

ATTACHMENT A

RESPONDENT'S PETITION FOR RECONSIDERATION



ATTACHMENT A

March 29, 2022

Via Fax: (916) 795-3972

Cheree Swedensky, Assistant to the Board
Executive Office
California Public Employees' Retirement System
PO Box 942701
Sacramento, CA 94229-2701

RE: PETITION FOR RECONSIDERATION, REFERENCE NO. 2021-0492, MICHAEL MCLAUGHLIN

Members of the CalPERS Board of Retirement:

The purpose of this letter is to make a petition for reconsideration to the board for review of Holiday Pay for Michael McLaughlin.

Michael McLaughlin retired from the District in December 25, 2020. McLaughlin's employment agreement with the District included the following provisions regarding Holiday Pay:

Holiday Pay. Due to the nature of work performed by McLaughlin, it is not possible for McLaughlin to observe recognized holidays as they occur. McLaughlin shall receive holiday pay for District recognized holidays, as set forth in Appendix "A", at a rate of One Thousand One Hundred and Fifty Dollars (\$1,150) per month to ensure that McLaughlin is on-call during all recognized holidays.

According to CalPERS proposed decision dated January 21, 2022, on December 20, 2021, during the Office of Administrative Hearing for Michael McLaughlin, Eric Herrera, Compensation Compliance & Review Analyst with the CalPERS Employer Account Management Division, testified the following:

"16. Herrera reviewed the Contract between the District and McLaughlin, 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 McLaughlin was, "on call" for all recognized holidays. There was no other language in the Contract, or any amendments or side letter thereto, to establish McLaughlin was required or scheduled to work on holidays." (Attachment B, Page 7, ¶ 16.)

Additionally, Herrera testified before Administrative Law Judge Tiffany L. King on December 20, 2021, that the District may consider amending the holiday pay language in the existing contract

Petition for Reconsideration, Ref. No. 2021-0492

March 29, 2022

Page 2 of 2

retroactively to ensure it is special compensation and thus compensable earnings. (Attachment B, Page 9, ¶ 19.)

On February 16, 2022, the District's Board of Directors adopted a Fifth Amendment to the employment contract for Michael McLaughlin. This language now reflects the following as attached:

Holidays. Due to the nature of work performed by McLaughlin, it is not possible for McLaughlin to observe recognized holidays, as they occur. McLaughlin shall receive holiday pay for District recognized holidays, as set forth in Appendix "A", at a rate of One Thousand One Hundred and Fifty Dollars (\$1,150) per month.

The Cosumnes Community Services District requests that the CalPERS Board of Retirement reconsider its decision to reject Holiday Pay as special compensation due to the amendment of McLaughlin's contractual language.



MARISA GUERRERO
DIRECTOR OF HUMAN RESOURCES

Attachment A: Contract Amendment

Attachment B: OAH No. 2021070811 Proposed Decision

cc: Sigrid Asmundson, District Counsel
Mathew G. Jacobs, General Counsel
Personnel file

**FIFTH AMENDMENT TO
EMPLOYMENT CONTRACT BETWEEN
MICHAEL MCLAUGHLIN AND
THE COSUMNES COMMUNITY SERVICES DISTRICT**

This Fifth Amendment to Employment Contract (“**Fifth Amendment**”) is dated as of February 16, 2022 (“**Effective Date**”), and is entered into by and between the Cosumnes Community Services District (“**District**”) and Michael McLaughlin (“**McLaughlin**”) with reference to the following recitals of fact:

RECITALS

WHEREAS, District and McLaughlin (collectively referred to as the “**Parties**”) entered into that certain Employment Contract, dated July 1, 2017, for the purpose of employing McLaughlin in the position of Fire Chief for the District, which was subsequently amended pursuant to a First Amendment, dated May 2, 2018, Second Amendment, dated December 5, 2018, Third Amendment, dated April 4, 2019, and Fourth Amendment, dated June 19, 2019 (the “**Contract**”).

WHEREAS, the Contract sets forth the terms and conditions for McLaughlin’s employment as Fire Chief for the District.

WHEREAS, the Parties now desire to enter into this Fifth Amendment to clarify McLaughlin’s duties on scheduled holidays.

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, DISTRICT AND MCLAUGHLIN AGREE AS FOLLOWS:

1. Section VIII.G is hereby amended in its entirety as follows:

Holidays. Due to the nature of work performed by McLaughlin, it is not possible for McLaughlin to observe recognized holidays as they occur. McLaughlin shall receive holiday pay for District recognized holidays, as set forth in Appendix “A”, at a rate of One Thousand One Hundred and Fifty Dollars (\$1,150) per month.

2. Provisions of Contract to Remain in Full Force and Effect. Except as otherwise specifically set forth in this Fifth Amendment, the provisions of the Contract shall remain in full force and effect.

3. Pensionable Compensation. The District makes no assertion or guarantee as to whether the compensation set forth herein is pensionable compensation.

4. Effective Date of Fifth Amendment This Fifth Amendment shall become effective on the Effective Date; provided, however, that it is approved by the Board and is executed by both Parties.

[Signatures on following page]

IN WITNESS WHEREOF, the Parties hereto have duly approved and executed this Fifth Amendment on February 16, 2022.

COSUMNES COMMUNITY SERVICES DISTRICT

By: _____
JOSHUA GREEN
GENERAL MANAGER

Date: February 16, 2022

ACCEPTANCE:

I hereby accept the terms and conditions of this Fifth Amendment and agree to comply with the conditions thereof and to fulfill all of the duties set forth herein and in the Contract.

MICHAEL MCLAUGHLIN

Date: February 16, 2022

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

**In the Matter of the Appeal Regarding the Final
Compensation of:**

**MICHAEL W. MCLAUGHLIN and COSUMNES COMMUNITY
SERVICES DISTRICT, Respondents**

Agency Case No. 2021-0492

OAH No. 2021070811

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 Paul Zehnder*, PERS Case No. 2021-0645, OAH Case No. 2021100257. 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 Michael McLaughlin (McLaughlin) 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 McLaughlin'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 July 22, 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. McLaughlin was employed by the District as its Fire Chief. By virtue of his employment, respondent is a local safety member of CalPERS.

4. On September 2, 2020, McLaughlin submitted an application for service retirement. He retired, effective December 26, 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 McLaughlin'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 \$1,150 monthly amount as special compensation which was identified as "holiday pay." After reviewing the employment contract between the District and McLaughlin, 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 McLaughlin's retirement allowance.

8. By letter dated February 19, 2021, CalPERS notified McLaughlin and the District of its determination and advised of their rights. McLaughlin filed a timely appeal. This hearing followed.

Employment Contract between District and McLaughlin

9. Effective July 1, 2017, the District's Board of Directors approved a four-year employment contract (Contract) between the District and McLaughlin. Section ILC of the Contract included the following provision:

Salary Compaction. The District recognizes the salary compaction between the Fire Chief and Deputy Fire Chief within the upper management ranks of the Fire Department. During the first two years of McLaughlin's contract, the District will make a good faith effort to correct this compaction.

10. In April 2019, the District began contract negotiations with McLaughlin, as well as Deputy Fire Chiefs, 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, the parties 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 McLaughlin's 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 the Fourth Amendment to the Contract, effective July 1, 2019. The amendment provided, in relevant part:

4. Section II.C of the Contract is hereby repealed and replaced in its entirety with the following:

Compaction. In recognition of current and known future compaction, on or after July 1, 2020, in the event the Deputy Fire Chief salary is increased to such a point that there is no longer a 10% difference in pay at the highest step of Deputy Fire Chief to the Fire Chief, McLaughlin may request an amendment to this Agreement to receive an increase to the Base Salary.

[1] . . . [1]

12. Section VIII.G is hereby added to the Contract:

Holiday Pay. Due to the nature of work performed by McLaughlin, it is not possible for McLaughlin to observe recognized holidays as they occur. McLaughlin shall receive holiday pay for District recognized holidays . . . at a rate of [\$1,150] per month to ensure that McLaughlin 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 McLaughlin's retirement, the District amended the definition of holiday pay in the employment contract with its current fire chief, to remove the "on call" language." This amendment was made in direct response to CalPERS' determination in this matter.

McLaughlin Argument

14. McLaughlin entered into the Fourth Amendment to the 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, McLaughlin argued he was not on call but

rather actually worked on all recognized holidays from July 1, 2019 until his retirement on December 26, 2020. McLaughlin understood "on call" to mean he could be two to three hours away from the District but remain available to answer District calls. However, due to the several wildfires as well as the impact of the COVID-19 pandemic in 2019 and 2020, McLaughlin was not allowed to go out of town on recognized holidays, and carried a District radio and two cellular telephones to be reachable. During that time, he also had a scheduled vacation which he was required to cancel. He explained there was no scheduled staffing because, as exempt employees, executive chiefs were expected to meet the ongoing workload demands as well as emergency issues, regardless of the number of hours required to do so.

