

SBCERA Resolution No. 2024- 6

**IMPLEMENTATION OF EXCLUSION OF NIGHT STANDBY (D06)
(FOR TIER 1 MEMBERS)**

WHEREAS, the San Bernardino County Employees' Retirement Association (SBCERA) Board of Retirement (BOARD) is required by Government Code sections 31461 and 31542, as well as BOARD Benefits Policy No. 26, *Compensation Earnable and Pensionable Compensation*, to determine compensation earnable for Tier 1 members.

WHEREAS, on March 7, 2019, the BOARD adopted a Resolution that considered the "AB 197 cases," which had been accepted for review by the California Supreme Court in *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.*, 9 Cal.5th 1032 (review granted March 28, 2018) ("*Alameda*"), and it affirmed that Resolution on June 4, 2020 (collectively, "AB-197 Clean-Up Resolution").

WHEREAS, as stated in the AB-197 Clean-Up Resolution, SBCERA, at the time of the *Alameda* decision, included in compensation earnable (i) certain types of pay that were considered in *Alameda* (standby, on call, and call back), and (ii) other types of pay that AB 197 confirmed could or should be excluded from compensation earnable under *In re Retirement Cases* (2003) 110 Cal.App.4th 426 (employer paid premiums to a third party) (collectively "Litigated Compensation Earnable Pay Codes").

WHEREAS, the AB-197 Clean-Up Resolution was based on legal and equitable principles as those principles were addressed by the First District Court of Appeal ("First DCA") in *Alameda*.

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WHEREAS, on July 30, 2020, the California Supreme Court filed its decision in *Alameda*, which, pursuant to Supreme Court Rule 8.532, became final on August 30, 2020 (the “*Alameda* Decision”). The *Alameda* Decision overturns certain legal and equitable determinations of the First DCA in *Alameda* and concludes that all amendments to the definition of Compensation Earnable in Government Code section 31461, enacted as a result of the Public Employees’ Pension Reform Act of 2013 and related statutory changes to CERL (“PEPRA”), effective January 1, 2013 are constitutional, and that CERL retirement boards may not be contractually bound or estopped by settlement agreements, board resolutions, or other similar actions, from implementing those amendments. The *Alameda* Decision further determines that CERL retirement boards may not include items in compensation earnable that section 31461 requires them to exclude.

WHEREAS, the *Alameda* Decision also held that CERL retirement boards have no discretion to include pay items in Compensation Earnable that are excluded under CERL, PEPRA, or other applicable statutes, disapproving of statements to the contrary in footnote no. 6 of *Guelfi v Marin County Employees’ Retirement Assn.* (1983) 145 Cal.App.3d 297 (“*Guelfi* footnote 6”).

WHEREAS, the BOARD hereby determines that the *Alameda* Decision and other applicable law require it to change its determinations of pensionability of the Litigated Compensation Earnable Pay Codes as set forth in the AB-197 Clean-Up Resolution, as resolved below.

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WHEREAS, the Board adopted Resolution 2020-9 excluding Night Standby (D06) pursuant to Government Code section 31461, Board Resolutions 2020-5 and 2020-6, and the *Alameda* Decision.

WHEREAS, Under Resolution 2020-8, SBCERA retirees affected by the exclusions, specifically Night Standby (D06), were provided the ability to appeal the specific issue of whether the pay was compensation under Government Code section 314610 and compensation earnable under Government Code section 31461, e.g., whether the pay was for services rendered within the “normal working hours” of a member’s position and of persons in the same grade or class of positions during the period the member rendered services at the same rate of pay, such that it is not mandatorily excluded under subdivision (b)(3) in Government Code section 31461.

WHEREAS, Night Standby (D06) is paid to personnel who perform services, i.e. processing laboratory test at \$10 per test, who are not assigned to the night shift, but who volunteer to work during the hours of 11:30 pm to 7:30 am, which is in addition to their regular shift.

WHEREAS, the assigned hearing officer selected to oversee the administrative hearing regarding Night Standby (D06), concluded that D06 for those who remained “in residence at ARMC ... is not standby service or on call service...”

WHEREAS, staff, as part of the implementation of the hearing officer’s recommendation, sent questions to San Bernardino County Human Resources to determine personnel who remained in residence at ARMC for work associated with Night Standby (D06).

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WHEREAS, the responses received indicates that personnel receiving D06 were not regularly assigned to the night shift, and that there is a clear break if the personnel works night shift following their regular shift.

WHEREAS, the information received from Human Resources is deemed to be new information regarding this specific pay item and confirms that the work associated with Night Standby (D06) is overtime, which is paid to members for services they render in excess of their normal working hours during their regular shift, regardless of how paid.

WHEREAS, the Board determines the includability or excludability of particular pay codes for compensation earnable and pensionable compensation based on the work associated with those pay codes, not with the label assigned to those pay codes.

WHEREAS, based on the new information received from Human Resources, the BOARD adopted SBCERA Resolution 2024-4, which states “The item [D06] is excluded from this exhibit based upon information obtained from the employer on October 23, 2024. The work associated with this pay code is a form of overtime as represented by additional information by the employer. The Board’s policy in interpreting the laws is that overtime, regardless of how paid (i.e. piecemeal), is not Compensation Earnable.”

WHEREAS, if an item is not compensation earnable, then such pay item shall be excluded from an SBCERA member’s compensation earnable for purposes of determining final average salary.

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WHEREAS, this Resolution is intended to comply with the requirements of the Internal Revenue Code of 1986, as amended or replaced from time to time and the regulations issued thereunder (the “Code”) as applicable.

THEREFORE, BE IT RESOLVED, that effective as of December 5, 2024, the following actions are authorized by the BOARD and required of SBCERA:

- 1) Continue exclusion from compensation earnable Night Standby (D06).
- 2) Retirees – Ronald Sanchez, Sharon Ochoa, and Lisa Chesonis
 - a. Exclude Night Standby (D06) from their monthly benefit, prospectively, beginning with the monthly benefit of December 2024.
 - b. To the extent contributions paid on D06 exceed overpaid benefits, then staff shall make corrective distributions.
 - c. No recoupment shall be made directly from the retirees, and to the extent of any overpaid benefits prior to December 2024, authorize the overpaid benefits to be included as part of the UAAL through self-correction.
- 3) Existing Retirees (D06 – Not Included) as part of their final average salary
 - a. Provide notice to the retirees regarding the continued exclusion of Night Standby (D06) from compensation earnable and that it will not be included in their final average salary for purposes of calculating their monthly benefit.

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- b. To the extent contributions paid on D06 exceed overpaid benefits, if any, then staff shall make corrective distributions of those contribution amounts that were paid subsequent to January 1, 2013 to the date of retirement.
- 4) Active Employee (D06 reported) to SBCERA
- a. Provide notice to the active employees regarding the continued exclusion of Night Standby (D06) from compensation earnable and that it will not be included in their final average salary for purposes of calculating their monthly benefit.
 - b. To the extent contributions were reported for D06, staff shall make corrective distributions paid subsequent to January 1, 2013.

IN WITNESS WHEREOF, the above Resolution for SBCERA is hereby adopted by the BOARD on this 5th day of December 2024.

**SAN BERNARDINO COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION**

By: _____
Marc Bracco, Chair

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, _____, Secretary to the BOARD of SBCERA, hereby certify the foregoing to be a full, true, and correct copy of the record of the action taken by the BOARD, by vote of the members present, as the same appears in the Official Minutes of said Board at its meeting of December 5, 2024.

Deborah S. Cherney