

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO REMAND THE PROPOSED DECISION

Respondent Barry D. Biermann (Respondent) established membership with CalPERS in 1986 when he was hired by the California Department of Forestry and Fire Protection. As an employee of California Department of Forestry and Fire Protection, Respondent was a state safety member of CalPERS.

On June 17, 2019, Respondent was hired by the City of Daly City (City) as Deputy Fire Chief. As an employee of the City, Respondent is a local safety member of CalPERS. On November 23, 2020, the City Council adopted Resolution No. 20-179 approving adjustments to the salary and benefits for specified Executive Management positions. The Resolution provides for the following pay for the Deputy Fire Chief and Fire Chief:

Holiday in Lieu Pay

Effective the first full pay period after adoption of this resolution, in recognition of the essential nature of services provided by the Deputy Fire Chief and Fire Chief, these classifications shall receive 7.5% of employee's base salary plus supplemental educational incentive pay earned in the previous six-month period in lieu of observing City Holidays. Such payments shall be made on the first payday after December 1 and the first payday after June 1.

Respondent applied for service retirement from his position as Deputy Fire Chief with the City, effective October 9, 2021. CalPERS reviewed Respondent's compensation to determine the amounts that could be used to calculate his final compensation, and thus his monthly retirement allowance.

CalPERS identified holiday pay as an item reported by the City for Respondent during his final compensation period of October 9, 2020, through October 8, 2021. CalPERS requested and received information from the City about the holiday pay applicable to Respondent's position as Deputy Fire Chief.

On October 22, 2021, CalPERS notified the City and Respondent of its preliminary determination that holiday pay reported for the period of October 2020 through October 2021 did not qualify as "compensation earnable" under the Public Employees' Retirement Law (PERL), because it was paid solely in Respondent's final compensation period.

The City filed an appeal and request for an administrative hearing contending the holiday pay was allowable as "special compensation" under the PERL.

On February 3, 2023, CalPERS issued an amended determination letter, stating that holiday pay was not compensation earnable for Respondent, because Deputy Fire Chief was not a position that required scheduled staffing without regard to holidays. The letter further indicated that “[o]nly special compensation that is exclusively identified and defined under California Code of Regulations (Code of Regulations), title 2, section 571 and meeting all the requirements under [Government Code section 20636,] subsection (b) may be used to calculated retirement benefits.”

Respondent and the City appealed this determination and exercised their right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on August 22, 2023. Respondent represented himself at the hearing. Respondent City was represented by counsel at the hearing.

The City provides fire services for three cities (Brisbane, Pacifica, and Daly City), under the auspices of the North County Fire Authority. Every third week, the Deputy Fire Chief from each of the three cities under the North County Fire Authority is required to serve a week-long shift as “Duty Chief.”

Respondent testified regarding his duties and work schedule as Deputy Fire Chief for the City and his shift as Duty Chief for the North County Fire Authority. Respondent testified that as a Deputy Fire Chief, he worked a 40-hour week, Mondays through Thursdays from 8:00 a.m. to 6:00 p.m. In addition, every third week, he served as Duty Chief for a shift of seven days. The Duty Chief shift began at 8:00 a.m. on Tuesday and ended at 8:00 a.m. the following Tuesday. During his seven-day shift as Duty Chief, Respondent was required to be available 24 hours a day and could not leave San Mateo County. When Respondent was working a Duty Chief shift, he lived at a fire station in Pacifica for the entire week.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ granted the Respondents’ appeal. The ALJ found that Respondent’s holiday pay is like that considered by the court in *Hale v. Public Employees’ Retirement System* (“*Hale*”) (2022) 82 Cal.App.5th 764. The ALJ concluded that the shift of Duty Chief every third week was part of Respondent’s normally required duties, therefore, it qualifies as “special compensation” pursuant to the *Hale* decision. But *Hale* should not apply to the facts of this case because it involves compensation paid to employees of the state, it does not involve special compensation paid to employees of contracting agencies, like Respondent.

Consequently, the Proposed Decision should be remanded to the OAH for a determination on the following issues: (1) whether Holiday Pay qualifies as special compensation pursuant to Code of Regulations, title 2, section 571; (2) whether Respondent’s shift as “Duty Chief” every third week for the North County Fire Authority entitles him to retirement benefits as a local safety member of the City; and (3) whether the Proposed Decision is correctly supported by *Hale*, which governs special compensation for state employees.

The Proposed Decision should be remanded for a determination on whether the holiday pay provided to Respondent qualifies as “[a]dditional 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. If these employees are paid over and above their normal monthly rate of pay for approved holidays, the additional compensation is holiday pay and reportable to PERS.” (Cal. Code Regs., tit. 2, § 571, subd. (a)(5).) Further, the Proposed Decision should address whether a shift every third week for the North County Fire Authority complies with the requirements set forth in Code of Regulations, title 2, section 571, subdivision (b). Finally, the Proposed Decision should reexamine whether the *Hale* case applies here, as *Hale* involves compensation paid to state employees, not to employees of contracting agencies.

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

March 20, 2024

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