

ATTACHMENT B
RESPONDENT'S ARGUMENT

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BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Effective Date of
CalPERS Membership of:

LISA HANDWERKER,

Respondent,

and

CALIFORNIA STATE UNIVERSITY EAST BAY

Respondent.

CASE NO. 2011-0524
OAH No. 2013080276

RESPONDENT'S ARGUMENT



I. Statement of Facts and Summary of Proceedings

Respondent Lisa Handwerker (“Handwerker”) has 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. 2.¹ CSU East Bay is a campus on “quarter system year-round operations.” Handwerker 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 she did not qualify for CalPERS membership at the beginning of the next consecutive quarter, *i.e.*, Winter Quarter 2004, in which she also worked more than half-time, because she 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 she 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 Handwerker regarding her membership date, CalPERS reiterated its original determination that she did not qualify for CalPERS membership at the beginning of Winter Quarter 2004. *See id.*, p. 4. However, CalPERS also concluded that she qualified for CalPERS membership one quarter earlier than originally determined, specifically, on March 27, 2006. *See id.*

By letter dated March 11, 2011, Handwerker timely appealed the determination that she did not qualify for CalPERS membership at the beginning of

¹ Exhibits in the Administrative Record shall be referred to as “Handwerker Exh.” And “CalPERS Exh.,” respectively, followed by the exhibit number and page number.

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 Handwerker 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 Handwerker met the requirements for CalPERS membership only on June 19, 2006.

II. The ALJ's Determination that Handwerker 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, Handwerker had assignments with a 8/15th—*i.e.*, more than half-time—timebase (winter, spring, and fall). *See* CalPERS Exh. 3, p. 2. In the remaining quarter, she had an assignment with a 4/15th—*i.e.*, less than half-time—timebase. *See id.* In the winter of 2004, the first quarter of 2004, she again had an assignment with more than a half-time timebase (8/15th). *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/HRAdm/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 Handwerker 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 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.

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 Handwerker, 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 Handwerker 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.

Contrary to CSU's interpretation of Government Code section 20305(a)(4)(A) reflected in the block quote immediately above, 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.³

Moreover, under the Proposed Decision's interpretation of the statute, a lecturer such as Handwerker 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, a lecturer such as Handwerker 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.⁴ 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

³ CalPERS manager Emily Perez de Flores testified at the hearing that even if, rather than working less than half-time, Handwerker had 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.

⁴ 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.

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 Handwerker met these requirements at the beginning of Winter Quarter 2004. The Board should find this to be Handwerker's CalPERS membership date.

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

There is conflicting evidence whether Handwerker worked at least half-time in Summer Quarter 2005, in which case she met the requirements for CalPERS membership at the beginning of Spring Quarter 2006. In an e-mail message to Handwerker dated December 29, 2009, CalPERS Membership Analysis & Design Unit Manager Steve Propp listed not only a 4/15th appointment in position number ending in 226 for Summer Quarter 2005, which alone was later considered by CalPERS when it re-determined her CalPERS membership date, but also a 4/15th appointment in position number ending in 002, which was later ignored by CalPERS

and is not reflected in its exhibits. *Compare* Respondent's Request for Introduction of Evidence Which is Not Contained in the Administrative Record ("Request"), filed herewith, 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 Handwerker's "[f]irst qualifying quarter" and that Spring Quarter 2006 was her "[f]ourth qualifying quarter," which is also the basis for CalPERS's determination on February 14, 2011, that Handwerker "qualif[ied] for membership on March 27, 2006." Request, 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 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's decision to change Handwerker's CalPERS membership date to March 27, 2006 was based on insufficient evidence and should be reversed.⁵

III. Conclusion

For all the foregoing reasons, Handwerker respectfully submits that the Board should hold that she met the requirements for CalPERS membership at the

⁵ In addition, the ALJ exceeded her authority, which was limited to Handwerker's 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.

beginning of Winter Quarter 2004. In the alternative, the Board should hold that she met the requirements for CalPERS membership at the beginning of Spring Quarter 2006, rather than at the beginning of Summer Quarter of 2006.

DATED: NOVEMBER 3, 2014

SIGNED: _____



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BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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CASE NO. 2011-0524
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RESPONDENT'S REQUEST FOR
INTRODUCTION OF EVIDENCE
WHICH IS NOT CONTAINED IN
THE ADMINISTRATIVE
RECORD

I. Introduction

Respondent Lisa Handwerker ("Handwerker") hereby respectfully makes this request for introduction of evidence which is not contained in the Administrative Record. The evidence in question is an e-mail message from CalPERS Membership Analysis and Design Unit Manager Stephen Propp to Handwerker. A true and correct copy of said e-mail message is attached hereto as Attachment "A" and incorporated herein by this reference. Introduction of this evidence is proper because, based on CalPERS's original Statement of Issues, Handwerker could not reasonably have foreseen that the e-mail message would have any relevance with regard to the issue described in that statement.

II. Good Cause Exists Why the Evidence Could Not, with Reasonable Diligence, Have Been Discovered and Produced at the Hearing.

On February 14, 2011, CalPERS determined, "based on a review of . . . CSU, Hayward appointment information reported to CalPERS" reflecting a 8/15th timebase in Summer Quarter 2005, that "[s]tarting June 20, 2005, you [*i.e.*, 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, 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).

Handwerker 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 Handwerker 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.

The ALJ should not have granted this request, especially as Handwerker 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 Handwerker prior notice,¹ unfairly prejudiced her position. Had Handwerker received such prior notice, she could have introduced Attachment A into evidence. Attachment A is an e-mail message from CalPERS Membership Analysis & Design Unit Manager Steve Propp to Handwerker, dated December 29, 2009, in which he listed not only a

¹ 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 4/15th 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 Handwerker.

4/15th appointment in position number ending in 226 for Summer Quarter 2005, which alone was later considered by CalPERS when it re-determined Handwerker's CalPERS membership date, but also a 4/15th appointment in position number ending in 002, which was later ignored by CalPERS. *Compare* Attachment A, p. 2, with CalPERS Exh. 9, pp. 104, 133. Based on this information, Mr. Propp determined that Summer Quarter 2005 was Handwerker's "[f]irst qualifying quarter" and Spring Quarter 2006 was her "[f]ourth qualifying quarter," which is also the basis for CalPERS's determination on February 14, 2011, that Handwerker "qualif[ied] for membership on March 27, 2006." Attachment A, p. 3; CalPERS Exh. 3, p. 4.

However, without any prior notice of CalPERS's intent to request a revision of its original Issue Statement, which stated that "This appeal is limited to the issue of whether respondent Handwerker should be granted a CalPERS membership date *prior to March 27, 2006*," Handwerker could not reasonably have known that Attachment A would be relevant at the hearing. CalPERS Exh. 1, p. 3 (italics supplied). Attachment A is irrelevant to CalPERS's original Issue Statement. It is relevant only to CalPERS's revised Issue Statement, *i.e.*, the question whether Handwerker should be granted a CalPERS membership date *prior to June 19, 2006*.

III. The Evidence Is Relevant to the Issue Whether Handwerker Should be Granted a CalPERS Membership Date Prior to June 19, 2006.

In his e-mail message to Handwerker dated December 29, 2009, CalPERS Membership Analysis & Design Unit Manager Steve Propp stated: "You **did** begin to work half-time for four consecutive quarters beginning 6/20/05." Attachment A, p. 1 (emphasis in original). Mr. Propp also noted an 8/15th timebase for March 27,

2006, the beginning of the “[f]ourth qualifying quarter.” *Id.*, p. 2. Mr. Propp finally wondered “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.” *Id.* These statements make Attachment plainly relevant to the issue whether Handwerker should be granted a CalPERS membership date prior to June 19, 2006.

IV. The Evidence Is Otherwise Admissible Under the Evidentiary Rules of the Administrative Procedure Act.

California Government Code § 11513(c) provides:

Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

CAL. GOV’T CODE § 11513(c). The e-mail message from CalPERS Membership Analysis & Design Unit Manager Steve Propp to Handwerker, dated December 29, 2009, clearly is “the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” It therefore is admissible.

California Government Code § 11513(c) also provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

CAL. GOV’T CODE § 11513(c). However, California Evidence Code § 1222 provides that “[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule” if “[t]he statement was made by a person authorized by the party to

make a statement or statements for him concerning the subject matter of the statement." CAL. EVIDENCE CODE § 1222. Here, there can be no dispute whether CalPERS Membership Analysis & Design Unit Manager Steve Propp was authorized to make statements for CalPERS to Handwerker concerning her CalPERS membership. Accordingly, Attachment A is sufficient itself to support a finding that Handwerker should be granted a CalPERS membership date prior to June 19, 2006.

V. Conclusion

For all the foregoing reasons, Handwerker respectfully submits that the Board should grant this Request for Introduction of Evidence Which Is Not Contained in the Administrative Record.

DATED: NOVEMBER 3, 2014

SIGNED: _____



BERNHARD ROHRBACHER
ATTORNEY FOR RESPONDENT
LISA HANDWERKER

Attachment "A"

From: "Propp, Steven"

**Subject: RE: IMPORTANT: HANDWERKER PIMS
REPORT UPDATED?**

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

To: 'Lisa Handwerker' <[redacted]>

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	09/05/08 S31C 08 04/15		
09/21/09 CRD 08 08/15			
03/30/09 405 08 08/15			
09/22/08 A52 08 04/15			
09/11/08 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	
		01/02/07 MSA 08 04/15	
		01/03/07 A52 08 04/15	
09/05/08 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	
	07/01/05 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			
06/17/03 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 S31TM 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

PROOF OF SERVICE

I am over the age of 18 years and not a party to the above-referenced matter. I declare that I am self-employed. My business address is: 5911 El Mio Drive, Los Angeles, CA 90042

On November 3, 2014, I caused

RESPONDENT'S ARGUMENT

and

RESPONDENT'S REQUEST FOR INTRODUCTION OF EVIDENCE WHICH IS NOT CONTAINED IN THE ADMINISTRATIVE RECORD

in CalPERS Case No. 2011-0524 (In the Matter of the Effective Date of CalPERS Membership of Lisa Handwerker) to be served on Respondent California State University, East Bay, by placing true copies thereof enclosed in a sealed envelope addressed as follows and depositing said envelope with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California:

California State University, East Bay
25800 Hillary Street
Hayward, CA 94542

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 3, 2014, at Los Angeles, California.



Signed: _____
Bernhard Rohrbacher