

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Paul Zehnder (Respondent) was employed by the Cosumnes Community Services District (District) as a Deputy Fire Chief and was a local safety member of CalPERS.

In April 2019, the District and Respondent renegotiated Respondent's employment contract. As part of the negotiations, the District attempted to address a problem with salary compaction in the upper management ranks. As a solution, the District and Respondent agreed to include holiday pay in addition to Respondent's base compensation, intending for the holiday pay to be pensionable. The employment contract specifically states that Respondent "shall receive holiday pay for District recognized holidays. . . at the rate of [\$1,106] per month to ensure that [Respondent] is on-call during all recognized holidays." However, neither the District nor Respondent inquired with CalPERS whether the holiday pay, as defined in the employment contract, would qualify as special compensation.

On November 17, 2020, Respondent submitted an application for service retirement, and he retired effective December 30, 2020. Upon receiving Respondent's application for service retirement, CalPERS commenced a review of his pay to determine whether his reported compensation complied with the provisions of the Public Employees Retirement Law (PERL). CalPERS discovered that the District had reported a monthly amount of \$1,106 as special compensation pay, identified as holiday pay.

After reviewing the employment contract, CalPERS determined that the holiday pay could not be included in the calculation of Respondent's pension benefits because it did not qualify as compensation earnable. The contract states that the pay was to ensure Respondent is **on-call** during all recognized holidays, but it does not state that Respondent is required to work those holidays. Thus, the holiday pay was in actuality stand-by pay, which is not reportable. Consequently, CalPERS determined that the holiday pay did not qualify as compensation earnable under Government Code (Gov. Code) section 20636 and Title 2, California Code of Regulations (CCR) section 571.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on December 20, 2021. Respondent represented himself at the hearing. The District appeared at the hearing and was represented by counsel.

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

The sole issue for determination at hearing was whether the holiday pay constituted special compensation to be included in Respondent's final compensation for purposes of calculating his retirement allowance.

CalPERS presented testimony explaining that the PERL defines compensation earnable as the compensation paid by the employer as payrate plus special compensation. (Govt. Code (GC) § 20636(b).) Payrate is defined as 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. (GC § 20636(b).)

Special compensation is defined as payments received by a member for special skills, knowledge, abilities, work assignment, workdays or other work conditions. Special compensation must be paid pursuant to a written labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment, in addition to payrate. (GC § 20636(c).) The CalPERS Board of Administration (Board), pursuant to statutory mandate, has specifically and exclusively identified what constitutes special compensation and under what conditions payments to a member may qualify as special compensation. (GC § 20636(c)(6); CCR § 571.)

In order to be considered compensation earnable, any item of special compensation must be listed as a compensable item under CCR section 571(a), plus it must meet the exhaustive, exclusive requirements set forth in CCR section 571(b).

Here, the holiday pay provision specified that Respondent was on-call for all recognized holidays. There was no other language in the employment contract to establish that he was required to work on holidays. When reviewing the reported compensation, CalPERS looks to the language of the employment contract. Section 571(b) of the CCR provides that the compensation must be contained in a written employment agreement and be performed during normal hours of employment. Here, the holiday pay did not meet the specific requirements of CCR section 571 because there was no scheduled staffing for recognized holidays. Further, the on-call language meant Respondent was only required to work on an as-needed basis, rendering those hours as overtime or standby pay. Overtime and standby pay are specifically excluded from consideration as special compensation. (GC § 20636(g)(4)(H) and (g)(4)(I).) The fact that Respondent may have worked on a District recognized holiday is irrelevant.

Respondent testified on his own behalf. He assumed that the holiday pay would be included in the calculation of his final compensation earnable. Notwithstanding the on-call contractual language, Respondent argued he was not on-call. He actually worked on several recognized District holidays. He was expected to be available "24 hours a day, 7 days a week, 365 days a year." He carried a District cell phone and drove a District vehicle. Respondent also called two witnesses from the District to testify on his behalf. Both witnesses testified that the holiday pay was provided to address the salary compaction and that Respondent could be called upon to work on the holidays.

Although the District was present at the hearing, it did not present any witnesses on its own behalf.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ reviewed relevant case law, finding that Respondent failed to establish that he was required to work on recognized holidays, as required by CCR section 571. The ALJ found the plain language of the contract provides that the purpose of the pay was to ensure Respondent maintained on-call status on holidays. The ALJ found "such is akin to standby pay, which is specifically excluded from special compensation under the PERL." (GC § 20636(1)(g)(l).) While the ALJ found Respondent's position to be sympathetic, the plain language of the contract must be followed. Only those items which specifically meet the requirements of CCR section 571 may be considered special compensation.

The ALJ affirmed CalPERS' determination that the holiday pay did not comply with the definition of compensation earnable under the PERL, and therefore cannot be included in his final compensation for purposes of calculating his monthly retirement allowance.

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

March 16, 2022

Preet Kaur
Senior Attorney