ATTACHMENT E

THE PROPOSED DECISION
BEFORE THE
PUBLIC EMPLOYEES’ RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:

PETER J. WESSEL,

Respondent,

and

CITY OF THOUSAND OAKS.

Respondent.

Case No. 2016-0068
OAH No. 2016091188

PROPOSED DECISION

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Ventura, California, on March 2, 2017.

Christopher Phillips, Senior Staff Attorney, represented Renee Ostrander (Complainant), Chief, Employer Account Services Division, Board of Administration, California Public Employees’ Retirement System (CalPERS).

Peter J. Wessell (Respondent) represented himself.

The City of Thousand Oaks (City) did not make a formal appearance, although notice was given as required by law and Felicia Liberman, Assistant City Attorney, was present at the hearing and Judi Goletti, Associate Human Resources Analyst, was called as a witness by Complainant.

At all times material, the City was a public agency that contracted with CalPERS to provide benefits for its employees. Respondent seeks CalPERS service credit for periods of employment for the City in 2011, 2012, 2013, and 2014. CalPERS denied the credit because Respondent worked as an hourly employee during these periods and was contractually precluded from receiving service credit. Respondent counters that he should be entitled to membership as a seasonal or temporary employee and that the City’s designation of him as an hourly employee is simply subterfuge to deny him retirement benefits.

[Signature]

May 17, 2017
Oral and documentary evidence was received at the hearing. The record was left open for the submission of additional evidence and written closing argument. On March 14, 2017, Respondent submitted a Petition to Accept Documents as Evidence and Brief From Respondent Peter J. Wessel. The evidence in question is an August 15, 1995 CalPERS Memorandum pertaining to the “Hourly Exclusion” and a December 21, 1995 letter from Karen DeFrank (DeFrank), CalPERS Employer Services Division, which have been marked for identification as Exhibit B. On March 16, 2017, Complainant submitted copies of the same two documents, which have been marked as Exhibit 8. Absent objection, Exhibits B and 8 are received.


FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.

2. At all times material, the City was a public agency that contracted with CalPERS to provide benefits for its employees. Its qualifying members are members of CalPERS.

3. A July 10, 2010 Amendment to Contract Between the Board of Administration of [CalPERS] and the [City] contains the following pertinent provision, A.5: “In addition to the classes of employees excluded from membership by [the Public Employees Retirement Law] the following classes of employees shall not become members of [CalPERS]: [¶] a Firefighters, [¶] Police Officers, and [¶] Employees compensated on an hourly basis.” (Exh. 6, at p. 3.) The same three categories of employees had been excluded from CalPERS membership in the original contract between the City and CalPERS, executed on May 18, 1965. (Exh. 6, at p. 6.)

4. a. In the late 1990s and early 2000s, CalPERS conducted a review of how the City and other contracting agencies applied the hourly-employee membership exclusion. As part of its review, CalPERS sent out a questionnaire, which included a question about how the agencies interpreted the exclusion.

b. In response to the question of how it interpreted the exclusion, the City replied on September 7, 1999: “As per our CalPERS contract we exclude persons compensated on an hourly basis. These are nonrepresented or designated part time employees, who are temporary, seasonal, or hold jobs of less than 30 hours per week.” (Exh. A, at p. 32.)

c. At the end of its review, CalPERS concluded that the City was properly applying its hourly-employee exclusion.

5. Respondent worked for the City from January 22 to June 24, 2011, and from July 9 to September 2, 2011, as an Engineering Aide. He was paid an hourly wage of $21.8806.
6. Respondent again worked for the City between August 18, 2012, and May 24, 2014, as a Transit Technician. He was paid an hourly wage of $15.00.

7. On February 1, 2011, and again on August 21, 2012, Respondent signed a “Notice of Exclusion from CalPERS Membership” form. The form listed several exclusions from CalPERS membership, such as for full time seasonal or limited term appointment of six months or less, for part time appointment of less than an average of 20 hours per week, for on-call intermittent emergency substitute with less than 1,000 hours of work, for employees who render legal services, for independent contractors, and for student aides in County schools. The specific exclusion checked off in Respondent’s signed form stated: “Your position is excluded by CalPERS contract agreement which excludes: [1] Employees compensated on an hourly basis.” (Exh. 7, at p. 2; emphasis in original.)

8. The City employs temporary and seasonal employees and pays them on an hourly basis. The City also employs some regular, part-time employees it compensates on an hourly basis.

9. Respondent cited CalPERS Circular Letter 800-151, dated November 18, 1994, in support of his position. In pertinent part, the letter states: “[Government Code section 20305] also states that this [sic] criteria supersedes any contract provision that purports to exclude persons in any temporary or seasonal employment. This means that those contracts that contain exclusions for hourly rated or hourly based employees, or similar time-based exclusions, must be read in conjunction with [section 20305]’s descriptions of mandated membership. In addition, contract exclusions are only effective for specific groups of employees, such as by departments, duties, date of hire. . . .” (Exh. A., at pp. 34-35.)

10. CalPERS subsequently rescinded Circular Letter 800-151. In a letter dated December 21, 1995, DeFrank wrote: “[In addition to gathering and reviewing input from employers, CalPERS also reviewed the provisions of [section 20305] with respect to the hourly exclusions. Based upon all the information, including a review by CalPERS Legal staff, it has been determined that as a general rule the section does not supersede contract provisions that exclude hourly based positions. It does however, specifically supersede the contract exclusion of temporary and/or seasonal positions. Therefore, the statement in CalPERS Circular Letter #800-151, that hourly based exclusions are superseded by section [20305] was too broad and should be disregarded. A copy of the CalPERS legal opinion on this issue is also attached.” (Exh. B., at p. 3.)

11. On May 21, 2015, Respondent requested service credit from CalPERS for his work for the City. Respondent argued that City hourly employees like him were in fact irregular, temporary or seasonal employees who could not be excluded from CalPERS membership.

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1 All further statutory references are to the Government Code
12. CalPERS denied Respondent's request in a letter dated September 18, 2015. CalPERS concluded that Respondent's employment was properly excluded pursuant to the contract between the City and CalPERS. CalPERS concluded that the applicable “hourly basis employees” exclusion had been accepted by CalPERS pursuant to its contract with the City and that the City did not exclusively apply the hourly compensation exclusion to temporary or seasonal employment.


LEGAL CONCLUSIONS

1. Section 20125 provides: “The board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.”

2. As set forth in factual finding numbers 2, 3, 5, 6, and 7, CalPERS contractually approved an exclusion from membership for employees compensated on an hourly basis, and Respondent was employed by the City as an hourly employee. Exclusion from CalPERS membership is therefore appropriate under section 20125.

3. Respondent nevertheless argues that he was, in effect, employed as a temporary or seasonal employee and the City is using the hourly compensation exclusion as a subterfuge not to comply with statutory protections for temporary and seasonal employees. With exceptions not pertinent, the provision in question, section 20305 provides, in part: “(a) An employee whose appointment or employment contract does not fix a term of full-time, continuous employment in excess of six months is excluded from this system unless: [¶] . . . [¶]

“(3) His or her employment is, in the opinion of the board, on a seasonal, limited-term, on-call, emergency, intermittent, substitute, or other irregular basis, and is compensated and meets one of the following conditions:

“(A) The appointment or employment contract does not fix a term of full-time, continuous employment in excess of six months, but full-time employment continues for longer than six months, in which case membership shall be effective not later than the first day of the first pay period of the seventh month of employment.

“(B) The person completes 125 days, if employed on a per diem basis or, if employed on other than a per diem basis, completes 1,000 hours within the fiscal year, in which case, membership shall be effective not later than the first day of the first pay period of the month following the month in which 125 days or 1,000 hours of service were completed. For purposes of this subdivision, ‘day’ means each eight-hour period of employment worked by an employee paid on a per diem basis so that membership is effective after he or she has completed 1,000 hours of compensated service in a fiscal year. [¶] . . . [¶]"
“(b) This section shall supersede any contract provision excluding persons in any temporary or seasonal employment basis and shall apply only to persons entering employment on and after January 1, 1975. Except as provided in Section 20502, no contract or contract amendment entered into after January 1, 1981, shall contain any provision excluding persons on an irregular employment basis.”

4. Circular Letter number 800-151 does not help Respondent because it has been rescinded. Moreover, as is clear from the plain language of section 20305, subdivision (b), and from CalPERS’s current practice consistent with the statutory language (Factual Finding number 10), the statute did not supersede contractual limitations, such as those pertaining to hourly-compensated employees, which do not expressly exclude persons in temporary or seasonal employment.

5. Respondent does not claim that he meets the requirements for the membership exception set forth in section 20305, subdivision (a)(3). Instead, he claims that the City is paying him and others like him hourly wages to prevent them from becoming CalPERS members as temporary or seasonal employees. However, the City has the discretion to hire hourly employees and to hire seasonal or temporary employees. Its contract with CalPERS allows the City to exclude hourly employees from CalPERS membership. Respondent did not establish that the City abused its discretion. Respondent did not show that in making its staffing decisions the City acted in an arbitrary, capricious or unlawful manner. In addition, temporary and seasonal employees are not the only ones receiving hourly wages, as the City employs some hourly-compensated employees who work on a regular, continuing basis. Respondent’s arguments about City misuse of the hourly compensation exclusion are unpersuasive.

6. Accordingly, Respondent is not entitled to receive service credit for his work for the City as an Engineering Aide or as a Transit Technician, by reason of factual finding numbers 1 through 13 and legal conclusion numbers 1 through 5.

ORDER

Respondent’s appeal is denied.

DATED: May 16, 2017

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings