Special Compensation Reportable to CalPERS is Limited by Law

Office of the Inspector General

Investigation Results

The laws regarding special compensation are complex. The California Public Employees Retirement Law (PERL) limits the reporting of special compensation for Classic CalPERS Members to that specified in Government Code 20636(c) and California Code of Regulations 571. An employee learned of this limitation after believing BART had said the special compensation would be reported to CalPERS for consideration in the employee's pension. While there was one email from Human Resources with information that could be interpreted to mean the special compensation would be reported to CalPERS, it was not a conclusive statement. Most of the available evidence was limited to testimonial, with both the employee and Human Resources having different understandings. Ultimately, Human Resources' interpretation that the special compensation is not reportable to CalPERS agreed with the law. BART management approved the temporary special compensation based on a cost-reimbursement agreement with the Tri-Valley – San Joaquin Valley Regional Rail Authority (TVSJVRRA) to reimburse BART for the employee's salary and benefit costs for providing services to TVSJVRRA. The agreement was driven by the BART Board of Directors' instructions to BART staff to collaborate with TVSJVRRA on its proposed Valley Link project, a major transportation project impacting BART. However, there is nothing formal in writing that explains to the employee the unique terms of the special assignment and special compensation.

Recommendation

Develop a template for use in providing a written agreement between BART and employees that explains the terms of special assignments and special compensation, including if the special compensation is reportable to CalPERS for pension purposes, and use it when such circumstances arise.

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Providing independent oversight of the District's use of revenue.

Background and Investigation

California Public Employees' Retirement Law (PERL) limits the reporting of special compensation for Classic CalPERS Members to that which is specified in Government Code 20636(c) and California Code of Regulations 571. Multiple subsections of those laws must be true in order for special compensation to be reportable to CalPERS for use in calculating a Classic Member's retirement benefit. Of significance to this investigation is that the special compensation must be:

- Received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.
- Defined in a written labor policy approved by the governing board.
- One of the special compensation categories listed in the law and meeting that definition.
- Available to all members in the group or class.

Government Code 20636(c) and California Code of Regulations 571 do not restrict agencies from offering employees other forms of special compensation. They only restrict agencies from reporting to CalPERS special compensation that does not meet the legal criteria.

BART management agreed to pay an employee special compensation for work on the Valley Link project, which they deemed to be a temporary special assignment. The Valley Link Project is the Tri-Valley – San Joaquin Valley Regional Rail Authority's (TVSJVRRA) proposed new rail system. This collaboration came at the direction of the BART Board of Directors because the project will impact BART facilities and services. The arrangement is supported by a cost-reimbursement agreement under which the TVSJVRRA reimburses BART for the BART employee's salary and fringe benefits for time working on the project. The agreement is set to expire on June 30, 2021.

The Office of the Inspector General received an allegation that BART failed to report special compensation to CalPERS as required. We considered this a potential violation of law and possible abuse of position and launched an investigation into the matter.

Key Findings

The special compensation received by the employee for work on the Valley Link Project does not meet the PERL criteria for reporting to CalPERS (Appendix A). The terms of the special compensation:

- Are not defined in a BART labor policy.
- Did not fall within the parameters of any of the listed PERL categories.
- Are not available to all members in a group or class.

The special compensation did not meet the necessary criteria due to the unique nature of the special assignment and cost-reimbursement agreement with TVSJVRRA. However, the employee believed the special compensation would be reported to CalPERS based on conversations with Human Resources. Human Resources, however, recalls being clear that the special compensation did not qualify for reporting to CalPERS.

In one email, Human Resources said that "reportable special compensation" will be sent to CalPERS when the employee retires. Human Resources did not specifically say that the special compensation for the Valley Link project would be reported to CalPERS. The employee believed the comment was specific to the Valley Link project. Both perceptions are valid in context with what was discussed verbally, making it nonconclusive as to intent.

The issue was further complicated by the use of the terminology Temporary Upgrade Pay (TUP) to account for and control the use of the special compensation. TUP is a category of special compensation that is reportable to CalPERS. However, the TUP must agree with PERL's description in order for it to reportable, which it did not. Human Resources categorized the special compensation as TUP to fit within their existing pay system. Use of the pay module is not meant to imply that all special compensation tracked in it meets the definition of Temporary Upgrade Pay, per PERL.

The misunderstandings could have been avoided by having a written agreement between BART and the employee that defined the terms of the special assignment and the special compensation.

BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG FINDINGS & RECOMMENDATIONS		
Report Title: Special Compensation Reportable to CalPERS is Limited by Law		
Management Response: Agree with report.		
1	**Recommendation:**	Develop a template for use in providing a written agreement between BART and employees that explains the terms of special assignments and special compensation, including if the special compensation is reportable to CalPERS for pension purposes, and use it when such circumstances arise.
	Responsible Department:	Human Resources
	Implementation Date:	April 1, 2021
	Corrective Action Plan:	Human Resources will revise the auto-generated email that is received by employees selected for temporary upgrades or special assignments to indicate whether or not the pay associated with the assignment is reportable to CalPERS. Additionally, we will institute a standard form offer letter to all prospective candidates of special assignments which will contain the specific details of the temporary assignment, including whether or not the compensation received during the assignment is reportable to CalPERS.

Appendix A – Assessment of Whether Special Compensation is Pensionable

The following information provides more specific detail as to why the special compensation subject to this investigation does not qualify as pensionable, per the California Public Employees' Retirement Law (PERL). Because the employee who received the special compensation is a CalPERS classic member, we focused our analysis on the provisions of PERL applicable to those members. The specific provisions regarding special compensation are Government Code Sections 20636(c) & 20636.1(c) and California Code of Regulations Section 571.

Further, the employee who received the special compensation is not represented by a collective bargaining group (union). Therefore, we assessed the employee's special compensation against the Non-Rep Handbook, which covers labor policies such as special pay applicable to non-represented employees. We begin our analysis with the Non-Rep Handbook because it is necessary to understand those provisions in determining whether the special compensation is pensionable.

Non-Rep Handbook

The Non-Rep Handbook includes a section for Temporary Pay/Premium Pay. We focused our analysis on that section because Human Resources used its Temporary Upgrade Pay module to create a record of the pay authorization and place limits on when the special compensation would be applied to the employee's time. That section says "*Non-Represented employees from time to time receive temporary assignments in which they are to perform the duties regularly assigned to a higher classification,"* and *"Employees in an approved temporary upgrade assignment will be compensated at five percent (5%) above their base pay rate after the forty-fifth (45) consecutive day of work in the higher classification.*" The employee's special compensation did not agree with those provisions of the Non-Rep Handbook.

First, the employee was not placed in a temporary assignment to perform duties regularly assigned to a higher classification. The employee's services were on loan to the Tri-Valley—San Joaquin Valley Regional Rail Authority (TVSJVRRA) for work on their Valley Link project under a cost-reimbursement agreement between BART and the TVSJVRRA. That agreement requires TVSJVRRA to reimburse BART for *"certain staff, consultant, legal, and other approved costs expended by BART reviewing the Valley Link Project."* Reimbursement covers both salary and fringe benefits for time worked on the project. Per that agreement, review activities included *"but were not limited to, (1) planning and environmental review and support; (2) preliminary engineering review and support; (3) interagency agreements development, review and support; (4) procurement review and support; and (5) attendance at meetings and participation in conference calls related to the Valley Link Project."* The employee received the assignment to work for the TVSJVRRA on their Valley Link project based on the employee's experience working on the eBART extension to Antioch. The employee did that work while in the employee's current job classification. Per BART management, that experience was relevant to the Valley Link project. The employee also said that the employee was asked to work on the Valley Link project due to the employee's experience on the eBART extension.

Second, the employee first negotiated a 15 percent pay upgrade and then an additional 9 percent pay upgrade, for a total of 24 percent above the employee's base pay for the employee's time worked on the Valley Link project for the TVSJVRRA. Those percentages exceed the five percent (5%) additional compensation allowed for Temporary Upgrade Pay, per the Non-Rep Handbook.

We reviewed other provisions of the Non-Rep Handbook that discussed additional pay. Those include Shift Differential, Standby Pay/Call Back, and Lead Worker/lnstructor Premium pay. None aligned with the special compensation subject to this investigation.

Government Code Sections: 20636(c) & 20636.1(c)

Government Code (GC) Section 20636(c) specifies what constitutes special compensation for the purpose of reporting it to CalPERS. Of significance is this subsection:

> GC Subsection 20636(c)(2) says, *"Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate."* The additional pay for the employee's special assignment does not meet this definition of special compensation. As noted above, the employee's pay does not align with the Non-Rep Handbook, which outlines the labor policies regarding pay for non-represented employees. The special pay is specific to the employee, not other non-represented employees, or employees within the same job classification.

We reviewed Section 20636.1(c) and determined it was not relevant to our analysis because it applies to school members.

California Code of Regulations Section 571

CCR Section 571 specifies what constitutes special compensation for the purpose of reporting it to CalPERS. Of significance is this subsection:

> CCR Section 571 (a) says, *"(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement:"* Of significance in that paragraph is that the special compensation must be contained in a written labor policy or agreement. As discussed above, the special compensation received by the employee was not defined in a labor policy.

CCR Section 571(a) defines special compensation that contracting agencies must report to CalPERS. In the list are the definitions for Premium Pay, which encompasses Temporary Upgrade Pay, and Special Assignment Pay. Temporary Upgrade Pay is the terminology Human Resources used to apply the employee's special compensation. Special Assignment is the terminology BART management used to describe the assignment. Those definitions are as follows:

CCR Section 571(a)(3): *"PREMIUM PAY. Temporary Upgrade Pay - Compensation to employees who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration."* Of significance in that paragraph is that the pay is for working in an upgraded position/classification. As discussed above, the employee was not asked to work in an upgraded position/classification for BART. The employee was working on loan to the TVSJVRRA to work on their Valley Link project. As such, the additional pay given to the employee does not meet the requirements of Temporary Upgrade Pay, per subsection CCR 571(a)(3).

CCR Section 571(a)(4) defines a large number of premiums that qualify as Special Assignment Pay. None meets the description of the assignment for the employee's work on the Valley Link project. The similarity for the majority of those premiums is that it is for work that employees could typically be required to perform during their normal course of duties. For example, employees could potentially receive a bilingual premium if they are *"routinely and consistently assigned to positions requiring communication skills in languages other than English."*

CCR Section 571(b) says, *"The Board has determined that all items of special compensation listed in subsection (a) are:*

(1) Contained in a written labor policy or agreement as defined at Government Code section 20049, provided that the document:

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

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

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

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

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

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

(2) Available to all members in the group or class;

(3) Part of normally required duties;

(4) Performed during normal hours of employment;

(5) Paid periodically as earned;

(6) Historically consistent with prior payments for the job classification;

(7) Not paid exclusively in the final compensation period;

(8) Not final settlement pay; and

(9) Not creating an unfunded liability over and above PERS' actuarial assumptions."

Of significance in CCR Section 571(b) are these factors:

The special compensation must be contained in a labor policy or agreement that *"Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;"* and *"Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website."* As noted above, the employee's pay was not defined in the Non-Rep Handbook. Additionally, the pay was not provided on any forum that would allow for public review.

Further, CCR Section 571(b)(2) requires that the special compensation is *"available to all members in the group or class."* This factor is not true with the special compensation subject to this investigation. The employee's additional pay of 24 percent was specific to the employee based on the employee's personal negotiations with management.

The following provision further clarifies why the additional pay does not quality as special compensation that is reportable to CalPERs:

CCR 571(d) says, *"If an items (sic) of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual."* Of significance of that subsection is that if the special compensation does not comply with all the provisions of CCR 571, then it is not pensionable. As noted throughout this analysis, the special compensation subject to this assessment does not comply with all the required provisions. It is, therefore, not pensionable.