

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Andrew D. Miller (Respondent Miller) worked as a Fire Chief for the City of Monterey (Respondent City). Respondent City contracts with CalPERS to provide retirement benefits for City employees, subject to the rules and requirements of the California Public Employees' Retirement Law (PERL). Thus, by virtue of his employment with Respondent City, Respondent Miller was a local safety member of CalPERS.

Respondent Miller began working for Respondent City in 2008 as Assistant Fire Chief. He became Fire Chief in December 2010. In 2012, Respondent City asked Respondent Miller to assume the role of interim Assistant City Manager (ACM) to help the City create a shared fire services agreement with Monterey Regional Airport Fire District. Based on his prior experience creating similar shared services agreements at City of Pacific Grove and other municipalities, Respondent Miller agreed. He remained in his position as Fire Chief, taking on the additional duties of interim ACM.

Respondent Miller retired for service effective July 9, 2013. CalPERS reviewed Respondent City's payroll records and other compensation documentation to process Respondent Miller's service retirement in compliance with PERL and establish the appropriate final compensation amount. CalPERS accepted Respondent Miller's Fire Chief payrate and various items of special compensation he received as Fire Chief; however, CalPERS rejected the special compensation of \$472.71 per month that Respondent Miller received for services rendered as interim ACM, finding it did not comply with PERL and its implementing regulations. CalPERS advised Respondents in writing of its determination.

Respondents Miller and City appealed, exercising their right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. The ALJ presided over a one-day hearing in Salinas, California on February 2, 2016. Counsel appeared on behalf of CalPERS. Respondent Miller represented himself. Though it filed an appeal, Respondent City did not appear at hearing.

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

CalPERS is a defined benefit plan. When a CalPERS member retires for service, the amount of the member's retirement allowance is calculated by applying a percentage figure, based on the member's age at retirement, to the member's years of service and the member's "final compensation," comprised of the member's payrate and any special compensation received. Payrate is the normal rate of pay for the member's position that is paid to other similarly situated members, for full-time work rendered during normal working hours.

Special compensation refers to payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions. By statute, special compensation must be set forth in a labor policy or agreement and available to similarly situated members of a group or class. For agencies that contract with CalPERS for retirement benefits, California Code of Regulations title 2, section 571 contains additional requirements. Subdivision (a) sets forth an exclusive list of special compensation items available to employees of contracting agencies. Subdivision (b) of 2 C.C.R. 571 lists the specific requirements for any compensation reported and paid as a type of approved special compensation listed in subdivision (a). Compensation paid by contracting agencies that is not listed in subdivision (a) or out of compliance with subdivision (b) will be excluded from the calculation of a member's final compensation. An agency or member seeking to obtain a recalculation of a retirement benefit bears the burden to prove entitlement to the allowance at issue.

At hearing, CalPERS' senior analyst Sam Camacho testified regarding CalPERS' decision to exclude the special compensation Respondent Miller received for performing the duties of interim ACM. He explained that the special compensation Respondent Miller received did not qualify as Temporary Upgrade Pay, as asserted by Respondent City in prior correspondence and argued by Respondent Miller at hearing. "Temporary Upgrade Pay" is a recognized form of special compensation, pursuant to 2 C.C.R. 571(a), when paid to employees who are "required by their employer to work in an upgraded position/classification of limited duration."

Mr. Camacho, however, testified that the increased pay Respondent Miller received for performing the interim ACM duties was not temporary upgrade pay because the City never upgraded Respondent Miller's employment classification to interim ACM. The City never created a job classification for interim ACM, and never reported to CalPERS any change in classification for Respondent Miller. During the period he served as interim ACM, Respondent City continued to report Respondent Miller to CalPERS in his classification as Fire Chief. Respondent Miller also testified he agreed to fulfill the interim ACM duties but was not required to do so, making the upgrade not mandatory and therefore not in compliance with 2 C.C.R. 557 (a).

Respondent Miller also argued that the pay increase he received for performing interim ACM duties qualified as Special Assignment Pay, another form of recognized special compensation set forth in 2 C.C.R. 571(a). Mr. Camacho testified that the pay Respondent Miller received for the interim ACM services did not qualify as Special Assignment Pay. Though contained in a labor agreement applicable to exempt employees, it did not set forth the eligibility criteria, any percentage increase, was paid solely in the final compensation period, and was not historically consistent with prior payments to the City's Fire Chief, all of which are required by PERL and its implementing regulations. Mr. Camacho also testified that, pursuant to Government Code 20635, compensation Mr. Miller received for work performed as interim ACM was properly excluded as overtime pay.

After considering all the documentary evidence and testimony, the ALJ denied Respondent Miller's appeal. The ALJ held that the additional compensation Respondent Miller received for interim ACM duties was not recognized special compensation pursuant to PERL and its implementing regulations. It was not work required of Respondent Miller as Fire Chief and did not meet the requirements of 2 C.C.R. 571. Moreover, the ALJ found that "Respondent [Miller] rendered service in two positions: Fire Chief and interim Assistant City Manager. His full time position was that of Fire Chief, and he received additional compensation for assuming part-time duties as interim Assistant City Manager." For this additional reason, the ALJ agreed that the additional pay received was properly excluded as overtime pay pursuant to Government Code 20635.

The ALJ concluded that Respondents' appeals 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.

April 20, 2016



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