

ATTACHMENT A
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

I THE BOARD'S REQUEST FOR A FULL BOARD HEARING

The Board of Administration (Board) requested a Full Board Hearing in this matter at its September 17, 2014, meeting. The Proposed Decision issued by the Administrative Law Judge (ALJ) on June 30, 2014, affirmed CalPERS' determination that Respondent Lisa Handwerker (Respondent) met the requirements for membership in CalPERS as a temporary faculty member at California State University (CSU), East Bay beginning June 19, 2006. (A copy of the Proposed Decision is contained in Attachment D to this Agenda Item.) By ordering a Full Board Hearing, the Board will consider and determine itself whether the Proposed Decision is supported by the law and facts presented at the June 18, 2014, hearing before the ALJ.

II SUMMARY OF THE CASE

Respondent has been employed as a temporary faculty member by CSU East Bay, from September 21, 1999 to the present. CSU East Bay uses a year-round quarter system. During her temporary employment at CSU East Bay, Respondent has worked sporadically at a time base of half-time or more. In the fall of 2005, she began working the first of three consecutive quarters at a time base of more than half-time. By the end of the 2006 spring quarter, Respondent had worked three consecutive quarters at half-time or more. Respondent's next consecutive quarter at half-time or more was in the summer of 2006. Therefore, CalPERS staff determined that Respondent's membership date began June 19, 2006, which reflected the next consecutive quarter after she had worked three consecutive quarters at half-time or more.

Thereafter, Respondent contacted CalPERS to inquire about whether she qualified for an earlier membership date. CalPERS staff reviewed the documentation provided by Respondent and applicable statutes regarding membership for temporary faculty members of the CSU, and determined that she qualified for membership on March 27, 2006. CalPERS staff sent Respondent a letter dated February 14, 2011, informing her of its determination. The letter explained that, pursuant to Government Code section 20305 subdivision (a)(4)(A) of the California Public Employees' Retirement Law (PERL), CalPERS membership for temporary faculty at a year-round quarter system, such as CSU East Bay, is based upon working three consecutive quarters at half-time or more, and that includes the summer quarter. Respondent appealed, stating she should qualify for CalPERS membership in the winter of 2004.

An evidentiary hearing was held on June 18, 2014, before an ALJ of the Office of Administrative Hearings. Based upon additional review before the hearing, CalPERS staff determined that its original determination date of June 19, 2006, is Respondent's correct membership date. Thus, on the record at the hearing, and as permitted by the Administrative Procedures Act, CalPERS amended the Statement of Issues to reflect

the change in Respondent's effective membership date from March 27, 2006, to the original determination date of June 19, 2006. Accordingly, the issue to be decided by the ALJ was whether Respondent should be granted a CalPERS membership date prior to June 19, 2006.

The ALJ issued a Proposed Decision on June 30, 2014, finding that Respondent met the requirements for membership eligibility in CalPERS beginning June 19, 2006, pursuant to Government Code section 20305(a)(4)(A). Furthermore, the ALJ concluded that the Education Code and the Rules and Regulations pursuant to the Education Code do not apply to this determination. Consequently, she denied Respondent's appeal of the effective date of her CalPERS membership. The Proposed Decision came before the Board at its meeting on September 17, 2014, with a staff argument to adopt the Proposed Decision. Respondent submitted her written argument that the Board should reject the Proposed Decision, and decide the matter itself; or alternatively, remand the matter to the ALJ for further evidentiary proceedings. The Board declined to adopt the Proposed Decision and voted to conduct a Full Board Hearing before making its decision in this matter.

III ISSUE PRESENTED

Is Respondent entitled to a CalPERS membership date prior to June 19, 2006?

IV FACTUAL BACKGROUND

Respondent began her employment on the faculty at CSU East Bay in 1999 and is still employed there. Prior to 2003, Respondent did not work at a time base of half-time or more. From January 1, 2003 to June 20, 2005, Respondent worked, at most, two consecutive quarters at half-time or more. Beginning in the fall quarter of 2005, Respondent worked at a time base of more than half-time, and continued working in positions at half-time or more for the consecutive quarters in winter of 2006, and spring of 2006. Having worked three consecutive quarters between the fall quarter of 2005, and the spring quarter of 2006, Respondent became eligible, under the PERL, for CalPERS membership at the start of the next consecutive quarter that she worked half-time or more, which was the start of summer quarter of 2006.

Respondent's employment history, as described above, was obtained by staff from the Personnel Information Management System (PIMS). Based on that employment history, CalPERS determined Respondent's membership date as June 19, 2006.

At the June 18, 2014, hearing, Emily DeFlores, Staff Services Manager II of the Membership Management Section in the Customer Account Services Division, testified for CalPERS. She explained that the PERL provides the rules for establishing membership into CalPERS for CSU temporary faculty members. Ms. DeFlores described the documentation that staff reviews to determine membership eligibility for

CSU faculty, including the PIMS. (Attachment F to Agenda Item, Reporter's Transcript, hereinafter referred to as "RT", pp. 15 of 83 and 16 of 83.) Ms. DeFlores indicated that the PIMS is the system CSU employers use to record employment information such as appointment to and separation from employment, and time base worked. Often part-time faculty have more than one position so, when determining membership eligibility for CSU faculty, staff must look at each of the positions and the time-base for those positions as reflected in the PIMS. (RT pp. 16 of 83 and 22 of 83.)

Ms. DeFlores established that by inputting Respondent's social security number into the PIMS, it provided a list of all the positions she held at CSU, with the corresponding position numbers. (RT pp. 18 of 83-20 of 83.) Further, she testified that, in addition to providing the position numbers, the PIMS records included the details of employment, such as the time base, job title, and salary of each position. (RT pp. 20 of 83 and 21 of 83.) The specific PIMS records that provide the position numbers and employment details of Respondent's various appointments and employment history at CSU were included in CalPERS exhibits. (Exhibit 9 in Attachment G to Agenda Item. Attachment G contains CalPERS Administrative Hearing Exhibits, consisting of Exhibits 1-5, 7-9.)

Through her testimony, Ms. DeFlores provided a synopsis of the information contained in the PIMS records related to Respondent's CSU employment. (RT pp. 20 of 83-22 of 83.) She also provided that synopsis in a chart and spreadsheet that she created to more easily identify the quarters Respondent worked less than half-time, and more than half-time. (Attachment G, Exhibit 7.) Based on her review of Respondent's work history, as reflected in the PIMS records, Ms. DeFlores stated that Respondent worked three consecutive quarters at half-time or more at the end of the spring quarter in 2006. The next consecutive quarter that Respondent worked at half-time or more was the summer of 2006, which started on June 19, 2006. (RT pp. 22 of 83 and 23 of 83.) Thus, pursuant to the PERL, June 19, 2006, is the date Respondent qualified for CalPERS membership. (RT p. 23 of 83.)

Regarding the incorrect March 27, 2006 date, Ms. DeFlores clarified that Respondent's time base for the summer of 2005, was inaccurately reported as more than half-time on the chart on page 2 of the February 14, 2011, letter sent to Respondent. (Attachment G, Exhibit 3.) However, based on the PIMS records, Respondent actually worked less than half-time in the summer of 2005. (RT pp. 32 of 83 and 33 of 83; Attachment G, Exhibit 9, p. 132 of 211.) Therefore, the March 27, 2006 membership date is incorrect. (RT p. 24 of 83.)

When asked whether Respondent would have been admitted to CalPERS membership sooner than 2006, if she had worked more than half-time in the summer of 2003, Ms. DeFlores answered that, if Respondent had worked at more than half-time in the summer of 2003, she would have qualified for membership in the fall of 2003, not the winter of 2004. (RT p. 39 of 83.) In response to the hypothetical question if Respondent had not worked at all in the summer of 2003, would she have been admitted to CalPERS membership prior to 2006, Ms. DeFlores responded that, if she had not worked at all in the summer of 2003, Respondent would not have worked the

three consecutive quarters required for membership, so she would not have qualified for membership prior to 2006. (RT p. 40 of 83.)

At the June 18, 2014 hearing, Respondent testified that she believed her CalPERS membership should be effective in the winter of 2004. (RT p. 50 of 83.) She cited to Title 5 California Code of Regulations (CCR) section 42751 of the Education Code as the basis for this conclusion because it describes an academic year as being "composed of any three quarters out of four consecutive quarters." Specifically, Respondent said that since she worked more than half-time in the winter of 2003, spring of 2003, and fall of 2003, and then more than half-time in the winter of 2004, she qualified for CalPERS membership in winter of 2004. (RT p. 53 of 83.) According to Respondent, summer of 2003 was not part of her academic year as described in Title 5 CCR section 42751, so it should not count "against" her. (RT p. 54 of 83.)

Respondent further testified that Board Member Diehr agreed with her position, and produced emails she exchanged with him, as well as emails from Dr. Diehr to CalPERS staff. (RT p. 66 of 83 and 67 of 83; Respondent's Exhibits in Attachment H, Exhibit J; Attachment I, Exhibit K.) Respondent also acknowledged that the correction that was made regarding when she qualified for CalPERS membership, which changed her membership date from March 27, 2006, back to June 19, 2006, was based upon her employment history, as reflected in the PIMS records. (RT p. 76 of 83.)

V ARGUMENT

Staff recommends that the Board adopt the ALJ's Proposed Decision for the following reasons:

A. The Proposed Decision Follows the Law as Written in the PERL.

Government Code section 20125 provides, in relevant part, that:

"The board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system."

For a temporary faculty member at a CSU quarter campus, such as CSU East Bay, to establish CalPERS membership, Government Code section 20305 provides, in relevant part, that:

(a) An employee whose appointment or employment contract does not fix a term of full-time, continuous employment in excess of six months is excluded from this system unless:

(4) He or she is a temporary faculty member of the California State University and meets one of the following conditions:

(A) He or she works two consecutive semesters or three consecutive quarters at half-time or more, and is not otherwise excluded pursuant to this article, in which case, membership shall be effective with the start of the next consecutive semester or quarter if the appointment requires service of half-time or more.

As Government Code section 20305(a)(4)(A) clearly indicates, and the ALJ found in the Proposed Decision, Respondent had to teach three consecutive quarters at half-time or more, and then became eligible for membership at the start of the next consecutive quarter in which she worked half-time or more. According to the PIMS records, Respondent worked at half-time or more in the three consecutive quarters of: fall of 2005, winter of 2006, and spring of 2006. Thus, the ALJ concluded, Respondent met the requirements of the Government Code for membership in CalPERS beginning June 19, 2006. The ALJ's conclusion follows the law; therefore the Board should adopt the Proposed Decision.

B. Respondent is Not Entitled to a CalPERS Membership Date Prior to June 19, 2006.

Respondent's work history, as reported by her employer and reflected in the PIMS, shows that she worked three consecutive quarters at half-time or more in the fall of 2005, winter of 2006, and spring of 2006. The PIMS records also show that after those three consecutive quarters, Respondent's next consecutive quarter at half-time or more was the summer of 2006, resulting in a CalPERS effective membership date of June 19, 2006.

1. Respondent's Request for a Membership Date at the Beginning of Winter Quarter of 2004, Violates the PERL.

Respondent appealed the determination that her membership began on June 19, 2006, and instead urges the Board to find that her membership began in January of 2004. Respondent argues that the three consecutive quarters establishing her membership date are: winter 2003, spring 2003, and fall 2003; thereby providing her with a CalPERS membership date in January of 2004. The problem with Respondent's request is that winter, spring, and fall are not three consecutive quarters, since the absence of summer causes a break in the three consecutive quarters needed to establish CalPERS membership. Accordingly, providing Respondent with an effective membership date at the start of winter quarter of 2004, would allow her membership to be effective after she worked only one quarter at half-time or more. Such a conclusion clearly violates the requirement in Government Code section 20305(a)(4)(A) that membership shall be effective at the start of the next consecutive quarter of an appointment at half-time or more, after a temporary faculty member works three consecutive quarters at half-time or more.

2. The Education Code is Irrelevant to Determining the Effective Date of CalPERS Membership.

Undaunted by the clear language in Government Code section 20305(a)(4)(A), Respondent relies on Title 5 CCR section 42751 in the Education Code to support that her membership in CalPERS should begin at the start of the winter quarter of 2004. However, the regulations in the Education Code cannot be relied upon to establish Respondent's membership date in CalPERS, because the California Public Employees' Retirement System is governed by the PERL, not the Education Code, and the PERL provides the rules for establishing membership into CalPERS.¹ As the ALJ correctly concluded in the Proposed Decision, the Education Code and the Regulations pursuant to the Education Code, including Title 5 CCR section 42751, do not apply to the determination in this matter. (Attachment D, p. 8 of 21.)

Moreover, if the Legislature meant to allow temporary faculty of the CSU to establish membership according to the guidelines written in Title 5 CCR section 42751 of the Education Code, regarding an academic year being any three quarters out of four consecutive quarters, it would have incorporated that language from section 42751 as the requirement to establish membership into the PERL; but that is not what the PERL indicates. Instead, section 20305(a)(4)(A) plainly states that a faculty member must work three consecutive quarters at half-time or more, and membership becomes effective at the start of the next consecutive quarter of employment at half-time or more.

3. The October 2, 2003 CSU Technical Letter Supports the Proposed Decision.

Beyond the regulations in the Education Code, Respondent cites a CSU technical letter dated October 2, 2003, (Attachment G, Exhibit 5) to support her assertion that quarters are treated differently, and they do not need to be consecutive for a temporary faculty member to establish CalPERS membership eligibility. (RT p. 58 of 83.) In addition, Respondent argues that, based on the interpretation of Government Code section 20305(a)(4)(A) in the Proposed Decision, a faculty member would never qualify for CalPERS membership under the "normal circumstances" described in the CSU technical letter. Although the PERL, not a CSU technical letter, provides the basis for determining the effective date of a temporary faculty member's CalPERS membership, the October 2, 2003, technical letter supports the Proposed Decision, as it explains:

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. If the employee works a fourth, consecutive quarter at half-

¹ Title 5 CCR section 42700 in the Education Code provides definitions of various terms in the CSU system. The February 14, 2011, determination letter (Attachment G, Exhibit 3) cited section 42700 in several footnotes to give a general background of the terms "appointment" and "academic year" as used at CSU campuses. However, the regulations in the Education Code are not dispositive of a faculty member's eligibility for CalPERS membership, the PERL is.

time or more, the employee should be enrolled at the beginning of that fourth quarter. (Attachment G, Exhibit 5, p. 20 of 211.)

The technical letter describes the exact circumstances under which Respondent was brought into CalPERS membership – at the beginning of the summer quarter of 2006, which was her fourth consecutive quarter working at half-time or more. In addition, if Respondent had taken the summer quarter of 2006 off and returned in the fall of 2006 at half-time or more, as the technical letter describes “normally” occurs, then her membership would have begun at the start of the fall quarter of 2006, since that would have been the start of the next consecutive quarter at half-time or more, as required under Government Code section 20305(a)(4)(A).

4. There Is No Basis to Provide Respondent With an Effective Membership Date of March 27, 2006.

Respondent asserts that the ALJ should not have granted CalPERS' request to amend the Statement of Issues at the hearing, which changed the date of her membership eligibility from March 27, 2006, (the start of the 2006 spring quarter) back to June 19, 2006, (the original date determined by CalPERS). However, the amendment was done in accordance with section 11507 of the Administrative Procedures Act (APA), which governs the administrative hearing process, and allows an agency to amend the Statement of Issues at any time before the matter is submitted to the ALJ for decision.

As for Respondent's allegation that granting this amendment unfairly prejudiced her, section 11507 of the APA also affords respondents a reasonable opportunity to prepare a defense to the amendment. Although the amendment was made on the record at the hearing, the ALJ offered to postpone the hearing so that Respondent could have additional time to prepare as a result of the amendment. Respondent declined the offer of additional time and elected to proceed with the hearing. (RT p. 8 of 83.) The ALJ also indicated that if there was anything that was needed because of the amendment, “we might have to give some time to get it in if there's any kind of other documents that we need.” (RT p. 8 of 83.) Despite the ALJ's efforts to afford Respondent with additional time to respond to the amendment to the Statement of Issues, neither Respondent, nor her representative, offered any additional response to the amendment.

Respondent additionally argues that there is insufficient evidence for the amendment to the Statement of Issues changing her membership eligibility date from March 27, 2006, to June 19, 2006, and seeks to have the Board provide her with the March 27, 2006, membership date. But, as Ms. DeFlores explained during her testimony, the March 27, 2006 date referenced in CalPERS February 14, 2011, determination letter, was based on an incorrect assumption that Respondent had worked more than half-time in the summer quarter of 2005, whereas the PIMS records reflected that she worked less than half-time in the summer of 2005. (RT pp. 24 of 83-25 of 83; 32 of 83-33 of 83.) Consequently, Respondent did not have the requisite three quarters at half-time or more by the start of the spring quarter in 2006, to support membership eligibility

on March 27, 2006. There is no evidence anywhere in the record to support Respondent's request for a membership date earlier than June 19, 2006.

**VI
CONCLUSION**

The only way to provide Respondent with a membership date in 2004 is to rewrite the PERL. Providing Respondent with a CalPERS membership date beginning in the winter quarter of 2004, would violate the PERL because it would allow her membership to become effective after she worked only one quarter at half-time or more, rather than the three consecutive quarters required by Government Code section 20305(a)(4)(A).

Because it correctly applies the law, the Proposed Decision should be adopted. Staff argues that the Board should find that Respondent is not entitled to an effective CalPERS membership date prior to June 19, 2006.

November 19, 2014



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