

ATTACHMENT C

RESPONDENT'S ARGUMENT

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AUG 27 2020

**Re: Respondent City of Santa Monica's Argument In the Matter of the Appeal of
Membership Reclassification of Susan Galloway, CalPERS Case No. 2019-0513
Client-Matter: SA530/208**

Dear Ms. Swedensky:

Respondent City of Santa Monica requests that the California Public Employees' Retirement System ("CalPERS") Board of Administration ("Board") adopt the Proposed Decision issued by the Administrative Law Judge ("ALJ") in the above-referenced matter.

I. INTRODUCTION

From January 2, 1985, to October 1, 2000, Susan Galloway served as an Airport Security Guard ("ASG") with the City of Santa Monica ("City"). As an ASG, Galloway was classified as a local miscellaneous member of CalPERS. Galloway received a disability retirement and started receiving her retirement allowance beginning on June 1, 2001. Almost 14 years later, on May 14, 2015, Galloway requested that CalPERS reclassify her membership from local miscellaneous to local safety. On April 19, 2016, CalPERS correctly denied her request because she did not qualify for local safety member status. Galloway thereafter filed the instant appeal.

Over the course of the three-day hearing, testimony from multiple Airport Security Guards, including Galloway, established that their duties did *not* consist of active law enforcement service, i.e., the active enforcement and suppression of crimes against people or property, or the arrest and detention of criminals. Accordingly, the ALJ correctly determined that CalPERS properly classified Galloway as a local miscellaneous member and her appeal should be denied. Therefore, the City requests that the CalPERS Board adopt the Proposed Decision as its own decision in the matter. Furthermore, because the decision contains a significant legal determination of general application that is likely to recur, the City also requests that the CalPERS Board designate the decision as precedent.

II. PROCEDURAL BACKGROUND

Galloway was employed as an ASG with the City from January 2, 1985, to October 1, 2000, during which she was classified as a local miscellaneous member of CalPERS. (Proposed

Cheree Swedensky

Re: *Respondent City of Santa Monica's Argument*

August 26, 2020

Page 2

Decision (“PD”), p. 5, ¶ 5.) The City applied for a disability retirement on behalf of Galloway and she has been receiving her retirement allowance as a local miscellaneous member since June 1, 2001. (PD, p. 5, ¶¶ 6-7.) On May 14, 2015, Galloway requested that CalPERS reclassify her membership from local miscellaneous to local safety. (PD, p. 5, ¶ 8.) On April 19, 2016, CalPERS notified Galloway that her service with the City did not qualify for local safety member status in part because her services did not constitute active law enforcement and she was not a patrol officer. (PD, p. 5, ¶ 9.) On March 19, 2019, Galloway filed the instant appeal, which was heard by Administrative Law Judge Ji Lan Zang from the Office of Administrative Hearings on October 23 and 24, 2019, and January 3, 2020. (PD, p. 1.) Following briefing from the Parties, the ALJ issued her Proposed Decision on June 30, 2020, denying the appeal.

III. FACTS ESTABLISHED AT HEARING

A. “Observe and Report” vs. Apprehension of Criminals

During the course of the appeal hearing, Galloway’s expert witness on law enforcement practices, Retired Los Angeles Sheriff Department Lieutenant Richard Lichten, testified that the major distinguishing characteristic between a security guard and a police officer is that a security guard’s duty is to “observe and report” whereas a police officer “has a duty to also act upon what they see and take positive action.” (PD, pp. 26-27, ¶ 53; Tr. Vol. 1, pp. 43:11-12, 139:5-16, 165:3-14.) Lt. Lichten explained that security guards are in the prevention business but not the apprehension business; if a security guard sees a crime, the security guard calls the police. A police officer, on the other hand, both prevents crime and apprehends criminals. (Tr. Vol. 1, pp. 28:12-21, 83:15-19, 140:12-141:4, 165:23-166:22.) Lichten also testified that police officers assigned to patrol would be expected to carry a duty weapon. (Tr. Vol. 1, pp. 145:21-11.)

B. Airport Security Guard Duties

Multiple City employees with experience performing the duties of an ASG testified at the hearing regarding their job duties. The testimony established there are two sides to ASG work: airport operations and security.

On the operations side, ASGs had to, among other things: (1) make a log of aircraft arrivals and departures from the airport, noting the tail number and type of aircraft, the time, the operation, arrival or departure and the runway used; (2) address noise violations by filling out a form when a departing aircraft exceeded the noise limit; (3) assist pilots by providing noise readings for their aircraft; (4) conduct tie-down audits to ensure the proper aircraft were parked at a given tie-down; (5) open and close and lock and unlock buildings; and (6) receive tie down fees and rent from airport tenants which they deposited into a cash box inwas to the administrative office. (Tr. Vol. 2, pp. 81:2-83:9, 109:18-110:5, 120:4-17.) Another important duty of the ASGs was removing foreign object debris (“FOD”) from the runways or taxiways that could be a danger to aircraft. (Tr. Vol. 2, pp. 122:16-24, 174:12-19.) One of their related duties was to slowly tow a magnet trailer around the service road areas around the airport to pick up metal debris from the airport. (Tr. Vol. 2, pp. 175:15-176:13.)

On the security side, ASGs would enforce the municipal code provisions for the airport. (Tr. Vol. 2, p. 82:13-14.) While they issued parking citations and citations for certain municipal code violations, they did not cite for Penal Code, Public Utilities Code or Vehicle Code violations (other than those related to parking). (Tr. Vol. 2, pp. 19:16-20:20, 134:17-23; Tr. Vol. 3, pp. 105:19-106:19.) Runway incursions were the most common municipal code violation citation they issued, but they would only average one or two incursions per month for the entire unit of five ASGs. (Tr. Vol. 2, p. 71:2-13, 79:3-80:16.) Curfew violations (i.e., airplane departures after curfew) were another recurring issue for which they would issue citations. (Tr. Vol. 1, pp. 145:22-146:4; Tr. Vol. 3, p. 13:20-25.)

ii. ASGs Did Not Detain, Apprehend or Physically Engage Suspects

While issuing citations technically constitutes an “arrest,” ASGs did not have the ability to arrest subjects (i.e., take someone into physical custody) for any reason, including Penal Code violations. (Tr. Vol. 2, p. 49:19-25, 122:25-123:13.) If someone refused to sign a citation, because ASGs did not have the ability to physically arrest a person, they would have to call the Police Department’s dispatchers (“Dispatch”) for a police unit to make the arrest. (Tr. Vol. 2, pp. 50:4-25, 56:18-57:6, 115:5-20, 125:25-126:16; Tr. Vol. 3, p. 23:8-16.)

ASGs were not allowed to physically detain subjects except to issue an administrative citation. They also could not make traffic stops. If they attempted to pull someone over using their overhead lights, an ASG was not supposed to engage in a pursuit if the person failed to yield and drove off. (Tr. Vol. 2, pp. 75:4-19, 123:14-25, 124:4-125:15; Tr. Vol. 3, pp. 23:4-7, 105:5-15.) The only time an ASG would be expected to physically stop a person would be to prevent the person from going onto the runway when a plane was landing. Otherwise, if a person was fleeing, or even if an ASG came across a crime in progress, they would not have the responsibility to intervene to stop the activity. Instead, they would be expected to notify Dispatch to have a police unit sent over. ASGs would not be expected to confront suspects, effect an arrest or take someone into physical custody. (Tr. Vol. 2, pp. 75:20-76:16, 77:8-78:14, 83:10-23, 85:3-86:8, 94:16-97:7, 115:21-116:10, 124:23-125:15, 132:24-133:11; Tr. Vol. 3, pp. 14:7-9, 20:11-21, 22:15-19.)

ASGs were not required or expected to engage with criminal suspects, or engage in apprehensions of any kind. (Tr. Vol. 2, pp. 127:13-128:3; Tr. Vol. 3, p. 17:2-18, 26:2-12.) ASGs would only be expected to make contact with a subject if they saw a person engaged in an infraction, such as a dog off leash or smoking in a park. (Tr. Vol. 3, pp. 20:22-21:8.) If they saw people engaged in a fight, they would not be expected to make contact but should get on the radio and broadcast the location of fight and a description of suspects in order for police officers to respond. (Tr. Vol. 3, p. 21:9-14.) Similarly, if there was a report of someone engaged in drug or alcohol use at the airport, they would not be expected to arrest and cite the individual but needed to call a police unit to assist. (Tr. Vol. 3, pp. 25:20-26:1.) Galloway admitted that if an airport tenant came to her with a report of an armed suspect, she would *not* have been expected to engage with or disarm the subject. Instead, she would be expected to contact Dispatch and

have police officers sent over. The police officers would have responsibility for engaging with and disarming the suspect. (Tr. Vol. 4, pp. 126:21-127:8.)

iii. ASGs Were Not Dispatched to Situations Requiring Law Enforcement

Generally, ASGs would only be dispatched to airport specific issues such as a plane crash, or the need to conduct a “field search” (i.e., a search for an aircraft that was overdue at other airport that might have made an emergency landing at the Santa Monica Airport). Dispatch would not send ASGs to other types of calls, such as responding to burglar alarms, calls regarding armed suspects or other situations known ahead of time to be dangerous (other than a plane crash). Dispatch would instead assign a police unit but advise the ASG that something was happening in a particular area so they did not accidentally walk into a situation and place themselves in jeopardy. (Tr. Vol. 2, pp. 129:9-25, 130:1-13, 133:12-134:4; Tr. Vol. 3, p. 22:20-23:3) ASGs also would not be dispatched to respond to calls regarding suspicious persons. Rather, one of their roles was being a good witness. They were considered the eyes and ears of the Police Department and were to report information back to Dispatch. (Tr. Vol. 2, pp. 109:8-11, 129:9-25, 131:23-132:23; Tr. Vol. 3, p. 22:12-14.)

iv. ASGs Did Not Conduct Criminal Investigations, Search Persons or Vehicles or Transport Prisoners Nor Did They Have Duty Weapons

ASGs did not perform criminal investigations. (Tr. Vol. 2, p. 124:1-3.) ASGs were not authorized to conduct searches of individuals, nor were they authorized to conduct searches of vehicles, except for inventorying a vehicle prior to the vehicle being impounded. ASGs cannot seize property. (Tr. Vol. 2, pp. 87:8-17, 98:8-22, 125:16-24.) If any contraband (weapon or narcotics) is found during a pre-impound vehicle inventory, a sworn police officer would need to be called to take possession of it. (Tr. Vol. 3, pp. 14:7-15:12.) ASGs also did not execute arrest or search warrants. (Tr. Vol. 2, pp. 110:12-15, Tr. Vol. 3, p. 28:10-14.) They did not transport any type of prisoners. (Tr. Vol. 3, p. 30:22-25.)

ASGs were not required to qualify to use a firearm, nor were they issued duty weapons. They did not have access to firearms on a regular basis. (Tr. Vol. 2, pp. 29:19-24, 102:25-103:4, 128:16-18; Tr. Vol. 3, p. 29:6-12; Tr. Vol. 4, p. 131:4-13.) The only defensive equipment issued to ASGs was pepper spray, and it could only be used if the ASG was in fear for his or her own safety or the safety of another. The pepper spray was not supposed to be used offensively. (Tr. Vol. 2, pp. 128:19-129:8; Tr. Vol. 3, p. 17:25-18:16.) ASGs were not issued or expected to carry batons, nor were they equipped with Tasers. (Tr. Vol. 3, pp. 28:20-29:2, 31:12-25.)

IV. LEGAL ARGUMENT

A. Standard for Local Safety Membership

Government Code section 20420 defines “Local safety member” as “all local police officers, local sheriffs, firefighters, safety officers, county peace officers, and school safety

Cheree Swedensky

Re: *Respondent City of Santa Monica's Argument*

August 26, 2020

Page 5

members, employed by a contracting agency who have by contract been included within this system.” In turn, Section 20425 defines “local police officer” to mean:

any officer or employee of a police department of a contracting agency which is a city, *except one* whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise and *whose functions do not clearly fall within the scope of active law enforcement service even though the employee is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement service*, but not excepting persons employed and qualifying as patrolmen or equal or higher rank irrespective of the duties to which they are assigned. (Emphasis added.)

While “active law enforcement service” is not defined in the Public Employees’ Retirement Law (Gov. Code § 20000, *et seq.*), the most frequently cited construction of the term comes from the seminal case of *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567. In *Crumpler*, the Court of Appeal analyzed whether animal control officers constituted local police officers for purposes of former Section 20020 (renumbered in 1995 to Section 20425) and defined “active law enforcement service” as follows:

The provision of a special category of retirement membership for policemen relates to the *hazardous nature of their occupation*. (Cf. *Kimball v. County of Santa Clara*, 24 Cal.App.3d 780, 785, 101 Cal.Rptr. 353.) *The phrase ‘active law enforcement service’ as used in section 20020 was no doubt intended to mean law enforcement services normally performed by policemen*. As the Attorney General has suggested, *it means the active enforcement and suppression of crimes and the arrest and detention of criminals*. (22 Ops.Cal.Atty.Gen., *supra*, 227, 229.) In a loose sense animal control officers are engaged in active law enforcement but so are a myriad of other public employees such as building inspectors, health officers, welfare fraud investigators and the like but their duties can hardly be said to constitute ‘active law enforcement service’ as contemplated by the statute. *The crimes with which policemen normally deal are those against persons and property and not violations of police regulations*.

(*Id.* at 578-579. Emphasis added.)

In *Crumpler*, the animal control officers seeking to be reclassified as local safety members “were sworn in as police officers and were issued identification cards showing them to be police officers,” “wore uniforms bearing the insignia of police officers, carried guns, and were required to be trained in the use of firearms,” “sometimes used marked police vehicles equipped

Cheree Swedensky

Re: *Respondent City of Santa Monica's Argument*

August 26, 2020

Page 6

with police radios and were occasionally called upon to serve as back up officers at the scene of a crime.” (*Id.* at 572.) Nevertheless, despite being dressed and armed like police officers, and even occasionally serving as backup officers, the Court of Appeal held that because their “primary duties involved the enforcement of state and local laws and ordinances pertaining to the licensing Control and maintenance of animals,” the duties of the animal control officers did not clearly fall within the scope of active law enforcement service for purposes of classifying them as safety members under Section 20020 (now Section 20425). (*Id.* at 576, 579.)

B. Galloway Was Not Principally Involved in “Active Law Enforcement”

The evidence at hearing demonstrated that ASGs did *not* have any duty to prevent crimes against people or property, did *not* conduct criminal investigations, did *not* apprehend criminals, did *not* conduct searches or serve warrants, and did *not* transport criminal suspects or prisoners. (See Section III, above.) Instead, ASGs’ duties were focused on safety and security at the airport, as well as a number of “airport operations” duties, such as removal of FOD or logging aircraft. ASGs were expressly tasked with “ensur[ing] against violation of City ordinances” and issuing citations for municipal code violations specific to the airport, such as preventing runway incursions, or airport curfew violations, and *not* suppression of crimes generally or apprehension of criminals. (Exhibit “C,” pp. 2-4; Tr. Vol. 1, pp. 145:22-146:4; Tr. Vol. 2, pp. 71:2-13, 82:13-14, 19:16-20:20; Tr. Vol. 3, pp. 13:20-25, 105:19-106:19.) These duties are more analogous with the limited duties of the animal control officers in *Crumpler*, than with those of a sworn police officer.

Although Galloway testified at length about how ASGs would be “first responders” to airplane crashes, that is nothing more than a red herring and ultimately irrelevant because responding to airplane crashes, while commendable, does *not* constitute active enforcement and suppression of crimes against persons and property or the arrest and detention of criminals. (PD, p. 35, ¶ 14.) Consequently, Galloway’s job duties and functions did not “clearly fall within the scope of active law enforcement service” as used in Section 20425, and the ALJ correctly concluded she was not entitled to be reclassified as a local safety member.

V. CONCLUSION

For each of the foregoing reasons, the City requests that the CalPERS Board adopt the Proposed Decision as its own decision in the matter.

Respectfully submitted,

LIEBERT CASSIDY WHITMORE

/S/ Alex Y. Wong

Alex Y. Wong

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