



# Board of Retirement Regular Meeting

## Sacramento County Employees' Retirement System

Agenda Item 16

**MEETING DATE:** October 21, 2020

**SUBJECT:** Amendments to Final Compensation Review Policy  
Pursuant to Board Order of September 16, 2020

**SUBMITTED FOR:** \_\_\_ Consent        X   Deliberation and Action      \_\_\_ Receive and File

### **RECOMMENDATION**

Staff recommends the Board approve the attached amendments to SCERS' *Final Compensation Review Policy* (Policy No. 024). The proposed amendments exclude certain pay items from the "compensation earnable" of members, consistent with a recent decision of the California Supreme Court and the Board's Order of September 16, 2020. In addition, Staff recommends the Board rescind *Compensation Earnable Policy for Overtime, CTO-Expired, and CTO-Over-Max* (Policy No. 25), the substance of which has been incorporated into the proposed amendments to the *Final Compensation Review Policy*.

### **PURPOSE**

This item supports the Strategic Management Plan by providing transparent communication to stakeholders regarding the standards by which SCERS administers the retirement plan.

### **BACKGROUND**

The California Public Employees' Pension Reform Act of 2013 ("PEPRA") made certain amendments to the County Employees Retirement Law of 1937, including to the definition of "compensation earnable." Specifically, Government Code section 31461(b) states that compensation earnable does not include . . .

- (2) Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.
- (3) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.

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That new definition of compensation earnable became effective on January 1, 2013.

On June 30, 2020, the California Supreme Court issued a landmark decision affirming the constitutionality of Section 31461(b) as applied to Legacy members. See *Alameda County Deputy Sheriff's Assoc. et al., v. Alameda County Employees' Retirement Assn.*, 9 Cal.5th 1032 (2020) ("*Alameda*"). Pursuant to the *Alameda* decision, on September 16, 2020, the Board issued an Order calling for five pay items to be excluded from the "compensation earnable" of members that retired, or will retire, after January 1, 2013. See Attachment A at ¶¶ 4, 8.a. In addition, the Order calls for Staff to draft conforming amendments to two SCERS policies: *Final Compensation Review Policy* (Policy No. 024), and *Compensation Earnable Policy for Overtime, CTO-Expired, and CTO-Over-Max* (Policy No. 25). See Attachment A at ¶¶ 7, 8.d.

## **DISCUSSION**

Pursuant to the Order, attached as Attachment B are conforming amendments to the *Final Compensation Review Policy* for the Board's review. Specifically, the proposed amendments exclude the follow pay items from the compensation earnable of Legacy members who retired, or will retire, on or after January 1, 2013:

- Standby pay
- Animal allowance (for both Legacy members and PEPRA members)
- Insurance subsidy offset
- Vacation cash-ins in excess of the maximum permitted in a single calendar year (or fiscal year, as applicable) under the member's labor agreement or employer policy, resulting from a designated final compensation period that straddles two calendar years (or fiscal years, as applicable)
- Any portion of allowances or other differentials earned as a result of overtime, CTO-expired, or CTO-over-max hours.

The amendments also provide new "descriptions" of standby pay, animal allowance, and vacation cash-in. To be clear, those new descriptions are intended to be clarifying only and do not introduce any substantive changes or modifications.

In addition, the proposed amendments contain new language concerning the final compensation review process itself. Specifically, the amendments clarify that the member and the employer bear the burden of proof when a question arises regarding whether a pay element was provided for impermissible pension-enhancement purposes. Allocating the burden in this way is fair and practical, as it is the member and not SCERS who has access to the relevant information and documents.

Finally, the proposed amendments clarify that SCERS members are subject to the final compensation review process even when retiring from a reciprocal retirement system. Because SCERS assumes pension liabilities based on the member's final average salary from reciprocal system employers, SCERS has implied powers under Sections 31542(a) and 31461(b) to exclude impermissible pay elements from that salary. This is true even if the impermissible pay element was deemed acceptable by the reciprocal system.

**ATTACHMENTS**

- A- Board of Retirement Order, September 16, 2020
- B- Final Compensation Review Policy (with Amendments in Tracked Changes)
- C- Final Compensation Review Policy (clean version)

Prepared By:

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Stephen Lau  
General Counsel

Reviewed By:

/S/

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Eric Stern  
Chief Executive Officer



## **Retirement Board Order**

### **Sacramento County Employees' Retirement System**

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**Before the Board of Retirement**  
**September 16, 2020**

**MOTION:**

**Implementation of Supreme Court Decision**

THE BOARD OF RETIREMENT hereby finds, declares, and orders as follows:

1. The California Public Employees' Pension Reform Act of 2013 ("PEPRA") made certain amendments to the County Employees Retirement Law of 1937, including to the definition of "compensation earnable" in Government Code section 31461. Those amendments became effective on January 1, 2013. Following the enactment of PEPRA, multiple lawsuits commenced challenging the constitutionality of those amendments.
2. On July 30, 2020, the California Supreme Court issued a decision rejecting those constitutional challenges. *Alameda County Deputy Sheriff's Assoc. et al., v. Alameda County Employees' Retirement Assn.*, 9 Cal.5th 1032 (2020) ("*Alameda*"). Specifically, the Court held that the PEPRA amendments to Section 31461 were constitutional and not in violation of the vested rights of Legacy members. The Court further held that the amendments to Section 31461 must be applied even if contrary to the terms of pre-existing settlement agreements. The Court also clarified the scope and meaning of the various "compensation earnable" exclusions set forth in Section 31461.
3. With the *Alameda* decision having clarified the constitutionality and meaning of Section 31461, SCERS must now take steps to comply with that decision. In particular, SCERS must now bring itself into prospective and retroactive compliance with Section 31461 by excluding certain pay items from the compensation earnable and pensionable compensation of SCERS members.

4. For all SCERS Legacy members who retired, or will retire, on and after January 1, 2013, the following categories of pay items are hereby excluded from their compensation earnable:

- Standby Pay
- Animal Allowance
- Insurance Subsidy Offset
- Vacation cash-in in excess of the maximum permitted in a single calendar year (or fiscal year, as applicable) under the member's labor agreement or employer policy, resulting from a designated final compensation period that straddles two calendar years (or fiscal years, as applicable).

