

ATTACHMENT E

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 of:**

**PAUL F. ZEHNDER, and COSUMNES COMMUNITY SERVICES
DISTRICT, Respondents**

Agency Case No. 2021-0645

OAH No. 2021100257

PROPOSED DECISION

Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this consolidated matter¹ by videoconference on December 20, 2021, from Sacramento, California.

¹ Pursuant to complainant's motion, this matter was consolidated for hearing with the related case, *In the Matter of the Appeal Regarding Final Compensation of Michael McLaughlin*, PERS Case No. 2021-0492, OAH Case No. 2021070811. A separate decision will issue for each matter.

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).

Respondent Paul Zehnder (Zehnder) was present and represented himself.

Sigrid Asmundson, General Counsel, represented respondent Cosumnes Community Services District (District).

Evidence was received, the record closed, and the matter submitted for decision on December 20, 2021.

ISSUE

Should "holiday pay" reported by the District be included in the calculation of Zehnder's final compensation for purposes of determining his monthly retirement allowance?

FACTUAL FINDINGS

Background

1. Complainant, in her official capacity, made and filed the Statements of Issues on October 4, 2021.

2. The District contracted with CalPERS to participate as a public agency member pursuant to Government Code section 20460 et seq. The provisions for local public agencies contracting with CalPERS are set forth in the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.).

3. Zehnder was employed by the District as a Deputy Fire Chief. By virtue of his employment, Zehnder is a local safety member of CalPERS.

4. On November 17, 2020, Zehnder submitted an application for service retirement. He retired, effective December 30, 2020, and has been receiving his CalPERS retirement allowance since approximately February 9, 2021.

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.

7. After receiving Zehnder's application for service retirement, CalPERS' Compensation Review Unit (CRU) staff began a review of his payroll, as reported by the District, 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. In its review, CRU found that the District reported to CalPERS a \$1,106 monthly amount as special compensation which was identified as "holiday pay." After reviewing the employment contract between the District and Zehnder, CalPERS determined the holiday pay did not qualify as "holiday pay" or any other item of special compensation under the PERL. Therefore, CalPERS concluded the holiday pay cannot be included in the calculation of final compensation earnable, or otherwise used to determine Zehnder's retirement allowance.

8. By letter dated March 5, 2021, CalPERS notified Zehnder and the District of its determination and advised of their rights. Zehnder filed a timely appeal. This hearing followed.

Employment Contract between District and Zehnder

9. Effective June 30, 2017, the District's Board of Directors approved a three-year employment contract (Contract) between the District and Zehnder. At the same time, the District entered into a four-year employment contract with Fire Chief Michael McLaughlin (McLaughlin). McLaughlin's contract specifically recognized existing salary compaction issues between the Fire Chief and Deputy Fire Chief within the upper management ranks of the Fire Department.

10. In April 2019, the District began contract negotiations with McLaughlin, as well as Zehnder and one other Deputy Fire Chief, to address the salary compaction in the upper management ranks of the Fire Department. The District desired to minimize any increase to the base salary and to use other incentives to achieve the separation in overall compensation. Initially, the parties considered using merit pay to address the issue, but there was concern whether

merit pay qualified as compensation earnable for purposes of calculating final compensation for retirement purposes. The District sent a written inquiry to CalPERS to see whether merit pay would so qualify, but did not receive a response.

11. Thereafter, McLaughlin, the Deputy Fire Chiefs (including Zehnder), and the District explored other possible options to address the salary compaction issue. They agreed upon holiday pay, with the intent that said pay would be included as compensation earnable for purposes of calculating the employees' retirement allowance. However, the parties did not inquire with CalPERS whether holiday pay, as defined by the parties, would qualify under the PERL prior to executing their new employment contracts. Effective July 1, 2019, Zehnder and the District entered into a new employment contract (2019 Contract) which provided, in relevant part:

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[¶] . . . [¶]

F. Holidays. Due to the nature of work performed by [Zehnder], it is not possible for [Zehnder] to observe recognized holidays as they occur. [Zehnder] to observe recognized holidays as they occur. [Zehnder] shall receive holiday pay for District recognized holidays . . . at a rate of [\$1,106] per month to ensure that [Zehnder] is **on-call** during all recognized holidays. (Emphasis added.)

12. During the relevant time period, the District followed a "unity of command" principle, meaning that at least one of the three executive chiefs (Fire Chief or Deputy Fire Chief) was on duty for all recognized holidays. For some

holidays, such as July 4th, all three executive chiefs were on duty. There was no scheduled staffing, identifying which executive chief was on duty for a specified number of hours on a specified holiday.

13. In 2021, following Zehnder's retirement, the District amended the definition of holiday pay in the employment contracts for its current fire chief and deputy fire chiefs to remove the "on call" language. This amendment was made in direct response to CalPERS' determination in this matter.

Zehnder's Argument

14. Zehnder entered into the 2019 Contract on the assumption and belief that the holiday pay, as defined therein, would be included in the calculation of his final compensation earnable. Notwithstanding the "on call" contractual language, Zehnder argued he was not on call but rather actually worked on several recognized District holidays from July 1, 2019 until his retirement on December 30, 2020. Zehnder was expected to be available "24 hours a day, seven days a week, 365 days a year." He carried a District cellular telephone and took a District vehicle home for emergency response.

CalPERS' Argument

15. Eric Herrera (Herrera) is an analyst for CalPERS in its Employer Account Management Division. His duties include reviewing compensation reported for retirement purposes, including holiday pay, to ensure it complies with the PERL. Herrera reviewed the compensation reported by the District for Zehnder and testified at hearing.

16. Herrera reviewed the 2019 Contract between the District and Zehnder, and found that the holiday pay provision, as defined in the agreement, did not satisfy the requirements to qualify for holiday pay under the PERL. Specifically, under the Contract, holiday pay was issued to ensure that Zehnder was "on call" for all recognized holidays. There was no other language in the Contract, or any amendment or side letter thereto, to establish Zehnder was required or scheduled to work on holidays.

17. In reviewing the reported compensation, Herrera was guided by Government Code section 20636 and California Code of Regulations, title 2, section 571, which together define payrate and special compensation (compensation earnable), and outline limitations to items that can be included by employers. CalPERS does not attempt to interpret members' intent, but looks to the language of the employment contract. Section 571, subdivision (b), provides the exclusive list of nine criteria that all special compensation must meet. These criteria include, in relevant part, that the compensation item be contained in a written employment agreement and be performed during normal hours of employment. Furthermore, section 572, subdivision (a)(5), defines "holiday pay," in relevant part, as follows:

Additional compensation for employees who are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays. If these employees are paid over and above their normal monthly rate of pay for approved holidays, the additional compensation is holiday pay and reportable to PERS.

18. Herrera determined that the “holiday pay” under the Contract did not meet the PERL definition because there was no scheduled staffing for recognized holidays, i.e., a written schedule that specified dates and times Zehnder was required to work. Herrera further explained the “on call” language meant Zehnder was only required to work on an as-needed basis, rendering those hours as overtime or standby. Overtime and standby pay are specifically excluded from consideration as special compensation under the PERL. (Gov. Code, § 20636, subds. (g)(4)(H) & (g)(4)(I).) The fact that Zehnder may have actually worked on District recognized holidays between July 1, 2019 and December 30, 2020, is irrelevant.

19. Herrera relied only on the plain language of the Contract, and not the parties’ unwritten intent, in determining whether reported compensation meets the definition of special compensation under the PERL. He indicated the District may be able to revise the holiday pay language in the Contract language retroactively to ensure it is special compensation and thus compensation earnable.

Analysis

20. The substantive facts in this case are not in dispute. The sole issue to be decided is a legal one: whether the holiday pay issued to Zehnder pursuant to the Contract constitutes special compensation to be included in the calculation of Zehnder’s compensation earnable for retirement purposes.

21. Here, respondents failed to establish Zehnder was required to work on recognized holidays because he works in a position that requires scheduled staffing, as mandated by the PERL. (Cal. Code Regs., tit. 2, § 571, subd. (a)(5).) Rather the plain language of the Contract states that the purpose of the holiday pay issued to Zehnder was to ensure he maintained on-call status for recognized

holidays. Such pay is akin to standby pay, which is specifically excluded from special compensation by the PERL. (Gov. Code, § 20636, subd. (1)(g)(I).) Zehnder's understanding of his duty on recognized holidays – that he be available "24 hours a day, seven days a week, 365 days a year" – comports with CalPERS' interpretation and does not dictate a different result. Nor does the fact that Zehnder actually worked on District recognized holidays between July 1, 2019 and December 30, 2020.

22. Zehnder's position is a sympathetic one. He and the District intended for the holiday pay to be included in the calculation of compensation earnable for retirement purposes, and Zehnder relied on that unwritten intent when he entered into the 2019 Contract. However, the parties' intent is not controlling, and the plain language of the Contract must be followed. When all of the evidence is considered, Zehnder's appeal from CalPERS' determination must be denied.

LEGAL CONCLUSIONS

1. The burden of proof rests with respondents to establish Zehnder is entitled to the retirement allowance he seeks. (*Greatorex v. Bd. of Administration* (1979) 91 Cal.App.3d 57.) Any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, but such construction must be consistent with the clear language and purpose of the statute. (*Ventura County Deputy Sheriff's Ass'n v. Bd. of Retirement* (1997) 16 Cal.4th 483, 490.)

Applicable Law and Regulations

2. 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: (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 and 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470,1479.)

3. 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. Pursuant to Government Code section 20630, respondents' compensation for retirement allowance calculation may be no more than their "compensation earnable," as that term is defined in Government Code section 20636. (Gov. Code, § 20630, subds. (a) & (b).)

4. "Compensation earnable" is composed of: (1) pay rate, and (2) special compensation, as defined in Government Code section 20636, subdivisions (b), (c), and (g). (Gov. Code, § 20636, subd. (a).)

5. "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 statutory limitations. (Gov. Code, § 20636, subd. (b)(1).)

6. "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 is 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 is 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. (Gov. Code, § 20636, subd. (c)(2).)

7. "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).)

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).) Subdivision (a)(5), states that holiday pay must be reported to CalPERS under specific circumstances, as follows:

Holiday Pay - Additional compensation for employees who are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays. If these employees are paid over and above their normal monthly rate of pay for approved holidays, the additional compensation is holiday pay and reportable to PERS.

9. Only those items that are specifically listed in California Code of Regulations, title 2, section 571, subsection (a), are considered special compensation and may be used to calculate a member's final compensation. (Cal. Code Regs., tit. 2, § 571, subds. (c) & (d).) Standby and overtime pay are specifically excluded from being considered as special compensation. (Gov. Code, § 20636, subds. (g)(4)(H) & (g)(4)(I).)

ORDER

CalPERS' determination that the holiday pay, reported to CalPERS as Paul Zehnder's compensation by the District for the period of July 1, 2019 through December 30, 2020, does not constitute compensation earnable, and therefore cannot be included in his final compensation for purposes of calculating his

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monthly retirement allowance is AFFIRMED. The appeal by Paul Zehnder from CalPERS' determination is DENIED.

DATE: January 21, 2022



TIFFANY L. KING

Administrative Law Judge

Office of Administrative Hearings