

ATTACHMENT C

RESPONDENT'S ARGUMENT

February 22, 2024

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California Public Employees' Retirement
System
Post Office Box 942701
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Re: *In the Matter of the Appeal Regarding Final Compensation Calculation of Barry D. Biermann, Ref. No. 2022-0221*
Respondent's Argument
Client-Matter: DA003/016

The City of Daly City ("City") submits this argument requesting that the California Public Employees' Retirement System ("CalPERS") Board of Administration ("Board") adopt the Proposed Decision issued by the Administrative Law Judge ("ALJ") as its own decision in this matter. The Proposed Decision correctly applies the unique facts of the case to the law and should be adopted.

I. INTRODUCTION

Respondent Barry Biermann served as a Deputy Fire Chief with the City of Daly City ("City"). The City's Deputy Fire Chiefs receive Holiday-in-Lieu ("HIL") Pay in lieu of observing City-recognized holidays because they are scheduled and normally required to work on holidays. Specifically, in addition to working 40 hours during the week, Deputy Fire Chiefs are designated as the Duty Chief for a seven-day period that repeats every 21 days. While serving as the Duty Chief, the Deputy Fire Chiefs do not merely serve as on-call or standby employees in the event another employee cannot fulfill their duties, but have primary responsibility to respond to and address certain issues that arise during their rotation. Duty Chiefs must remain within the service area, are required to respond to specified incidents requiring a higher level of response similar to other command officers and supervisors, must remain in constant communication with the Fire Department, and are required to push important information up to supervisors and directives down to subordinates while serving as the Duty Chief.

There is ample evidence in the record that Deputy Fire Chiefs are regularly scheduled to work on holidays on a rotating basis similar to battalion chiefs and all other firefighters in the fire service. The assignment was not merely a stand-by assignment to serve as backup staffing or

in the case of a rare emergency, but a primary assignment with specified responses. There is also ample evidence in the record that responses were not merely a theoretical possibility, but were a normal and regularly occurring feature of the assignment, and that the assignment included regularly working on holidays. Failing to be available and respond would have subjected Deputy Fire Chiefs to disciplinary action.

HIL Pay for Deputy Fire Chiefs meets the statutory requirements under the Public Employees' Retirement Law ("PERL") and regulatory requirements adopted by CalPERS to be reportable as special compensation. The Proposed Decision, which followed extensive briefing on the legal arguments, an administrative hearing, and oral argument, carefully weighs, considers, and rejects each argument raised by CalPERS. Thus, the City requests that the CalPERS Board adopt the Proposed Decision as its own.

II. FACTUAL BACKGROUND

The City's Deputy Fire Chiefs and Fire Chief receive HIL Pay of 7.5% "in lieu of observing City holidays." (PD, pp 5-6, ¶ 19.) Deputy Fire Chiefs are designated as the Duty Chief. (*Id.*) As part of their regular duties, Deputy Fire Chiefs are required to serve a week-long shift as the Duty Chief every third week. (PD, p. 4, ¶ 14.) The schedule is in effect without regard to holidays and is planned out for the entire year before the start of the year. (*Id.*) Specifically, in addition to their Monday through Thursday schedule, Deputy Fire Chiefs were required to serve as the Duty Chief every third week beginning on Tuesday at 8:00 a.m. and ending the following Tuesday at 8:00 a.m. During the Duty Chief rotation, Mr. Biermann was required to be available 24 hours a day and could not leave San Mateo County. (*Id.*, p.4 at ¶ 15.) During his Duty Chief rotation, Mr. Biermann remained at a fire station for the entire rotation. (*Id.*) Mr. Biermann was regularly required to work holidays as part of the Duty Chief rotation and also had to work other specified holidays. (*Id.*, p. 5, ¶ 16.)

During the Duty Chief rotation, Deputy Fire Chiefs oversee eight stations, and must be available for emergency response at all times. (*Id.*, p. 5 ¶ 17.) Several incidents also required the Duty Chief to respond to the scene. (*Id.*) For example, Duty Chiefs were required to respond where there was augmented dispatch, wildland fires, multi-engine responses, cliff rescues, and incidents with media coverage. (*Id.*) The Duty Chief would coordinate the response with the on-scene incident commander and would provide public information statements. (*Id.*) The Duty Chief also had to be in communication to provide supervision to Battalion Chiefs on an ongoing basis. (*Id.*) The Duty Chief had to physically respond to five or seven calls per week and had to handle communications requiring substantive responses 20 to 30 times per week. (*Id.*, p. 5 ¶ 18.) The Proposed Decision found that Mr. Biermann testified credibly and that his testimony was uncontroverted. (*Id.*, p. 4, ¶ 13.)

III. DISCUSSION

A. LEGAL REQUIREMENTS FOR HOLIDAY PAY

Under Government Code section 20636, “compensation earnable,” which can be reported to CalPERS for inclusion in benefits, is made up of “payrate” and “special compensation.” Government Code section 20636(c)(6) requires CalPERS to promulgate regulations setting forth what constitutes “special compensation” for the purposes of inclusion in pension benefits. The Legislature directed that Holiday Pay must be included under the regulations and be appropriately defined. (Gov. Code, § 20636(c)(6).) The California Code of Regulations sets forth the exclusive list of items that qualify as special compensation for the purposes of inclusion in compensation earnable. (Cal. Code Regs., tit. 2, § 571(a).)¹ Under California Code of regulations, title 2, § 571(a)(1), “Holiday Pay” is defined in relevant part as follows:

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. 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.

B. THE PROPOSED DECISION

At hearing, CalPERS raised several grounds to argue that holiday pay was not reportable. Specifically, CalPERS contended that the policy did not require work without regard to holidays, and that the Duty Chief rotation was akin to standby or overtime. (*Id.*, pp. 8-9, ¶ 5.) Each of these contentions was turned away by the ALJ.

The Proposed Decision rejected the contention that the language was insufficient because the applicable resolution clearly designates the compensation as “Holiday-in-Lieu Pay,” and provides that it is in lieu of observing City holidays. (*Id.*, p. 9, ¶ 7.) The ALJ determined that the only logical reading was that the Deputy Fire Chiefs were required to work without regard to holidays, which was also consistent with the evidence presented at hearing. (*Id.*)

The Proposed Decision also rejected CalPERS’ contention that the Deputy Fire Chiefs were merely “on-call” or on “standby.” (*Id.*, pp. 9-10, ¶ 7.) The uncontroverted evidence established that Deputy Fire Chiefs were not serving as mere back-up employees, but covered several areas where they had primary responsibility. (*Id.*) The evidence was also uncontroverted that the seven-day rotation, in addition to the 40-hour schedule, “was a part of [the Deputy Fire Chiefs’] normally required job duties,” that it was “scheduled without regard to holidays,” and that the Deputy Chiefs “worked on holidays.” (*Id.*) Based on the uncontroverted evidence, the HIL Pay was reportable as special compensation.

¹ Biermann is a CalPERS classic member and only provisions related to classic members are relevant to this matter.

Accordingly, the Proposed Decision correctly determined that the compensation met all of the statutory and regulatory requirements to be reported as special compensation and that the appeal should be granted. (*Id.*, p. 10.)

C. THE PROPOSED DECISION IS SUPPORTED BY THE LAW

The HIL Pay paid to Deputy Fire Chiefs satisfies the statutory and regulatory requirements to be reported to CalPERS as special compensation and included in retirement benefits.

As discussed above, under Government Code section 20636, CalPERS must adopt regulations concerning the inclusion of Holiday Pay in retirement benefits. CalPERS adopted a regulation, which defines Holiday Pay in relevant part 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. 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.

Deputy Fire Chiefs clearly meet the requirements to have HIL Pay reported to CalPERS as special compensation. Under Resolution No. 20-179, in recognition of the essential services they provide, Deputy Fire Chiefs and the Fire Chief receive an additional 7.5% “in lieu of observing City Holidays.” Resolution No. 20-179 clearly provides additional compensation to Deputy Fire Chiefs in lieu of observing City-recognized holidays.

It is also beyond dispute that Deputy Fire Chiefs are “normally required to work on approved holidays because they work in positions that require scheduled staffing without regard to holidays.” Deputy Fire Chiefs are obligated to observe a duty schedule that requires them to work a seven-day rotation every 21 days. The schedule that they must work is prepared before the beginning of the year and proceeds in a rotating schedule throughout the entire year so that there is coverage 24 hours per day, seven days per week. The schedule operates without regard to holidays and a Deputy Fire Chief will be scheduled to work some holidays and not others based on the rotation. Indeed, the testimony at hearing confirmed that this process is the same as for battalion chiefs and rank-and-file fire employees who have a predictably repeating two on, four off schedule. Accordingly, Deputy Chiefs are “normally required to work” holidays due to “scheduled staffing without regard to holidays.” They clearly fall within the plain language of the regulation adopted by CalPERS, and it was in error for CalPERS to exclude HIL Pay from pension benefits, which the Proposed Decision correctly remedies.

The facts here are similar to those in *Hale v. Public Employees' Retirement System* (2022) 82 Cal.App.5th 764, 764 where the court held that certain holiday-pay cash outs were included as special compensation for State members. The Court of Appeal rejected the argument that the

employees were merely working on-call or stand-by, which was expressly excluded from compensation earnable for State members by Government Code section 20636(g)(4)(I). Here, like the employees in *Hale*, the Duty Chief rotation, which requires Deputy Fire Chiefs to work on holidays, is part of their normally required duties and schedule. *Hale* distinguished *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 540, noting that the compensation at issue there was called “standby pay” under the labor agreement. (*Hale, supra*, 82 Cal.App.5th at 778.) The *Hale* court also noted that in *Pleasanton*, the employee was working a backup schedule and could be at home every evening during the week, on holidays, and on weekends, unless called in to relieve someone. (*Id.*) The record in *Pleasanton* also did not disclose how frequently the employee actually had to work on holidays. (*Id.*, at 778-779.) In *Pleasanton*, since the individual only had to work if they were called in to relieve someone, they were not normally required to work on a holiday, and could not satisfy the requirements under California Code of regulations, title 2, § 571(a)(1). (*Id.*, at 779.) Like the employees discussed in *Hale*, and unlike the employees in *Pleasanton*, Biermann and the Deputy Fire Chiefs at issue in this matter “were required to work on holidays, and there is ample evidence that they were routinely required to carry out their duties...regardless of the day of the week or whether it was a holiday.” (*Id.*, at 779.) Here, the Deputy Fire Chiefs do not serve as mere backups in the event that another employee is unable to fulfill their duties, but covers several areas of primary responsibility during the rotation. (PD, pp. 9-10, ¶ 7.)

While CalPERS will likely argue that the ALJ applied the wrong law, the contention is without merit. The Proposed Decision expressly applies California Code of regulations, title 2, § 571(a)(1). Moreover, notwithstanding the fact that Government Code section 20636(g)(4)(I) excludes from state members’ retirement allowances “[c]ompensation for additional services outside regular duties, such as standby pay, callback pay, court duty, allowance for automobiles, and bonuses for duties performed after the member’s regular work shift,” the *Hale* court rejected the argument that the employees were working on-call or standby. Specifically, in *Hale*, CalPERS argued that the time the employees spent taking calls from union members during holidays as part of their regular duties was excluded because the members were working outside of regular duties, after the member’s regular work shift, on-call, or on standby. The *Hale* court rejected CalPERS’ position and found that the holiday pay at issue was includable in pension benefits. *Hale* also distinguished *Pleasanton*, where the employees worked a true backup schedule where they were home unless called in to relieve someone, the pay was expressly for standby, and the record did not disclose whether employees actually ever worked on holidays or how frequently. Here, like the employees in *Hale*, and unlike the employees in *Pleasanton*, the Deputy Fire Chiefs are regularly required to work a schedule that requires staffing without regard to holidays. The Duty Chief rotation is a scheduled and recurring part of their normal duties and there is no competent evidence to the contrary. It follows that the HIL Pay is not excluded because it is outside regular duties, standby, callback, or payment for work outside of the regular shift. (*Id.*) There is nothing in the regulation that would change this result, as the *Hale* decision and the Proposed Decision reject the contention that the compensation at issue is outside of regular duties, standby, or callback.

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Accordingly, CalPERS' attempts to distinguish *Hale* must fail.

D. THE PERL MUST BE LIBERALLY CONSTRUED IN FAVOR OF PENSIONERS

The PERL and its implementing regulations must be construed liberally in favor of pensioners. (*Hudson v. Board of Admin, of Public Employees' Retirement System* (1997) 59 Cal.App.4th 1310, 1324; *Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 459.) Of course, the interpretation must still be consistent with the statutory language. (Id.)

In this case, CalPERS' staff arguments would, at best, require the Board to interpret Government Code section 20636 and California Code of regulations, title 2, § 571(a)(1), in a manner that is adverse to Biermann without any supporting language in the statute, supporting language in the regulation, or any supporting interpretive guidance. The uncontroverted facts confirm that Deputy Fire Chiefs "are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays." (Cal. Code Regs., tit. 2, § 571(a).) Not only does the plain language compel the inclusion of HIL Pay in pension benefits under the facts established at hearing, any other interpretation would violate rules of statutory construction as they relate to the interpretation of pension legislation.

Therefore, the well-established rules of statutory construction support the inclusion of HIL Pay in the calculation of pension benefits.

IV. CONCLUSION

The HIL Pay is reportable for Biermann and the Deputy Fire Chiefs who are required to observe a Duty Chief rotation without regard to holidays in which they exercise primary responsibilities. The City requests that the CalPERS Board adopt the Proposed Decision as its decision in this matter, as the Proposed Decision correctly applies the uncontroverted facts to the law.

Very truly yours,

LIEBERT CASSIDY WHITMORE



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