



BOARD OF RETIREMENT

Staff Report

File #: 19-1098.1

Agenda Date: 12/2/2021

Agenda #: 12.

FROM: Barbara Hannah, Chief Counsel

SUBJECT: Exclude Canine Pay as compensation earnable.

RECOMMENDATION:

Exclude Canine Pay as compensation earnable for Tier I members of SBCERA, effective as of January 1, 2013 and adopt Resolution 2021-9.

BACKGROUND:

The SBCERA Board of Retirement (Board) is required by Government Code sections 31461, 31542, 7522.10, and 7522.34, as well as Benefits Policy No. 026, "Compensation Earnable and Pensionable Compensation," to determine what items of member compensation are included or excluded in employee compensation upon which appropriate contribution rates should be applied and upon which retirement benefits are calculated.

On September 3, 2020, staff presented to the Board the Employer Pay Code Resolution, which removed items from the Resolution that are required to be excluded as a result of the Board's implementation of the *Alameda* decision. Staff further requested that canine officer pay be excluded from compensation earnable as it is for additional services rendered outside of normal working hours. The Board approved the Resolution, but required further information regarding canine officer pay in order to determine whether such item should continue inclusion as compensation earnable based on the *Alameda* decision.

On October 1, 2020, after staff received additional information from the County regarding Canine Pay (Exhibit A and B), staff recommended that the Board exclude Canine Pay as compensation earnable for Tier 1 members effective January 1, 2013. The Board approved continuing the item to a future Board meeting and then-Chair Rutherford appointed an ad hoc committee consisting of Trustees Basle and Bracco to further review Canine Pay with staff.

Ad Hoc Committee Procedural History

The ad hoc committee held meetings on January 11, 2021, April 6, 2021, and August 4, 2021. Staff presented to the committee the information received from the County (Exhibits A, B, and D), specifically that the County affirmed that the services rendered for the care, feeding and maintenance of the canine are for services rendered outside of the deputy's normal working hours. However, the committee was concerned that the County's response considered that the employee's regular or normal work schedule is 88 hours could be construed to mean that extra 8 hours is part of the regular work schedule. (See Exhibit D.) As a result, the committee is not providing a recommendation to either include or exclude canine officer pay from compensation earnable.

Canine Pay is provided to the County of San Bernardino (County) classified positions of Deputy Sheriff, Sheriff's Detective Corporal, and Victim Advocate II, Specialized Fire Unit for the "care, feeding, and maintenance of the canine".

FACTS

Canine Pay is provided to the County classified positions of deputy sheriff, detective corporal, victim advocate II, and positions in the Specialized Fire Unit. The employees assigned a canine are responsible for the canine during their regular work schedule, but the employees receive eight (8) additional hours of pay to perform canine care functions after their regular work schedule. That pay is provided "at the employee's base rate of pay," but it is "considered hours worked for the purposes of calculating overtime." Accordingly, canine pay operates as a means by which those who are assigned a canine are compensated eight (8) hours of pay each pay period at the overtime rate. Due to the transitory nature of caring for the canine, however, the care, by definition, occurs each day throughout the week at different intervals as needed, and not within scheduled normal working hours, and those services include, but are not limited to feeding, grooming, veterinary care, and exercise. Employees assigned a canine are not in a subclass or considered a separate unit, instead they remain in the broader classification of the position.

ISSUE

Whether Canine Pay is compensation for "additional services rendered outside of normal working hours".

ANALYSIS

Canine Pay is for additional services rendered outside of normal working hours. Government Code section 31461(b)(3) expressly excludes "payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise". In addition, since compensation earnable excludes overtime pay and is calculated on the basis of the days "ordinarily" worked by an employee's peers (§ 31461, subd. (a)), the inclusion of payment for services provided outside normal hours in compensation earnable is also inconsistent with the statutory concept. (*Alameda County Deputy Sheriff's Association v. Alameda* (2020) 9 Cal.5th 1032, 1062.) Furthermore, an intended constitutional purpose of excluding additional pay for services rendered outside of normal working hours was to prevent employees from volunteering, during their final compensation period, to perform additional services outside normal working hours in order to artificially inflating their daily rate of pay. However, the distinction between "voluntary" or "mandatory" services is not present in the compensation earnable statutory language, and the face that an employee who is assigned a canine is then required to care for that canine does not transform that work into services rendered during normal working hours. (*Id.* at 1097.)

Here, based on the information provided, for those employees receiving Canine Pay, their regular work schedule is a 40-hour workweek or 80 hours per pay period. (Ex. A, Q3) Any hours above the standard 80 hours per pay period count as time worked for purposes of overtime (Ex. A, Q7, Q8). The employees in the specified classification receive an additional 8 hours each pay period to perform the services of caring for the canine. Additionally, the facts presented by the County do not support that the additional 8 hours of service paid at the overtime rate is for services rendered within an employee's normal working hours.

- As defined in the MOU, overtime consists of all hours actually worked **in excess of a regularly scheduled** daily work shift. (Ex. D, Q1)
- Training **after an employee's regular shift** primarily includes exercise of the dog and obedience training reinforcement, as necessary. (Ex. D, Q3)
- As included in #6 above, canine officers are required to care for the dogs **after their shift** for which they are allotted an additional 8 hours to account for the additional care and training. (Ex. D, Q7)

Therefore, despite the County stating the services are mandatory once a canine is assigned to an employee, the additional 8 hours are not for services that are normally schedule or performed within normal working hours of the employee, but rather are specifically paid for additional services, above the standard 80 hours per pay period, work schedule and paid at the overtime rate. Moreover, they cannot, by definition, be tacked onto the beginning, or end of an employees' shift (to be part of "normal working hours"), because the care, feeding and maintenance of a canine occurs on irregular intervals through the day and night that an employee is off-duty. Thus, the employee is receiving payment for additional services rendered outside of normal working hours, which the law requires SBCERA to exclude from compensation earnable.

CONCLUSION

Based on the above, staff recommends the Board exclude from compensation earnable Canine Pay and adopt Resolution 2021-9 to implement the exclusion.

BUDGET IMPACT:

None.

STRATEGIC PLANNING GOAL/OBJECTIVE:

Prudent Fiscal Management

STAFF CONTACT:

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ATTACHMENTS:

Exhibit A: Letter to County of San Bernardino
Exhibit B: Response #1 from County
Exhibit C: Confidential Letter from SBCERA Fiduciary Counsel
Exhibit D: Response #2 from County
Exhibit E: Memorandums of Understanding - Wage Differentials re Canine Pay
Exhibit F: Proposed SBCERA Resolution No. 2021-9