

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Appeal of Reclassification to Peace
Officers & Firefighters (POFF) Retirement Category of
Firefighters of:**

**LOS ALAMITOS JOINT FORCES TRAINING BASE FIRE
DEPARTMENT, CALIFORNIA MILITARY DEPARTMENT,**

Respondent

and

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES,

Respondent

and

**BRETT A. ALVAREZ; RUSSELL S. BASTOW; JASON M.
BEEBOUT; WILLIAM J. DAVID; RYAN A. HAMMANG; JEFFREY
D. HARRIS; STEVEN V. JENSEN; JOHN T. KELLY; SEAN M.
KLOMAN; ANTHONY C. MORGANTI; CAMERON H. PETERS;
BRIAN M. ROOSEN; TADASHI R. SHIMADA; JASON T. TIGHE;**

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED June 16, 20 20

K. Parker

JUSTIN N. TOPALIAN; BRIAN P. WHITAKER; MICHAEL D.

WITMER, Respondents

Case No. 2019-0891

OAH No. 2019100859

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on March 11 and 12, 2020, in Sacramento, California.

Preet Kaur, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Attorney Charmaine E. Betty-Singleton represented respondent California Military Department.

Attorney Tawni O. Parr represented respondent California Department of Human Resources (CalHR).

Attorney Jules F. Miller of the Law Offices of Jules Miller represented respondents Brett A. Alvarez, Russel S. Bastow, Jason M. Beebout, William J. David, Ryan A. Hammang, Jeffrey D. Harris, Steven V. Jensen, John T. Kelly, Sean M. Kloman, Anthony C. Morganti, Cameron H. Peters, Brian M. Roosen, Tadashi R. Shimada, Jason T. Tighe, Justin N. Topalian, Brian P. Whitaker, and Michael D. Witmer (collectively, individual respondents).

Evidence was received, and the record was left open to allow the parties to submit simultaneous written closing and reply briefs. CalPERS's closing and reply briefs are marked as Exhibits 29 and 30, respectively, and the individual respondents' closing and reply briefs are marked as Exhibits EE and FF, respectively. Respondents California Military Department and CalHR chose not to submit written briefs. The record was closed and the matter submitted for written decision on June 8, 2020.

SUMMARY

The individual respondents are state miscellaneous members of CalPERS by virtue of their employment as state active duty service members of the California Military Department. They are currently assigned, or were assigned in the past, to the Los Alamitos Joint Forces Training Base (JFTB) in Los Alamitos, California, as firefighters. The individual respondents seek reclassification as state peace officer/firefighter (POFF) members because they perform job duties, wear attire, and operate equipment similar to other firefighters classified as POFF members.

CalPERS plainly has authority to reclassify members who have been misclassified. But the individual respondents' argument that they have been misclassified as state miscellaneous members is premised on a tortured interpretation of applicable law. They failed to demonstrate that they satisfy any of the statutory conditions for becoming a POFF member. Therefore, their request for reclassification must be denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. On January 6, 2017, the individual respondents requested that CalPERS reclassify them from state miscellaneous members to POFF members. CalPERS responded by explaining that only CalHR has authority to reclassify state employees.
2. The individual respondents forwarded their request for reclassification to CalHR on February 28, 2017. CalHR responded by explaining it has no authority to reclassify the individual respondents.
3. The individual respondents submitted a second request for reclassification to CalPERS on October 24, 2017. CalPERS responded by explaining it has no authority to reclassify state miscellaneous members, and declined to assist the individual respondents. On April 12, 2018, the individual respondents filed an appeal with CalPERS requesting an administrative hearing to determine their right to reclassification.
4. Initially, CalPERS took the position that the individual respondents had no right to appeal. The individual respondents filed a petition for a writ of mandate to compel CalPERS to consider their appeal. The parties settled the petition by CalPERS agreeing to consider the individual respondents' appeal.
5. On October 22, 2019, Renee Ostrander, Chief of CalPERS's Employer Account Management Division, signed the Statement of Issues solely in her official capacity. The Statement of Issues provides:

This appeal is limited to determining 1) whether there are any statute(s) or legal authority which empowers CalPERS to reclassify Respondent Members from miscellaneous to the state POFF retirement category; and if there are, then 2) whether Respondent Members meet the legal requirements set forth in those statutes and/or regulations to be reclassified from miscellaneous to the state POFF retirement category.

The Parties' Stipulation

6. The parties stipulated that all individual respondents are firefighters who are or were employed by the California Military Department and assigned to the JFTB.¹ Respondent Justin Topalian no longer works for the California Military Department.²

7. The parties further stipulated that all individual respondents are state active duty service members of the State Military Reserve, and are not in state civil

¹ While the written stipulation is between CalPERS and the individual respondents, respondents California Military Department and CalHR signed the stipulation and orally agreed to its terms at the beginning of the hearing. (*Webster v. Webster* (1932) 216 Cal. 485, 489 [an oral stipulation entered into during open court while on the record is an agreement between the parties and the court which the court is required to enforce].)

² No evidence of the identity of the other individual respondent who is no longer employed by the California Military Department was introduced.

service. They are state miscellaneous members of CalPERS by virtue of their state active duty status.

Additional Evidence

JFTB

8. The California Attorney General described the JFTB as follows:

The Joint Forces Training Base at Los Alamitos, California ("JTFB" [*sic*] or "the base"), is a federal property licensed indefinitely to the State of California for use by the State's Military Department, pursuant to a master cooperative agreement between California and the federal National Guard Bureau. [Citation.] The California National Guard operates the base, and is its primary occupant. Fire protection for the base is currently provided by employees of the State's Military Department who are classified as "state active duty" personnel, but who are not members of the National Guard.

(97 Ops.Cal.Atty.Gen. 34, 1 (2014).)

CALIFORNIA MILITARY DEPARTMENT

9. Brigadier General (CA) Robert Spano is the Director of Staff for the California Military Department, and is third in command behind the Adjutant General and Assistant Adjutant General. The JFTB is under the command of the Army Division, and General Spano oversees the Army Division.

10. "State active duty service member" describes an employee of the California Military Department who must hold a military affiliation with either the National Guard or the California State Guard as a condition of employment.³ State active duty service members are not members of the state civil service. Firefighters assigned to the JFTB are state active duty service members of the California Military Department, and are affiliated with the California State Guard.

11. Camp Roberts is a National Guard post located on both sides of the Salinas River in Monterey and San Luis Obispo Counties. Members of its fire department are not state active duty service members of the California Military Department, but are state civil servants. They receive CalPERS benefits as POFF members.

CALHR

12. Desi Rodrigues is a Program Manager II in CalHR's Benefits Division. She oversees several programs, including the Retirement Program.

13. Ms. Rodrigues received the individual respondents' February 28, 2017 request for reclassification as POFF members. After reviewing the correspondence and the enclosures, she investigated the individual respondents' job classifications and could not find the job classifications in CalHR's state civil service system. She conferred with co-workers in CalHR's Personnel Management Division, the division with jurisdiction over state civil service classifications, and determined that the individual respondents are state active duty service members of the California Military

³ The California State Guard is sometimes referred to as the "California State Military Reserve" or the "State Militia."

Department and are exempt from state civil service. She did not conduct a "POFF analysis" because the Personnel Management Division does not have jurisdiction over employees who are exempt from state civil service.

INDIVIDUAL RESPONDENTS

14. Steven Jensen, Sean Kloman, and Brian Whitaker were the only individual respondents to testify at hearing. Each confirmed he is a state active duty service member of the California Military Department assigned to the JFTB as a firefighter. They are not members of state civil service, and each was adamant that he does not want his firefighter position reclassified as state civil service.

15. Mr. Jensen currently holds the rank of "Fire Captain" within the JFTB fire department. He previously held the ranks of "Fire Apparatus Engineer" and "Firefighter." He explained that the firefighting duties he performs as a Fire Captain, and previously performed as a Fire Apparatus Engineer and Firefighter, are substantially the same as those performed by firefighters holding the same ranks who work at Camp Roberts, for the California Department of Forestry and Fire Protection, and for the Orange County Fire Authority. He wears similar attire and operates similar equipment as those firefighters. Those firefighters are POFF members of CalPERS by virtue of their employment.

16. Messrs. Kloman and Whitaker hold the rank of "Firefighter." They reiterated Mr. Jensen's testimony about the similarity of duties performed, attire worn, and equipment operated by firefighters at the JFTB, Camp Roberts, the California Department of Forestry and Fire Protection, and the Orange County Fire Authority.

Analysis

CALPERS'S AUTHORITY TO RECLASSIFY MEMBERS WHO HAVE BEEN MISCLASSIFIED

17. CalPERS argues it has no authority to reclassify the individual respondents as POFF members, because: 1) none of them holds a job classification specified in Government Code section 20392, and 2) CalHR has exclusive authority to designate job classifications for inclusion within the POFF classification pursuant to Government Code section 20398, subdivision (a). Such argument confuses CalPERS's **authority** to reclassify a member who has been misclassified, on the one hand, with that member's **eligibility** for reclassification, on the other. Also, the individual respondents' closing brief emphasized that they "have never sought [reclassification] under § 20398."

18. Government Code section 20160, subdivision (b), provides, "[t]he board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system." "A misclassification is covered by this section." (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 46 (*City of Oakland*)).

NONE OF THE INDIVIDUAL RESPONDENTS QUALIFY FOR RECLASSIFICATION

19. The individual respondents argue in their closing brief they are entitled to "POFF classification under § 20282 and *City of Oakland, supra*." Government Code section 20282 specifies that state active duty service members of the California Military Department "shall become members [of CalPERS] in the manner and under the same conditions as under this article apply to other state employees." Because they perform the same duties, wear the same attire, and use the same equipment as firefighters with

Camp Roberts, the Department of Forestry and Fire Protection, and the Orange County Fire Authority, the individual respondents contend they should also be classified as POFF members.

20. The "conditions" under which "other state employees" qualify as POFF members are outlined in Government Code sections 20391 through 20397, and include: 1) employment in a specific job classification; 2) employment with a specific agency; 3) employment as a peace officer; 4) representation by a specific bargaining unit; 5) responsibility for direct supervision of POFF members; or 6) a combination of these conditions. The individual respondents failed to demonstrate they satisfy any of the statutory conditions for being a POFF member. Indeed, they agree they do not hold any of the job classifications enumerated in Government Code section 20392.

21. The individual respondents misplace their reliance on *City of Oakland*. That case involved an application for reclassification from "local miscellaneous member" to "local safety member" submitted by a group of employees performing firefighting duties at the Oakland International Airport. "'Local safety member' includes all . . . firefighters . . . employed by a contracting agency who have by contract been included within the system." (Gov. Code, § 20420.) As applicable to the employees, "'local firefighter' means any officer or employee of a fire department of a contracting agency . . ." (Gov. Code, § 20433.)

22. On appeal, the City of Oakland argued the firefighters did not qualify as local firefighters because they were employed by the Port of Oakland, an agency within the City of Oakland operating the Oakland International Airport, rather than the Oakland Fire Department. "Therefore, they are not employees of a fire department of the City." (*City of Oakland, supra*, 95 Cal.App.4th at p. 55.)

23. Rejecting the City of Oakland's argument, the appellate court explained: "If an entity is designed to act and does act like a fire department, it is a de facto fire department." (*City of Oakland, supra*, 95 Cal.App.4th at p. 56.) The court rationalized: "this accords with the rule that a worker's status should be determined based on duties actually performed." (*Ibid.*) The court then analyzed the members' primary job duties before concluding they met the definition of "local firefighter" specified in Government Code section 20433. (*City of Oakland, supra*, 95 Cal.App.4th at pp. 58-63.)

24. Here, the "conditions" for being a POFF member are defined more narrowly. They do not include the individual respondents' job duties, the attire they wear, or the equipment they use, and such issues are not relevant to their claim for reclassification. Therefore, the appellate court's analysis of those factors in *City of Oakland* is inapplicable. (See *Contra Costa Water District v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660 ["Opinions are not authority for issues they do not consider"].)

25. Finally, the individual respondents contend Government Code section 20066 provides additional authority for their classification as POFF members. But that statute does not define any conditions for being a POFF member. Instead, it defines "state peace officer/firefighter service" as:

[s]ervice rendered as a state peace officer/firefighter member only while receiving compensation for that service, except as provided in Article 4 (commencing with Section 20990) of Chapter 11. It also includes service rendered in an employment in which persons have since become state peace officer/firefighter members.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. The individual respondents have the burden of presenting sufficient evidence of their "right to correction pursuant to [Business and Professions Code section 20160,] subdivisions (a) and (b)." (Bus. & Prof. Code, § 20160, subd. (d).) They must meet their burden by a preponderance of the evidence. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of evidence"].) This evidentiary standard requires the individual respondents to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, they must prove it is more likely than not that they meet one or more of the statutory conditions for being a POFF member of CalPERS. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

INDIVIDUAL RESPONDENTS' EMPLOYMENT STATUS

2. It is undisputed that at all relevant times, the individual respondents were state active duty service members of the California Military Department assigned to the JFTB as firefighters. As such, they were exempt from state civil service. (Cal. Const., art. VII, § 4, subd. (k) ["Members of the militia while engaged in military service" are exempt from civil service].) Although Government Code section 18592 was a legislative attempt to include the firefighters at the JFTB within the definition of "state civil service," the statute never became operative because federal funds were not made available to pay the costs associated with converting those employees to civil service

status. (Stats. 1993, ch. 310 (Assem. Bill No. 1054), § 3 ["This act shall become operative only if federal funds are made available for the specific purposes of this act to pay all costs resulting from this act"].)

CALPERS MEMBERSHIP

3. "A CalPERS 'member' . . . is an 'employee who has qualified for membership in this system and on whose behalf an employer has become obligated to pay contributions.'" (*Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 499, quoting Gov. Code, § 20370, subd. (a).) All state employees are members of CalPERS, unless specifically excluded by statute. (Gov. Code, § 20280.) Membership begins upon employment. (Gov. Code, § 20281.)

4. Government Code section 20282 provides the following regarding state active duty service employees:

All officers, warrant officers, and enlisted men who after October 1, 1961, are placed on full-time active duty with the office of the Adjutant General, pursuant to Sections 142, 167, 321, 340 and 551 of the Military and Veterans Code, shall become members in the manner and under the same conditions as under this article apply to other state employees. The retirement benefit provisions of the Military and Veterans Code shall not apply to those persons. This section shall not apply to the Adjutant General or the Assistant Adjutant General.

5. There are two classifications of CalPERS members — the "miscellaneous member" classification, and the "safety member" classification. (Gov. Code, § 20371.)

The miscellaneous member classification includes those classified as "state miscellaneous members." (Gov. Code, § 20371, subd. (a).) The safety member classification includes those classified as POFF members. (Gov. Code, § 20371, subd. (b).)

6. The parties stipulated the individual respondents are classified as state miscellaneous members.⁴ "State miscellaneous member' includes all members employed by the state and university, except . . . state peace officer/firefighter . . . members." (Gov. Code, § 20380.)

7. POFF members include certain employees employed as peace officers by the Board of Parole Hearings, the Department of Consumer Affairs, the Department of Developmental Services, the Department of Health Care Services, the Department of Toxic Substances Control, the California Horse Racing Board, the Department of Industrial Relations, the Department of Insurance, the Department of State Hospitals, the Department of Motor Vehicles, the Department of Social Services, the Department of Alcoholic Beverage Control; the Department of Justice, the Department of Parks and Recreation, or the Franchise Tax Board. (Gov. Code, § 20391.)

⁴ Stipulations are the equivalent of evidence, and are "conclusive as to all matters properly contained in them." (*Harris v. Spinali Auto Sales, Inc.* (1966) 240 Cal.App.2d 447, 453.) Evidence offered to prove a stipulated fact is inadmissible because it is irrelevant; it does not tend "to prove or disprove any disputed fact." (Evid. Code, §§ 210, 350 [only relevant evidence is admissible]; *Robinson v. Robinson* (1962) 208 Cal.App.2d 213, 217 [trial court did not err by not making findings of fact and conclusions of law because the parties' stipulation "amounted to a withdrawal of the issues raised by the pleadings"].)

8. POFF members also include employees holding specific civil service job classifications enumerated in Government Code section 20392, including "Fire Apparatus Engineer," "Fire Captain," "Firefighter," "Firefighter I," or "Firefighter II." Additionally, certain employees designated as peace officers and employed by the Secretary of State, State Controller, CalPERS, the former Department of Corporations, the State Fair Police Department, the California Lottery, the Contractor's State License Board, or the California Department of the Youth Authority are POFF members. (Gov. Code, § 20393, subds. (a)-(c).) POFF members also include those employed by the California Department of Forestry and Fire Protection as a Forester I or Forester II. (Gov. Code, § 20393, subd. (d).)

9. Peace officers employed by a California State University police department and represented by Public Safety Unit No. 8, as well as those responsible for the direct supervision of such employees, are POFF members. (Gov. Code, § 20394.) Also, campus fire apparatus engineers employed by the California State University and represented by Technical and Support Services Unit No. 9 are members of the classification, provided that such membership is authorized by the applicable memorandum of understanding. (Gov. Code, § 20396.)

10. Peace officers represented by Corrections Unit No. 6 or Protective Services and Public Safety Unit No. 7, as well as employees whose primary duties include active firefighting/fire suppression and are represented by Firefighters Unit No. 8, are POFF members. (Gov. Code, § 20395.) Additionally, those employed by the California State Senate or the California State Assembly as Sergeant-at-Arms, or by the judicial branch as bailiffs or security coordinators, are POFF members. (Gov. Code, § 20397.)

11. Peace officers and firefighters "whose principal duties consist of active firefighting/fire suppression" exempt from state civil service or excluded from representation under the Ralph C. Dills Act (Gov. Code, §§ 3512-3524) may be designated as POFF members if their primary job duties consist of: 1) providing direct supervision of others who are POFF members pursuant to Government Code sections 20391, 20392, 20393, or 20395; 2) performing internal affairs investigations for the Department of Corrections and Rehabilitation; or 3) administering programs for an entity with primary responsibility for active law enforcement or active firefighting/fire suppression. (Gov. Code, § 20398, subd. (a).) CalHR has sole responsibility for designating the job classifications to be included in the POFF classification, and "an agency or department shall not designate a classification as a 'state peace officer/firefighter member' classification pursuant to this section without prior approval from the Department of Human Resources." (Gov. Code, § 20398, subd. (e).)

AUTHORITY TO CORRECT MISCLASSIFICATION

12. Government Code section 20160, subdivision (b), specifies that "the board [of administration] shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or the system." Classifying a member in the wrong membership classification constitutes an error correctable by CalPERS's board of administration pursuant to Government Code section 20160, subdivision (b). (*City of Oakland, supra*, 95 Cal.App.4th 29, 46.)

Conclusion

13. CalPERS clearly has authority to correct any misclassification of the individual respondents. However, whether they were in fact misclassified is an entirely

separate issue. The individual respondents failed to establish that they meet any of the conditions for being a POFF member specified in Government Code sections 20391 through 20397, and they expressly stated they were not seeking reclassification pursuant to Government Code section 20398, subdivision (a). Therefore, their request for reclassification must be denied.

ORDER

Respondents Brett A. Alvarez, Russel S. Bastow, Jason M. Beebout, William J. David, Ryan A. Hammang, Jeffrey D. Harris, Steven V. Jensen, John T. Kelly, Sean M. Kloman, Anthony C. Morganti, Cameron H. Peters, Brian M. Roosen, Tadashi R. Shimada, Jason T. Tighe, Justin N. Topalian, Brian P. Whitaker, and Michael D. Witmer's request for reclassification from state miscellaneous members to state peace officer/firefighter members is DENIED.

DATE: June 16, 2020

DocuSigned by:
Coren D. Wong
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COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings