ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal Regarding Retired Annuitant Employment of: DAVID L. WHEELER, Respondent, and LOOMIS FIRE PROTECTION DISTRICT, Respondent.	Case No. No. 2014-0152 OAH No. 2014020769

PROPOSED DECISION

This matter was heard before Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings (OAH), on October 8, 9, and 10, 2014, and April 13, and 14, 2015, in Sacramento, California.

Wesley E. Kennedy, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Will M. Yamada, Attorney at Law,[1] represented the Loomis Fire Protection District (respondent District or District) and David Wheeler (respondent) who was present.

Evidence was received and the record remained open for parties to submit written closing arguments, which were timely received, and marked as Exhibits.[2] On August 4, 2015, CalPERS lodged an electronic copy of the hearing transcripts. The communication

[1] Will M. Yamada, Attorney at Law, Novey, Tribuiano & Yamada, LLP, 2222 Watt Avenue, Suite B-1, Sacramento, California 95825.

[2] Initial Closing Briefs were submitted by CalPERS and respondents, and marked as Exhibit 22 and Exhibit U, respectively. Reply Closing Briefs were submitted by CalPERS and respondents, and marked as Exhibit 23 and Exhibit V, respectively. CalPERS also filed a Notice of Errata in Closing Argument, which was marked as Exhibit 24.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
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and accompanying CD-ROM were marked as Exhibits 25 and 26, respectively. The record closed on August 17, 2015.

SUMMARY

Respondent retired from State service in 2006 and began receiving retirement benefits. In 2007, he was hired by the Loomis Fire Protection District to be the District's Fire Chief. At the time, the District was not a CalPERS public agency. However, in September 2010, the District contracted for CalPERS to administer retirement benefits to their employees. CalPERS notified respondent that he was required to resign or reinstate into active CalPERS membership because his position was not excluded from the fire safety classification and he did not meet statutory requirements for retired annuitant status.

Respondent sought to maintain his part-time Fire Chief position while concurrently receiving his retirement allowance. He attempted to amend his subsequent employment contracts to satisfy the Public Employment Retirement Law (PERL). In November 2013, CalPERS finalized an audit, which found that respondent's post-retirement employment was in violation of the PERL and that he was required to reimburse CalPERS for retirement benefits received from September 2010 to the date of his resignation from the District. Respondent finally resigned his Fire Chief position in December 2013, over three years after the problem of his continued employment with the District was first identified. Respondent and the District appealed. The facts presented at hearing support a finding that respondent's post-retirement employment as Fire Chief for the District violated the PERL.

FACTUAL FINDINGS

1. On February 21, 2014, petitioner, Anthony Suine, Chief Benefit Services Division, Board of Administration California Public Employees' Retirement System (CalPERS) made and filed the Statement of Issues in his official capacity. CalPERS alleged that respondent, who had previously retired from membership and was receiving retirement benefits, was required to reinstate into CalPERS when his post-retirement employer became a new public agency member of CalPERS. Respondent appealed CalPERS' determination.

Respondent's Relevant Employment History

2. Respondent worked for the Alameda Fire Department from 1978 to 2006. Effective in December 2006, respondent retired from Alameda as Assistant Fire Chief and began receiving his retirement allowance. He subsequently moved to Loomis.

3. When a vacancy occurred for the position of Fire Chief in the Loomis Fire Protection District (District), respondent applied. Respondent worked as Fire Chief for the District from September 1, 2007, through December 31, 2013, pursuant to a series of formal employment agreements.

4. When respondent started working for the District in September 2007, the District was not a member of CalPERS. A year later, in October 2008, the District initiated formal negotiations to become a CalPERS public agency for the purpose of providing retirement benefits to its eligible employees. Effective September 11, 2010, the District became a contracting CalPERS public agency. By virtue of its public agency membership the District was subject to the provisions of the Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.)

Respondent's Employment Agreements with District

5. *August 2007 Agreement.* The initial employment agreement ("Agreement for Professional Services for Fire Chief") between respondent and the District was dated August 29, 2007. Under "Scope of Duties" respondent was required to work "a minimum of twenty (20) hours per week." The first employment agreement was effective September 1, 2007, for a "three (3) year period through August 31, 2010 (Initial Term) unless otherwise terminated" and was renewable for an additional term, on agreement of the parties.

Respondent's monthly salary was set at $3,500, with an annual cost of living adjustment of up to five percent, expenses, educational reimbursement, and a District owned automobile or mileage reimbursement. The District Fire Chief, as stated in the job description/District Policy Handbook (Policy No. 2300):

> receives administrative direction from the [District Board] in the planning, directing and reviewing of the activities and operations of the Fire Department including fire suppression, prevention, and support services; exercises direct supervision over technical and clerical staff, coordinates assigned activities with other City and county departments and outside agencies; provides...administrative support to the Fire District Board of Directors; ...

6. *October 2008 Agreement.* The first amendment ("Amendement-1") to respondent's initial employment agreement was dated October 30, 2008. The first amendment only changed respondent's compensation schedule (Section 5). Respondent's salary was retroactively increased effective July 2008 to $4,229.68, with increases in January 2009 (to $4,525.76), and January 2010 (to $5,035.34). The amendment also established "out of district emergency response" pay ($73 to $87 per hour), an annual "uniform allowance" ($650 to $700 per year), and an annual "management benefit" ($800 to $850 per year) for reimbursement of expenses related to technology, medical co-pays, eyeglasses, and dental care. All other sections of the August 2007 Agreement remained in place.

7. *January 2011 Agreement.* The District and respondent entered into a revised employment agreement ("Agreement for Temporary Professional Services for Fire Chief") effective January 1, 2011. The agreement was signed February 9, 2011. By this agreement, respondent filled the position of Fire Chief as a "retired annuitant, on a temporary bases [*sic*], as described in ...Government Code section 21224." Under Scope of Duties, this agreement provided:

> [Respondent] shall work for the District, as a retired annuitant not exceeding a total of 960 hours within a fiscal year beginning July 1st and ending June 30th in accordance [sic] employment of [CalPERS]; Government Code section 21224.

The term of this agreement was one year, effective January 1, 2011. Respondent's base compensation was $5,035.34 with additional compensation for out-of-district emergency responses ($87.05 per hour), management benefit re-imbursement ($900), uniform allowance ($750), and professional liability protection insurance.

8. *January 2012 Agreement.* The District and respondent entered into another revised "Agreement for Temporary Professional Services for Fire Chief" effective January 1, 2012, for a term of one year. Notably, this agreement was not signed until eight months later on September 12, 2012. The scope of respondent's employment remained "as a retired annuitant, on a temporary bases [*sic*]," not "exceeding a total of 960 hours within a fiscal year beginning July 1st and ending June 30th in accordance [with]... Government Code section 21224." His compensation package remained the same.

9. *January 2013 Agreement.* The District and respondent entered into another revised "Agreement for Professional Services for Fire Chief" effective January 1, 2013, for a term of one year. This final agreement between the parties was signed February 13, 2013. This 2013 Agreement deleted all reference to "temporary employment," instead describing the Fire Chief as:

> ...a part-time employee. The position of Fire Chief for the [District] is not included within the contract with [CalPERS]. Therefore the conditions for [respondent's] employment in the positon of Fire Chief as a retired annuitant, as described in [Government Code section 21224] does not apply.

The Scope of Duties was also modified to state, "[Respondent] shall work for the District as a part-time employee not exceeding a total of 960 hours within the fiscal year beginning July 1st and ending June 30th." Reference to Government Code section 21224 was deleted.

Public Agency Negotiations between District and CalPERS

10. On October 22, 2008, respondent, on behalf of the District, initiated membership into CalPERS as a public agency by mailing to CalPERS the necessary forms. These forms included a New Agency Questionnaire, Certificate of Existence, CON-10/20 forms for all employees,[3] and job descriptions. At that time, the District maintained nine employees: a Fire Chief (respondent), Secretary (Barbara Leak), two Fire Captains, three Fire Engineers, and two Fire Fighters. The New Agency Questionnaire contained basic information on CalPERS membership and laws, and identified "the two general categories the agency may provide coverage for":

> 1) Local Miscellaneous Members (all employees of a contracting agency except safety employees), and
>
> 2) Local Safety Members (safety groups: police officers, fire fighters, county peace officers, sheriff, and other safety officers)... If the contract is to include a safety category, job specifications for all safety positions must be submitted and reviewed to determine if they qualify for safety status, as defined in the Government Code.
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> ...**all** employees in a covered category must be enrolled as members of [CalPERS] unless they are specifically excluded by the Government Code. (Underline & Bold in Original.)

The New Agency Questionnaire also identified types of employees that could be excluded under the PERL to include persons who are members of another retirement system (Gov. Code, § 20303); persons whose employment contract fixes a term of full-time, continuous employment of six months or less; persons whose part-time position requires less than an average of 20 hours a week; and persons employed in seasonal, limited-term, on-call, emergency, intermittent, substitute, or other irregular basis until the employee works more than 125 days or 1,000 hours in a fiscal year. (Gov. Code, § 20305.)

11. In addition to drafting his own employment Agreements with the District, respondent was the District's primary contact person in negotiations with CalPERS. On October 21, 2008, respondent completed and signed the New Agency Questionnaire, on behalf of the District, indicating that it had one "miscellaneous" employee (the Secretary) and seven "fire" employees. Respondent identified two positions to be excluded from CalPERS membership: the Fire Chief [respondent wrote: "PERS retiree, working less than 960 hours annually"] and a Resident Firefighter [respondent wrote "Temp employee, less than 960 hours annually"].

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[3] The CON-10/20 form provided identifying information for each employee to include gender, social security number, date of birth, hire date, base monthly pay, average monthly special compensation, and percent of full-time, position title.

12. CalPERS mailed a letter to the District on December 17, 2008, confirming that three positions, the Firefighter II, Fire Engineer, and Fire Captain, were eligible for safety membership in CalPERS. This letter made no mention of the Fire Chief position which respondent sought to exclude. However, this letter did provide the definition of "safety" membership, as defined in the PERL, as follows:

> These positions meet the criteria of Government Code section 20433, the applicable statute which defines "safety" membership for such positions by reflecting principal duties of "active firefighting" and/or qualifying "as firefighters or equal or higher rank, irrespective of the duties to which they are assigned." (Quotes in original.)

13. On December 18, 2008, CalPERS' Actuarial and Employer Services Branch mailed another letter to the District enclosing copies of the actuarial valuations and a summary of benefits and exclusions for the "Safety" membership category. The letter explained that the District was permitted to contract with CalPERS by category: Police, Fire, and/or Miscellaneous employees. The District was not required to include all categories. However, "all employees in a covered category must be members of the Retirement System unless they are specifically excluded by the Government Code." Examples of excludable individuals were listed as employees serving on a part-time basis for less than an average of 20 hours a week, employees contracted to work full-time for six months or less, and employees working less than 125 days or 1,000 hours in a fiscal year.

14. In 2009 and 2010, CalPERS and the District continued negotiations over the terms of the Proposed Safety Plan. CalPERS prepared actuarial valuations dated March 31, 2009, and February 28, 2010, both based on the District enrolling seven active safety members. According to respondent, this excluded the Fire Chief and one temporary Firefighter, both working less than 960 hours annually. (Factual Finding 10.) Actuarial valuations were completed by CalPERS on or about April 22, 2010. The District proceeded to sign a letter of intent and complete the required agency actions including holding an employee election and adopting a Resolution of Intention (adopted on June 9, 2010).

15. The final contract between CalPERS and the District for administration of retirement benefits was effective September 11, 2010. Two classes of employees were covered by the contract: Local Fire Fighters (local safety members), and Non-Local Safety (local miscellaneous members). Police members were expressly excluded from membership in the retirement system.

16. On October 13, 2010, CalPERS' Retirement Contract Services Division sent an internal memorandum to CalPERS' Benefit Services Division, informing them that the contracting process was complete, the effective date of the contract was September 11, 2010, and that respondent had been identified as a "retiree" employed by the agency.

17. By letter on December 22, 2010, CalPERS Retirement Program Specialist Liz Burke explained to respondent how the District's membership in CalPERS affected his CalPERS service retirement. She notified respondent that: "Retirement law prohibits a member from receiving a retirement allowance and working on a permanent basis for a CalPERS-covered agency." Respondent's options were to: 1) reinstate from retirement (Gov. Code, §§ 21202, 21200), or 2) stop working for the District. Ms. Burke wrote:

> I understand you were told you could work as a retired annuitant for 960 hours or less in a fiscal year; however, that is only true if you are a temporary appointment. A retired annuitant is a temporary appointment in which; (1) the employment is during an emergency to prevent stoppage of public business or, (2) the retired member has specialized skills needed in performing work that is temporary in nature. The conditions of this type of employment are (1) the hours worked cannot exceed 960 hours in a fiscal year for all employers, and (2) the rate of pay for this employment should not be less than the minimum nor exceed that paid by the employer to other employees performing comparable duties (Government Code section 21224).

In this December 2010 letter, Ms. Burke further explained that CalPERS' Membership Analysis and Design Unit had reviewed respondent's August 2007, to December 2010 employment agreements to determine the nature of his employment. She noted that the relevant employment agreements required respondent to work "a minimum of 20 hours a week which is more than 960 hours in a fiscal year for a period of 3 years which is not temporary." She added:

> If you decide to stop working, we will consider treating your employment with [the District] from September 11, 2010, as under Government Code section 21224 as long as you did not exceeded 960 hours total.
>
> Please provide a response to this letter by January 31, 2011. If we do not receive a response by that date, we will stop your retirement warrant on March 1, 2011 and reinstate you retroactive to September 11, 2010.

18. Respondent contacted Ms. Burke by phone after he received her December 22, 2010 letter. She verbally explained to him that he had been working under a three-year contract that did not fit the retired annuitant provisions and this was a violation of the PERL. Ms. Burke testified that because respondent did not receive notice to "reinstate or quit" until December 22, 2010, had he chosen to stop working in December 2010, he would not have been required to make retroactive payments back to the CalPERS contract date of September 11, 2010.

19. Ronald Gow has been a CalPERS Retirement Program Specialist II for ten years. In this position he reviews membership issues and exclusions, mostly for safety, peace officers, and independent contractors. Mr. Gow testified that he reviewed the District's Job Description for Fire Chief and deemed this a "safety position." He noted that amongst other Essential Duties, the Fire Chief "responds to major emergencies and personally oversees emergency scene activities as necessary, directs and participates in the research of alternative approaches to fire suppression, hazardous material handling, fire and life safety code, and emergency programs, prepares a variety of technical and Departmental activities as related to the Fire Department..." The District's qualifications for Fire Chief required eight years of command experience and supervisory experience in an organized fire department, including five years of administrative and supervisory responsibility in fire protection programs. Under Working Conditions: the Fire Chief was required to work indoors and outdoors, travel to emergency scenes as necessary, may be exposed to dust, noise, smoke, fumes, slippery and uneven surfaces, machinery, moving objects or other vehicles while in the field; and may be exposed to varying climates and high and low temperatures in the field.

20. Mr. Gow determined that respondent's positon as Fire Chief was part of a group: the safety classification. This is important because respondent was seeking to be excluded from the contract between CalPERS and the District, which governed all "safety" personnel. Mr. Gow spoke to respondent by phone in December 2010, and explained that the PERL allowed exclusions for "groups of employees" not for individual employees. The PERL states: "The contract shall not provide for the exclusion of some, but not all , firefighters, police officers, county peace officers, or local sheriffs." (Gov. Code, § 20502.) Mr. Gow sent an email to Liz Burk on December 27, 2010, memorializing his discussion with respondent.

21. Respondent sent his written response to Ms. Burke on January 17, 2011. He stated that he did not want to reinstate from retirement. He stated that the District had the "understanding I would be able to complete the remaining 3 months of my contract which expired December 31, 2010, as a '*retired annuitant.*'" (*Italics* in original.) Respondent also explained that the District had "not filled the position of Fire Chief and has retained my services as a temporary employee as described in California Government Code section 21224 for a period not to exceed 1 year..." Respondent expressed assurances that his hours would not exceed 960 for the fiscal year July 1, 2010, through June 30, 2011. Respondent subsequently signed an employment agreement, on February 9, 2011, for a term of one year effective January 1, 2011, to work as a retired annuitant not to exceed 960 hours.

22. Ms. Burke had a telephone conversation with respondent after she received his letter in January 2011. She testified that after speaking to him, it was her understanding that respondent would continue to work through September 11, 2011. Though Ms. Burke did not specifically tell respondent that he could validly work for the District until September 11, 2011, she testified that he could have, as long as his hours did not exceed 960. She explained that retired annuitants are doing work of "limited duration," not filling a permanent position. As examples she cited units needing experienced help with tax processing done once a year,

or staff to fill in when an employee is on medical leave or when work load is more than regular staff can complete. In respondent's case, he was performing the duties of the Fire Chief, there was only one Fire Chief position and respondent was it. Ms. Burke testified that as long as respondent and the District were "in compliance with either statute [Gov. Code, §§ 21221, 21224], we would be fine with it."

23. After her telephone call with respondent, Ms. Burke mailed District Secretary Barbara Leak a copy of a CalPERS informational document entitled "Public Agency-Temporary Employment of CalPERS Retired Members." This document covered the relevant statutes for retired annuitants. (Gov. Code, §§ 21221, subd. (h) & 21224.) Neither Ms. Burke nor Mr. Gow had any further discussions with respondent until January or February 2013, when CalPERS' public affairs division received a call from a reporter asking about respondent's employment with the District.

24. Ms. Burke next contacted respondent in 2013 to ask if he was still working for the District. She assumed he had stopped working in 2011. Respondent informed her that he was still working for the District and that his position was excluded. Ms. Burke asked respondent to send information showing it was excluded. On February 7, 2013, respondent faxed documents that were part of earlier negotiations with CalPERS as well as a copy of his contract effective January 1, 2012, which was curiously not signed until September 12, 2012. Respondent also included a copy of the Job Description for Fire Chief. Ms. Burke forwarded the documentation to the Employer Contracts Division of CalPERS. An agency audit of the District was subsequently opened.

CalPERS Public Agency Review (Audit)

25. Terry Heffelfinger is a Staff Program Evaluator for CalPERS. She was the lead auditor in the District's audit which was initiated in March 2013. The scope of the audit was December 2010 to December 2012. The audit consisted of three steps: 1) an initial on-site "entrance conference," to obtain documents and complete a general agency questionnaire in order to arrive at preliminary findings, 2) an "exit conference" to review preliminary findings with the agency and obtain more documents in order to finalize preliminary findings, and 3) issue a Draft Report, provide a copy to the agency, and obtain agency responses to be included in the Final Report.

26. Two weeks before her initial on-site visit, Ms. Heffelfinger contacted Ms. Leak, District Secretary, and requested documents including the organization chart, employee roster, list of temporary part-time individuals, a list of retired annuitants, independent contractors, 1099 forms, and all of respondent's employment agreements from 2007 through 2012. At the entrance conference on March 26, 2013, Ms. Heffelfinger met with Ms. Leak and respondent. Ms. Leak informed Ms. Heffelfinger that respondent was retired and working in a permanent position. Respondent stated that his position was "excluded" from the contract. Ms. Heffelfinger informed them that she did not see an exclusion of the Fire Chief position in the CalPERS contract and the law did not allow one person to be excluded. Ms. Heffelfinger reviewed Ms. Burke's December 22, 2010 letter by

which respondent was on notice that he either needed to resign or reinstate. Ms. Heffelfinger also spoke to Ms. Burke, Retirement Program Specialist, about any prior conversations with respondent. Ms. Heffelfinger learned that respondent had stated he was not going to reinstate, and he clearly did not resign, but continued working.

27. Ms. Heffelfinger's preliminary findings were that respondent's employment violated the PERL. She testified that this was not based on whether the number of hours worked was less than 960, but because he was working in a "permanent position – it wasn't work of a limited duration." She noted that respondent's 2011 and 2012 employment agreements stated "temporary." However, Ms. Heffelfinger surmised that in fact, respondent was filling a "permanent position" and "it was recurring." She determined that it was not an "extra help" type of assignment. His initial employment agreement was for a term of three years. Further, there was no evidence that the covered agency was recruiting to fill the position, - "actively seeking to fill the position." (Gov. Code, §§ 21221, subd. (h), 21224).) Ms. Heffelfinger testified that if the District had given her documents showing they were actively recruiting it might have made a difference in her findings.

28. Ms. Heffelfinger's preliminary findings were reviewed by Alan Feblowitz and Mike Dutil, both managers Audit Unit. CalPERs completed their Draft Audit Report in June 2013, and Final Audit Report in November 2013. Finding 1 of the Audit found that "The District unlawfully employed a retired annuitant." The audit report contained a factual statement (Condition), as is summarized below:

> A retired annuitant [respondent] was unlawfully employed due to the annuitant's permanent employment without reinstatement from retirement. Respondent's initial employment agreement effective September 1, 2007, predated the CalPERS contract with the District. CalPERS notified respondent on December 22, 2010, that his employment at the District on a permanent basis required he either reinstate from retirement or stop working at the District. Respondent wrote on January 17, 2011, that he did not wish to reinstate, and he had been "retained as a temporary employee as described in Government Code section 21224 for a period not to exceed one year. Despite this representation, however, the retired annuitant continued to work at the District without reinstating from retirement." At the time the audit started, respondent had been the District's Fire Chief for over five years.
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> Although respondent's employment agreements with the District stated "temporary assignment not to exceed one year," respondent's assignment had continued on a recurring basis with no break in employment for over five years. Based on these facts, CalPERS "determined that [respondent's] appointment as the District Fire Chief was a permanent appointment rather than

an appointment to perform work of a limited duration in accordance with Government Code section 21221(h), or Government Code section 7522.56(c), and therefore [respondent] should have reinstated from retirement or left the position if he wanted to continue to receive his retirement allowance."

CalPERS' "contract with the District did not include an exclusion for the position of Fire Chief. The PERL does not permit an employer to provide retirement benefits to some but not all members of a membership classification." (Gov. Code, § 20479.) "Because the position of Fire Chief meets the definition of local firefighter, that position was not and could not have been excluded from the contract."

29. By letter dated January 8, 2014, CalPERS notified respondent that his retirement benefits would stop effective March 1, 2014, that he would be reinstated from service retirement effective September 11, 2010, and he would be responsible for reimbursing CalPERS for all retirement benefits he had received from September 11, 2010 to January 31, 2014, which was approximately $461,459. He would also be required to pay all retirement contributions that should have been deducted from his earnings for that period, plus interest. Respondent exercised his right to appeal the CalPERS' Audit Report Findings and requested an administrative hearing.

Respondent's Testimony

30. Respondent testified at hearing. When he began working for the District in 2007, employees did not have retirement benefits. In 2008 and 2009, respondent worked with the District to secure funding, form a collective bargaining agreement, produce a Memorandum of Understanding, and negotiate with CalPERS for a secured retirement for safety and miscellaneous employees. On October 21, 2008, respondent signed the New Agency Questionnaire which was the first step in the process of joining CalPERS. Respondent did not intend for his Fire Chief position to be included in the coverage. He considered himself a retired annuitant. Respondent conceded that neither the Fire Chief Job Announcement nor application process described the job as a temporary assignment lasting for limited duration.

31. During public agency negotiations, respondent spoke to two CalPERs employees, Gerald Lyn and Yolanda Clive. According to respondent, Ms. Clive told him that a position working "less than 1000 [hours] a year" would be excluded. However, she also explained to respondent that "we needed to turn all the information in and it would be determined by an analyst." As such, respondent listed the Fire Chief position on the Questionnaire with notations that it was to be "excluded" based on his status as a CalPERS retiree working "less than 960 hours annually."

32. After respondent received Ms. Burke's December 22, 2010 letter, he called her. Respondent recalled Ms. Burke telling him that there were problems with him continuing to work. His then current contract was set to end on December 31, 2010. After their call, respondent sent a letter dated January 17, 2011, in which he stated that the District had "not filled the position of Fire Chief and has retained my services as a temporary employee." At hearing, he explained that what he meant to convey was that "I would work without a contract until the position was filled."

It is noted that just three weeks later, on February 9, 2011, respondent signed a one-year contract with the District agreeing to work as a "temporary" Fire Chief (effective January 1, 2011). This was the first time the word "temporary" was written into his employment contract. On September 12, 2012, respondent signed another one-year contract to work as a "temporary" Fire Chief (retroactive back to the effective date of January 1, 2012). On February 13, 2013, respondent signed another one-year contract to work as a Fire Chief (effective January 1, 2013). In this last 2013 contract, the word "temporary" was omitted, though respondent testified that he was still a temporary employee. He stopped working for the District as Fire Chief on December 31, 2013. Respondent testified that he felt he was already excluded from the CalPERS contract but for his own peace of mind, "I decided to stay as close to the law as possible."

33. When asked if his former position as Assistant Fire Chief for Alameda County was a safety position, respondent stated, "Yes." When asked if his position as Fire Chief for the District was as a "safety" member, respondent stated, "I was an administrator." He acknowledged that his Fire Chief duties included being "In Command" of fire suppression and he was provided a vehicle to fight fire scenes. The District now contracts with the South Placer Fire Protection District for fire administration. The South Placer Fire Chief and staff are covered by a PERS contract. There is sufficient evidence that the position of Fire Chief is properly classified as a "safety" position for purposes of implementing the PERL.

34. On June 13, 2012, the District Board convened to discuss recruitment services to fill the position of Fire Chief. The meeting minutes stated, in relevant part:

> Due to a recent change in [CalPERS] pension laws,[4] [respondent] will be resigning his position as fire chief as of September 11, 2012. Effects of the law will severely limit pool of applicants to fill the position. General consensus of the Board is that the District will require the assistance of a professional recruiter to find a qualified applicant in a timely manner.

[4] According to respondent, the "recent change" the District Board was referring to had to do with CalPERS' having "changed" the wording of the pension law (Gov. Code, § 21221, subd. (h)), from "each year" to "one time only." The District was waiting for information in a Circular of whether the change was retroactive.

The Board also moved to appoint a special committee of two District Board members to select and approve a professional recruiter, and to authorize the Board President to enter into a contract for professional recruiting services at a cost not to exceed $6,000. These June 13, 2012 meeting minutes make clear that respondent was not forthright when he wrote in his January 17, 2011 letter to Ms. Burke that "The District has not filled the position of Fire Chief and has retained my services as a temporary employee." The District did not convene to discuss recruitment until June 2012 (18 months later), and the word "temporary" was not used before his employment agreement signed February 9, 2011 (effective January 1, 2011).

35. Respondent stated that he did not hear from CalPERS again until January 2013, when it informed him of its audit. He received the Draft Audit in July 2013. He disagreed with the auditor's findings. Respondent understands that the recommendation of the final audit report (November 2013 Report) is that he be required to pay back the retirement allowances he received from September 11, 2010, through December 13, 2013. Respondent approximated his annual retirement allowance at $112,000 to $120,000. (Gov. Code, § 21220, subd. (b).)

Discussion

36. The position of "Local Firefighter" for purposes of the PERL is defined in Government Code section 20433:

> ...any officer or employee of a fire department of a contracting agency, except one whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise and whose functions do not clearly fall within the scope of active firefighting,... even though that employee is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active firefighting,... *but not excepting persons employed and qualifying as firefighters or equal or higher rank, irrespective of the duties to which they are assigned.* (Italic added.)

The District's job description of Fire Chief falls within the statutory definition of firefighter as determined by CalPERS. Respondent defined his Fire Chief role as one of "command" and "administration." The District's job description requires the Fire Chief to be an experienced firefighter and able to supervise office and field work associated with fire protection programs. All of these descriptions fall within the definition of Local Firefighter. (Gov. Code, § 20433.) As such, the Fire Chief cannot be excluded from the "safety category" of firefighters covered by the District's public agency contract with CalPERS.

37. The District chose to cover Local Miscellaneous and Safety members under the CalPERS contract. All employees in a covered category must be enrolled as members unless they are specifically excluded by the Government Code. (Factual Finding 10.) The PERL supersedes any employment contract provision that attempts to exclude an employee

covered under a public agency contract. (Gov. Code, § 20305.) The District's public agency contract with CalPERS did not identify the Fire Chief position as excluded. And revisions to respondent's employment agreements with the District, in an effort to exclude the Fire Chief position, are superseded by the PERL.

38. As a CalPERS retiree from another CalPERS covered public agency, respondent received continuous retirement benefits since 2006. He began working for the District as the Fire Chief in August 2007. The District was not a CalPERS covered public agency at that time. Hence, respondent's employment status was not an issue until September 11, 2010, when the CalPERS contract became effective. On December 22, 2010, CalPERS notified respondent that his continued employment was a problem and provided him the relevant law.

39. At hearing, Barbara Leak explained the two applicable provisions under which retired members may work without reinstating. Government Code section 21224 is commonly used when agencies employ retired members as "*extra help*" with special projects or work that the regular staff cannot perform. Government Code section 21221, subdivision (h) is used when agencies employ retired members to fill a permanent position on an "*interim*" or temporary basis. As a CalPERS retiree, respondent was entitled to work under either statute without reinstatement from retirement or loss or interruption of benefits provided by this system.

40. *Government Code section 21224.* Respondent's employment with the District from September 11, 2010, through December 31, 2013, did not constitute "extra help" or work of "limited duration" under Government Code section 21224. Under Government Code section 21224:

> A retired person may serve without reinstatement from retirement or loss or interruption of benefits provided by this system upon appointment by the appointing power of a state agency or public agency employer either *during an emergency to prevent stoppage of public business* or because the retired person has *specialized skills* needed in performing *work of limited duration.* These appointments *shall not exceed a combined total of 960 hours* for all employers each fiscal year. ... A retired annuitant appointed pursuant to this section shall not work more than 960 hours each fiscal year regardless of whether he or she works for one or more employers. (Gov. Code, § 21224, subd. (a); Italics added.)

41. There is no evidence that the District was experiencing an emergency and needed to hire respondent to prevent stoppage of public business. Respondent testified that nine months after he moved to Loomis, the District's Fire Chief retired. Respondent read in the paper that the District was thinking of dissolving the Fire District. He started attending Board meetings and "reluctantly applied" for the position. Hence, respondent was hired as

an alternative to dissolving the Fire Chief position all together. This does not describe an emergency.

Second, the work was not of limited duration. Respondent worked as the District Fire Chief for five years, four months (from August 2007 through December 2013). For three years and three months, the District was covered by a CalPERS contract while respondent served as Fire Chief. Respondent's contracts with the District collectively represented employment for fixed terms that were regularly renewed; including three contract renewals after the effective date of the CalPERS contract. This is not work of limited duration.

In addition to the two requirements that the employment must ameliorate an emergency work situation or require specialized skills for limited duration, the actual number of hours cannot *exceed* 960. Respondent's initial three-year (September 2007 to August 2010) contract required him to work a "minimum of twenty (20) hours per week," which amounted to a minimum of 1,040 hours per year (20 hours for 52 weeks). This is well above the minimum number hours permitted for a retired annuitant. Hence, at the time respondent completed the New Agency Questionnaire on October 21, 2008, he was contracted to work more than 960 hours, not "less than 960 hours annually." As such, the information he wrote in the New Agency Questionnaire as the basis for his exclusion was incorrect. (Factual Finding 11.)

Finally, respondent drafted his last employment agreement (January 2013 Agreement) with the District to specifically state that Government Code section 21224 "does not apply." [Factual Finding 9.]

The facts support a finding that there was no emergency situation for which respondent was hired to prevent work stoppage. Nor was his employment with the District work of a "limited duration." (Gov. Code, § 21224, subd. (a).) As such, section 21224 was not applicable to respondent's employment with the District from September 2011 forward.

42. *Government Code section 21221, subdivision (h).* The District hired respondent and renewed his contract four times over the course of five years (2007 through 2013). The District was not recruiting to fill the Fire Chief position while respondent held that office. The District Board did not even convene to discuss recruitment for the Fire Chief position until June 13, 2012. (Factual Finding 34.) There is no evidence that the District took any further steps toward recruiting another candidate for Fire Chief. It is clear that respondent was *the* applicant chosen by the District to fill the position from September 2007 through December 2013. Under Government Code section 21221, subdivision (h):

> ...Upon interim appointment by the governing body of a contracting agency to a vacant position *during recruitment for a permanent appointment* and deemed by the governing body to require specialized skills or during an emergency to prevent stoppage of public business. A retired person shall only be appointed once to this vacant position. These appointments,

including any made concurrently pursuant to Section 21224 or 21229, shall not exceed a combined total of 960 hours for all employers each fiscal year...A retired annuitant appointed pursuant to this subdivision shall not work more than 960 hours each fiscal year ... (Gov. Code, § 21221, subd. (h); Italics added.)

43. The facts support a finding that respondent was not an interim or temporary employee pending recruitment of another individual for appointment to the Fire Chief position. (Gov. Code, § 21221, subd. (h).) The District Board convened in June 2012, to discuss recruitment for a Fire Chief, almost two years after the District became a CalPERS covered public agency. (Factual Finding 34.) As such, section 21221 was not applicable to respondent's post retirement employment.

Credibility

44. When respondent received the written notification from CalPERS in December 2010, he was made aware of his options. Instead of choosing to either resign or reinstate, he sent a letter to Ms. Burke on January 17, 2011, stating that the District had "not filled the position of Fire Chief." This gave the impression that the District was recruiting to fill the position, when it was not. If it had been, respondent's employment could have been considered "interim" in nature and according to Ms. Burke, respondent could have worked as a retired annuitant performing work of limited duration or special skills, for an additional year, through September 10, 2011. (Gov. Code, § 21221.)

45. Ms. Burke did not speak to respondent again until 2013. During that call, respondent told her that he thought his positon was excluded from the District's contract with CalPERS. For the reasons stated above, the Fire Chief position was not excluded from the safety classification. Further, respondent did not meet the requirements for retired annuitants provided in Government Code sections 21221 or 21224. Respondent was essentially the District's Fire Chief from September 2007 through December 2013. When the CalPERS contract became effective on September 11, 2010, respondent was working in violation of the PERL. However, because he did not receive the letter from CalPERS notifying him of his options until December 2010, he should, in fairness, be treated as a retired annuitant though December 31, 2010.

LEGAL CONCLUSIONS

1. Government Code section 21220, subdivision (a) states, in relevant part: "A person who has been retired under this system, for service or for disability, shall not be employed in any capacity thereafter by the state, the university, a school employer, or by a contracting agency ... unless he or she has first been reinstated from retirement pursuant to this chapter, or unless the employment, without reinstatement is authorized by this article..."

A person employed in violation of Government Code section 21220, "Shall be reinstated to membership in the category in which, and on the date on which, the unlawful employment occurred." (Gov. Code, § 21202.)

2. Any retired member employed in violation of Government Code section 21220, shall be required to: 1) Reimburse this system for any retirement allowance received during the period or periods of employment that are in violation of law, 2) Pay to CalPERS an amount of money equal to the employee contributions that would otherwise have been paid during the period or periods of unlawful employment, plus interest, 3) Contribute toward reimbursement of administrative expenses incurred in responding to the situation. (Gov. Code, § 21220, subd. (b).)

A public employer that employs a retired member in violation of this article shall be required to: 1) Pay to this system an amount of money equal to employer contributions that would otherwise have been paid for the period or periods of time that the member is employed in violation of this article, plus interest, and 2) Contribute toward reimbursement of administrative expenses incurred in responding to the situation. (Gov. Code, § 21220, subd. (c).)

3. Pursuant to Government Code section 21221, subdivision (h), a retired person may serve without reinstatement from retirement or loss or interruption of benefits provided by this system, as follows:

> Upon interim appointment by the governing body of a contracting agency to a vacant position during recruitment for a permanent appointment and deemed by the governing body to require specialized skills or during an emergency to prevent stoppage of public business... These appointments, including any made concurrently pursuant to Section 21224 or 21229, shall not exceed a combined total of 960 hours for all employers each fiscal year.

4. Pursuant to Government Code section 21224, subdivision (a):

> A retired person may serve without reinstatement from retirement or loss or interruption of benefits provided by this system upon appointment by the appointing power of a state agency or public agency employer either during an emergency to prevent stoppage of public business or because the retired person has specialized skills needed in performing work of limited duration. These appointments shall not exceed a combined total of 960 hours for all employers each fiscal year.

5. The Fire Chief position falls within the definition of a local firefighter as stated in Government Code section 20433 ["...any officer or employee of a fire department of a contracting agency, ...not excepting persons employed and qualifying as firefighters or equal or higher rank, irrespective of the duties to which they are assigned."] (Factual Finding 36.)

"[N]o contract or contract amendment shall be made to provide retirement benefits for some, but not all members of the following membership classifications: local miscellaneous members, local police officers, local firefighters, county peace officers, local sheriffs, local safety officers, or school safety members." (Gov. Code, § 20479.)

"The contract shall include in this system all firefighters, police officers, county peace officers, local sheriffs, and other employees of the contracting agency, except as exclusions in addition to the exclusions applicable to state employees may be agreed to by the agency and the board. The contract shall not provide for the exclusion of some, but not all, firefighters, police officers, county peace officers, or local sheriffs." (Gov. Code, § 20502.)

6. The law does not respect form over substance. (Pulaski v. Calif. Occupational Safety and Health Standards Board (1999) 75 Cal.App.4th 1315, 1328.) In applying the doctrine of substance over form, the courts look to the "objective realities of a transaction rather than to the particular form the parties employed. Thus, we focus on the actual rights and benefits acquired, not the labels used." (General Mills v. Franchise Tax Bd. (2009) 172 Cal.App.4th 1535, 1543.)

Conclusion

7. The Fire Chief shares many functions of firefighters and has oversight of firefighters in addition to administrative functions. Under the PERL, the Fire Chief is a safety position and is not separate and excludable from the Local Safety classification in public agency contracts. (Gov. Code, § 20502.)

8. The PERL also controls exclusion of individual retirees from CalPERS contracts with public agencies and limits circumstances by which retired annuitants may work post retirement. Respondent was hired in 2007 to be the District's Fire Chief. When the District subsequently decided to apply for inclusion in the CalPERS' retirement system, respondent sought to maintain this employment and retain his retirement benefits. The CalPERS contract became effective September 11, 2010. Three months later, on December 22, 2010, CalPERS notified respondent of his options to resign or reinstate. Respondent chose to disregard the information provided by Ms. Burke in the notice and by phone. Instead he continued to work under three more employment contracts two of which stated he was working pursuant to Government Code section 21224, and one of which stated he was not working pursuant to this statute.

9. The various modifications to respondent's employment contracts in 2011, 2012, and 2013, are examples of form over substance. Respondent's employment with the District did not fall within either statute allowing retirees to work under emergent situations, for limited duration, or while recruiting is taking place. (Gov. Code, §§ 21221, subd. (h), 21224, subd. (a).) As such, respondent's work after September 11, 2010, was in violation of the PERL. He received due notice of the relevant laws and his options to quit or reinstate in December 2010. As such, he knowingly worked in violation of the PERL after December 31, 2010. Retirement benefits respondent received from December 31, 2010, forward must be repaid. (Gov. Code, § 20220, subd. (b).)

ORDER

Respondent David L. Wheeler's post retirement employment with the District was in violation of the Public Employees' Retirement Law. Respondent's and the District's appeal of CalPERS' November 2013 Audit findings is therefore, DENIED. Respondent Wheeler worked in CalPERS covered employment while also receiving retirement benefits from CalPERS.

Respondent shall reimburse CalPERS for all retirement allowances received during the period from December 31, 2010, through December 31, 2013. Respondent and the District shall pay all applicable employee and employer contributions and administrative expenses pursuant to Government Code section 21220, subd. (b).

DATED: September 14, 2015

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DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings