

SAN BERNARDINO COUNTY
EMPLOYEES' RETIREMENT ASSOCIATION
BOARD OF RETIREMENT

In the Matter of:) SBCERA File No. 21-1006-1095.8.002R-PL
Alameda Administrative Appeal of Clinical) Final Proposed Findings and Recommendation
Laboratory Scientists (Formerly known as) Hearing Date: Sept. 29, 2025
Professional Lab Technicians),)
Applicants.

INTRODUCTION

This appeal concerns Clinical Laboratory Scientists (“CLS”/“Applicants”) working at the Arrowhead Regional Medical Center (“ARMC”), who receive Night Standby Pay (“D06”)¹ for working shifts on Fridays and Saturdays. During D06 shifts, each CLS receives a payment of \$10 per call to perform lab tests.

It is argued by the Applicants that D06 Pay is a differential, that increases the rate of base pay for regularly assigned shifts. During D06 shifts, each CLS receives a payment of \$10 per call or lab test performed. This pay structure makes D06 unique among County pay codes, as there is no other discernible differential for which employees are compensated in this manner.

Effective January 1, 2013, the Legislature adopted the Public Employees’ Pension Reform Act (“PEPRA”). Although many of its provisions applied only to “New members” (see Government Code sections 7522.15 and 7522.34), some provisions implicated Government Code section 31461 and applied to public employees who had commenced employment prior to January 1, 2013. The amendments to Section 31461 included subdivision (b)(3), which states:

¹ The Night Standby shift is referenced herein as the “D06 shift,” “D06,” and “Night Weekend shift.”

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(b) “Compensation earnable” does not include, in any case, the following:

(3) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.

On July 30, 2020, the California Supreme Court issued its decision in *Alameda County Deputy Sheriff’s Assn. v. Alameda County Employees’ Retirement Assn* (2020) 9 Cal.5th 1032, which involved a challenge by plaintiffs to the application of the changes to Section 31461 to legacy members (*i.e.*, those who commenced employment prior to January 1, 2013). The plaintiffs in the case argued that the changes to Section 31461 contravened and impaired their vested contractual right to receive pension benefits according to the law as it existed prior to PEPRA in violation of Article I section 9 of the California Constitution.

The Court concluded that the additions to the definition of compensation earnable did not violate the California Constitution. (*Id.* at 1103.) After the Supreme Court’s decision in *Alameda*, SBCERA issued a series of resolutions implementing *Alameda*, and notified affected employees that pay such as on-call and standby pay, which had previously been regarded as “compensation earnable,” would no longer be included in final compensation or compensation earnable.

The SBCERA Board reviewed the impact of the *Alameda* decision, specifically pay items that are for additional pay for services rendered outside of normal working hours. Night Standby Pay was one such pay item that was excluded by the SBCERA on August 6, 2020. As part of the implementation of the *Alameda* decision, the Board adopted Resolution 2020.8.1, permitting any retiree impacted by the Board’s decision to appeal where the sole issue(s) for determination on the administrative appeals are as follows:

1. Whether the pay was “compensation” under Government Code section 31460 and “compensation earnable” under Government Code section 31461. For example, was the pay 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.
2. Whether SBCERA calculations or other numerical data provided above are incorrect.
3. Whether the member actually was retired from SBCERA before the effective date of the law that SBCERA is applying to him or her.

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The Applicants in this matter have appealed the exclusion of Night Standby Pay (D06) from compensation earnable.

The matter proceeded to hearing before Hearing Officer Daniel Hauter, who rendered proposed findings on December 9, 2021. The proposed decision that was submitted to the Board recommended that Night Standby/D06 Pay be included as compensation earnable only when the duties are performed in residence at ARMC. Standby duties performed out of residence were excluded from compensation earnable. The decision concluded that D06 Pay, *in residence*, was a form of differential pay for work performed during normal working hours and thus compensation earnable.

Amy McNerny testified that when the Board sought to implement the decision with information from the County, it was revealed that CLSs received D06 Pay not as a traditional differential - an hourly premium or incentive layered on top of base wages for the same services rendered for those base wages - but rather as a per-service payment received only during specific additional shifts occurring separately and apart from base wages. The County explained that the D06 shift is not a regular shift where there would be other full time CLSs working under a regular shift compensation model.²

On December 5, 2024, the SBCERA Board of Retirement remanded this matter to Hearing Officer Daniel Haueter to conduct a live in-person hearing to determine whether D06/Night Standby Pay constitutes additional services rendered outside of regular working hours. Since Mr. Haueter was unavailable, the matter was reassigned on remand to Hearing Officer Duane E. Bennett to consider the matter *de novo*.

Several issues were presented for the Hearing Officer to determine in this matter. However, the ultimate question on appeal, and in this *de novo* proceeding, is whether Night Standby Pay or D06 is compensation earnable for retirement calculation purposes.

The Hearing Officer submitted the Proposed Findings and Recommendation on December 27, 2025, and amended the proposed findings due to a minor typographical error on January 8, 2026.

Objections to the Amended Proposed Findings and Recommendation were served by the Applicant on January 9, 2026. SBCERA served on the Hearing Officer all responsive pleadings related to the objections on January 20, 2026.

² See AR:1332-1336, 1364-1365. In this regard, the “in-residence” dichotomy was irrelevant to the analysis of D06 Pay or the determination of compensation earnable. This aspect was borne out by testimony at the hearing that indicated that all of the CLS services delivered were in-residence.

The Hearing Officer hereby submits the Final Proposed Findings and Recommendation, and separately addresses various aspects of the Applicant's objections in Section IV of the analysis herein.

Both Parties were well represented in this matter. The Applicants were represented in this matter by David Vasquez, Esq., Law Offices of David Vasquez, APC. The Respondent was represented by Ashley K. Dunning, Esq. and Alexander Westerfield, Esq., Nossaman LLP.

BACKGROUND AND STATEMENT ON APPEAL

The Hearing Officer appreciates the high level of advocacy and case presentations by the Parties and counsel on both sides. The issues raised in this matter are unique and novel in regard to pay structure and compensation earnable.

The Applicants maintain that Night Standby Pay (D06) received was provided as salary, and "considered to be part of compensation earnable" earned during normal working hours. Therefore, they contend that D06 is linked to regular hourly pay/salary as a differential.

The Respondent disagrees, and argues that D06 was properly excluded from compensation earnable pursuant to *Alameda*. Based on the Supreme Court's decision, the Respondent maintains that SBCERA may not include pay items in compensation earnable that reflect payment for additional services rendered outside of normal working hours, such as D06.

Respondent argues that *Alameda's* holding in reference to Government Code section 31461(b)(3), effective on January 1, 2013, requires SBCERA to exclude pay items notwithstanding settlement agreements to the contrary. A fortiori, MOU negotiations and interpretations portending to represent D06 Pay as a salary or traditional base differential would be inconsistent with the Court's pronouncement.

Alameda upheld the constitutionality of amendments to Government Code section 31461, including subdivision (b)(3), which excluded from compensation earnable, "Payments for additional services rendered outside of normal working hours." Therefore, the Respondent maintains *inter alia*, that the Night Standby Pay was properly excluded from the Applicants' final compensation and compensation earnable. Under this argument, D06 is not earned during normal working hours since employees clock out of their

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standard shifts before beginning a D06 shift.³ D06 shifts only occur on Friday and Saturday nights and fall outside of normal schedules for Applicants.

Moreover, D06 affords payment to employees on a flat rate basis, or per call and test processed basis. The pay varies with the number of calls or tests performed, and does not corollate to base salaries. In this regard, CLS employees receive no base or hourly wages in conjunction with D06. In fact, it is possible that employees working D06 could go uncompensated if no tests are conducted during a shift.

The D06 Pay at issue is vaguely described under the MOU. The applicable portions of the MOU regarding this aspect are found within the County of San Bernardino Alameda Earn Codes Report, and incorporated in full by reference:

- (a) The hours included on Night Standby duty shall be from 11:30 p.m. to 7:30 a.m., seven days each week.
- (b) The first laboratory technologist must be in residence at the Arrowhead Regional Medical Center, in a room assisted to the Laboratory, during the hours of standby duty. This Laboratory shall be paid ten dollars per call.
- (c) A second laboratory technologist may be designated for Night Standby duty at the Technologist normal place of residence. This second laboratory technologies shall be paid \$16.00 for standby duty, if not called. If called, this laboratory technologist shall be paid thirty-two dollars which shall include the first call and ten dollars for each subsequent call... (end)

Pursuant to the MOU, Night Standby is not available to CLSs scheduled to work 11:30 p.m. to 7:30 a.m. shift as part of their regular schedule. Instead, Night Standby Pay is (arguably) provided to employees with a Sunday through Thursday schedule, who sign-up or volunteer for Friday and Saturday night shifts. Notably, “per call” refers to laboratory tests processed during these shifts. As noted, the CLS on a D06 shift is paid \$10 for each lab test performed. In theory, if no tests are performed, there is no compensation for the employee during the shift.

SBCERA has excluded D06 Pay from the final compensation of the Applicants pursuant to this authority, thus framing the issues on appeal.

³ AR:1335-1336.

ISSUES

The primary issue presented on appeal concerns “compensation earnable” for Applicants under the County Employees Retirement Law of 1937 (“CERL”); and whether D06 Pay for weekend Night Standby received by the Applicants during their final compensation periods must be included in the calculation of each of the Applicants’ retirement allowances.

More specifically, the Hearing Officer was assigned the following specific issues for determination and recommendation:

1. Each Applicant’s regular working hours, including the standard schedule (e.g. hours per day and schedule days worked).
2. Differentiation between differential pay and standby pay in terms of definitions, applications, and employment contexts.
3. Determination of what the pay item D06 is for, and how and to whom Night Standby Pay is administered.
4. Whether the services rendered in exchange for services provided under the D06 Pay code, including the resulting \$10 per call, fall within or outside its recipients’ normal working hours.
5. Whether Night Standby Pay performed at ARMC is compensation under Government Code section 31460 and whether such pay is additional pay for services rendered outside of “regular working hours” thereby excluding the pay from “compensation earnable” under Government Code section 31461 (b)(3) and “pensionable compensation” under Government Code section 7522.34(c)(6).

In order to assist the Hearing Officer in addressing the issues, the Hearing Officer also directed the Parties to address the following questions during the proceeding in an effort to ascertain the proper findings and recommendation:

1. What are the expectations concerning the staffing of Night Standby?
 - a) What are management expectations regarding Clinical Laboratory Scientists working Night Standby?
 - b) Is Night Standby defined as a mandatory “work shift” or assignment by the County?
 - c) If Night Standby is a work shift, is there any other wage or compensation for primary (first) Clinical Laboratory Scientist other than \$10 per test conducted?
2. Is it required or mandatory that all Clinical Laboratory Scientists work Night Standby, excepting those assigned to work the 11:30 p.m. to 7:30 a.m. shift?

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- a) Are there Clinical Laboratory Scientists that do not work the Night Standby, excepting those assigned to work the 11:30 p.m. to 7:30 a.m. shift?
3. Is there a standard “rotation” of Clinical Laboratory Scientists for Night Standby?
 - a) How is the rotation established, and by whom?
 - b) Do Clinical Laboratory Scientists voluntarily “sign up” for Night Standby, or are they assigned?
4. Is there any enforcement of a Night Standby rotation to ensure coverage?
 - a) If so, how is the Night Standby rotation enforced?
 - b) Are Clinical Laboratory Scientist managers, supervisors or FLSA exempted employees treated in the same manner as other Clinical Laboratory Scientists in regard to any Night Standby rotation?
5. What does it mean to be “in residence” at the medical center?
 - a) Has this practice changed? If so, how?
6. Does the “D” in D06 stand for “differential”? If so, is there any other reference to the differential in County records or the MOU besides MOU Section 4?
7. Is the only pay for the first Clinical Laboratory Scientist on Night Standby \$10 per test?
 - a) Do the first Clinical Laboratory Scientists on Night Standby receive any other hourly pay, compensation, stipend, etc.?
 - b) Is it possible for the first Clinical Laboratory Scientist to be on standby and receive no compensation at all if no tests are actually conducted?
 - c) Are Clinical Laboratory Scientists able to perform any other personal tasks, or sleep, while “in residence” or on Night Standby?
 - d) Is the \$10 per test a negotiated term to avoid paying overtime pay? If so, where is this stated in the MOU or County records?

DISCUSSION AND FINDINGS

The Applicants have the burden of proof by a preponderance of the evidence to support their contentions that retirement benefits should include Night Standby/D06 Pay in their final compensation or compensation earnable.

As provided by Evidence Code section 500, “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” The burden of proof is only met with reliable, “substantial” evidence. (*Weiser v. Board of Retirement* (1984) 152

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Cal.App.3d 775, 783.) Substantial evidence clearly implies that such evidence must be of ponderable legal significance. Such evidence cannot be deemed synonymous with any evidence. “It must be reasonable..., credible, and of solid value...” (*Kuhn v. Dept. of General Service* (1994) 22 Cal.App.4th 1627, 1633.)

Once the initial burden is met, the responding party is charged with producing evidence as to the matters established. The burden of producing evidence means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue. (See Evidence Code § 110.)

Effective January 1, 2013, the Legislature adopted the Public Employees’ Pension Reform Act (“PEPRA”). Although many of its provisions applied only to “New members,” (see Government Code sections 7522.15 and 7522.34) some provisions implicated Government Code section 31461 and applied to public employees who had commenced employment prior to January 1, 2013. The amendments to Section 31461 included subdivision (b)(3), which states:

(b) “Compensation earnable” does not include, in any case, the following:

(3) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.

On July 30, 2020, the California Supreme Court issued its decision in *Alameda*, which involved a challenge by plaintiffs to the application of the changes to Section 31461 to legacy members (*i.e.*, those who commenced employment prior to January 1, 2013). The plaintiffs in the case argued that the changes to Section 31461 impaired their vested contractual right to receive pension benefits according to the law as it existed prior to PEPRA in violation of Article I section 9 of the California Constitution. (*Alameda, supra*, 9 Cal.5th at p. 1053.)

The Court concluded that the additions to the definition of compensation earnable did not violate the California Constitution. (*Id.* at 1103.) After the Supreme Court’s decision in *Alameda*, SBCERA issued a series of resolutions implementing *Alameda* and notified affected employees that various pay, which had previously been regarded as “compensation earnable,” would no longer be included in final compensation or compensation earnable.

Government Code § 31461(a) sets forth the definition of compensation earnable, by providing:

“Compensation earnable” by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily

worked by persons in the same grade or class of positions during the period, and at the same rate of pay...”

Importantly, Government Code § 31461(b)(3) excludes from compensation earnable “[p]ayments for additional services rendered outside of normal working hours.” Conversely, all work which is required of an employee during normal working hours is included in compensation earnable.

In *Alameda, supra*, 9 Cal.5th at p.1097, the California Supreme Court addressed the exclusion set forth in Government Code § 31461(b)(3). According to the Court, this restriction “prevents employees from volunteering, during their final compensation period, to perform additional services outside normal working hours in order to artificially inflate their daily rate of pay.” (*Ibid.*) The *Alameda* court explained that, “[a]n often-cited example of such compensation is on-call duty pay, which is provided to employees in return for voluntarily making themselves available to be called to work outside their normal working hours. (*Id.* at 1062.)

The Applicants argue that Night Standby or D06 Pay is compensation earnable for mandatory services and not for additional services, while the Respondent argues to the contrary.

I. SUMMARY OF PERTINENT TESTIMONY PRESENTED AT THE HEARING

Witness testimony at the hearing was illuminating in regard to Night Standby and D06 Pay. Applicants Ronald Sanchez and Martin Santoyo testified at the hearing regarding the nature of D06 Pay.

They both described a system where D06 sign-ups are listed on a spreadsheet. Qualified CLSs and management coordinate coverage based on availability to cover the shifts. Generally, there are enough sign-ups to cover the shift. If a particular CLS in the rotation cannot, or does not desire to, cover a particular weekend shift, management goes to the next CLS in the rotation. In theory, if there is insufficient coverage for the specific shift, management may assign a CLS. This has never occurred according to testimony at the hearing.

Labs have different sections and the graveyard shifts are generally staffed by three scientists/techs. Shift differentials are provided for Sunday through Thursday shifts from

3:30pm and 11:30pm and 11:30pm to 7:30am. There are approximately fifteen CLSs qualified to work the Night Standby/D06 shift.⁴

The schedules for CLSs are set at least a month in advance and can change periodically. In order to staff the D06 shift, a spreadsheet is developed with names of “qualified” CLSs. A CLS would sign-up and indicate availability to work a various shift and coordinate the coverage with management. Mr. Sanchez could not recall a time when a CLS did not comply with the process.⁵

Q. All right. And why don't you tell us about that. How did a person -- how would a tech get assigned to a call shift?

A. I have to use the term "qualified techs" because not all techs worked a shift. They had to be cross-trained in each of the departments that were -- where the tests were performed.

That list was put onto a spreadsheet (indicating) with the days of the week that they were going to be scheduled, and on a rotating basis, the supervisor went to the first tech and asked about their availability to work. If they were available, they signed up for a call shift. Then we went to the second tech and on down the line until the shifts were filled for that next month.⁶

Q. Just to go over that one time, Mr. Sanchez, you're saying as management there would be CLSs that were identified and qualified to work the shift; correct?

A. Correct.

Q. Okay. And the protocol was to go -- what would the protocol be? To circulate this assignment -- this assignment or this spreadsheet?

A. The spreadsheet. A supervisor was usually assigned to take the spreadsheet with the techs' names on it and go through the first tech because -- okay. The very first time we did it, we put everybody's name in a hat, pulled it out, put it on a spreadsheet, so it was random.

Then we went to the first tech and showed the schedule and then, you know, was there a day here that you could work because we wanted to make sure it was available because ultimately if they didn't sign up, we were going to have to assign them. So we gave them the option to sign up if they could...⁷

Interestingly, Mr. Sanchez indicated that it was possible for a CLS to sign-up for all of the D06 shifts. However, he testified that “there would have been an uproar in the laboratory if one person got all the shifts,” since others would be deprived of making the D06 Pay. He testified about a spirit of cooperation amongst CLSs in regard to Night Standby/D06.⁸

⁴ Tr. at pp. 29-35.

⁵ Tr. at pp. 40-47.

⁶ Tr. at pp. 41:17-25 through 42:1:6.

⁷ Tr. at pp. 45:17-25 through 46:1-12.

⁸ Tr. at pp. 48; 57-58; 63-68. Mr. Sanchez's testimony was equivocal in some respects pertaining to scientists being “assigned” to Night Standby.

Q. Okay. And so you also had testified that it was theoretically possible for one tech to volunteer or sign up for all the shifts in the month. But that didn't happen; is that correct?

A. That's correct.

Q. And you noted that there would have been an uproar in the lab if that had happened; is that correct?

A. Yes. Ask these guys (indicating).

Q. And can you tell me exactly why there would have been an uproar if one tech had taken all the shifts or signed up for all the shifts?

A. Well, I mean, I'll be honest that when you work that shift, \$10 per call is a nice incentive to work the shift.

Q. And you said that there were certain clinical laboratory technicians or scientists that did not work any of those D06 shifts; is that correct?

A. That's correct...⁹

Q. I want to make sure I really understand. All right. In terms of the CLSs who could take all the shifts or that line of testimony – you mentioned something like that -- there was a CLS who could take all the shifts.

How exactly would that occur –

A. Well –

Q. -- in theory?

A. -- in theory the other techs would not want -- or were not available to work. So they would all have to say, "I can't work it" or "I don't want to work it" for one tech to step in and work all the shifts. Of course the chances of that happening are very small. Zero...¹⁰

Mr. Sanchez worked approximately two-hundred D06 shifts prior to retiring. He was never mandated or assigned to work the shift. Management did not have to assign scientists/techs for the duty since they were always available to work the D06 shift. If a CLS could not work the shift, management would “move on” and reassign the shift to another CLS on the spreadsheet.¹¹

It was clear from the testimonies of Mr. Sanchez and Mr. Santoyo that paid leave time off was not required where a CLS did not work a D06 shift, even after they had indicated their availability. Likewise, a CLS would not suffer any discipline for not covering a

⁹ Tr. at pp. 57:23-25 through 58:1-2.

¹⁰ Tr. at p. 63:10-23.

¹¹ Tr. at pp. 53-56; 59-62.

scheduled D06 shift. According to Mr. Santoyo, there are usually enough “volunteers” who sign-up to cover the shift.¹²

Mr. Santoyo stated that there was one time in 2016, where there were multiple vacancies and short staffing, where it was mandatory that scientists work a D06 shift. That shortage no longer exists. He also testified that if a scientist was given a D06 shift and could not work the shift, they would not have to use any paid time off.¹³

Carlos Prieto is the Associate Hospital Administrator of ARMC. Both he and Mr. Santoyo clearly testified that Night Standby is staffed by CLSs who “volunteer” or sign-up for the shift.

Q. And, to your understanding, is there a standard rotation of D06 shifts, like a particular clinical laboratory scientist works the first and third Friday, the second one works the first and third Saturday, so on and so forth?

A. It's my understanding, because the pool of clinical labs scientists that are trained to do those tests volunteer, that they self-coordinate to avoid any gaps in coverage...¹⁴

Q. And are you familiar with the scheduling procedures with the shifts assigned to Arrowhead?

A. Yes.

Q. Are call shifts -- these are the D06 shifts. Are they assigned in advance?

A. They are open for volunteer in advance, yes.

Q. Okay. So at some point in time does someone, a supervisor, write down someone's name in a slot associated with a D06 shift?

A. The supervisor is the one who is charged with making sure there are not gaps in the schedule.¹⁵

Mr. Prieto stated that the D06 shift does not correlate to a regular work shift. The D06 shift is not a “tour of duty.”¹⁶ The hours of the work do not reflect D06 Pay. Moreover, D06 shifts do not affect overtime hours or eligibility for overtime pay. Shifts are usually scheduled 6-8 weeks in advance.

¹² Tr. at pp. 110-113.

¹³ Tr. at pp. 113-119.

¹⁴ Tr. at p. 125:1-9.

¹⁵ Tr. at p. 130:8-18.

¹⁶ Tr. at pp. 136; 141-142.

If a CLS declines to work the shift, or becomes ill, they are not required to use sick leave or paid time off work.¹⁷ The testimony indicated that the D06 shift is voluntary and discretionary for CLSs.

According to Mr. Prieto, a pay differential is different than D06 Pay, that is not tied to an hourly rate. There is no other similar code to D06 at the hospital. Moreover, no tour of duty includes coverage for the D06 shift. He said that a CLS may refuse to work a D06 shift with no consequences, as opposed to a normal tour of duty shift.¹⁸

Mr. Prieto did not necessarily agree that management had a right to mandatorily assign CLSs to the D06 shift.

Q.... So there's been testimony today that where there are not sufficient volunteers to sign up for D06, management will just have -- I've been taking it. You all can clarify. I've been taking what has been stated as, whether or not sufficient volunteers for D06, management has the right to assign a CLS to fill the D06 slot or D06 assignment. What does that mean, or is that right?

A. I don't feel like that's right. It's not something I would do. A staff may feel pressure maybe as you're describing it in that sense. I think it's the management's responsibility to look ahead to see that there's enough labor in the pool to not have that be the only solution or a solution.¹⁹

Amy McNerny is the Chief Financial Officer, and testified regarding confusion surrounding D06 Pay, and what was meant for a CLS to be residence after the hearing officer's decision in December 2021.

She stated that once SBCERA sought to implement the decision, it was discovered that there was no dichotomy for "in residence" versus out of residence work for CLSs. Instead, D06 was explained in a vague manner requiring numerous communications between SBCERA, Human Resources and the County to understand the coding of D06.²⁰

It was determined that D06 Pay was not a differential tied to base salary for special skills or an undesirable shift. Instead, it is a "stand-alone pay item for work done on - - for these specific shifts."²¹

Ms. McNerny further testified that D06 Pay is not a differential paid for regular shift work, and is paid \$10 per call. There is a clear break and separation between a normal, or regular, shift and D06 shift. Furthermore, D06 does not correspond to a normal/regular

¹⁷ Tr. at pp. 143-144.

¹⁸ Tr. at pp. 139-140.

¹⁹ Tr. at pp. 150:14-25 through 151:1-2.

²⁰ Tr. at pp. 162-163.

²¹ Tr. at p. 164.

shift and constitutes pay outside of normal working hours for all CLSs. Moreover, D06 has no impact on overtime calculations.²²

Q. So based on this investigation that you did and these conversations with Mr. Gomez, what did you come to learn about how D06 was paid?

A. I came to learn that D06 was not a differential and that it was a stand-alone pay item for work done on -- for these specific shifts.

Q. When you say it's not a differential, could you please explain what you mean by that.

A. Yes. So when we speak of differentials here, what we mean by differential is that a person earns their base rate of pay for their regular work, and within the scope of that regular work, they're either doing it at a nonpreferred hour or perhaps they have a special skill set. So because of that, they get an amount of pay on top of or a difference. And so we refer to that as a differential, so it's on top of their regular pay.

Q. How was the D06 different from the differential that you're describing?

A. So we came to learn that the D06 was paid per call, which we discussed ad nauseam what "per call" is. But per call they were paid \$10; and that within a shift multiple calls would happen and be paid multiple sets of \$10. And then that was the only pay that was happening during that shift.

Q. So was D06 paid for work that the CLSs provided on any regular schedule where they got their regular pay? ***

Q. Yes or no.

A. The answer to that is no...²³

Ms. McNerny concluded that there was no way to differentiate between in residence and out of residence relative to D06 Pay. Therefore, Hearing Officer Haueter's December 2021 decision could not be implemented.²⁴

II. LEGAL FRAMEWORK FOR ANALYSIS ON APPEAL

More than many other matter that the Hearing Officer has handled on appeal for SBCERA, the instant appeal required a detailed legal analysis for proper discernment.

²² Tr. at pp. 168-174.

²³ Tr. at pp. 164-165:1-7.

²⁴ Tr. at pp. 183-187.

The issues presented were not clear nor straight forward in light of the type of pay that the County has afforded the Applicants in juxtaposition to what the Board must decide regarding compensation earnable.

On the one hand, the County has a need to conduct lab tests during graveyard weekend shifts, where no full-time staff has been assigned to fulfil the duties. The Applicants routinely fulfil the duties on a voluntary sign-up basis for a type of pay coded D06, that they have characterized as a differential or piece-rate pay for lab testing services.

The Applicants state that D06 is an unusual type of differential that is not specifically addressed by any caselaw or other County pay practice. In this regard, they maintain that in practice, D06 functions as a piece-rate pay plan.

They list as examples of piece-rate plans:

1. *Automobile mechanics paid on a "book rate" (i.e., brake job, one hour and fifty minutes, tune-up, one hour, etc.), usually based on the Chilton Manual or similar;*
2. *Nurses paid on the basis of the number of procedures performed;*
3. *Carpet layers paid by the yard of carpet laid;*
4. *Technicians paid by the number of telephones installed...*

Such pay plans are, in fact, recognized under California Labor Code section 226.2. However, there are stringent requirements for such pay, that do not apply in practice nor theory in this matter. For instance, under subdivision (a), the statute provides: ²⁵

(a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for that pay period:

²⁵ As referenced herein, the Applicant's references to piece rate pay in the pre-hearing brief are probative, since D06 has characteristics of piece rate pay as the Applicant's suggest.

The record references MOU's dating from 2016. Ironically, Assembly Bill 1513 was signed into law by Governor Brown in 2016, significantly changing California's piece-rate pay law, adding Labor Code section 226.2, and requiring employers to separately pay for mandatory rest/recovery periods and other nonproductive time (waiting time) at specific hourly rates, in addition to piece-rate earnings. This legislation mandated separate compensation for nonproductive time, often requiring payment at the higher of minimum wage or the employee's average hourly rate, and created complex requirements for wage statements and a "safe harbor" for employers to address past underpayments.

Piece rate pay employees must receive at least the minimum wage for all tasks not specifically included in the piece rate. In this regard, the Parties have indicated that a CLS could theoretically work the D06 shift and go uncompensated if no tests were performed. If such were the case, such an uncompensated pay practice would be inconsistent with the Labor Code in regard to minimum wages.

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(1) Employees shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation.

(2) The itemized statement required by subdivision (a) of Section 226 shall, in addition to the other items specified in that subdivision, separately state the following, to which the provisions of Section 226 shall also be applicable:

(A) The total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period.

(B) Except for employers paying compensation for other nonproductive time in accordance with paragraph (7), the total hours of other nonproductive time, as determined under paragraph (5), the rate of compensation, and the gross wages paid for that time during the pay period.

(3) (A) Employees shall be compensated for rest and recovery periods at a regular hourly rate that is no less than the higher of:

(i) An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods.

(ii) The applicable minimum wage.

In reference to the above, the Applicants argue that the practical effect of D06 Pay is also to provide a premium to CLSs working a mandatory, but undesirable shift. Over the years, D06 Pay served as a strong incentive for those CLSs required to work the undesirable weekend shift. As a differential, the Applicants maintain that D06 should be included in compensation earnable as opposed to the overtime exclusion.

The Applicants argue that D06 Pay is not overtime, which is defined by the County's MOU and calculated by paying an employee 1.5 times the base rate of pay for every hour worked over 80 per pay period. The Applicants' work week runs from Saturday at 12:01am to the following Saturday at 12:00am. Therefore, they maintain that D06 cannot be deemed overtime, or even a special type of overtime, given that at least 25% of the time it occurs in the first 24 hours of a pay period. In this regard, the first available D06 shift takes place on the first day of the pay period, or long before 80 hours have been worked.

In addition, it is axiomatic that D06 Pay has no relation to hours worked; nor is it paid on the basis of normal hours worked for purposes of statutorily required overtime pay.

The Applicants further contend that CLSs work the same number of hours each D06 shift and receive variable pay based on the number of calls processed that particular D06 shift. Therefore, D06 Pay is nothing like overtime.

To the contrary, the Respondent argues that D06 is a type of overtime that is specifically excluded as compensation earnable. It maintains that D06 compensates CLSs for additional services performed outside of their normally scheduled working hours.

It is argued that CLSs at ARMC work standard shifts Sunday through Thursday, either during daytime or evening hours. By contrast, D06 shifts occur exclusively on Friday and Saturday nights from 11:30pm to 7:30am, where there are no regular shifts.

Moreover, employees are not normally assigned to D06 shifts. Instead, employees volunteer or agree to take on these shifts in addition to their normal assignments. Where employees decline or fail to work the shifts, they are not penalized nor required to use any paid time off, sick leave, etc.

The Respondent maintains that employees are never paid D06 during their regular shifts. D06 is paid only for work voluntarily performed outside of an employee's normal hours that does not cover regular shift work.

In this regard, the Respondent argues that D06 must be excluded from compensation earnable because it is paid for additional work performed outside normal working hours. According to the Respondent, D06 is akin to a type of overtime pay, i.e., pay at a negotiated rate for extra work performed outside of normal working hours. This analysis compels the conclusion that D06 is not compensation earnable nor pensionable.

A. Despite the Original 2021 Decision in this Matter and as a Local Retirement Agency, SBCERA is Obligated to Comply with CERL when Calculating County Employee Pension Benefits

Despite consternation expressed by the Applicants in regard to this hearing de novo on remand, SBCERA is mandated to verify the exact nature and purpose of D06 Pay in juxtaposition to compensation earnable. The concern expressed by the Applicants regarding the remand is understandable. However, obvious confusion concerning the applicability of D06 in the context of compensation earnable is clearly evident in regard to legal precedent.

The Hearing Officer is ever mindful of the potential ramifications of these proposed findings and recommendation upon the Applicants and SBCERA alike. Recognizing this dichotomy, the Hearing Officer has endeavored to conduct this proceeding within the proper legal framework while accurately applying the law and concepts of due process.

It is important to note that the *Alameda* Court began its compensation earnable analysis by discussing the fiduciary roles of county retirement boards in regard to the administration of benefits. The Court stated:

An understanding of the proper role of county retirement boards under CERL is critical to resolving plaintiffs' contract and estoppel claims. Under CERL, "management of the retirement system is vested" in the county retirement boards. (§ 31520.) This delegation of authority is echoed by article XVI of our Constitution, which grants to public employee retirement boards, including those operating under CERL, the "sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries." (Cal. Const., art. XVI, § 17, subd. (a) [Citation.] As a practical matter, the retirement boards' responsibilities generally involve management of the system's financial assets...and the processing and payment of claims for benefits under the plan (see, e.g., *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 734, 110 Cal.Rptr.2d 565 [board has exclusive authority to determine whether plan is obligated to pay benefits to employee]...In carrying out these responsibilities, the Constitution grants retirement boards "plenary authority and fiduciary responsibility for investment of moneys and administration of the system." (Cal. Const., art. XVI, § 17.) Of necessity, the task of processing claims for retirement benefits requires the county retirement boards to interpret and apply the provisions of CERL, including the sections defining compensation, compensation earnable, and final compensation. (*Alameda Cnty. Deputy Sheriff's Assn. v. Alameda Cnty. Employees' Ret. Assn.*, *supra* at 9 Cal. 5th 1032, 1066.)

The Court further stated:

Although CERL grants to retirement boards the power to make regulations, those regulations must be consistent with the provisions of CERL. (§ 31525 ["The board may make regulations not inconsistent with this chapter".]) The boards do not have the authority to "evade the law" that otherwise applies to their system. [Citation.] "The granting of retirement benefits is a legislative action within the exclusive jurisdiction of the [relevant legislative body]. ... [¶] It is not within [a board's] authority to expand pension benefits beyond those afforded by the authorizing legislation. ... The scope of the board's power as to benefits is limited to administering the benefits set by the [legislative body]." [Citations.] This conclusion follows from principles governing the authority of administrative bodies generally: "[I]t is well established that the rulemaking power of an administrative agency does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature. [Citation.] (*Alameda Cnty. Deputy Sheriff's Assn. v. Alameda Cnty. Employees' Ret. Assn.*, *supra* at 9 Cal. 5th 1032, 1067.)

In light of this expressed authority, it is axiomatic that the SBCERA remand should not be seen as a subterfuge, or second bite at the apple, given the confusion that D06 Pay has caused in this matter. The following analysis, and the fact that SBCERA created a unique evidentiary hearing process for this matter, underscores the novel and opaque nature of D06 Pay in the context of compensation earnable. The Applicants' closing brief describing the D06 pay system as the "real villain in this story" and "some type of weird remnant of a situation that arose in the 1970s" further underscores this point.²⁶

²⁶ Applicant's Closing Statement at pp. 2:26: 5:26.

At first blush, the issues might seem clear to the Parties; but as the following analysis indicates, whether D06 Pay is pensionable required a detailed legal analysis and factual application by the Hearing Officer to properly discern.

B. Alameda's Analysis of PEPRA and Compensation Earnable is Instructive in this Matter

The issues in *Alameda* concerned contract implications in regard to PEPRA's amendment of Section 31461, the CERL provision defining the term "compensation earnable." The Court stated, in part:

Final compensation, which factors *** directly into the pension benefit calculation, is statutorily defined as an employee's annual compensation earnable, received either in a single specific year or calculated as an average over three specific years. (§§ 31462, 31462.1; *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 499, 66 Cal.Rptr.2d 304, 940 P.2d 891 (*Ventura County*)). The basis for a county employee's pension benefit is therefore the annual compensation earnable received by the employee in the period during which final compensation is determined.

Compensation earnable, in turn, is defined in section 31461 as the employee's "average compensation ... for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay... For purposes of this definition, "compensation" is statutorily defined as the employee's "remuneration paid in cash ... but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member." (§ 31460.)...

Further, compensation earnable has long been held not to include overtime pay. (See *1058 *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297, 306–307, 193 Cal.Rptr. 343 (*Guelfi*) ["overtime pay is not 'compensation earnable' and thus is not to be included in computing ... 'final compensation'"].) Since 2000, overtime premium pay has been expressly excluded from compensation earnable in most circumstances by section 31461.6. (Stats. 2000, ch. 966, § 3, p. 7065.)

Within this same framework, the Court discussed the definition of compensation earnable, enhancements, advantages given to employees and "add-ons":

As our quotation from section 31461 suggests, CERL's *definition of compensation earnable is both very general and somewhat inscrutable.* (See *Ventura County, supra*, 16 Cal.4th at p. 493, 66 Cal.Rptr.2d 304, 940 P.2d 891 [§§ 31460 and 31461 are "ambiguous in some respects"].) After an extensive examination of the language and legislative history, we held in *Ventura County* that " 'compensation earnable' is the average pay of the individual retiring employee computed on the basis of the number of hours worked by other employees in the same class and pay rate — that is[,] the average monthly pay, excluding overtime, received by the retiring

employee for the average number of days worked in a month by the other employees in the same job classification at the same base pay level.” (*Id.* at p. 504, 66 Cal.Rptr.2d 304, 940 P.2d 891.) Accordingly, to calculate compensation earnable, section 31461 uses a retiring employee's personal daily rate of pay, while it looks to the *** number of days “ordinarily” worked by comparable employees — that is, “persons in the same grade or class of positions during the period, and at the same [base] rate of pay” (*id.*, subd. (a)) — to determine the number of workdays over which that rate of pay is applied. As a practical matter, a retiring employee's final compensation is the annual compensation the employee would have received had he or she worked the average number of days ordinarily worked by his or her peers during the final compensation period...

Determining the components of an employee's compensation that are included in compensation earnable has been a recurring issue in the implementation of CERL. The compensation of many county employees, particularly including public safety workers like the members of the Association, consists of a base salary augmented by a series of employee-specific *add-ons* to recognize, for example, special training, experience, or hazardous duty. * Prior to our decision in *Ventura County*, many county retirement boards were guided by *Guelfi, supra*, 145 Cal.App.3d 297, 193 Cal.Rptr. 343, which held that *compensation earnable does not include such add-ons unless they are paid to all of an employee's peers...* (*Alameda Cnty. Deputy Sheriff's Assn. v. Alameda Cnty. Employees' Ret. Assn.*, 9 Cal. 5th 1032, 1057–59, 470 P.3d 85, 95–97 (2020). (Emphasis added.)

Although applicable to California Public Retirement Law (“PERL”) and CalPERS, Government Code section 20636 is also helpful in generally understanding what constitutes compensation earnable. Section 20636 states, in relevant part:

(a) “*Compensation earnable*” by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b)(1) “Payrate” 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*, pursuant to publicly available pay schedules...

(c)(1) *Special compensation of a member includes* a payment received for special skills, knowledge, abilities, *work assignment, workdays or hours*, or other work conditions.

(2) 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...

(3) *Special compensation shall be for services rendered during normal working hours* and, when reported to the board, the employer shall do all of the following:

(A) Identify the pay period in which the special compensation was earned.

(B) Identify each item of special compensation and the category under which that item is listed, as described in regulations promulgated by the board pursuant to paragraph (6), for example, the item of Uniform Allowance would be reported under the category of Statutory Items.

(C) Report each item of special compensation separately from payrate...

(7) *Special compensation does not include any of the following:*

(A) Final settlement pay.

(B) *Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise...* (Emphasis added.)

As can be seen through these legal pronouncements, the determination of compensation earnable is not necessarily clearly defined in all circumstances. In the context of D06 Pay, the Court's references to "specific add-ons" and "advantages" to employees are particularly probative in understanding compensation earnable and D06 Pay.

Likewise, the statutory references in Government Code section 20636 to "special compensation" as compensation earnable in juxtaposition to normal work assignments, workdays or hours is also helpful and probative to a general understanding of legislative interpretation, even if not directly applicable to this matter.

C. *The Payment of D06 must be Analyzed in Regard to Enhancements, Add-Ons, Additional Compensation and/or PEPRAs Prohibition Against Pension Spiking*

At the outset, the Hearing Officer does not find, nor infer, that any of the Applicants in this matter set out to "spike," artificially inflate pensions or seek retirement advantages by volunteering for Night Standby/D06. The Applicants are well intentioned employees and/or retirees seeking to vindicate important rights. As the Applicants stated in their pre-hearing statement, there have been no references or arguments of intentional pension spiking in this matter. The Hearing Officer expressly concurs with this assessment.

Nevertheless, the analysis in this matter cannot be understood without a discussion and understanding of the same in regard to the legislative intent behind PEPRAs. Like the Court stated in *Alameda*:

We emphasize that there is nothing inherently abusive in the practices addressed by section 31461, subdivision (b)(2) through (4), at least when divorced from *** their pension consequences. *Accepting voluntary on-call duty and cashing out unused leave time to the extent permitted by an employer are ordinary practices that serve proper public policy interests. Yet by not expressly excluding such payments when determining a county employee's pension benefit, the pre-PEPRA definition of compensation earnable allowed an employee to considerably increase his or her pension benefit by volunteering for a large quantity of on-call... during the final compensation period. Because such enhancements are arguably inconsistent with the underlying concept of compensation earnable, which is intended to reflect pay for work ordinarily performed during the course of a year, these types of enhancement have been characterized as*

pension spiking. (*Alameda Cnty. Deputy Sheriff's Assn. v. Alameda Cnty. Employees' Ret. Assn.*, *supra* at 9 Cal. 5th 1032, 1063. Emphasis added.)

It is this rationale that, *inter alia*, led to PEPRA's exclusion of voluntary pay items such as standby pay, on-call pay, overtime and payments for additional services outside of normal working hours. To illustrate this point, the Court specifically discussed the purpose of Government Code section 31461(b)(3) and its application to traditional overtime by stating:

“A comparable rationale supports the enactment of section 31461, subdivision (b)(3), which excludes “[p]ayments for *additional services rendered outside of normal working hours*.” Section 31461 bases compensation earnable on the same number of days worked for all employees within a particular pay grade. The long-standing exclusion of overtime from compensation earnable, now embodied in section 31461.6, confirms that an employee's pensionable compensation is generally to be based on pay for work performed during normal working hours. Consistently with this exclusion of overtime, subdivision (b)(3) requires the exclusion of compensation for other services rendered outside normal working hours. This restriction prevents employees from *volunteering*, during their final compensation period, to perform additional services outside normal working hours in *order to artificially inflate their daily rate of pay...*” (*Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.*, *supra* at 9 Cal.5th 1032, 1097. Emphasis added.)

D06 Pay must be analyzed within this context. Although there is no evidence of intentional pension spiking or add-ons to enhance retirement benefits, the County's D06 payments to CLSs who voluntarily work Night Standby could constitute enhancements or add-ons in a manner that artificially inflate the pensions of some workers in contravention of PEPRA and Government Code section 31461.

In this regard, testimony at the hearing by Mr. Sanchez that it is theoretically possible that one CLS could sign up for all of the D06 shifts, thereby creating consternation amongst other CLS attests to this aspect. The hearing testimony confirmed that D06 is administered on a cooperative basis among CLS staff and management. Nevertheless, despite the inherent ability of management to mandate or require D06 coverage, none of the witnesses could identify a time when such authority was ever exercised, or was required. Instead, the testimony revealed that there are always enough CLSs who sign up or volunteer to work the shift. Moreover, the per call payment arrangement can be lucrative and serves as an incentive for working the shift.

What became apparent at the hearing was that the Applicant's references to Night Standby being mandatory was in reference to the shift *per se*. In other words, the County requires the weekend graveyard shift to deliver services to the community. However, a CLS who performs the services is not mandated nor required to do so.

The Applicants represent roughly one-half CLSs who are certified to perform the tests required for weekend Night Standby/D06. Another one-half of CLSs cannot work the weekend duty because they do not meet requirements or qualifications. Therefore, by voluntarily signing up and working the weekend duty, the Applicants are in a position to obtain greater retirement benefits than others within the same class. This is true whether D06 Pay is classified as piece-rate pay or a type of overtime.

In *Stevenson v. Orange County Employees' Retirement Association* (2010) 186 Cal.App.4th 498, 506, the court began its analysis regarding the meaning of "grade or class of positions" by recognizing that 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."

There appears to be no issue regarding how and why the Applicants are paid for lab tests. However, it is the voluntary nature of the Night Standby/D06 shift that is most difficult to reconcile, since a CLS who volunteers for Night Standby could stand to receive a greatly enhanced retirement as opposed to other scientists, even within the same class. Such a result could result in artificial pension inflation, whether intentional or not, and would be inconsistent with the above case and statutory authorities.

**III. ANALYSIS OF D06 PAY AND COMPENSATION EARNABLE
BASED ON EVIDENCE PRESENTED AT THE HEARING**

In light of the above legal framework, the Hearing Officer turns to the evidence presented in this matter in addressing whether D06 is compensation earnable. The Parties agree that there is no clear precedent for the type payment reflected by D06.

Although described as a "differential" by the Applicants and the MOU, it was clear at the hearing that D06 does not apply to hourly rate, per diem, base salary nor minimum wage calculations. In this regard, the piece-rate pay concept described by the Applicants would be more applicable than a salary differential if all of the requirements for such pay were met by the County, which is not the case according to the evidence.²⁷

The Hearing Officer notes the unique structure of D06 Pay based on a per call for service basis. The Respondent is correct that the County does not routinely pay all CLSs a flat rate salary based on the number of lab tests performed. Therefore, D06 Pay cannot be considered as a part of normal salary for routine duties and involves some form of

²⁷ Reference Labor Code §226.2.

additional services and compensation. Whether these additional services occur within the confines of normal working hours presents a separate issue; as well as how the voluntary or required nature of the services factor into the definition of compensation earnable.

A. The Evidence Indicates that D06 Pay does not represent Overtime Pay, a Shift Differential nor Piece-rate Pay

The evidence in this matter does not support the interpretation of D06 as a traditional pay differential despite the MOU reference. D06 Pay cannot be defined as a traditional pay differential since it is paid on a per call basis, and does not correlate with per diem, hourly pay, percentages of wages, salary, etc.

D06 Pay equates to a “differential” only in regard to serving as an incentive for working the weekend shift. Wage differentials generally describe variations in pay based on factors like job skills, working conditions, experience, and industry. These differences can appear as a fixed hourly amount (e.g., an extra \$2 for a night shift) or a percentage increase on an hourly wage. D06 Pay has no actual correlation to a wage differential and, in this regard, appears to be a misnomer.

Ms. McNerny confirmed this analysis in testifying that a differential adds an amount “on top” of an employee’s regular hourly rate for regular work; whereas D06 is paid per call for work not performed on any regular schedule.²⁸

The MOU’s, attached as exhibits, are also instructive in this regard.²⁹ It is axiomatic that an MOU represents a contract that must be interpreted according to its plain meaning.

Under California contract law applicable to labor contracts, “if the language [of a contract] is clear and explicit, and does not involve an absurdity” the language must govern the contract's interpretation.” (California Civil Code § 1638.) If reasonably practicable, a contract must be interpreted as a whole, “so as to give effect to every part... each clause helping to interpret the other.” (California Civil Code § 164.)

At page 12, the 2020-2024 MOU discusses Night Standby and D06 Pay under the heading of “Differentials.” Under Section 5, in regard to Shift Differentials, the MOU states:

²⁸ See Tr. at pp. 164:10–18, 164:21–165:7, 174:18–20, 192:8–10.

²⁹ SBCERA Exhibits 1-3. The Hearing Officer only references the 2020-2024 MOU in this matter, recognizing that the relevant sections of the three MOUs submitted by the Respondent contain similar language.

Unless otherwise provided in the Memorandum of Understanding, shift differential compensation shall not be included in the base rate of pay when computing overtime, or call-back pay. Such differential will be included in computing overtime for employees who are not exempt under the Fair Labor Standards Act.

Section 5(a) discusses evening or night differentials as follows:

The purpose of this provision to compensate employees, who are required as part of their assigned schedule to work evening or night shifts, over and above the established base rates of pay when working the evening or night shift. Employees assigned to a continuous or rotating evening or night shift schedule shall be eligible for shift differential compensation. Further, employees who provide relief work for other employees assigned to continuous or rotating evening or night shift schedule shall receive shift differential compensation for all hours actually worked while providing relief work with prior approval of the appointing authority.

(1) Evening Shift – Employees who work an assigned shift where the majority of hours, including mealtime and at least four (4) hours, are worked between 6:00 p.m. and 12:00 a.m. (midnight), shall receive one dollar and twenty cents (\$1.20) per hour over and above their base hourly rate.

(2) Night Shift – Employees who work an assigned shift where the majority of hours, including mealtime and at least four (4) hours, are worked between 12:00 a.m. (midnight) and 8:00 a.m. of the following day, shall receive one dollar and seventy cents (\$1.70) per hour over and above their base hourly rate...

It is axiomatic that the MOU references to hourly (or even per diem) differentials would not apply to the type of per service calls reflected in D06 Pay. Similarly, in order for D06 to constitute a type of overtime, it would have to be paid at 1 ½ times the hourly rate to be consistent with state law.³⁰ This non-correlation between D06 and hourly pay, or salary, militates against any arguments that D06 is actually paid for overtime or as an actual differential.

For instance and in regard to overtime, California Wage Order 5-02 states:

“...Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1.5) times the employee’s regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and

³⁰ Labor Code section 510(a). Any work in excess of eight hours in a day and any work in excess of 40 hours in a workweek must be compensated at the rate of no less than one and one-half times the employee’s regular rate of pay.

(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

(c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one fortieth (1/40) of the employee's weekly salary."

Neither in practice nor in theory does D06 Pay function in this manner. Therefore, the pay cannot be defined as overtime, even though it possesses some characteristics of extra work beyond the normal workweek. Moreover, it should be noted that under California law, overtime pay is mandated and may not be waived through a D06 payment arrangement or otherwise. (See *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1430.)

Likewise, and as previously discussed, D06 Pay cannot constitute piece-rate pay since it does not comport with the requirements of Labor Code section 226.2.

For the various reasons discussed herein, the Hearing Officer finds that D06 Pay does not constitute a wage during normal working hours, a differential, piece-rate pay plan nor overtime pay.

A fortiori, the evidence that a CLS could theoretically work the Night/Weekend shift and receive no pay if no tests were performed further indicates that the D06 shift could not be a part of normal working hours. This analysis holds true because under such circumstances, a CLS would not receive minimum hourly wages in violation of Labor Code section 1197 and related wage orders. It is inconceivable that the County would engage in such a pay practice given the stringent legal requirements for payment of minimum wages for all normal working hours.

B. D06 is a Unique and Novel County Form of Incentivized Pay Per Service

Based on the whole of the evidence, the Hearing Officer concludes that D06 is a unique form of incentivized pay, paid on a per service basis that is not tied to base salary nor wages. As referenced, it only possesses the characteristics of piece-rate pay in regard to payment for a specific service. Otherwise, it does not meet the statutory definition of piece-rate pay in practice. As best the Hearing Officer could ascertain, such pay is not

Exhibit B: Page 27

reflected anywhere else in the MOU per se. In this sense, the Applicants' description of D06 Pay as piece-rate pay is probative, but not applicable.

By the same token, the Respondent's original description of D06 Pay as a type of overtime is not erroneous, but not an actual characterization of the pay since D06 is not tied to hourly wages or payments at time and a half.

On the other hand, the Hearing Officer agrees with the Respondent that D06 Pay earned on a strictly voluntary basis is for additional work after normal working hours. In this regard, the Hearing Officer does not find that services for Night Standby/D06 constitute work performed during normal work hours, since it is performed on a voluntary extra work basis.

The gravamen of evidence indicates that D06 is a form of incentivized pay that is unrelated to base salary for all intents and purposes. As previously discussed, there is insufficient evidence that D06 Pay conforms to all of the requirements of Labor Code section 226.2 to constitute piece-rate pay. There is a lack of evidence regarding guaranteed minimum wages, rest or meal breaks, non-productive time calculations, etc.

In fact, both Parties have indicated that it is possible for a CLS working D06 to go totally uncompensated, in theory, if no calls or tests are performed. Such a potential would appear untenable, meaning that the employee would not be paid minimum wages nor any compensation at all. Therefore, the pay does not correlate to any manner of base pay, differential or overtime.

The Hearing Officer concludes that D06 Pay that is paid to CLSs who volunteer for Night Standby is for additional testing services at \$10/call, and outside of normal working hours. Such incentivized per service pay is not afforded to all CLSs, who are routinely paid an hourly wage and/or on a salary basis as opposed to a per service basis. By analogy and in school, one would call this type of system "extra credit," where a student is not required to do additional work but chooses to do extra work in order to enhance a grade. Such extra credit work is done at the student's discretion, outside the boundaries of the assignment and on a voluntary basis.

This was essentially the testimony of Associate Hospital Administrator Carlos Prieto, who disagreed that management could mandate or require a CLS to work the D06 shift, without some type of negotiated agreement, i.e., meet-and-confer or the Myers-Milias-Brown Act. In this regard, he described night standby weekend work as voluntary based on sign-ups. He said that such work is discretionary, and based on the scheduling desires of the CLS.

Mr. Prieto confirmed that D06 shifts have no impact on a CLS's overtime hours. In this regard, hours worked on a D06 shift do not count toward the threshold hours at which an employee would be eligible for overtime.³¹ He also confirmed that any work performed on a D06 shift does not count toward the accumulation of overtime hours, and that a CLS who misses a regularly assigned shift must use available leave time, whereas a CLS who does not work a D06 shift is not required to do so.³²

Contrary to Mr. Prieto's testimony that management could not require or mandate a CLS to work weekend night standby, Applicant witnesses generally testified that D06 could be required if necessary. Nevertheless, even these witnesses stated that D06 has always been performed on a voluntary sign-up basis. In other words, Mr. Sanchez and Mr. Santoyo testified that CLSs exercise their own voluntary discretion in signing-up for D06 Pay.

Regardless of the logistics of compiling a spreadsheet and a rotation, CLSs make themselves available for weekend night standby. In this regard, no witness identified an occasion when a CLS was forced, mandated or required to specifically work the Night Standby shift.³³

In this instance, CLSs who voluntarily work D06 receive the compensation that they are due by way of \$10/call. The pay varies depending on the number of calls received or voluntarily worked by the CLSs. This is not to discount the fact that the work that CLSs perform is essential County work that serves a valuable public service.

Nevertheless, the fact that the County has not chosen to fund full time positions for the weekend shift does not automatically mean that Night Standby/D06 work constitutes normal services during normal working hours. To the contrary, the voluntariness of the work equates to performing discretionary additional services, outside of normal working hours. Therefore, where CLSs voluntarily staff Night Standby and receive D06 Pay, such pay should be excluded from compensation earnable.

On the other hand, the Hearing Officer also finds that if management were to mandate that CLSs perform Night Standby or staff the weekend shift, the opposite would be true and the corresponding D06 Pay could be considered as compensation earnable. This would assume that D06 Pay could be averaged and calculated as compensation earnable consistent with the formula and requirements of *Alameda* and PEPRA. As discussed below in regard to the Applicant's objections, it is beyond *this* hearing officer's

³¹ Tr. 128:13–23.

³² See Tr. 128:13-23; 143:16–144:3.

³³One occasion, in 2016, was identified by Mr. Santoyo where all scientists were forced to work various schedules.

comprehension as to how D06 could be averaged or calculated as compensation earnable since it has no correlation to hourly wages and is strictly paid on a \$10 per service basis unrelated to normal salary.³⁴

The rationale here would be that the D06 work would not be voluntary, nor an add-on or enhancement within the discretion of the employee. Where mandated, the D06 shift could not be said to constitute additional work performed outside of normal working hours since management would have defined the CLS's required duties and working hours, or tour of duty, to include the weekend shift. The Applicants have sought to make this point on appeal. However, there is insufficient evidence to support this argument.

The 2020-2024 MOU reserves as a management right the definition of Hours of Work:³⁵

The appointing authority shall establish work schedules, including determining the number of hours that comprises a scheduled shift and the number of hours in a pay period, for each position. The appointing authority may modify or change work schedules and the number of hours in a shift to meet the needs of service upon reasonable notice to the employee. Employees shall be required to work during such hours as necessary to carry out the duties of their position, as designated by the appointing authority, and such hours may be varied so long as the work requirements and efficient operations of the County are assured. Employees shall be present at the assigned work location and ready to begin work at the start of their shift. Employees may request established alternate work schedules (i.e., 9/80, 4/10). The County shall not arbitrarily deny requests for alternate work schedules. (Emphasis added.)

Both Parties indicated that where there are insufficient CLS volunteers for Night Standby, in theory, management reserved the right to require and assign CLSs to staff the shift. In such situations, it could not be stated that the work performed was at the voluntary discretion of the CLSs for any purposes contrary to PEPRRA, i.e., pension spiking, overly enhanced retirement benefits, etc.

In fact, under these circumstances, the failure of the CLS to perform the required weekend duty could result in potential personnel ramifications or disciplinary actions such as charges of insubordination, job abandonment and possible termination, etc. Nevertheless, there is insufficient evidence in the record to support the fact that management has ever exercised the right to mandate or require a CLS to work the Night Standby/D06 shift, or disciplined an employee for failing to work the shift.

³⁴ This is not to suggest that any such calculations would be impossible for SBCERA. However, any such method of calculating D06 Pay as compensation earnable is simply beyond this hearing officer's understanding.

³⁵ SBCERA Exhibit 2.

IV. **OBJECTIONS BY THE APPLICANTS TO THE AMENDED PROPOSED FINDINGS AND RECOMMENDATION**

The Applicants filed objections to the Amended Proposed Findings and Recommendation based on the analysis herein. The Hearing Officer addresses two arguments raised in the objections.

The Applicants continue to describe D06 as a differential for purposes of compensation earnable, while not explaining how D06 correlates to hourly wages or base salary. As discussed above, the evidence and MOU equate “differentials” to differences paid on top of wages, hourly rates or base salary. In this regard, D06 operates in isolation or a vacuum, paid separately and independently from hourly wages or base salary. In this regard, D06 provides a payment of \$10 pay per test, not per hour or on top of hourly wages. How such a pay mechanism could be annualized or calculated in conjunction with average wages for purposes of compensation earnable is difficult to discern. How does the \$10 per test equate with an hourly rate for purposes of pension calculations? Since it is not equated with hours or salary, how would D06 apply to a CLS’s average hourly or annual salaried rate of pay?

The Applicants argue that the former hearing officer reached a different conclusion in regard to D06 Pay as a differential. This aspect is acknowledged. However, it should be noted that the hearing officer did not receive the depth of evidence, information, live testimony and legal advocacy presented in this matter. Instead, the previous matter was solely decided on written pleadings and evidence unlike that received in this instance.

It is in this sense that the Board remanded this matter to be heard *de novo* (independently and anew, without deferring to the previous decision). In addition, the former hearing officer appeared to discuss D06 Pay primarily on the basis of standby pay, callback pay and services provided in residence. The opinion recognized, as does the instant opinion, that neither standby nor callback pay are generally considered as compensation earnable per PEPR. In this regard, the hearing officer deemed D06 to be a wage differential, since it served as incentive for working an undesirable shift in residence.

Likewise, the analysis presented herein acknowledges that D06 Pay serves as an incentive for working the night/weekend shift. Nevertheless, the preponderance of evidence also indicates that D06 Pay is a misnomer as a “differential.” It is a differential in name only, and is not paid in conjunction with hourly wages.

As discussed herein, the *Alameda* Court discussed the calculation of compensation earnable in terms of hours and average wages. In part, the Court stated, ““compensation

earnable' is the average pay of the individual retiring employee computed on the basis of the *number of hours* worked by other employees in the same class and pay rate — that is[,] the average monthly pay, excluding overtime, received by the retiring employee for the *average number of days* worked in a month by the other employees in the same job classification *at the same base pay level.*” (Emphasis added.)

To calculate compensation earnable, a retiring employee's personal daily rate of pay must be calculated, while looking at the number of days ordinarily worked by comparable employees, or persons in the same grade or class of positions during the period, and at the same [base or hourly] rate of pay. The Court concluded that as a practical matter, “a retiring employee's final compensation is the annual compensation the employee would have received had he or she worked the average number of days ordinarily worked by his or her peers during the final compensation period...”

In light of this authority, how would SBCERA calculate D06 Pay within this formula, as it is presently administered? How does the D06 payment per test structure fit within the formula for calculating compensation earnable, particularly since there is no minimum wage requirement or correlation with hourly wages or base pay? In this sense, it is readily understandable as to why it was necessary for SBCERA to seek extensive clarification from the County regarding D06 Pay.

The objections also bring to light another aspect related to the *voluntariness* of the Night/Weekend shift. The Applicants dispute the voluntariness of the D06 shift, arguing that it is a mandatory assignment, despite the strong testimony of Mr. Prieto and a preponderance of evidence that no CLS has ever been mandated or required by management to work the shift.

It is axiomatic that management reserves the inherent right to decide a tour of duty and define normal working hours. As noted, where mandated or required by management, even overtime may be deemed as compensation earnable under law, as Ms. McInerny testified. Just as the case with the Night/Weekend shift, overtime may be essential and necessary to complete an important work task or duty. Nevertheless, where such overtime is voluntary and within the discretion of an employee, it is specifically excluded under PEPRA. Likewise, the same legal analysis and rationale must hold true for the Night/Weekend shift/D06 Pay, since it is voluntarily worked and accepted by CLSs.

The Applicants have the burden of proof in this matter, and the preponderance of evidence fails to demonstrate that the Night/Weekend, or D06 shift, has been a mandatory assignment for any CLS or that a CLS has ever been required to work the shift.

FINDINGS REGARDING ISSUES PRESENTED

Based on the foregoing analysis, the Hearing Officer finds as follows regarding the issues presented for determination:

1. *Determination as to each applicant's regular working hours, including the standard schedule (e.g. hours per day and schedule days worked).*

Each Applicant either works, or worked, a standard base shift from 7:00/7:30-3:00/3:30, 3:30-11:30 or 11:30 -7:30 Sundays through Thursdays. None of the Applicants had a base shift or schedule where they were strictly assigned to the weekend Night Standby or D06 shift.

2. *Differentiation between differential pay and standby pay in terms of definitions, applications, and employment contexts.*

The Hearing Officer generally agrees with the Respondent's definition of terms.

"Differentials" provide a lump sum, hourly, or even per diem rate increase for particular assignments or shifts worked within their regular schedule, or based on an employee's particular credentials or skills.

Differentials are additional payments provided to an employee's base salary for performing special assignments, working undesirable shifts, or meeting measurable performance threshold within the scope of their normal duties, and assigned work schedules.

"Standby pay" compensates employees for making themselves available outside their scheduled hours. The predominant features of standby duty are the restrictions placed on the employee's personal time and the obligation to remain available, readily reachable and responsive outside of normal working hours.

By contrast, D06 Pay is a unique form of compensation specific to ARMC's clinical laboratories. It is only paid when CLS employees work voluntary overnight shifts on Fridays and Saturdays, and is calculated per call or test performed, not by the hour or for the employees' mere availability.

Despite its descriptive name as a differential, D06 Pay is neither a differential nor a form of standby pay. It is best understood as a unique form of incentivized per service compensation. Unlike differentials, which supplement base wages for

work performed during an employee's regularly mandated shift, D06 is paid separately per service and only for work performed outside the employee's normally scheduled hours.

Unlike standby pay, D06 does not compensate employees for being available. Instead, it compensates them on a per service basis for lab tests conducted at a rate of \$10 per call or test.

3. *Determination as to what the pay item D06 is for and how and to whom Night Standby Pay is administered.*

The pay item D06 is for lab or testing services that are rendered in addition to normal job duties of a CLS during weekend graveyard shifts. D06 Pay is earned on a voluntary basis by a CLS for extra weekend work in conjunction with testing or lab services required to be done on a stat basis.

It is mandatory that the County have the Night Weekend or D06 shift; but not mandatory that any CLS work the shift.

Based on the whole of the evidence, the Hearing Officer concludes that D06 is a unique form of incentivized pay, that is paid on a per service basis and unrelated to normal base salary or wages. As noted, it possesses the characteristics of a differential as an incentive, and piece-rate pay in regard to payment for a specific service. Otherwise, it does not meet the definition of a pay differential nor the statutory definition of piece-rate pay.

The Hearing Officer finds that D06 Pay is provided on a *voluntary basis* for additional services at \$10/call. The services occur outside of normal working hours or the tour of duty. This type of pay is not afforded to all CLSs, who are routinely paid an hourly wage and/or on a salary basis, and not on a per service call basis.

4. *Whether the services rendered in exchange for services provided under the D06 Pay code, including the resulting \$10 per call, fall within or outside its recipients' normal working hours.*

D06 Pay code services at \$10 per call are rendered on a sign-up or voluntary basis. Therefore, the services fall within the discretion of the CLS, and represent additional services outside of a recipient's normal working hours.

Moreover, the evidence that a CLS could theoretically work the Night Standby or Weekend/D06 shift and go unpaid if no tests were performed further indicates that the shift could not be a part of normal working hours or standard salary. This analysis holds true because under such circumstances, a CLS would not receive

minimum hourly wages in regard to Labor Code section 1197 and related wage orders.

5. *Whether Night Standby Pay performed at ARMC is compensation under Government Code section 31460 and whether such pay is additional pay for services rendered outside of “regular working hours” thereby excluding the pay from “compensation earnable” under Government Code section 31461 (b)(3) and “pensionable compensation” under Government Code section 7522.34(c)(6):*

Based on the aforementioned evidence and analysis, the Hearing Officer finds that Night Standby/D06 is paid to CLSs who sign-up or *volunteer* for the weekend shift. Therefore, D06 Pay constitutes compensation for additional work outside of normal or regular working hours. Since the work performed is done at the voluntary discretion of the CLS, it is susceptible to concepts of pension enhancement of the type prohibited in reference to *Alameda* and statutory law.

One need only look to the sample wage stubs in the record to understand this finding. The included paystubs show a wide variety of D06 Pay earned by CLSs, with one CLS making over twice the amount of her base salary.³⁶ There was also testimony that a CLS could sign-up for all of the D06 shifts, thereby depriving others of the opportunity to earn the pay.

Although there is an understanding among scientists that signing up for all D06 shifts would not be an acceptable practice and would cause angst, it is still theoretically possible that such could occur depending on the desires and availability of a CLS.

As stressed above, this is not to suggest in any way, shape or form that the Applicants are (or were) engaged in improper efforts to enhance pensions. On the other hand, it is this type of voluntary additional work that PEPR is meant to guard against for purposes of pension enhancement.

If the services rendered in exchange for payment provided under the D06 code, including the resulting \$10 per call, were provided on a mandatory or required basis, management would have defined normal working hours to include the required services. Management reserves the right to establish and define hours of work as it deems necessary to meet the service needs of the County. Therefore, assuming that D06 Pay could be properly calculated as compensation earnable and as a matter of law; if services were *required* or *mandated*, they could fall

³⁶ See AR at Bates 00539.

within the CLS's normal working hours or tour of duty. This is not the case in regard to Night Standby and D06 Pay practices.

The evidence indicates that all D06 services are provided at ARMC. Therefore, and as the Parties maintain in their closing briefs, the "in residence" dichotomy has no actual relevance in this matter and is a moot issue.³⁷

Under the County's practices for the Night Standby/Weekend shift, D06 Pay does not constitute compensation earnable and should be excluded from pension calculations.

DISPOSITION AND PROPOSED RECOMMENDATION

The Hearing Officer recognizes that the Applicants fulfill a very important County need for laboratory services during the weekends. The Applicants are dedicated public servants with sincere intentions. The fact that the County has chosen not to fund full time positions, and instead use a unique per service pay method to meet its service needs, is within its sole discretion.

Nevertheless, the weight of the evidence indicates that the services rendered for D06 Pay are voluntary, and the pay does not constitute a true wage differential. All services are conducted at ARMC. Moreover, the weight of evidence supports the fact that D06 Pay is for voluntary additional services outside of normal working hours.

In this regard, the Applicants have failed to meet their burden of proof that D06 Pay is compensation earnable. Based upon the weight or preponderance of evidence, the Hearing Officer recommends that the appeal in this matter be **denied**.

Dated: February 20, 2026

Respectfully submitted,
/s/ Duane E. Bennett, Hearing Officer

³⁷ Applicants' Closing Brief at p. 5:21-22.