In addition, Animal Allowance is hereby excluded from the pensionable compensation of SCERS PEPRA members. (The exclusions identified in this Paragraph 4 shall be referred to collectively as the "New Exclusions.")

5. For Active and Deferred Members who will retire on or after January 1, 2013, Staff shall:

a. Direct Participating Employers to cease collecting member and employer contributions on New Exclusions as of the August 31, 2020 payroll. Since that directive cannot logistically be implemented on a timely basis, overpaid contributions from August 31 forward should be refunded to such active members as soon as practical.

b. Work with Participating Employers to return contributions to active members plus interest earnings, consistent with the Error Correction Policy, that were collected on New Exclusions from January 1, 2013 forward.

c. Return contributions to deferred members plus interest earnings, consistent with the Error Correction Policy, that were collected on New Exclusions from January 1, 2013 forward.

d. Provide a Notice of Correction to each affected member.

6. For Retired Members who retired on or after January 1, 2013, Staff shall:

a. Adjust retirement allowances for members who retired on or after January 1, 2013 to reflect the New Exclusions, beginning with the August 31, 2020 retiree payroll. (For the avoidance of doubt, this population includes members whose retirement occurs on or after January 1, 2013 but whose Final Compensation period wholly or partially predates January 1, 2013.)

b. With respect to benefit overpayments that occurred prior to the August 31, 2020 payroll, refrain from recouping those amounts from retirees unless ordered to do so by the Internal Revenue Service and/or a final, non-appealable, order of a court of competent jurisdiction; SCERS will correct the overpayments by reconciling employer contributions through the actuarial valuation process.

c. Recoup any benefit overpayments made on and after the August 31, 2020 payroll consistent with the Error Correction Policy.

d. Recognize that SCERS has over-collected member contributions on New Exclusions from January 1, 2013 forward. For the most part, no actual refund payments to this group will be necessary because overpaid benefits will offset refundable contributions and related interest earnings. However, SCERS will refund over-collected member contributions plus interest earnings, consistent with the Error Correction Policy, retroactive to January 1, 2013, to the extent the value of such exceeds the marginal increase in retirement allowances the member received from the New Exclusions.

e. Provide a Notice of Correction to each affected member.

7. Staff shall draft conforming amendments to the Final Compensation Review Policy for approval by the Board at a future meeting.

8. Regarding the Compensation Earnable Policy for Overtime, CTO-Expired, and CTO-Over-Max ("Overtime Policy"):

a. The effective date of the Overtime Policy is hereby revised from April 28, 2019 to January 1, 2013. Thus, any portion of allowances or other differentials earned as a result of overtime, CTO-expired or CTO-over-max hours must be excluded from compensation earnable and pensionable compensation calculations for retirements occurring on or after January 1, 2013. (For the avoidance of doubt, this population includes members whose retirement occurs on or after January 1, 2013 but whose Final Compensation period wholly or partially predates January 1, 2013.)

b. For members retiring on or after August 31, 2020, Staff shall adjust retirement allowances to reflect the new effective date of the Overtime Policy. For this group, Staff should also return contributions plus interest earnings, consistent with the Error Correction Policy, that were collected on differentials earned as a result of overtime, CTO-expired or CTO-over-max hours, from January 1, 2013 forward.

c. For members who retired between January 1, 2013 and August 30, 2020, Staff shall develop a plan for correcting, as applicable, (1) retirement allowances on a going forward basis, (2) past benefit overpayments, and (3) past contribution overpayments. Staff shall present that correction plan at a future Board meeting.

d. Staff shall draft conforming amendments to the Overtime Policy for approval by the Board at a future meeting.

9. This Order overrides and supersedes any provisions to the contrary in any SCERS policy in effect as of the date of this Order, including the Final Compensation Policy (Policy No. 024) and the Compensation Earnable Policy for Overtime, CTO-Expired, and CTO-Over-Max (Policy No. 25).

I HEREBY CERTIFY that the above order was passed and adopted on September 16, 2020 by the following vote of the Board of Retirement, to wit:

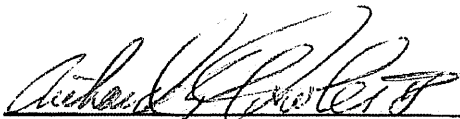
AYES: Fowler, DeVore, Diepenbrock, Gin, Comerchero, Petersen, Hoover, Lamera

NOES: None

ABSENT: Kelly

ABSTAIN: None

ALTERNATES (Present but not voting): O'Neil



Richard B. Fowler II  
Board President



Eric Stern  
Chief Executive Officer and  
Board Secretary



# FINAL COMPENSATION REVIEW POLICY

## PURPOSE

This policy reviews the authorities and standards that Staff relies on to assess the final average salary of a retiring member and exclude any elements of compensation that are paid to enhance a member's retirement, as required by the California Public Employees' Pension Reform Act of 2013 (PEPRA).

## OBJECTIVE

This policy affirms the administrative process devised and applied by staff in response to Government Code § 31542, which PEPRA added to the County Employees Retirement Law of 1937. Section 31452 requires the Board to (1) establish procedures to assess the elements of compensation considered in individual retirement calculations and (2) disregard any element that is found to enhance the member's retirement benefit before finalizing the individual payment amount:

The board shall establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit. If the board determines that compensation was paid to enhance a member's benefit, the member or the employer may present evidence that the compensation was not paid for that purpose. Upon receipt of sufficient evidence to the contrary, a board may reverse its determination that compensation was paid to enhance a member's retirement benefits.

[Government Code § 31542(a)]

## POLICY

Members whose retirement effective dates occur on and after January 1, 2013 have their payroll activity reviewed when Final Compensation is calculated. ~~Pursuant to Government Code sections 31542(a) and 31461(b), if a member's Final Compensation increase exceeds the wage growth assumption for SCERS by a standard factor, then the Staff shall review individual pay elements are reviewed for compensation "paid to enhance a member's retirement benefit." compliance with Section 31452.~~ If Staff determines that any pay elements or elements have been paid to enhance the member's retirement benefit, then Staff recommends exclusion of the element(s) from Final Compensation and submits the matter to the Board of Retirement for final resolution. Members retiring from a reciprocal retirement system shall also be subject to this review process. Staff shall review for and exclude impermissible pay elements even if paid by an employer of a reciprocal retirement system and accepted by such reciprocal system.



