

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent William Savko (Respondent) was employed by Respondent City of El Cerrito (City) as a Police Officer until he retired in December 2011. During his final year of employment, Respondent received a payrate of \$42.94/hour based on an agreement between the City and the Police Officers' Union that increased the payrate for officers who were about to retire. The rate Respondent was receiving was higher than non-retiring officers received and was higher than the City's published pay schedule. Upon review of his final compensation, CalPERS determined that the payrate Respondent received was ineligible for inclusion in the "compensation earnable" used to calculate his retirement benefits, and that those benefits would be calculated based upon a payrate of \$40.13/hour. The City appealed. The hearing was completed on September 4, 2013.

The sole issue for determination was whether the compensation to be used to calculate Respondent's retirement benefits should be the payrate he actually received during his final year of employment (\$42.94/hour), or the payrate that was being paid to other officers and was reflected in the City's publicly available pay schedule (\$40.13/hour).

CalPERS presented evidence regarding the City's publicly available pay schedules at the time of Respondent's retirement, and that the City had granted Respondent a 7% increase over this amount based on a "Side Letter of Agreement" between the City and the Police Officers' Union that had modified the parties' Memorandum of Understanding (MOU). CalPERS asserted that the 7% increase Respondent received did not meet the definition of "compensation earnable" found in Government Code section 20636 because: (1) it was not paid to similarly situated members of the same class, and (2) was not paid pursuant to a publicly available pay schedule. In addition, the 7% increase constituted "final settlement pay" because it was a benefit awarded in connection with or in anticipation of separation from employment.

Respondent presented evidence of the MOU, which provided that police officers were to receive a 14% increased salary. By the time the MOU was amended, the City was facing a \$1 million deficit. Accordingly, the Police Officers' Union agreed to modify the MOU to implement the 14% increase in stages. The modifications were set forth in a "Side Letter of Agreement" which provided that a 3.5% increase in salary would be effective every six months beginning July 2010. The full 14% increase would be payable beginning January 2012. The Side Letter also added specific criteria to ensure that officers (such as Respondent Savko) retiring between July 2010 and January 2012 would receive the full 14% increase to which the parties had agreed.

The Administrative Law Judge (ALJ) determined that Respondent's payrate did not meet the "compensation earnable" criterion of Government Code 20636 and California Code of Regulations section 570.5, because it was not paid pursuant to a publicly available pay schedule, and was not paid to other similarly situated members of the group or class. During Respondent's final year of employment, the maximum payrate on the City's publicly available pay schedule for the first six months of 2011 was

\$40.13/hour. Although not presented in evidence, salary schedules for the second six months of 2011 were presumably increased by 3.5% to \$41.53/hour.

The ALJ found pursuant to California Code of Regulations section 570.5(b), that if a contracting agency fails to meet the requirements for a publicly available pay schedule, the CalPERS Board has the discretion to determine the amount that will be considered the payrate, taking into account all information it deems relevant. One item of information the regulation specifies may be considered are "documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer."

The ALJ held that "compensation earnable" cannot include "final settlement pay." The ALJ found that "final settlement pay" is a benefit awarded to a member in anticipation of separation from employment. While Respondent was not provided a benefit not available to similarly situated El Cerrito police officers, the raise he got was undeniably granted in anticipation of his retirement. The ALJ found it was in effect a "golden parachute." While the intent of the side letter agreement might have been laudable, the ALJ found that the result ran afoul of the California Public Employees' Retirement Law (PERL). Therefore, the City ended up awarding precisely the sort of benefit Government Code section 20636 and California Code of Regulations, Title 2, section 570 were intended to preclude.

The ALJ questioned why Respondent could not be given credit for the \$41.53/hour payrate that was in effect for the last six months of his employment. Use of that rate would give him a slightly increased payrate when calculating his retirement benefit. The ALJ directed CalPERS to reconsider whether Respondent is entitled to have his benefits calculated using the higher payrate in effect for the second half of 2011.

CalPERS staff has considered the ALJ's finding on payrate, and has determined that the payrate of \$40.13 will be used for the first 6.32 months of 2011, and \$41.53 for the second 5.68 months of 2011, which will equal a final compensation amount of approximately \$40.79 for 2011.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

November 20, 2013


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