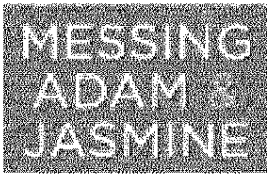


**ATTACHMENT C**

**Respondent's Argument**

## ATTACHMENT C



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<b>RE</b>	Respondent's Argument - Appeal re Compensation Earnable Calculation of Sgt. Gerry Serrano - Case No. 2021-0084 - OAH No. 2021050155

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**MESSAGE**

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No. of pages: 8

Message: Attached, please find a written argument on behalf of Sgt. Gerry Serrano, Respondent. A hard copy will follow.

Jon Davis

Legal Assistant to Steven Kaiser, Lina Balciunas Cockrell & David Kruckenberg

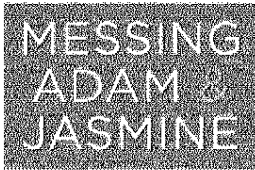
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March 28, 2022

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**Re: RESPONDENT'S ARGUMENT**

In the Matter of the Appeal Regarding Compensation Earnable Calculation of Sgt. GERRY SERRANO by CITY OF SANTA ANA, Respondent, and GERRY SERRANO, Respondent

**TO THE BOARD:**

This written argument is on behalf of Sgt. Gerry Serrano concerning the Determination Letter of October 30, 2020 issued by CalPERS. The primary issue in the appeal by Sgt. Serrano and his employer, the City of Santa Ana ("City"), was a legal one, whether Government Code section 3558.8 protects the collectively bargained retirement benefits of a member (or any similarly situated member). Addressed here are the benefits to be paid upon retirement to Sgt. Serrano, who is also the President of the Santa Ana Police Officers Association ("SAPOA"), working in a City-created work assignment pursuant to a collective bargaining agreement and permitted by state law. In his Proposed Decision, the Administrative Law Judge ("ALJ") misinterpreted the PERL in a manner contrary to both state law and the intended purpose of section 3558.8, which is to protect the salary and benefits - including retirement benefits - from being lost when an employee is performing duties for the employer relating to collective bargaining and labor relations. The Proposed Decision undercuts the purpose of Section 3558.8, rendering the statute a nullity. CalPERS's role is to administer pension benefits as contractually obligated by the employer, within state law and regulations, and always with the interest of the employee/beneficiary at the forefront.

The ALJ's misunderstanding of this role and his refusal to acknowledge explicit language in the law, legislative intent and past practice cannot be permitted. The CalPERS Board has the authority and obligation to reverse this proposed decision and acknowledge that section 3558.8 protects against loss of pension benefits contractually obligated to and lawfully earned by public employees who are representing public employees in collective bargaining with their employers. Anything other than reversal of this proposed decision is not legally defensible.

**I. THE APPLICATION OF THE ISSUE ADDRESSED IN THE PROPOSED DECISION WAS ERRONEOUS**

The ALJ framed the issue of the case as whether certain pay differentials Sgt. Serrano continued to receive while on full-time leave as the SAPOA President qualify as "compensation earnable" under the PERL. But the issue is bigger than that and the ALJ's failure to recognize as much unconscionably reduces Sgt. Serrano's pension benefits by almost 50%, violating Government Code sections 3558.8 and 20636, and 2 Cal. Code of Regulations ("CCR") section 571, as explained below.

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## II. THE ALJ ERRONEOUSLY SUBORDINATED GOVERNMENT CODE § 3558.8 TO THE PERL.

### A. The Purpose of Government Code section 3558.8 Is To Promote Labor Peace by Incentivizing Participation in Union Leadership Without Loss of Compensation

The terms of Section 3558.8 are clear.

(a) A public employer shall grant to public employees, upon request of the exclusive representative of that employee, reasonable leaves of absence without loss of compensation or other benefits for the purpose of enabling employees to serve as stewards or officers of the exclusive representative.... Leave may be granted on a full-time, part-time, periodic, or intermittent basis.

(b) Procedures for requesting and granting leave shall be determined by mutual agreement between the employer and exclusive representative. The exclusive representative or employee organization shall reimburse the public employer for all compensation paid to the employee on leave unless otherwise provided by a collective bargaining agreement or memorandum of understanding. ...

(c) Compensation during leave granted under this section shall include retirement fund contributions required of the public employer as an employer. The employee shall earn full service credit during the leave of absence and shall pay his or her member contributions unless the employer has agreed in a memorandum of understanding or collective bargaining agreement to pay the contributions on the employee's behalf.

By rejecting the application of all Special Compensation other than Education Pay to Sgt. Serrano's pension, the Proposed Decision effectively eviscerates section 3558.8. Rather than recognizing that Sgt. Serrano was putting into operation the collective bargaining needs addressed by section 3558.8, the Proposed Decision erroneously ignored the explicit language and express purpose of this state law.

### B. Government Code Section 20636's Definition Of "Special Compensation" Accounts For Sgt. Serrano's Union Role and Is Not In Conflict With Section 3558.8

Government Code section 20636 states as follows:

... (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. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e)...

(c)(1) As used in this part, "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. A single employee is not a group or class.

Sgt. Serrano testified that his duties in this City-created "work assignment" as President of the SAPOA require extensive special skills, knowledge and abilities on par with the other employees assigned by

the City to collective bargaining. His work assignment requires that he represent City employees and administer health benefits on behalf of the City, its legal mandate. Many other employees have served in and have retired from this work assignment without discrimination.

The ALJ fundamentally misunderstood the meaning and application of section 20636. That section provides in subsection (c) that “Special Compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement ... to similarly situated members of a group or class of employment.” The “group or class of employment” to which Sgt. Serrano belongs is his entire bargaining unit of police officers serving the City of Santa Ana. Therefore, his Confidential Premium pay is received by “a member” (Serrano) pursuant to a labor agreement (the MOU), which is available to similarly situated members of the group or class – i.e. the uniformed officers. The law does not require that everyone in a bargaining unit receive the same special assignment pay, but, where (one or more) officers are in such an assignment, the associated pay is pensionable. To adopt the ALJ’s reasoning would mean that everyone would be required to receive K9 Pay, Detective Pay, Confidential Pay or any other special assignment pay to receive pension credit, negating the number of positions required and created by the employer. K9 pay, Detective Pay and Confidential Pay are just some of many types of special compensation, but under the ALJ’s reasoning, the City must assign everyone in the bargaining unit to these assignments for them to be pensionable. This theory is absurd and not in accordance with the law.

**C. 2 Cal. Admin. Code section 571 has the same effect as section 20636.**

The regulations governing CalPERS define Confidential Premium pay as “Compensation to rank and file employees who are routinely and consistently assigned to sensitive positions requiring trust and discretion.” (2 CCR § 571.) In fact, CalPERS has historically authorized Confidential Premium pay as pensionable Special Compensation for SAPOA’s past presidents that have been assigned to this work assignment, as well as other labor representatives around the State.

As Sgt. Serrano testified, Confidential Premium pay is available to any member of the bargaining unit represented by SAPOA whom the City assigns to this work assignment, just as Special Assignment Pay is available to any officer who is on full time release performing in an external special assignment, for example while assigned to the FBI or to any external task forces, and this is true even if there is only one such officer so assigned. CalPERS has never proffered a basis for distinguishing between these two situations and the ALJ failed to address it in his Proposed Decision.

The analytical error in the Proposed Decision is evident. The ALJ concluded that the Confidential Premium is not available to “similarly situated members” of a group or class because the MOU says that it is “only available to one person”. But this is incorrect. This work assignment and corresponding Confidential Premium are available to all members in the bargaining unit, just as a K9 officer work assignment or Detective position are available to all the officers of the bargaining unit. The only testimony on this point came from Sgt. Serrano, who testified that this City-created work assignment is available to anyone in the bargaining unit, because any member of the bargaining unit may be appointed. This is no different from when the City appoints and rotates officers to any of its various work assignments, such as Detective, K9, or full-time release external taskforces. The ALJ assumed incorrectly that there must be multiple work assignments or positions in each assignment, but there is no evidence to this effect in the record and it contradicts the language, meaning, and intent of section 20636 and section 571. Nothing in the law requires an employer have multiple or a certain number of work assignments for special compensation to be pensionable.

**D. Other Considerations**

Lost in the analysis is the fact that the taxpayers of the City of Santa Ana have been reaping a financial windfall from the SAPOA collective bargaining agreement for decades. The press reports to the public and wants the public to believe incorrectly that public employee pensions are wholly funded by

taxpayers and that higher pensions mean higher public costs; and recent press coverage has contained the same incorrect assertions. They claim that labor representatives on full time leave conduct only union work while the taxpayers are essentially cheated, paying for work and benefits which they do not receive. This was reflected in the briefs filed by CalPERS, but it is false. In reality, and to the contrary, both taxpayers and the employer City of Santa Ana reap huge financial benefits from the City-created work assignment.<sup>1</sup>

Federal and state law require that the City provide health benefits for its employees. This "Employer Mandate" is administered by Sgt. Serrano in this City-created work assignment. For the past 30 years, the employee placed in this work assignment by the City has served as the administrator of the City's employee health benefits system, performing duties of what would otherwise require at least two full time City employees. This has saved the City at least \$300,000 every year and saved the taxpayers millions of dollars. The City created this "work assignment", saving over \$10 million dollars over the course of the last several years, and will continue to do so.

In May and June of 2021, several members of the State Legislature signed letters to CalPERS staff and the Board indicating that their interpretation of state law was inconsistent with clear language and legislative intent of Gov. Code §§ 3558.8, 20636 and 2 CCR § 571(a), but the ALJ improperly excluded this evidence, thereby refusing to recognize their position and the intent of existing law.

In *Hale & Wolf* (CalPERS Case No. 2016-0211), a recent matter on appeal to the State Court of Appeal, two long term labor representatives on full time release were permitted by CalPERS to promote to higher job classifications while remaining in their labor representative assignments, never having worked a day in their new job classification. CalPERS itself acknowledged that they were allowed to retire with the added compensation and all items of special compensation, based on their collective bargaining agreement. This is inconsistent and contrary to its position in this case. But in both *Hale & Wolf* and here, all items of special compensation are available pursuant to a collective bargaining agreement.

#### **E. Summary**

Confidentiality of the Sgt. Serrano's work assignment results from his duties as Association President, including: 1) representation in grievance administration and other personnel matters, 2) representation of employees in collective bargaining, including for health benefits, and 3) administration of the legal Employer Mandate for the City. Each of these duties requires a high degree of confidentiality, discretion and trust, as stated in the description of Confidential Pay in section 571.

The ALJ failed to acknowledge these facts and this analysis applicable to this work assignment, an assignment created by the City and available to everyone in the bargaining unit.

### **III. SECTION 3558.8 APPLIES ALSO TO THE SPECIAL COMPENSATION RECEIVED BY SGT. SERRANO**

Five items of Special Compensation earned by Sgt. Serrano were also addressed at the hearing below: Education Pay, Holiday Pay, Uniform Allowance, Detective Premium and Bilingual Premium. Section 571 expressly designates each of these as pensionable Special Compensation. The Proposed Decision, however, only recognized Education Pay as pensionable, but not the others. This was erroneous

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<sup>1</sup> The salary and benefits of employees who have been assigned to this work assignment are fully reimbursed to the City by the Association members themselves; it is not paid for by the public. Thus there is no cost to the City for the employees in this assignment. This arrangement has saved the City and taxpayers millions of dollars, and will continue to save millions into the future. This is the same as when other employees assigned to external taskforces where salaries and or costs are reimbursed to the City by external employers.

because all of these items fall under the coverage of Gov. Code §§ 3558.5, 203636, and CCR 571(a) (see above at p. 3).

**A. Holiday pay and uniform allowance are statutory items and must be pensionable.**

Holiday Pay and the Uniform Allowance are both items which are subject to regulation under the Fair Labor Standards Act (FLSA). Under the FLSA, compensation is remuneration paid for normal full-time work including premium pay required by the FLSA. For example, if a firefighter's normal work schedule is 56 hours per week, the FLSA requires that premium pay must be paid on all hours worked above 53 hours per week. In this example, regular compensation would be reported for 53 hours per week and FLSA premium pay would be reported for 3 hours per week, and this additional 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 is reported to CalPERS as Holiday Pay. In other words, if these employees are paid over and above their normal monthly rate of pay for approved holidays, the additional compensation is Holiday Pay and is then reportable to CalPERS as Holiday Pay.

For those employees like Sgt. Serrano with written labor agreements providing holiday credit and allowing employees to cash out accumulated holiday credit, the cash-out must be done at least annually and reported in the period earned.<sup>2</sup> This was applicable in Sgt. Serrano's case and he is therefore entitled to retirement credit for his earned holiday pay paid by the City whether or not he was on leave but working in a City created special work assignment, just like his regular compensation.

The same analysis applies to the Uniform Allowance, which is compensation paid for the purchase, rental and/or maintenance of required clothing. As Sgt. Serrano testified, in this work assignment he attends events where he is required to be in uniform, representing the City, and must maintain his Sergeant's uniform in accordance with City requirements. He is therefore entitled to retirement credit for this City-paid expense like any other officer of the City of Santa Ana.

**B. Detective premium and bilingual premium**

2 CCR § 571, subd. (4), which describes multiple categories of pay for various categories of Special Assignments, expressly provides retirement credit for employees such as Sgt. Serrano who receive a premium for assignment to the Detective Division. Sgt. Serrano had been assigned to the Detective Division at the time he was elected as President of the SAPOA in April, 2016, and has continued to receive this pay. The proposed decision finds this item ineligible for retirement credit because Sgt. Serrano is released from duty to perform his statutory and contractual duties. This flies in the face of the direction of Section 3558.8 that he should not suffer a loss of retirement benefits which he was accruing when the city placed him in a special work assignment. That decision should be reversed.

Section 571 also calls for retirement credit for employees who display skills in a language other than English who are routinely and consistently assigned to positions requiring communication skills in languages other than English. Not only is Sgt. Serrano proficient in Spanish (a common language in the Santa Ana community) and so was receiving the Bilingual premium on his election, but, as he testified at the hearing, he still must utilize his second language in explaining the operations of the Santa Ana Police Department to members of the community as part of his current duties in this Work Assignment. He is therefore entitled to retirement credit for his bilingual skills.

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<sup>2</sup> While not applicable here, if a written labor agreement allows an employee 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 compensation for PERS purposes. The labor agreement applicable here does not allow employees to accumulate credit in that way.



#### IV. CONCLUSION

Sgt. Serrano's duties in this work assignment require a full time commitment. He has performed those duties since his appointment by the City to this work assignment in April 2016. Prior employees in this work assignment have earned full service credit with CalPERS including credit for all of their compensation and benefits, including those items of Special Compensation which they had been earning before their election. And Sgt. Serrano therefore has operated, since his appointment to this work assignment, under the assumption that would be the case with him.

In a surprise move, CalPERS intends to cut his and his family's pensionable compensation by almost 50% into retirement, by taking the position that Gov. Code § 3558.8 does not apply to him and failing to recognize that there is nothing in the law which prohibits the City from creating any special work assignment it needs. This despite the undisputed fact that Sgt. Serrano's current work assignment is to administer the City's Employer Mandate as required by law and by the Memorandum of Understanding between the City and the SAPOA. CalPERS's indefensible actions will cause him an unjust and inconceivable loss in his pension benefit by almost 50% of his salary, something never done before to any other employee who has served in this work assignment. If this is not actual discrimination because of his Union office, it certainly appears to be as no other labor representatives throughout the state, past or present, have been similarly targeted.

This work assignment is strenuous, representing police officers not only in negotiations over the Memorandum of Understanding pursuant to which they serve, but also in their personnel actions, in administration of their health benefits, and in their communications with the administration of the City and the community they serve. While a rewarding work assignment, it is extraordinarily stressful and frequently requires confidential communications with members of the police department, the City administration, elected members of the City Council, and various other elected offices. In recognition of that fact, this work assignment is provided a Confidential Premium by the City in the MOU; and that in turn is recognized as part of his compensation for retirement purposes in section 571.

Nonetheless, CalPERS has challenged the applicability of the Confidential Premium and those benefits, and the proposed decision erred in not accepting relevant evidence and clear language in the law, and incorrectly agreed with CalPERS staff, except with regard to Educational Pay. This was wrong, and does not effectuate the will of the Legislature when it enacted Gov. Code §§ 3558.8 and 20636. When a law is ambiguous it must construed in favor of the pensioner; but here both the language and intent of the law are quite clear. Sgt. Serrano is a City employee. Section 20636 allows an employer to create a work assignment, and Section 571 requires that CalPERS recognize pensionability of the assignment if it is contained in a labor agreement, which it is. Section 3558.8 was designed and enacted to protect Sgt. Serrano from the intended action in the Proposed Decision. To comply with state law, legislative intent and past practice, and to effectuate the will of the People of the State of California and the City of Santa Ana, the Proposed Decision must be reversed. Acceptance of this proposed ALJ decision is neither just nor defensible.

Sincerely,

MESSING ADAM & JASMINE LLP



Steven Kaiser

SK:jpd