

**ATTACHMENT C**  
**RESPONDENT'S ARGUMENT**

Lisa Handwerker

August 28, 2014

BY FAX [(916) 795-3972] AND CERTIFIED RETURN RECEIPT U.S. MAIL

Cheree Swedensky, Assistant to the Board  
CalPERS Executive Office  
P.O. Box 942701  
Sacramento, CA 94229-2701



RE: **RESPONDENT'S ARGUMENT**  
In the Matter of the CalPERS Membership of LISA  
HANDWERKER, Respondent and CALIFORNIA STATE  
UNIVERSITY, EAST BAY, Respondent  
Ref. No. 2011-0524 (OAH No. 2013080276)

Dear Members of the CalPERS Board of Administration,

I am the Respondent in the above-referenced matter. This letter constitutes my argument why the Board should decline to adopt the Proposed Decision in this matter, which the Administrative Law Judge ("ALJ") issued on June 30, 2014, in favor of its own decision. In the alternative, the Board should remand the matter to the ALJ for further evidentiary proceedings, for the reasons described below.

**I. Statement of Facts and Summary of Proceedings**

I have been a part-time temporary employee in the classification "Lecturer - Academic Year" in multiple departments at California State University ("CSU"), East Bay, formerly CSU, Hayward, since 1999. *See* Handwerker Exh. A, p. 2. CSU East Bay is a campus on "quarter system year-round operations." I worked more than half-time in three out of four consecutive quarters in 2003. *See* CalPERS Exh. 3, p. 2. Nevertheless, CalPERS originally determined that I did not qualify for CalPERS membership at the beginning of the next consecutive quarter, *i.e.*, Winter Quarter 2004, in which I also worked more than half-time, because I had worked less than half-time in one of the four consecutive quarters in 2003, *i.e.*, Summer Quarter 2003. Instead, CalPERS originally determined that I qualified for CalPERS membership only at the beginning of Summer Quarter 2006, specifically, on June 19, 2006. *See id.*

By letter dated February 14, 2011, and in response to inquiries from me regarding my membership date, CalPERS reiterated its original determination that I did not qualify for CalPERS membership at the beginning of Winter Quarter 2004. *See id.*, p. 4. However, CalPERS also concluded that I qualified for CalPERS membership one quarter earlier than originally determined, specifically, on March 27, 2006. *See id.*

By letter dated March 11, 2011, I timely appealed the determination that I did not qualify for CalPERS membership at the beginning of Winter Quarter 2004. *See* CalPERS Exh. 4. Accordingly, CalPERS's original Statement of Issues, dated October 17, 2013, appropriately stated: "This appeal is limited to the issue of whether respondent Handwerker should be granted a CalPERS membership date prior to March 27, 2006." CalPERS Exh. 1, p. 3. However, on the day of the hearing on June 18, 2014, more than eight (8) months after the submission of CalPERS's original Statement of the Issues on October 17, 2013, and more than seven (7) months after the original hearing date in this matter of November 14, 2013, CalPERS's staff counsel made a last-minute request to revise its Statement of the Issues so as to limit the appeal to the issue whether I should be granted a CalPERS membership date prior to June 19, 2006, the eligibility date as originally determined. The ALJ granted said request and, in a Proposed Decision dated June 30, 2014, determined that I met the requirements for CalPERS membership only on June 19, 2006.

**II. The ALJ's Determination that I Did Not Meet the Requirements for CalPERS Membership at the Beginning of Winter Quarter 2004 Must Be Reversed as a Misinterpretation of Government Code § 20305(a)(4)(A).**

The regulations governing the CSU specify that at campuses on quarter system year-round operations, "[a]cademic year employees will be appointed for an academic year composed of any three quarters out of four consecutive quarters." 5 CAL. CODE REGS. § 42751. An assignment for the remaining of the four consecutive quarters that constitute the academic year is an "extra quarter assignment" and is permissible only "[i]n exceptional circumstances." 5 CAL. CODE REGS. § 42754(a), (b). Crucially, "[n]o service credit for retirement . . . will be earned during this extra quarter." 5 CAL. CODE REGS. § 42754(e) (1) (italics supplied).

