

**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 Public Employees'  
Pension Reform Act of 2013 Enrollment in The Judges'  
Retirement System II of:**

**HONORABLE DIEGO H. EDBER, Respondent.**

**Agency Case No. 2019-0387**

**OAH No. 2019080632**

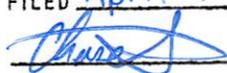
**PROPOSED DECISION**

This matter was submitted for decision on March 6, 2020, on stipulated facts and exhibits and briefing from the parties, and assigned to Thomas Heller, Administrative Law Judge, Office of Administrative Hearings, State of California.

Kevin Kreutz, Senior Attorney, California Public Employees' Retirement System (CalPERS), represented the Judges' Retirement System II (JRS II).

Respondent, the Honorable Diego H. Edber, Judge of the Superior Court of California, County of Los Angeles, represented himself.

Respondent attached two additional exhibits to his briefs that were not included the parties' stipulated facts and exhibits. In the stipulation, the parties agreed that the

PUBLIC EMPLOYEES RETIREMENT SYSTEM  
FILED April 9 20 20  


matter should be decided on the stipulated facts and exhibits. Therefore, the additional exhibits were marked for identification but not admitted.

## **ISSUE**

Whether respondent was correctly enrolled in JRS II as a "new member" subject to the California Public Employees' Pension Reform Act of 2013 (PEPRA, Gov. Code, § 7522 et seq.)<sup>1</sup>

## **FACTUAL FINDINGS**

The stipulated facts are:

1. On October 22, 2001, respondent became a member of CalPERS through his employment with the California Department of Justice as a Deputy Attorney General I.
2. On February 23, 2007, respondent left CalPERS-covered employment, and his CalPERS contributions remained on deposit.
3. By virtue of his employment with the Los Angeles City Attorney's Office as a Deputy City Attorney from February 26, 2007 through July 11, 2017, respondent established membership in the Los Angeles City Employees' Retirement System (LACERS).

---

<sup>1</sup> Undesignated statutory references are to the Government Code.

4. By virtue of his employment with the Superior Court of California, County of Los Angeles as a Court Commissioner from July 12, 2017 through October 12, 2018, respondent established membership in the Los Angeles County Employees' Retirement Association (LACERA). LACERA classified respondent as a "classic" member of the LACERA retirement system.

5. On October 15, 2018, respondent was appointed as a judge for the Superior Court of California, County of Los Angeles.

6. Administered by CalPERS, the Judges' Retirement System (JRS) is the retirement system created for judges appointed or elected to the Superior Court of California prior to November 9, 1994. (§ 75000 et seq.) JRS II is the retirement system for judges appointed or elected on or after November 9, 1994, including respondent. (§ 75500 et seq.)

7. By virtue of his appointment as a judge, respondent became a member of JRS II.

8. Pursuant to PEPR, effective January 1, 2013, JRS II applicable employers enroll judges into JRS II as either "classic" members or "new" members.

9. New members are subject to the terms and conditions of PEPR, which include higher contribution rates and a 36-month final compensation period.

10. JRS II members who are not new members are considered classic members not subject to PEPR.

11. Under PEPR, "[n]ew member means any of the following: [¶] (1) An individual who becomes a member of any public retirement system for the first time on or after January 1, 2013, and who was not a member of any other public retirement

system prior to that date. [¶] (2) An individual who becomes a member of a public retirement system for the first time on or after January 1, 2013, and who was a member of another public retirement system prior to that date, but who was not subject to reciprocity under subdivision (c) of Section 7522.02. [¶] (3) An individual who was an active member in a retirement system and who, after a break in service of more than six months, returned to active membership in that system with a new employer. For purposes of this subdivision, a change in employment between state entities or from one school employer to another shall not be considered as service with a new employer." (§ 7522.04, subd. (f).)

12. JRS II issues correspondence to newly appointed and elected judges advising them of the determination it makes regarding a judge's JRS II status as a classic member or a new member.

13. Respondent filled out a JRS II Self-Certification Form advising JRS II of his prior membership in LACERA, LACERS and CalPERS, due to his former employment in public service for agencies that provide retirement benefits through those systems.

14. Statutory authority for concurrent retirement is provided under section 75528 for JRS II members who retire concurrently from JRS II and CalPERS, or a retirement system subject to the County Employees Retirement Law of 1937 pursuant to section 20639 or 31840.8. For these reasons, a judge who is a new member of JRS II and has membership in CalPERS may be "subject to reciprocity" under section 7522.02 and thus not a new member under PEPR, provided he or she meets the other requirements of the statute and its implementing regulations.

15. JRS II does not have a reciprocal agreement with LACERS.

16. LACERA is subject to the County Employees Retirement Law of 1937 as referenced in the statutory authority for concurrent retirement described above. Therefore, a judge who is a new member of JRS II and has membership in LACERA may be "subject to reciprocity" under section 7522.02, and thus not a new member under PEPRA, provided he or she meets the other requirements of the statute and its implementing regulations.

17. On or about December 14, 2018, respondent, through his representative, submitted correspondence to JRS II requesting he be considered a classic member of JRS II and not a new member subject to PEPRA.

18. On or about February 15, 2019, JRS II determined that respondent should be enrolled in JRS II as a new member subject to PEPRA, and issued a determination letter stating the same.

19. Replying to respondent's December 14, 2018 letter, JRS II issued follow-up correspondence on March 1, 2019, affirming its determination that respondent should be enrolled in JRS II as a new member, and gave him appeal rights.

20. Respondent timely appealed JRS II's determination on or about March 20, 2019.

21. JRS II acknowledged respondent's appeal in correspondence dated March 29, 2019.

## **LEGAL CONCLUSIONS**

1. "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion

by a preponderance of the evidence. [Citation.]” (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5; see also *Coffin v. Alcoholic Beverage Control Appeals Board* (2006) 139 Cal.App.4th 471, 476; § 11504.) Here, respondent is asserting the affirmative that JRS II incorrectly enrolled him as a new member; accordingly, respondent has the burden of proof. The material facts are undisputed; the only question is the applicability of certain statutes to those undisputed facts, which is a question of law. (*Cohon v. Department of Alcoholic Beverage Control* (1963) 218 Cal.App.2d 332, 338.)

2. The issue for decision is whether respondent was correctly enrolled as a new member of JRS II subject to PEPPRA. According to respondent, he is not a new member as defined in section 7522.04, subdivision (f); according to JRS II, respondent is a new member under subdivision (f)(2) because he is “[a]n individual who [became] a member of a public retirement system for the first time on or after January 1, 2013, and who was a member of another public retirement system prior to that date, but who was not subject to reciprocity under subdivision (c) of Section 7522.02.” (§7522.04, subd. (f)(2).) Section 7522.02, subdivision (c) states in relevant part: “Individuals who were employed by any public employer before January 1, 2013, and who became employed by a subsequent public employer for the first time on or after January 1, 2013, shall be subject to the retirement plan that would have been available to employees of the subsequent employer who were first employed by the subsequent employer on or before December 31, 2012, if the individual was subject to concurrent membership for which creditable service was performed in the previous six months or reciprocity established under any of the following provisions: [¶] (A) Article 5 (commencing with Section 20350) of Chapter 3 of Part 3 of Division 5 of Title 2. [¶] (B) Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3. [¶] (C)

Any agreement between public retirement systems to provide reciprocity to members of the systems. [¶] (D) Section 22115.2 of the Education Code.” (§ 7522.02, subd. (c)(1).)

3. The stipulated facts establish that respondent is “[a]n individual who [became] a member of a public retirement system for the first time on or after January 1, 2013” – specifically, JRS II – and “was a member of another public retirement system prior to that date” – specifically, LACERS and CalPERS. (§ 7522.04, subd. (f)(2).) Furthermore, respondent “was not subject to reciprocity under subdivision (c) of section 7522.02” with respect to his prior memberships in LACERS and CalPERS. (*Ibid.*) As to his prior membership in LACERS, respondent was not subject to reciprocity because there is no reciprocal agreement between JRS II and LACERS. As to his prior membership in CalPERS, respondent also was not subject to reciprocity because he had a break in service of more than six months between the end of his CalPERS employment and the beginning of his JRS II employment. CalPERS has defined “subject to reciprocity” in sections 7522.02, subdivision (c) and 7522.04 to mean that, “on the Applicable Date, an individual is eligible for reciprocity pursuant to the terms of a statute or reciprocity agreement to which CalPERS is a party, provided he or she did not have a break in service of more than six (6) months immediately preceding the Applicable Date.” (Cal. Code Regs., tit. 2, § 579.3, subd. (b)(2).) The term “Applicable Date” refers to the appointment date in the new public retirement system. (Cal. Code Regs., tit. 2, § 579.3, subd. (b)(1).) Here, respondent had more than an 11-year break in service between the end of his CalPERS employment and the beginning of his JRS II employment.

4. Respondent argues that he is not a new member under section 7522.04, subdivision (f)(2) because “he was a classic member of LACERA in 2017 and because LACERA has reciprocity with JRS II . . . , his reciprocity followed him from the

Department of Justice to [LACERS] to [LACERA] to [JRS II]." (Respondent's Opening Br. at pp. 5-6.) The parties stipulated that a judge who is a new member of JRS II and has membership in LACERA may be "subject to reciprocity" under section 7522.02, and thus not a new member under PEPRA, provided he or she meets the other requirements of the statute and its implementing regulations. But respondent was a member of LACERA only from July 12, 2017 until October 12, 2018, and the reciprocity referenced in section 7522.04, subdivision (f)(2) plainly refers to reciprocity as between an individual's new public retirement system on or after January 1, 2013, and another public retirement system of which the individual was a member prior to January 1, 2013. Therefore, respondent's prior membership in LACERA does not exclude him from the definition of a new member in section 7522.04, subdivision (f)(2).

5. Based on the above, respondent qualified as a new member of JRS II as defined in section 7522.04, subdivision (f)(2), and JRS II correctly enrolled him as a new member subject to PEPRA.

## ORDER

Respondent's appeal is denied.

DATE: April 6, 2020

DocuSigned by:  
*Thomas Heller*  
CFDEA01421714A4...

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings