

Memorandum



ASSOCIATION OF CALIFORNIA WATER AGENCIES
JOINT POWERS
INSURANCE AUTHORITY

To: Sandra Smith, Employee Benefits Manager
From: Robert H. Greenfield, Esq., Claims Litigation Counsel
Date: March 3, 2014
Re: Cash in lieu of health benefits to Board Members

The issue presented is if the member district provides health benefits to its Board of Directors, may a director take the cash value of the benefit rather than the benefit.

The answer is no.

California Water Code § 20201 states, “the governing board of any water district may by ordinance adopted pursuant to this chapter, provide compensation to members of the governing board in an amount not to exceed one hundred dollars per day for each day’s attendance at meetings of the board, or for each day’s service rendered as a member of the board by request of the board.

Statute also provides that any additions to the compensation may not exceed 5% annually. Also any change requires a public hearing.

Finally, several code sections limit the total number of compensable days to a maximum of 6 per month. See Water Code §§ 34741, 30507, 21166, 50605, & 74208. Similar statutes exist for CSD’s and PUD’s.

Government Code § 35120 provides: “Notwithstanding any statutory limitation upon compensation or statutory restriction relating to interest in contracts entered into by any local agency, any member of a legislative body may participate in any plan of health and welfare benefits permitted by this article.”

The public entity may pay for the health benefits directly as it does with its employees. Alternatively, the entity may reimburse the board member for his/her out of pocket expense for health benefits. It should be noted that if the director receives health coverage from another source, the cost of the health benefit may not be given as cash but may be used to cover any out of pocket costs the director incurs as part of the other plan, such as co-payments or out of plan expenses.

There are two Attorney General Opinions that are frequently cited on the subject of cash in lieu of benefits, which at first blush may seem contradictory. In Opinion 00-111 the public agency requesting an opinion was a school district. The AG opined that cash in lieu of health benefits would be compensation of a public official. *Thorning v Hollister School Dist.* (1992) 11 Cal.App 4th 1598, 1606-1607. As such, the compensation would result in excess compensation over the statutory allowable limit.

Often cited for the proposition that cash may be paid to board members Opinion 05-910 does allow cash in lieu of benefits. However, this opinion is very limited to special language contained in the statutes for general law cities to the city council members. It is not a change in the prior opinion.

Recommendations if cash has been paid to directors.

The total payments made in cash to the director in lieu of not receiving health benefits **must** be paid back to the district.

As the AG suggests that the members of the governing board who approved the payments may be subjected to criminal prosecution. Government Code §1222 states that every willful omission to perform any duty enjoined by law is punishable as a misdemeanor. The statutes provide a limit on compensation. Exceeding these limits may be viewed as a willful omission to comply with the law. The District attorney of the county would be the appropriate public official responsible for investigating and prosecuting such an action.

In addition to criminal proceedings, there may be various civil remedies available. Public officials who authorize improper expenditures may incur personal liability and be order to make restitution. *Stanson v Mott* (1976) 17 Cal.3d 206. Furthermore the district may be subject to a taxpayer suit under the Code of Civil Procedure §526a. In *TRIM, Inc. v County of Monterey* (1978) 86 Cal.App.3d 539 the Court held, "Taxpayers clearly have standing to challenge illegal expenditures of funds by county officials under section 526a and may also sue to enjoin wasteful expenditures."