ATTACHMENT A

THE PROPOSED DECISION

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BEFOE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Calculation of Final Compensation of: DANIEL A. CATALONO and NORMAN (ELDO) E. EVENSON and Similarly Situated Non-Management Police Officers, Respondents, and CITY OF HUNTINGTON BEACH, Respondent.	Case No. 9329 OAH No. 2011061387

PROPOSED DECISION

The hearing in the above-captioned matter took place on November 15, 2011, at Los Angeles, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH). Complainant was represented by Henry W. Crowle, Senior Staff Counsel, California Public Employees' Retirement System (PERS). Respondents Norman E. Evenson and Daniel Catalano appeared with their attorney, Stephen H. Silver, Silver, Hadden, Silver, Wexler, and Levine. There was no appearance by Respondent City of Huntington Beach (City).

After the receipt of evidence, the record was left open so that the parties could file post-hearing briefs. Complainant's brief was timely received, and is marked Exhibit 16 for identification. Respondents' brief was timely received, and is identified as Exhibit J. The matter was deemed submitted on December 29, 2011. Based on the foregoing, the ALJ hereafter makes his factual findings, legal conclusions, and orders.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED March 20 2013
Lisa Okamoto

STATEMENT OF THE CASE

Respondents Evenson and Catalona are retired police officers, who spent their careers with the Huntington Beach Police Department (HBPD), serving in non-management positions. As part of their employment contract, they were entitled to 10 paid holidays per year, of the type typically recognized by government agencies, such as Christmas and Independence Day. However, if they actually worked one or more of the holidays, they were entitled to receive additional compensation, denominated "Holiday Premium Pay" by the City. Under their employment contract—the Memorandum of Understanding, or MOU—the Holiday Premium Pay was to be reported to PERS as part of the employee's "compensation earnable," compensation that can form part of the basis of their retirement benefits. For nearly 20 years, the City reported any Holiday Premium Pay to PERS as compensation earnable—compensation that could form the basis of retirement benefits—and PERS accepted it as such.

In 2009, PERS took the position that such compensation could not be included in calculating Respondents' retirement benefits. This proceeding was then initiated at the demand of Respondents Evenson and Catalano to establish whether or not the Holiday Premium Pay should be part of the compensation earnable. After the proceeding began, the parties agreed the decision would be binding on all similarly situated police officers employed by the City.

While there was some dispute regarding the facts of the matter, the parties acknowledged that the case tended to be a dispute regarding the interpretation of the law. Thus, the dispute has centered on the question of whether the Holiday Premium Pay is actually overtime pay, which by statute cannot be included in calculating retirement benefits, or whether it is a type of "special compensation," which may form the basis of retirement benefit calculations.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. The Statement of Issues and Amended Statement of Issues were filed by Marion Montez, while acting in the official capacity of Assistant Division Chief, Customer Account Services Division, PERS.

2. (A) Respondents Daniel Catalano and Norman E. (Eldo) Evenson[1] were police officers employed by Respondent City in non-management positions. It is undisputed that their status as peace officers entitles them to retirement benefits from PERS.

(B) Respondent Evenson retired effective September 20, 2008, as a Motor Police Officer on industrial disability, with more than 29 years of service credit. Respondent Catalano retired effective November 6, 2009, with over 30 years of service credit.

3. Respondent City is a public agency that contracts with PERS for retirement benefits for its eligible employees. PERS is a defined benefit plan, its operation governed by various statutes and regulations. The benefits it pays out are funded by member and employer contributions, determined by applying a fixed percentage to the member's compensation and to the public agency's payroll. Respondents Evenson and Catalano are members of PERS.

4. (A) In January 2009, PERS wrote to Respondent Evenson regarding his retirement. PERS stated that some of the special compensation reported by the City would not be used to calculate his retirement benefits. PERS took the position that the pay Evenson had received under the rubric of Holiday Premium Pay—which the agency denominated Holiday Premium Overtime Payrate—was overtime which is not "reportable" under Government Code section 20035. PERS further asserted that the pay reported as Holiday Premium Pay was not "special compensation" within the meaning of the regulation that define special compensation. The letter went on to inform Evanson of his appeal rights.

(B) In September 2009, PERS wrote to Respondent Catalano, denying that monies he had received as Holiday Premium Pay was reportable—could not be considered in determining retirement benefits. The letter stated a second ground to deny the payments: a claim that the Holiday Premium Pay improperly counted two types of pay, and "compounded" other remuneration. (Ex. 5, p. 2.)

5. Respondents Evenson and Catalano requested a hearing, and this proceeding ensued, notwithstanding the City's failure to participate.[2] All jurisdictional requirements have been met.

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[1] When the proceeding was initiated, Richard C. Bright was also a respondent. However, pursuant to stipulation he was removed as a respondent because he is part of management and subject to a different Memorandum of Understanding with the City.

[2] Because the City did not appear in the proceeding, hereafter references to "Respondents" shall refer to Evanson and Catalano together, unless otherwise noted.

6. (A) After the Statement of Issues was filed, the parties agreed that Respondents would be designated as representatives of their similarly situated fellow non-managerial peace officers in seeking a determination as to whether compensation denominated as Holiday Premium Pay should be considered as "compensation earnable" by PERS. Complainant thereafter filed the Amended Statement of Issues, which makes reference to the agreement pertaining to the scope of the proceeding.

(B) In the Amended Statement of Issues, it was alleged that the City had reported both Holiday Pay and Holiday Premium Pay as special compensation. It was also alleged that "CalPERS rejected the Holiday Premium Pay as special compensation since it does not constitute reportable compensation pursuant to Government Code section 20035." (Ex. 8, p. 3 at par. IV.) This was, in essence, an allegation that the Holiday Premium Pay was really overtime pay.

Holiday Pay and Holiday Premium Pay Under the MOU

7. Through the MOU between Respondents' bargaining unit, the Huntington Beach Police Officers' Association (Association), and the City, Respondents are entitled to particular types of pay and benefits. As noted above, what is most pertinent to this matter is compensation received for working on recognized holidays.

8. Under the MOU that became effective for the period April 1, 2006 through March 31, 2010, Respondents and other police officers were entitled to 10 paid holidays each year.[3] Essentially, the police officers were and are paid for those holidays, and ostensibly have those days off work, as would other City employees.

9. (A) The MOU provides that if a police officer actually works on one of the paid holidays, the officer is to receive additional compensation on top of that day's pay. The pertinent provisions of the MOU, found in Article VII G, first deal with payment for the 10 paid holidays. That part of the agreement provides that each employee will receive, in each biweekly paycheck, one twenty-sixth of the total of 80 hours earned for the year for the ten holidays. Hence, the pay for the 10 holidays is pro-rated in the officers' paychecks over the course of the year; they receive an amount equal to 1/26 of the value of 80 hours pay in each biweekly paycheck.

(B) It should be noted that although the pay for the holidays is at the rate of eight hours per day, the non-management peace officers do not work an eight hour day. They either work a "four-ten" schedule, working four ten hour shifts per

[3] The 10 holidays are New Years Day, Martin Luther King's Birthday, President's Day, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day and the day after, and Christmas Day. (Ex. 9, page 6.) The record indicates that most City offices were closed on these days, although the HBPD was not.

week, or they work seven extended days in a two-week period, each day being 11 hours and 25 minutes long. Some police officers within the management team work a traditional shift of five days, eight hours per day, Monday to Friday, but such does not apply to officers in the rank of sergeant or below.

(C) Part VII G of the MOU then states that "[non-managerial police officers] who work on a recognized City holiday shall be compensated at their overtime rate for time actually worked from 12:00 A.M. through 11:59 P.M." (Ex. 9, p. 6.) The overtime pay rate amounts to "time and a half"; that is, one and one-half times the regular pay rate. (*Id.*, at p. 10.)

10. According to the testimony of Lieutenant Russell Reinhart, who was involved in the negotiation of the MOU, a police officer who works a paid holiday is not paid one and one-half times his or her regular pay in addition to the pay otherwise received for holidays. Instead, if the officer works a day such as Christmas, he or she is to be paid one-half of their regular day's pay for that day of work, in addition to the money pro-rated through the paychecks.

The Side Letter Agreement Between the Association and the City

11. As previously noted, in 2009 PERS took the position that the Holiday Premium Pay was overtime pay, and therefore not part of compensation earnable. The claim that the Holiday Premium Pay was overtime was based in part on the language from the MOU which stated that the Holiday Premium Pay would be paid at the overtime rate.

12. In response, the City and the Association entered into an agreement on the issue of the holiday pay, which was memorialized in a "Side Letter of Agreement" (Side Letter), which amended portions of the 2006 MOU. The Side Letter was executed in February 2010, and the City approved and adopted the Side Letter by a resolution made on March 1, 2010.

13. The Side Letter adopted a new part G-2 of Article VII of the MOU. It states:

> Holidays Worked – Employees who work on a recognized City holiday shall be compensated Shift Differential Pay. Holiday Shift Differential Pay is available to all members of the HBPOA that are regularly scheduled to work a recognized holiday. Members shall receive Shift Differential Pay equal to fifty percent (50%) of their regular rate of pay for all time actually worked from 12:00 A.M. through 11:59 P.M. on the recognized holiday.
>
> (Ex. 10, at the page marked "2 of 5.")

14. As set forth further below, shift differential is a species of special compensation, and thus recognized as compensation earnable. However, Complainant has asserted that in fact the Holiday Premium Pay does not meet the definition of shift differential, and thus may not be calculated into the retirement benefits.

Holiday Staffing

15. The HBPD must staff all of the 10 City holidays, because public safety requires police staffing every hour of every day of the year. However, some holidays put more demand on the HBPD for manpower than do others. This is especially the case for Memorial Day, Independence Day, and Labor Day. On these days there are more likely to be community events, parties, and entertainment events in bars and restaurants, and therefore more staffing need. While the police must also work days such as Christmas and Thanksgiving, they appear less likely to respond to crowds at parties, parks, or bars on those days than they would during the previously-mentioned national holidays.

16. According to the credible testimony of Lieutenant Reinhart of the HBPD, no officer in the rank of sergeant or below gets a paid holiday off, at least so far as they are otherwise scheduled to work that day. Furthermore, some officers are called in to work overtime—more than a standard shift or to work a holiday that falls on their normal day off—on one or more of the holidays.

17. Any officer scheduled to work on weekdays would be likely to work some of the holidays that fall on weekdays, such as Thanksgiving and/or the day after Thanksgiving, which always fall on a Thursday and Friday, or Memorial Day and Presidents Day, both of which always fall on a Monday. By comparison, holidays that tie to a specific date, such as Independence Day or Christmas, would occur on different days of the week each year, and be somewhat less predictable, though obviously they would fall on weekdays approximately five out of every seven years.

18. Lieutenant Reinhart also testified that the extra 50 per cent pay that is to be provided to officers who work on a paid holiday was intended by the City to provide an incentive for more senior officers and sergeants to work on some or all of the holidays. This incentive works because senior officers can "bid" on the shifts they can work, and by allowing for an 50 per cent extra pay on worked holidays, the HBPD is more likely to have senior officers available on shifts that are likely to fall on the holidays where there is high demand for police staffing. This has, from the HBPD's point of view, the salubrious effect of bringing experienced officers into the staffing mix on those days. The incentive nature of the pay is further established by the fact that more senior officers, in the absence of the incentive, might use their seniority to avoid working some of the holidays in order to spend time with their families.

The Pay Calculations

19. During the hearing, copies of some of Respondents' pay stubs were received in evidence. While it was agreed that the general legal issues were to remain the issues in the case, the pay documents shed some light on the contentions of the witnesses regarding the manner in which the police officers were to be paid. Hence, it was shown that Respondent Evenson received $112.31 as Holiday Pay on his February 2, 2007 pay check, and that amount was, indeed, 1/26 of his regular 80 hours of pay, which totaled $2,920, based on an hourly rate of $36.50. (Ex. 14, p. 2.) That document also showed a separate entry for "Holiday Prem[ium]" which showed eight hours, at a pay rate of $33.50. Thus, the check stub shows two different types of holiday pay. However, the Holiday Premium Pay rate did not comport with Lieutenant Reinhart's understanding of how the Holiday Premium Pay was to be allocated; from his testimony the Holiday Premium Pay should have amounted to one-half of the regular hourly pay, or $18.25 per hour, to be added to the $36.50 paid for eight hours on a holiday, when not worked.

20. Mr. Gutierrez, the PERS staff person who testified for Complainant, analyzed the total holiday pay to Evenson—the holiday pay and the holiday premium pay—and calculated that the Respondent had been paid 262 per cent of regular pay for holidays worked. The accuracy of this analysis is not determined here, but it does raise questions as to whether the Holiday Premium Pay is paid as agreed by the City and Association.

21. Finally, it should be noted that the amount of PERS contributions vary from paycheck to paycheck, both as to the main contribution, and the one denoted as 2.25 per cent. It is not clear whether receipt of Holiday Premium Pay increased contributions to PERS in either contribution category.

LEGAL CONCLUSIONS

Pertinent Statutes and Regulations

1. The outcome of this case is controlled by a handful of statutes and regulations. They tend to be lengthy, and not all provisions of those statutes and regulations are pertinent to the case. The pertinent provisions follow, though at times further text is provided to give context to the statute or regulation.[4] It should be noted

[4] For example, more than one type of compensation provided for work not performed is quoted from section 20630, subdivision (a). Likewise, while many types of special compensation are not set out with CCR section 571, some that are otherwise not particularly relevant to the case are quoted, so as to illustrate the scope

that all statutory citations are to the Government Code, and all regulations are from title 2 of the California Code of Regulations (CCR). As will be seen, the holiday pay is reportable as compensation, sometimes called "payrate" and the Holiday Premium Pay is special compensation.

2. "Compensation" is generally defined in section 20630 as follows:

> (a) As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of any of the following:
>
> (1) *Holidays.*
>
> [¶ . . . ¶]
>
> (4) Vacation.
>
> (5) Compensatory time off.
>
> (6) Leave of absence.
>
> (b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.
>
> (Emphasis added.)

3. Overtime is defined in section 20635, and the part that is pertinent to this case states:

> When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service. For the purposes of this part, *overtime is the aggregate*

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of special compensation. And, in the latter case, evidence was adduced that one is not confined to receiving retirement credit for only one type of special compensation.

service performed by an employee as a member for all employers and in all categories of employment in excess of the hours of work considered normal for employees on a full-time basis, and for which monetary compensation is paid.

(Emphasis added.)

4. Section 20636 defines "compensation earnable," another statutory term of art. As seen below, it is made up of two components, payrate and special compensation, the latter term having the most relevance to this case.

a) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b)(1) "Payrate" means 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. "Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e).

(2) "Payrate" shall include an amount deducted from a member's salary for any of the following:

(A) Participation in a deferred compensation plan.

¶ . . . ¶

(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).

(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.

(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

(5) The monetary value of a service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, *holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 et seq. of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.*

(7) Special compensation does not include any of the following:

(A) Final settlement pay.

(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

(C) Other payments the board has not affirmatively determined to be special compensation.

(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.

¶ . . . ¶

(Emphasis added.)

5. As set forth above, section 20636, subdivision (c)(6), calls for the promulgation of regulations that further define special compensation. The PERS Board has enacted such a regulation, found at CCR section 571, pertinent portions of which follow:

(a) The following list 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:

(1) INCENTIVE PAY

Bonus - Compensation to employees for superior performance such as "annual performance bonus" and "merit pay". If provided only during a member's final compensation period, it shall be excluded from final compensation as "final settlement" pay. A program or system must be in place to plan and identify performance goals and objectives.

Dictation/Shorthand/Typing Premium - Compensation to clerical employees for shorthand, dictation or typing at a specified speed.

Longevity Pay - Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.

¶ . . . ¶

(2) EDUCATIONAL PAY

The items of special compensation outlined below do not include reimbursement to an employee for the cost of an application or test, books, tuition or travel.

Applicator's Differential - Compensation to employees who are required to maintain a Qualified Pesticide Applicator's Certificate.

Certified Public Accountant Incentive - Compensation to miscellaneous employees passing an exam and receiving a license as a Certified Public Accountant.

¶ . . . ¶

(3) PREMIUM PAY

Temporary Upgrade Pay - Compensation to employees who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration.

(4) SPECIAL ASSIGNMENT PAY

Accountant Premium - Compensation to rank and file employees who are routinely and consistently responsible for developing the employer's budget.

Administrative Secretary Premium - Compensation to an administrative secretary responsible for coordinating meetings, plans and other specialized activities for the governing body of the contracting agency or school employer.

¶ . . . ¶

(5) STATUTORY ITEMS

Fair Labor Standards Act (FLSA) - Compensation paid for normal full-time work schedule including premium pay required by FLSA. For example, a firefighter's normal work schedule is 56 hours per week. FLSA states premium pay must be paid on all hours worked above 53 hours per week up to what is considered normal for employees on a full-time basis. In this example, the firefighter works 56 hours in a normal work week. Therefore compensation would be reported for 53 hours per week and FLSA premium pay would be reported for 3 hours per week. Any work performed above 56 hours per week would be considered overtime and would not be reported to PERS.

Holiday Pay - 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. If these employees are paid over and above their normal monthly rate of pay for approved holidays, the additional compensation is holiday pay and reportable to PERS.

¶ . . . ¶

(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;

(2) Available to all members in the group or class;

(3) Part of normally required duties;

(4) Performed during normal hours of employment;

(5) Paid periodically as earned;

(6) Historically consistent with prior payments for the job classification;

(7) Not paid exclusively in the final compensation period;

(8) Not final settlement pay; and

(9) Not creating an unfunded liability over and above PERS' actuarial assumptions.

(c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).

(d) If an items [sic] of special compensation is not listed in subsection (a), or is out of compliance with any of the standards

in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual.

(Emphasis added.)

Analysis

6 Under the statutes, remuneration provided to a member for *not* working a holiday is deemed compensation, and PERS has not denied that the basic holiday pay is part of compensation earnable, also referred to as payrate by Complainant's witness, Mr. Gutierrez. Certainly this is appropriate, because the law denominates pay for not working a holiday as such, while the manner in which it is paid brings it within the definition of payrate. (§§ 20630, subd. (a)(1); 20636, subd. (a) and (b); Factual Findings 7 and 8(A).)

7. The Holiday Premium Pay falls within the general statutory definition of special compensation, in that it is payment for "work assignment, workdays or hours, or other work conditions." (§20636, subd. (c)(1).) While that does not end the analysis, it must be determined that the Holiday Premium Pay pertains to work assignments and workdays.

8. The statute that defines special compensation specifically defines "holiday pay" as a type of special compensation. (§20636, subdivision (c)(6).) That the term is used in the statute pertaining to special compensation, and not the statute defining compensation generally implies that "holiday pay" is different than the remuneration that may be paid to an employee even though he or she is excused from

work on a holiday. (See § 20630, subd. (a)(1).) Put another way, there was no need for the Legislature to define pay for not working on a recognized holiday in a separate statute, so on the face of the two statutes, "holiday pay" is not the base pay due every City employee for being employed on, and not working on, a holiday such as Christmas or Independence Day.

9. The Holiday Premium Pay is "Holiday Pay" within the meaning of CCR section 571, subdivision (a)(5), based on Factual Findings 7 through 13, and 15 through 18. First, it is "additional compensation," above the compensation paid every employee for the 10 holidays, when not worked. Second, it is paid to employees who are "normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays." (CCR § 571, subd. (a)(5).) Plainly, police and fire departments around the state must have staffing every hour of every day of the year, "without regard to holidays." The record in this case establishes that the HBPD is no different. Finally, the Holiday Premium Pay is "over and above their normal monthly pay for approved holidays" and from the record is plainly "additional compensation."[5] (*Id.*) Therefore, that additional compensation known as Holiday Premium Pay is reportable to PERS as holiday pay within the meaning of section 20636, subdivision (c)(6) and CCR section 571, subdivision (a)(5).

10. (A) The Holiday Premium Pay, when paid to an employee whose schedule requires him or her to work on a holiday is not excludable overtime pay. As set out in Factual Finding 9, the Holiday Premium Pay is to be paid at the same rate as overtime, but is not meant to be overtime, and that is a fair reading of the MOU. To be sure, this conclusion applies to those employees regularly scheduled to work on a day that falls on a holiday, as the definition of Holiday Pay, noted above, contains that requirement, and in such situations, the employee's work does not fall within the definition of overtime set out in section 20635, quoted in Legal Conclusion 3, above.

(B) However, if an employee who was not scheduled to work on a day that is a holiday is required to do so despite their normal schedule, then they are only entitled to overtime pay, and not holiday pay, which amount is not reportable to PERS. This conclusion is consistent with Lieutenant Reinhart's understanding of the MOU, and is consistent with section 20635. Hence, if a police officer was working on the 11 hour day schedule, and normally scheduled to work Tuesday through Thursday during one of the two week pay periods, and if that three-day work week fell in the week of Thanksgiving, he would be entitled to credit his Holiday Premium

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[5] The regulation starts and essentially ends with the terms "additional compensation." Holiday Pay within the meaning of the regulation is obviously above and beyond the basic holiday pay that a City employee receives whether he or she works, or does not. This is consistent with the other part of subsection (a)(5), pertaining to FLSA rules, where the regulation analyzes compensation and additional pay up to a statutory ceiling.

Pay as Holiday Pay for working Thanksgiving. If the Department required him (or her) to work the Friday after Thanksgiving, a day not on the officer's schedule, the officer would receive overtime, which would not be reported to PERS.

(C) When PERS labeled the pay received by Respondents Holiday Premium Overtime, they had no basis for doing so. There was nothing available to them or in this record, that would show that the employees were not regularly scheduled to work on a day that coincided with a holiday. It may be presumed that the City otherwise properly reported the employees' compensation to PERS, and there was no evidence to rebut that. (Evid. Code, § 664.)

11. While the Side Letter denominated the Holiday Premium Pay as "shift differential," that label is not controlling. That label was plainly adopted in an effort to meet the PERS objections that the Holiday Premium Pay was overtime. Calling it another name does not determine whether or not the Holiday Premium Pay is special compensation, as the law respects substance over form. (Civ. Code, § 3528; *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 237.) Indeed, that was the position taken by Mr. Gutierrez, and in that regard he was correct: that the label attached by the parties to a type of pay can't control how it is treated by PRES, but that the substance of the matter must control the treatment.

12. Complainant raised issues regarding how the Holiday Premium Pay is actually being paid to the parties. The claim is that somehow the employees were "double dipping" for working on a holiday, because they were getting the base amount, spread over the 26 pay checks, and then something else for actually working. That attack on the compensation is not sustainable, in that "holiday pay," as defined in the statute and regulation appears to have been designed to compensate that relatively small number of public employees who might regularly have to work on a day for which they would otherwise be excused, with pay. Simply put, the compensation due because of the holiday is pay rate, and the money paid for actually working is special compensation, so long as the employee is otherwise scheduled for work on that date.

13. (A) During the hearing, it was asserted that since the senior employees could bid on the shifts that tended to require work on the weekends, then the work was either being taken in an effort to "spike" their pension benefits, or in a manner that was not historically consistent and therefore taking it outside the general requirements of special compensation, or the work was obtained in a way that established it was not available to the entire class of employees. On this record, those attacks cannot be sustained.

(B) Aside from the fact that "spiking" was never raised as a reason not to deny the Holiday Premium Pay as reportable, the record shows that senior officers might be able to avoid working on the holidays, by dint of their seniority. It is plain that seniority may have a significant effect on other aspects of how the employees are assigned, and not just to work days. It is speculative to assume that senior officers

will work numerous holidays during their last years on the job simply to pump up their retirement benefits. It is just as conceivable that they would use their seniority to avoid schedules with many holidays, so as to spend more time with family and friends, or in activities that would take them away from the area. For instance, it does not appear that Respondent Evenson worked on Memorial Day in 2007, in that his check for the period ending June 1 showed no Holiday Premium Pay. (Ex. 14, p. 8.) Whether that was by election or by the nature of his workshift cannot be determined.

(C) Furthermore, to the extent that receipt of Holiday Premium Pay increases an employee's contributions, such monies earned over many years, and not just the last three years of employment, may tend to ameliorate any spiking effect. And, to the effect that member contributions would increase as pay increases, contributions would be higher in any year the officer received Holiday Premium Pay.

(D) As to the matter of historical consistency, it must be noted that Mr. Gutierrez could not suggest any sure or sound test for determining when someone's work or schedule had some historical consistency to it.

(E) Finally, on the issue of whether or not the Holiday Premium Pay is available to the entire class of peace officers, it is reasonably clear that non-management personnel are likely to work holidays, based on Mr. Reinhart's testimony.

14. In summary, it is concluded that the Holiday Premium Pay is not overtime, and constitutes Special Compensation. However, no determination is made as to whether the actual amounts reported to PERS for Respondents Catalano and Evanson is correct.

ORDER

The type of compensation reported by the City of Huntington Beach to CalPERS for Respondents Evenson and Catalano as Holiday Premium Pay is deemed "reportable" in that it is special compensation, for the purposes of determining the Respondents' retirement benefits.

March 15, 2013

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings