



California Public Employees' Retirement System

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February 17, 2022

Ref. No. 2021-0084

**Certified Mail – Return Receipt Requested, First-class Mail and E-mail**

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**Subject: In the Matter of the Appeal of Regarding Compensation Earnable Calculation of Santa Ana Police Officers Association President by CITY OF SANTA ANA, Respondent, and GERRY SERRANO, Respondent.**

Dear Messrs. Brown and Kaiser:

This is to forward a photocopy of the Proposed Decision of the Administrative Law Judge in the above-named matter. In accordance with the Administrative Procedure Act, it has no force or effect until the Board of Administration (Board) of the California Public Employees' Retirement System (CalPERS) takes formal action to either adopt it, remand it, or decline to adopt it in favor of its own decision.

Your appeal has been calendared for consideration by the Board at its regular meeting on April 19, 2022. **Although oral argument is not allowed, the parties may submit written argument for or against the Proposed Decision.**

As part of this argument, you may also ask the Board to designate the decision as **precedent**, in whole or in part, if it is adopted. The purpose of designating precedent is to provide guidance to the Board and other parties in future appeals where the disputed law and issues are the same. This designation has no effect on the binding outcome of your appeal. CalPERS' staff routinely submits written argument and may make this same request of the Board. Or, the

Board may choose to designate a given decision as precedent on its own motion. For this reason, although you are not required to take a position, if you have a preference against precedential status, you should explain why in your written argument to the Board.

In deciding whether to designate precedent, the Board will always consider: *Does the decision contain a significant legal or policy determination of general application that is likely to recur? Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made and how the law was applied?*

All precedential decisions will be **published** with a cumulative index and made available free of charge on the CalPERS website (<http://www.calpers.ca.gov>). They will also be available in "hard copy" upon written request to this office. Any precedential decision may be de-published at the request of an interested party after an opportunity for public comment and at the sole discretion of the Board.

**Your written argument should be no longer than six pages and must be received by CalPERS no later than March 30, 2022.** Please note, even if you miss this deadline, the Board will still act on the Proposed Decision. All written argument will be included in the Agenda Item and mailed simultaneously to the Board and all parties. Your argument will not be disclosed to the attorney assigned to this matter until then. Please redact personal information as Respondents' Arguments become public documents when included in the Agenda Item. **As mentioned earlier, parties will not be allowed to orally respond to the Board on the merits of written argument.** Please title your submission as "Respondent's Argument," and send it to:

Cheree Swedensky, Assistant to the Board  
CalPERS Executive Office  
P.O. Box 942701  
Sacramento, CA 94229-2701  
Fax: (916) 795-3972

If you have any questions about this procedure, you may contact John Shipley, Senior Attorney, at (916) 795-9511.

Sincerely,



Deb Jo Wooten  
Legal Secretary  
Legal Office

Enclosure: Proposed Decision

**BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

**In the Matter of the Appeal Regarding Compensation  
Earnable Calculation of Santa Ana Police Officers Association**

**President by:**

**CITY OF SANTA ANA**

**and**

**GERRY SERRANO,**

**Respondents**

**Case No. 2021-0084**

**OAH No. 2021050155**

**PROPOSED DECISION**

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on November 21, 2021.

John Shipley, Senior Staff Attorney, California Employees' Retirement System (CalPERS) represented the complainant, Renee Ostrander, Chief, Employer Account Management Division, CalPERS.

Peter Brown, Liebert Cassidy Whitmore, represented respondent City of Santa Ana (City).

Steven Kaiser, Messing Adam & Jasmine LLP, represented respondent Gerry Serrano.

Oral and documentary evidence was received, and the record was held open for the submission of closing briefs as follows: Mr. Serrano's on December 14, 2021, complainant's and the City's on January 11, 2022, and Mr. Serrano's reply on January 18, 2022. All briefs were timely received. However, on January 18, 2022, complainant filed a reply to the City's January 11, 2022, brief. In that reply, complainant indicated that it was filing the limited response because the City raised issues in its closing brief that were not raised in its appeal letter, and the City indicated it did not oppose complainant filing a reply brief. On January 20, 2022, Mr. Serrano objected to complainant's reply brief because the briefing schedule did not provide for complainant to submit a reply brief.

Mr. Serrano's objection is sustained, and complainant's reply brief was not considered. Complainant did not seek leave from the administrative law judge to file a reply brief and one was not ordered in the briefing schedule.

Additionally, on January 12, 2022, complainant filed a request for official notice, which was opposed by Mr. Serrano on January 18, 2022. On January 28, 2022, Mr. Serrano filed a request for official notice, which was opposed by complainant. For reasons discussed below, both requests for official notice are denied.

The matter was submitted for decision on January 18, 2022.

## **ISSUES**

1. With regard to respondent City of Santa Ana, whether confidential premium pay (confidential premium), detective division premium (detective premium), and bilingual premium paid by the City to an individual who is on a full-time leave of absence from the City to serve as the President of the Santa Ana Police Officers Association (SAPOA or union) qualify as "compensation earnable."

2. With regard to respondent Gerry Serrano, whether the confidential premium, detective premium, bilingual premium, holiday pay, uniform allowance, and educational incentive pay as reported by the City on behalf of Mr. Serrano while he is on a full-time leave of absence from the City to serve as SAPOA president qualify as "compensation earnable."

## **SUMMARY**

The pension of a CalPERS member is calculated based on years of service, age at time of retirement, and the member's "final compensation." Final compensation is defined in terms of "compensation earnable," which consists of (1) "pay rate," which can roughly be understood as base salary; and (2) "special compensation," which can roughly be understood as certain specified additions or premiums to the base salary. The issue in this case is whether one or more of six pay premiums are properly reportable as special compensation when provided to a member who is on full-time leave of absence from the City to serve as the SAPOA president, as has Mr. Serrano since April 2016. It is concluded that five of the six items the City identified as special compensation— confidential premium, bilingual premium, detective premium, holiday pay, and a uniform allowance, are excluded from special compensation, and thus, are

not considered compensation earnable. It is further concluded, however, that the sixth item, educational incentive pay, was properly reported as special compensation.

## **FACTUAL FINDINGS**

### **Background**

1. The City is a public agency that contracts with CalPERS to provide retirement benefits for its eligible employees.

2. On October 30, 2020, Brad Hanson, Assistant Division Chief, Employer Account Management Division, issued a determination letter to the City to address the City's inquiry<sup>1</sup> regarding whether a confidential premium provided to a police sergeant on paid leave of absence while serving as the president of SAPOA is pensionable (i.e., qualifies as "compensation earnable") under the Public Employees' Retirement Law (PERL). CalPERS determined that even though the confidential premium is an enumerated item of "special compensation" pursuant to California Code of Regulations, title 2, section 571 (Regulation 571), subdivision (a)(4), it is not pensionable compensation for two reasons. First, the confidential premium is not

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<sup>1</sup> While the letter indicated that the City made an "inquiry," the evidence did not establish what precipitated CalPERS's review. Mr. Serrano testified the inquiry was initiated by a complaint to CalPERS from a City councilmember who was recalled from office with whom Mr. Serrano had "political differences." Even if it were, the reason the inquiry was initiated is irrelevant, as CalPERS has the authority to engage in reviews of how compensation is reported by contracting agencies.

available to “similarly situated members” of a group of employment because under the Memorandum of Understanding (MOU) between the City and SAPOA, it is only available to one person, the person serving as president of SAPOA. Second, even if the confidential premium were available to other similarly situated employees, it is not available to an employee on paid leave of absence. Specifically, a sergeant on paid leave of absence is not performing any duties for the City qualifying him for this special assignment pay. Further, CalPERS maintained not only that confidential premium pay does not qualify as special compensation for an employee on leave of absence while serving as the SAPOA president, but that other items identified as special assignment pay such as the detective premium and the bilingual premium do not qualify as special compensation and thus are not pensionable either. Accordingly, CalPERS required the City to reverse any reported special assignment pay for any employee who is on paid leave of absence.

3. The City timely appealed CalPERS’s determination.

4. On May 4, 2021, complainant signed the Statement of Issues. The issues identified to be resolved were whether “special assignment pay” provided to the SAPOA president qualify as “compensation earnable” while that individual holds that position and on full-time paid leave of absence; whether confidential premium pay paid to the SAPOA president qualifies as compensation earnable; and whether detective premium and bilingual premiums qualify as compensation earnable for an individual on full-time leave of absence from his or her duties with the City.

5. Mr. Serrano established membership with CalPERS as a local safety member by virtue of his employment with the City on July 16, 1995. He is currently employed by the City as a police sergeant. In April 2016, he was elected SAPOA

president, at which time he went on full-time leave of absence from the City. To this date, he remains in that position.

6. Because Mr. Serrano holds the position of SAPOA president, and his retirement benefits would be affected by a decision limiting the reportable items of special compensation available to the SAPOA president, Mr. Serrano requested permission to participate in the appeal hearing. By letter dated October 8, 2021, CalPERS notified Mr. Serrano that he would be named as a respondent to this action. In conjunction with this request, CalPERS conducted a Compensation Compliance Review to determine whether certain components of compensation reported on behalf of Mr. Serrano complied with the PERL and Regulations. The review identified eight items of compensation reported by the City while Mr. Serrano was on full-time leave of absence serving as SAPOA president that CalPERS determined were not reportable as compensation earnable. CalPERS identified four types of special assignment pay it did not believe was reportable while Mr. Serrano was on a leave of absence with the City: bilingual premium, confidential premium, detective premium, and lead worker/supervisor premiums. CalPERS identified four other items as to which it "did not receive sufficient information" to conclude that they should be received while Mr. Serrano was on a paid leave of absence: "Off-Salary-Schedule Pay," educational incentive pay, holiday pay, and a uniform allowance.

7. On October 26, 2021, complainant signed the amended statement of issues, naming Mr. Serrano as a respondent and identifying the following issues to be decided at hearing: whether holiday pay, detective premium, lead worker/supervisor premium, uniform allowance, bilingual pay, educational incentive pay, off-salary schedule pay, and confidential premium can be included in the calculation of Mr. Serrano's final compensation for purposes of determining his retirement allowance;



and if not, whether the value of the Employer-Paid Member Contributions (EPMC) reported by the City to CalPERS on behalf of Mr. Serrano should be calculated in a manner excluding those items of special compensation that do not qualify as compensation earnable.

### **The SAPOA President and Confidential Premium**

8. Pursuant to a labor agreement codified in an MOU between the City and SAPOA from at least July 1, 2004, the City agreed to grant full-time release for one SAPOA representative to conduct SAPOA business, with SAPOA reimbursing the City for the representative's compensation.

9. On April 27, 2011, CalPERS issued a Public Agency Review informing the City that "union pay" it was reporting to CalPERS on behalf of the SAPOA representative was not a recognized item of special compensation. The City agreed with the findings and discontinued reporting this item as special compensation.

10. In response to the audit, in a memorandum dated September 14, 2012, the City began paying the SAPOA president a confidential premium, effective July 1, 2012, "in lieu of 20 hours per pay period at time and one-half." The memorandum stated that the value of the premium shall be equivalent to 28 hours of pay at straight time per period (every two weeks).

11. Beginning with the MOU for the period of July 2013 through June 2015, and continuing in subsequent MOUs for all periods relevant to these proceedings, the City agrees to grant full-time release for one SAPOA representative (SAPOA president)

to conduct SAPOA business. The MOU<sup>2</sup> requires SAPOA to reimburse the City for the representative's salary and benefits. Additionally, the City agrees to pay the SAPOA representative a confidential premium "in lieu of 20 hours per pay period at time and one -half." The provision states:

This premium is contained in the California Public Employees' Retirement Law (PERL) and is described as "compensation to rank and file employees who are routinely and consistently assigned to sensitive positions requiring trust and discretion." The parties agree that the value of this premium shall be equivalent to 28 hours of pay at straight time per pay period. The rate paid shall be tied to the incumbent's rank. The POA agrees that the acceptance of said compensation as described in section E as "PERSable" is subject to PERS approval and if it is determined that said compensation is not "PERSable" the City is not obligated to provide additional benefits.

12. The MOU also provides that SAPOA would provide an insurance policy, naming the City as an insured, for all claims against the SAPOA's representative, and obtain workers' compensation coverage for the representative. The MOU specifies that the representative:

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<sup>2</sup> The term "MOU" refers collectively to all MOUs for the period relevant to these proceedings, as the cited provisions are the same in each version.

will not be required to carry out any peace officer's duties during such time that the Association's representative is on such full -time release from duty. The Association's representative will be required to comply with the Rules and Regulations of the Santa Ana Police Department as they apply to off -duty employees, except such representative will not be required to report for duty for any purpose.

### **Relevant MOU Provisions**

13. The bargaining unit covered by the MOU includes full-time police department employees in the sworn "safety member" classifications including Police Officer and Police Sergeant, and multiple non-sworn classifications.

14. The MOU contains the following provisions as they relate to items of special compensation at issue in this case:

- Section 5.1 outlines the assignment pay differentials available to members of the bargaining unit. Subsection (K) provides a pay differential to an employee who is "continuously and regularly assigned to and actually performing duties of a Detective/Investigator assigned to the Investigations Division or Special Investigations Units."
- Section 5.3 provides a monthly pay differential for an assignment by the Police Chief to a position requiring bilingual capability or, for a Police Officer or Police Sergeant for "street level proficiency in Spanish."

- Section 6.10, entitled “Career Development Pay-Sworn” outlines the pay increases for sworn employees who have obtained an associate degree, some college credit, and a bachelor’s degree.
- Section 13.11 (Section 23.2 in earlier versions) provides that the City will report to CalPERS the monetary value of uniforms and uniform maintenance “for those employees required to wear uniforms.”

### **CalPERS Review of Mr. Serrano’s Compensation**

15. Taras Kachmar is an Associate Governmental Program Analyst for CalPERS who testified at the hearing. The following is a summary of his relevant testimony and other documentary evidence submitted by complainant.

16. Mr. Kachmar reviewed a CalPERS payroll transcript for Mr. Serrano documenting the compensation the City reported to CalPERS on Mr. Serrano’s behalf from the City from July 2, 2011, through October 26, 2021. Mr. Serrano went on full-time leave of absence from the City in April 2016, when he was elected SAPOA president. For the 2015/2016 fiscal year, Mr. Serrano received approximately \$47,800 in reported special compensation. This amount jumped to approximately \$92,600 the next year, which Mr. Kachmar attributed to the confidential premium (although the City initially misreported this as detective premium).

17. Prior to becoming SAPOA president, Mr. Serrano received detective, bilingual, and lead worker/supervisor premiums, holiday pay, and a uniform allowance, all of which he continued to receive once becoming SAPOA president. According to Mr. Kachmar, for some time, the City misreported the educational incentive as a lead worker/supervisor premium. Mr. Kachmar believes the City has since changed its reporting to reflect an educational incentive.

18. Mr. Serrano also continued to receive a longevity premium as SAPOA president, but complainant is not contesting that this is reportable special compensation. As for the off-salary schedule pay, CalPERS later determined that this is actually part of Mr. Serrano's "payrate," and the City misreported it as special compensation. However, it would comply with the PERL if properly reported. Accordingly, off-salary schedule pay is no longer at issue in this proceeding.

19. Mr. Kachmar testified he was aware that the City reported a confidential premium as special compensation for an unknown number of senior human resource analysts. Mr. Kachmar has no knowledge of whether any other employees from the City are currently on a leave of absence performing work for another jurisdiction. He is not aware of any audits or reviews by CalPERS of these employees. He is unaware of exactly what precipitated CalPERS's investigation into the City's reporting of the confidential premium for the SAPOA president.

20. Mr. Kachmar believes that Mr. Serrano is not required to wear a uniform as SAPOA president, but he admitted having no knowledge that this was actually the case. He would assume that Mr. Serrano as the SAPOA president would have to go to certain functions in uniform, such as funerals. Complainant's position is that the uniform allowance reported for the SAPOA president is not reportable because he is not required to wear a uniform on behalf of the City.

21. Given complainant's position that the items of special compensation at issue in this case are unreportable for the SAPOA president while on a full-time leave of absence from the City, Mr. Kachmar was asked whether an employee would be entitled to special compensation being reported on his or her behalf whenever the employee is not performing the work during normal working hours, such as when the employee is on vacation, or a leave of absence for some reason such as an internal

investigation. Mr. Kachmar testified that if CalPERS is aware that an employee is on full-time leave of absence, then it would review whether the special compensation is within compliance. One factor would be whether the employee was contemplating returning to work. Mr. Kachmar testified that when an employee goes on vacation, the payroll reporting is generally the same, so CalPERS would not be made aware of this situation. CalPERS has not communicated with agencies directing them not to report special compensation items for members who are in any situation other than working (such as holiday or leave of absence). If an employee is out of work based on a workers' compensation claim, Mr. Kachmar does not believe that CalPERS would challenge the forms of special compensation received during this period. Mr. Kachmar has no knowledge whether CalPERS has challenged the reporting of special compensation for someone utilizing his or her forms of approved leave.

## **Mr. Serrano's Evidence**

### **MR. SERRANO'S TESTIMONY**

22. Mr. Serrano testified at hearing. Relevant parts of his hearing testimony and a declaration he submitted are summarized as follows: Mr. Serrano has been employed by the City's police department for more than 26 years. He began serving as the SAPOA president in April 2016, when he was elected to the position. Anyone in the bargaining unit, sworn or unsworn, is eligible to run for president. As SAPOA president, he performs a range of duties including meeting and conferring on negotiations and policy matters; representing members with grievances and other personnel issues; and communicating with civic leaders, members of the Legislature, members of the public, and members of state and local governments.

23. As SAPOA president, Mr. Serrano is responsible for administering the City's "employer mandate" to provide medical, dental, health and disability insurance benefits for the police public safety employees in the bargaining unit represented by SAPOA, which consists of approximately 500 employees (approximately half of all of the City's full-time employees). By way of comparison, there are three City employees who perform the employer mandate requirements for the City's other employees. He reconciles and audits funds received from the City to provide these benefits. If SAPOA did not perform this function for the public safety employees, the City would have to do so. Mr. Serrano submitted as evidence a job classification flyer from the City indicating that health and dental insurance were administered by SAPOA.

24. As SAPOA president, Mr. Serrano meets with city officials, senior management from the police department, and the City's labor negotiator on policy matters. He also collaborates with various department heads, elected officials, and community members to support the goals, objectives, and mission of the police department. His role is important for maintaining good labor relations and being an effective partner for delivering the best public safety services to the City. The City receives a benefit from these services.

25. As SAPOA president, Mr. Serrano believes he is eligible to work overtime for the City, but he has not done so since beginning this assignment. Although he cannot be forced to work overtime, nothing in the MOU prevents him from signing up for an overtime shift. When asked if he has performed any peace officer duties for the City since becoming SAPOA president, he said he has attended roll call briefings, uniform inspections, and a peace officer memorial ceremony, but he has not "gotten into a police car and answered calls for service." He admitted that he was not required to perform any of the above functions under the MOU.

26. Mr. Serrano receives an educational incentive based on a bachelor's degree from California State University Long Beach.

27. Mr. Serrano believes that the SAPOA president is routinely and consistently assigned to sensitive positions, justifying the confidential premium. He is the only police department employee who receives a confidential premium.

28. As SAPOA president, Mr. Serrano works regular business hours. He is not required to work holidays, but he sometimes does. For example, he met with the City's negotiator on Veterans Day, which is a City-recognized holiday. When he was working as a police sergeant, he was required to work holidays.

29. The City does not require Mr. Serrano to wear a uniform as SAPOA president, but he does on occasion.

30. Mr. Serrano is almost 52 years old, has been eligible to retire for the past two years, but has been prevented from doing so because of this matter. The items reported of special compensation complainant asserts are not pensionable amount to approximately 84 percent of his salary<sup>3</sup>. Had he known his pensionable salary would be

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<sup>3</sup> Mr. Serrano did not provide any analysis of how he reached this conclusion, which appears to be inflated when considered in light of the evidence in the record. Specifically, for the 2018/2019 fiscal year, Mr. Serrano had a payrate of \$126,443 with \$120,448 in special compensation. The next year he had a payrate of \$133,032 with special compensation of \$123,925. After the City stopped reporting the confidential premium following the CalPERS review, for the 2020/2021 fiscal year, Mr. Serrano had a payrate of \$134,376 and had \$72,349 reported as special compensation. Thus, even if all of the special compensation is deemed non-reportable (including longevity pay,



reduced by this much, he would not have taken the position and would have been promoted to lieutenant. Mr. Serrano admitted that he never inquired with CalPERS whether the confidential premium would be pensionable. He admitted that his salary increased when he became SAPOA president.

### **ADDITIONAL EVIDENCE**

31. Mr. Serrano submitted a letter signed by five current legislators and another letter signed by Senator John Newman. Both letters are exact duplicates of each other and contain the authors' opinion as to the meaning of Government Code<sup>4</sup> section 3558.8, and what they believe the outcome of the case should be. Both letters contain inadmissible opinions as to the ultimate legal question in this case, which is solely the province of the ALJ and the CalPERS Board of Administration (Board). (Evid. Code, § 803; (*American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1262 [statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation].) As such, the letters were not considered.

### **Requests for Official Notice**

32. As noted above, both complainant and Mr. Serrano filed requests for official notice. Complainant requested official notice be taken of documents published \_\_\_\_\_ which complainant is not seeking to exclude) for the 2018/2019 year (when the confidential premium was reported), the reduction would reflect an approximate 48 percent loss in pensionable income.

<sup>4</sup> All future statutory references are to the Government Code.

by the Voice of Orange County newspaper on its website on August 4, 2021 – documents which were purportedly obtained from the City pursuant to a public records request. The documents consist of various communications between City officials, and communication between Mr. Serrano and his attorney with various City officials relating to his pension, following the CalPERS review.

Complainant’s request is denied. First, the evidentiary record was closed at the conclusion of the hearing on November 21, 2022. To the extent that complainant’s request is treated as a request to reopen the record for submission of additional evidence, that request is denied, as it was not established that the evidence was unavailable at the time of the hearing (the documents were published on the Voice of Orange County’s website several months before the hearing). Furthermore, the proposed evidence is not relevant. “Although a court may judicially notice a variety of matters (Evid. Code, § 450 et seq.), only *relevant* material may be noticed.” (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063) [emphasis in original.] “Relevant evidence” means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) The issues in this case can be decided solely on the provisions contained in the MOU; thus, the individual beliefs of certain City officials reflected in the documents are not relevant. As the proposed exhibit is irrelevant, it may not be the subject of official notice, and is excluded. (Evid. Code, § 350; Gov. Code, § 11513, subd. (c).)

33. Mr. Serrano also filed a request for official notice of an appellate brief CalPERS filed in *Hale & Wolfe v. California Public Employees’ Retirement System*, Case No. A161758, currently pending before the California Court of Appeal, First District.

Mr. Serrano's request for official notice is denied because CalPERS's trial brief in support of the superior court's decision denying a petition for writ of administrative mandate in an unrelated matter is irrelevant to these proceedings. Only cases designated by the Board as precedential pursuant to Section 11425.60, or published decisions by an appellate court, can be cited as precedent. The arguments complainant advanced in another case, involving different facts, are irrelevant and may not be the subject of official notice.

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500; *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) The standard of proof is proof by a preponderance of the evidence. (Evid. Code, § 115.) in this case, respondents have the burden to prove by a preponderance of the evidence that the challenged items of special compensation constitute compensation earnable for the SAPOA representative and Mr. Serrano.<sup>5</sup>

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<sup>5</sup> In closing briefs, only complainant addressed the issue of the burden of proof. However, the operative facts are largely not in dispute and the issues in this matter are almost entirely based on legal conclusions. Under these circumstances, the outcome would be the same regardless of the party bearing the burden.

## Relevant Provisions of the PERL and Regulations

2. The management and control of the retirement system is vested with the Board. (§ 20120; *Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 896.) The California Constitution imposes on CalPERS a duty to "ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland v. Public Employees' Retirement System* (2002), 95 Cal.App.4th 29, 46.) But, "[CalPERS's] fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. [CalPERS] has a duty to follow the law." (*City of Pleasanton v. Bd. of Administration* (2012) 211 Cal.App.4th 522, 544.) Any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, but such construction must be consistent with the clear language and purpose of the statute. (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 490.)

3. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Bd. of Administration* (1994) 23 Cal.App.4th 194, 198.) The formula for determining a member's retirement benefit takes into account: the years of service, a percentage figure based on the employee's age on the date of retirement; and "final compensation." (Gov. Code, §§ 20037, 21350, 21352 and 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.) The determination of what items of pay constitute final compensation is thus crucial to the computation of an employee's ultimate pension benefits. (*Id.* at p.1478.)

4. Section 20630, subdivision (a), defines "compensation" as the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of holidays, sick leave, industrial disability

leave, vacation, compensatory time off, and leave of absence. Compensation for retirement allowance calculation may be no more than "compensation earnable," as that term is defined in Section 20636. (§ 20630, subd. (b).)

5. "Compensation earnable" is composed of (1) payrate, and (2) special compensation, as defined in Section 20636, subdivisions (b), (c), and (g). (§ 20636, subd. (a).)

6. "Payrate" means 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. (§ 20636, subd. (b)(1).)

7. "Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions." (§ 20636, subd. (c)(1).) Special compensation is limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. (*Id.*, subd. (c)(2).) "Special compensation shall be for services rendered during normal working hours . . . ." (*Id.*, subd. (c)(3).)

8. A "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. A group or class must include more than one employee. (§ 20636, subd. (e)(1).) An employee may not be a member of more than one group or class. (*Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983, 993.)

9. "The board shall promulgate regulations that delineate more specifically and exclusively what constitutes special compensation as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee . . . shall be included as special compensation and appropriately defined in those regulations." (§ 20636, subd. (c)(6).)

10. "Final Compensation" means the highest annual average compensation earnable by a member during any consecutive 36-month period of employment preceding the effective date of his or her retirement. (§ 20037.)

11. Regulation 571, subdivision (a), exclusively identifies and defines special compensation items for members employed by a contracting agency that must be reported to CalPERS if they are contained in a written labor policy or agreement, as follows:

(1) INCENTIVE PAY

[¶] . . . [¶]

Longevity Pay - Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.

Value of Employer-Paid Member Contributions (EPMC) -  
The full monetary value of employer-paid member contributions (EPMC) paid to CalPERS and reported as an

item of special compensation on behalf of all members in a group or class.

The value of EPMC is calculated on all "compensation earnable" excluding the special compensation of the monetary value of EPMC paid to CalPERS by the employer under Government Code section 20636(c)(4), thus eliminating a perpetual calculation

[¶] . . . [¶]

#### (2) EDUCATIONAL PAY

Educational Incentive - Compensation to employees for completing educational courses, certificates and degrees which enhance their ability to do their job. A program or system must be in place to evaluate and approve acceptable courses. The cost of education that is required for the employee's current job classification is not included in this item of special compensation.

[¶] . . . [¶]

#### (4) SPECIAL ASSIGNMENT PAY

Bilingual Premium - Compensation to employees who are routinely and consistently assigned to positions requiring communication skills in languages other than English.

[¶] . . . [¶]

Confidential Premium - Compensation to rank and file employees who are routinely and consistently assigned to sensitive positions requiring trust and discretion.

Detective Division Premium - Compensation to local police officers, county peace officers and school police or security officers who are routinely and consistently assigned to a detective or investigative division or intelligence duties.

[¶] . . . [¶]

Lead Worker/Supervisor Premium - Compensation to employees who are routinely and consistently assigned to a lead or supervisory position over other employees, subordinate classifications, or agency-sponsored program participants.

#### (5) STATUTORY ITEMS

Holiday Pay - 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.

Uniform Allowance - Compensation paid or the monetary value for the purchase, rental and/or maintenance of



required clothing, including clothing made from specially designed protective fabrics, which is a ready substitute for personal attire the employee would otherwise have to acquire and maintain. This excludes items that are solely for personal health and safety such as protective vests, pistols, bullets, and safety shoes.

12. Regulation 571, subdivision (b), requires that all items of special compensation listed in subdivision (a), must be:

(1) Contained in a written labor policy or agreement . . .

[¶] . . . [¶]

(2) Available to all members in the group or class;

(3) Part of normally required duties;

(4) Performed during normal hours of employment;

(5) Paid periodically as earned;

(6) Historically consistent with prior payments for the job classification;

(7) Not paid exclusively in the final compensation period;

(8) Not final settlement pay; and

(9) Not creating an unfunded liability over and above PERS' actuarial assumptions

13. Regulation 571, subdivision (c), provides that only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b). If an item of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual. (*Id.*, subd. (d).)

### **Government Code section 3558.8**

14. Section 3558.8 provides in relevant part:

(a) A public employer shall grant to public employees, upon request of the exclusive representative of that employee, reasonable leaves of absence without loss of compensation or other benefits for the purpose of enabling employees to serve as stewards or officers of the exclusive representative, or of any statewide or national employee organization with which the exclusive representative is affiliated. Leave may be granted on a full-time, part-time, periodic, or intermittent basis.

[¶] . . . [¶]

(c) At the conclusion or termination of leave granted under this section, the steward or representative shall have a right of reinstatement to the same position and work location held prior to the leave, or, if not feasible, a substantially

similar position without loss of seniority, rank, or classification.

e) Compensation during leave granted under this section shall include retirement fund contributions required of the public employer as an employer. The employee shall earn full service credit during the leave of absence and shall pay his or her member contributions unless the employer has agreed in a memorandum of understanding or collective bargaining agreement to pay the contributions on the employee's behalf.

## **The Parties' Arguments**

15. Mr. Serrano argues that the purpose of Section 3558.8 is to promote labor peace by ensuring that members can undertake union leadership positions "without loss of compensation or other benefits." (§ 3558.8, subd. (a).) The statute requires that compensation include "retirement fund contributions required of the public employers as an employer." (*Id.*, subd. (c).) Mr. Serrano argues that by excluding the pay differentials he received prior to taking leave to serve as the union president, CalPERS "eviscerates" Section 3558.8, which would result in him receiving an 85 percent reduction in his pension and would serve as a disincentive for anyone to serve as a union representative. Mr. Serrano rejects complainant's argument that while serving as union president, he was not performing services for the City. Instead, he argues that many of his duties as union president involved administering health benefits for police department employees, a task for which the City was responsible – and for the performance of which the City would otherwise have to make other arrangements. Thus, he believes this constitutes "services rendered" for the City.

Mr. Serrano argues that the confidential premium is not available only to a group of one, but instead to any member of the bargaining unit who is eligible for election as SAPOA president. This is analogous to a situation where a department might only have one specialty assignment available, such as a single canine officer.

Mr. Serrano was also critical of complainant's position that special compensation is not reportable for an individual on a full-time leave of absence but *is* reportable for other individuals who are on *other* leaves of absence. He argues that Section 20630, subdivision (a)(6), explicitly states that pension benefits are available to employees while on leave of absence.

16. The City argues that Section 20630 expressly defines compensation to include payment for time during which a member is excused from work, including during leaves of absence, thus special compensation should be reportable for the SAPOA president while serving in this capacity. The City echoed Mr. Serrano's argument that Section 3558.8 requires that union representatives must be afforded reasonable leaves of absence without loss of compensation or other benefits. The City argues that the legislative intent behind this provision is clear – that a public employee should not be penalized, either in compensation, assignment, or retirement, for taking leaves of absence to serve their unions. To hold otherwise would disincentivize employees from taking these positions.

The City argues there is no valid reason for treating the SAPOA president differently than other employees who are not performing work during normal working hours such as an employee utilizing paid time off or on industrial disability leave. That the SAPOA president is not required to perform duties of a peace officer while in this position should not be a distinguishing feature, because employees on leave or otherwise disabled may also be prohibited from performing peace officer duties. In

short, there is no valid basis for treating an employee on full-time release for union business any differently than other employees who are similarly excused from work due to holiday, sick leave, or any reason listed in Section 20630, subdivision (a).

In its closing brief, the City indicated it will defer to the Board's determination as to whether the confidential premium is reportable. Although it initially appealed CalPERS's determination that the confidential premium was not pensionable, it did so to allow Mr. Serrano to intervene and present his arguments. However, pursuant to the express language of the MOU, the determination of whether the confidential premium is pensionable rests with CalPERS.

17. Complainant argues that four special assignment pay items received by Mr. Serrano (bilingual, confidential, detective, and lead worker premiums) do not qualify as special compensation because Mr. Serrano received these items while he was on leave from the City, and thus, he was not "routinely and consistently" performing these special assignments. Similarly, complainant argues that the SAPOA president is not entitled to holiday pay or uniform allowance because the incumbent is not required to work holidays or wear a City uniform. Complainant also argues that the confidential premium does not qualify as special compensation because Mr. Serrano (and only one person who is elected SAPOA president), is the only employee eligible for the premium; the SAPOA president is not performing any work for the City; and it is specified in the MOU as being in lieu of overtime compensation, which is excluded from compensation earnable.

Complainant further argues that Government Code section 3558.8 does not govern what qualifies as compensation earnable. Specifically, complainant contends the intent of the statute is to ensure that an employee who is serving as a union representative retains the same compensation and benefits is provided the right of

return to his or her former position and receives service credit; the intent of the statute is not to allow an employer to make pensionable special compensation for services not provided by the employee to inflate the person's pension while on leave.

## **Evaluation**

### **INTERPLAY BETWEEN THE PERL AND SECTION 3558.8**

18. Both respondents argue that Section 3558.8 should be construed to require items of special compensation previously paid to an employee to be continued to be reported while the employee is on full-time release to serve as a union representative. They argue that to do otherwise would penalize an employee from taking a union position, which is contrary to what they perceive as the clear legislative intent of the statute.

19. "[T]he objective of statutory interpretation is to ascertain and effectuate legislative intent." (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.) To determine legislative intent, courts examine the words of the statute, giving them their usual and ordinary meaning and construing the words and clauses in the context of the statute as a whole. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not exist." ' ' (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.) The Legislature's chosen language is the most reliable indicator of its intent, because "it is the language of the statute itself that has successfully braved the legislative gauntlet." (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 338.) The words of the statute must be given "a plain and commonsense meaning," unless the statute

specifically defines the words to give them a special meaning. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 577.) If the statutory language is clear and unambiguous, there is no need for statutory construction because there is nothing to interpret or construe. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239.)

20. Section 3558.8 requires a public employer to grant a leave of absence, up to full-time, to an employee to serve as a union representative "without loss of compensation or other benefits." (*Id.*, subd. (a).) The term "compensation" is defined in the PERL as meaning the "remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work. (§ 20630, subd. (a).) Although this definition only applies to the PERL, not Section 3558.8, it is consistent with the plain and commonsense meaning of compensation as remuneration paid for work performed. The plain and commonsense meaning of "benefits" as used in Section 3558.8 is that of something of tangible, economic value an employee receives from his or her employer, such as insurance benefits.

Respondents argue that the provision "without loss of compensation or other benefits" means that the employee while on union leave cannot lose "pensionable compensation." However, neither the terms "compensation" nor "other benefits" can reasonably be construed to mean as such. Pensionable income, or "compensation earnable," as it is called in the PERL, serves as the basis for determining a member's "final compensation," which is ultimately used for calculating a member's retirement benefit. While "compensation" as a general concept may be understood as the total remuneration paid by an employer to an employee, "compensation earnable," is more precisely a determination of how much of an employee's compensation can be used to determine a member's pension, based on application of the PERL. Because "payrate"

and "special compensation" are statutorily defined, an employee's pension "will not necessarily reflect his total personal compensation." (*Molina v. Board of Administration* (2011) 200 Cal.App.4th 53, 65.)

Applying these considerations to Mr. Serrano, he continued to receive the same compensation after becoming union president as he did before he took on that new role. Indeed, with the addition of the confidential premium, his compensation increased substantially. CalPERS's determination that certain reported items of special compensation do not qualify as compensation earnable has no bearing on his compensation (i.e., money paid for services performed). Thus, the term "compensation" as used in Section 3558.8 is best construed as not to include "compensation earnable."

Similarly, compensation earnable is not a "benefit" within the meaning of Section 3558.8. While a pension payment is unquestionably a "benefit," retirement is the condition precedent to receive this benefit. The reporting of compensation as pensionable is not itself a "benefit," even if the reporting takes place during a member's final compensation period. Thus, a determination by CalPERS that reported income for a member on full-time leave to conduct union business is not pensionable does not run afoul of Section 3558.8, as it does not result in "a loss of compensation or other benefit." Put another way, Mr. Serrano received the exact same (if not more) compensation and benefits while serving as the SAPOA president as he would have received if he were not in that position. The fact that certain types of pay are not *reportable* to CalPERS as special compensation, and will thus be excluded from the calculation of final compensation if he elects to retire without returning to his former position, does not result in a "loss of compensation or other benefit."



Moreover, Section 3558.8, subdivision (e), addresses retirement contributions, stating that the employer must continue to provide retirement fund contributions, and an employee shall earn full service credit during the leave of absence. While the legislature mandated that an employee on leave of absence to serve in a union capacity receive full service credit (which Mr. Serrano has received), the statute is silent on the issue of whether an employee's previously reportable special compensation must continue to be reported as such. While respondents make several policy arguments for why special compensation must continue to be reported, including that the potential loss of pensionable income would serve as a disincentive to serve as a union representative,<sup>6</sup> the absence of any statutory language relating to the reporting of special compensation is significant and cannot be ignored. A review of the legislative history for Section 3558.8 does not indicate that the Legislature considered whether the provision applies to the determination of compensation earnable. Absent express statutory language within the provision, or an amendment to the PERL, the Board is not permitted to interpret this statute in a manner inconsistent with the plain statutory language. To interpret section 3558.8 as including the reporting of special compensation within the definition of "compensation" or "benefit" is to write into the statute a provision that is simply not there.

Accordingly, the determination of whether the reported items of special compensation on behalf of Mr. Serrano, or for any person on leave from the City in the

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<sup>6</sup> In this regard, it is noted that the only members who would be affected would be those whose union service occurs during their "final compensation period," which generally immediately precedes retirement.

capacity of SAPOA president, must be based solely on application of the PERL. Section 3558.8 cannot be construed to require any outcome not authorized under the PERL.

### **CONFIDENTIAL PREMIUM**

21. The confidential premium is unique among the items of special compensation at issue in this proceeding because it is only available within the bargaining unit to the SAPOA president and is paid to the incumbent only upon assuming this role. The confidential premium may not be reportable special compensation for the SAPOA president or for Mr. Serrano for multiple reasons.

22. First, the MOU specifically states that the confidential premium is in lieu of 20 hours of overtime. Overtime is not pensionable either as payrate or as part of special compensation. (Gov. Code, §§ 20630, 20636.) Thus, even if, as argued by respondents, Section 3558.8 were construed to prevent an employee from suffering a loss of reported compensation earnable, the inclusion of the confidential premium in the MOU provides the employee with pensionable compensation to supplant potentially lost overtime, which is not pensionable. This is clearly not the intent of Section 3558.8 or permissible under the PERL.

23. Second, to qualify as special compensation, the confidential premium must satisfy the conditions outlined in Regulation 571, subdivision (a)(4), which requires the incumbent be "routinely and consistently assigned to sensitive positions requiring trust and discretion." Under the MOU, the SAPOA president, while on a leave of absence from the City, is not required to report for duty for any purpose. Mr. Serrano's role as SAPOA president does not satisfy the regulatory requirement because he was not assigned to any position within the City while on leave of absence, let alone any position requiring trust and discretion. Mr. Serrano argues that because

SAPOA administers health and other insurance benefits for the bargaining unit members, a function that would otherwise be performed by the City, he is entitled to the confidential premium because of the trust and discretion required of this role. He argues that two City human resources employees receive a confidential premium, (although there was no evidence regarding those employees' job duties or whether they involve administering insurance benefits).

Mr. Serrano's trust and discretion argument is unpersuasive. Again, the MOU explicitly states that the confidential premium is offered to compensate for overtime – it makes no mention to any position of trust or discretion required of the SAPOA president. Moreover, while the work the SAPOA president performs might benefit the City, directly or indirectly, the SAPOA president is performing work for, and under the direction of, the union, and the City has no substantial right to control his work activities or the manner that they are performed. In fact, the only evidence regarding the City's involvement in the administration of insurance benefits for police employees is to contribute to SAPOA a fixed amount for each enrolled employee. Additionally, the MOU requires SAPOA to obtain an insurance policy, naming the City as an insured, to cover any claims against the SAPOA president, and provide workers' compensation coverage for the SAPOA president. Thus, the MOU makes clear that any duties to be performed by the president are under the sole direction and control of the union, not the City. Because only special compensation performed as part of the member's "normally required duties" is reportable under Regulation 571, subdivision (b), and the SAPOA president has no normally required duties while on leave from the City, work performed on behalf of the union cannot qualify as special compensation, regardless of the nature of the work or its ultimate benefit to the City.

Third, complainant argues that Mr. Serrano and the SAPOA president are not eligible for a confidential premium because it is not available to similarly situated employees of the group or class, which is required by Regulation 571, subdivision (c)(2). As discussed below, this argument has merit.

Respondents argue that the premium is available to everyone in the bargaining unit because everyone in the unit is eligible to run for SAPOA president.<sup>7</sup> Moreover, they argue that there are many specialty items that are similarly only paid to one member within a group or class of employment. For example, a small police department might only have one canine officer, who would still be entitled to a pay differential despite being the only person in that assignment.

A “group or class of employment” is a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit or other logical work-related grouping. (§ 20636, subd. (e)(1).) In this case, the SAPOA president is a member of the bargaining unit of full-time police department employees. While any member of the bargaining unit might be eligible to run for election as SAPOA president, there can only be one president at any given time, and by extension, only one member is entitled to receive a confidential premium. This is differentiated from a situation where, because of budgetary considerations or lack of need, an agency might have only one specialty position allocated (e.g., one canine officer). Here, the MOU explicitly limits the confidential premium to a single

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<sup>7</sup> The evidence was not clear if anyone in the bargaining unit (sworn and non-sworn members of the police department) is eligible to run for president or whether only dues-paying members of SAPOA may run. If it is the latter, then the confidential premium would not be available to all members in the bargaining unit.

person. The statute and regulation requiring that an item of special compensation be available to all members of a group or class are written in the present tense, referencing the special compensation which "is" received (§ 20630, subd. (c)(2)), and items of special compensation which "are" available to all members in the group or class (Regulation 571, subd. (b)(2)). Nothing in these provisions states that it is sufficient if the special compensation is available to all members, one at a time, contingent upon future elections. Because Mr. Serrano, while serving as union president was the only employee then eligible to receive a confidential premium, the premium was not reportable to CalPERS as special compensation. (§ 20636, subds. (c)(2), (e)(1).)

### **SPECIAL ASSIGNMENT PAY (DETECTIVE AND BILINGUAL PREMIUMS)**

24. Respondents argue that special assignment pay reported on behalf of Mr. Serrano (and anyone serving as SAPOA president) continues to qualify as special compensation, even while the employee is on a full-time leave of absence while serving in the union position. Although much of their arguments rested on the applicability of Section 3558.8, they also disagree with complainant's contention that special assignment pay is unavailable to an individual while on leave of absence.

At issue in this regard are the detective and bilingual premiums.<sup>8</sup> Under Regulation 571, subdivision (a)(4), the detective and bilingual premiums only qualify as

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<sup>8</sup> The confidential premium is addressed above. Although for several years the City reported a lead worker/supervisor premium on Mr. Serrano's behalf, and it is listed in the Amended Statement of Issues, the evidence at hearing showed this was the result of misreporting by the City of the education pay, which will be discussed

special compensation if the member is "routinely and consistently assigned" to "a detective or investigative division or intelligence duties" or "positions requiring communication skills in languages other than English," respectively. It is undisputed that Mr. Serrano met the requirements for these premiums prior to becoming SAPOA president. As discussed in relation to the confidential premium, under the MOU, while on full-time leave, the SAPOA president cannot be required to carry out any peace officer duties or report to duty for any purpose. Thus, while on leave of absence to serve as a union representative, Mr. Serrano was not, and could not be, routinely and consistently assigned to either a detective division or position requiring foreign language skills. And as previously noted, only special compensation performed as part of the member's "normally required duties" is reportable under Regulation 571, subdivision (b). Since Mr. Serrano, as the SAPOA president, has no required duties while on full-time leave of absence, special assignment pay cannot be considered compensation earnable.

Respondents both argue that Section 20630 defines compensation to include payment for time during which the member is excused from work, including leaves of absence. They argue that because compensation is reportable while a member is excused from work, special compensation should be as well. However, this argument ignores the statutory distinction between "compensation" and "compensation earnable." Section 20630, subdivision (b), provides that compensation shall be reported in accordance with Section 20636, and shall not exceed compensation earnable. Section 20636, in turn, defines compensation earnable as the payrate and

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below. Thus, Mr. Serrano did not receive a lead worker/supervisor as part of specialty assignment pay.

special compensation. The term 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." (*Id.* subd. (b)(1).) A member's payrate would include time on authorized leave because it is the payment to similarly situated members of the same group. However, special compensation must be "for services rendered during normal working hours." (*Id.*, subd. (c)(3); Regulation 571, subd. (b)(4).) Thus, while compensation includes periods where a member is on a leave of absence, special compensation must be performed during normal working hours.

The City argues cogently that CalPERS does accept the reporting of special compensation for members who are not working under certain situations, such as when the member takes approved leave or is on a leave of absence following an industrial injury. Thus, the City argues, CalPERS is inconsistent in its approach and is arbitrarily determining that the SAPOA president is not entitled to special compensation while on full-time leave of absence.

The City's argument is not without some merit, but it is ultimately unpersuasive. Nothing in Section 20636 or the Regulation 571 provides that special compensation is available to a member when the member is on a leave of absence or for work performed outside normal working hours. While CalPERS might not disallow reporting of special compensation in certain situations (such as when a member is out of work due to industrial injury), and it might not be aware of other situations when a member is on leave because it is not reported as such, the determination of whether a specific item qualifies as special compensation is made on an individual basis. The scope of this proceeding is to apply the facts of this case to the law. In this regard, what the agency may or may not do in other cases is outside the scope of the administrative

hearing process. In this case, respondents are seeking to report items as special compensation where the reporting is simply not authorized by statute or regulation.

### **HOLIDAY PAY AND UNIFORM ALLOWANCE**

25. Holiday pay is listed in Section 20636, subdivision (c)(6), and is within the scope of special compensation as defined in Regulation 571, subdivision (a)(5) "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." Complainant contends that holiday pay reported on behalf of Mr. Serrano while serving as union president is not reportable compensation because Mr. Serrano was not required to work holidays or in a position that requires scheduled staffing without regard to holidays.

Under the MOU, the union president is not required to report for duty or account to the City for his sick leave or vacation time. There is no requirement that he is required to work for the City on approved holidays or work a required staffing schedule without regard to holidays. Mr. Serrano's testimony that he occasionally performed union business on holidays is irrelevant, as this was not required nor was the work performed for the City. Mr. Serrano again relies on the applicability of Section 3558.8 to argue he should continue to receive this premium. However, as discussed above, the statutory language does not provide for such result. Mr. Serrano is not entitled to reportable holiday pay while on leave of absence to serve as the SAPOA president.

26. A uniform allowance is listed in Section 20636, subdivision (c)(6), and is defined in Regulation 571, subdivision (a)(5) as:



Compensation paid or the monetary value for the purchase, rental and/or maintenance of required clothing, including clothing made from specially designed protective fabrics, which is a ready substitute for personal attire the employee would otherwise have to acquire and maintain. This excludes items that are solely for personal health and safety such as protective vests, pistols, bullets, and safety shoes.

Complainant argues that the uniform allowance reported for Mr. Serrano while on union leave is not reportable as special compensation because the City could not require Mr. Serrano to wear a uniform while on leave. Mr. Serrano argues that he did wear a uniform at certain functions, and based on Section 3558.8, it should continue to be reported as special compensation.

The regulation explicitly states that the item of special compensation is only for "required" clothing. Section 13.11 of the MOU provides that the City will report to CalPERS the monetary value of uniforms and uniform maintenance "for those employees required to wear uniforms." While serving as union president, Mr. Serrano was not required by the City to wear a uniform. That he elected to do so on certain occasions does not obviate the express language that the allowance relates only to required clothing. Mr. Serrano is not entitled to reportable uniform allowance while on leave of absence to serve as the SAPOA president

### **EDUCATION INCENTIVE PAY**

27. Education pay or incentive is defined in Regulation 571, subdivision (a)(2) as: "[c]ompensation to employees for completing educational courses, certificates and degrees which enhance their ability to do their job." Complainant contends that Mr.

Serrano is not entitled to reportable education incentive while on full-time leave because he is not actually performing his job for the City, and thus cannot be established that his education enhances his ability to do his job.

As previously discussed, the City initially misreported Mr. Serrano's education pay as "lead worker/supervisor pay." This error was corrected on June 1, 2020. Complainant did not contest that Mr. Serrano was appropriately awarded this pay incentive prior to becoming SAPOA president, and that the City has a "program or system" in place to evaluate and approve acceptable course as required under Regulation 571, subdivision (a)(2).

The education incentive is distinguishable from the special assignment pay, holiday pay, and uniform allowance discussed above. For those other items of special compensation, a member must be "routinely and consistently" performing the specialty assignment; "normally required to work" on an approved holiday or in a position that require scheduled staffing without regard to holiday; or be "required" to wear certain clothing. In contrast, under the MOU, Mr. Serrano was entitled to the educational incentive upon completion of a bachelor's degree. There is no on-going requirements or conditions for him to continue to receive this incentive pay. In this regard, the education incentive is similar to longevity pay. As it is not contested that Mr. Serrano qualified for the education incentive when he obtained a bachelor's degree, and this "enhanced [his] ability to do [his] job" at the time, this incentive payment continues to be a reportable form of special compensation, even while on leave of absence.

## Conclusion

28. With regard to respondent City of Santa Ana, cause exists to affirm complainant's determination that the confidential premium, detective premium, and bilingual premium under the category of specialty assignment pay do not qualify as special compensation, and in turn, compensation earnable, when provided to an individual who is on a full-time leave of absence from the City to serve as the SAPOA president.

29. With regard to respondent Gerry Serrano, cause exists to affirm complainant's determination that the confidential premium, detective premium, bilingual premium, holiday pay, and uniform allowance do not qualify as special compensation, and in turn, compensation earnable, while Mr. Serrano is on a full-time leave of absence from the City to serve as SAPOA president.<sup>9 10</sup> However, cause does not exist to affirm complainant's determination that the education incentive/pay does

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<sup>9</sup> As previously discussed, the reporting of lead worker/supervisor premium and off-salary schedule pay referenced in the Amended Statement of Issues are determined to have been erroneously reported.

<sup>10</sup> The Amended Statement of Issues frames the issue as whether these items of special compensation can be included in the calculation of Mr. Serrano's "final compensation" for purposes of determination of his retirement allowance. However, since Mr. Serrano has not submitted an application for retirement, it is premature to determine his final compensation. Instead, the issue is whether it is correctly reported as compensation earnable.

not qualify as special compensation during the period Mr. Serrano was on full-time release from the City to serve as SAPOA president.

30. Any other assertions advanced by the parties not addressed above and inconsistent with this decision, have been considered and are found to be unpersuasive.

## **ORDERS**


1. The appeal by the City of Santa Ana is denied. CalPERS's determination that the confidential premium, detective premium, and bilingual premium under the category of specialty assignment pay do not qualify as compensation earnable when provided to an individual who is on full-time leave of absence to serve as the SAPOA representative is affirmed.

2. The appeal by Gerry Serrano is granted in part and denied in part. CalPERS's determination that the confidential premium, detective premium, bilingual premium, holiday pay, and uniform allowance reported by the City on behalf of Mr. Serrano while on full-time release from the City to serve as SAPOA president do not qualify as special compensation, and thus are not compensation earnable, is affirmed. CalPERS's determination that the education incentive pay Mr. Serrano received during the period he was on full-time release from the City to serve as SAPOA president does not qualify as special compensation is reversed.

3. The City of Santa Ana shall amend the Employer-Paid Member Contributions reported to CalPERS on behalf of Mr. Serrano and reverse excluded items of compensation paid to Mr. Serrano that do not qualify as compensation

earnable consistent with this decision. Upon reversal, CalPERS shall reimburse or credit the City for any excessive contributions.

DATE: February 15, 2022

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Adam Berg (Feb 15, 2022 16:42 PST)

ADAM L. BERG

Administrative Law Judge

Office of Administrative Hearings