

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues Against:

BRYAN F. GLASS, Respondent,

and

CITY OF COSTA MESA, Respondent.

Agency Case No. 2022-0422

OAH No. 2022100523

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter by videoconference on May 11, 2023.

Austa Wakily, Senior Attorney, represented Renee Ostrander (complainant), Chief, Employer Account Management Division, Board of Administration (Board), California Public Employees' Retirement System (CalPERS).

Bryan F. Glass (respondent) appeared and represented himself.

Respondent City of Costa Mesa (City) did not appear at the hearing, even though it was properly served with a Notice of Hearing. Therefore, this matter proceeded as a default hearing against City pursuant to Government Code section

11520, subdivision (a). (All further statutory references are to the Government Code, unless otherwise designated.)

At the hearing, complainant moved to amend the Statement of Issues (Ex. 1) by interlineation by adding the words "and assisted value of employer paid contributions" after the words "Holiday Pay" on page A13, line 16 of Exhibit 1. Respondent did not object, and the motion to amend was granted.

Oral and documentary evidence was received, and argument was heard. The record remained open after the hearing until May 19, 2023, to allow respondent to file additional evidence, and until May 26, 2023, for CalPERS to provide a response, if any, to respondent's evidence.

On May 14, 2023, respondent filed and served the following exhibits: (1) a cover page with subject line "Offer Message on Cashout" (marked as Exhibit F-1); (2) an audio file of a voicemail message from February 26, 2019 (marked as Exhibit F-2); (3) respondent's written summary of the February 26, 2019 voicemail message (marked as Exhibit G); and (4) an unexecuted City resolution dated March 2023 regarding executive pay (marked as Exhibit H).

On May 26, 2023, CalPERS lodged objections (marked as Exhibit 16) to Exhibits F-2, G, and H. CalPERS objected to Exhibit F-2 on grounds of hearsay and relevance; to Exhibit G as untimely and on additional grounds of relevance and hearsay; and to Exhibit H as untimely and on additional grounds of relevance, hearsay, and lack of foundation.

The ALJ rules on the admission of respondent's additional exhibits as follows: (1) Exhibit F-1 is excluded, as it appears to be the cover page to Exhibit F-2; (2) Exhibits F-2 and G are admitted as administrative hearsay under section 11513, subdivision (d), to

supplement and explain respondent's testimony at hearing; and (3) Exhibit H is excluded, as the unexecuted City resolution dated March 2023 is not relevant to the time frame at issue in this appeal.

The record closed and the matter was submitted for decision on May 26, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant filed the Statement of Issues in her official capacity.
2. CalPERS is the state agency responsible for the administration of the Public Employees' Retirement Law (PERL), section 20000 et seq.
3. The City is a local agency that contracts with CalPERS for retirement benefits for its eligible employees and, as such, is subject to the provisions of the PERL.
4. Respondent established membership with CalPERS through employment with the City on October 1, 1995. Respondent was last employed as the City's Police Chief. By virtue of his employment, respondent is a local safety member of CalPERS.
5. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions and by interest and other earnings on those contributions. The amount of a member's contribution is determined by applying a fixed percentage to the member's compensation. A local public agency's contribution is determined by applying a rate to the member's compensation as reported by the agency. Using certain actuarial assumptions specified by law, the Board sets the employer paid contribution rate on an annual basis.

6. The amount of a member's service retirement allowance is calculated by applying a percentage figure based upon the member's age on the date of retirement to the member's years of service and the member's "final compensation." In calculating a member's retirement allowance, CalPERS staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member's final compensation for purposes of calculating the retirement allowance.

7. On May 14, 2021, respondent applied for service retirement requesting an effective retirement date of September 3, 2021. Respondent retired for service on his requested date and has been receiving his CalPERS retirement allowance since October 12, 2021.

8. During respondent's tenure first as the City's Acting Police Chief and later the Police Chief, consisting of the period of November 10, 2019, through September 2, 2021, the City reported to CalPERS respondent's Holiday Pay. (Ex. 6.) The City also reported employer paid member contribution (EPMC), an additional three-percent contribution the City made on respondent's behalf from November 10, 2019, to February 29, 2020. (*Ibid.*) CalPERS reviewed these payrolls and determined that the Holiday Pay and the assisted value of the EPMC do not qualify as "compensation earnable" under the PERL and thus cannot be included in the calculation of respondent's retirement benefits.

9. CalPERS notified the City and respondent of this determination by letters dated January 14, 2022, and January 15, 2022, respectively. Respondent timely appealed and requested an administrative hearing. All jurisdictional requirements have been met.

10. This appeal is limited to the issue of whether Holiday Pay and the assisted value of EPMC reported by the City on behalf of respondent, for the period of November 10, 2019, through September 2, 2021, can be used in the calculation of respondent's final compensation for purposes of determining his monthly retirement allowance.

Respondent's Employment History

11. Respondent began his career with the City's Police Department in 1995, when he was a police recruit. From 1996 to 2005, respondent worked as a police officer. In 2005, respondent became a Police Sergeant, and he was subsequently promoted to the rank of Police Lieutenant in January 2010 and to the rank of Police Captain in July 2015.

12. As a Police Captain, respondent was a part of the Costa Mesa Police Management Association (CMPMA), which had a Memorandum of Understanding (CMPMA MOU) with the City that its members were entitled to Holiday Pay for 12 designated holidays per year. (Ex. 8, p. A71.)

13. On November 10, 2019, the City appointed respondent as the Acting Police Chief. Although respondent held the title of Acting Police Chief, his rank was still that of a Police Captain, and he wore a Police Captain's badge. Nevertheless, respondent was paid the salary of a Police Chief, which was higher than that of a Police Captain. As an Acting Police Chief, he also became one of the City's executives subject to the executive compensation plan, which was set forth in Resolution No. 17-25 (Executive Salary Resolution), adopted by the City on April 18, 2017. (Ex. 10.) The Executive Salary Resolution does not provide any Holiday Pay to the City's executives,

and it does not contain any language specifying that executives are required to work without regard to holidays. (*Ibid.*)

14. In a letter dated February 26, 2020 (Offer Letter), the City offered respondent the position of Police Chief. Regarding the hours of work, the Offer Letter stated: "There is an expectation that Executive Staff are available to the City Manager whenever the needs of the City require." (Ex. 12, p. A119.) The Offer Letter also provided that the benefits of the position include 12 paid holidays per year. (*Ibid.*)

15. On March 1, 2020, the City appointed respondent as the Police Chief. Respondent worked as the City's Police Chief until his retirement, which was effective September 3, 2021.

CalPERS' Inquiries and Determination

16. After receiving a request from respondent regarding a retirement estimate, CalPERS began reviewing the City's reporting of respondent's payroll during his tenure as Police Chief beginning on November 10, 2019. Respondent's payroll history from November 10, 2019, to September 2, 2021, shows that the City reported \$18,110.40 of Holiday Pay and \$197.57 of EPMC to CalPERS. (Ex. 6, p. A34.)

17. On October 20, 2021, CalPERS staff member Taras Kachmar (Kachmar) emailed the City's Human Resources representative Kasama Lee (Lee), and asked, "[respondent] advised us he was required to work on [h]olidays, but mainly due to staff shortages. Is the Police Chief position normally scheduled to work without regard to holidays? Also, can you please provide a copy of the current Police Chief's employment contract?" (Ex. 7, p. A43.)

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18. On November 10, 2021, Lee responded:

The Police Chief is required to work without regard to holidays. Our Police Chief position does not work under an individual employment contract. They are covered as an Executive Employee under a City Council Resolution [Executive Salary Resolution]. If a benefit is not listed, they receive the benefit that is tied to the Employee Management group most similar (in this case the [CMPMA]).

(Ex. 7, p. A42.)

19. On November 10, 2021, another CalPERS staff member, Jennifer Sandness (Sandness) emailed Lee for additional information. Lee responded by email on November 19, 2021. Sandness' questions and Lee's responses are as follows:

1. Is the Police Chief position 40 hours/week, Monday-Friday? In other words, what are the normal work hours outside of special requests from the City Manager or when the City requires additional assistance?

The Chief can elect (Based on approval of the City Manager) a 5/8 (M-F), 9/80 (off every other Friday) or 4/10 (4 days a week) schedule. Totals 40 hours a week.

2. If a holiday, such as Christmas, occurs on a weekday, does the Police Chief normally take the day off but remain

available in the event of an emergency? Or is the Police Chief working in the office on Christmas?

The Chief would generally be scheduled to work the holiday. However, if they would like to request the holiday off, they would need to request it off similar to vacation time and record leave time for that day.

3. Please provide copies of his payroll that show when he was working on the holidays.

Please see attached copies of his time cards. We are exception based time cards which means that an employee only records "exceptions" to time cards (ex. any leave time off or if regular time needs to be coded to a special account or program). If the date is blank or not shown, that means he worked that day. For example, in the attached, you will see that 5/25/20 is coded as "EXEC". This means he did not work [on] Memorial Day. But 7/4/20 is blank (or not shown) which means he worked [on the] July 4th holiday.

4. We don't show that holiday pay was reported previously for the prior Police Chief, [name omitted] – please clarify what changed and provide any documentation that addresses this change.

New City Manager expectations for new Police Chief to work the holidays. This is also due to changing political environment (political unrest) and pandemic. In addition,

[respondent] was actually in an Acting assignment before he was formally appointed Chief. Under the acting assignment and as a Police Management employee, he was already required to work the holidays which he continued to do so once he was formal[ly] appointed as Chief.

5. Aside from the [Executive Salary Resolution] that you provided below, please provide any documentation duly approved by the governing body that links the Police Chief to the Police Management employee group and documentation that was approved by the governing body outlining the pay and benefits for Police Chief.

No other documents I am aware of.

(Ex. 7, p. A41.)

20. On November 19, 2021, Sandness followed up on this exchange with further questions. She asked, "For item #4 [City Manager's expectation for Police Chief to work during the holidays], please provide the documentation that memorialized the formal change regarding the staffing requirement for the Police Chief position. When the Police Chief elects not to work on the Holiday, who is responsible for filling the Police Chief duties? Please provide any labor policy(ies) that speak to this." (Ex. 7, p. A39.)

21. On December 7, 2021, Lee replied, in relevant part:

The only document referencing the work schedule would be the attached employee's offer letter which states that

Executive Staff (which includes the Police Chief) are available to the City Manager whenever the needs of the City require.

When the Chief is not available, the Field Services Police Captain would be Acting Chief. Please see attached policy under Command Protocol.

(Ex. 7, p. A38.)

22. Between December 10 and December 23, 2021, CalPERS staff and Lee exchanged further emails in which Lee confirmed that a Police Captain or a Watch Commander would oversee all operational duties when the Police Chief is unavailable. Lee further confirmed that in the event of an emergency, the Police Chief would be called in for duty. Specifically, Lee wrote: "If there was a departmental, city, state, federal emergency, the Police Chief would be asked to report to duty. If there was a significant police matter (active shooter, civil unrest, protests, matter or incident involving management team or City Council, just to name a few) the Police Chief would report to duty." (Ex. 7, p. A36.)

