

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Amended Statement of Issues
Against:

LEONIS C. MALBURG and
CITY OF VERNON,

Respondents.

Case No. 2014-0542

OAH No. 2014080341

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on October 20, 2014, in Glendale.

Elizabeth Yelland, Senior Staff Attorney, represented Complainant Anthony Suine.

Anthony Murray, Esq., and Patrick N. Downes, Esq., Loeb & Loeb LLP, represented Leonis C. Malburg (Respondent), who was present. No appearance was made by or on behalf of the City of Vernon (the City).

The record remained open after the hearing for the parties to submit closing briefs. The ALJ issued an order identifying the briefs received, as well as the status of Respondent's requests that notice be taken of three documents attached to his closing briefs.

The record was closed and the matter submitted for decision on January 5, 2015.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Amended Statement of Issues was filed on Complainant's behalf in his official capacity as the Chief of the Benefit Services Division for the California Public Employees' Retirement System (PERS).
2. Respondent was appointed as a councilmember for the City, and became a local miscellaneous member of PERS on or about September 1, 1956.

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3. PERS is a defined benefit plan. Benefits for its members are funded by employee and employer contributions, as well as by interest and other earnings on those contributions. The amount of an employee's contributions is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a rate to the payroll of the agency. Using certain actuarial assumptions specified by law, PERS' Board of Administration (the Board) sets employer contribution rates annually.

4. The City is a contracting agency with PERS for retirement benefits for its eligible employees. The provisions of the City's contract with PERS are governed by the California Public Employees' Retirement Law. (Gov. Code, § 20000 et seq.)

5. On June 22, 2008, the City contracted with PERS to give an enhanced benefit formula of 2.7 percent at 55 years of age for local miscellaneous members who were actively employed on or after June 22, 2008.

6. Respondent retired from service with the City effective July 1, 2009, and began receiving a monthly service allowance of \$7,362.04. A few months later, he was convicted of perjury.

7. After much written correspondence between the parties discussed in more detail below, by a letter dated February 18, 2014, PERS advised Respondent that because of his conviction, the portion of his service credit that arose on and after the commission of his crime (October 25, 2006, through July 1, 2009) would be forfeited, his monthly service allowance reduced to \$3,767.80, and he would be required to reimburse PERS for overpayments.

8. By an appeal dated March 17, 2014, Respondent requested a hearing to contest PERS' proposed actions. In the appeal, Respondent argued: a) his perjury conviction did not subject his pension to forfeiture because his crime did not arise directly out of his official duties; b) his conviction had been expunged and by operation of law he was released from all penalties and disabilities (including forfeiture of pension benefits) resulting from his conviction; c) PERS had misconstrued the forfeiture provision; and d) there was no evidence supporting his perjury conviction.

Respondent's Retirement and Conviction for Perjury

9. An indictment was filed against Respondent on October 25, 2007, containing various charges, including one count of perjury.

10. An amended indictment was filed against Respondent on November 21, 2008, which also included one count of perjury among the various charges.

11. On or about September 8, 2009, Respondent signed and submitted to PERS his application for a service retirement, effective July 1, 2009. He thereafter began receiving his retirement allowance.

12. At the time of his retirement, Respondent was credited with 57.479 years of service. His final monthly compensation (determined by the highest consecutive 12 month period) was \$5,671.00, based on the time period of July 1, 2008, through June 30, 2009. Because he was actively employed by the City on and after June 22, 2008, he received the 2.7 percent enhanced benefit. Based on those three factors, PERS calculated Respondent's monthly service benefit to be \$7,362.04. The monthly allowance was later increased to \$7,812.60 due to a 2014 cost of living adjustment (COLA).

13. A. On December 4, 2009, the Superior Court of the State of California, Los Angeles County, after a court trial, returned a verdict of guilty on various charges of the amended indictment, including one felony count of violating Penal Code section 118, subdivision (a), perjury.

