IN FACTFINDING PROCEEDINGS PURSUANT TO CALIFORNIA GOVERNMENT CODE SECTIONS 3505.4 AND 3505.5

In the Matter of a Dispute between **MORAGA-ORINDA FIRE PROTECTION DISTRICT, Employer,** and **UNITED PROFESSIONAL FIREFIGHTERS, IAFF LOCAL 1230.**	**REPORT OF FACTFINDING PANEL** March 2, 2018 PERB Case No. SF-IM-197-M

FACTFINDING PANEL:

Katherine J. Thomson, Impartial Chairperson, El Cerrito
Lucas Lambert, Executive Board Representative, IAFF Local 1230
Edward Kreisberg, Meyers Nave, a PLC

APPEARANCES AND WITNESSES:

On behalf of the Moraga-Orinda Fire Protection District:

Jeff Sloan, Renne Sloan Holtzman Sakai, LLP
Justin Sceva, Renne Sloan Holtzman Sakai, LLP
Gloriann Sasser, Administrative Services Director, Moraga-Orinda Fire Protection District
Christine Russell, Human Resources Manager, Moraga-Orinda Fire Protection District

On behalf of the United Professional Firefighters, Local 1230:

David Kruckenberg, Mastagni Holstedt, A.P.C.
Larry Menth, Labor Consultant, Mastagni Holstedt, A.P.C.
Vince Wells, President, IAFF Local 1230
Mark DeWeese

I. BACKGROUND

A. Employer Description

The Moraga-Orinda Fire Protection District is a public agency employer within the meaning of Sections 3500-3511 of the Government Code. The District employs approximately 56 full-time equivalent fire protection employees represented by United Professional Firefighters of Contra Costa County, IAFF Local 1230, AFL-CIO, which has been recognized as the exclusive representative of the unit.

B. Procedural History

The District and Local 1230 are parties to a collective bargaining agreement effective January 1, 2011 through June 30, 2018. (Joint Exhibit 1, "MOU") Under the MOU, the District makes contributions to health and welfare benefits on a pre-tax basis through a Section 125 cafeteria plan available through CalPERS. In 2010, the Board of Directors of the District passed Resolution 10-13, designed to achieve savings in benefit costs. (Assn. Ex. 6B) The resolution provided an incentive to eligible employees to waive District health insurance coverage and receive a payment in lieu of the District-paid medical insurance premium. Under the program the District paid into a 457 (b) deferred compensation plan half the amount of the premium the employee would otherwise have received for medical benefits.

In late 2016, the District notified the unions representing its employees that it intended to discontinue the benefit in light of tax advice the District received regarding compliance with IRS requirements. Upon the request of Local 1230, the District met with the Association regarding the issue. The District delayed any change to the deferred compensation plan for a year while it met with Local 1230, but negotiations were unsuccessful.

The District declared impasse on December 15, 2017. (Assn. Ex. 18) On December 20, 2017, the Board passed Resolution 17-18, superseding Resolution 10-13. Recognizing its obligations to maintain the status quo during negotiations and impasse

resolution proceedings, the District resolved to place the contributions into a separate account pending satisfaction of bargaining obligations. (Jt. Ex. 4)

The Association requested factfinding in a letter dated December 29, 2017. The Public Employment Relations Board appointed the chair of the factfinding panel in a letter dated January 25, 2018. The parties extended the deadline for issuance of this report until March 2, 2018.

The factfinding hearing was conducted on January 31, 2018. The parties had a full opportunity to introduce relevant data and exhibits, and present oral testimony and argument. The panel met in executive session by conference call on February 9, 15, 27 and 28, 2018.

II. ISSUES

The parties agreed to the following statement of the issue before the panel:

> In 2010, the District approved a resolution allowing qualifying District employees the option of receiving a deferred compensation contribution in lieu of District-paid medical benefits. In late 2016, the District notified its unions that it intended to discontinue the benefit in light of tax advice the District received regarding compliance with IRS requirements. Upon the request of Local 1230, the District then met with Local 1230 regarding the issue. The District deferred any change to deferred compensation payments for a year while it met with Local 1230, but negotiations were unsuccessful. Effective January 1, 2018, the District moved forward with discontinuing deferred compensation payments, while at the same time setting aside equivalent payments pending completion of impasse procedures.

III. BACKGROUND

Although established separately from benefits negotiated in the 2011-2018 MOU, the resolution refers to the amounts of District-paid contributions to health and welfare benefits in the contract, which provides in part,

SECTION 13 - MEDICAL AND DENTAL CARE

13.1 Medical

Effective following Board approval of this MOU, the District's monthly medical contribution will be set at the PERS minimum contribution level (currently $119/month

and as subsequently adjusted by PERS and/or statute). Concurrently, and going forward, for each participant, the District's maximum further obligation for medical related expenses shall be the difference between the amount of the District's monthly medical plan contribution prior to this MOU:

Employee Only	$ 575.44
Employee +1	$1,150.85
Employee + 2 or more	$1,191.87

and the PERS minimum health contribution (currently $119/month), will be placed in a "Premium Expense Account" of the IRS Section 125 Flexible Benefits Plan of Moraga-Orinda Fire District. The "Premium Expense Account" allows participants to use tax-free dollars above the $119/month amount defined above to pay for health care premiums under the various insurance programs offered by the District above.... Thus, the District's obligation with respect to District contributions that may be used toward medical premiums shall be capped at the amounts contributed by the District prior to adoption of this MOU. The District assumes no responsibility regarding the tax consequence of any benefit provided under this MOU.

...

13.4 Health Care Spending Account.

The District will offer permanent employees the option to participate in a Health Care Spending Account (HCSA) Program designated to qualify for tax savings under Section 125 of the Internal Revenue Code, but such savings are not guaranteed. The HCSA Program allows employees to set aside a pre-determined amount of money from their paycheck, not to exceed the legal limit per year, for health care expenses not reimbursed by any other health benefits plan with before tax dollars. HCSA dollars can be expended on any eligible medical expenses allowed by Internal Revenue Code Section 125. Any unused balance cannot be recovered by the employee.

In a side letter dated August 2016, the parties agreed that, during the period January 1, 2017 through June 30, 2018, the District contributions would increase to

Employee Only	$ 684
Employee +1	$1,368
Employee + 2 or more	$1,778

After June 30, 2018, the contributions will revert to the levels in the 2011-2018 MOU unless the parties negotiate different amounts in bargaining for the successor contract, which will begin in a couple months.

A. Chronology of Negotiations

In June 2016, the federal Court of Appeals for the Ninth Circuit issued its decision in *Flores v. City of San Gabriel*[1], which held that medical in-lieu payments made directly to an employee were compensation includable in the employee's regular rate of pay for purposes of calculating overtime premium rates under the Fair Labor Standards Act (FLSA). In the process of obtaining advice about the effect of the ruling on the District's medical in-lieu incentive payment program, the District received legal advice that District contributions through its Section 125 cafeteria plan health benefits program to the deferred compensation accounts did not comply with tax laws. Continuing payments into the 457(b) accounts would risk the possibility that the benefits received by all cafeteria plan participants would be considered taxable. (District Ex. 4, hereinafter the "Chang memo")

In addition, the fact that each employee eligible for an in-lieu incentive payment had an option to direct the in-lieu payment into a deferred compensation account or choose the district health plan likely made the District medical plan contribution taxable as income under the "assignment of income" doctrine because the employee had control over its disposition. Chang advised the District to "disconnect" the 457(b) incentive payments from the cafeteria plan and to discontinue the election process for employees eligible for the in-lieu incentive payment.

In the September 2016 memo, Chang did identify a possible solution, under which the District would use a formula or other criteria to decide which benefit employees receive. He also acknowledged that the District could pay a cash incentive to the employees, who could then deposit the funds into the deferred compensation system.

The District provided the Chang memo to the Association in a meeting on December 20, 2016, together with a memo explaining why various alternatives it had researched would not work (Dist. Ex. A-5) and an article by attorney Eddie Kreisberg concerning the *Flores* decision (Dist. Ex A-6).

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[1] 824 F. 3d 890.

In the memo regarding alternatives, the District rejected substituting a cash payment for the deferred compensation contribution due to its effect of increasing overtime premium pay under *Flores*, and the inequality and administrative burdens of paying different overtime rates to employees in the same classification. It also cited language in *Flores* that indicated the normal exclusion from FLSA overtime calculations for payments into a health plan might not apply if the District's health plan was found not to be "bona fide" because its in-lieu cash payments were more than an "incidental" part of the plan. The *Flores* court rejected a prior administrative rule-of-thumb that cash payments amounting to less than 20% of the payments into the entire plan would be found incidental, but the court did not establish a new cap or measure of allowable ("incidental") cash payments. At the time, 15% of the District total medical plan contributions went to in-lieu payments.

The memo also set out other options:

> Continuing the program but *requiring* that employees with access to qualifying health plans receive only the in-lieu payment;
>
> Putting the money into a Section 125 Flexible Spending Account, which was at the time limited to $2,550, and permitted only $500 of the unspent funds to be carried over to the next year.

The District also listed other ideas that it found unworkable:

> A Retirement Health Reimbursement Account cannot be funded through a cafeteria plan;
>
> A stand-alone Health Reimbursement Account is not allowed under the Affordable Care Act;
>
> A Health Savings Account can be used only in conjunction with a high deductible plan, and CalPERS does not offer any high deductible health plans.

Other than citing the *Flores* decision, the memo provided no other legal support for its contentions that the options were unworkable.

The District offered to "buy out" the employees electing the incentive by giving the employees a lump sum equal to a full year of the incentive payment. The Association rejected the buyout and demanded to meet and confer on the issue.

During the next 9 months, the parties corresponded primarily by email about proposed options. In March, the district provided to the Association a document from Keenan and Associates explaining some of the tax ramifications of various options. (Dist. Ex. B-2)

In early May 2017, the Association proposed that the in-lieu payments be made to an ICMA Vantage Care Retirement Health Savings program that would establish a part-trust integral to the District and permit the District to make pre-tax contributions to a retirement health savings account. On August 3, 2017, when it looked like the ICMA program would be a workable vehicle for the incentive payment, the Association's bargaining representative, Labor Consultant Larry Menth, asked to meet and confer over the issue.

However, in an email to Administrative Services Director Gloriann Sasser and former Fire Chief Steve Healy on August 22, 2017, Chang noted that the ICMA Vantage Care program accepts only mandatory employer contributions, and would not allow employee election or employee funds. He asserted there was likely a way to structure a program that could work for the District, but that it would be advisable to have an IRS Private Letter Ruling before proceeding. (Dist. Ex. C-4) At the hearing the District estimated that the ruling would cost $20,000 plus attorneys' fees.

When asked whether making the payment mandatory for employees with access to other health plans would allow use of the ICMA RHS, Chang noted that the District is subject to the requirement of the ACA, which requires it to offer medical coverage to at least 95% of its full-time employees. A mandatory in-lieu payment would likely be seen as a violation of the offer requirement, resulting in a penalty to the District if any of its employees received a premium tax credit for buying marketplace healthcare coverage. (Dist. Ex. C-7) Chang estimated that 7 employees could possibly qualify for a premium tax credit under the ACA, and penalties would range from $24,000 to $78,000.

On September 15, 2017, the District's counsel notified Association President Vince Wells that the District intended to terminate the in-lieu contributions to deferred compensation "to protect the tax free status of the District's cafeteria plan and keep

District contributions to health premiums non-taxable." (Assn. Ex. 15) The District informed unit members of the intent to terminate the deferred compensation payments prior to open enrollment to allow employees to take that development into consideration when choosing health insurance for 2018.

The parties met in formal negotiations twice, on October 3 and November 27, 2017. Labor Consultant Menth testified that the Association was trying to obtain fuller explanations for the District objections to various alternatives when the District declared impasse. The District contends that both parties agreed they were at impasse.

When bargaining was not successful, the District board passed Resolution 17-18 and deposited the medical in-lieu payments into a separate account. The amount deposited for January 2018 payroll is $13,746 for all in-lieu payments, including management and other employees not in this bargaining unit.

If the incentive program is ended, the employees who participated will have lost not only the amount contributed to deferred compensation, but also the earnings on the amounts that would have been invested in mutual funds in their accounts, which in recent years has been very substantial.

B. Proposals at Factfinding

District Proposal: The District proposes to eliminate the program.

Association Proposal: The Association proposes that the incentive payment be reduced to 20% of the amount of the premium contribution the District would otherwise make to the employee under the MOU, and that it match in-lieu participant contributions of up to $1,325 into the Health Care Savings Account described in Section 13.4 of the MOU or place $2,500 into a dependent care FSA for the in-lieu participant.

Alternatively the Association proposes the 20% in lieu stipend in conjunction with a $1,000 payment to all members of the bargaining unit into a 457(b) plan or to the Health Care Savings Account described in Section 13.4 of the MOU.

In response to District objections to consideration of Association proposals not made during bargaining, the Association explains that it did not have a chance to present these alternatives at the formal meet and confer sessions before the District declared impasse because it was attempting to understand the objections to each of the options the District had rejected. The District counters that both parties agreed they were at impasse in December 2017.

IV. ANALYSIS AND RECOMMENDATIONS

The panel has based these recommendations on factors commonly used in factfinding and listed in Government Code Section 3505.4 (d). The factors that are primarily applicable here are 1) state and federal laws that are applicable to the employer, 2) the interests and welfare of the public and the financial ability of the public agency, and 3) comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services for comparable public agencies. The evidence cited regarding comparability with employees of other public entities necessarily does not include up-to-the-moment information.

a. Other Agencies Provide a Medical In-Lieu Incentive

The evidence shows that nearly all neighboring fire districts and departments pay an in-lieu incentive to employees who opt out of medical coverage. These are fire departments that would compete with the MOFD for employees when vacant firefighter positions arise.

Under its 2008-2020 MOU with its firefighter union, the County of Alameda pays a monthly stipend of $100 to $200 to employees, depending on whether they decline family coverage or all medical coverage. (Assn. Ex. 12-A, p. 14)

Under its 2010-2018 MOU, the City of Hayward pays a taxable cash amount based on the level of coverage the employee would have received if not opting out of medical coverage. The monthly amounts were frozen in 2013 at $668 for the employee

only, $1,337 for employee and one dependent, and $1,738 for employee and two or more dependents. (Assn. Ex. 12-F, p. 24)

At least through June 2017, the City of Berkeley has paid a flat amount equal to the Kaiser premium for a single employee, which in 2014 was $560 monthly. (Assn. Ex. 12-B) The City of Pinole has paid a stipend of $225 to $600, depending on dependent coverage. (Assn. Ex. 12-H) The City of El Cerrito has paid an amount equal to the higher of Kaiser or Health Net single premium into a flexible benefits plan that the employee could take as (taxable) cash and/or allocate toward other benefits in the plan. (Assn. Ex. 12-E) The City of Oakland has paid $160 monthly to those who opt out. (Assn. Ex. 12-G) The City of Richmond has paid $150 to $200 monthly as a taxable addition to salary or as a credit into the Flexible Benefits Plan. (Assn. Ex. 12-I, p. 29) The 2014-2017 MOU of the East Contra Costa Fire Protection District provides for a $400 cash payment "if possible." (Assn. Ex. 12-D) There is no evidence that successor agreements (if any have been reached) have changed these in-lieu payment provisions.

Some cities do not have fire departments, but MOUs with their police employee organizations, which usually have similar compensation provisions as for firefighters, show that they have medical in-lieu payment programs. The City of Concord pays a minimum of $200 to police officers who opt out of medical coverage. (Assn. Ex. 12-C) The City of Walnut Creek pays $350 monthly into a 457 plan. (Assn. Ex. 12-J)

In addition, Menth testified that he has participated in negotiations regarding medical in-lieu payments with other local public entities. In one, the City of Lincoln agreed to replace the deferred compensation payment with a cash payment, despite the fact that the cash payment would increase the employees' overtime premium rates under *Flores*. The city recognized that its overall costs would be lower with the increased overtime because of the savings that come with employees opting out of full medical coverage.

b. The Interests and Welfare of the Public – Elimination of the Program would Likely Increase District Benefits Costs

The amount the District has saved from the medical in-lieu program has ranged from about $55,400 for 9 District employees in 2011, to approximately $167,760 for 20 employees in 2017. (Un. Ex. 10-B)

Based on the firefighter unit members who opted out of the District health plan coverage in December 2017, the District would save up to $144,000 in benefit costs if it were to continue to pay current amounts to opt-out participants. Fifteen unit members opted out of medical coverage for 2018; the District will set aside nearly $12,000 per month for the in-lieu benefit for unit members. (Assn. Ex. 10-C) If all of the current in-lieu program participants in the unit had decided not to opt out of the District-provided medical plans, the District would be contributing an additional $144,000 to the unit's medical care plan costs. Including the contribution to management employees and another union's members who participate in the in-lieu program, the District's in-lieu costs are $13,746 monthly. (Assn. Ex. 10-C) Its savings are therefore potentially $165,000 annually.

Because of the legal obstacles, the District proposes to end the program entirely. However, elimination of the program would not be in the best interests of the public because the program saves the District money. The goal of the original program—to save the District money—is achievable, but substantial savings are unlikely to be achieved without providing an incentive to employees to opt out of District coverage if they have other medical coverage. Firefighter DeWeese testified that he calculates the benefit of opting out of the District's plan every year. Since his wife's employer penalizes her $100 monthly if she does not opt to be covered by another available plan, the lack of any incentive would likely cause them to enroll instead in the District plan.

The Association proposes a cash payment. It acknowledges that the District would have to include the cash amount in the overtime premium calculations for the opt-out participants, but calculates that the amount of increased overtime would be small compared to the savings achieved by the medical in-lieu program. It calculates that a

reduction of the cash amount to 20% of the District medical plan premium contribution would increase the District's overtime costs approximately $18,000, an amount overwhelmingly offset by savings of up to $144,000 on medical benefit costs.

There are several other drawbacks to a 20% payment. While it is more likely to be found "incidental" to the benefits plan than a program providing 50% cash payments, the *Flores* case did not set a 20% standard or any other standard below which cash payments would be deemed incidental. In addition, there are administrative costs to having to calculate additional cash payments into some members' pay but not others' pay, and the District urges that it is inequitable for employees at the same step of the pay scale to earn different amounts for overtime work.

The Chair agrees with the Association that a cash payment is workable and would save money overall. The Chair finds that a small flat cash in-lieu payment substantially addresses these issues and accords with the compensation provided by other cited agencies, all of which provide a medical in-lieu incentive.

- A cash payment of $200 per month would result in an extra $1.24 hourly FLSA overtime premium. Even without calculating any offset due to other District pay practices, this additional cost for 8,000 overtime hours worked by in-lieu participants (based on 2017estimates from Assn Ex. 10A) would amount to about $10,000. Though this level of payment might not attract as many in-lieu participants, **the District would save substantially for each participant**. Even a single-eligibility employee working 1,000 hours of overtime would receive at most an extra $1,240 overtime pay, while the District would save $5,808 on the medical plan premiums annually ($8,208 - $2,400). The medical plan savings would be higher for all the other current in-lieu participants, who have dependents: $14,016 for those with one dependent, and $18,936 for employees who have two or more dependents.

- The total in-lieu program for all current District in-lieu participants would cost $40,800 if providing an incentive of $200 monthly. While the parties

did not provide the annual cost for all medical plan contributions in 2017, the total District expenditure on medical plan contributions for unit members was $716,014. (Assn. Ex. 10-B) The $40,800 cost would be about 5% of the total plan costs, a percentage that is very defensible as "incidental."

- A flat dollar amount reduces the administrative burden added by the requirement to calculate overtime differently for in-lieu participants.

- The small inequality in overtime pay is more than balanced out by the fact that in-lieu participants are not receiving District medical benefits and will be taxed on the in-lieu cash payment. Variations in total compensation are common, even among employees on the same pay step.

c. Federal Law Does not Clearly Allow FSA Contributions Based on Employee Election

Although the program has saved the District money, the parties do not have the option to continue the program as it is now structured. The legal landscape has changed, and the tax code, the Fair Labor Standards Act, and the Affordable Care Act present obstacles to continuing a substantially similar program. Even the Association implicitly acknowledges that a cash payment of any more than 20% of the medical premium could have FLSA overtime implications for the District's cafeteria plan under the *Flores* case.

Either the flat $200 or a payment equal to 20% of the amount the District would pay for medical benefits is obviously much less than the District currently provides. To address this decrease in compensation, the Association proposes that the District make matching contributions to the Health Care Spending Account or to a new dependent care spending account. The tax laws limit the amount that the District can contribute pre-tax to FSAs to an amount that is not much more than $100 monthly to health care and to approximately $200 per month for dependent care. In addition, the law does not allow the employee to carry over more than $500 of the unspent amount in a health care spending account from one year to the next. The drawbacks to employees of using this vehicle are

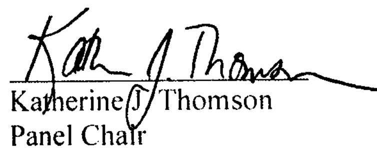
obvious. The employees would receive less than half of the previous incentive amount, and could lose nearly all of the incentive if it is not spent.

The bigger problem, however, is the maze of tax laws that apply to employee health benefits and their interaction with the Affordable Care Act. The District did not point specifically to any laws that would prevent it from making tax-free contributions to an FSA based on an employee election, but the tax laws are sufficiently complex that a majority of the Panel does not recommend implementing FSA contributions in lieu of medical benefits without fully-considered legal advice. The Association did not provide any employee benefits expert opinion that would allay the legal concerns.

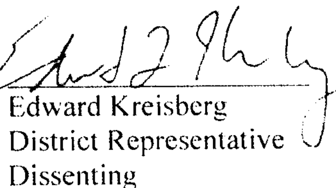
The Association urges the panel to recognize the value of the benefit to the unit that will be lost if the District pays only $40,800 in in-lieu incentives. This contention overlooks the fact that the value of the program varies with the number of participants. If half the participants decide not to opt out of District medical plans, the District compensation costs for the unit will actually increase substantially. In addition, from the Board minutes relating to the resolution, it appears that the in-lieu program originated separately from MOU compensation bargaining, and was instead a strategy to save the District money in benefits costs.

Recommendation: A majority of the panel recommends that the parties agree to continue an in-lieu payment program. The Chair recommends an in-lieu cash payment of $200 per participant.

DATED: March 1, 2018.



Katherine J. Thomson
Panel Chair



Edward Kreisberg
District Representative
Dissenting

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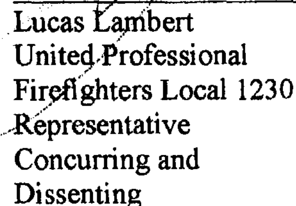

Katherine J. Thomson
Panel Chair

Edward Kreisberg
District Representative
Dissenting

Lucas Lambert
United Professional
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March 2, 2018

To Whom It May Concern:

As a panelist representing the United Professional Firefighters of Contra Costa County, IAFF Local 1230 I am writing this letter to both concur with and dissent from the report and recommendations of the fact-finding chair, Katherine Thomson.

I agree with the factual findings of the Fact-Finding report by Ms. Thomson. I also agree with the recommendation that Ms. Thomson makes stating, "flat cash in-lieu payment substantially addresses these issues and accords with the compensation provided by other cited agencies, all of which provide a medical in-lieu incentive" (Fact-Finding report, 2018). I believe that this method of a "flat cash in-lieu payment" is an acceptable alternative to what employees currently receive as 457 contributions. This option allows MOFD employees to maintain a medical in-lieu benefit while allowing the Moraga-Orinda Fire District to remain fiscally responsible with public funds. As stated in the Fact-Finding report, "savings are unlikely to be achieved without providing an incentive to employees to opt out of District coverage if they have other medical coverage" (Fact-Finding report, 2018). However, I believe that the amount of "$200" that is being recommended is not a comparable alternative for the current medical in-lieu compensation. This will likely result in employees not opting for the medical-in-lieu program. This ultimately will negatively affect the district's continued savings from those employees who have the option of alternative health care plans.

In addition, I believe that the option of combining a "flat cash in-lieu payment" with employer matching contributions to a FSA (Flexible Spending Account) should be a recommendation agreed upon by the entire panel. When coupled with a flat cash payment, a FSA benefit is an additional alternative that would be more equivalent to the current compensation received by employees in the medical in-lieu program. However, I acknowledge an option of a FSA plan may require further evaluation.

I appreciate the attention that has been given to this issue by the fact-finding panel.

Respectfully,

Lucas Lambert

DISSENT OF FACT-FINDING PANELIST EDWARD L. KREISBERG

In the Matter of a Dispute Between the Moraga-Orinda Fire District and United Professional Firefighters, IAFF Local 1230

3/2/18

I respectfully dissent. It was undisputed that the Moraga-Orinda Fire District (District) needed to cease making deferred compensation payments on behalf of employees that opted not to enroll in District provided health insurance in order to avoid violating the tax code and threatening the tax exempt status of all District contributions to health premiums. As such, I recommend the simple termination of this legally problematic program as favored by the District. The panel should not recommend creation of a new cash in lieu program, even at the lower dollar amount recommended by the Panel Chairperson.

The District gave IAFF Local 1230 (the Union) well over a year of notice that the program needed to end. Nonetheless, the District continued to make in lieu contributions to deferred compensation, and assumed the tax risk, for all of 2017 while it tried to work with the Union toward an appropriate resolution. Despite being provided this opportunity, the Union never identified nor proposed any alternative tax exempt and/or viable option for similar payments. Notably, the Union never advanced during the meet and confer process the new proposals it made during the fact-finding hearing.

The Panel Chairperson has appropriately recognized that the Union has not addressed significant legal questions and/or problems with its new ideas of District-paid Health Care Savings Account (HCSA) matching contributions or dependent care Flexible Spending Account contributions. The public's (and the District's and employees') interest obviously weighs in favor of the District complying with IRS tax requirements and not threatening the District or employees with greater tax obligations or penalties. Further, the Union proposal to include payments to a HCSA *for all Union represented employees*, not just those "opting out" of health insurance, would create a new unit-wide benefit entirely unrelated to health insurance enrollment status, and the District would have to start making payments for most employees toward *both* health insurance premiums and to the HCSA.

The Union provided no evidence that comparable agencies are moving to create cash in lieu programs since the *Flores v. City of San Gabriel* decision or adoption of the Affordable Care Act. Indeed, the legal concerns discussed around cash in lieu contributions suggest the trend of other public agencies would be away from, not toward, cash in lieu programs.

Such a cash payment/program does not exist now and is the kind of new program more appropriately discussed and evaluated fully during a bargaining process by the Union and by the public's duly elected Board of Directors. In the process leading to this fact-finding, including the parties' lengthy informal discussions and then the formal meet and confer process that followed, the idea of cash in lieu was not seriously entertained by either party due to the numerous legal and other concerns with cash in lieu. And, the Union never proposed or discussed support for cash in lieu during the parties' two formal meet and confer

meetings. This fact-finding panel should not now recommend what neither party proposed or favored during the preceding meet and confer process.

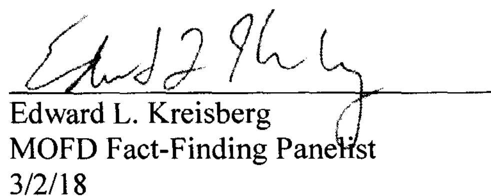
Creating a new cash in lieu benefit would increase the District's overtime costs due to the *Flores v. City of San Gabriel* decision and require the District to pay higher overtime rates for persons lucky enough to have a spouse with good health insurance. It also would obligate the District to pay two different employees, in the same classification and doing exactly the same work and with the same qualifications, different overtime amounts. The District also would have to update its payroll system and practices to be able to accommodate a new cash in lieu program, with the need to incorporate cash in lieu amounts into the Fair Labor Standards Act (FLSA) overtime rate, and then compare MOU overtime payments already made to the District's FLSA obligations at the end of each FLSA work period to determine potential additional amounts owed.

Further, the District would risk a legal finding that the overall amounts the Panel Chairperson recommends be paid in cash under the District's cafeteria program are more than "incidental" under the FLSA. If this occurred, then all District contributions to employees' health premiums, not just the District's cash in lieu payments, also would need to be included in employees' FLSA overtime rates, with the result being an even larger increase in the District's overtime costs. Finally, a cash in lieu program would risk District non-compliance with the Affordable Care Act and the related financial penalties. Requiring the District to address and/or risk each of these realities would be contrary to the public's interest.

CONCLUSION

District employees remain free to enroll in District provided health benefits. If employees with superior health insurance through a family member choose not to enroll, that remains their choice.

The panel should recommend neither a cash payment to employees that choose not to enroll in District health nor creation of a legally questionable HCSA or Flexible Spending Account obligation for the District as favored by the Union. Both proposals are either inconsistent or potentially inconsistent with State and Federal Law. Both also are contrary to the public's interest and the direction other public agencies will naturally be moving with respect to cash in lieu in light of tax law, the *Flores v. City of San Gabriel* decision and/or the Affordable Care Act. As such, I respectfully dissent and recommend that the contributions to deferred compensation in lieu of employee enrollment in the District's health plan simply be terminated.



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3/2/18