23. In letters dated January 14, 2022, and January 15, 2022, CalPERS notified Lee and respondent, respectively of its determination that the Holiday Pay and the assisted value of the EPMC did not meet the definition of "compensation earnable" under the PERL. Citing to section 20636 and California Code of Regulations, title 2, section 571 (Rule 571) as support, the January 15, 2022 determination letter to respondent stated, in relevant part:

Based on information provided by the City, the Police Chief was not normally required to work on holidays but was on

standby, available to work on holidays based on the needs of the City. Additionally, we confirmed that Holiday Pay was not historically consistent with prior payments for the classification of Police Chief prior to your appointment. Accordingly, we excluded Holiday Pay, and the associated EPMC, from the calculation of your final compensation amount.

(Ex. 14, p. A124.)

Lee's Testimony

24. At the hearing, Lee testified that from November 2019 to February 29, 2020, when respondent was the Acting Police Chief, it was a temporary assignment until the Police Chief position was filled. Respondent still had the rank of a Police Captain. The City provided to him the benefits of a Police Captain, and respondent was also paying dues to the CMPMA as a member of the bargaining unit.

25. Lee clarified that once respondent became the Police Chief on March 2020, the City Manager expected the Police Chief to be "ready and available at any time of the day." Lee explained that March 2020 was the height of the COVID-19 pandemic, which required enforcement of lock downs and mask requirements. Therefore, the City Manager expected "mandatory coverage" at all times.

26. During cross-examination by complainant's counsel, Lee conceded that the Acting Police Chief and the Police Chief are paid the same salary and that both positions are considered a part of the executive management group.

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Respondent's Testimony

27. Respondent testified at the hearing on his own behalf. Respondent contended that CalPERS' reliance on historic practices is insufficient justification for excluding Holiday Pay and the EPMC in calculating his final compensation for retirement purposes. Respondent testified the City "took a different direction in 2020 and 2021" due to the demands of the pandemic and the civil unrest during that time. Respondent stated he was "on call 24/7." He worked through some holidays and had to request time off if he was taking a holiday off. Respondent asserted that his case was a "special case" and an exception should be made, as there were many exceptions made during the pandemic.

28. Moreover, respondent asserted that Holiday Pay and the assisted value of the EPMC should be a part of his "compensation earnable" because it was a part of his job offer approved by the City Manager and the City's Human Resources Manager, Lance Nakamoto (Nakamoto). To support this assertion, respondent relied on the Offer Letter which shows that the benefits of the Police Chief included 12 paid holidays. (Ex. 12, p. A 119.) Respondent also submitted a February 26, 2020 voicemail message, in which Nakamoto stated that as Police Chief, respondent would be entitled to 12 paid holidays. (Ex. F-2.) Additionally, respondent asserted the City recently changed its practice to include Holiday Pay as compensation for its Police Chief.

29. In the alternative, respondent requests that the Holiday Pay and the assisted value of the EPMC from November 10, 2019, to February 29, 2020, be included as a part of his "compensation earnable." Respondent contends that during this period, when he was an Acting Police Chief, he was still a Police Captain who was a part of CMPMA and thus entitled to the Holiday Pay benefits set forth under the CMPMA MOU.

Testimony of Eric Herrera

30. At the hearing, Eric Herrera (Herrera), compensation review analyst, testified on CalPERS' behalf. Herrera explained that the Holiday Pay respondent received did not meet the definition of compensation earnable under section 20636 for two reasons. First, no written labor agreement indicates that the City's executives, including the Police Chief, would receive Holiday Pay. Second, documentation from the City, including the Executive Salary Resolution, did not contain any indication the position of Police Chief was required to work without regard to holidays. According to the responses from the City, the Police Chief was expected to be available for work on an on-call basis.

31. Herrera also clarified that the CMPMA MOU did not apply to respondent as soon as he became the Acting Police Chief on November 10, 2019. Even though respondent had the rank of a Police Captain, he was receiving the salary of a Police Chief, which was the compensation reported to CalPERS. Even if respondent was paying dues to his union, under the PERL, CalPERS could not use the salary respondent was receiving as a Police Chief and the Holiday Pay respondent was receiving as a Police Captain to calculate respondent's retirement benefits. According to Herrera, the salary and the Holiday Pay must be from the same group or class, whereas the positions of Police Chief and Police Captain fall into two separate classes.

LEGAL CONCLUSIONS

Standard and Burden of Proof

1. In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed

entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.)

2. Based on the above, respondent has the burden of establishing by a preponderance of the evidence that the Holiday Pay and the assisted value of the EPMC during the period of November 10, 2019, through September 2, 2021, meet the definition of "compensation earnable" and thus should be included in the calculation of his final compensation for retirement purposes. Respondent has not met this burden.

Statutory Framework

3. In *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478–1479, the court summarized the general principles governing the determination of a public employee's retirement allowance, as follows:

Under the PERL, the determination of what benefits and items of pay constitute "compensation" is crucial to the computation of an employee's ultimate pension benefits. The pension is calculated to equal a certain fraction of the employee's "final compensation" which is multiplied by a fraction based on age and length of service. [Citations.] "Final compensation" is the "highest average annual compensation earnable by a member during the three

consecutive years of employment immediately preceding the effective date of his retirement” or other designated consecutive three-year period. [Citation.] Both the employer and the employee are required to make contributions to the system, based on a percentage of “compensation.”

4. Thus, only “compensation earnable” is used to calculate “final compensation” under the PERL, and “final compensation,” along with age and length of service, are factors upon which a member’s retirement allowance is based. (§§ 20037, 20042.) In this case, respondent’s Holiday Pay must first meet the definition of “compensation earnable” before it can be used to calculate his “final compensation” as a factor in determining his retirement allowance.

5. Section 20636, defines “compensation earnable” in pertinent part, as follows:

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

[¶] [¶]

(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.

6. In the plainest terms, “compensation earnable” is payrate plus special compensation. Under section 20636, subdivision (b)(1), “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 “

7. Although “special compensation” is defined in section 20636, subdivision (c), the statutory scheme also directs the Board to promulgate regulations delineating more specifically and exclusively what constitutes “special compensation.” (§ 20636, subd. (c)(6).) Pursuant to this authorization, CalPERS promulgated Rule 571. (*DiCarlo v. County of Monterey* (2017) 12 Cal.App.5th 468, 481–482.) Subdivision (a) of Rule 571 contains a list that “exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement.” Respondent, as a CalPERS member employed by the City, a local contracting agency, is subject to Rule 571. (See *Hale v. California Public Employees’ Retirement System* (2022) 82 Cal.App.5th 764.)

8. Under Rule 571, “Holiday Pay” is defined as “[a]dditional compensation for employees who are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays” (Rule 571, subd. (a)(5).) However, for Holiday Pay to be considered as “special

compensation” to be included as “compensation earnable,” it also must meet the requirements of Rule 571, subdivision (b), which states in relevant part:

(b) The Board has determined that all items of special compensation listed in subsection (a) are:

(1) Contained in a written labor policy or agreement as defined at Government Code section 20049, provided that the document:

(A) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

(B) Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;

(C) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

(D) Indicates an effective date and date of any revisions;

(E) Is retained by the employer and available for public inspection for not less than five years; and

(F) Does not reference another document in lieu of disclosing the item of special compensation

Respondent's Holiday Pay Is Not Compensation Earnable

9. Applying section 20636 and Rule 571 to the instant case, respondent's Holiday Pay during his tenure as Police Chief does not meet the definition of "special compensation" under either the statute or the regulation. As Lee conceded in her testimony, respondent, when he became an Acting Police Chief on November 10, 2020, became a member of the City's executive management group. (Factual Finding 26.) As such, respondent's compensation was governed by the Executive Salary Resolution, which did not provide Holiday Pay to City executives. (Factual Finding 13.) Thus, respondent's Holiday Pay fails to meet the definition of special compensation under section 20636 because the labor policy or agreement of similarly situated members of the group, namely, the Executive Salary Resolution, did not provide for it.

