

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Susan P. Galloway (Respondent) was an employee of Respondent City of Santa Monica (City). The City is a public agency contracting with CalPERS for retirement benefits for its eligible employees. The provisions of the City's contract with CalPERS are contained in the Public Employees' Retirement Law (PERL). (Government Code section 20000 et seq.)

On April 1, 1979, Respondent was employed by the City's police department as a Telephone Operator. By virtue of her employment, Respondent became a local miscellaneous member of CalPERS. On January 23, 1983, Respondent separated from employment with the City's police department. On August 19, 1983, Respondent took a refund of her CalPERS contributions. On January 2, 1985, Respondent returned to employment with the City as an Airport Security Guard (ASG). By virtue of her employment, Respondent again became a local miscellaneous member of CalPERS.

On October 25, 2000, the City submitted to CalPERS an application for disability retirement on behalf of Respondent, with a requested retirement date of October 1, 2000. Respondent retired for disability retirement effective October 1, 2000 and has been receiving her retirement allowance since or around June 1, 2001.

By letter dated May 14, 2015, Respondent requested that her membership with CalPERS be reclassified from local miscellaneous to local safety for her employment as an ASG with the City.

CalPERS reviewed multiple job duty statements for Respondent's position as an ASG and determined that the principle duties of the position are not active law enforcement type duties. For this reason, the position did not meet the definition of "Local police officer" found in Government Code section 20425. In addition, CalPERS determined that Respondent did not qualify to receive local safety benefits under Government Code section 20423.3, which allows airport police who are peace officers to qualify as local safety. For Respondent to qualify to receive local safety benefits under section 20423.3 the City must amend its contract with CalPERS to include benefits under this section before it can reclassify eligible employees. The City never amended its contract with CalPERS. In addition, reclassifications under Section 20423.3 are only available to employees active in the position on the effective date of the contract amendment. Since Section 20423.3 was added to the PERL in 2009, approximately 9 years after Respondent was actively enrolled by the City, CalPERS determined Respondent could not qualify for local safety benefits under this section. By letter dated April 19, 2016, CalPERS informed Respondent that her service with the City did not qualify as local safety because she was not employed in a police department, her services did not constitute active law enforcement, she was not a patrolperson, and the City did not contract for benefits under Section 20423.3.

On or about June 25, 2018, Respondent, through her counsel, submitted an appeal of CalPERS' April 19, 2016 letter and provided additional information to CalPERS.

On July 19, 2018, CalPERS informed Respondent and her counsel that there was insufficient information provided to change her classification from miscellaneous to safety, and that Respondent was not entitled to an administrative appeal on this issue.

On February 20, 2019, CalPERS sent a determination letter to Respondent restating that her service with the City did not qualify for safety membership. CalPERS determined that Respondent's position does not meet the statutory requirements to be classified as Local Police Officer or Local Safety pursuant to Sections 20425 and 20420 of the PERL. CalPERS determined that:

[e]ven though the position may be occasionally called upon or subject to the occasional call, the principle duties for Respondent's Susan Galloway's position do not fall within the scope of active law enforcement. As a result, Susan Galloway was properly reported to CalPERS as a miscellaneous member for her service with the City from April 1, 1979 to January 23, 1983 and January 2, 1985 to October 1, 2000.

CalPERS provided Respondent 30 days to appeal CalPERS' determination.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. A hearing was held on October 23 and October 24, 2019, as well as January 2 and January 3, 2020. Both the Respondent and Respondent City were represented by separate counsel.

At the hearing, CalPERS presented evidence regarding the job duties of Respondent's position as an ASG. Respondent presented evidence that, under the PERL, some local safety member classifications are mandatory and that some are optional. CalPERS presented evidence that the principle duties of the Respondent's position were not active law enforcement type duties. For this reason, CalPERS argued that the position did not meet the definition of "Local police officer" found in Government Code section 20425, which would require mandatory local safety membership.

In addition, CalPERS presented evidence and argument that Respondent did not qualify to receive local safety benefits under Section 20423.3, which allows airport police who are peace officers to qualify as local safety. CalPERS also presented evidence that the City had not amended its contract with CalPERS to include benefits under this section. In addition, CalPERS presented evidence that Respondent retired prior to Section 20423.3 being enacted as law, and that reclassifications under Section 20423.3 are only available to employees active in the position on the effective date of the contract amendment. Consequently, CalPERS argued and the evidence confirmed that Respondent could not qualify for local safety benefits under Section 20423.3.

Ultimately, CalPERS presented evidence and argument that there was insufficient evidence to allow CalPERS to change Respondent's classification from local miscellaneous to local safety because there is no evidence that Respondent performed the active law enforcement service type duties necessary to qualify her as a local safety member.

The City also participated in the hearing and presented evidence and argument that Respondent did not qualify as a local safety member and that her classification should not be changed from a local miscellaneous member to a local safety member.

Respondent testified on her own behalf at the hearing. Respondent testified regarding her employment with the City. Respondent also testified regarding her job duties as an ASG, and the education and training that she obtained in connection with performing these job duties.

In addition, the parties presented testimony, through three witnesses, regarding the job duties and activities of ASGs. These witnesses explained not only the job duties of an ASG, but also the training they are required to receive. Through these witnesses, evidence regarding the difference between a peace officer and a public officer, and the different training and processes required to become a peace officer versus a public officer, was presented to the ALJ.

In addition, Respondent presented expert testimony through Retired Lieutenant Richard Lichten. Lieutenant Lichten testified regarding the basis for him rendering his opinion, which included reviewing records from this case and conducting a telephonic interview with Respondent. Based on his review of the records and his interview with Respondent, Lieutenant Lichten wrote a report of his findings and opinions. Lieutenant Lichten opined that many of Respondent's day to day activities, coupled with her police training, were consistent with those duties of a sworn active law enforcement position and not a civilian security officer.

After considering all of the evidence introduced, as well as the arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent, because she was challenging CalPERS' determination that ASGs were properly classified as local miscellaneous members, bore the burden of proof by a preponderance of the evidence that she was entitled to be reclassified as a local safety member. The ALJ found that Respondent did not meet her burden.

The ALJ found that for a position to qualify for local safety member classification with CalPERS, its duties must fall within the parameters of one of the sections of retirement law defining local safety member classification (Sections 20420-20445). Further, the ALJ found that under a mandatory safety classification, if a member's job duties fall within the definition of that section, he or she must be classified as a safety member. On the other hand, under an optional safety classification, the ALJ found that a member may be placed in that safety classification only if he or she is placed there by a contract between the member's employer and CalPERS.

The ALJ found that Section 20423.31, which provides a basis for optional safety member classification, does not apply in this matter “because respondent City has not amended its contract with CalPERS to confer safety status to ASGs under the provisions of this statute.”

The ALJ then applied applicable case law to determine whether the principal duties and functions of ASG position clearly fell within “active law enforcement” which would entitle Respondent to a mandatory safety classification under Section 20425. The ALJ found that for “ASGs to be considered as having engaged in active law enforcement service, they must be involved in the suppression of crimes and the arrest and detention of criminals, services normally performed by police officers. In performing these services, they must also implicitly be exposed to a similar level of hazard as police officers.” The ALJ ultimately concluded that Respondent was not a police officer and did not perform the duties normally performed by police officers.

The ALJ concluded that Respondent's job duties differed from the "active law enforcement service" of police officers in the following twelve ways:

- (1) Respondent did not and was not required to complete the POST basic academy training;
- (2) Respondent was not required to qualify for the use of any firearms;
- (3) Respondent was not authorized to carry a weapon, other than pepper spray;
- (4) Respondent was not required to engage in physical confrontations with suspects;
- (5) Respondent did not respond to police dispatches or to crime scenes;
- (6) Respondent did not make any arrests where she took the suspect into custody;
- (7) Respondent did not transport suspects to jail;
- (8) Respondent did not guard suspects;
- (9) Respondent did not engage in pursuits of suspects by foot or car,
- (10) Respondent did not serve any search or arrest warrants;
- (11) Respondent did not enforce criminal laws outside the premises of the Airport; and,
- (12) Respondent did not conduct any criminal investigations.

The ALJ did recognize, that on a few occasions, Respondent assisted law enforcement officers in arresting individuals and rendered aid to victims of plane crashes. The ALJ found Respondent's actions commendable; however, these actions did not support a finding that Respondent's duties were typical of those of an active law enforcement officer. In fact, the ALJ found that these limited instances supported CalPERS' determination that Respondent's duties were not similar to those of a law enforcement officer. For example, the ALJ found that while ASGs were allowed to issue citations for some Municipal Code and Penal Code violations, they were not allowed to take an individual into custody for failure to sign the agreement to appear. The ASG was

required to call a police officer to do this. In addition, the ALJ found there was no evidence that ASGs were required, as part of their job duties, to put their lives at risk to be first responders at airplane crashes.

The ALJ accorded little weight to the testimony and opinion of Respondent's expert witness, Lieutenant Lichten. The ALJ found that Lieutenant Lichten had the requisite knowledge and experience to render an opinion on the nature of Respondent's job duties as an ASG; however, his opinion on assumptions that are not supported by the evidence in this case. For example, his opinion was based on an assumption that Respondent was a sworn peace officer, which was not supported by the evidence. Further, he ALJ also found the Lieutenant Lichten's opinion was inconsistent with the actual evidence of the case. For example, his opinion was based, in part, on job descriptions using the term "patrol" for both police officers and ASGs. However, at the hearing Lieutenant Lichten acknowledged that the patrol duties of an ASG are significantly different that the patrol duties of a police officer.

Ultimately, the ALJ found that an expert's opinion is only as good as the facts and the reason upon which it is based. Lieutenant Lichten's opinion was based on facts and assumptions provided to him by Respondent, that were not actually supported by evidence. Consequently, the ALJ found that his opinion should be accorded little weight.

The ALJ ultimately found that Respondent, as well as other ASGs, perform a valuable public service on behalf of the City, and that they were sometimes exposed to very real dangers. However, the ALJ concluded that Respondent's reclassification request was not supported by the evidence of her duties as an ASG and the definition of "local safety officer" as defined by Section 20425.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

September 16, 2020

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