

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Respondent City of Santa Ana (Respondent City) is a public agency that contracts with CalPERS to provide retirement benefits for its eligible employees. By way of its Contract with CalPERS, Respondent City agreed to be bound by the terms of the Contract and by the Public Employees' Retirement Law (PERL). (Govt. Code § 20000 *et seq.*)<sup>1</sup>

Respondent City contacted CalPERS to request a review of whether an item of special compensation, Confidential Premium, paid to a Sergeant while on a full-time leave of absence to serve as President of the Santa Ana Police Officers Association (SAPOA), complied with the PERL.<sup>2</sup> CalPERS determined that this item of pay did not qualify as reportable special compensation because it was only paid to one individual and was not available to all members of the Sergeant's group or class. In addition, CalPERS determined the Sergeant was not routinely and consistently assigned to sensitive positions requiring trust and discretion by Respondent City; therefore, the Sergeant did not meet the definition of Confidential Premium found in California Code of Regulations, title 2 (CCR), section 571, subdivision (a)(4). CalPERS, during its review, also determined that additional items of "Special Assignment Pay" received by the Sergeant, such as Detective Division Premium and Bilingual Premium, do not qualify as special compensation under the PERL because he was not routinely and consistently performing services for Respondent City while on full-time leave. Respondent City was informed of CalPERS' determination by letter dated October 30, 2020.

Respondent City appealed CalPERS' determination and exercised its right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH).

Respondent Gerry Serrano (Serrano) established membership with CalPERS through employment with Respondent City on July 16, 1995. By virtue of his employment, Serrano is a local safety member of CalPERS. In April 2016, Serrano was elected President of the SAPOA. At the time of Serrano's election, he was employed as a Sergeant with Respondent City's police department. Pursuant to the terms of the Memorandum of Understanding (MOU) between Respondent City and SAPOA, while Serrano serves as SAPOA's President, he is on full-time release from his duties as a Sergeant with Respondent City.<sup>3</sup>

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<sup>1</sup> Unless indicated otherwise, all further statutory citations are to the Government Code.

<sup>2</sup> At the time of the request, CalPERS did not know the identity of the Sergeant who was President of the SAPOA. During CalPERS' review, it determined that the Sergeant was Respondent Gerry Serrano.

<sup>3</sup> CalPERS introduced as evidence the MOUs and side letters between Respondent City and SAPOA covering the period July 1, 2004, through December 31, 2021. The terms relevant to this appeal are identical and the MOUs will collectively be referred to as the "MOU."

Serrano contacted CalPERS regarding its determination that Confidential Premium and additional Special Assignment Pay items of compensation do not qualify as special compensation under the PERL. Serrano requested that he be allowed to intervene and participate in the hearing. CalPERS agreed to name Serrano as a respondent and conducted a full review of all compensation reported on his behalf by Respondent City.<sup>4</sup>

On October 8, 2021, CalPERS issued a determination letter regarding non-compliant items of compensation. CalPERS determined that the following items of compensation are not reportable as compensation earnable while Serrano is on full-time leave to serve as the SAPOA President: Holiday Pay, Uniform Allowance, Bilingual Pay, Confidential Premium, Detective Division Premium, and Lead Worker/Supervisor Premium. CalPERS' determination was based on the fact Serrano did not meet the definitions for these items of special compensation. CalPERS also determined that it had not received sufficient information from Serrano and/or Respondent City to conclude the Educational Incentive and Off-Salary-Schedule Pay he received qualifies as special compensation under the PERL. Because of the errors in reportable pay, CalPERS also determined that Respondent City's reporting of the value of Employer Paid Member Contributions (EPMC) was erroneous because it was based on items of pay that did not qualify as compensation earnable.

Serrano appealed CalPERS' determination and exercised his right to a hearing before an ALJ with OAH. A hearing was held on November 23, 2021. Both respondents were represented by counsel at the hearing.

### *CalPERS' evidence*

At the hearing, CalPERS presented documentary evidence and testimony of CalPERS' staff to support its determination.

CalPERS' documentary evidence included the MOU between Respondent City and SAPOA which governed Serrano's employment. Pursuant to the terms of the MOU, Respondent City granted full-time release for one SAPOA representative to conduct SAPOA business, and SAPOA reimbursed Respondent City for that representative's compensation. The MOU provides that "the City shall pay the POA President a 'Confidential Premium' in lieu of 20 hours per pay period at time and one-half." The MOU states that the acceptance of "Confidential Premium" as compensation earnable is subject to CalPERS' approval. The MOU makes clear that the SAPOA President, while on full-time release, is not "required to carry out any peace officer's duties during such time" and that the SAPOA President "will not be required to report for duty for any purpose." In fact, the MOU requires SAPOA to obtain an insurance policy which provides coverage for Respondent City against liability "for any and all claims and/or

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<sup>4</sup> CalPERS initially did not name Serrano as a respondent because he has not retired nor has he submitted an application for service retirement. Consequently, any determination regarding his future retirement benefits was speculation based on the assumption he would not return to full-time duty as a Sergeant with Respondent City and/or not move to another position that would render an analysis of his compensation with Respondent City moot.

suits for damages or injuries to persons or property resulting from or arising out of any act or omission of said Association representative.”

CalPERS’ documentary evidence also included the payroll reporting from Respondent City documenting the types and amounts of special compensation reported on Serrano’s behalf. The evidence established that Serrano received \$41,109.55 in special compensation in the fiscal year prior to becoming SAPOA’s President, 2014-2015, and that he received \$92,674.50 in special compensation in 2015-2016, his first full fiscal year as SAPOA’s President (an increase of over \$50,000 in one year). Serrano’s special compensation continued to increase dramatically until he received \$123,925.06 in special compensation in the 2019-2020 fiscal year.

CalPERS also presented the testimony of CalPERS’ staff who testified that Serrano’s compensation identified as Bilingual Pay, Confidential Premium, Detective Division Premium and Lead Worker / Supervisor Premium does not qualify as special compensation. Each item requires that the employee be routinely and consistently assigned to a position by the employer to meet the regulatory requirements. However, while on full-time leave, Serrano was never routinely and consistently assigned to a position by his employer, because the terms of the MOU specifically preclude him from performing any work for Respondent City.

For these same reasons, CalPERS’ staff testified that the Uniform Allowance and Holiday Pay did not meet the definitions provided in CCR section 571, subdivision (b)(5). There are two requirements Serrano must meet to be eligible to receive Holiday Pay. First, he must be required to work on holidays. Second, he must work in a position that requires scheduled staffing without regard to holidays. CalPERS’ witness testified that Serrano does not meet either of these requirements while on full-time leave. Similarly, Uniform Allowance is defined as “[c]ompensation paid or the monetary value for the purchase, rental and/or maintenance of *required* clothing....” (CCR § 571 subd. (a)(5), emphasis added.) Serrano did not meet these requirements because while on full-time release, he cannot be “required to carry out any peace officer’s duties” and cannot be “required to report for duty for any purpose.” Consequently, Respondent City could not require Serrano to wear any particular type of clothing, especially not a Police Officer’s uniform.

CalPERS’ staff testified that even if Serrano could meet the definition of Confidential Premium, the pay does not qualify as special compensation because it was actually overtime and/or standby pay. According to the MOU, Confidential Premium was paid to the SAPOA President in lieu of 20 hours per pay period at time and one-half. Moreover, the Confidential Premium was paid to only one member of Santa Ana’s police department – Respondent Serrano. Consequently, Confidential Premium was not available to all similarly situated members of Serrano’s group or class of employment as required by section 20636, subdivision (c)(2) and CCR section 571 subdivision (b)(2).

CalPERS' staff also testified that Serrano's Educational Incentive Pay did not meet the definition contained in CCR section 571, subdivision (a)(2).<sup>5</sup> Educational Incentive Pay is defined as compensation for employees completing educational courses, certificates and/or degrees, which enhance their ability to do their job. In addition, the employer must have a program or system to evaluate and approve acceptable courses. At the hearing, evidence was presented of Respondent City's program/system for evaluating and approving courses. In addition, Serrano presented evidence relating to his education. CalPERS argued that Serrano did not meet the definition of Education Incentive because he was not actually performing his job for Respondent City. Consequently, CalPERS argued that Serrano could not establish that his education enhances his ability to perform his job with Respondent City.

CalPERS further argued that the PERL, and not section 3558.8, governs what qualifies as pensionable income. Despite section 3558.8 relating to Public Employee Communications and not being part of the PERL, Serrano and Respondent City argued CalPERS is not legally entitled to review the compensation he received to determine whether it complies with the PERL. CalPERS argued that section 3558.8 was enacted to ensure public employee representatives did not lose compensation and were provided "lost time" to allow employees leave from their employers to serve as stewards or officers of the employee representative or its state and national affiliates. Essentially, it was enacted to ensure the public employees did not lose pay and received service credit while on leave, and Serrano has been paid and has received service credit the entire time he was on leave. Moreover, as discussed above, Serrano's compensation has dramatically increased while on leave.

CalPERS argued that section 3558.8, subdivision (c) also was enacted to secure return rights to the public employee representative's position held prior to taking leave. Thus, Serrano could return to his position at Respondent City and seek further promotions or assignments that provide opportunities for additional special compensation that comply with the PERL. However, CalPERS argued that under no reasonable statutory interpretation could one conclude section 3558.8 eliminates or usurps CalPERS' duty to apply the PERL to determine what qualifies as compensation earnable.

### *Serrano's evidence*

Serrano testified on his own behalf. Serrano testified that as SAPOA President, he performs a range of duties on behalf of SAPOA, including meeting and conferring on negotiations and policy matters; representing members with grievances and other personnel issues; and communicating with civic leaders, members of the Legislature, members of the public, and members of state and local governments. Serrano testified that he performs duties for Respondent City while on leave because SAPOA is responsible for administering Respondent City's "employer mandate" to provide medical, dental, health and disability insurance benefits for Respondent City's public

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<sup>5</sup> Until June 1, 2020, Respondent City erroneously reported Educational Incentive as Lead Worker/Supervisor Premium. In fact, it should be reported as Educational Incentive.

police safety employees. Serrano also testified that Respondent City receives a benefit from the services he performs for SAPOA because his role is important in maintaining good labor relations.

Serrano testified that he believes he is eligible to work overtime for Respondent City while on full-time leave but admitted that he had not done so since becoming the SAPOA President. Serrano also admitted that he has not performed any peace officer duties since becoming the SAPOA President and that he is not required to perform any peace officer functions while on leave.

Serrano testified that he is not required to wear a uniform by Respondent City but that he does wear a uniform when it is appropriate - for example, at a peace officer memorial ceremony. Serrano testified that he has worked on holidays but that he is not required to work on all holidays.

Serrano admitted that he did not contact CalPERS to ascertain whether his Confidential Premium Pay would be pensionable despite the fact the MOU says that CalPERS would make this determination. Serrano also admitted that his salary increased when he became the SAPOA president.

Serrano argued that section 3558.8 requires a finding that all compensation he receives while on leave is pensionable. Serrano also argued that he meets the definitions of special compensation because he is performing duties for Respondent City while on leave as the SAPOA President. Last, Serrano argued that because any member of SAPOA could be President, the items of pay he receives, including Confidential Premium, are available to all members of his group or class of employment.

#### *Respondent City's argument*

Respondent City did not call any witnesses or present any evidence at the hearing. However, in its Closing Brief, Respondent City argued that section 20630 defines compensation to include payment for time during which a member is excused from work. Therefore, Respondent City believes that the special compensation Serrano received while serving in the capacity as the SAPOA President should be reportable. Respondent City agreed with Serrano that under section 3558.8, a public employee should not be penalized either in compensation, assignment, or retirement for taking leaves of absence to serve their unions. Respondent City indicated in its Closing Brief that it would defer to the CalPERS Board's determination as to whether the Confidential Premium Pay received by Serrano qualifies as reportable special compensation.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied the appeal of Respondent City and denied in part and granted in part the appeal of Respondent Serrano.

Initially, the ALJ found that section 3558.8 should not be interpreted to include "compensation earnable" within the term "compensation" as that term is used in the

statute. Moreover, the ALJ found that “compensation earnable” is not a “benefit” within the meaning of the statute. Moreover, the ALJ found that to interpret section 3558.8 to include the reporting of special compensation within the definition of compensation or benefit is to write into the statute a provision that is simply not there. Accordingly, the ALJ found that the determination of whether the reported items of special compensation on behalf of Serrano, or for any person on leave from Respondent City in the capacity of SAPOA President, must be based solely on the application of the PERL.

With regard to Serrano’s appeal, the ALJ concluded that CalPERS was correct in determining that Confidential Premium, Detective Premium, Bilingual Premium, Holiday Pay, and Uniform Allowance do not qualify as special compensation/compensation earnable while Serrano was on a full-time leave of absence from Respondent City to serve as the SAPOA President. The ALJ found that while on full-time leave, Serrano was not routinely and consistently assigned duties by Respondent City, was not required to wear a uniform by Respondent City and was not required to perform work for Respondent City on holidays. Consequently, the ALJ found that Serrano could not meet the definitions of these items of special compensation. The ALJ also found that Confidential Premium did not qualify as compensation earnable because it was pay in lieu of overtime and not available to all members of Serrano’s group or class of employment. However, the ALJ disagreed with CalPERS’ determination that the Educational Incentive Pay does not qualify as special compensation during the time Serrano was on full-time release from Respondent City to serve as the SAPOA President, and therefore granted Serrano’s appeal as to Educational Incentive Pay only.

With respect to Respondent City’s appeal, the ALJ concluded that Confidential Premium, Detective Premium, and Bilingual Premium, under the category of Specialty Assignment Pay, do not qualify as reportable special compensation for an employee who was on a full-time leave of absence from Respondent City to serve as the SAPOA President.

Pursuant to Government Code section 11517, subdivision (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 the date “November 21, 2021” be replaced with the date “November 23, 2021” on page one, paragraph one and on page 16, paragraph two of the Proposed Decision.

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

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John Shipley  
Senior Attorney