

ATTACHMENT B

STAFF'S ARGUMENT

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

Bryan F. Glass (Respondent) established membership with CalPERS through employment as a police recruit with the City of Costa Mesa (Respondent City) on October 1, 1995. Over the years, he promoted to Police Officer, Police Sergeant, Police Lieutenant, Police Captain and finally Police Chief. By virtue of his employment, Respondent is a local safety member of CalPERS.

Respondent was promoted to the rank of Police Captain in July 2015. As a Police Captain, Respondent was part of the Costa Mesa Police Management Association (CMPMA), which had a Memorandum of Understanding (MOU) with Respondent City that included Holiday Pay.

On November 10, 2019, Respondent 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, Respondent also became one of Respondent City's executives subject to the executive compensation plan, which was set forth in Resolution No. 17-25 (Executive Salary Resolution), adopted by Respondent City on April 18, 2017. The Executive Salary Resolution does not provide any Holiday Pay to Respondent City's executives, and it does not contain any language specifying that executives are required to work without regard to holidays.

In a letter dated February 26, 2020 (Offer Letter), Respondent 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." The Offer Letter also provided that the benefits of the position include 12 paid holidays per year.

On March 1, 2020, Respondent City appointed Respondent as the Police Chief.

On May 14, 2021, Respondent applied for service retirement. Respondent worked as Respondent City's Police Chief until he retired on September 3, 2021.

CalPERS reviewed the compensation reported by Respondent City on behalf of Respondent during his tenure as Police Chief beginning on November 10, 2019. Respondent City reported \$18,110.40 in Holiday Pay and \$197.57 in the associated value of Employer Paid Member Contribution (EPMC) from November 10, 2019 to September 2, 2021.

CalPERS contacted Respondent City to obtain additional information relating to the Holiday Pay reported for Respondent. Respondent City provided the following information in a series of email exchanges:

4. We don't show that holiday pay was reported previously for the prior Police Chief, . . . 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, Bryan Glass 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 formally 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.

Based on information provided by Respondent City and available documents, CalPERS determined that 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 Respondent City. CalPERS further confirmed that Holiday Pay was not historically consistent with prior payments for the classification of Police Chief.

CalPERS notified Respondent and Respondent City of its determination that Holiday Pay did not meet the definition of "compensation earnable" pursuant to Government Code section 20636 and California Code of Regulations (CCR), title 2, section 571. CalPERS excluded Holiday Pay and the associated value of EPMC from Respondent's final compensation. CalPERS also informed Respondent and Respondent City of their right to appeal CalPERS' determination.

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 May 11, 2023. Respondent represented himself at the hearing. Respondent City did not appear at the hearing, and a default was taken as to Respondent City only.

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, answered Respondent's questions and clarified how to obtain further information on the process.

Respondent testified on his own behalf. Respondent asserted that CalPERS' reliance on historic practices is insufficient justification for excluding Holiday Pay and the associated value of EPMC in calculating his final compensation for retirement purposes. Respondent testified Respondent 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." Respondent asserted that his case was a "special case" and an exception should be made, as there were many exceptions made during the pandemic.

Respondent also asserted that Holiday Pay and the associated 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. Additionally, Respondent asserted Respondent City changed its practice to include Holiday Pay as part of the Police Chief's compensation after he retired.

Respondent testified that as an alternative, CalPERS should include Holiday Pay and the associated value of the EPMC from November 10, 2019 to February 29, 2020, when he was the Acting Police Chief. Respondent contends that during this period he was still part of the CMPMA and thus entitled to the Holiday Pay benefits set forth under the CMPMA MOU.

Respondent also called Respondent City's Human Resources Representative Kasama Lee (Lee) to testify. Lee testified that the Acting Police Chief position from November 2019 to February 2020 was a temporary assignment until the Police Chief position was filled. Respondent still had the rank of a Police Captain. Respondent City provided him with Police Captain benefits, and Respondent paid dues to the CMPMA as a member of that bargaining unit.

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.

Lee confirmed 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.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Holiday Pay reported during

Respondent's tenure as Police Chief did not qualify as "special compensation" under either Government Code section 20636 or CCR section 571. Respondent became a member of Respondent City's executive management group when he was appointed as Acting Police Chief on November 10, 2019. Respondent's compensation was governed by the Executive Salary Resolution, which did not provide Holiday Pay to City executives. Respondent's Holiday Pay does not qualify as special compensation under Government Code 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.

The ALJ further determined that Holiday Pay did not meet the definition of special compensation in CCR section 571. The evidence shows that Respondent was in an on-call position based on the needs of Respondent City. Neither the Offer Letter nor Nakamoto's oral offer meet the requirements and definition found in CCR section 571.

Finally, the ALJ rejected Respondent's assertion that CalPERS should make an exception due to the emergency conditions during the pandemic. The ALJ correctly noted that the "compensation earnable" does not focus on individual effort, but on the compensation paid by the employer to similarly situated groups or classes of employees.

In the Proposed Decision, the ALJ concludes that Holiday Pay and the associated value of EPMC were properly excluded from the calculation of Respondent's final compensation.

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." To avoid ambiguity, staff recommends changing "assisted value" to "associated value" in the first full paragraph on page 2, paragraph 8 on page 4, paragraph 10 on page 5, paragraph 23 on page 10, paragraph 28 and 29 on page 12, paragraph 2 on page 14, and paragraph 19 on page 23; change "November 10, 2020" to "November 10, 2019" in paragraph 9 on page 18 of the Proposed Decision.

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

July 19, 2023

Austa Wakily
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