

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION**

On March 29, 2022, Respondent Cosumnes Community Services District (District) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated January 21, 2022. On March 30, 2022, Respondent Paul Zehnder (Respondent) also filed a petition for reconsideration. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent was employed by Respondent District as a Deputy Fire Chief. By virtue of his employment with the District, he was a local safety member of CalPERS.

In April 2019, the District and Respondent renegotiated Respondent's employment contract. As part of the negotiations, the District attempted to address a problem with salary compaction in the upper management ranks. As a solution, the District and Respondent agreed to include holiday pay in addition to Respondent's base compensation, intending for the holiday pay to be pensionable. The employment contract specifically states that Respondent "shall receive holiday pay for District recognized holidays. . . at the rate of [\$1,106] per month to ensure that [Respondent] is on-call during all recognized holidays." However, neither the District nor Respondent inquired with CalPERS whether the holiday pay, as defined in the employment contract, would qualify as special compensation.

On November 17, 2020, Respondent submitted an application for service retirement, and he retired effective December 30, 2020. Upon receiving Respondent's application for service retirement, CalPERS commenced a review of his pay to determine whether his reported compensation complied with the provisions of the Public Employees Retirement Law (PERL). CalPERS discovered that the District had reported a monthly amount of \$1,106 as special compensation, identified as holiday pay.

After reviewing the employment contract, CalPERS determined the holiday pay could not be included in the calculation of Respondent's pension benefits because it did not qualify as compensation earnable. The contract states that the pay was to ensure Respondent was on-call during all recognized holidays, but it does not state that Respondent is required to work those holidays. Thus, the holiday pay was in actuality stand-by pay, which is not reportable. Consequently, CalPERS determined that the holiday pay did not qualify as compensation earnable under Government Code section 20636, and California Code of Regulations, Title 2, (CCR) section 571.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on December 20, 2021. Respondent represented himself at the hearing. The District also appeared at the hearing, was represented by counsel, but did not present any witnesses on its own behalf.

The sole issue for determination at the hearing was whether the holiday pay constituted special compensation to be included in Respondent's final compensation for purposes of calculating his retirement allowance.

The PERL defines compensation earnable as the compensation paid by the employer of payrate plus special compensation. (Govt. Code (GC) § 20636(b).) Payrate is defined as the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. (GC § 20636(b).)

Special compensation is defined as payments received by a member for special skills, knowledge, abilities, work assignment, workdays, or other work conditions. Special compensation must be paid pursuant to a written labor policy or agreement, or as otherwise required by state or federal law, to similarly situated members of a group or class of employment, in addition to payrate. (GC § 20636(c).) The CalPERS Board of Administration (Board), pursuant to statutory mandate, has specifically and exclusively identified what constitutes special compensation and under what conditions payments to a member may qualify as special compensation. (GC § 20636(c)(6); CCR § 571.)

In order to be considered compensation earnable, any item of special compensation must be listed as a compensable item under CCR section 571(a), plus it must meet the exhaustive, exclusive requirements set forth in CCR section 571(b). Here, the holiday pay provision specified that Respondent was on-call for all recognized holidays. There was no other language in the employment contract to establish that he was required to work on holidays. When reviewing the reported compensation, CalPERS looks to the language of the employment contract. Compensation must be contained in a written employment agreement and be performed during normal hours of employment. (CCR § 571(b).) Here the holiday pay did not meet the specific requirements of CCR section 571 because there was no scheduled staffing for recognized holidays. Further, the on-call language meant Respondent was only required to work on an as-needed basis, rendering those hours as overtime or standby pay. Overtime and standby pay are specifically excluded from consideration in the calculation of a member's final compensation. (GC §§ 20636(g)(4)(H) and (g)(4)(I).) The fact that Respondent may have worked on a District recognized holiday is irrelevant.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ reviewed relevant case law, finding that Respondent failed to establish that he was required to work on recognized holidays, as required by CCR section 571. The ALJ found the plain language of the contract provides that the purpose of the pay was to ensure Respondent maintained on-call status on holidays. The ALJ found "such is akin to standby pay, which is specifically excluded from special compensation under the PERL." (GC § 20636(1)(g)(I).) While the ALJ found Respondent's position to be sympathetic, the plain language of the contract must be followed. Only those items which specifically meet the requirements of

CCR section 571 may be considered special compensation. Accordingly, the ALJ denied Respondent's appeal and affirmed CalPERS' determination that the holiday pay did not comply with the definition of compensation earnable under the PERL, and therefore cannot be included in his final compensation for purposes of calculating his monthly retirement allowance.

On February 16, 2022, the District's Board of Directors adopted an amendment to Respondent's employment contract. The language regarding Holiday Pay was changed to remove the on-call clause.

On March 29, 2022, the District filed a Petition for Reconsideration, requesting that CalPERS Board reconsider its decision to reject Holiday Pay as special compensation due to the amendment of Respondent's employment contract. The February 2022 contract amendment does not fix the initial problems with Holiday Pay because only those items which specifically meet the requirements of CCR section 571 may be considered special compensation. The amendment does not change the fact that CCR section 571 requires Respondent to have been "normally required to work on an approved holiday." Respondent retired December 25, 2020. He never performed work under the amended contract. Even if he had, the evidence at hearing showed that Respondent was never required to work on an approved holiday. Respondent's holiday pay ensured that he was "on call" for all recognized holidays. CCR section 571 defines Holiday Pay as "Additional compensation for employees who are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays." There was no evidence showing that Respondent was required or scheduled to work on holidays. Rather, the evidence at hearing showed there was no scheduled staffing for recognized holidays (i.e., a written schedule that specified dates and times Respondent was required to work). If he worked on a District holiday, Respondent performed that work on an "as-needed" basis.

On March 30, 2022, Respondent filed a petition for reconsideration. Based on testimony given by CalPERS staff, Respondent argues that it is permissible practice for the District to amend the holiday pay language in the existing contract retroactively to ensure it is special compensation which can be used in the calculation of his final compensation. CalPERS does not dispute that occasionally an employer may amend a contract to comply with the requirements of CCR section 571. However, the amended holiday pay provision here does not comply with CCR section 571, so it must be excluded.

No new evidence has been presented by the District that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the March 16, 2022 meeting was well reasoned and based on the credible evidence presented at hearing.

For all the above reasons, staff argues that the Board deny the Petition for Reconsideration.

April 19, 2022

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