B. On January 21, 2010, the judgment for Respondent's conviction was entered along with his sentencing. Imposition of sentence was suspended and Respondent was placed on formal probation for five years, under various terms including that he pay fines in the amount of \$51,000.00 pursuant to the Elections Code (of which \$10,000.00 was attributable to the perjury count), pay penalty assessments in the amount of \$132,600.00, and pay restitution to the City in the amount of \$395,588.00.

14. As established by the elements of the crime for which he was convicted in count five of the amended indictment, on March 24, 2006, Respondent did unlawfully, under penalty of perjury, declare that his adult son resided at a particular address in the City, which he knew to be false. Other evidence presented in the instant hearing established by a preponderance that Respondent's act of perjury was done in connection with the City's election on April 11, 2006, in which Respondent was re-elected to City Council. It was also established that although Respondent's son was registered to vote in that election, he failed to actually vote. (Respondent's testimony; ex. 13, p. 41; ex. 23B, Supp. Req. for Jud. Not., ex. C.) The restitution award was based on Respondent's compensation for serving on City Council for the term of which he was elected in April 2006 until he retired.

15. Respondent timely appealed his conviction. On November 30, 2011, the Court of Appeal affirmed the conviction, except for two counts not involving the one for perjury. Respondent filed a petition for review with the California Supreme Court. On March 14, 2012, the Supreme Court denied Respondent's petition, without prejudice to any relief which Respondent might be entitled after the Court decided four other related cases. The outcome of those other cases did not effect Respondent's appeal. Remittitur was filed with the trial court on April 10, 2012, and Respondent's conviction became final.

16. On May 1, 2012, the Superior Court of the State of California, County of Los Angeles, granted Respondent's motion for expungement. As a result, the trial court terminated Respondent's probation pursuant to Penal Code section 1203.3, set aside the conviction, entered a plea of not guilty to all the counts, and dismissed the entire case pursuant to Penal Code section 1203.4.

17. On a date or dates not established, Respondent paid the fines, fees and restitution required by the terms of his probation, totaling \$579,188.00.

PERS Contends Respondent is Subject to Forfeiture of Some Pension Benefits

18. On a date not established, PERS became aware that Respondent had been convicted of perjury.

19. By letters dated March 17 and 23, 2011, PERS informed Respondent that it construed his conviction for perjury as being "in relation to your official duties as Council Member for the City," which triggered the pension benefit forfeiture provision of Government Code section 1243. PERS advised Respondent that his service credit would be reduced by 2.623 years of service and his monthly retirement allowance would be reduced to \$3,830.13. PERS also advised Respondent that the reduction was retroactive and he would be responsible for reimbursing PERS for overpayments (then) totaling \$79,120.56.

20. By a letter dated April 11, 2011, Respondent's counsel advised PERS that the proposed reduction was improper because the perjury conviction was under appeal and therefore was not final. Respondent's counsel requested that the instant matter be stayed pending the outcome of his criminal appeal.

21. By a letter dated May 13, 2011, PERS notified Respondent that it would not proceed with the pension forfeiture proceeding until final determination of Respondent's appeal of his perjury conviction.

22. By a letter dated February 18, 2014, PERS advised Respondent that it believed his perjury conviction had become final and that it intended to go forward with the pension forfeiture proceeding against him. In response, Respondent did not dispute the finality of his conviction; instead, he argued that the pension forfeiture provision of Government Code section 1243 did not apply to his perjury conviction, as explained above in Factual Finding 8.

23. A. PERS has determined that, based on the operation of Government Code section 1243, Respondent forfeited the portion of his service credit that arose on and after the commission of his crime. PERS determined the period to be from the commencement of the term for which he was elected (October 25, 2006) through the effective date of his retirement (July 1, 2009), which equals 2.623 years of service credit.

B. PERS also determined that Respondent is no longer eligible for the formula enhancement (2.7 percent at 55) contracted for by the City because he could no longer be deemed to have been actively employed on or after June 22, 2008.

C. PERS therefore proposed to reduce Respondent's monthly service allowance to \$3,767.80. However, due to the 2014 COLA, PERS calculated that Respondent's monthly retirement allowance should be \$4,078.27.

D. PERS also demanded that Respondent reimburse it \$209,961.24 of overpayments, which is the difference between the monthly retirement allowance actually paid to Respondent since he retired and the proposed reduced amount. The proposed overpayment increases as Respondent receives his monthly retirement allowance.

24. Respondent does not dispute any of PERS' calculations. He maintains that his perjury conviction does not trigger the forfeiture provision of the Government Code for various reasons and that his monthly retirement allowance is not subject to any reduction.

Other Relevant Information

25. On October 16, 2012, PERS and the City executed Resolution No. 2012-192. This resolution recites various contracts and amendments between the parties, including those effective June 30, 2002, and February 6, 2005. (Ex. 21, Req. for Jud. Not., ex. A.) By operation of that resolution and the prior contracts and amendments recited in it, Respondent was first eligible to retire from service for the City at the age of 55, which was in April 1984.

26. The conduct of elections in the City is generally the responsibility of the City Clerk, although the City Council has some responsibilities after an election. (Ex. 23B, Supp. Req. for Jud. Not., ex. C; ex. 20, Vernon City Code, CH: 3.4, p. 107.)

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476.)

2. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, the court considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found "the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence."

3. In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

4. In this case, the parties agree that Respondent has the burden of establishing by a preponderance of the evidence that his monthly retirement allowance is not subject to any reduction by forfeiture.

Forfeiture of Benefits Due to a Qualifying Conviction

5. Government Code section 1243 became effective in 2006. It was amended and re-numbered as section 7522.70 pursuant to the California Public Employees' Pension Reform Act of 2013 (PEPRA), which became effective January 1, 2013.¹ Section 7522.70, in part, provides:

(a) This section shall apply to any elected public officer who takes public office, or is reelected to public office, on or after January 1, 2006.

(b) If an elected public officer is convicted during or after holding office of any felony involving accepting or giving, or offering to give, any bribe, the embezzlement of public money, extortion or theft of public money, perjury, or conspiracy to commit any of those crimes arising directly out of his or her official duties as an elected public officer, he or she shall forfeit all rights and benefits under, and membership in, any public retirement system in which he or she is a member, effective on the date of final conviction.

(c) The elected public officer described in subdivision (b) shall forfeit only that portion of his or her rights and benefits that accrued on or after January 1, 2006, on account of his or her service in the elected public office held when the felony occurred.

(d) Any contributions made by the elected public officer described in subdivision (b) to the public retirement system that arose directly from or accrued solely as a result of his or her forfeited service as an elected public officer shall be returned, without interest, to the public officer.

[¶] . . . [¶]

(g) For purposes of this section, "public officer" means an officer of the state, or an officer of a county, city, city and county, district, or authority, or any department, division, bureau, board, commission, agency, or instrumentality of any of these entities.

Did Respondent's Crime Arise Directly Out of His Duties as an Elected Public Officer?

6. A. There is no dispute that Respondent's conviction for perjury is one of the crimes specifically listed in section 7522.70. However, Respondent argues the statute does not apply to him because his crime was committed in the process of registering his adult son to vote in the April 2006 election and therefore did not arise "directly out of his . . . official duties as an elected public officer. . . ."

¹ All further statutory references are to the Government Code unless noted otherwise.

B. Specifically, Respondent argues he had no official duty as a member of City Council to state where his son lived for purposes of voting. He also argues that it is the City Clerk who is generally responsible for conducting elections in the City, not members of City Council (although the City Council has some duties after an election is over). Respondent appears to argue that the forfeiture provision of section 7522.70 only applies when the crime in question was committed while engaging in official duties specifically referenced in an ordinance or job description issued by the public entity in question.

7. There are no appellate cases decided under section 7522.70 or its predecessor that explain the statute. Deciding this issue is simply a matter of how to construe the statute. Respondent's argument has some merit on its face, but a deeper review indicates that the phrasing "arising directly out of his or her official duties" should not be as narrowly interpreted as Respondent suggests. Respondent's crime was committed in the process of being re-elected to City Council, the position which allowed him to continue to accrue service credit in his pension. The connection between his crime and his service on City Council is demonstrated by the fact that the restitution award ordered as part of his criminal probation required him to repay the City his compensation while serving on City Council after being re-elected in April 2006. Interestingly, Respondent's conviction of a felony disqualified him from continuing to serve in office under state law. (Gov. Code, §§ 1770, subd. (h), 1770.2.) And his conviction for perjury, which is a crime involving moral turpitude (*In re: Kristovich* (1976) 18 Cal.3d 468), similarly disqualified him from serving under the City's law. (Vernon City Code, CH: 3.8, ex. 20, p. 108.) In summary, Respondent's crime was committed in connection with his re-election, disqualified him from continuing to serve in that capacity, and warranted the disgorgement of the compensation paid to him while serving after being re-elected.

8. Section 7522.70 and its predecessor appear aimed at providing PERS redress for public officials increasing their public pension benefits as a result of crimes committed while in office and related to their official duties. In that sense, it is also a penalty against the offending public official. Other parts of the Government Code provide the remedy of ousting from office a public official guilty of such crimes. Criminal courts have tools at their disposal to force guilty public officials to disgorge their compensation while serving in office. What remains is preventing such public officials from fattening their pension benefits as a result of and after committing qualifying crimes. Construing section 7522.70 as Respondent suggests would lead to the absurd result outlined above, i.e., Respondent could commit a crime related to his being elected to office, be disqualified from continuing to serve in office, disgorge his compensation earned while serving in office after his crime, and yet continue to increase his pension benefits after committing his crime.

9. Under these circumstances, the requirement that a qualifying crime is one "arising directly out of" the duties of an elected public officer should be more generally construed as meaning the crime has a reasonable connection with the public official's position. In this case, Respondent's crime is deemed to have arisen directly out of his duties on the City Council and therefore is a crime for which he is subject to forfeiture by section 7522.70. (Factual Findings 1-24.)

Does the Expungement of Respondent's Conviction Prevent Forfeiture?

10. In 2012, Respondent's conviction, including the perjury count, was dismissed and "expunged" pursuant to Penal Code section 1203.4. When a conviction is dismissed under that statute, the convicted person "shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted except as provided in Section 13555 of the Vehicle Code." Penal Code section 1203.4 provides some additional circumstances when release is not available, none of which apply here. On its face, this language means that Respondent's expungement releases him from the penalty of pension benefit forfeiture as a result of his conviction.

11. A. As mentioned above, PEPRA became effective on January 1, 2013, after Respondent's conviction was expunged. PEPRA includes Government Code section 7522.72, subdivision (c)(1), which provides that a public employee's pension rights and benefits "shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the public employee's conviction." When Respondent's conviction was expunged in 2012, the pension forfeiture provision was still contained in Government Code section 1243. At that time, there was nothing in section 1243 that provided an exception to the relief provided by Penal Code section 1203.4 similar to that now contained in section 7522.72. Every part of a statute must be presumed to have some effect and a construction that renders surplusage should be avoided. (*People v. Arias* (2008) 45 Cal.4th 169, 180.) This demonstrates that, before PEPRA became effective in 2013, the relief provided by Penal Code section 1203.4 was available to vitiate forfeiture provided by section 1243. Otherwise there would have been no purpose in adding the provision in section 7522.72, subdivision (c)(1), plainly stating that such relief is no longer available.

B. Another canon of statutory interpretation is that statutes do not operate retroactively unless the Legislature plainly intended them to do so. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) The presumption against retroactive application is grounded in principles of due process and proscriptions against ex post facto laws. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841.) Thus, a statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application. (*Id.* at p. 844.) Here, section 7522.72 is ambiguous on this point. Although the statute states it applies to public employees or officials first employed or elected before January 1, 2013, it is silent as to whether it applies to convictions expunged before its effective date. In his closing brief, Complainant does not argue that section 7522.72 can be retroactively applied; in fact, Complainant does not urge application of section 7522.72 at all. Instead, as discussed in more detail below, Complainant argues that Penal Code section 1203.4 is not applicable. Under these circumstances, it cannot be concluded that section 7522.72, subdivision (c)(1), expresses a clear intent of retroactivity, and therefore it cannot be retroactively applied to Respondent, who obtained his expungement before section 7522.72 became effective.

C. Since there were no exceptions to the relief provided by Penal Code section 1203.4 applicable to Respondent when his conviction was expunged in 2012, the forfeiture provided by section 7522.70 and its predecessor is not applicable to Respondent because the expungement of his conviction released him from all penalties and disabilities resulting from his conviction.

12. A. Complainant contends that the relief provided by Penal Code section 1203.4 is not applicable in this case, because that relief is intended only to release one from “criminal” penalties and disabilities, not from those penalties or disabilities that are “civil” in nature. However, Complainant did not cite any appellate authority stating that precisely. The ALJ is unaware of any published appellate decision creating a bright-line between “criminal” and “civil” penalties and disabilities for purposes of Penal Code section 1203.4. In fact, if the relief provided by Penal Code section 1203.4 is not applicable to pension forfeiture, it is hard to imagine why the Legislature would have added section 7522.72, subdivision (c)(1).

B. Complainant cites language from *Adams v. County of Sacramento* (1991) 235 Cal.App.3d 872, in which the court stated that section 1203.4 “merely frees the convicted felon from certain ‘penalties and disabilities’ of a criminal or like nature.” (*Id.* at pp. 880-881.) Complainant cites no California authority holding that the forfeiture of pension benefits is a “civil” penalty or disability. The cases from other states cited by Complainant are not relevant, as they do not relate to PEPRA. Even so, it is hard to conclude that the forfeiture of pension rights and benefits as a result of a conviction is anything other than a penalty or disability “of a criminal or like nature.”

C. In any event, the many California appellate decisions cited by Complainant, including *Adams v. County of Sacramento*, all revolve around the legal axis that a conviction expunged pursuant to Penal Code section 1203.4 can still support cause to terminate a public employee, revoke a license or deny an application for a license. That is because preclusion from certain types of public employment or from holding certain kinds of licenses or licensing rights “is not the kind of penalty or disability which is eliminated by expungement. Such preclusion is intended for the protection of the public, not as further punishment of the convicted felon.” (*Adams v. County of Sacramento, supra*, 235 Cal.App.3d 872, 880-881.)

D. In this case, neither party cited any provision from PEPRA indicating that the forfeiture of pension rights as a result of a conviction is intended to protect the public, as opposed to simply a way of punishing the involved elected official and preventing him from benefitting by ill-gotten gains. It is easy to see how preventing a convicted felon from serving in certain public positions or having a license to engage in activity with the public are matters of public protection. But Complainant failed to cite anything from PEPRA demonstrating a similar intent. If anything, the forfeiture provision of section 7522.70 seems intended to amplify the penalties of being convicted for acts related to serving the public.

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13. Respondent established by a preponderance of the evidence that he is released from the penalty and disability imposed by the forfeiture provision of section 7522.70 as a result of his conviction being expunged in 2012 pursuant to Penal Code section 1203.4. As his pension rights and benefits are not subject to forfeiture, none of the reductions to his pension rights and benefits proposed by PERS are warranted. (Factual Findings 1-24.)

14. Respondent also argues that his pension rights and benefits are not subject to reduction because his pension vested when he turned 55 in 1984, and thereafter when the agreement between PERS and the City was amended in 2002 and 2005, which events all preceded the enactment of the initial forfeiture provision of section 1243 in 2006. Based on Legal Conclusion 13 above, however, it is unnecessary to resolve that argument.

ORDER

The appeal of Respondent Leonis C. Malburg is granted. PERS shall not reduce his pension rights and benefits as proposed in its letter dated February 18, 2014.

DATED: January 16, 2015



ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings