# ATTACHMENT B

# STAFF’S ARGUMENT

**STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED**

Respondent Lorrie Koahou (Respondent Koahou) is the wife and heir to Decedent Alan Koahou (Decedent). Decedent became a local safety member by virtue of his employment with the County of Riverside and retired as a police sergeant with the City of Colton (Respondent City). On December 5, 2014, Decedent applied for service retirement. He retired for service effective December 29, 2014 and started receiving his service retirement from that date. Decedent passed away on November 3, 2019. Respondent Koahou, as Decedent's beneficiary, made an election to receive monthly survivor retirement death benefits. Respondent Koahou has been receiving survivor benefits since Decedent's death.

On August 25, 2016, CalPERS' Office of Audit Services issued a Public Agency Review audit report including Respondent City to determine whether the City's reporting of special compensation complied with the Public Employees' Retirement Law. Two of the audit findings are relevant to this appeal.

First, the audit report identified improperly reported Holiday Pay cash out. The audit report states:

> Specifically, the Agency's written labor agreement allows police employees to accrue holiday hours beyond the year in which it was earned. However, CCR 571 states that if a written labor agreement allows employees to accumulate holiday credit beyond the year in which it is earned, and an employee later elects to cash out accumulated holiday credit, it is not reportable compensation. Therefore, the Agency should not have reported the Holiday Pay as special compensation to CalPERS.

Second, the audit report identified improperly reported amounts of Peace Officer Standard Training (POST) pay and College Degree Incentive Pay. The audit report states:

> Specifically, the Agency included non-reportable Holiday Pay (see Finding 2E) in its calculation for POST Pay and College Degree Incentive Pay for three police officers. Compensation derived from items that are not reportable to CalPERS do not meet the definition of reportable compensation pursuant to Government Code Section 20636 and CCR Section 571.

Respondent City agreed with the audit report findings. CalPERS directed Respondent City to resolve the audit issues, provide a list of impacted employees and reverse the incorrect amounts.

On April 26, 2018 and June 20, 2018, CalPERS notified Decedent in writing that the audit identified special compensation that was improperly reported on his behalf by Respondent City. CalPERS informed Decedent that non-reportable College Degree Incentive Pay and POST Pay would be excluded from his final compensation and that his retirement amount would be re-calculated, and that an overpayment would be due to CalPERS.

Later, on July 11, 2018, Decedent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). He also requested the financial impact of the reductions.

Thereafter, on November 19, 2018, CalPERS informed Decedent that his retirement allowance would be reduced by $313.60/month and his overpayment amount was $14,400.59. Due to operation of the statute of limitations, the overpayment amount was reduced to $11,039.60 pursuant to Government Code section 20164. Decedent was given an option of repayment by lump sum or by monthly reduction. If no response was received, CalPERS would begin monthly deductions of $229.99 on March 1, 2019.

On January 30, 2020, the first date scheduled for hearing, CalPERS learned that Decedent had passed away. A continuance was granted, so CalPERS could determine whether Respondent Koahou had a justiciable interest in the hearing. On November 6, 2020, CalPERS notified OAH that Respondent Koahou had a justiciable interest and that she wished to proceed with the appeal.

A hearing was held on May 3, 2021. Respondent Koahou represented herself at the hearing. Respondent City did not appear at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent Koahou and the need to support her case with witnesses and documents. CalPERS provided Respondent Koahou with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Koahou's questions and clarified how to obtain further information on the process.

CalPERS presented evidence showing Decedent's retirement benefit calculations before and after the audit. CalPERS' evidence showed that calculation of Decedent's retirement allowance was based on final compensation which included special compensation significantly higher in one pay period than special compensation reported for all other months. The overreported amount was due to erroneously reporting Holiday Pay Cash Out as a lump sum item of special compensation in one pay period, and not reporting it at least annually and in the pay period the Holiday Pay was earned as required by CCR section 571. The City reversed the Holiday Pay Cash Out, and Decedent's special compensation was reduced to $2,060.64 (from $9,908.58). This in turn changed Decedent's highest paid final compensation period. And, since his College Degree Incentive Pay and POST Pay were derived from the incorrectly reported Holiday Pay Cash Out, the reportable amount of these two items of special compensation was reduced. After all corrections were made, Decedent's final compensation was reduced from $10,463.79 to $10,086.73, which in turn reduced his monthly retirement warrant $313.60 per month. CalPERS also presented evidence on the calculation of overpayment amount.

Respondent Koahou did not present any evidence or challenge the audit findings or amounts reversed by the City. She indicated that she had little knowledge about her late husband's pension but thought she should continue with his appeal anyway.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal.[1] Applying the law to the facts, the ALJ found that CalPERS has the authority to review and correct erroneous reports of income made by its contract employers. The ALJ reasoned that through the audit, CalPERS determined that the City should not have reported Holiday Pay Cash Out, and the derivative POST Pay and College Degree Incentive Pay exceeded what should have been reported. Once the error in reporting was discovered, CalPERS had a duty to correct the error. Under Gov. Code section 20160(e), CalPERS was required to make a correction that returned the parties to the status they would have had, but for the error. The ALJ affirmed CalPERS' decision to reduce Decedent's retirement benefit and collect the overpayment.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes in the proposed decision." In order to avoid ambiguity, staff recommends that "36-month period" be changed to "12-month period" on page eight, paragraph sixteen. In addition, staff recommends that "(Gov. Code, §20037)" be changed to "(Gov. Code, §20042)" on page eight, paragraph sixteen.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

July 14, 2021

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JOHN SHIPLEY
Senior Attorney

[1] The ALJ found that CalPERS had the burden of proof in this matter. CalPERS does not agree that it has the burden of proof with respect to its determination that Decedent's POST Pay and College Degree Incentive pay were not reported in compliance with the Public Employees' Retirement Law. However, since this error does not impact the ALJ's determination in this matter CalPERS argues the Proposed Decision should be adopted.