## APPLICATION

### Retirement-Eligible Compensation

For those members who enrolled in a California public retirement system prior to January 1, 2013 (also known as legacy members), compensation can include base salary plus other differentials, allowances, incentives and other pay elements, depending on the member's job classification, grade or status, and possibly, the member's participation in a given bargaining unit.

As a general rule, a compensation element paid in cash in the normal course of regular employment is considered in the calculation of the legacy member's pension benefit. This includes payments received, while working, related to the cash-out of accrued vacation leave by members permitted to sell-back leave.

There are exceptions to this general rule, however, and some payments are not considered when calculating a pension, for example: (1) Payments for overtime; and (2) Payments made at and associated with the termination of employment ('terminal pay'). In addition, payments related to the cash-out of accrued leave in any year are limited to the amount of leave the member can accrue in one year.

For those members who enrolled in a California public retirement system on or after January 1, 2013 (also known as PEPRA or CalPEPRA members), compensation is generally limited to base salary.

A summary of the compensation or pay elements that are included in and excluded from Final Compensation is provided as appendices to this policy. The exclusions described in the appendices should be understood to also exclude any other compensation derived from or based on the same underlying activity. For example, the exclusion of standby pay should be understood to also exclude differential pay for standby time.

### Final Compensation Standard of Review

The review process mandated by PEPRA and addressed by this policy focuses on why a pay element is provided – that is, whether it is provided for the purpose of enhancing the member's retirement benefit. If an otherwise eligible pay element meets that criterion, then it is still to be paid to the member, but not considered for pension purposes.

A situation where a pay element may be excluded under the PEPRA standard would be where the compensation was previously provided in-kind or paid to a third party on behalf of the member, but converted to a cash payment to the member in the final average salary period – for example, if a member previously had a car provided by the employer but shifted to a cash car allowance, or if the employer previously paid a health insurance company for health care coverage for the member but the member subsequently opted to receive a cash-back payment instead.

Other examples where the PEPRA standard may result in a pay element being excluded

would be: (1) A one-time or ad hoc payment not given to similarly situated members in the same job classification or grade; or (2) Severance or separation pay received by the member prior to the termination of employment.

### Final Compensation Review Process

The Final Compensation review starts once SCERS receives a retirement application and occurs at the same time as many other tasks that are required to process the application.

All pay elements in the final average salary period undergo the required review. However, the scope of review corresponds to the degree to which compensation in the final average salary period exceeds the compensation prior to that period and/or the nature of the pay element(s) in question. A small increase in compensation in the final average salary period and/or common, widespread pay elements require less review. A larger increase in compensation or an unusual or isolated pay element requires more review.

In some cases, SCERS requires additional information to complete the assessment of a pay element. Depending on the item of concern, SCERS may request information from the employer, the member or both to reach a determination.

If SCERS determines there is evidence that a pay element may have been provided for the purpose of enhancing the applicant's retirement benefit, then the applicant and the employer are notified and given an opportunity to submit additional information to rebut that assessment. At all times, the applicant and the employer bear the burden of proving that a pay element was provided for permissible reasons and not for pension-enhancement, including the burden of providing documentary evidence. Take, for example, an applicant who previously accepted an in-kind benefit from an employer (e.g., a vehicle or health care coverage) and who opted in the final compensation period to accept a cash payment instead. Such an applicant must prove that a new, previously unavailable opportunity or other change in circumstances made the in-kind benefit unnecessary or otherwise inappropriate. As part of such proof, the member must provide comprehensive documentary evidence substantiating the claimed change in circumstances (including but not limited to an affidavit). SCERS reserves the right to consider any failure to provide such comprehensive evidence a failure to meet the burden of proof.

If it is still believed that the pay element is provided to enhance the applicant's retirement benefit, and the applicant chooses not to contest that decision, SCERS will exclude the pay element(s) in question and finalize the retirement benefit calculation. If the applicant chooses to contest the recommendation, then the matter will be presented to the SCERS Board for final determination on whether the pay element should be excluded from the calculation of the retirement benefit.

The SCERS Board will consider the matter in open session at the next scheduled SCERS Board Meeting. The retirement applicant and/or the employer will have an opportunity to submit additional written information, and the SCERS Board will make its determination on the written record.

If the SCERS Board determines that a pay element must be excluded from the Final Compensation used to calculate the retirement benefit, then the employer and the retirement

applicant will be so notified, and will have an opportunity to seek review of the decision by a court of law.

### Distribution of Initial Benefit Payment

The final compensation review process need not delay the first benefit payment. However, the amount of the first payment (and, if necessary, subsequent benefit payments) can be limited if the Final Compensation review process is not concluded (without issue) before the first payment is processed by SCERS.

The key factor in whether the amount of the first payment may be impacted by the Final Compensation review is the length of time between when the retirement application is submitted and the date of retirement. The earlier the retirement application is submitted relative to the retirement date, the more time there is to conduct the required Final Compensation review, and the greater the likelihood that the review will be completed by the time all the other necessary steps have been taken to issue the first benefit payment.

If there is insufficient time to complete the Final Compensation review prior to issuance of the first benefit payment, then a 'hold-back' amount based on the pay element(s) under review will be applied to the first benefit check, and if necessary, to subsequent benefit payments until a determination has been made regarding Final Compensation.

While the amount of a potential hold-back will vary, members should consider the possibility that initial (and possibly subsequent) benefit payments could be less than the benefit estimates they have received, and members should assess how the possibility of a reduced benefit could impact their decision to retire and/or the timing of submission of the retirement application relative to the date of retirement. SCERS will not review compensation elements and/or advise members whether particular pay elements might be excluded prior to the submission of a retirement application.

When necessary, benefit payments are adjusted after the review is completed. If all potential pay elements are included in Final Compensation, then subsequent benefit payments will reflect the higher benefit and include any retroactive amounts associated with the initial hold-back. If SCERS determines that a pay element must be excluded from Final Compensation, then the reduced benefit payment and the corresponding 'hold-back' will become permanent and final. If the retirement applicant or the employer elect to contest that decision in court, the benefit payments will continue to include the hold-back unless/until there is a final court ruling that the pay element be included in the retirement calculation.

## **BACKGROUND**

With the enactment of PEPRA, the Legislature effected significant changes and reforms for governmental defined benefit plans in California. Included among these changes was a recognition that retirement boards have both the authority and the obligation to monitor a wider range of employer activities than they have in the past.

The Final Compensation process reviewed in this policy arose from an implementation memo from the former Chief Executive Officer (which the Board of Retirement discussed

during their December 19, 2012 meeting) and was effected with the delivery of a subsequent memo regarding “Review of Final Compensation Pay Elements” (which the Board of Retirement discussed and approved during their February 20, 2013 meeting). Since that time, the guidance available to members and participating employers of SCERS has expanded to include a publication regarding “CalPEPRA and Final Compensation Review at SCERS” (which was last updated during the 2015 calendar year) and a Member Handbook for legacy members (which was released during the 2017 calendar year). This policy affirms and provides a consolidated document of the longstanding practice reflected in those materials.

## APPENDICES

- 1- Legacy Members (Entry Dates Before January 1, 2013)
- 2- PEPRA Members (Entry Dates After December 31, 2012)

## RESPONSIBILITIES

Executive Owner: Chief Benefits Officer

## POLICY HISTORY

Date	Description
<a href="#"><u>10-21-2020</u></a>	<a href="#"><u>Staff to recommend amendments conforming to Board Order of September 16, 2020</u></a>
10-17-2018	Board approved policy in revised format
2017 Calendar Year	<i>Member Handbook for Members Hired Before January 1, 2013, Appendix A: Summary of Pension–Eligible Pay Elements</i>
2017 Calendar Year	<i>Member Handbook for Members Hired Before January 1, 2013, p. 41: Final Compensation Review</i>
2015 Calendar Year	Updated Memo re “CalPEPRA and Final Compensation Review at SCERS”
08-19-2015	Board Materials for Agenda Item 17: Memo re “Proposed Amendment to the Final Compensation Review Process Mandated by CalPEPRA”
02-20-2013	Board Materials for Agenda Item 16: Memo re “Review of Final Compensation Pay Elements”
12-19-2012	Board Materials for Agenda Item 14: Memo re “Implementation of AB 340 and AB 197”

APPENDIX 1 -  
Legacy Members (Entry Dates Before January 1, 2013)

Earnings Type	Description	Included*	Excluded
Regular Earnings	Paid for hours worked	X	
One Time Bonus Payment	Payments normally made once a year as a result of bargaining	X	
Overtime - includes CTO Expired and CTO-over-max	Paid for hours worked in excess of normal work schedule; <b>includes the portion of differentials, allowances, or other incentives that include overtime, CTO-expired, and CTO-over-max</b>		X**
7/12 Work Shift	Paid for regular work schedule of 12 hours per day; 84 hours per bi-weekly pay period	X	
Extra-help wages	Paid to employees who are not regular (permanent) county employees		X
Holiday-in-lieu paid after 104.0 hours	Paid for hours over the maximum of 104.0	X	
Workers' Compensation Temporary Disability	Paid Workers' Compensation benefits integrated with existing leave balances for employees who have an accepted industrial injury and are temporarily disabled	X	
State Disability Integration	Paid State Disability benefits integrated with existing leave balances for employees who are temporarily disabled	X	
Shift Differential	Paid to employees working other than the day shift	X	
Standby Pay	Paid to employees assigned to remain on call <b>outside of normal working hours worked by persons in the same grade or class of positions</b> if the need arises for emergency work	X	X**
Food Allowance	Paid to employees hired or transferred into food service prior to July 1971 represented by Health Services Unit	X	
Terminal Pay – vacation, holiday in lieu, CTO, and leave payout	Accumulated leave balances paid to an employee upon separation from employment.		X
Special Pay Allowances	Additional pay for performing work considered to be out of or in addition to the class	X	
Incentive Pay Allowances	Additional pay for possession of educational degrees or required certificates	X	
Miscellaneous Allowances	Assignment differentials paid as a percentage of base pay	X	
Management Differential	Additional pay to managers in lieu of other benefits, i.e., tuition reimbursement	X	
Transcription Fees for court reporters	Paid to court reporters to transcribe their cases		X
Retirement Offset	Additional pay for certain employees in-lieu of the county paying ½ retirement contributions	X	
Leave Balance Usage (vacation, compensating time off (CTO), holiday in-lieu, sick leave, etc.)	Paid leave for authorized absence from work	X	

APPENDIX 1 -  
Legacy Members (Entry Dates Before January 1, 2013)

Earnings Type	Description	Included*	Excluded
Vacation Cash-In	<del>Additional pay for cashing in accrued vacation that does not exceed what may be earned in each 12-month period during the final compensation period</del> <b>Vacation cash-in in excess of the maximum permitted in a single calendar year (or fiscal year, as applicable) under the member's labor agreement or employer policy, resulting from a designated final compensation period that straddles two calendar years (or fiscal years, as applicable)</b>	✗	X**
Payoff Beyond Maximum Accrual	Additional pay for vacation or holiday-in-lieu hours over the maximum accrual	X	
Mental Health Retention	Paid to employees who work at the mental health facility	X	
Disability Pay	Additional pay that, when combined with Workers' Compensation Disability Pay, equals 50% of an employee's bi-weekly pay	X	
4850 Time Pay	Paid for up to one year, tax free, in lieu of temporary disability for Safety personnel in accordance with Labor Code Section 4850	X	
Clothing Allowance	Paid to employees for the cost of maintaining a uniform	X	
Equipment Allowance	Paid to reimburse employees who are required to provide their own equipment; i.e., court reporters	X	
Animal Allowance	<del>Paid to employees assigned as a canine handler for scheduled work of ten (10) hours per month for ordinary care and informal training</del> <b>Paid to employees for the ordinary care and informal training of canines in overtime or outside of regularly scheduled hours</b>	✗	X**
Insurance Subsidy	Cash payment of the amount of the county contribution towards health insurance over the premium, less the cost of social security	X	
Fair Labor Standards Act Adjustment	Differential paid when the value of overtime per FLSA guidelines is greater than that negotiated		X***
Insurance Subsidy Offset	An amount paid in January of each year to refund the social security reduction of the health insurance subsidy to employees who were at social security maximum	✗	X**
Auto Allowance	Payment for use of personal vehicle for county business	X	

\* Compensation can be excluded if: (a) Board of Retirement determines compensation had been paid to enhance retirement benefits, (b) compensation had previously been provided in kind and converted to cash payment in the final compensation period; (c) any one-time or ad-hoc payment made to a member, but not to similarly situated members in the member's grade or class, and (d) any payment for unused leave balances that exceed what may be earned in each 12-month period during the final compensation period.

\*\* **Effective for all Legacy members who retired, or will retire, on and after January 1, 2013, pursuant to Government Code section 31461(b)(3) and *Alameda County Deputy Sheriff's Association, et al. v. Alameda County Employees' Retirement Association, et al.*, 9 Cal.5th 1032 (2020)**

APPENDIX 1 -  
Legacy Members (Entry Dates Before January 1, 2013)

Earnings Type	Description	Included*	Excluded
<p>*** Per prior, written agreement, one exception has been established to the standard exclusion of the pay element reserved for FLSA adjustments. That exception is the additional "half rate" payable for 12 hours of contractual overtime to members who work 24-hour schedules.</p>			

APPENDIX 2 -  
PEPRA Members (Entry Dates After December 31, 2012)

Earnings Type	Description	Included*	Excluded
Regular Earnings	Paid for hours worked	X	
7/12 Work Shift	Paid for regular work schedule of 12 hours per day; 84 hours per bi-weekly pay period	X	
Workers' Compensation Temporary Disability	Paid Workers' Compensation benefits integrated with existing leave balances for employees who have an accepted industrial injury and are temporarily disabled	X	
State Disability Integration	Paid State Disability benefits integrated with existing leave balances for employees who are temporarily disabled	X	
Leave Balance Usage (vacation, compensating time off (CTO), holiday in-lieu, sick leave, etc.)	Paid leave for authorized absence from work	X	
Disability Pay	Additional pay that, when combined with Workers' Compensation Disability Pay, equals 50% of an employee's bi-weekly pay	X	
4850 Time Pay	Paid for up to one year, tax free, in lieu of temporary disability for Safety personnel in accordance with Labor Code Section 4850	X	
Animal Allowance	<del>Paid to employees assigned as a canine handler for scheduled work of ten (10) hours per month for ordinary care and informal training</del> <b>Paid to employees for the ordinary care and informal training of canines in overtime or outside of regularly scheduled hours</b>	X	X**
One Time Bonus Payment	Payments normally made once a year as a result of bargaining		X
Overtime - includes CTO Expired and CTO-over-max	Paid for hours worked in excess of normal work schedule ; <b>includes the portion of differentials, allowances, or other incentives that include overtime, CTO-expired, and CTO-over-max</b>		X
Extra-help wages	Paid to employees who are not regular (permanent) county employees		X
Holiday-in-lieu paid after 104.0 hours	Paid for hours over the maximum of 104.0		X
Shift Differential	Paid to employees working other than the day shift		X
Standby Pay	Paid to employees assigned to remain on call <b>outside of normal working hours worked by persons in the same grade or class of positions</b> if the need arises for emergency work		X
Food Allowance	Paid to employees hired or transferred into food service prior to July 1971 represented by Health Services Unit		X
Terminal Pay – vacation, holiday in lieu, CTO, and leave payout	Accumulated leave balances paid to an employee upon separation from employment.		X
Special Pay Allowances	Additional pay for performing work considered to be out of or in addition to the class		X
Incentive Pay Allowances	Additional pay for possession of educational degrees or required certificates		X



APPENDIX 2 -  
PEPRA Members (Entry Dates After December 31, 2012)

Earnings Type	Description	Included*	Excluded
Miscellaneous Allowances	Assignment differentials paid as a percentage of base pay		X
Management Differential	Additional pay to managers in lieu of other benefits, i.e., tuition reimbursement		X
Transcription Fees for court reporters	Paid to court reporters to transcribe their cases		X
Retirement Offset	Additional pay for certain employees in-lieu of the county paying ½ retirement contributions		X
Vacation Cash-In	<del>Additional pay for cashing in accrued vacation that does not exceed what may be earned in each 12-month period during the final compensation period.</del> <b>Vacation cash-in in excess of the maximum permitted in a single calendar year (or fiscal year, as applicable) under the member's labor agreement or employer policy, resulting from a designated final compensation period that straddles two calendar years (or fiscal years, as applicable)</b>		X
Payoff Beyond Maximum Accrual	Additional pay for vacation or holiday-in-lieu hours over the maximum accrual		X
Mental Health Retention	Paid to employees who work at the mental health facility		X
Clothing Allowance	Paid to employees for the cost of maintaining a uniform		X
Equipment Allowance	Paid to reimburse employees who are required to provide their own equipment; i.e., court reporters		X
Insurance Subsidy	Cash payment of the amount of the county contribution towards health insurance over the premium, less the cost of social security		X
Fair Labor Standards Act Adjustment	Differential paid when the value of overtime per FLSA guidelines is greater than that negotiated		X***
Insurance Subsidy Offset	An amount paid in January of each year to refund the social security reduction of the health insurance subsidy to employees who were at social security maximum		X
Auto Allowance	Payment for use of personal vehicle for county business		X

\* Compensation can be excluded if: (a) Board of Retirement determines compensation had been paid to enhance retirement benefits, (b) compensation had previously been provided in kind and converted to cash payment in the final compensation period; (c) any one-time or ad-hoc payment made to a member, but not to similarly situated members in the member's grade or class, and (d) any payment for unused leave balances that exceed what may be earned in each 12-month period during the final compensation period.

\*\* **Effective for all PEPRA members who retired, or will retire, on and after January 1, 2013, pursuant to Government Code section 31461(b)(3) and *Alameda County Deputy Sheriff's Association, et al. v. Alameda County Employees' Retirement Association, et al.*, 9 Cal.5th 1032 (2020)**

\*\*\* Per prior, written agreement, one exception has been established to the standard exclusion of the pay element reserved for FLSA adjustments. That exception is the additional "half rate" payable for 12 hours of contractual overtime to members who work 24-hour schedules.



# FINAL COMPENSATION REVIEW POLICY

## PURPOSE

This policy reviews the authorities and standards that Staff relies on to assess the final average salary of a retiring member and exclude any elements of compensation that are paid to enhance a member's retirement, as required by the California Public Employees' Pension Reform Act of 2013 (PEPRA).

## OBJECTIVE

This policy affirms the administrative process devised and applied by staff in response to Government Code § 31542, which PEPRA added to the County Employees Retirement Law of 1937. Section 31452 requires the Board to (1) establish procedures to assess the elements of compensation considered in individual retirement calculations and (2) disregard any element that is found to enhance the member's retirement benefit before finalizing the individual payment amount:

The board shall establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit. If the board determines that compensation was paid to enhance a member's benefit, the member or the employer may present evidence that the compensation was not paid for that purpose. Upon receipt of sufficient evidence to the contrary, a board may reverse its determination that compensation was paid to enhance a member's retirement benefits.

[Government Code § 31542(a)]

## POLICY

Members whose retirement effective dates occur on and after January 1, 2013 have their payroll activity reviewed when Final Compensation is calculated. Pursuant to Government Code sections 31542(a) and 31461(b), Staff shall review individual pay elements for compensation "paid to enhance a member's retirement benefit." . If Staff determines that any pay elements or elements have been paid to enhance the member's retirement benefit, then Staff recommends exclusion of the element(s) from Final Compensation and submits the matter to the Board of Retirement for final resolution. Members retiring from a reciprocal retirement system shall also be subject to this review process. Staff shall review for and exclude impermissible pay elements even if paid by an employer of a reciprocal retirement system and accepted by such reciprocal system.

## APPLICATION

### Retirement-Eligible Compensation

For those members who enrolled in a California public retirement system prior to January 1, 2013 (also known as legacy members), compensation can include base salary plus other differentials, allowances, incentives and other pay elements, depending on the member's job classification, grade or status, and possibly, the member's participation in a given bargaining unit.

As a general rule, a compensation element paid in cash in the normal course of regular employment is considered in the calculation of the legacy member's pension benefit. This includes payments received, while working, related to the cash-out of accrued vacation leave by members permitted to sell-back leave.

There are exceptions to this general rule, however, and some payments are not considered when calculating a pension, for example: (1) Payments for overtime; and (2) Payments made at and associated with the termination of employment ('terminal pay'). In addition, payments related to the cash-out of accrued leave in any year are limited to the amount of leave the member can accrue in one year.

For those members who enrolled in a California public retirement system on or after January 1, 2013 (also known as PEPRA or CalPEPRA members), compensation is generally limited to base salary.

A summary of the compensation or pay elements that are included in and excluded from Final Compensation is provided as appendices to this policy. The exclusions described in the appendices should be understood to also exclude any other compensation derived from or based on the same underlying activity. For example, the exclusion of standby pay should be understood to also exclude differential pay for standby time.

### Final Compensation Standard of Review

The review process mandated by PEPRA and addressed by this policy focuses on why a pay element is provided – that is, whether it is provided for the purpose of enhancing the member's retirement benefit. If an otherwise eligible pay element meets that criterion, then it is still to be paid to the member, but not considered for pension purposes.

A situation where a pay element may be excluded under the PEPRA standard would be where the compensation was previously provided in-kind or paid to a third party on behalf of the member, but converted to a cash payment to the member in the final average salary period – for example, if a member previously had a car provided by the employer but shifted to a cash car allowance, or if the employer previously paid a health insurance company for health care coverage for the member but the member subsequently opted to receive a cash-back payment instead.

Other examples where the PEPRA standard may result in a pay element being excluded would be: (1) A one-time or ad hoc payment not given to similarly situated members in the same job classification or grade; or (2) Severance or separation pay received by the member

prior to the termination of employment.

### Final Compensation Review Process

The Final Compensation review starts once SCERS receives a retirement application and occurs at the same time as many other tasks that are required to process the application.

All pay elements in the final average salary period undergo the required review. However, the scope of review corresponds to the degree to which compensation in the final average salary period exceeds the compensation prior to that period and/or the nature of the pay element(s) in question. A small increase in compensation in the final average salary period and/or common, widespread pay elements require less review. A larger increase in compensation or an unusual or isolated pay element requires more review.

In some cases, SCERS requires additional information to complete the assessment of a pay element. Depending on the item of concern, SCERS may request information from the employer, the member or both to reach a determination.

If SCERS determines there is evidence that a pay element may have been provided for the purpose of enhancing the applicant's retirement benefit, then the applicant and the employer are notified and given an opportunity to submit additional information to rebut that assessment. At all times, the applicant and the employer bear the burden of proving that a pay element was provided for permissible reasons and not for pension-enhancement, including the burden of providing documentary evidence. Take, for example, an applicant who previously accepted an in-kind benefit from an employer (e.g., a vehicle or health care coverage) and who opted in the final compensation period to accept a cash payment instead. Such an applicant must prove that a new, previously unavailable opportunity or other change in circumstances made the in-kind benefit unnecessary or otherwise inappropriate. As part of such proof, the member must provide comprehensive documentary evidence substantiating the claimed change in circumstances (including but not limited to an affidavit). SCERS reserves the right to consider any failure to provide such comprehensive evidence a failure to meet the burden of proof.

If it is still believed that the pay element is provided to enhance the applicant's retirement benefit, and the applicant chooses not to contest that decision, SCERS will exclude the pay element(s) in question and finalize the retirement benefit calculation. If the applicant chooses to contest the recommendation, then the matter will be presented to the SCERS Board for final determination on whether the pay element should be excluded from the calculation of the retirement benefit.

The SCERS Board will consider the matter in open session at the next scheduled SCERS Board Meeting. The retirement applicant and/or the employer will have an opportunity to submit additional written information, and the SCERS Board will make its determination on the written record.

If the SCERS Board determines that a pay element must be excluded from the Final Compensation used to calculate the retirement benefit, then the employer and the retirement applicant will be so notified, and will have an opportunity to seek review of the decision by a court of law.

## Distribution of Initial Benefit Payment

The final compensation review process need not delay the first benefit payment. However, the amount of the first payment (and, if necessary, subsequent benefit payments) can be limited if the Final Compensation review process is not concluded (without issue) before the first payment is processed by SCERS.

The key factor in whether the amount of the first payment may be impacted by the Final Compensation review is the length of time between when the retirement application is submitted and the date of retirement. The earlier the retirement application is submitted relative to the retirement date, the more time there is to conduct the required Final Compensation review, and the greater the likelihood that the review will be completed by the time all the other necessary steps have been taken to issue the first benefit payment.

If there is insufficient time to complete the Final Compensation review prior to issuance of the first benefit payment, then a 'hold-back' amount based on the pay element(s) under review will be applied to the first benefit check, and if necessary, to subsequent benefit payments until a determination has been made regarding Final Compensation.

While the amount of a potential hold-back will vary, members should consider the possibility that initial (and possibly subsequent) benefit payments could be less than the benefit estimates they have received, and members should assess how the possibility of a reduced benefit could impact their decision to retire and/or the timing of submission of the retirement application relative to the date of retirement. SCERS will not review compensation elements and/or advise members whether particular pay elements might be excluded prior to the submission of a retirement application.

When necessary, benefit payments are adjusted after the review is completed. If all potential pay elements are included in Final Compensation, then subsequent benefit payments will reflect the higher benefit and include any retroactive amounts associated with the initial hold-back. If SCERS determines that a pay element must be excluded from Final Compensation, then the reduced benefit payment and the corresponding 'hold-back' will become permanent and final. If the retirement applicant or the employer elect to contest that decision in court, the benefit payments will continue to include the hold-back unless/until there is a final court ruling that the pay element be included in the retirement calculation.

## **BACKGROUND**

With the enactment of PEPRA, the Legislature effected significant changes and reforms for governmental defined benefit plans in California. Included among these changes was a recognition that retirement boards have both the authority and the obligation to monitor a wider range of employer activities than they have in the past.

The Final Compensation process reviewed in this policy arose from an implementation memo from the former Chief Executive Officer (which the Board of Retirement discussed during their December 19, 2012 meeting) and was effected with the delivery of a subsequent memo regarding "Review of Final Compensation Pay Elements" (which the Board of

Retirement discussed and approved during their February 20, 2013 meeting). Since that time, the guidance available to members and participating employers of SCERS has expanded to include a publication regarding “CalPEPRA and Final Compensation Review at SCERS” (which was last updated during the 2015 calendar year) and a Member Handbook for legacy members (which was released during the 2017 calendar year). This policy affirms and provides a consolidated document of the longstanding practice reflected in those materials.

## APPENDICES

- 1- Legacy Members (Entry Dates Before January 1, 2013)
- 2- PEPRA Members (Entry Dates After December 31, 2012)

## RESPONSIBILITIES

Executive Owner: Chief Benefits Officer

## POLICY HISTORY

Date	Description
10-21-2020	Staff to recommend amendments conforming to Board Order of September 16, 2020
10-17-2018	Board approved policy in revised format
2017 Calendar Year	<i>Member Handbook for Members Hired Before January 1, 2013, Appendix A: Summary of Pension–Eligible Pay Elements</i>
2017 Calendar Year	<i>Member Handbook for Members Hired Before January 1, 2013, p. 41: Final Compensation Review</i>
2015 Calendar Year	Updated Memo re “CalPEPRA and Final Compensation Review at SCERS”
08-19-2015	Board Materials for Agenda Item 17: Memo re “Proposed Amendment to the Final Compensation Review Process Mandated by CalPEPRA”
02-20-2013	Board Materials for Agenda Item 16: Memo re “Review of Final Compensation Pay Elements”
12-19-2012	Board Materials for Agenda Item 14: Memo re “Implementation of AB 340 and AB 197”

APPENDIX 1 -  
Legacy Members (Entry Dates Before January 1, 2013)

Earnings Type	Description	Included*	Excluded
Regular Earnings	Paid for hours worked	X	
One Time Bonus Payment	Payments normally made once a year as a result of bargaining	X	
Overtime - includes CTO Expired and CTO-over-max	Paid for hours worked in excess of normal work schedule; includes the portion of differentials, allowances, or other incentives that include overtime, CTO-expired, and CTO-over-max		X**
7/12 Work Shift	Paid for regular work schedule of 12 hours per day; 84 hours per bi-weekly pay period	X	
Extra-help wages	Paid to employees who are not regular (permanent) county employees		X
Holiday-in-lieu paid after 104.0 hours	Paid for hours over the maximum of 104.0	X	
Workers' Compensation Temporary Disability	Paid Workers' Compensation benefits integrated with existing leave balances for employees who have an accepted industrial injury and are temporarily disabled	X	
State Disability Integration	Paid State Disability benefits integrated with existing leave balances for employees who are temporarily disabled	X	
Shift Differential	Paid to employees working other than the day shift	X	
Standby Pay	Paid to employees assigned to remain on call outside of normal working hours worked by persons in the same grade or class of positions if the need arises for emergency work		X**
Food Allowance	Paid to employees hired or transferred into food service prior to July 1971 represented by Health Services Unit	X	
Terminal Pay – vacation, holiday in lieu, CTO, and leave payout	Accumulated leave balances paid to an employee upon separation from employment.		X
Special Pay Allowances	Additional pay for performing work considered to be out of or in addition to the class	X	
Incentive Pay Allowances	Additional pay for possession of educational degrees or required certificates	X	
Miscellaneous Allowances	Assignment differentials paid as a percentage of base pay	X	
Management Differential	Additional pay to managers in lieu of other benefits, i.e., tuition reimbursement	X	
Transcription Fees for court reporters	Paid to court reporters to transcribe their cases		X
Retirement Offset	Additional pay for certain employees in-lieu of the county paying ½ retirement contributions	X	
Leave Balance Usage (vacation, compensating time off (CTO), holiday in-lieu, sick leave, etc.)	Paid leave for authorized absence from work	X	

APPENDIX 1 -  
Legacy Members (Entry Dates Before January 1, 2013)

Earnings Type	Description	Included*	Excluded
Vacation Cash-In	Vacation cash-in in excess of the maximum permitted in a single calendar year (or fiscal year, as applicable) under the member's labor agreement or employer policy, resulting from a designated final compensation period that straddles two calendar years (or fiscal years, as applicable)		X**
Payoff Beyond Maximum Accrual	Additional pay for vacation or holiday-in-lieu hours over the maximum accrual	X	
Mental Health Retention	Paid to employees who work at the mental health facility	X	
Disability Pay	Additional pay that, when combined with Workers' Compensation Disability Pay, equals 50% of an employee's bi-weekly pay	X	
4850 Time Pay	Paid for up to one year, tax free, in lieu of temporary disability for Safety personnel in accordance with Labor Code Section 4850	X	
Clothing Allowance	Paid to employees for the cost of maintaining a uniform	X	
Equipment Allowance	Paid to reimburse employees who are required to provide their own equipment; i.e., court reporters	X	
Animal Allowance	Paid to employees for the ordinary care and informal training of canines in overtime or outside of regularly scheduled hours		X**
Insurance Subsidy	Cash payment of the amount of the county contribution towards health insurance over the premium, less the cost of social security	X	
Fair Labor Standards Act Adjustment	Differential paid when the value of overtime per FLSA guidelines is greater than that negotiated		X***
Insurance Subsidy Offset	An amount paid in January of each year to refund the social security reduction of the health insurance subsidy to employees who were at social security maximum		X**
Auto Allowance	Payment for use of personal vehicle for county business	X	

\* Compensation can be excluded if: (a) Board of Retirement determines compensation had been paid to enhance retirement benefits, (b) compensation had previously been provided in kind and converted to cash payment in the final compensation period; (c) any one-time or ad-hoc payment made to a member, but not to similarly situated members in the member's grade or class, and (d) any payment for unused leave balances that exceed what may be earned in each 12-month period during the final compensation period.

\*\* Effective for all Legacy members who retired, or will retire, on and after January 1, 2013, pursuant to Government Code section 31461(b)(3) and *Alameda County Deputy Sheriff's Association, et al. v. Alameda County Employees' Retirement Association, et al.*, 9 Cal.5th 1032 (2020)



APPENDIX 1 -  
Legacy Members (Entry Dates Before January 1, 2013)

Earnings Type	Description	Included*	Excluded
<p>*** Per prior, written agreement, one exception has been established to the standard exclusion of the pay element reserved for FLSA adjustments. That exception is the additional "half rate" payable for 12 hours of contractual overtime to members who work 24-hour schedules.</p>			

APPENDIX 2 -  
PEPRA Members (Entry Dates After December 31, 2012)

<b>Earnings Type</b>	<b>Description</b>	<b>Included*</b>	<b>Excluded</b>
Regular Earnings	Paid for hours worked	X	
7/12 Work Shift	Paid for regular work schedule of 12 hours per day; 84 hours per bi-weekly pay period	X	
Workers' Compensation Temporary Disability	Paid Workers' Compensation benefits integrated with existing leave balances for employees who have an accepted industrial injury and are temporarily disabled	X	
State Disability Integration	Paid State Disability benefits integrated with existing leave balances for employees who are temporarily disabled	X	
Leave Balance Usage (vacation, compensating time off (CTO), holiday in-lieu, sick leave, etc.)	Paid leave for authorized absence from work	X	
Disability Pay	Additional pay that, when combined with Workers' Compensation Disability Pay, equals 50% of an employee's bi-weekly pay	X	
4850 Time Pay	Paid for up to one year, tax free, in lieu of temporary disability for Safety personnel in accordance with Labor Code Section 4850	X	
Animal Allowance	Paid to employees for the ordinary care and informal training of canines in overtime or outside of regularly scheduled hours		X**
One Time Bonus Payment	Payments normally made once a year as a result of bargaining		X
Overtime - includes CTO Expired and CTO-over-max	Paid for hours worked in excess of normal work schedule; includes the portion of differentials, allowances, or other incentives that include overtime, CTO-expired, and CTO-over-max		X
Extra-help wages	Paid to employees who are not regular (permanent) county employees		X
Holiday-in-lieu paid after 104.0 hours	Paid for hours over the maximum of 104.0		X
Shift Differential	Paid to employees working other than the day shift		X
Standby Pay	Paid to employees assigned to remain on call outside of normal working hours worked by persons in the same grade or class of positions if the need arises for emergency work		X
Food Allowance	Paid to employees hired or transferred into food service prior to July 1971 represented by Health Services Unit		X
Terminal Pay – vacation, holiday in lieu, CTO, and leave payout	Accumulated leave balances paid to an employee upon separation from employment.		X
Special Pay Allowances	Additional pay for performing work considered to be out of or in addition to the class		X
Incentive Pay Allowances	Additional pay for possession of educational degrees or required certificates		X

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PEPRA Members (Entry Dates After December 31, 2012)

Earnings Type	Description	Included*	Excluded
Miscellaneous Allowances	Assignment differentials paid as a percentage of base pay		X
Management Differential	Additional pay to managers in lieu of other benefits, i.e., tuition reimbursement		X
Transcription Fees for court reporters	Paid to court reporters to transcribe their cases		X
Retirement Offset	Additional pay for certain employees in-lieu of the county paying ½ retirement contributions		X
Vacation Cash-In	Vacation cash-in in excess of the maximum permitted in a single calendar year (or fiscal year, as applicable) under the member's labor agreement or employer policy, resulting from a designated final compensation period that straddles two calendar years (or fiscal years, as applicable)		X
Payoff Beyond Maximum Accrual	Additional pay for vacation or holiday-in-lieu hours over the maximum accrual		X
Mental Health Retention	Paid to employees who work at the mental health facility		X
Clothing Allowance	Paid to employees for the cost of maintaining a uniform		X
Equipment Allowance	Paid to reimburse employees who are required to provide their own equipment; i.e., court reporters		X
Insurance Subsidy	Cash payment of the amount of the county contribution towards health insurance over the premium, less the cost of social security		X
Fair Labor Standards Act Adjustment	Differential paid when the value of overtime per FLSA guidelines is greater than that negotiated		X***
Insurance Subsidy Offset	An amount paid in January of each year to refund the social security reduction of the health insurance subsidy to employees who were at social security maximum		X
Auto Allowance	Payment for use of personal vehicle for county business		X

\* Compensation can be excluded if: (a) Board of Retirement determines compensation had been paid to enhance retirement benefits, (b) compensation had previously been provided in kind and converted to cash payment in the final compensation period; (c) any one-time or ad-hoc payment made to a member, but not to similarly situated members in the member's grade or class, and (d) any payment for unused leave balances that exceed what may be earned in each 12-month period during the final compensation period.

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