calculating respondent's final compensation.

DATE: October 2, 2019

DocuSigned by:

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KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings