

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

In certain circumstances, when a person works beyond a certain amount of hours in their normal workweek, they are entitled under the Fair Labor Standards Act (FLSA) to be paid "time and a half" pay, or, one and a half times their normal rate of pay for a portion of those hours. Government Code section 20636, subdivision (c) and Regulation 571, subdivision (a)(5) requires the FLSA premium pay to be reported as special compensation.

Respondents Kenneth M. Sanders (Respondent Sanders) and Stewart E. Dietro (Respondent Dietro) worked as firefighters for the Apple Valley Fire Protection District (Respondent Apple Valley). Respondents Sanders and Dietro both worked 112 hours every two weeks, or, 56 hours in a regular workweek. Applying the FLSA to Respondents Sanders and Dietro, they were both required to be compensated at time and a half for the three hours of their normal work week, from hour 54 to hour 56.

Government Code section 20636, subdivision (c) and Regulation 571, subdivision (a)(5) require the FLSA premium pay to be reported as special compensation. Under Regulation 571, subdivision (a)(5), only the premium portion of earnings can be reported as special compensation. In this case, under Government Code section 20636 and Regulation 571, subdivision (a)(5), regular earnings are to be reported for 56 hours. Since the regular earnings must be reported for all regular hours worked, only the premium portion, the three hours of half-time earned from hours 54 to 56, can be reported as special compensation.

In the case of Respondents Sanders and Dietro, it was not disputed that each worked three hours of FLSA time per week. In that respect, under federal law, they were entitled to three hours of FLSA premium pay, or, one and a half times their normal payrate, for each of those three hours.

CalPERS began an audit of Respondent Apple Valley's reporting practices in 2015. Through the audit, for which the 2016 Audit Report (Audit) was released in 2016, CalPERS learned that Respondent Apple Valley improperly reported special compensation resulting from the FLSA premium pay. Instead of reporting 56 hours of regular earnings with three hours of special compensation at half-time, Respondent Apple Valley improperly reported 53 hours of regular earnings, and improperly reported special compensation for three hours at time and a half.

Soon after the Audit, both Respondents Sanders and Dietro applied for service retirement from Respondent Apple Valley. Respondents Sanders and Dietro began receiving their retirement allowances shortly after filing their applications. Following the retirements of both Respondents Sanders and Dietro, CalPERS reviewed both accounts to ensure the compliance with the Public Employees' Retirement Law (PERL).

CalPERS determined that the special compensation for the FLSA premium pay was improperly reported for Respondents Sanders and Dietro. Because special compensation was overreported, CalPERS determined that downward adjustments to Respondents Sanders and Dietro's retirements were required. In addition, Respondent

Sanders received an overpayment totaling \$10,890.85, while Respondent Dietro received an overpayment of \$8,557.58.<sup>1</sup>

Respondent Apple Valley appealed CalPERS' determination on behalf of both Respondents Sanders and Dietro. Respondents Sanders and Dietro submitted their own respective appeals. A hearing was held on June 18, 2019, to determine whether CalPERS was correct finding that the FLSA special compensation was overreported. If the FLSA special compensation was overreported, the issue then turned to: a) whether CalPERS can make a downward adjustment to Respondents Sanders' and Dietro's retirement allowances, and b) may CalPERS collect the overpayments from Respondents Sanders and Dietro.

Prior to the hearing, CalPERS explained the hearing process to Respondents Sanders and Dietro, and the need to support their cases with witnesses, evidence, and documents. CalPERS provided both Respondents Sanders and Dietro with copies of the administrative hearing process pamphlet. CalPERS answered Respondents Sanders' and Dietro's questions and clarified how to obtain further information on the process.

CalPERS' Staff testified at hearing in support of CalPERS' determination. Staff explained that compensation earnable is made up of payrate and special compensation. Under Government Code section 20636, subdivision (b)(1), payrate must be reported for services rendered on a full-time basis during normal working hours. Because payrate must be reported for services rendered on a full-time basis during normal working hours, the 56-hour normal workweek at issue requires 56 hours to be reported for payrate. Since the full 56 hours are already reported as payrate, under Regulation 571, subdivision (a)(5), FLSA may only be reported for three hours at half-time.

Staff explained that Respondent Apple Valley's reporting error here, the reporting of 53 hours of regular time and three hours at time and a half, does not affect Respondents Sanders' and Dietro's salary as earned. Regardless of how Respondent Apple Valley reported the FLSA special compensation, Respondents Sanders' and Dietro's periodic pay remained the same. However, Respondent Apple Valley overreported Respondents Sanders' and Dietro's special compensation, which affected benefit calculations, and ultimately caused overpayments in monthly retirement allowances to both Respondents Sanders and Dietro. Respondents Sanders and Dietro were thus receiving benefits "forbidden by the PERL." (Proposed Decision, page 9.)

Staff then detailed that the overreporting of FLSA special compensation can cause an underreporting of service credit, as the overreporting disrupts the payrate/earnings relationship. Reported on a fiscal year basis, CalPERS members generally earn one full year of service credit in ten months of full-time work. Here, Respondent Sanders retired in the middle of the 2016-2017 fiscal year. Since Respondent Sanders had not yet attained full service credit for the 2016-2017 fiscal year, the overreported FLSA special compensation resulted in underreported service credit for Respondent Sanders. The underreported service credit did not affect Respondent Sanders benefit calculation, though, as he had already maxed out his service credit for retirement purposes.

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<sup>1</sup> \$3,185.81 of Respondent Dietro's overpayment was made to his community property payee. The community property payee was not made a part of this proceeding. The community property payee was notified of the overpayment. Prior to the hearing, the community property payee agreed to repay the overpayment pursuant to a 36 month payment plan.

Respondent Dietro retired at the end of the fiscal year, and his service credit was unaffected by the reporting error.

Staff also explained that CalPERS provides instruction to its agencies as to how to correctly report special compensation. CalPERS distributed its 2010 Public Agency and Schools Procedures Manual (Manual) to public agencies. The Manual expressly advises agencies, such as Respondent Apple Valley, how to correctly report FLSA special compensation. Staff also explained that CalPERS' instruction on FLSA special compensation reporting has been historically consistent.

Respondent Apple Valley's witnesses also testified at hearing. Respondent Apple Valley's witnesses asserted that Respondent Apple Valley was reporting the FLSA special compensation correctly.

Respondents Sanders and Dietro did not testify at hearing, but instead provided written statements at the hearing in support of their respective positions.

After considering all of the evidence introduced, as well as written arguments by the parties, the Administrative Law Judge (ALJ) denied the appeal. The ALJ reasoned that payrate must be reported for services rendered on a full-time basis during normal working hours. Because payrate must be reported for services rendered on a full-time basis during normal working hours, the 56-hour normal workweek at issue requires 56 hours to be reported for payrate. The only portion of the 56 hours that is premium, and the only portion that qualifies as special compensation, is the half-time paid in excess of the normal payrate. That half-time here is the three hours after hour 53, from hour 54 through hour 56. So, Respondent Apple Valley's reporting was incorrect.

Consequently, the ALJ then concluded that Government Code section 20160 requires CalPERS to correct the reporting errors. Here, Government Code section 20160 requires CalPERS to make a downward adjustment to both Respondents Sanders' and Dietro's retirement allowances. Because the overpayments to Respondents Sanders and Dietro were made within three years of the subject proceeding, CalPERS must collect the overpayment from Respondent Sanders, and CalPERS must also collect Respondent Dietro's portion of his overpayment.

The ALJ also rejected the application of estoppel against CalPERS. If applied, estoppel can preclude a downward adjustment, or overpayment recovery, by CalPERS. Both Respondents Sanders and Dietro would receive retirement allowances not allowed by statute, and to which they are not entitled, should estoppel apply. The ALJ thus correctly ruled that estoppel cannot apply here against CalPERS.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

November 20, 2019

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