

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal of the Denial of  
Group Health Benefits Coverage Under the  
Public Employees' Medical and Hospital  
Act by:

FOOTHILL-DE ANZA COMMUNITY  
COLLEGE DISTRICT,

Respondent.

Case No. 2013-0549

OAH No. 2013070971

**PROPOSED DECISION**

Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, conducted a hearing in this matter on March 3 and 4, 2015, in Oakland, California.

Renee Salazar, Senior Staff Attorney, represented petitioner Renee Ostrander, Acting Chief, California Public Employees' Retirement System (CalPERS).

Jahmal T. Davis, Attorney at Law, Hanson Bridgett LLP, represented respondent Foothill-De Anza Community College District (District).

The record was left open for the submission of closing briefs. The District's closing brief (marked for identification as Exhibit L) was filed on July 10, 2015, and CalPERS' closing brief (marked for identification as Exhibit 13) was filed on July 13, 2015. CalPERS' reply brief (marked for identification as Exhibit 14) and the District's reply brief (marked for identification as Exhibit M) were filed on July 24, 2015.

Pursuant to Government Code section 11515, the parties were notified that official notice would be taken of the following documents attached to CalPERS' closing and reply briefs: CalPERS Enrolled Bill Report on Senate Bill No. 626, dated June 16, 2004 (marked for identification as Exhibit 15); Senate Public Employment and Retirement Committee Analysis of Assembly Bill No. 2734 as amended, dated April 23, 1986 (marked for identification as Exhibit 16); section 599.500 of the Public Employees' Medical and Hospital Care Act Regulations [definitions] (marked for identification as Exhibit 17); CalPERS Circular Letter No. 600-007-06 re: Compliance with Government Code section 22934 – Alternative Health Benefit Plans (marked for identification as Exhibit 18); and Government

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RETIREMENT SYSTEM  
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Code section 2293 [Alternative Health Benefit Plans] (marked for identification as Exhibit 19). The parties were also notified that official notice would be taken of the documents attached to the District's reply brief: former Government Code section 22754, subdivision (e), Stats 2003 chapter 519, section 36 (marked for identification as Exhibit N); Senate Bill No. 626, section 40, as annotated at Government Code section 22750 (marked for identification as Exhibit O); Government Code section 22920, as annotated (marked for identification as Exhibit P); Government Code section 22760, as annotated (marked for identification as Exhibit Q); and Government Code section 22772, as annotated (marked for identification as Exhibit R). No written opposition was filed. Official notice was taken of Exhibits 15-19 and N-R.

The District's reply brief also included an attachment with a list of names entitled: "20-Year Retirees" as of July 24, 2015 (marked for identification as Exhibit S). On September 3, 2015, CalPERS filed an opposition (marked for identification as Exhibit 20). Over objection, Exhibit S was admitted into evidence as administrative hearsay.

The record closed and the matter was submitted for decision on September 3, 2015.

#### SUMMARY

Historically, the District contracted with CalPERS and the California State Teachers Retirement System (CalSTRS) to provide retirement benefits to its employees and retirees. In addition, the District provided self-funded group health insurance benefits coverage for its employees and retirees. The District also provided lifetime group health insurance benefits coverage to a classification of employees who left the District's employment after 20 years of service (otherwise known as "20-year retirees"), even if they were not yet eligible to (or chose not to) retire under the CalPERS or CalSTRS retirement systems.

In 2012, the District sought to discontinue its self-funded health insurance benefits coverage for employees and retirees. The District entered into a contract with CalPERS to provide group health benefits coverage for its employees and retirees. CalPERS determined that the 20-year retirees were ineligible for group health benefits coverage because they did not meet the requirements to be considered as annuitants<sup>1</sup> under the Public Employees' Medical and Hospital Care Act (PEMCHA).

The issues are: (1) whether CalPERS complied with PEMCHA in denying the 20-year retirees eligibility for group health benefits coverage; and (2) did the District rely on CalPERS representatives (regarding coverage for the 20-year retirees) to its detriment when it entered into the contract with CalPERS for group health benefits coverage under PEMCHA. It is determined that CalPERS complied with PEMCHA. Also, the District did not establish the necessary elements to apply the doctrine of equitable estoppel to CalPERS's actions.

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<sup>1</sup> Annuitants and retirees are used interchangeably throughout.

## FACTUAL FINDINGS

### *Background*

1. Petitioner Renee Ostrander filed the First Amended Statement of Issues in her official capacity as Acting Chief of CalPERS's Customer Account Services Division.

2. CalPERS is the agency charged with administering PEMHCA, Government Code section 22750, et seq. PEMHCA authorizes and requires CalPERS to provide health benefits for state employees, eligible dependents, and annuitants, as well as for employees and annuitants of public agencies that elect to contract with CalPERS for group health benefits coverage. A public agency must agree to all the laws and rules that govern PEMHCA when entering into a contract with CalPERS.

3. The District is a public entity that contracts with CalPERS and CalSTRS to provide retirement benefits to its employees and retirees. The District is also eligible to contract with CALPERS for group health benefits coverage for its employees and retirees as governed by the provisions of PEMHCA.

### *The District's Health Insurance Benefits Plan*

4. Prior to 2012, the District contracted with Kaiser and United Healthcare for administration and delivery of a self-funded health insurance benefits plan for several thousand current and retired employees. Pursuant to several collective bargaining agreements, the District provided lifetime health insurance benefits coverage for qualified retired workers (and their eligible dependents and domestic partners) who were hired before July 1, 1997. To receive lifetime health insurance benefits, an employee had to meet the requirements of at least one of three groups of qualified workers. The first group of qualified workers consists of employees who have reached the age of 55, have at least 10 years of service as permanent or probationary workers, and who have initiated retirement through CalPERS or CalSTRS. The second group of qualified workers consists of employees with ten years of service who separated from service because of a disability.

5. The third group of qualified workers (the 20-year retirees) includes employees who have "rendered service to the District as a permanent or probationary worker with a normal workweek of at least 20 hours for 20 or more years immediately preceding her or his resignation." Each 20-year retiree (and his or her spouse or domestic partner) is eligible for lifetime health insurance benefits coverage regardless of whether he or she is eligible to retire under CalPERS or CalSTRS when he or she leaves the District. 20-year retirees also include employees who after leaving the District obtain employment with another CalPERS contracting public agency.

*The District's Joint Labor Management Benefits Council*

6. The Joint Labor Management Benefits Council (JLMBC) is a collective of representatives from each union and employee association that represents District employees, retirees, and the District. The purpose of the JLMBC is to address employee-related benefits issues.

7. The JLMBC had been reviewing the increased costs of the District's employee benefits plan. In 2011, the JLMBC projected that the costs associated with the District's self-funded health insurance benefits plan would no longer be financially sustainable within two years. According to Dorene Novotny, the District's Vice Chancellor for Human Resources, the District would "have to completely decimate the entire benefits package for [its] employees in order to be able to afford it."

8. The JLMBC was charged with evaluating whether the District should enter into a contract with a group health benefits plan provider to maintain the best available benefits package and remain financially stable. The District's primary goal was to ensure continued coverage for all employees and retirees who were eligible under the District's self-funded health insurance benefits plan. The JLMBC explored the option of PEMHCA coverage.

9. Rod Wilkinson, a CalPERS marketing analyst, was the liaison with the District. In October 2011, Wilkinson made a presentation to the JLMBC about PEMHCA coverage and eligibility rules. He distributed CalPERS brochures that indicated that active employees, annuitants (retirees) and family members are eligible to enroll in PEMHCA. The following three criteria applied to eligibility for annuitants: a) "Retire within 120 days of separation date to be eligible," b) "Receive a monthly retirement warrant (check)," and c) "Employer must be contracting with CalPERS for Health Benefits."

10. After Wilkinson's presentation, the JLMBC still had concerns about the potential impact on the following classifications of employees: (a) 20-year retirees who had retired from the District but may have waited to reach a particular age to maximize the retirement formula before retiring under CalPERS; (b) 20-year retirees who had retired from the District and went to work at another public entity covered by CalPERS; (c) nonregistered domestic partners who did not meet the definition of being registered or a legal spouse under CalPERS; and (d) survivors of retiree members who had not elected a survivor benefit and had not been designated as receiving annuity benefits upon the death of the member.

11. Wilkinson told the JLMBC about situations where other public employers had created employer resolutions to ensure that certain classifications of employees and retirees would be covered under PEMHCA.<sup>2</sup> Wilkinson also said that the District could waive the

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<sup>2</sup> The District prepared a resolution to address the issue of eligibility for the non-registered domestic partners, which was approved by CalPERS. The District also prepared a

eligibility requirement of an individual retiring within 120 days of separation from employment. Wilkinson provided the same information to several hundred union members at a "town hall" meeting.

12. The JLMBC recommended PEMHCA coverage as the best alternative for the District to maintain group health benefits coverage for all eligible employees and retirees. The various unions ratified the JLMBC's recommendation to switch to PEMHCA coverage.

13. In January 2012, the District adopted PEMHCA's recommendation to contract with CalPERS for PEMHCA coverage for its employees and retirees. A change of benefits plan is a complex process that can normally take up to a year to implement. The District chose July 1, 2012, as the effective date to start PEMHCA coverage.

#### *The Implementation Phase*

14. In early February 2012, Christine Vo, the District's Employee Benefits Manager, was directed to act as project manager to implement the process for the switch to PEMHCA coverage. Vo only had a few months to prepare and distribute open enrollment materials to approximately 4,000 potential enrollees. According to Vo, "thousands of computer codes" regarding employee benefits had to be created in the District's internal computerized system to handle the switch to PEMHCA.

15. During the implementation phase, Vo raised her concerns with Wilkinson about the 20-year retirees' eligibility under PEMHCA. Wilkinson told Vo that they qualified as long as they were "under a program sponsored by the employer."

16. On April 5, 2012, the District sent a written notice to CalPERS of its waiver of the requirement that retirees demonstrate that they have retired within 120 days of separation from employment to participate in PEMHCA. The waiver only applied to individuals who retired from the District prior to July 1, 2012.

17. The District also sought to ensure PEMHCA coverage for its retired Board of Trustees members who were not contributing members to CalPERS, CalSTRS or in any other retirement plan. If a public entity has a group of employees that do not qualify for CalPERS or CalSTRS (i.e., Board of Trustee members or employees that only worked half-time), then the public employer is required to offer an alternative retirement system for the employees to be eligible as annuitants.

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resolution to address the issue of eligibility for survivors of retiree members, which was also approved by CalPERS.

### *Creation of the 401A Plan*

18. The District created the Foothill-De Anza Community College District Retirement Plan, also known as a “401A Plan,” pursuant to Internal Revenue Code section 401(a), to be effective on June 30, 2012. Retirees under the 401A Plan would receive a monthly retirement check in the amount of \$1.00, starting June 30, 2012. The stated purpose of the 401A Plan was to provide “supplemental benefits” under a retirement system sponsored by the District for those employees not receiving retirement checks from CalPERS or CalSTRS. Furthermore, the 401A Plan stated the following:

It is intended that future and former retirees and future and former retired District Board of Trustees members covered under this Plan meet the requirements for “annuitants” as defined in PEMHCA by receiving a “retirement allowance” under this Plan. The retirement allowance provided under this Plan is intended to be structured such that District retirees who qualified for District retiree medical benefits on June 30, 2012, but do not otherwise meet the PEMHCA requirements, as well as any current or future employees of the District who may terminate employment in the future and qualify for District retiree medical benefits who do not otherwise meet the PEMHCA requirements, will meet the definition of an “annuitant” under PEMHCA by being provided a retirement allowance under this Plan.

19. The 401A Plan provides for automatic enrollment upon attaining 20 years of service and automatic termination upon the employee “becoming an annuitant under CalPERS or CalSTRS without regard to the benefits provided under [the 401A] Plan.” The appendix to the 401A Plan included the specific names of the retired Board of Trustees members and eight 20-year retirees,<sup>3</sup> who were eligible to participate in the plan.

20. Vo described the purpose of the 401A plan as a means “to create a similar pension plan as an alternative for individuals that may not wish to cash out their vested pension with either PERS or STRS.”

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<sup>3</sup> The listed individuals are Ernesto Agilpay, Carole Chapman (active CalPERS member with University of California at San Luis Obispo and currently enrolled in PEMHCA), Kim Garcia (active CalPERS member with San Jose Community College and currently enrolled in PEMHCA), Lisa Kaaz (separated from the District in January 1999), Linda Knowles (active CalPERS member with California Department of Fish and Wildlife and currently enrolled in PEMHCA), Michael Logan (separated from the District in January 1997), Jon O’Bergh (separated from the District in July 2009), and Beverly Shead (separated from the District in August 2012).

### *Identifying the Eligible Annuitants*

21. To determine participant eligibility for annuitants, CalPERS verifies whether the annuitant's last employer contracted with CalPERS, whether the annuitant permanently separated within 120 days, whether the annuitant worked for the last employer at least five years, and whether the annuitant met the minimum age requirement of 50 or older.

22. In late March 2012, CalPERS sought to identify all of the District's eligible retirees. CalPERS sent the District a list of retirees that received a monthly CalPERS warrant. This list did not include the 20-year retirees. Wilkinson noted in an email, "We have no way of finding the pre-dated retirees so [the District] should send that list to us. Remember we can't send retirement packets to the retirees that are not receiving a monthly retirement warrant." The District sought further clarification on the status of the 20-year retirees. Wilkinson responded that if the District provided identifying information, then CalPERS could "look them up to verify that [the District] was the last employer and that they are receiving a retirement allowance." Wilkinson's response created further confusion for the District regarding the status of the 20-year retirees.

23. In April 2012, after creating the 401A Plan, the District notified CalPERS that all retirees were receiving a retirement check from CalPERS, CalSTRS, or a qualified retirement plan [the 401A Plan] sponsored by the District. Therefore, according to the District, all retirees met the statutory definition of "annuitant" for PEMHCA eligibility.

24. On May 17, 2012, Novotny contacted Terri McIntyre, CalPERS' Chief of Health Contracts and Marketing. Novotny wrote in an email that there was confusion regarding whether the 20-year retirees qualified as annuitants to be eligible for PEMHCA under the 401A Plan.

25. On May 18, 2012, McIntyre informed the District that retired members of the Board of Trustees met the definition of annuitant for PEMHCA eligibility based on their receipt of a retirement check from the 401A Plan. Regarding the 20-year retirees, McIntyre wrote, in an email to Novotny, the following:

When they were working, their retirement system was PERS or STRS, not a 401A Plan. Their eligibility is tied to their **true retirement program**, not one that is assigned after the fact in order to provide an allowance to people who are otherwise not eligible. If the individuals had worked for the district and did not participate in the PERS or STRS plan because they did not qualify under those plans, and instead were provided the 401a plan as a retirement plan, then it would be okay. But they did not participate in the 401a plan as active members, and giving them a retirement allowance now to provide "retirement" before the effective date of the contract so that they are not subject to the 120 day rule is not permissible. . . .

We realize that the District may have an obligation to cover some former employees that do not qualify for benefits under the PEMHCA law. Other agencies have also had the same challenges, but have been able to work out another way to provide coverage to those individuals, outside of PEMHCA.

[Emphasis added.]

26. On May 23, 2012, Novotny responded that the District continued to believe that the 20-year retirees met the eligibility requirements, and requested that McIntyre seek further guidance from her managers. McIntyre informed Novotny that she had “vetted the issue with [her] management,” and that the 20-year retirees were not eligible because “they are not current employees nor will they be retired on the contract effective date of July 1, 2012, and will not meet the 120-day rule provided by Government Code section 22760(c).” Novotny responded that, “It’s just disappointing given we’re trying to do the right thing by the employees/retirees. And seeking an outside alternative will create other significant challenges/problems, as you might imagine.”

27. The District timely appealed CalPERS’s decision on June 22, 2012.

28. At hearing, Novotny acknowledged that the District considered whether to “bifurcate” the 20-year retirees out of PEMHCA. However, the District decided that it would have meant additional costs in terms of administering more than one benefits plan.<sup>4</sup> Also, the District had a long history of providing a simple benefits plan which the District wanted to continue to do.

#### *District’s Interactions with CalPERS*

29. At hearing, Vo testified that Wilkinson was “the most difficult person [she had] ever dealt with in her entire professional career.” According to Vo, Wilkinson was unresponsive, she had to call him several times for clarifications, and he did not respond to her emails. Eventually, Vo had to communicate solely with Wilkinson’s supervisors.

30. Novotny confirmed that the process of switching to PEMHCA was frustrating for District staff. Primarily, staff found it difficult to obtain information from Wilkinson.

31. Robert Sharp was CalPERS Health Managing Marketer and Wilkinson’s direct supervisor. Sharp replaced McIntyre as the CalPERS Section Chief of Health Contracts and Marketing. He persuasively explained the following:

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<sup>4</sup> The District would have had to secure a separate individual health insurance policies for each 20-year retiree, assuming that he or she could qualify for an individual policy. This would cause the District to incur excessive expenses in the use of public funds.

a. CalPERS is responsible for maintaining its financial stability, which includes deciding who is eligible as an annuitant under PEMHCA. Generally, the retiree's share of the premium for PEMHCA coverage is deducted from the individual's CalPERS or CalSTRS retirement check. However, for retirees in a different qualified plan, like a 401A Plan, CalPERS charges the employer for 100 percent of the premiums for the retiree's health benefits. In turn, the employer must obtain directly from the retiree any contributions toward the premiums for which the employee is responsible.

In this case, CalPERS would be unable to collect the contribution toward the premium from the 20-year retirees because they do not receive a retirement check directly from CalPERS or CalSTRS. The District would have to pay the premiums to CalPERS. However, the cost to the District to include the 20-year retirees would be less than \$1,000 per month, and CalPERS would not incur any significant costs.

b. The District had to be the "last employer" for the 20-year retirees. The "last employer" for an employee who retires from CalPERS or CalSTRS is the one that is "on the hook for paying for the healthcare benefits for the retiree the rest of their lives and their survivors."

c. There is no specific rule indicating that a retiree who receives a check under a 401A Plan, but did not contribute to the 401A Plan while an active employee is not eligible under PEMHCA.

d. CalPERS staff experienced difficulty interacting with District staff, primarily Vo, who was "extremely pushy and aggressive" on the telephone.

#### *Impact of CalPERS Determination on 20-year Retirees*

32. Blanche Monary is president of the Association of Classified Employees and a member of the JLMBC. Union members relied on the information that Wilkinson provided at the "town hall" meeting to ratify the District's switch to PEMHCA. CalPERS denial of lifetime health benefits coverage for the 20-year retirees created a conflict with the collective bargaining agreements. Also, the 20-year retirees made major life decisions regarding when to retire based on the availability of lifetime retiree medical benefits offered under the collective bargaining agreements.

33. As of July 24, 2015, there were eight 20-year retirees who qualified for lifetime health insurance benefits coverage under the District's self-funded plan. Because they are considered ineligible for PEMHCA, in general, they will all lose their lifetime retiree health benefits coverage. Two of the 20-year retirees testified at hearing:

a. Kim Garcia has been employed with the San Jose Evergreen Community College District for over four years and she is not eligible for retiree medical benefits from her current employer. She worked approximately 26 years for the District before she left at the age of 49. Because of her age, she was not eligible to retire from

CalPERS. She carefully planned her retirement from the District, and made sure that her status when leaving was a retirement and not a separation or resignation. Prior to the District's switch to PEMCHA, Garcia was placed in the 401A Plan. CalPERS informed her that she was ineligible for PEMHCA because she was not a retiree of CalPERS.

b. In January 2012, MaryJo Lomax retired from the District after more than 20 years. Her original plan was to retire from CalPERS in 2015, when she turned 55 years old. Before leaving the District, she was informed by the District's human resources department that the pending switch to PEMHCA would not affect her lifetime retiree health benefits. In June 2012, Lomax was informed that she was not eligible for PEMHCA coverage because she was not a current retiree of CalPERS. In order to receive her lifetime retiree health benefits, she immediately enrolled in CalPERS and retired with a lesser pension than she would have received if she had waited until the age of 55.

## LEGAL CONCLUSIONS

1. The applicant for retirement benefits has the burden of proving entitlement to those benefits. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051; *Greatorex v. Bd. of Retirement* (1979) 91 Cal.App.3d 54.) In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

### *Overview of PEMHCA*

2. Title 2, Division 5, of the Government Code is known as the California Public Employees' Retirement Law (PERL). Part 3 (sections 20000 through 21703) governs the Public Employees' Retirement System. Part 5 (sections 22750 through 22948) contains the Public Employees' Medical and Hospital Care Act which is a distinct statutory scheme that governs the provisions of retirement health benefits. The stated purpose of PEMHCA is to promote increased economy and efficiency in state service; enable the state to attract and retain qualified employees by providing health benefit plans similar to those commonly provided in private industry; and recognize and protect the state's investment in each permanent employee by promoting and preserving good health among state employees. (Gov. Code, § 22751.)

3. The CalPERS Board of Administration has "all powers reasonably necessary to carry out the authority and responsibilities expressly granted" to administer PEMHCA. (Gov. Code, §§ 22790, 22794.) The Board also has the authority to make determinations of the applicability of PEMHCA to specific employees or annuitants, or groups of employees or annuitants. (Cal. Code Regs., tit. 2, § 599.501, subd. (b)(8), (c), (d), (e) & (h).) CalPERS is responsible for determining the right of a public pension system member to receive benefits. (*Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 503-504.)

4. Government Code section 22760, subdivision (c), defines annuitant as:

A person who has retired within 120 days of separation from employment with a contracting agency . . . and who receives a retirement allowance from the retirement system provided by that employer, or a surviving family member who receives the retirement allowance in place of the deceased.

*The Statutory Language*

5. In interpreting Government Code section 22760, subdivision (c), fundamental rules of statutory construction apply so as to effectuate the legislative intent and purpose of the law. (*California Teachers Ass'n. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698; *Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1710.) Courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them. A court first turns to the words of the statute to determine the intent of the Legislature. If the words of the statute are clear and unambiguous, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (*Schmidt v. Foundation Health, supra*, at p. 1710.) Therefore, if the language is unambiguous, the plain meaning governs and it is unnecessary to resort to extrinsic sources to determine legislative intent. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919.)

6. The parties agree that the plain language of Government Code section 22760, subdivision (c), governs. The particular language of the statute at issue here is the definition of annuitant under PEMHCA as one “who has retired within 120 days of separation from employment with a contracting agency,” and “who receives a retirement allowance from the retirement system provided by the employer.”

retired within 120 days

7. The usual and ordinary meaning of the word “retire” is to “withdraw from one’s position or occupation: to conclude one’s working or professional career.”<sup>5</sup> Therefore, under the usual and ordinary meaning of the word “retire,” a 20-year retiree must be an individual who has ended his or her professional career with the District within 120 days of separating from employment with the District.

8. An attorney general opinion also provides guidance in determining the plain meaning of the phrase “‘retire’ while employed” as it applies to CalPERS. The question before the attorney general was whether a retired person is eligible to enroll even though his retirement was not effective until after the day following his last day of his employment. The opinion stated the following: “[To limit] enrollment to a certain class of retired

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<sup>5</sup> “Retire.” *Merriam-Webster.com*. Merriam-Webster dictionary (30 September 2015)

members presupposes eligibility to retire. A person who is not eligible to retire while employed cannot be said to have retired while employed. Even in the popular concept a person who leaves service at age 45 or at any age below the minimum retirement age for his group and exercises his right to leave his contribution on deposit is not looked upon as retiring.” (39 Ops.Cal.Atty.Gen. 172 (1962).)

9. The plain meaning of retire as it is used in PEMHCA differs from the District’s definition of the word “retire,” when referring to the 20-year retirees. The 20-year retirees have either left employment with the District to work elsewhere or are awaiting retirement age to be eligible for retirement, under CalPERS or CalSTRS.<sup>6</sup> Furthermore, the District’s definition of “retire” is used for compliance with the terms of the collective bargaining agreements to provide lifetime health insurance benefits.

10. Ultimately, an individual who is leaving the District’s employment is not the same as retiring under the District’s retirement system with all of its intended benefits, including receiving a monthly check from either CalPERS or CalSTRS. Eligibility for PEMHCA as an annuitant is not based entirely on whether one has ended their working career. The individual must also be eligible to retire. In this case, some of the 20-year retirees were not yet eligible to retire under CalPERS or CalSTRS.

retirement system provided by the employer

11. Under the PEMHCA regulations, “retirement system” means CalPERS, CalSTRS, the Legislators’ Retirement System, or the Judges’ Retirement System, as the case may be, under which a retired person has acquired the status of ‘annuitant.’” (Cal. Code Regs., tit. 2, § 599.500, subd. (l).)

12. “Persons who are members of any other retirement or pension system” that is supported by a public entity and “who are receiving credit in the other system for service are, as to that service, excluded” from PEMHCA. (Gov. Code, § 20303, subd. (a).) This means that PEMHCA allows for other retirement systems other than those identified under the regulations. However, when an employee receives a retirement allowance from another retirement system provided by the employer, it is contemplated that the employee must have

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<sup>6</sup> It is important to note that simultaneous status as an employee and annuitant is not allowed, under these circumstances. (See Gov. Code, §§ 22772, subd. (a)(2) [defining employee]; 21220 [prohibits a person who retires for service under CalPERS from being employed by another entity under CalPERS unless reinstated from retirement].) Pursuant to Government Code section 21220, a person who retires for service under CalPERS, cannot be employed by another entity under CalPERS unless reinstated from retirement. There are exceptions, such as, a retired annuitant with specialized skills can work up to a maximum number of hours each fiscal year. Otherwise, the retired person risks mandatory reinstatement into CalPERS from retirement or the loss or interruption of CalPERS benefits. (Gov. Code, § 21221, subd. (h).)

received service credit in and can retire from only one retirement system for the purposes of PEMHCA. In this case, the District's 401A Plan would be considered "an other retirement or pension system."

13. The District contends that CalPERS's conclusion that 20-year retirees must receive a retirement allowance from their "true retirement program" is at odds with the statutory language. The District also contends that the 20-year retirees are receiving a retirement check [retirement allowance] from the 401A Plan [the retirement system provided by the District], as required to meet the PEMHCA eligibility requirements as annuitants.

14. It is true that there is no specific law or regulation supporting the phrase "true retirement program," as CalPERS described in its explanation to the District. However, CalPERS's response must be evaluated in its entire context. McIntyre wrote, "When they were working, their retirement system was PERS or STRS, not a 401A Plan. Their eligibility is tied to their true retirement program, not one that is assigned after the fact in order to provide an allowance to people who are otherwise not eligible." Although CalPERS's explanation may have been inartfully phrased, the meaning of annuitant is clear. At the time they left employment with the District, the 20-year retirees were participating in the CalPERS or CalSTRS retirement system, not the 401A Plan. It is reasonable to conclude that a person has not retired simply because he or she is eligible to receive lifetime "retiree" health care benefits pursuant to a collective bargaining agreement.

15. The 401A Plan is a supplemental retirement plan established by the District. "Supplemental" is defined as "added to something else to make it complete; serving to supplement." The antonyms of supplemental are "chief, main, principal."<sup>7</sup> The 401A Plan's stated purpose is to provide "supplemental" benefits which means that the District has a main or primary retirement program for each individual employee which must be either CalPERS or CalSTRS. For example, retiring from the District's 401A Plan is similar to a state employee who is a CalPERS member, indicating that she has retired because she has begun receiving payments from a 401(k) or 457 supplemental retirement account.

In addition, the stated intent of the 401A Plan was for the purpose of attempting to make otherwise ineligible 20-year retirees to meet the requirements as annuitants under PEMHCA. It also provides for automatic termination in the 401A Plan after the employee becomes an annuitant under the CalPERS or CalSTRS retirement systems.

16. To allow the 20-year retirees that participate in the 401A Plan to be considered as annuitants would circumvent the 120-day requirement. The 120-day rule waiver only applies to retirees who have retired from the District prior to the effective date. Because the 20-year retirees have not retired (under the ordinary use of the term) they are subject to the 120-day rule. Additionally, all but one of the 20-year retirees had left the District before the

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<sup>7</sup> Supplemental. *Merriam-Webster.com*. Merriam-Webster dictionary (30 September 2015)

establishment of the 401A Plan. At the time, they were not receiving a monthly retirement check from either the CalPERS or CalSTRS retirement system. Neither can the retirement allowance from the 401A Plan be deemed an allowance from the retirement system provided by the District. The 401A is merely a supplemental plan for the purpose of attempting to make otherwise ineligible employees to meet the definition of annuitant.

17. Furthermore, allowing the retired Board of Trustees to be eligible as annuitants under the 401A Plan will not lead to an arbitrary result. The phrase “retirement system” can include the District’s 401A Plan for the purpose of the retired Board of Trustees’ eligibility only. The retired Board of Trustees were never part of the District’s retirement system (CalPERS and CalSTRS) for employees and retirees. However, the 20-year retirees worked their entire 20-year careers under either the CalPERS or CalSTRS retirement system.

18. Therefore, according to the plain language of Government Code section 22760, subdivision (c), the 20-year retirees are ineligible because they do not meet the definition of annuitant under PEMHCA. It is determined that the retirement system provided to the District employees (as it applies to the 20-year retirees) refers to CalPERS and CalSTRS, and a contracting agency may only have one retirement system for each employee for the purposes of annuitant eligibility under PEMHCA.

*Estoppel does not apply to CalPERS*

19. Equitable estoppel may be asserted against the government in some circumstances. The requisite elements of equitable estoppel against a private party are: “(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so that the party asserting the estoppel has a right to believe it was so intended; (3) the other party [party asserting estoppel] must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.” (*Lentz v. McMahan* (1989) 49 Cal.3d 393, 399.) “The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.” (*Lentz v. McMahan, supra*, 49 Cal.3d at p. 400; *Medina v. Bd. of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 868-869.) In other words, the interests of a private party must outweigh any effect on public interests and policies. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462.) Also, “where one of the elements of an estoppel is missing there can be no estoppel.” (*People ex rel. Franchise Tax Bd. v. Superior Court* (1985) 164 Cal.App.3d 526, 552.)

In *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28, the Court observed that, “[N]o court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations.” In that case, Longshore, a retired county employee, claimed the county was estopped to deny that he was entitled to cash compensation for unused overtime credits because, when he had tried to use overtime credits, his supervisors refused

to allow him to take time off and told him his “hours would be credited for him for future use.” After the supervisors made those representations but before Longshore retired, there were revisions to the salary laws that provided for forfeiture of unused overtime credits. The Court held that the supervisors’ representations could not be used as a ground to estop the county from relying on the salary laws. (*Id.*, at pp. 25-26.) The Court noted that there had been cases in which the Court held that “misrepresentations by a public officer concerning the terms and conditions of civil service employment generally will not estop a public entity from asserting the true terms and conditions as established by statute. [Citations.]” (*Id.*, at p. 28.)

20. The District contends that it relied, to its detriment, on CalPERS’s representations that the 20-year retirees were eligible under PEMHCA. In particular, District managers received verbal and written confirmation from Wilkinson that the 20-year retirees would be eligible under PEMHCA. Furthermore, part of CalPERS’s marketing strategy was to assure the District and the JLMBC that everyone who was eligible for lifetime health benefits coverage before the switch to PEMHCA would continue to be eligible for coverage. In reliance on these assurances, the District made the decision, terminated its self-insured health benefits plan, mailed out thousands of open enrollment materials to employees and retirees, and created computer codes in its internal system. Therefore, when CalPERS determined that the 20-year retirees would not be eligible for coverage, “it was too late for the District to make a change.”

The District also contends that enforcing the promise that CalPERS made would not endanger a public benefit and would further the purpose of PEMHCA to enable public employers to attract and retain qualified employees by offering health benefits. (Gov. Code, § 22751.)

21. The evidence established that Wilkinson provided erroneous information to the District regarding eligibility of the 20-year retirees. This was not brought to the attention of CalPERS upper management until May 2012, before the effective date of the plan. Even though District staff had difficulties dealing with Wilkinson and had to work with his supervisors, no one from the District sought clarification from Wilkinson’s supervisor before including the 20-year retirees in the 401A Plan. Once CalPERS’s upper management became aware of the issue, McIntyre, a CalPERS senior official, notified the District of the problem. Furthermore, CalPERS informed the District that it would still provide health benefits for the 20-year retirees outside of PEMHCA, as other public entities had done in the past. Novotny acknowledged that the District considered whether to “bifurcate” the 20-year retirees out of PEMHCA. However, the District decided that it would have meant additional costs in terms of administering more than one benefits plan.

22. In the instant case, the District has not established the elements necessary for the application of the doctrine of equitable estoppel. As to the first element, CalPERS was not apprised of all the facts, including that the District was creating a 401A Plan to attempt to include the 20-year retirees. There is no proof that CalPERS either knew the true facts or

that it engaged in “careless and culpable conduct resulting in the deception of the party entitled to claim the estoppel.” (*Banco Mercantil S.A. v. Sauls, Inc.* (1956) 140 Cal.App.2d 316, 323.)

23. Even if the elements of equitable estoppel had been met, public policy interests outweigh the District’s interest. CalPERS has specific authority to administer and manage PEMCHA. One purpose of PEMHCA is to retain qualified employees by making receipt of retiree health care benefits contingent upon an employee retiring within 120 days of separation from employment with the employer who provides the benefits. Moreover, the purpose of a retirement system is to provide benefits to employees, not to allow employees to meet the definition of annuitant. (See Gov. Code, § 22751.)

24. If the 20-year retirees are found to be eligible for PEMHCA coverage, this would contravene the purpose of PEMHCA because it would enable employees who left District employment to continue to be eligible for lifetime health benefits that, under PEMHCA, are only provided to employees who continue to work for an employer and go on to retire from that employer within 120 days of separation from employment.

25. It is true that there is no increase in costs to CalPERS or the taxpaying public because the District and the retiree pay the entire cost of PEMHCA coverage; and therefore, it will not affect the financial stability of PEMHCA. Also, the District will incur significant costs to attempt to provide individual policy coverage for the 20-year retirees. However, according to Novotny, the District would “have to completely decimate the entire benefits package for [its] employees in order to be able to afford it” to continue with its self-funded health insurance benefits for all of its employee and retirees. There is no evidence that the District would have totally abandoned the contract with CalPERS if it had known earlier that the 20-year retirees would not be covered under PEMHCA.

26. The District’s other arguments, including that denying eligibility to the 20-year retirees would cause the District to violate the collective bargaining agreements, fail. The Legislature has made clear that the provisions of PEMHCA are controlling over any memorandum of understanding reached between public employers and employee organizations. (Gov. Code, § 3500, et seq.) The District’s argument that adopting an alternate health plan for the 20-year retirees would violate PEMHCA and risks the termination of coverage for all employees and retirees fails. The 20-year retirees are not eligible for enrollment in PEMHCA, therefore the District is allowed to obtain individual health plans for the 20-year retirees. (CalPERS Cir. Ltr. 600-007-06, dated Jan. 20, 2006.)

27. As key elements of the doctrine of equitable estoppel were not established and the District’s interests do not outweigh the public policy interests of CalPERS, respondent’s claim of estoppel must fail. To hold CalPERS estopped to deny coverage of the 20-year retirees under PEMHCA would directly contravene the requirements to meet the definition of annuitant in Government Code section 22760, subdivision (c).

28. Based upon the evidence and the applicable coverage provisions of PEMHCA, it is determined that CalPERS complied with PEMHCA when it denied coverage for the 20-year retirees for group health benefits coverage for failure to meet the requirements as annuitants.

*Other Matters*

29. All contentions made by CalPERS and the District not specifically addressed herein were considered and are found to be without merit.

ORDER

Respondent Foothill-De Anza Community College District's appeal is denied. CalPERS's determination that the District's 20-year retirees were ineligible for group health benefits coverage under the Public Employees' Medical and Hospital Care Act is sustained.

DATED: October 5, 2015

DocuSigned by:  
Regina Brown  
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REGINA BROWN  
Administrative Law Judge  
Office of Administrative Hearings