In three of the four quarters in 2003, I had assignments with a 8/15<sup>th</sup>—*i.e.*, more than half-time—timebase (winter, spring, and fall). *See* CalPERS Exh. 3, p. 2. In the remaining quarter, I had an assignment with a 4/15<sup>th</sup>—*i.e.*, less than half-time—timebase. *See id.* In the winter of 2004, the first quarter of 2004, I again had an assignment with more than a half-time timebase (8/15<sup>th</sup>). *See id.* All of these assignments were in classification 2358, *i.e.*, "Lecturer - Academic Year." *See* CalPERS Exh. 9, pp. 5, 104; <http://www.calstate.edu/HRAAdm/SalarySchedule/SalaryGrid.aspx?S1=1&F1=2358&D1=0&Page=1&Recs=15> (italics supplied).

The Proposed Decision nevertheless concluded that this service did not qualify me for CalPERS membership because in "[t]he summer of 2003, respondent worked less than half-time." Proposed Decision, p. 2, §7. This conclusion was based on an overly literal interpretation of Government Code section 20305(a)(4)(A), which excludes an employee whose appointment letter or employment contract does not fix a term of full-time, continuous employment in excess of six months from CalPERS membership unless he or she is a temporary CSU faculty member and:

He or she works for . . . three consecutive quarters at half-time or more . . . , in which case, membership shall be effective with the start of the next consecutive . . . quarter if the appointment requires service of half-time or more.

CAL. GOV'T CODE § 20305(a)(4)(A).

Under the Proposed Decision's overly literal interpretation of this section, a part-time lecturer with quarter-to-quarter appointments at a campus on quarter system year-round operations, such as myself, would meet the requirements for CalPERS membership only if he or she were appointed for four "consecutive" quarters at half-time or more, in which case he or she would qualify for CalPERS membership at the beginning of the fourth quarter. This is so because if the phrase "three consecutive quarters" in Government Code section 20305(a)(4)(A) is interpreted to mean "three quarters that immediately follow one another," then the phrase "the next consecutive quarter" in the same statute must be interpreted to mean "the next quarter that immediately follows the first three." However, this simply cannot be, because then a lecturer such as myself would *never* qualify for CalPERS membership under normal circumstances. CSU Technical Letter HR/Benefits 2003-27, which is on the subject of "Updated Eligibility Rules for Temporary Faculty Enrollment into CalPERS' Retirement Plan," describes these normal circumstances as follows:

Please note that for quarter campuses, the understanding is that a faculty employee normally works three consecutive quarters, takes one quarter off, then is brought into CalPERS membership if the appointment is half-time or more.

CalPERS Exh. 5, p. 2. However, contrary to CSU's interpretation of Government Code section 20305(a)(4)(A), under the Proposed Decision's overly literal interpretation of the same statute, a faculty member would *not* be "brought into CalPERS membership" after "tak[ing] one quarter off" even if "the [next] appointment is half-time or more," because the intervening quarter off would make the next quarter non-consecutive to the first three quarters of at least half-time employment.<sup>1</sup>

Moreover, under the Proposed Decision's interpretation of the statute, a lecturer such as myself would not be brought into CalPERS membership even if, "[i]n exceptional circumstances," he or she is given an "extra quarter assignment" for the remaining of the four consecutive quarters that constitute the academic year, because "*[n]o service credit for retirement . . . will be earned during this extra [fourth] quarter,*" which is an "extra quarter assignment." 5 CAL. CODE REGS. §§ 42751, 42754 (italics supplied). Thus, under the Proposed Decision's interpretation of the statute,

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<sup>1</sup> CalPERS manager Emily Perez de Flores testified at the hearing that even if, rather than working less than half-time, I would have taken off Summer Quarter 2003, the decision would have been the same, *i.e.*, the "intervening" quarter would have precluded CalPERS membership at the beginning of Winter Quarter 2004.

a lecturer such as myself would *never* be brought into CalPERS membership under any circumstances, be they “normal” or “exceptional,” which would render Government Code section 20305(a)(4)(A) almost entirely nugatory.<sup>2</sup> The Proposed Decision’s interpretation of the statute must therefore be rejected.

Lecturers on semester campuses, by contrast, never face a similar problem. As long as they work at least half time during the Fall Semester and the following Spring Semester, they qualify for CalPERS membership at the beginning of the following Fall Semester if they work at least half time then, too, regardless of whether or not they also work during the intervening winter or summer intersession.

The only interpretation of Government Code section 20305(a)(4)(A) that does not render it nugatory or create an absurd distinction between quarter and semester campuses is one under which a lecturer at a campus on quarter system year-round operations becomes a CalPERS member at the beginning of a quarter during which he/she works at least half-time and that is preceded by four consecutive quarters during three of which he/she worked at least half-time. It is undisputed that I met these requirements at the beginning of Winter Quarter 2004. I respectfully submit that the Board should find this to be my CalPERS membership date.

**III. In the Alternative, the ALJ’s Determination, Upon a Last-Minute Request by CalPERS’s Staff Counsel, that I Also Did Not Meet the Requirements for CalPERS Membership at the Beginning of Spring Quarter 2006, Must Be Reversed as Based on Insufficient Evidence.**

Even if the Board affirms the ALJ’s determination that I did not meet the criteria for CalPERS membership at the beginning of Winter Quarter 2004, I respectfully submit that the Board should still reverse the ALJ’s determination, upon a last-minute request by CalPERS’s staff counsel, that I also did not meet the criteria for CalPERS membership at the beginning of Spring Quarter 2006.

On February 14, 2011, CalPERS determined, “based on a review of . . . CSU, Hayward appointment information reported to CalPERS” reflecting a 8/15<sup>th</sup> timebase in Summer Quarter 2015, that “[s]tarting June 20, 2005, you [*i.e.*, Lisa Handwerker] worked half-time or more for three consecutive quarters to qualify for membership on March 27, 2006, which was your next qualifying appointment. CalPERS Exh. 3,

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<sup>2</sup> The only exception would be if the non-extra quarter assignments and quarters off in two successive academic years were manipulated such that the lecturer works four “consecutive” quarters *across* two academic years. For example, if the lecturer’s quarter off in the first academic year is winter, and his/her non-extra-quarter assignments in that year are spring, summer, and fall, then his/her quarter off in the second academic year would have to be moved to spring or later to create eligibility for CalPERS membership. This exception thus only serves to highlight the absurd consequences of the Proposed Decision’s interpretation of the statute.

pp. 2, 4. It continued: "This determination changes your previous membership date from *June 19, 2006 to March 27, 2006.*" *Id.*, p. 4 (italics supplied).

I timely appealed from said determination by letter dated March 11, 2011, arguing that "[i]n my case, the three quarters that should count in my first year should be Winter 2003, Spring 2003, and Fall 2003, which means that my CalPERS membership should have been effective Winter 2004." CalPERS Exh. 4.

CalPERS's original Statement of Issues, dated October 17, 2013, appropriately stated: "This appeal is limited to the issue of whether respondent Handwerker should be granted a CalPERS membership date *prior to March 27, 2006.*" CalPERS Exh. 1, p. 3 (italics supplied). However, on the day of the hearing on June 18, 2014, more than eight (8) months after the submission of CalPERS's original Statement of the Issues on October 17, 2013, and more than seven (7) months after the original hearing date in this matter of November 14, 2013, CalPERS made a last-minute request to revise its Statement of the Issues so as to limit the appeal to the issue whether I should be granted a CalPERS membership date *prior to June 19, 2006*, the eligibility date as originally determined. The ALJ granted this request, noting in her Proposed Decision only that "[u]pon subsequent review CalPERS determined that June 19, 2006, was the correct membership date." ALJ's Proposed Decision, p. 2.

I respectfully submit that the ALJ should not have granted this request, especially as I was not represented by counsel at the hearing. To entertain this request, without any excuse having been offered by CalPERS for the failure to give me prior notice,<sup>3</sup> unfairly prejudiced my position. Had I received such prior notice, I could have introduced into evidence an e-mail message from CalPERS Membership Analysis & Design Unit Manager Steve Propp, dated December 29, 2009, in which he listed not only a 4/15<sup>th</sup> appointment in position number ending in 226 for Summer Quarter 2005, which alone was later considered by CalPERS when it re-determined my CalPERS membership date, but also a 4/15<sup>th</sup> appointment in position number ending in 002, which was later ignored by CalPERS.<sup>4</sup> *Compare* Attachment A, p. 2, with CalPERS Exh. 9, pp. 104, 133. Based on the information available to him at the time, Mr. Propp determined that Summer Quarter 2005 was my "[f]irst qualifying quarter" and Spring Quarter 2006 was my "[f]ourth qualifying quarter," which is also the basis for CalPERS's determination on February 14, 2011, that I "qualif[ied] for membership on March 27, 2006." Attachment A, p. 3; CalPERS Exh. 3, p. 4.

In a case such as this one, in which the record is replete with missing and incorrect information, surely the information that was available to CalPERS in December of

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<sup>3</sup> CalPERS apparently knew of the "facts" that formed the basis for its request as early as November 4, 2013. See CalPERS Exh. 7 (listing only a 4/15<sup>th</sup> appointment in position number ending in 226 for Summer Quarter 2005 and stating that it was "[c]reated" on "11/4/13"). Thus, prior notice could have been given to me.

<sup>4</sup> A true and correct copy Mr. Propp's e-mail is attached hereto as Attachment "A" and included herein by this reference.

2009 and February of 2011 must be deemed to have been more complete and reliable than the information that was available during the "subsequent review," based on which CalPERS re-determined years later, and at any rate after the original hearing date in this matter of November 14, 2013, "that June 19, 2006, was the correct membership date." ALJ's Proposed Decision, p. 2.

Accordingly, the ALJ should not have granted CalPERS's last minute request, without any excuse for the failure to give me prior notice, and her decision to change my CalPERS membership date to March 27, 2006 was based on insufficient evidence, requiring at the very least a remand for further evidentiary proceedings.<sup>5</sup>

**IV. The Decision in this Matter, Which Involves Unique Factual Issues and Record Keeping Problems, Should Not Be Designated as Precedent.**

As discussed above, at CSU campuses on quarter system year-round operations, "a faculty employee normally works three consecutive quarters" and then "takes one quarter off." CalPERS Exh. 5, p. 2. This was not the case for me during the first period at issue here, when I worked seven (7) consecutive quarters, from Fall Quarter 2002 through Spring Quarter 2004, before I took a quarter off in Summer Quarter 2004. See CalPERS Exh. 9, pp. 4-5, 104. In addition, as also discussed above, the second period at issue here, Summer Quarter 2005, was marred by record keeping problems. Compare CalPERS Exh. 9, pp. 104, 133 (current CalPERS records reflecting no appointment in position number ending in 002 for Summer Quarter 2005) with Attachment A (e-mail message from CalPERS Membership Analysis & Design Unit Manager Steve Propp, dated December 29, 2009, reflecting 4/15<sup>th</sup> appointment in position number ending in 006 for Summer Quarter 2005). Because of these unique factual issues and record keeping problems, I respectfully submit that the Board's decision in this matter should not be designated as precedent.

**V. Conclusion**

For all the foregoing reasons, I respectfully submit that the Board should hold that I met the requirements for CalPERS membership at the beginning of Winter Quarter 2004. In the alternative, the Board should remand the matter to the ALJ for further evidentiary proceedings to determine whether I met the requirements for CalPERS membership at the beginning of Spring Quarter of 2006, rather than at the beginning of Summer Quarter of 2006, as the ALJ erroneously determined.

Sincerely,

  
8/28/2014  
Lisa Handwerker

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<sup>5</sup> In addition, the ALJ exceeded her authority, which was limited to my appeal from CalPERS's February 14, 2011 decision and did not extend to what was effectively a "cross-appeal" by CalPERS improperly seeking to modify that decision.

Attachment "A"

From: "Propp, Steven"

Subject: RE: IMPORTANT: HANDWERKER PIMS  
REPORT UPDATED?

Date: December 29, 2009 4:39:17 PM PST

To: 'Lisa Handwerker'

The chart below summarizes your employment history, for your various positions (identified by their state Position Number).

Here's what my staff is seeing: Although between 1/6/03 and 3/22/05 you were working at least half-time on several occasions, you had three periods (indicated in **RED** below; 6/23/03-9/10/03, 3/29/04-8/31/04, and 3/28/05-6/14/05) during which your time base dropped below half-time, which prevented you from getting the four consecutive quarters needed to qualify for membership.

You **did** begin to work half-time for four consecutive quarters beginning 6/20/05, and our original determination was that you qualified for membership effective 6/19/06.

So (unless some additional employment is missing from the chart below, that was extracted from PIMS), you would not have qualified for membership in 2003.

229-065-2358-001	229-015-2358-226	229-015-2358-002	229-360-2363-003
09/21/09 SCR 08 01/05			
09/21/09 405C 08 01/05	09/05/06 S31C 08 04/15		
09/21/09 CRO 08 08/15			
02/30/09 405 08 08/15			
03/22/08 A52 08 04/15			
02/11/08 S31 08 08/15			
07/01/08 SCRC 08 08/15			
06/23/08 505E 08 08/15		06/23/08 505E 08 04/15	
06/17/08 S31V TM 08/15			
04/01/08 405C 08 08/15			
09/24/07 A52C 08 04/15		09/24/07 A52C 08 04/15	
06/19/07 S31C 08 04/15			
04/02/07 A52C 08 04/15			
		03/27/07 S31C 08 04/15	
		01/08/07 MSA 08 04/15	
		01/08/07 A52 08 04/15	
03/05/06 S31C 08 04/15			
07/01/06 GEN 08 04/15			
07/01/06 GENF TM 04/15	07/01/06 GEN 08 04/15		
06/19/06 R01 08 04/15			
06/19/06 A52 TM 04/15	06/19/06 A52 08 04/15		
06/13/06 S31 TM 08/15			
03/27/06 A52 TM 08/15	Fourth qualifying quarter		
03/21/06 S31 TM 02/03		03/21/06 S31 TM 04/15	
01/03/06 A52C TM 02/03		01/03/06 A52 TM 04/15	Third qualifying quarter
12/13/05 S31 TM 04/15		12/13/05 S31 TM 04/15	
09/20/05 A52 TM 04/15		09/20/05 A52 TM 04/15	Second qualifying quarter
	09/06/05 S31C TM 04/15	09/06/05 S31F TM 04/15	
	07/01/06 GEN TM 04/15	07/01/05 GEN TM 04/15	
	06/20/05 A52 TM 04/15	06/20/05 A52 TM 04/15	First qualifying quarter
06/14/05 S31 TM 04/15			
03/28/05 A52 TM 04/15			
03/22/05 S31 TM 04/15		03/22/05 S31 TM 04/15	
01/03/05 A52 TM 04/15		01/03/05 A52 TM 04/15	
08/31/04 S31 TM 07/15			
03/29/04 405 TM 07/15			
		03/23/04 S31 TM 04/15	
01/05/04 405 TM 08/15		01/05/04 A52 TM 04/15	
			12/16/04 A54 TM IND
			11/01/03 A54 TM IND
09/23/03 A52C TM 08/15			
09/10/03 S31 TM 04/15			
06/23/03 A52 TM 04/15			
08/17/03 S31 TM 04/15		06/17/03 S31 TM 04/15	
04/01/03 A52 TM 04/15		04/01/03 A52 TM 04/15	
03/25/03 S31 TM 04/15		03/25/03 S31 TM 04/15	
01/06/03 A52 TM 04/15		01/06/03 A52 TM 04/15	

Now, I'm not sure why our staff person who made the original determination didn't determine that you were eligible for membership at the *start* of your fourth qualifying quarter, rather than *after* the fourth qualifying quarter. She's out of the office this week, so I won't be able to speak to her until next Monday.

Steve Propp, Manager  
Membership Analysis & Design Unit  
Employer Services Division