

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Appeal Regarding

Final Compensation Calculation of:

BARRY D. BIERMANN,

and

CITY OF DALY CITY,

Respondents.

Agency Case No. 2022-0221

OAH No. 2022070557

PROPOSED DECISION

Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, heard this matter on August 22, 2023, by videoconference.

Senior Attorney Austa Wakily represented the California Public Employees' Retirement System (CalPERS).

Respondent Barry D. Biermann represented himself.

Attorney Michael D. Youril represented respondent City of Daly City.

The record was held open for the submission of closing briefs. The City of Daly City's closing brief and reply brief were marked as Exhibits City 12 and City 13, respectively. CalPERS's closing brief was marked as Exhibit 25.

The matter was submitted for decision on November 22, 2023.

ISSUE

Did CalPERS err in determining that holiday pay reported by the City of Daly City on behalf of respondent Barry D. Biermann is not "compensation earnable" that can be used in the calculation of respondent's final compensation for purposes of determining his monthly retirement allowance?

FACTUAL FINDINGS

1. Respondent Barry D. Biermann (respondent) worked for the California Department of Forestry and Fire Protection from 1986 to early 2019, when he retired.
2. On June 17, 2019, respondent was hired by the City of Daly City (City) as Deputy Fire Chief and reinstated to active CalPERS membership. Respondent is a local safety member of CalPERS by virtue of this employment.
3. Respondent applied for service retirement from his position with the City, effective October 9, 2021. The Retirement Benefit Services Division of CalPERS accepted this retirement application and calculated respondent's monthly retirement benefit, based on his years of service, formula/benefit factor, and final compensation.

4. The CalPERS Compensation Compliance Review Unit (CCRU) also reviewed respondent's compensation to determine the amounts that could be used to calculate his final compensation, and thus his monthly retirement allowance. The CCRU identified holiday pay as an item reported by the City for respondent during his final compensation period of October 9, 2020, through October 8, 2021.

5. CalPERS requested and received information from the City about holiday pay, including the Memorandum of Understanding (MOU) applicable to respondent's position as Deputy Fire Chief and a resolution of the City Council.

6. On October 22, 2021, CalPERS notified the City and respondent of its preliminary determination that respondent's holiday pay for the period of October 2020 through October 2021 did not qualify as "compensation earnable" under the Public Employees' Retirement Law (PERL), because it was paid solely in respondent's final compensation period. CalPERS sent another similar letter to respondent on November 8, 2021.

7. The City filed an appeal and request for an administrative hearing (deemed to also be made on behalf of respondent), contending the holiday pay was allowable as "special compensation" under the PERL.

8. CalPERS later changed its stated reason for finding that holiday pay cannot be used in calculation of respondent's final compensation. On February 3, 2023, CalPERS issued an amended determination letter, stating that holiday pay was not compensation earnable for respondent, because Deputy Fire Chief was not a position that required scheduled staffing without regard to holidays.

9. The City and respondent timely appealed from the amended determination letter and requested an administrative hearing.

10. On May 30, 2023, CalPERS issued an amended statement of issues.

11. At hearing, the amended statement of issues was orally amended further: (1) to clarify that June 17, 2019, was the date the City hired respondent as Deputy Fire Chief; and (2) to reflect that holiday pay is the only issue to be decided in this appeal, because the previously disputed issue of uniform allowance has now been resolved.

Respondent's Duties as Deputy Fire Chief

12. The City acts as the fire authority for three cities (Brisbane, Pacifica, and Daly City) under the auspices of the North County Fire Authority.

13. Respondent testified credibly at hearing regarding his duties and work schedule as Deputy Fire Chief for the City. This testimony was uncontroverted, and was consistent with the policy for "Duty Chief" from the North County Fire Authority Policy and Procedure Manual for Operations.

14. The City employs three Deputy Fire Chiefs. As part of their regular duties, each Deputy Fire Chief is required to serve a week-long shift as Duty Chief every third week. The Duty Chief rotation schedule is in effect without regard to holidays, and it is planned out for the entire year before January 1st of each year.

15. As a Deputy Fire Chief, respondent worked a 40-hour week, Mondays through Thursdays from 8:00 a.m. to 6:00 p.m. In addition, he served as Duty Chief for a shift of seven days, every third week. Each Duty Chief shift began at 8:00 a.m. on Tuesday and ended at 8:00 a.m. the following Tuesday. During his seven-day shifts as Duty Chief, respondent was required to be available 24 hours a day, and could not leave San Mateo County. When respondent was working a Duty Chief shift, he lived at a fire station in Pacifica for the entire week.

16. Respondent was regularly required to work holidays as part of the regular Duty Chief rotation. In addition to the Duty Chief rotation, all three Deputy Fire Chiefs were required to work on July 4 each year due to the number of fires caused by illegal fireworks.

17. The Duty Chief oversees eight fire stations, and must be available for emergency response at all times. Respondent explained that certain types of incidents required the Duty Chief to respond to the scene, such as augmented dispatch, wildland fires, multi-engine responses, cliff rescues, and incidents with high media coverage. The Duty Chief would help coordinate the emergency response with the on-scene incident commander, and would often provide public information statements at the scene. Apart from emergency responses, the Duty Chief had communication duties, and provided a level of supervision above Battalion Chiefs.

18. Respondent estimated that on average, he would physically respond to five to seven calls each week as Duty Chief. During a Duty Chief shift, respondent would also handle communications requiring substantive responses multiple times per day, with about 20 to 30 events or issues per week.

