

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Respondent Robert Torres (Respondent Torres) was employed by Respondent City of Glendale (City). The City contracted with CalPERS to provide retirement benefits to the City's employees. By virtue of his employment, Respondent Torres was a local miscellaneous member of CalPERS. Respondent Torres submitted an application for service retirement on March 28, 2013.

The City had reported to CalPERS an item of special compensation paid to Respondent Torres exclusively in his final year of employment. This fact triggered a review of Respondent Torres's compensation by staff. Following their review, staff determined that the "Assignment Pay" paid to Respondent Torres by the City in his final year of employment did not qualify as an allowable item of special compensation and therefore, could not be included in his final compensation for purposes of calculating his service retirement benefit. Staff notified both Respondent Torres and the City on November 27, 2013, of staff's determination. Respondent Torres appealed staff's determination and a hearing was held on March 23, 2015. Following the hearing, the parties submitted post-hearing briefs.

Prior to the hearing, CalPERS explained the hearing process to Respondent Torres and the need to support his case with witnesses and documents. CalPERS provided Respondent Torres with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Torres's questions and clarified how to obtain further information on the process.

Respondent Torres worked for the City as a Water System Equipment Operator. His duties included operating heavy equipment, repairing and replacing water pipes, cleaning debris, and occasionally testing water samples for chlorine content. His regular work hours were from 6:30 a.m. to 4:00 p.m. He worked a "9/80" shift (nine days, 80 hours every two weeks).

The California Department of Health Services created Water Distribution Certificates (Levels 1 – 5). The Water Distribution Certificates are awarded to individuals upon successful completion of testing, acknowledging the individual's knowledge and qualifications in the area of water treatment and related services. Additional compensation paid to an individual with this type of specialized knowledge or skill has been recognized by CalPERS as an allowable item of special compensation. California Code of Regulations, section 571 provides in relevant part, as follows:

- (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:

¶ . . . ¶

**Water Certification Premium** – Compensation to miscellaneous employees who are routinely and consistently assigned to test local water quality for compliance with governmental health standards.

¶ . . . ¶

The collective bargaining agreement between the City and Respondent Torres's collective bargaining unit included the following provision:

Compensation in Lieu of Water Stand-By Assignment Pay.

Unit employees assigned to Water Stand-By duties shall receive an assignment pay of six hundred fifty dollars (\$650.00) per month over their base salary in lieu of any other stand-by assignment pay for this classification.

Based upon the above-quoted provision in the applicable collective bargaining agreement, the City created Assignment Pay. In order to receive Assignment Pay, an employee had to secure a Water Distribution Certificate, Level D3. In 2011, Respondent Torres successfully tested for and received a Water Distribution Certificate, Level D3. Thereafter, in 2012 (Respondent's final year of employment with the City) the City paid Respondent Torres an additional \$650 per month. The City reported this additional compensation to CalPERS as Water Certification Premium (not as Assignment Pay) and identified it as an item of special compensation. It was this additional compensation that staff determined was not an allowable item of special compensation.

After hearing testimony from Respondent Torres and a CalPERS Program witness, and reviewing relevant documents/exhibits, the administrative law judge (ALJ) found that the Assignment Pay was paid to Respondent Torres, not for any special skills or knowledge that he possessed and used to "routinely and consistently . . . test local water quality for compliance with governmental health standards," but for being on call one week a month to work essentially overtime.

[O]nce Respondent obtained the certificate, the supervisor gave him the special assignment. In the assignment, which occurred one week each month, Respondent had to be on call after his regular hours of work, from 4:00 p.m. to 6:30 a.m., to report to emergency calls for service. If he was actually called to a site, Respondent performed his regular duties [operate heavy equipment, repair and replace water pipes, clean debris] and was paid overtime. (Factual Finding No. 6.)

Accordingly, applying the provisions of Government Code sections 20630 and 20636, as well as the regulations pertaining to allowable special compensation, the ALJ concluded that the Assignment Pay was not an allowable item of special compensation.

[I]n sum, the special assignment for which [Respondent] received the Assignment Pay of \$650 per month required Respondent to make himself available, or standby, from 4:00 p.m. to 6:30 a.m., outside his regular working hours, to perform his usual duties, typically in response to emergency requests. While on the stand by special assignment, if he actually went to a worksite or performed other work at the site, Respondent was paid overtime. In these circumstances, the Assignment Pay does not constitute special compensation and cannot be included in the earnable compensation calculation. (Legal Conclusion No. 5.)

The ALJ also referred to and cited the holding in the case *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522. In *City of Pleasanton*, a division chief in the City's fire department sought to have stand by pay included in his compensation earnable. This was disallowed by CalPERS and the determination appealed. Summarizing the court's decision in the *City of Pleasanton* case, the ALJ concluded in relevant part, as follows:

The court concluded that the 7.5% pay increment was for being available to work on standby basis outside his normal working hours, and rejected the member's arguments to classify the payment as falling within specific categories affirmatively determined by CalPERS to constitute special compensation, namely, holiday pay, shift differential pay, or training premium pay. (Legal Conclusion No. 6.)

The ALJ also rejected Respondent Torres's argument that the doctrine of equitable estoppel should be imposed against CalPERS in order to prevent CalPERS from implementing its determination to disallow the Assignment Pay as an item of special compensation.

[R]espondent may not avail himself of the equitable estoppel doctrine to obtain relief. While Respondent City treated the Assignment Pay as pensionable and reported it as such to CalPERS, CalPERS was not aware of the true facts until after it investigated the matter following Respondent's retirement. Mere receipt of the compensation reports from Respondent City did not make CalPERS aware of all the facts. Nor did CalPERS make any specific representations regarding the nature of the Assignment Pay upon which Respondent could have reasonably rely [sic]. Moreover, since the Assignment Pay received by Respondent cannot be characterized as special compensation (legal conclusions numbers 1 through 5), granting the relief that Respondent seeks would expand CalPERS' authority beyond that permitted by law. (Legal Conclusion No. 7.)

The court in *Pleasanton* rejected similar equitable estoppel arguments. The court initially concluded that equitable estoppel was not available

in that case because, as a matter of law, section 20636 deprived CalPERS of the legal authority to classify the stand by pay in that case as pensionable compensation. [Citation omitted.] The same conclusion is required in this case, as the same statute, section 20636, precludes a finding that the Assignment Pay is pensionable compensation. (Legal Conclusion No. 8.)

¶ . . . ¶

Finally, the ALJ rejected Respondent Torres's argument that CalPERS breached a fiduciary duty to him by failing to notify him that the Assignment Pay was not an allowable item of special compensation.

[A]s the court in *Pleasanton* concluded in the face of the same argument, which it deemed another way of restating the equitable estoppel claim: '[P]ERS's fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. PERS has a duty to follow the law. As stated in *City of Oakland*, the policy reflected in the constitutional provision is to 'ensure the rights of members and retirees to their full, earned benefits.' [Citation omitted.] It does not authorize an order compelling PERS to pay greater benefits than section 20636 allows, either by estoppel or as a tort damages for an inadvertent failure to correct a contracting agency's error.... (Citation omitted.) (Legal Conclusion No.9.)

The ALJ concluded that Respondent Torres's appeal should be denied. 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.

August 19, 2015

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RORY J. COFFEY  
Senior Staff Attorney