

1 BOARD OF ADMINISTRATION
2 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

3 In the Matter of the Appeal of)
4 Calculation of Industrial Disability)
5 Retirement Benefits Under)
6 Government Code Section 21417 of)
7 MICHAEL D. HUNTER,)
8 Respondent,)
9 and)
10 DEPARTMENT OF MOTOR VEHICLES,)
11 Respondent.)

CASE NO. 3050
OAH NO. L-1999100489
PRECEDENTIAL DECISION
00-04
EFFECTIVE: July 28, 2000

11 **PRECEDENTIAL DECISION**

12 RESOLVED, that the Board of Administration of the California Public Employees'
13 Retirement System hereby adopts as its own decision the Proposed Decision dated
14 [May 4, 2000](#), concerning the [application of Michael D. Hunter](#); hereby designates its
15 decision as precedential; RESOLVED FURTHER that this Board decision shall be
16 effective 30 days following mailing of the decision.

17 * * * * *

18 I hereby certify that on [June 21, 2000](#), the Board of Administration, California
19 Public Employees' Retirement System, made and adopted the foregoing Resolution,
20 and I certify further that the attached copy of the administrative law judge's Proposed
21 Decision is a true copy of the decision adopted by said Board of Administration in said
22 matter.

23 BOARD OF ADMINISTRATION, CALIFORNIA
24 PUBLIC EMPLOYEES' RETIREMENT SYSTEM
25 JAMES E. BURTON, CHIEF EXECUTIVE OFFICER

26 Dated: June 28, 2000

27 BY _____
28 **BARBARA HEGDAL**
ASSISTANT EXECUTIVE OFFICER

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

In the Matter of the Calculation of Industrial
Disability Retirement Benefits Under
Government Code Section 21417

Case No. 3050

MICHAEL D. HUNTER,

OAH No. L-1999100489

Respondent,

And

DEPARTMENT OF MOTOR VEHICLES,

Respondent.

PROPOSED DECISION

Administrative Law Judge Greer D. Knopf, State of California, Office of Administrative Hearings, heard this matter in San Diego, California on February 8, 2000.

Roland K. Bowns, Senior Staff Counsel, California Public Employees' Retirement System, represented petitioner James E. Burton, Chief Executive Officer of the California Public Employees' Retirement System.

Mark Ellis Singer, Attorney at Law, represented respondent Michael D. Hunter who was also present at the hearing.

No one appeared on behalf of respondent, Department of Motor Vehicles, State of California.

The record was closed and then reopened for submission of additional evidence. The record was closed and the matter was submitted on April 4, 2000.

FACTUAL FINDINGS

Statement of Issues number 3050 dated November 5, 1999 was filed by petitioner James E. Burton, Chief Executive Officer of the California Public Employees' Retirement System, State of California (hereinafter referred to as "petitioner") against respondent Michael D. Hunter (hereinafter referred to as "respondent") and respondent Department of Motor Vehicles, State of California (hereinafter referred to as

“the Department”). The statement of issues alleges that respondent’s industrial disability retirement benefits should be limited by Government Code section 21417 and that the exception to the limit imposed on retirement allowance for particularly hazardous and dangerous activities does not apply herein.

In 1985, respondent was employed by the County of San Diego as a Deputy Sheriff. In 1985 respondent was diagnosed with a cardiac arrhythmia condition after he received a chest injury while arresting a suspect. In December 1990, respondent was given a disability retirement from his position as Deputy Sheriff as a result of this cardiac condition. Thereafter respondent worked in private industry and for the State of California in non-sworn positions.

On August 2, 1995, the Department first hired respondent as a special investigator. When the Department hired respondent he was given a full medical clearance with no restrictions imposed on his duties. On August 7, 1995, the Department issued respondent his investigative equipment, which included a Smith/Wesson firearm, holster, ammunition and soft body armor. During his employment with the Department, respondent was promoted to a senior special investigator. He remained employed at the Department until February 1997. As a special investigator, respondent was a state safety member of the California Public Employees’ Retirement System (hereinafter referred to as “PERS”) subject to Government Code section 21151. An investigator is a sworn public safety officer who must be qualified under the California Penal Code in the use of firearms.

3. Respondent’s duties as a special investigator with the Department were generally to conduct investigations for the Department and detect or verify suspected violations of laws, rules or regulations. This included conducting undercover investigations when necessary. Respondent claims that two of his assignments while employed by the Department were particularly hazardous and dangerous under Government Code section 21417.

4. Respondent’s first assignment was to conduct an undercover investigation of several car dealerships. As part of the assignment, respondent posed as a car salesman and went to work in a dealership in order to observe whether or not the salesmen were engaging in the practice known as “bird-dogging”. Bird-dogging is also known as off-premises selling. This practice is where car salesmen refer customers to another dealership and then get a commission from the sale at the other dealership. This practice is an illegal license violation under Vehicle Code section 11700. Respondent worked at three dealerships over the course of approximately one month. About half his time was spent actually working at the dealerships and the other half was spent looking for the sales positions, reporting back to the Department and time off.

While working this assignment, respondent feared for his own personal safety. He did not take a firearm with him when he went to work at the dealerships and he did not have another investigator as backup outside the dealership to watch out for his safety. It is unclear why respondent did not carry his firearm with him since the Department had issued him one. He had the option of carrying a firearm while undercover, but did not.

The Department did not provide respondent with investigator backup during this operation. However, the Department had not needed backup for other similar undercover operations looking for bird-dogging activity. Respondent was not undercover looking for violent or dangerous criminal activity. He

was not required to make any arrests of suspects or confront any suspects while undercover and he was able to leave the premises at any time. It is standard police procedure in undercover operations concerning such dangerous activities as narcotics trafficking or murder for hire to always utilize backup, but there was insufficient evidence to establish that this is true for undercover operations looking for non-violent licensing violations.

Respondent feared for his safety because he did not have extensive background information on the car salesman he was observing. However, when a car salesman is licensed, the Department runs an extensive background check on the applicant before a license can be granted. This background information was available to respondent.

Respondent also feared for his safety while working this undercover assignment because he was first assigned a car to drive that had a police radio in it and he thought its registration was too easily traceable back to the Department. The residence address the Department gave him was also traceable back to the Department. Respondent was able to obtain other vehicles to drive and there is no evidence that he ever made a request to the Department that he be assigned another address. The vehicle and the residence address the Department assigned to respondent demonstrate sloppy undercover practices. This could have placed respondent at risk of being found out by the salesman he was observing, but that does not constitute a particularly hazardous or dangerous activity. Most peace officer duties involve some amount of risk and danger.

5. While respondent was working undercover at one of the dealerships, he believed his safety was in fact threatened on one occasion. A salesman took respondent for a drive with two others. While in the car, the salesman asked respondent a lot of questions about who he was and where he was from. They told respondent his car looked like a police car. They implied they might have thought respondent could be an undercover police officer. During this encounter, respondent feared for his life. There was no evidence that the salesman had weapons or displayed any capability of carrying out any implied threat. This situation was frightening to respondent, but without more dangerous behavior than veiled threats, this encounter does not rise to the level of a particularly hazardous and dangerous duty.

6. In April 1996, respondent went with some other investigators while they were executing an arrest warrant. His supervisor was present at the scene. When respondent asked if they should wear their raid jackets and body armor, he was given the option to do so. Respondent chose not to wear the protective gear because he and the other investigators did not consider this to be a dangerous suspect. After the suspect was taken into custody and handcuffed, he was searched and placed in the back seat of the transporting car that respondent was driving. After he removed the suspect from the vehicle, respondent found a folding knife in the back seat of the car. The suspect was handcuffed in the car and presented no danger to respondent. Finding the knife was probably disconcerting to respondent, but was not a particularly hazardous incident. This arrest and the discovery of the knife in the car was not a particularly hazardous or dangerous event, beyond the normal level of danger any peace officer could expect to encounter in his everyday duties.

7. During respondent's employment at the Department, he began to experience an increase in cardiac disease symptoms. After respondent's retirement from the Sheriff's Department, his arrhythmia symptoms had decreased although he continued to experience some symptoms. The symptoms then started to increase once he

began working again as a law enforcement officer. In January 1997, respondent was involved in a major trial that was increasing his level of stress and causing his arrhythmia to worsen. The onset of this arrhythmia had been in 1985, it persisted through the years and then worsened while he was working for the Department. On January 21, 1997, respondent applied for industrial disability retirement, based on his cardiovascular condition known as cardiac arrhythmia.

After review of the competent medical evidence, PERS approved respondent's application for disability retirement based on the cardiovascular condition from which respondent suffered. In approving respondent's application, petitioner PERS determined that Government Code section 21417 applied to limit respondent's benefits to 39 percent of his final compensation. Petitioner further concluded that respondent did not meet any of the exceptions under Government Code section 21417 that would increase his retirement benefits. On December 7, 1998, petitioner notified respondent of this conclusion that respondent was entitled to disability retirement benefits based on 39 percent of his final compensation and that the exceptions under Government Code section 21417 did not apply to respondent. On December 30, 1998, respondent filed a timely appeal on the ground that his disability resulted from an injury that occurred during the performance of duties that were particularly hazardous and dangerous and that he was therefore subject to the exception under Government Code section 21417.

LEGAL CONCLUSIONS

1. Cause does not exist to grant respondent's appeal of complainant's determination limiting respondent's retirement benefits under Government Code section 21417 in that respondent failed to establish his duties were particularly hazardous and dangerous, as set forth in Findings 2, 3, 4, 5, 6, and 7. Government Code sections 21411¹ and 21417² are the statutes that are applicable to the calculation of respondent's industrial disability retirement benefits. Government Code section 21292.6 which was later renumbered to Government Code section 21417 (hereinafter referred to as "Section 21417") was enacted by Stats. 1979, ch. 1099, SB 434. Originally, SB 434 limited the retirement benefits of those employees who were hired after January 1, 1980. An employee's disability retirement benefits were limited to the amount that the retiree would have received if he had continued to work until normal retirement age.

¹ Government Code section 21411 provides:

Upon retirement of a state safety member for industrial disability he or she shall receive a disability retirement allowance of 50 percent of his or her final compensation plus an annuity purchased with his or her accumulated additional contributions, if any, or, if qualified for service retirement, he or she shall receive his or her service retirement allowance if the allowance, after deducting the annuity, is greater.

² Government Code section 21417 provides:

Notwithstanding any other provision of this part, the industrial disability retirement allowance of a member whose membership commenced after January 1, 1980, in the category of membership in which the member was serving at the time of suffering the disability or incurring the disease causing retirement for industrial disability, shall not exceed the service retirement allowance that would be payable as a result of service in that category of membership if the member's service had continued to age 55, if patrol, state peace officer/firefighter state safety, or local safety member, age 65, if service is subject to Section 21076, or age 63, if any other category of member.

This section shall not be applicable to a member . . . whose disability results from an injury that is a direct consequence of a violent act perpetrated upon his or her person or occurs during the performance of those portions of his or her duties that are particularly hazardous and dangerous. (emphasis added)

Several exceptions were added by amendment on July 19, 1979. One of those added exceptions is the exception at issue herein.

Section 21417 provides the exception whereby a state safety member is given a higher rate of retirement pay if he is retired due to an injury that occurs while performing “duties that are particularly hazardous and dangerous”. This phrase refers to job duties that have an especially high risk of danger when compared to other duties of the employee. Common dictionary definitions of the words in the phrase “particularly hazardous and dangerous”, are:

“Particularly: To a great degree; especially”

“Hazardous: 1) Marked by danger; perilous; 2) Depending on chance; risky.” “Dangerous: 1) Involving or fraught with danger; perilous; 2) Able or apt to do harm.” (Webster’s New World Dictionary, Third College Edition, 1986).

The phrase “particularly hazardous and dangerous” found in Section 21417 should be interpreted and applied to this case using the ordinary meaning of the words. The plain meaning of the words supports PERS’ interpretation of Section 21417. The duties respondent was engaged in while employed with the Department were not duties that were especially likely to result in harm or injury, compared to his general duties as a peace officer. They were not particularly hazardous or dangerous activities, especially in light of respondent’s general duties as a sworn peace officer. Government Code section 21417 clearly requires that retirement benefits be limited unless the injury occurred during performance of a duty that was particularly hazardous and dangerous. The language of the statute is clear and unambiguous, so the plain meaning of the language controls. *City of Petaluma v. County of Sonoma* (1993) 12 Cal.App.4th, 1239, 1244; *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th, 1233, 1239. There is insufficient evidence to support respondent’s assertion that certain duties as assigned when he was a special investigator for the Department of Motor Vehicles were particularly hazardous and dangerous.

2. Cause does not exist to grant respondent’s appeal of complainant’s determination limiting respondent’s retirement benefits under Government Code section 21417 in that respondent failed to establish that his disability was actually caused by the duties alleged to be particularly hazardous and dangerous, as set forth in Findings 2, 3, 4, 5, 6, and 7. Respondent’s heart condition first began in 1985. He suffered from the same heart condition when the Department hired him, even though his symptoms were infrequent. Respondent did not prove that the heart condition that caused him to retire occurred during the performance of any one of the duties alleged to be particularly hazardous and dangerous. The evidence established only that respondent’s heart condition was pre-existing and became aggravated while employed by the Department. There was not sufficient medical evidence to establish what specific events, if any, triggered the aggravation of the existing heart condition.

3. Cause does not exist to grant respondent’s appeal of complainant’s determination limiting respondent’s retirement benefits under Government Code section 21417 in that respondent failed to establish he suffered an “injury” as a result of the duties alleged to be particularly hazardous and dangerous, as set forth in Findings 2, 3, 4, 5, 6, and 7. Government Code section 21417 calls for the exception to the retirement limitation to apply when the employee suffers from a disability that resulted from “an injury” occurring during

the performance of particularly hazardous or dangerous duties. The clear language of the statute calls for the exception to apply to disabilities resulting from “an injury” and not to disabilities resulting from a disease. Respondent did not present evidence of any specific injury that occurred during the performance of his duties and therefore does not qualify under the exception in Government Code section 21417.

ORDER

The Chief Executive Officer’s determination that respondent Michael Hunter’s disability retirement benefits are limited under Government Code section 21417 is upheld and respondent’s appeal is hereby denied.

Dated: May 4, 2000

GREER D. KNOFF
Administrative Law Judge

Office of Administrative Hearings