Holiday-in-Lieu Pay

19. Resolution No. 20-179 was adopted by the City Council of the City of Daly City on November 23, 2020, approving adjustments to salary and benefits for specified Executive Management positions. As pertinent to this matter, the resolution includes the following provision regarding the Deputy Fire Chief and Fire Chief:

Holiday in Lieu Pay

Effective the first full pay period after adoption of this resolution, in recognition of the essential nature of services provided by the Deputy Fire Chief and Fire Chief, these classifications shall receive 7.5% of employee's base salary plus supplemental educational incentive pay earned in the previous six-month period in lieu of observing City Holidays. Such payments shall be made on the first payday after December 1 and the first payday after June 1.

The resolution then listed 12 specified City holidays for which the Deputy Fire Chief and Fire Chief would receive the holiday-in-lieu pay.

CalPERS Evidence

20. CalPERS employee Karina Artunduaga, an analyst in the CCRU, testified at hearing. Artunduaga was not the analyst who performed the analysis and drafted the determination letters, but she reviewed respondent's file prior to the hearing.

21. Artunduaga stated that the City's resolution providing Holiday-in-Lieu pay does not meet the requirements for the holiday pay to be considered special compensation under California Code of Regulations, title 2, section 571 because it does not state that the Deputy Fire Chief is a position requiring scheduled staffing without regard to holidays. Reviewing the North County Fire Authority's policy for Duty Chief did not change Artunduaga's opinion. She pointed to language in the Duty Chief policy stating that: "Outside of normal duty hours, on weekends and on holidays, the Duty Chief shall administer the Department....." Artunduaga stated that special compensation under Government Code section 20636 is for services performed

“during normal working hours,” and that this refers to the employee’s regular working schedule.

Respondents’ Evidence

22. The City and respondent presented the testimony of respondent regarding his job duties, schedule, and holiday pay, as well as documentary evidence, including the City Council’s resolution, the Duty Chief policy, and Duty Chief schedule. (See Factual Findings 12-19.)

LEGAL CONCLUSIONS

1. The burden of proof is on respondents 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 in part on the final compensation (“compensation earnable”). In determining final compensation, CalPERS applies the PERL (Gov. Code, § 20000 et seq.) and related regulations.

3. Government Code section 20636 provides that a member’s compensation earnable is comprised of payrate and “special compensation,” defined as including “payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.” (Gov. Code, § 20636, subd. (c)(1).) The statute provides, among other things, that special compensation shall be “for services rendered during normal working hours.” (*Id.*, subd. (c)(3).) The allowable items of special compensation that can be considered in determining a member’s final compensation are specified by regulation.

4. 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 that must be reported to CalPERS if they are contained in a written labor policy or agreement.” Regarding holiday pay, the regulation provides: “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.” (Cal. Code Regs., tit. 2, § 571, subd. (a)(5).)

Subdivision (b) sets forth numerous requirements that all items of special compensation must meet in order to be included in a member’s final compensation. All special compensation items must be contained in a written labor policy or agreement, be duly approved by the employer’s governing body in accordance with public meetings laws, indicate the conditions for payment of the items, be posted at the office of the employer or immediately accessible and available for public review from the employer or posted on the employer’s website, indicate an effective date and date of any revisions, be maintained for inspection for not less than five years, must not reference another document in lieu of disclosing the item of special compensation, must be available to all members of a group or class, must not be paid exclusively in the final compensation period, and must not constitute final settlement pay. (Cal. Code Regs., tit. 2, § 571, subd. (b).)

5. CalPERS contends that respondent’s Holiday-in-Lieu pay cannot be considered special compensation under the PERL because the City’s resolution does not specifically state the Deputy Fire Chief position is staffed “without regard to

holidays,” and contends that serving as Duty Chief is akin to standby or overtime pay, rather than work during respondent’s normal working hours.

6. The City and respondent contend that respondent’s Holiday-in-Lieu pay meets the requirements for special compensation.

The City contends that respondent’s holiday pay is similar to that considered by the court in *Hale v. Public Employees’ Retirement System* (“*Hale*”) (2022) 82 Cal.App.5th 764. The employees in *Hale* were firefighters for Cal Fire who served as executive officers for the union, were required to handle matters as union officers on weekends and holidays, did not take any holidays off, and received holiday cash-outs. The *Hale* court found that responding to the needs of union members whenever calls came in, on holidays or otherwise, was part of the employees’ normally required duties, and was thus special compensation. (*Id.*, at p. 778-779.) The court rejected the argument that holiday cash-outs were payments for working “on-call” or “stand-by.”

7. CalPERS’s contention that the language of the City’s resolution is defective because it does not state Deputy Fire Chiefs are required to work on holidays is rejected. Resolution No. 20-179 clearly designates the item of compensation as “Holiday-in-Lieu Pay,” and provides that it is in lieu of observing City holidays—the only logical reading of this language is that Deputy Fire Chiefs were required to work without regard to holidays.

The evidence established that during respondent’s Duty Chief shifts, he was not serving as a mere back-up employee, but instead was covering several areas of primary responsibility. The evidence is uncontroverted that working as Duty Chief during every third week, in addition to a regular 40-hour work schedule, was a part of respondent’s normally required job duties as Deputy Fire Chief; that this rotation was

scheduled without regard to holidays; and that respondent worked on holidays. (Factual Findings 12-19.) The argument of the City and respondent is persuasive that respondent's holiday pay qualifies as special compensation, as was found by the court in *Hale*.

Respondent's holiday pay reported by the City to CalPERS constitutes special compensation under the PERL and must be used in calculating his final compensation.

ORDER

The appeal of respondents Barry D. Biermann and City of Daly City is granted.

DATE: 12/19/2023



HOLLY M. BALDWIN

Administrative Law Judge

Office of Administrative Hearings