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 McLaughlin and testified at hearing.

16. Herrera reviewed the Contract between the District and McLaughlin, 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 McLaughlin was "on call" for all recognized holidays. There was no other language in the Contract, or any amendment or side letter thereto, to establish McLaughlin 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 McLaughlin was required to work. Herrera further explained the "on call" language meant McLaughlin 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 McLaughlin may have actually worked all scheduled holidays between July 1, 2019 and December 26, 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 McLaughlin pursuant to the Contract constitutes special compensation to be included in the calculation of McLaughlin's compensation earnable for retirement purposes.

21. Here, respondents failed to establish McLaughlin 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 McLaughlin 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).) McLaughlin's understanding of his duty on recognized holidays – to stay in town and be available to respond to calls – comports with CalPERS' interpretation and does not dictate a different result. Nor does the fact that McLaughlin actually worked on all recognized holidays between July 1, 2019 and December 26, 2020.

22. McLaughlin'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 McLaughlin relied on that unwritten intent when he entered into the agreement. However, the parties' intent is not controlling, and the plain language of the Contract must be followed. When all of the evidence is considered, McLaughlin's appeal from CalPERS' determination must be denied.

LEGAL CONCLUSIONS

1. The burden of proof rests with respondents to establish McLaughlin is entitled to the retirement allowance he seeks. (*Greator 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:

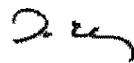
Holiday Pay - Additional compensation for employees who are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays. If these employees are paid over and above their normal monthly rate of pay for approved holidays, the 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 Michael McLaughlin's compensation by the District for the period of July 1, 2019 through December 26, 2020, does not constitute compensation earnable, and therefore cannot be included in his final compensation for purposes of calculating his monthly retirement allowance is AFFIRMED. The appeal by Michael McLaughlin from CalPERS' determination is DENIED.

DATE: January 21, 2022



TIFFANY L. KING

Administrative Law Judge

Office of Administrative Hearings

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On March 17, 2022, I served the foregoing document described as:

DECISION - In the Matter of the Appeal Regarding Final Compensation Calculation of MICHAEL W. MCLAUGHLIN, Respondent, and COSUMNES COMMUNITY SERVICES DISTRICT, Respondent. Case No. 2021-0492; OAH No. 2021070811.

on interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Michael W. McLaughlin



Office of Administrative Hearings
2349 Gateway Oaks Dr., Ste. 200
Sacramento, CA 95833-4231
(Via OAH SECURE e-FILE)

Personnel Officer
Cosumnes Community Services District
8820 Elk Grove, Blvd.
Elk Grove, CA 95624

- [XX] **BY OVERNIGHT DELIVERY:** I caused such envelope(s) to be delivered to the above address(es) within 24 hours by overnight delivery service.
- [XX] **BY ELECTRONIC TRANSMISSION:** I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.
- [XX] **BY ELECTRONIC FILING:** I caused such documents to be e-filed via OAH SECURE e-FILE.

Executed on March 17, 2022, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Kady Pasley

NAME

K. Pasley

SIGNATURE

ATTACHMENT A
MICHAEL W. MCLAUGHLIN

SUBMITTED VIA U.S. MAIL AND ELECTRONIC MAIL: Cheree.Swedensky@calPERS.ca.gov,

and

March 30, 2022

Cheree Swedensky, Assistant to the Board
Executive Office
California Public Employees Retirement System
PO Box 942701
Sacramento, CA 94229-2701

Subject: Petition for Reconsideration – Appeal: Formal Determination of Retirement Allowance: Holiday Pay
(CalPERS ID: [REDACTED])

Ms. Swedensky:

Please accept this letter to respectfully request your consideration and approval of the attached Cosumnes Community Services District (District) *Petition for Reconsideration, Reference No. 2021-0492 Michael McLaughlin*.

During our December 20, 2021, Office of Administrative Law Hearing, Eric Herrera, the Compensation Compliance & Review Analyst with the CalPERS Employer Account Management Division who reviewed our cases and recommended the exclusion, testified under oath that it is permissible practice for the district to amend the holiday pay language in the existing contract retroactively to ensure it is special compensation and thus compensable earnings in accordance with CalPERS requirements. Further, Mr. Herrera testified that retroactive amendments have been recognized and approved by CalPERS.

While I disagreed with the Final Determination that excluded holiday pay from my final compensation and subsequently filed an appeal, I did not submit a respondent position statement for the CalPERS Board of Administration agenda item related to our appeal as Mr. Herrera provided us with a remedy to our situation while he was under oath.

The purpose of the Petition for Reconsideration is to adhere to and implement the advice/direction that Mr. Herrera provided under oath during the December 20, 2021, hearing by retroactively amending the existing contract to reflect that as the Fire Chief for the Cosumnes CSD Fire Department, I was “normally required” to work and did work on recognized District holidays.

For the Deputy Fire Chiefs and Fire Chief, working on a holiday was not special, it was normal, planned for, and expected by the district, myself, and my family. During holidays, I consistently generated and responded to phone calls and emails from our dispatch, my fellow chief officers, board members, associated agencies, etc. I physically responded to local, area and state emergencies. I always carried two forms of communications, and I worked from

[REDACTED]

one of my two official offices, my home office (during COVID), and from my official chief vehicle to respond to the needs of my agency, community and beyond.

I am respectfully requesting your consideration and approval of the attached *Petition for Reconsideration, Reference No 2021-0492, Michael McLaughlin*, to allow Holiday Pay to be considered as "Compensation Earnable" to calculate my final compensation.

Respectfully,



Michael W. McLaughlin
CalPERS ID: [REDACTED]
Fire Chief, Retired
Cosumnes CSD Fire Department

ATTACHMENTS

- Petition for Reconsideration, Reference No 2021-0492, Michael McLaughlin



March 29, 2022

Via Fax: (916) 795-3972

Cheree Swedensky, Assistant to the Board
Executive Office
California Public Employees' Retirement System
PO Box 942701
Sacramento, CA 94229-2701

RE: PETITION FOR RECONSIDERATION, REFERENCE NO. 2021-0492, MICHAEL MCLAUGHLIN

Members of the CalPERS Board of Retirement:

The purpose of this letter is to make a petition for reconsideration to the board for review of Holiday Pay for Michael McLaughlin.

Michael McLaughlin retired from the District in December 25, 2020. McLaughlin's employment agreement with the District included the following provisions regarding Holiday Pay:

Holiday Pay. Due to the nature of work performed by McLaughlin, it is not possible for McLaughlin to observe recognized holidays as they occur. McLaughlin shall receive holiday pay for District recognized holidays, as set forth in Appendix "A", at a rate of One Thousand One Hundred and Fifty Dollars (\$1,150) per month to ensure that McLaughlin is on-call during all recognized holidays.

According to CalPERS proposed decision dated January 21, 2022, on December 20, 2021, during the Office of Administrative Hearing for Michael McLaughlin, Eric Herrera, Compensation Compliance & Review Analyst with the CalPERS Employer Account Management Division, testified the following:

"16. Herrera reviewed the Contract between the District and McLaughlin, 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 McLaughlin was, "on call" for all recognized holidays. There was no other language in the Contract, or any amendments or side letter thereto, to establish McLaughlin was required or scheduled to work on holidays." (Attachment B, Page 7, ¶ 16.)

Additionally, Herrera testified before Administrative Law Judge Tiffany L. King on December 20, 2021, that the District may consider amending the holiday pay language in the existing contract

March 29, 2022

Page 2 of 2

retroactively to ensure it is special compensation and thus compensable earnings. (Attachment B, Page 9, ¶ 19.)

On February 16, 2022, the District's Board of Directors adopted a Fifth Amendment to the employment contract for Michael McLaughlin. This language now reflects the following as attached:

Holidays. Due to the nature of work performed by McLaughlin, it is not possible for McLaughlin to observe recognized holidays, as they occur. McLaughlin shall receive holiday pay for District recognized holidays, as set forth in Appendix "A", at a rate of One Thousand One Hundred and Fifty Dollars (\$1,150) per month.

The Cosumnes Community Services District requests that the CalPERS Board of Retirement reconsider its decision to reject Holiday Pay as special compensation due to the amendment of McLaughlin's contractual language..



MARISA GUERRERO
DIRECTOR OF HUMAN RESOURCES

Attachment A: Contract Amendment

Attachment B: OAH No. 2021070811 Proposed Decision

cc: Sigrid Asmundson, District Counsel
Mathew G. Jacobs, General Counsel
Personnel file

**FIFTH AMENDMENT TO
EMPLOYMENT CONTRACT BETWEEN
MICHAEL MCLAUGHLIN AND
THE COSUMNES COMMUNITY SERVICES DISTRICT**

This Fifth Amendment to Employment Contract (“**Fifth Amendment**”) is dated as of February 16, 2022 (“**Effective Date**”), and is entered into by and between the Cosumnes Community Services District (“**District**”) and Michael McLaughlin (“**McLaughlin**”) with reference to the following recitals of fact:

RECITALS

WHEREAS, District and McLaughlin (collectively referred to as the “**Parties**”) entered into that certain Employment Contract, dated July 1, 2017, for the purpose of employing McLaughlin in the position of Fire Chief for the District, which was subsequently amended pursuant to a First Amendment, dated May 2, 2018, Second Amendment, dated December 5, 2018, Third Amendment, dated April 4, 2019, and Fourth Amendment, dated June 19, 2019 (the “**Contract**”).

WHEREAS, the Contract sets forth the terms and conditions for McLaughlin’s employment as Fire Chief for the District.

WHEREAS, the Parties now desire to enter into this Fifth Amendment to clarify McLaughlin’s duties on scheduled holidays.

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, DISTRICT AND MCLAUGHLIN AGREE AS FOLLOWS:

1. Section VIII.G is hereby amended in its entirety as follows:

Holidays. Due to the nature of work performed by McLaughlin, it is not possible for McLaughlin to observe recognized holidays as they occur. McLaughlin shall receive holiday pay for District recognized holidays, as set forth in Appendix “A”, at a rate of One Thousand One Hundred and Fifty Dollars (\$1,150) per month.

2. Provisions of Contract to Remain in Full Force and Effect. Except as otherwise specifically set forth in this Fifth Amendment, the provisions of the Contract shall remain in full force and effect.

3. Pensionable Compensation. The District makes no assertion or guarantee as to whether the compensation set forth herein is pensionable compensation.

4. Effective Date of Fifth Amendment This Fifth Amendment shall become effective on the Effective Date; provided, however, that it is approved by the Board and is executed by both Parties.

[Signatures on following page]

IN WITNESS WHEREOF, the Parties hereto have duly approved and executed this Fifth Amendment on February 16, 2022.

COSUMNES COMMUNITY SERVICES DISTRICT

By: _____
JOSHUA GREEN
GENERAL MANAGER

Date: February 16, 2022

ACCEPTANCE:

I hereby accept the terms and conditions of this Fifth Amendment and agree to comply with the conditions thereof and to fulfill all of the duties set forth herein and in the Contract.

MICHAEL MCLAUGHLIN

Date: February 16, 2022

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding)	CASE NO. 2021-0492
Final Compensation Calculation of:)	OAH NO. 2021070811
)	
MICHAEL W. MCLAUGHLIN,)	DECISION
)	
Respondent,)	
)	
and)	
)	
COSUMNES COMMUNITY SERVICES)	
DISTRICT,)	
)	
Respondent.)	
)	

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own Decision the Proposed Decision dated January 21, 2022, concerning the appeal of Michael W. McLaughlin; RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the Decision.

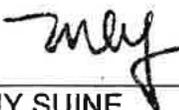
* * * * *

I hereby certify that on March 16, 2022, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the Administrative Law Judge's Proposed Decision is a true copy of the Decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA PUBLIC
EMPLOYEES' RETIREMENT SYSTEM
MARCIE FROST
CHIEF EXECUTIVE OFFICER

Dated: 3/17/2022

BY



ANTHONY SUINE
Deputy Executive Officer
Customer Services and Support

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:**

**MICHAEL W. MCLAUGHLIN and COSUMNES COMMUNITY
SERVICES DISTRICT, Respondents**

Agency Case No. 2021-0492

OAH No. 2021070811

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 Paul Zehnder*, PERS Case No. 2021-0645, OAH Case No. 2021100257. 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 Michael McLaughlin (McLaughlin) 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 McLaughlin'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 July 22, 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. McLaughlin was employed by the District as its Fire Chief. By virtue of his employment, respondent is a local safety member of CalPERS.

4. On September 2, 2020, McLaughlin submitted an application for service retirement. He retired, effective December 26, 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 McLaughlin'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 \$1,150 monthly amount as special compensation which was identified as "holiday pay." After reviewing the employment contract between the District and McLaughlin, 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 McLaughlin's retirement allowance.

8. By letter dated February 19, 2021, CalPERS notified McLaughlin and the District of its determination and advised of their rights. McLaughlin filed a timely appeal. This hearing followed.

Employment Contract between District and McLaughlin

9. Effective July 1, 2017, the District's Board of Directors approved a four-year employment contract (Contract) between the District and McLaughlin. Section II.C of the Contract included the following provision:

Salary Compaction. The District recognizes the salary compaction between the Fire Chief and Deputy Fire Chief within the upper management ranks of the Fire Department. During the first two years of McLaughlin's contract, the District will make a good faith effort to correct this compaction.

10. In April 2019, the District began contract negotiations with McLaughlin, as well as Deputy Fire Chiefs, 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, the parties 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 McLaughlin's 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 the Fourth Amendment to the Contract, effective July 1, 2019. The amendment provided, in relevant part:

4. Section II.C of the Contract is hereby repealed and replaced in its entirety with the following:

Compaction. In recognition of current and known future compaction, on or after July 1, 2020, in the event the Deputy Fire Chief salary is increased to such a point that there is no longer a 10% difference in pay at the highest step of Deputy Fire Chief to the Fire Chief, McLaughlin may request an amendment to this Agreement to receive an increase to the Base Salary.

[¶] . . . [¶]

12. Section VIII.G is hereby added to the Contract:

Holiday Pay. Due to the nature of work performed by McLaughlin, it is not possible for McLaughlin to observe recognized holidays as they occur. McLaughlin shall receive holiday pay for District recognized holidays . . . at a rate of [\$1,150] per month to ensure that McLaughlin 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 McLaughlin's retirement, the District amended the definition of holiday pay in the employment contract with its current fire chief, to remove the "on call" language." This amendment was made in direct response to CalPERS' determination in this matter.

McLaughlin Argument

14. McLaughlin entered into the Fourth Amendment to the 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, McLaughlin argued he was not on call but

rather actually worked on all recognized holidays from July 1, 2019 until his retirement on December 26, 2020. McLaughlin understood "on call" to mean he could be two to three hours away from the District but remain available to answer District calls. However, due to the several wildfires as well as the impact of the COVID-19 pandemic in 2019 and 2020, McLaughlin was not allowed to go out of town on recognized holidays, and carried a District radio and two cellular telephones to be reachable. During that time, he also had a scheduled vacation which he was required to cancel. He explained there was no scheduled staffing because, as exempt employees, executive chiefs were expected to meet the ongoing workload demands as well as emergency issues, regardless of the number of hours required to do so.

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 McLaughlin and testified at hearing.

16. Herrera reviewed the Contract between the District and McLaughlin, 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 McLaughlin was "on call" for all recognized holidays. There was no other language in the Contract, or any amendment or side letter thereto, to establish McLaughlin 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 McLaughlin was required to work. Herrera further explained the "on call" language meant McLaughlin 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 McLaughlin may have actually worked all scheduled holidays between July 1, 2019 and December 26, 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 McLaughlin pursuant to the Contract constitutes special compensation to be included in the calculation of McLaughlin's compensation earnable for retirement purposes.

21. Here, respondents failed to establish McLaughlin 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 McLaughlin 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).) McLaughlin's understanding of his duty on recognized holidays – to stay in town and be available to respond to calls – comports with CalPERS' interpretation and does not dictate a different result. Nor does the fact that McLaughlin actually worked on all recognized holidays between July 1, 2019 and December 26, 2020.

22. McLaughlin'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 McLaughlin relied on that unwritten intent when he entered into the agreement. However, the parties' intent is not controlling, and the plain language of the Contract must be followed. When all of the evidence is considered, McLaughlin's appeal from CalPERS' determination must be denied.

LEGAL CONCLUSIONS

1. The burden of proof rests with respondents to establish McLaughlin 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 Michael McLaughlin's compensation by the District for the period of July 1, 2019 through December 26, 2020, does not constitute compensation earnable, and therefore cannot be included in his final compensation for purposes of calculating his monthly retirement allowance is AFFIRMED. The appeal by Michael McLaughlin from CalPERS' determination is DENIED.

DATE: January 21, 2022



TIFFANY L. KING

Administrative Law Judge

Office of Administrative Hearings

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On **March 17, 2022**, I served the foregoing document described as:

DECISION - In the Matter of the Appeal Regarding Final Compensation Calculation of **MICHAEL W. MCLAUGHLIN**, Respondent, and **COSUMNES COMMUNITY SERVICES DISTRICT**, Respondent. Case No. 2021-0492; OAH No. 2021070811.

on interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Michael W. McLaughlin



**Office of Administrative Hearings
2349 Gateway Oaks Dr., Ste. 200
Sacramento, CA 95833-4231
(Via OAH SECURE e-FILE)**

**Personnel Officer
Cosumnes Community Services District
8820 Elk Grove, Blvd.
Elk Grove, CA 95624**

- [**XX**] **BY OVERNIGHT DELIVERY:** I caused such envelope(s) to be delivered to the above address(es) within 24 hours by overnight delivery service.
- [**XX**] **BY ELECTRONIC TRANSMISSION:** I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.
- [**XX**] **BY ELECTRONIC FILING:** I caused such documents to be e-filed via OAH SECURE e-FILE.

Executed on **March 17, 2022**, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Kady Pasley

NAME

K. Pasley

SIGNATURE



March 29, 2022

Via Fax: (916) 795-3972

Cheree Swedensky, Assistant to the Board
Executive Office
California Public Employees' Retirement System
PO Box 942701
Sacramento, CA 94229-2701

RE: PETITION FOR RECONSIDERATION, REFERENCE NO. 2021-0645, PAUL ZEHNDER

Members of the CalPERS Board of Retirement:

The purpose of this letter is to make a petition for reconsideration to the board for review of Holiday Pay for Paul Zehnder.

Paul Zehnder retired from the District in December 31, 2020. Zehnder's employment agreement with the District included the following provisions regarding Holiday Pay:

Holiday Pay. Due to the nature of work performed by Employee, it is not possible for Employee to observe recognized holidays as they occur. Employee shall receive holiday pay for District recognized holidays as set forth in Appendix D, at a rate of One Thousand One Hundred and Six Dollars (\$1,106) per month to ensure that Employee is on-call during all recognized holidays.

According to CalPERS proposed decision dated January 21, 2022, on December 20, 2021, during the Office of Administrative Hearing for Paul Zehnder, Eric Herrera, Compensation Compliance & Review Analyst with the CalPERS Employer Account Management Division, testified the following:

"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." (Attachment B, Page 7, ¶ 16.)

Additionally, Herrera testified before Administrative Law Judge Tiffany L. King on December 20, 2021, that the District may consider amending the holiday pay language in the existing contract retroactively to ensure it is special compensation and thus compensable earnings. (Attachment B, Page 9, ¶ 19.)

Petition for Reconsideration, Ref. No. 2021-0645

March 29, 2022

Page 2 of 2

On February 16, 2022, the District's Board of Directors adopted a First Amendment to the employment contract for Paul Zehnder. This language now reflects the following as attached:

Holidays. Due to the nature of work performed by Employee, it is not possible for Employee to observe recognized holidays, as they occur. Employee shall receive holiday pay for District recognized holidays, as set forth in Appendix "A", at a rate of One Thousand One Hundred and Six Dollars (\$1,106) per month.

The Cosumnes Community Services District requests that the CalPERS Board of Retirement reconsider its decision to reject Holiday Pay as special compensation due to the amendment of Zehnder's contractual language.



MARISA GUERRERO
DIRECTOR OF HUMAN RESOURCES

Attachment A: Contract Amendment

Attachment B: OAH No. 2021100257 Proposed Decision

cc: Sigrid Asmundson, District Counsel
Mathew G. Jacobs, General Counsel
Personnel file

**FIRST AMENDMENT TO
EMPLOYMENT CONTRACT BETWEEN
PAUL ZEHNDER AND
THE COSUMNES COMMUNITY SERVICES DISTRICT**

This First Amendment to Employment Contract (“**First Amendment**”) is dated as of February 16, 2022 (“**Effective Date**”), and is entered into by and between the Cosumnes Community Services District (“**District**”) and Paul Zehnder (“**Employee**”) with reference to the following recitals of fact:

RECITALS

WHEREAS, District and Employee (collectively referred to as the “**Parties**”) entered into that certain Employment Contract, dated June 19, 2019, for the purpose of employing Employee in the position of Deputy Fire Chief for the District (the “**Contract**”).

WHEREAS, the Contract sets forth the terms and conditions for Employee’s employment as Deputy Fire Chief for the District.

WHEREAS, the Parties now desire to enter into this First Amendment to clarify Employee’s duties on scheduled holidays.

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, DISTRICT AND EMPLOYEE AGREE AS FOLLOWS:

1. Section VIII.F is hereby amended in its entirety as follows:

Holidays. Due to the nature of work performed by Employee, it is not possible for Employee to observe recognized holidays as they occur. Employee shall receive holiday pay for District recognized holidays, as set forth in Appendix “A”, at a rate of One Thousand One Hundred and Six Dollars (\$1,106) per month.

2. Provisions of Contract to Remain in Full Force and Effect. Except as otherwise specifically set forth in this First Amendment, the provisions of the Contract shall remain in full force and effect.

3. Pensionable Compensation. The District makes no assertion or guarantee as to whether the compensation set forth herein is pensionable compensation.

4. Effective Date of First Amendment This First Amendment shall become effective on the Effective Date; provided, however, that it is approved by the Board and is executed by both Parties.

[Signatures on following page]

IN WITNESS WHEREOF, the Parties hereto have duly approved and executed this First Amendment on February 16, 2022.

COSUMNES COMMUNITY SERVICES DISTRICT

By: _____
JOSHUA GREEN
GENERAL MANAGER

Date: February 16, 2022

ACCEPTANCE:

I hereby accept the terms and conditions of this First Amendment and agree to comply with the conditions thereof and to fulfill all of the duties set forth herein and in the Contract.

PAUL ZEHNDER

Date: February 16, 2022

1 BOARD OF ADMINISTRATION
2 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

3 In the Matter of the Appeal Regarding) CASE NO. 2021-0645
4 Final Compensation Calculation of:) OAH NO. 2021100257
5 PAUL ZEHNDER,)
6 Respondent,) **DECISION**
7 and)
8 COSUMNES COMMUNITY SERVICES)
9 DISTRICT,)
Respondent.)

10 RESOLVED, that the Board of Administration of the California Public
11 Employees' Retirement System hereby adopts as its own Decision the Proposed
12 Decision dated January 21, 2022, concerning the appeal of Paul Zehnder;
13 RESOLVED FURTHER that this Board Decision shall be effective 30 days following
14 mailing of the Decision.

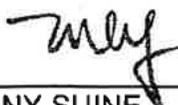
15 * * * * *

16 I hereby certify that on March 16, 2022, the Board of Administration,
17 California Public Employees' Retirement System, made and adopted the foregoing
18 Resolution, and I certify further that the attached copy of the Administrative Law
19 Judge's Proposed Decision is a true copy of the Decision adopted by said Board of
20 Administration in said matter.

21 BOARD OF ADMINISTRATION, CALIFORNIA PUBLIC
22 EMPLOYEES' RETIREMENT SYSTEM
23 MARCIE FROST
CHIEF EXECUTIVE OFFICER

24 Dated: 3/17/2022

BY


25 ANTHONY SUINE
Deputy Executive Officer
Customer Services and Support

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:

Section VIII. EXPENSE REIMBURSEMENT

[¶] . . . [¶]

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, subs. (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

//

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

PROOF OF SERVICE

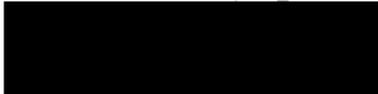
I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On **March 17, 2022**, I served the foregoing document described as:

DECISION - In the Matter of the Appeal Regarding Final Compensation Calculation of PAUL F. ZEHNDER, Respondent, and COSUMNES COMMUNITY SERVICES DISTRICT, Respondent. Case No. 2021-0645; OAH No. 2021100257.

on interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Paul Zehnder



**Office of Administrative Hearings
2349 Gateway Oaks Dr., Ste. 200
Sacramento, CA 95833-4231
(Via OAH SECURE e-FILE)**

**Personnel Officer
Cosumnes Community Services District
8820 Elk Grove, Blvd.
Elk Grove, CA 95624**

- [**XX**] **BY OVERNIGHT DELIVERY:** I caused such envelope(s) to be delivered to the above address(es) within 24 hours by overnight delivery service.
- [**XX**] **BY ELECTRONIC TRANSMISSION:** I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.
- [**XX**] **BY ELECTRONIC FILING:** I caused such documents to be e-filed via OAH SECURE e-FILE.

Executed on **March 17, 2022**, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Kady Pasley

NAME

K. Pasley

SIGNATURE