10. Respondent's Holiday Pay also fails to meet the definition of special compensation under Rule 571. To begin with, the Executive Salary Resolution did not contain language about City executives being scheduled to work without regard to holidays. (Factual Finding 13.) Moreover, as Lee noted in her December 7, 2021 email, the only document referencing the Police Chief's work schedule is the Offer Letter, which states that executive staff, including the Police Chief, are to be available to the City Manager whenever the needs of the City require. (Factual Findings 14 & 21.) Lee, in her testimony, also stated the City Manager's expectation is for the Police Chief to be "ready and available at all times." (Factual Finding 25.) These statements indicate the Police Chief position is not one "that require[s] scheduled staffing without regard to holidays" as defined by Rule 571. It is an on-call position, where the Police Chief would be available to work on holidays based on the needs of the City.

11. Respondent contends Nakamoto orally told him that Holiday Pay was included in his compensation, which the Offer Letter confirmed. However, neither

Nakamoto's oral offer nor the Offer Letter satisfies the requirements under Rule 571 for the Holiday Pay to qualify as "special compensation." There is no evidence that Nakamoto's oral offer and the Offer Letter (1) have been duly approved and adopted by the City in accordance with requirements of applicable public meetings laws; (2) indicate the conditions for payment of Holiday Pay including, eligibility for, and amount of, the Holiday Pay; (3) are posted at the City's offices or immediately accessible and available for public review from the City during normal business hours or posted on the City's internet website; (4) indicate an effective date and date of any revisions; and (5) are retained by the City and available for public inspection for not less than five years, as required by Rule 571, subdivisions (b)(1)(A), (B), (C), (D), and (E).

12. Respondent further argues that he worked through the holidays during his tenure as the Police Chief and a special exception should be made in his case due to the emergency conditions during the pandemic. This argument is not persuasive because section 20636's definition of "compensation earnable" focuses not on individual effort, but on the compensation paid by the employer to similarly situated groups or classes of employees. Courts have held that "calculation of compensation earnable is not based on individual efforts." (*City of Sacramento v. Public Employees Retirement System, supra*, 229 Cal.App.3d at p. 1479; *Prentice v. Board of Admin., California Public Employees' Retirement System (Prentice)* (2007) 157 Cal.App.4th 983, 992.) Rather, it is an "earnings factor . . . based on categories of groups of employees." (*Santa Monica Police Officers Assn. v. Board of Administration*, (1977) 69 Cal.App.3d 96, 99.) In fact, both components of "compensation earnable," an employee's payrate and special compensation "are measured by the amounts provided by the employer to similarly situated employees." (*Prentice, supra*, 157 Cal.App.4th at p. 992.)

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13. Therefore, when respondent became the Acting Police Chief on November 10, 2019, the group or class of similarly situated City employees to which he belonged changed from the CMPMA to the City's executive management group. Respondent cannot be exempt from that classification under the PERL, and he, as an individual, cannot be considered a group or class because section 20636, subdivision (e)(1), expressly states that "[a] single employee is not a group or class." As a member of the executive management group, respondent is not entitled to Holiday Pay, as the Executive Salary Resolution did not provide for it.

14. In fact, to grant respondent's appeal to include Holiday Pay as "compensation earnable" would conflict with the legislative intent underlying section 20636. During the 1993 to 1994 legislative session, the Legislature added the current definition of "compensation earnable" to the PERL through Senate Bill 53. The Senate Floor Analysis of that bill indicates revisions to the definition of "compensation earnable" were meant to tackle "widespread 'spiking' (purposeful inflation) of the final 'compensation' (upon which retirement benefits are based) of local contracting agency employees " (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Senate Bill No. 53 (1993-1994 Reg. Sess.) as amended August 31, 1993, p. 2.) Caselaw also confirms that "compensation earnable" under the PERL is "exactly defined to include or exclude various employment benefits and items of pay." (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198; citing former § 20020 (currently § 20630).) The main purpose for this precision of definition and the strict construction of these statutes and rules is to prevent the mischief of pension spiking. (*Prentice v. Board of Admin., supra*, 157 Cal.App.4th at p. 993.)

15. Here, Nakamoto's oral offer and the Offer Letter granting respondent Holiday Pay were not a part of any City-approved, publicly available resolution that

sets forth the conditions for the Holiday Pay. There is no evidence that by offering respondent Holiday Pay, the City was attempting to manipulate payments in favor of one employee over another. However, the purpose of section 20636 and Rule 571 is to prevent a situation, such as the one presented in this case, where the lack of transparency in privately negotiated compensation packages provides opportunities for artificial inflation of an employee's pension.

Respondent's "Compensation Earnable" Cannot Consist of Payrate as a Police Chief and Special Compensation as a Police Captain

16. Respondent requested as an alternative, that his "compensation earnable" includes his Holiday Pay for the period of November 10, 2019, to February 29, 2020, when he was working as an Acting Police Chief, but still had the rank of Police Captain and paid union dues to CMPMA. It is undisputed that respondent, during this period, received the salary of an Acting Police Chief, which is the same as that of a Police Chief, but more than that of a Police Captain. Hence, respondent's alternative request amounts to asking for his "compensation earnable" during his tenure as Acting Police Chief to consist of the payrate of an Acting Police Chief/Police Chief and the special compensation of a Police Captain. However, for purposes of the PERL, respondent cannot both be a member of the executive management group as an Acting Police Chief and a member of the CMPMA as a Police Captain at the same time because courts have prohibited such dual classification.

17. In *Prentice, supra*, 157 Cal.App.4th at p. 993, the Appellate Court held:

. . . . Contrary to [appellant's] suggestion, we do not believe that for purposes of applying the limitations on compensation earnable set forth in the PERL an employee

may be a member of more than one group or classification. We note that in both the PERL and the applicable regulations, references to class, group or classification are, for the most part, preceded by the definite article "the," rather than the indefinite "a." This word choice strongly implies the existence of a single classification rather than alternative classifications. More importantly, the alternative classification scheme [appellant] asserts would be inconsistent with what we perceive as the central role of the limitations on compensation earnable, to wit: preventing local agencies from artificially increasing a preferred employee's retirement benefits by providing the employee with compensation increases which are not available to other similarly situated employees. An alternative classification scheme would plainly give local agencies a level of flexibility inconsistent with the purpose of the limitations.

18. In this case, respondent can only belong to one class or group at a time, and his payrate and special compensation must reflect those that are available to members of that single class or group. As Lee noted in her testimony, both Acting Police Chief and the Police Chief belong in the same class as members of the City's executive management group. Therefore, for the period of November 10, 2019, to February 29, 2020, respondent's "compensation earnable" must consist of the payrate and special compensation of a Police Chief. To hold otherwise would allow the City to artificially increase respondent's retirement benefits by providing to him the Holiday

Pay of a Police Captain, a compensation increase not available to other members in the executive management group, in contravention of the purposes of the PERL.

Disposition

19. Under these circumstances, respondent's appeal to include Holiday Pay and the assisted value of EPMC for the period of November 10, 2019, through September 2, 2021, in the calculation of his final compensation for purposes of determining his monthly retirement allowance must be denied. Furthermore, respondent's alternative request to include Holiday Pay and the assisted value of the EPMC for the period of November 10, 2019, through February 29, 2020, in the calculation of his final compensation for purposes of determining his monthly retirement allowance must also be denied.

ORDER

Respondent Bryan F. Glass' appeal is denied. CalPERS correctly determined that the Holiday Pay and the assisted value of employer paid member contribution the City of Cost Mesa reported on behalf of respondent for the period of November 10, 2019, through September 2, 2021, cannot be used in the calculation of his final compensation for purposes of determining his monthly retirement allowance.

DATE: **06/15/2023**

Ji-Lan Zang

JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings