

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

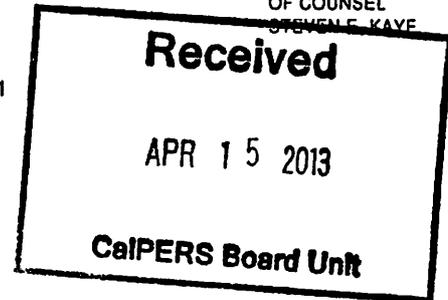
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April 10, 2013

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
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Sent via Facsimile & U.S. Mail
(916) 795-1101

Re: In the Matter of the Calculation of Final Compensation of DANIEL A. CATALANO and NORMAN (ELDO) E. EVENSON and Similarly Situated Non-Management Police Officers, Respondents, and City of Huntington Beach, Respondents.

Dear Ms. Swedensky:

In response to the letter to me dated March 22, 2013 from Allyson McCain of the CalPERS legal office, I am forwarding to you the "Respondents' Argument" in the above captioned matter. According to Ms. McCain, this matter is calendared for consideration by the Board of Administration at its regular meeting on May 15, 2013. As per Ms. McCain's instructions, I have not forwarded a copy to the CalPERS attorney assigned to this matter, Elizabeth Yelland.

If you have any questions or if I can be of further assistance, please feel free to contact me. Otherwise, I am looking forward to receiving a copy of the final Decision rendered by the Board of Administration which, hopefully, will adopt the Proposed Decision.

Finally, I am neither requesting nor opposing a determination that the final Decision be designated as precedent.

Sincerely,
SILVER, HADDEN, SILVER, WEXLER &
LEVINE

A handwritten signature in black ink, appearing to read "Stephen H. Silver". Below the signature, the name "STEPHEN H. SILVER" is printed in a bold, sans-serif font.

STEPHEN H. SILVER

SHS:mrj
cc. Huntington Beach Police Officers' Association
Norm Evenson
Daniel Catalano

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8 **BOARD OF ADMINISTRATION**
9 **CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM**

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In the Matter of the Calculation of Final)
Compensation of)
RICHARD C. BRIGHT, NORMAN (ELDO))
E. EVENSON AND DANIEL CATALANO,)
Respondents,)
and)
CITY OF HUNTINGTON BEACH,)
Respondent.)

Case No.: 9329
OAH NO. L-2011061387
RESPONDENTS' ARGUMENT
DATE: November 15 & 16, 2011
TIME: 9:30 a.m.
PLACE: Office of Administrative Hearings
320 W. Fourth St., Suite 630
Los Angeles, CA 90013

1 **I. INTRODUCTION**

2 This "Argument" is submitted on behalf of the named Respondents and all similarly
3 situated retirees who, pursuant to Stipulation of the parties, were governed and bound by the
4 outcome of this proceeding. That Stipulation is reflected in Factual Finding 6(A) of the Proposed
5 Decision and Paragraph II of the Amended Statement of Issues submitted by CalPERS dated
6 November 14, 2011, the day before the actual hearing was conducted.

7 We strongly urge that the CalPERS Board of Administration (the Board) adopt the
8 Proposed Decision which the Administrative Law Judge rendered after conducting a full and fair
9 impartial hearing at which both CalPERS and Respondents were afforded every opportunity to
10 present oral testimony and written evidence in support of their respective positions, as well as the
11 ability to cross-examine witnesses presented by the opposing side. The Proposed Decision
12 clearly and carefully reviewed that evidence and rendered resulting legal conclusions that are
13 completely consistent with approximately thirty years of conduct on the part of CalPERS and the
14 City of Huntington Beach.¹

15 The Holiday Premium Pay at issue is additional compensation provided to a law
16 enforcement officer who worked on a designated holiday that falls on a regularly scheduled work
17 day. As such, it clearly falls within the definition of "Holiday Pay" set forth in Government
18 Code Section 571(a)(5) of the California Code of Regulations, which states:

19 "Additional compensation for employees who are normally
20 required to work on an approved holiday because they work in
21 positions that required scheduled staffing without regard to
22 holidays. If these employees are paid over and above their normal
23 monthly rate of pay for approved holidays, the additional
24 compensation is holiday pay and reportable to PERS."

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27 ^{1/} During that time frame, CalPERS accepted without any question or objection (a) the periodic reports
28 by the City that correctly reported the "Holiday Premium Pay" that is the subject of this proceeding as
"compensation earnable" and (b) the employer and member contributions based upon that reported
compensation earnable. Out of the clear blue sky, in 2009, CalPERS reversed course and determined that this
Holiday Premium Pay was not properly reportable as "compensation earnable."

1 This pay is not provided for working outside of regularly scheduled hours. Therefore, it
2 cannot possibly be regarded as "overtime compensation," as originally contended by CalPERS.

3 **II. STATEMENT OF FACTS**

4 Respondents and the other affected retirees served as rank and file peace officers for the
5 City of Huntington Beach Police Department. Because of the nature of the services provided by
6 the Police Department, it was necessary to have rank and file peace officers on duty at all times,
7 including all holidays. Thus, any such peace officer who was scheduled to work on a holiday
8 was required to report to work that day just like any other work day. Because they did not
9 receive time off with pay for all ten holidays recognized by the City like most other employees,
10 each year they received eighty hours of additional pay in lieu of holidays, which was paid in
11 equal amounts over twenty-six pay periods.² These peace officers also received "Holiday
12 Premium Pay" equal to the value of fifty percent (50%) of their hourly rate for each hour worked
13 on a regularly scheduled holiday as compensation for the inconvenience of working on a day
14 when most other City employees were given time off with pay to celebrate the holiday with their
15 families.

16 While the applicable Memoranda of Understanding described this pay as being "at [the]
17 overtime rate," this was not overtime compensation. Instead, it was intended to identify the rate
18 of the extra premium pay that represented additional compensation for the inconvenience of
19 having to work on a holiday.

20 This Holiday Premium Pay has been provided to rank and file peace officers of the City
21 of Huntington Beach since at least 1992. At all times thereafter until the CalPERS 2009 denial
22 letters, the City and HBPOA regarded it as compensation earnable and the City reported it to
23 CalPERS as such. All required employer and employee retirement contributions relating to this
24 pay were transmitted to CalPERS.

25 In July 2003, CalPERS conducted an official Audit wherein its auditors reviewed the
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27 ^{2/} That eighty hours "Holiday in Lieu Pay" did not fully compensate those individuals
28 for the loss of their ten paid holidays inasmuch as they were scheduled to work and worked
more than eight hours per day.

1 City's personnel and payroll records and payroll reporting processes to determine whether the
2 City was in compliance with the Public Employees Retirement Law. The Audit concluded that
3 the City was "in compliance in all material respects with the provisions of the Public Employees
4 Retirement Law and its regulations for those transactions . . . included in [the] sample test." It
5 added that "[t]he City appropriately . . . reported member earnings to CalPERS for the employees
6 included in [the] sample [with certain specified exceptions described below]" As part of the
7 Audit, the auditors "[s]ampled the payroll transactions for two pay periods, and compared the
8 City's payroll register with the data reported to CalPERS to determine whether the City correctly
9 reported compensation."

10 The exceptions to the conclusion that the City accurately reported member earnings to
11 CalPERS made no mention whatsoever of the Holiday Premium Pay. The only exceptions in any
12 way relating to Holiday Pay were that (1) the City did not report Holiday Pay for Police
13 Lieutenants and Captains and (2) one Police Sergeant received pay that was coded as "90 Holiday
14 Prem." which was not reported as compensation, but should have been.

15 At the hearing before the Administrative Law Judge, the CalPERS representative testified
16 that the sole reason it is now declining to include this reported Holiday Premium Pay as
17 "compensation earnable" and "final compensation" is that it is inappropriate to credit two forms
18 of Holiday Pay. However, he could not identify any promulgations or any other writing that
19 prescribed that, if an individual received two or more forms or components of an item of pay
20 CalPERS regarded as compensation earnable, only one form or component would be treated as
21 such. He acknowledged that an employee receiving two types of Shift Differential Pay, such as
22 Night Differential and Weekend Differential because he or she worked at night on weekends,
23 was entitled to have both forms of this Shift Differential Pay treated as compensation earnable.
24 Likewise, an individual receiving two components of Educational Incentive pay (*e.g.*, a bonus for
25 one degree and another bonus for a separate degree) was entitled to have both treated as
26 compensation earnable.

27 **III. ARGUMENT**

28 The Proposed Decision correctly concludes (in paragraph 9 on page 15) that the Holiday

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1 Premium Pay satisfies the definition of "Holiday Pay" set forth in Government Code Section
2 20636(c)(6) and Section 571(a)(5) of the California Code of Regulations. As we noted above,
3 the Regulations expressly define "Holiday Pay" as "[a]dditional compensation for employees
4 who are normally required to work on an approved holiday because they work in positions that
5 require scheduled staffing without regard to holidays." It adds that "[i]f these employees are
6 paid over and above their normal monthly rate of pay for approved holidays, the additional
7 compensation is Holiday Pay and reportable to PERS."

8 There can be no question that the Holiday Premium Pay at issue constitutes "additional
9 compensation for employees who are normally required to work on an approved holiday because
10 they work in positions that require scheduled staffing without regard to holidays" that is "over
11 and above their normal monthly rate of pay." Lt. Reinhart's uncontroverted testimony clearly
12 illustrated that Respondents and the other affected individuals worked in positions that required
13 scheduled staffing without regard to holidays inasmuch as it was necessary for the Police
14 Department to have rank and file officers on duty at all times, including all holidays. He also
15 testified that those rank and file peace officers who were scheduled to work on a holiday were
16 required to report to work just like they would on any other scheduled work day. As a result, the
17 Holiday Premium Pay in question clearly represents additional compensation for those rank and
18 file peace officers normally required to work on approved holidays as part of their regular
19 schedule.

20 The sole basis for excluding this Holiday Premium Pay asserted by CalPERS at the
21 hearing is that it cannot qualify as Holiday Pay because Respondents and the other affected
22 individuals received another form of Holiday Pay, *i.e.*, the "Holiday in Lieu Pay." However,
23 CalPERS cited no promulgation of any type or any other writing that prescribes that an item of
24 "compensation earnable" only can be received in one form or component, and that if received in
25 two or more forms or components, only one can be treated as compensation earnable. In fact, the
26 CalPERS witness testified that, if an employee received two forms of Shift Differential, one for
27 working nights and one for working weekends, both forms components would be considered
28 "compensation earnable". He also acknowledged that, if an employee earns two forms of

1 Educational Incentive Pay, which is regarded as compensation earnable, both will be treated as
2 such. Consequently, the Holiday Premium Pay clearly fits the definition of "Holiday Pay"
3 pursuant to Section 571(a)(5) of the California Code of Regulations. As such, it must be
4 regarded as "compensation earnable" even though it is only one of two forms of Holiday Pay
5 afforded to Respondents and the other affected individuals.

6 Although the Proposed Decision did not need to address the alternative contention
7 submitted by Respondents to the effect that this additional pay also satisfies the definition of
8 "shift differential" as set forth in Section 571(a)(4) of the California Code of Regulations, it is
9 clear that this premium pay also falls within that definition, which states:

10 "Compensation to employees who are routinely and consistently
11 scheduled to work other than a standard 'daytime' shift, e.g.,
12 graveyard shift, swing shift, shift change, rotating shift, split shift
13 or weekends."

14 The uncontroverted evidence established that a "standard 'daytime' shift" in the City of
15 Huntington Beach is one where the employees do **not** work on designated holidays.
16 Consequently, because Respondents and the affected retirees **were required to work on**
17 **holidays** that fell on their regularly scheduled work days, they did **not** work a standard daytime
18 shift. Because the Holiday Premium Pay was compensation for being routinely and consistently
19 scheduled to work other than a standard daytime shift (*i.e.*, by working holidays that were not
20 part of the standard daytime shift) it clearly fits the "shift differential" definition set forth above.

21 Moreover, this pay is virtually identical to the examples used by CalPERS in its definition
22 (*i.e.* "graveyard, swing shift, shift change, rotating shift, split shift or weekends"). There is
23 absolutely no difference between extra pay for the inconvenience of having to work nights or
24 weekends, on the one hand, and holidays, on the other hand. In fact, for all intents and purposes,
25 holidays are identical to weekends. Thus, because extra pay for working on a Sunday that is part
26 of an employee's regular hours of work is regarded as special compensation, the exact same result
27 must follow with respect to extra pay for working on a recognized holiday that falls on the
28 ensuing Monday that is part of the employee's regularly scheduled hours of work.

1 Out of nowhere, in its Post-Hearing Brief CalPERS asserted that, somehow, the Holiday
2 Premium Pay must be excluded because it is “pension spiking,” *i.e.*, an attempt to inflate a
3 component of the retirement plan. As the Proposed Decision recognizes (in ¶13(b) at p. 16) at no
4 time prior to the hearing, including (a) the letters from CalPERS to Respondents initially
5 declining to include the Holiday Premium Pay as compensation earnable, (b) the original
6 Statement of Issues and (c) the Amended Statement of Issues first presented at the hearing, was
7 there any hint of an assertion that Respondents or any of the other affected retirees engaged in
8 pension spiking.

9 The Proposed Decision also determined (*ibid.*) that this claim of CalPERS is based solely
10 on the premise that there was an opportunity for a rank and file peace officer in his final
11 compensation measurement period to bid for a shift that would provide the most scheduled
12 holidays and, therefore, the highest possible Holiday Premium Pay. The Administrative Law
13 Judge regarded this claim as “speculative”, especially inasmuch as there was absolutely no
14 **evidence** that any such activity occurred. As a result, the Proposed Decision correctly
15 disregarded this assertion.

16 SILVER, HADDEN, SILVER,
17 WEXLER & LEVINE

18 Date: April 10, 2013

19 By: Stephen H. Silver
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21 Attorneys for Respondents NORMAN (ELDO)
22 E. EVENSON and DANIEL CATALANO
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