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

In the Matter of the Appeal of Approval of Membership of COVINA VALLEY UNIFIED SCHOOL DISTRICT, Respondent. And VIOLETA R. SAN PEDRO, Real Party in Interest.	CalPERS No. 2844 OAH No. L-1999110338 **PRECEDENTIAL DECISION 00-03** **EFFECTIVE: May 31, 2000**

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated March 6, 2000, concerning the application of Violeta R. San Pedro; hereby designates its decision as precedential; and RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

* * * * *

I hereby certify that on April 19, 2000, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the administrative law judge's Proposed Decision is a true copy of the decision adopted by said Board of Administration in said matter.

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

Dated: May 1, 2000 BY_____
RONALD L. SEELING
ASSISTANT EXECUTIVE OFFICER

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

In the Matter of the Statement of Issues Against: COVINA VALLEY UNIFIED SCHOOL DISTRICT, Respondent. And VIOLETA R. SAN PEDRO, Real Party in Interest.	CalPERS No. 2844 OAH No. L1999110338

PROPOSED DECISION

This matter came on regularly for hearing on February 16, 2000 at Los Angeles, California before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. Respondent Covina Valley Unified School District was present by Dr. Louis Pappas, Assistant Superintendent for Personnel Services, and was represented by Christopher Keeler, attorney at law. Real party in interest Violeta R. San Pedro was present and was represented by Maureen Whelan, staff attorney with the California School Employees Association. Petitioner James E. Burton, Chief Executive Officer, California Public Employees' Retirement System, was represented by Paul M. Ryan, senior staff counsel.

Evidence was received by testimony, documents and stipulation, and the matter was submitted for decision.

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. The Statement of Issues was filed by Petitioner James E. Burton in his official capacity as Chief Executive Officer, California Public Employees' Retirement System ("CalPERS").

2. Violeta R. San Pedro is an employee of the Covina Valley Unified School District ("District"). The question of her eligibility for retirement benefits was raised by letter from the California School Employees Association ("CSEA") to CalPERS dated

October 2, 1998. In a letter dated October 26, 1998, CalPERS requested that the District submit paperwork to enroll Ms. San Pedro as a member in CalPERS.

By letter dated December 15, 1998, the District informed CalPERS that, according to the District's interpretation of the facts and the law, Ms. San Pedro was not eligible for membership. CalPERS replied, by letter dated December 30, 1998, that it had determined Ms. San Pedro was eligible, and that the District could appeal that determination.

On February 1, 1999, the District filed its appeal, and this hearing followed.

3. The parties reached stipulations of facts, summarized in Findings 4 through 10.

4. Ms. San Pedro began working for the District in October 1984 as a part-time Instructional Aide, a classified position. Her time base is 3.75 hours per day.

5. Ms. San Pedro completed a 6 month probation period and became a permanent classified employee. From 1984 to present she has worked 3.75 hours per day, 5 days per week, 10 months per year. As an Instructional Aide she is covered by the CSEA collective bargaining contract and is entitled to vacation, sick leave, holiday pay, seniority, and statutory and due process rights prior to termination, and layoff and reemployment rights.

6. As an Instructional Aide for the District, Ms. San Pedro has worked in the following assignments: (A) RSP Aide (resource aide), working with small groups of students assisting with reading and mathematics; (B) ESL Aide, assisting English as a Second Language students with their subjects; (C) Classroom Aide, assisting a teacher in the classroom, assisting with reading and mathematics in small groups, clerical work, correcting papers, etc.; and (D) recess and lunch duty, supervising students on the playground at recess and in the cafeteria at lunch.

7. In September 1996, Ms. San Pedro began a second job for the District as a Playground Supervisor/Breakfast Aide, supervising breakfast in the cafeteria. The base assignment is 0.5 hours per day, the position is not classified nor is it included in the CSEA contract, and Ms. San Pedro does not receive benefits related to this position.

8. The District's breakfast program is funded through State and Federal grants and programs. Ms. San Pedro fills out a separate time sheet for her work as a Breakfast Aide.

9. In addition to the work listed above, Ms. San Pedro has performed the following work for the District: (A) home visits, under Pupil Personnel Services as assigned, for up to 95 hours per year from 1988-1998, to resolve truancy problems and verify addresses; (B) Clerk I, since August 1997, up to 8 hours per day for 1-2 weeks before the school year begins, ordering supplies and setting up for the school year; and (C) translation for parent-teacher conferences, 2 days per year, in addition to some irregular translation work as an Instructional Aide. She has also worked as a summer school substitute, Child Care Aide translating on an intermittent basis as assigned.

10. The parties calculated Ms. San Pedro's hours for the school years from 1996 through 1999, and came up with slightly different totals, as indicated below:

1996-1997	CSEA:	868.25	District:	867
1997-1998		967		963.5
1998-1999		905.43		905.43

11. Government Code §20305, which addresses the eligibility of part-time employees for benefits under CalPERS, states in pertinent part:

> "(a) An employee serving on a less than full-time basis is excluded from this system unless:
>
> . . .
>
> (2) His or her position requires regular, part-time service for one year or longer for at least an average of 20 hours a week, or requires service that is equivalent to at least an average of 20 hours a week . . . .
>
> (3) His or her employment is, in the opinion of the board, on a seasonal, limited-term, on-call, emergency, intermittent, substitute, or other irregular basis, and is compensated and meets one of the following conditions:
>
> . . .
>
> (B) The person works more than 125 days, if employed on a per diem basis or, if employed on other than a per diem basis, 1,000 hours within the fiscal year . . . ."

12. Various procedures for determination of eligibility are found in the CalPERS Procedure Manual (6/97). At page 2-9, the Procedure Manual addresses "less than full-time" employees by referring to the requirement of Government Code §20305(a)(3)(B), stating: "However, the most important and commonly used guideline to consider for less-than-full-time employees is **1000 hours or 125 days in a fiscal year**. (125 8-hour days equals 1000 hours.) This standard is the equivalent of a 20-hour week, for 50 weeks out of the year . . . ." [Emphasis in original.]

The Procedure Manual goes on to state that certain general principles should be followed to determine when and if someone qualifies for membership. As they relate to Ms. San Pedro's case, they are:

> "2. Persons enter membership upon appointment to a position with one of the following conditions:
>
> . . .
>
> "b. The position requires **regular, part-time** service for at least an average of 20 hours per week (or its equivalent) for one year or longer.
>
> . . .
>
> "3. Persons must otherwise be **monitored** to determine when and if they qualify for membership; qualification for membership is reached when:
>
> . . .
>
> "c. The person works more than 1,000 hours in a fiscal year if paid on other than a per diem basis. . . ." [Emphasis in original.]

13. The Procedure Manual also contains instructions to an employer for filling out the form for an employee to become a member of CalPERS (Member Action

Request, form PERS-MSD-1). As relevant here, page 2-35 instructs the employer to select a time base (item 14 of the form). The applicable alternative is part-time. The instructions continue:

"If PART-TIME is selected, enter the total hours the employee is scheduled to work per week. Also, enter the normal work week hours, for your agency. Example for Part-Time Employee:

Number of hours per week to be worked = 24
Number of normal work week hours = 40

- enter hours to be worked: 24
- enter Normal Work Week Hours: 40" [Emphasis in original.]

The Procedure Manual also instructs the employer at page 2-35 to select a term of appointment (item 15 of the form). The instructions describe the choices as follows:

> "PERMANENT: an open-ended appointment which will extend for more than 12 months; or, in the case of SCHOOLS, an employment contract that will last for the school year (10-12 months) or more.
>
> "TEMPORARY: An appointment with a fixed ending date of 12 months or less; or, in case of SCHOOL employees, an employment contract that will last for less than the school year."

The Policy Manual then instructs the employer to check box A, B or C "only if it applies to the qualification for membership for the employee." The boxes on the form state: "A: Employee is already PERS member; B: Employee has worked 125 days or 1,000 hours this fiscal year; C: Position will average 20 hours per week for one year or longer."

14. A CalPERS employee from the actuarial division, whose job is to make initial eligibility reviews and decisions, has testified to an "equivalency test" used by CalPERS for at least 25 years to balance the eligibility of school employees who work for 10 months with other employees who work for 12 months. This equivalency test is based upon the reasoning of Government Code §20966, which provides in pertinent part:

> "For purposes of calculating retirement allowances, credit for service rendered on a part-time basis in each fiscal year shall be based on the ratio that the service rendered bears:
>
> (a) To one academic year if rendered on an academic year basis.
> (b) To 10 months if rendered on a monthly basis."

Although the eligibility issue is different from the statute's subject of calculating retirement allowances, nevertheless the same reasoning is used to determine eligibility for membership.

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

1. Respondent San Pedro is eligible for benefits from CalPERS under the criteria of Government Code §20305[1], as interpreted and applied by CalPERS, as set forth in Findings 2 through 14.

2. The District is correct that the language of section 20305 is not directly affected by the language of section 20966. However, the testimony of the CalPERS employee, Finding 14, is that the reasoning of section 20966 is used to support the CalPERS policy of using an "equivalency test" to fairly handle the circumstances of school employees who work for 10 months. Section 20966 equalizes part-time school (or other) employees who work less than a full year with part-time employees who work a full year, by calculating retirement allowances based upon the ratio that the part-time, 10 month employee's work bears to a 10 month period.

The reasoning behind section 20966 supports the CalPERS policy to apply the "equivalency test" to determine eligibility under section 20305. As applied to Ms. San Pedro, her 4.25 hours per day in both jobs for 10 months each year would therefore average 21.25 hours per month and qualify her for benefits under section 20305(a)(2), which requires a minimum average of 20 hours per week. The "equivalency test" runs counter to the District's reasoning that Ms. San Pedro's hours must be averaged over 12 months, which would compute to a monthly average below 20 hours per week, making her ineligible for membership.

3. It might also be argued that the plain language of section 20305(a)(2) supports the CalPERS interpretation and application. There are two alternatives under that section: (1) if a position "requires regular, part-time service for one year or longer for at least an average of 20 hours per week"; or, if a position "requires service that is equivalent to at least an average of 20 hours per week." This second alternative, in its use of the concept of an "equivalent" amount of hours, supports the argument that part-time work performed for <u>less</u> than one year should have the hours extrapolated from the actual number of weeks worked to a full year. That is, if the employee continued to work for a full year under the same conditions, she would have enough hours to be eligible.

4. The Policy Manual, Findings 12 and 13, is in some ways helpful.[2] It simply asks the employer to fill in the part-time employee's number of hours worked per week. The only qualifier is whether the term of appointment is temporary or permanent, and there is no indication of how this assists in determining eligibility.

5. The CalPERS' interpretation of the laws it is empowered to enforce is entitled to great weight. In *City of Los Altos v. Board of Administration* (1978) 80 Cal.App.3d

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[1] All statutory references are to the Government Code.

[2] In other ways, the Policy Manual does not appear to be helpful because it may not comport with the statute. For example, the Policy Manual states that, for less than full-time employees, the most important criteria are 1000 hours or 125 days in a fiscal year, while the statute states these criteria only apply to employment that is on a "seasonal, limited-term, on-call, emergency, intermittent, substitute or other irregular basis." The Policy Manual also requires the employer to fill in information, such as permanent or temporary, which is not required by the statute.

1049, the City claimed the employees at issue were seasonal, but CalPERS believed they qualified as full-time for retirement purposes. As stated by the Court:

> "We believe that the PERS Board of Administration, and not the contracting public agency, is to establish the standards for defining full-time and part-time employment. There is a strong policy favoring statewide uniformity of interpretation as between PERS and all of its contracting agencies." *Id.* at 1051.
>
> "For more than 30 years, the PERS has consistently maintained that employment is not part-time merely because it is seasonal or temporary. The interpretation of a statute by an administrative agency charged with its enforcement and construction is entitled to great weight unless clearly erroneous or unauthorized. (*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567.)" *Id.* at 1052.

6. With respect to the eligibility criterion of a minimum of 1,000 hours per year in section 20305(a)(3), CalPERS has taken inconsistent positions. In a letter dated December 30, 1998 (Exhibit 5), CalPERS argues that, because it does not view her work as being "on a seasonal, limited-term, on-call, emergency, intermittent, substitute, or other irregular basis," as those terms are used in section 20305(a)(3), it does not believe that the 1,000 hours minimum is the correct criteria. However, in its letter brief (Exhibit 12), CalPERS argues that, by a parity of reasoning with the "equivalency test," it can calculate Ms. San Pedro's hours as if she continued to work the same monthly hours for 12 months as totaling 1,105 (21.25 hours per week x 52 weeks).

Its first position is the more correct one. It was not established that the work performed by Ms. San Pedro as an Instructional Aide or as a Playground Supervisor/Breakfast Aide is "on a seasonal, limited-term, on-call, emergency, intermittent, substitute, or other irregular basis," as those terms are used in section 20305(a)(3). Therefore, the criterion of working 1,000 hours minimum does not apply.

7. Under all of the circumstances herein, particularly the propriety of deferring to CalPERS in its interpretation of section 20305 and application of that interpretation to Ms. San Pedro, and that such application is not disallowed by the language of the statute, CalPERS is correct in its determination that Ms. San Pedro is entitled to membership.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The appeal by the Covina Valley Unified School District of the determination by CalPERS that Violeta R. San Pedro is eligible for membership is dismissed.

DATED: March 6, 2000.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings