

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 Forfeiture of Benefits of:

JOHNNIE W. SWAIM, Respondent,

and

CALIFORNIA HIGHWAY PATROL, Respondent.

Case No. 2021-0322 (Statement of Issues)

OAH No. 2021080417

PROPOSED DECISION

Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on January 31, 2022, by videoconference.

Charles H. Glauber, Senior Attorney, represented California Public Employees' Retirement System (CalPERS).

Jacob A. Kalinski, Esq., represented Johnnie W. Swaim (respondent).

No appearance was made by or on behalf of California Highway Patrol (CHP).

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The record was held open after the conclusion of the hearing for the parties to lodge closing and reply briefs. The documents lodged by the parties are described in the ALJ's order marked as Exhibit 21.

The record was closed and the matter submitted for decision on April 1, 2022.

SUMMARY

Respondent appeals CalPERS' determination that his two felony convictions for sexually molesting his minor daughters requires forfeiture of a portion of his pension benefits under Government Code section 7522.72. But that felony forfeiture statute does not apply because CalPERS failed to meet its burden of proving by a preponderance of the evidence that respondent's felony convictions arose out of the performance of his official duties as a CHP officer. CalPERS' reliance on various other legal doctrines to trigger application of the felony forfeiture statute is misplaced. Therefore, respondent's appeal is granted.

FACTUAL FINDINGS

Parties and Jurisdictional Matters

1. CalPERS is a defined benefit plan administered under the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.) CalPERS is governed by its Board of Administration (Board). (Ex. 16.)

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2. Respondent was brought into CalPERS membership through his employment with CHP on April 25, 1988. He was last employed on December 21, 2011, in the position of Lieutenant. By virtue of his employment, respondent is a state safety member of CalPERS. (Ex. 15, ¶ 1.)

3. In December 2015, respondent submitted to CalPERS his signed application for service retirement, in which he retired from service effective February 15, 2016. Respondent received his first regular benefit check on or about April 1, 2016. (Ex. 15, ¶¶ 2, 3; exs. 1, 2 [exhibits attached to Exhibit 15 are denoted as "ex."].)

4. On a date not established, CalPERS received an ethics complaint about respondent. (Ex. 15, ¶ 10.) After an investigation, CalPERS learned respondent had been convicted of felonies for sexually molesting two minors. (Ex. 15, ¶¶ 10, 11.) CalPERS concluded respondent's felony convictions had arisen out of his employment with CHP and that he was subject to forfeiture of benefits, including a reduction of his service credit and monthly allowance, and that he repay CalPERS for an overpayment of retirement benefits. (Ex. 15, ¶ 11, ex. 10.)

5. By letter dated February 9, 2021, respondent and CHP were notified of CalPERS' determination. (Ex. 15, ¶ 11, ex. 10.)

6. By letter dated March 10, 2021, respondent, through counsel, filed an appeal and requested a hearing to challenge CalPERS' determination. (Ex. 15, ¶ 12, ex. 11.)

7. On a date not established, the Statement of Issues was filed by Kimberlee Pulido, Chief of CalPERS' Retirement Benefit Services Division. (Ex. 16.)

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Respondent's Felony Convictions

8. On November 17, 2011, a criminal felony complaint was filed against respondent in the Superior Court of the State of California, County of Imperial (Superior Court). Respondent was charged with the following four felony counts: 1) Lewd Acts Upon a Child (Pen. Code, § 288, subd. (a)); 2) Oral Copulation of a Person Under 14 (Pen. Code, § 288, subds. (a) & (c)(1)); 3) Lewd Acts Upon a Child (Pen. Code, § 288, subd. (a)); and 4) Oral Copulation of a Person Under 14 (Pen. Code, § 288, subds. (a) and (c)(1)). (Ex. 15, ¶ 4, ex. 3.) The complaint alleged counts one and two occurred between January 29, 1997, and January 29, 1999; and counts three and four occurred between September 11, 2002, and September 11, 2004. (*Ibid.*)

9. On March 8, 2012, an Information was filed against respondent in the Superior Court, alleging the same four felony charges with the same dates of occurrence of the crimes. (Ex. 15, ¶ 5, ex. 4.)

10. The two minors alleged as victims in the criminal case were respondent's daughters, described in the felony complaint as Jane Does 1 and 2. The felony counts were based on the allegations by respondent's daughters that he forced them to perform oral sex on him in the family home. (Ex. 15, ex. 6., pp. A186-188.)

11. Following a trial, respondent was convicted of all four felony counts. Respondent was sentenced to 10 years in state prison. Respondent's subsequent motion for new trial was denied. Respondent appealed his felony convictions. (Ex. 15, ¶ 6, ex. 5.)

12. Respondent's appeal was heard by the Court of Appeal, Fourth Appellate District, Division One (Court of Appeal). The Court of Appeal upheld the felony convictions on counts one and three, but ordered counts two and four to be

dismissed. The matter was remanded to the Superior Court. (Ex. 15, ¶ 7, ex. 6.) In discussing the trial court's sentencing determination, the Court of Appeal observed, "While we agree that a defendant's use of his or her position as a law enforcement officer to commit a crime can be considered as an aggravating factor, there is no evidence that [respondent] did so here." (Ex. 15, ex. 6, p. A215.)

13. On remand, the Superior Court, on January 6, 2016, dismissed counts two and four, but upheld the 10-year state prison sentence. (Ex. 15, ¶ 8, ex. 7.)

14. An Abstract of Judgment was filed by the Superior Court on January 7, 2016. (Ex. 15, ¶ 9, ex. 8.) Respondent did not appeal and the Judgment became final. (*Ibid.*)

CalPERS' Determination Concerning Respondent's Felony Convictions

15. After receiving the above-described ethics complaint, CalPERS sent CHP a Forfeiture of Benefits Form to complete. A personnel officer of CHP checked a box at the top of the form stating that the felonies were not work-related. (Ex. 15, ¶ 10, ex. 9.)

16. Nonetheless, in its aforementioned letter dated February 9, 2021, CalPERS advised respondent "we have been informed the felony conduct arose out of the performance of your official duties as an employee for the Department of California Highway Patrol, and the earliest date of the commission of the felony was on January 29, 1997." (Ex. 15, ex. 10, p. A227.)

CalPERS determined respondent's felony convictions subjected his retirement benefit to forfeiture. (*Ibid.*)

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CalPERS determined respondent forfeited 14.5 years of service credit, covering the period of January 29, 1997, the earliest date of the commission of the felonies, through December 21, 2011, his last day on payroll. (*Ibid.*)

Due to the removal of 14.5 years of service credit, respondent's benefit would be based on the remaining 8.924 years of service credit accrued prior to the commission of his crimes, i.e., January 29, 1997. (*Id.*, p. A228.)

CalPERS recalculated respondent's retirement allowance, resulting in a decrease to his monthly allowance and an estimated overpayment of retirement monies in the amount of \$412,833.52. Respondent's new monthly allowance amount would be approximately \$1,111.20, beginning on April 1, 2021. (*Ibid.*)

CalPERS advised respondent he would receive at a later date a letter with the final overpayment balance and options for repayment to CalPERS. (*Ibid.*)

17. There is no evidence the felonies were committed while respondent was working a shift for CHP. (Ex. 15, ¶ 13.) There is no evidence respondent used the tools or instrumentalities of his job to commit the felonies. (Ex. 15, ¶ 14.)

18. Chapter 14 of CHP's Highway Patrol Manual (HPM) 10.3 enumerates cause for discipline of a CHP officer's employment, including "[o]ther failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment." (Ex. 15, ¶ 17, ex. 14, p. A278.) Respondent was never charged with a violation of Chapter 14 of HPM 10.3; a violation of Chapter 14 of HPM 10.3 is not a felony. (Ex. 15, ¶ 17, ex. 14.)

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LEGAL CONCLUSIONS

Burden and Standard of Proof

1. “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Evid. Code, § 500.) Thus, the party asserting a claim or making charges has the burden of proof in administrative proceedings. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 [*McCoy*].) Put another way, there is a built-in bias in favor of the status quo; the party seeking to change the status quo usually has the burden of proving the change is appropriate. (*Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1388.)

In determining who bears the burden of proof in this case, it is important to note that a public employee has a property interest in vested pension benefits protected by the Fourteenth Amendment of the United States Constitution and Article I, section 7 of the California Constitution. (*Hipsher v. Los Angeles County Employees Retirement Assn.* (2020) 58 Cal.App.5th 671, 699-700 [*Hipsher*].)

In the case at bar, respondent has a vested property interest in his pension benefits. CalPERS had paid respondent’s monthly retirement benefit based on his full service credit for many years, beginning in April 2016. Based on CalPERS’ argument that respondent’s felony convictions arose out of his performance of official duties, CalPERS seeks to drastically reduce respondent’s service credit and resulting monthly retirement benefit. CalPERS also seeks an order requiring respondent to repay over \$400,000. As the party asserting these claims for the first time after many years, and seeking to deprive respondent of vested property interests, the result of which

would substantially change the status quo between the parties, CalPERS should bear the burden of proof.

2. CalPERS' argument that respondent bears the burden of proof is not made convincing by citing to *McCoy* for the proposition that "in the absence of a statutory provision to the contrary, the applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed entitlement or benefit." (Ex. 18, p. A360.) *McCoy* involved an employee who applied for a disability retirement allowance, and thus had the burden of proving he was so entitled. In the case at bar, respondent is not seeking a benefit; rather, CalPERS is attempting to deprive him of a portion of his vested property interest in his pension.

Also unconvincing is CalPERS' argument that respondent bears the burden of proof because a government agency, in exercising its official duty, is entitled to the presumption that the official duty was regularly performed. (Evid. Code, § 664.)

In support of its argument, CalPERS cites *Roelfsema v. Department of Motor Vehicles* (1995) 41 Cal.App.4th 871, but that case simply held a police agency's administration of a blood alcohol test is presumed to have been regularly performed absent other evidence. That holding, limited to how to view one piece of evidence, is different from the legal issue of who bears the burden of proof in a case involving a government agency seeking to deprive one of vested property interests.

CalPERS also cites *Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006) 139 Cal.App.4th 471, which held the applicant for a license bears the burden of proof. That case is contrasted with others in which it has been held that a government agency seeking to discipline an existing license bears the burden of proof. (See, e.g., *Hughes v. Board of Architectural Exam'rs* (1998) 17 Cal.4th 763, 789, fn. 9.) Here,

CalPERS is seeking to take away respondent's vested property interests, a concept more akin to an agency seeking discipline of an existing license rather than an applicant seeking a license never before held by him or her.

3. The standard of proof in this matter is the preponderance of the evidence. (*McCoy, supra*, 183 Cal.App.3d at p. 1051.) That standard of proof is met when a party's evidence has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

The Felony Forfeiture Statute

4. The California Public Employees' Pension Reform Act of 2013 (PEPRA) includes Government Code section 7522.72, a provision requiring the forfeiture of public employee pension benefits for certain felony offenses, sometimes referred to herein as the felony forfeiture statute. (Subsequent undesignated statutory references are to the Government Code.)

5. Section 7522.72, subdivision (a), provides that the felony forfeiture statute applies to any public employee hired before January 1, 2013. Respondent was hired well before that date.

6. Section 7522.72, subdivision (b)(1), provides:

If a public employee is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit

all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.

7. Pertinent to this case is section 7522.72, subdivision (b)(2), which provides:

If a public employee who has contact with children as part of his or her official duties is convicted of a felony that was committed within the scope of his or her official duties against or involving a child who he or she has contact with as part of his or her official duties, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.

8. The date of the forfeiture is determined from the "earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive." (§ 7522.72, subd. (c)(1).) The felony forfeiture statute also makes clear that pension rights and benefits "attributable to service performed prior to the date of the first commission of the felony for which the member was convicted shall not be forfeited as a result of this section." (*Ibid.*)

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9. The primary purpose of PEPRA is to encourage faithful public service and avoid abuse of the pension system. (*Wilmot v. Contra Costa County Employees' Retirement Association* (2021) 60 Cal.App.5th 631, 661 [*Wilmot*].) Specifically, the *Wilmot* court noted, "An employee who draws public pay while stealing public property, or embezzling public funds, or who uses public facilities or equipment to run an illegal business (which is what occurred in *Hipsher*), is the antithesis of a 'faithful' servant of the public trust. When misconduct turns into outright criminality, it is beyond dispute that public service is not being faithfully performed. To give such a person a pension would further reward misconduct." (*Ibid.*)

Respondent is Not Subject to the Felony Forfeiture Statute

10. In the case at bar, CalPERS failed to meet its burden of establishing that the felony forfeiture statute applies to respondent's two convictions for molesting his daughters. (Factual Findings 8-15, 17.)

On its face, section 7522.72, subdivision (b)(1), only permits forfeiture of a pension benefit when a public employee "is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits." In this case, it is clear respondent was not convicted of such a crime.

Respondent's felony convictions for molesting his daughters, which crimes occurred in the family home, have no logical relationship to respondent performing his duties as a CHP Lieutenant, pursuit of that position, or in connection with obtaining a benefit related to his job. Importantly, both the Court of Appeal and CHP concluded respondent's crimes were not work-related.

This conclusion is bolstered by the lack of evidence showing the felonies were committed while respondent was working a shift for CHP or that respondent used the tools or instrumentalities of his job to commit them.

While neither party discusses it in their briefs, section 7522.72, subdivision (b)(2), is significant. This provision strongly suggests a qualifying felony conviction for a crime against a child is one in which the public employee "has contact with children as part of his or her official duties," and the crime was "committed within the scope of his or her official duties" involving "a child who he or she has contact with as part of his or her official duties." Respondent's molestation of his minor daughters at home while he was not working clearly falls outside of that definition.

Finally, this conclusion is in line with the primary purpose of the felony forfeiture statute articulated in *Wilmot*. It is hard to see how taking away pension benefits from those who commit felony crimes in their personal life will nonetheless encourage faithful public service and avoid abuse of the pension system. While respondent's crimes against his children are despicable, no evidence indicates they have any bearing on how he fulfilled his duties as a CHP officer or obtained his pension. Nor did his crimes have the same relationship to work as those noted in *Wilmot*, such as stealing public property, embezzling public funds, or using public facilities or equipment to run an illegal business.

CalPERS' Contrary Arguments are Not Convincing

11. CalPERS' various arguments that respondent's convictions did involve conduct arising out of his employment with CHP are not convincing.

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12. For example, CalPERS cites to the holdings in *Hipsher* and *Wilmot* because in both cases the courts upheld forfeiture. However, the courts in those cases were not asked to make a determination whether the respective felonies of Hipsher or Wilmot were work-related. Instead, the courts were asked to rule on the constitutionality of the felony forfeiture statute in general.

Each court discussed how the primary purpose of PEPRRA supported its holding. However, the facts of those cases are substantially different from the instant case. *Hipsher* involved a retired county employee who had been convicted of running an illegal international gambling business through a company in Costa Rica, allegedly from his government office while performing his public duties. *Wilmot* involved a public employee convicted of felony charges for stealing property and equipment from his employing public agency.

Thus, the crimes involved in *Hipsher* and *Wilmot* directly involved public employees, and were committed at the employers' offices. As discussed above, such a direct connection between a felony and public employment is consistent with the primary purpose of the felony forfeiture statute. Respondent's crimes were not committed at a CHP office, nor while respondent was on duty.

13. Next, CalPERS cites authority indicating peace officers are not ordinary citizens and have extraordinary powers. That is generally true. However, the cited authority does not establish respondent's felony crimes arose out of his public employment for purposes of the felony forfeiture statute.

For example, CalPERS cites *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202 (*Mary M.*), in which the California Supreme Court articulated the limited way in which an employer can be vicariously liable for damages for the criminal

conduct of an employee. *Mary M.* involved a police officer who raped a woman after a routine traffic stop. The Court concluded the employing police department should be civilly liable for damages because of the extraordinary power police officers wield by means of their uniforms, badges, guns, and powers of arrest and detention.

Mary M. is distinguishable for several reasons. Primarily, the case did not involve the offending officer's vested property rights, but rather compensation of the victim and responsibility of the offending officer's employer. As important, it is clear from *Mary M.* that the offending officer's misconduct was committed while working for his employer, and while performing his duties as an officer. Respondent's crimes have no such connection.

CalPERS' citation to cases involving employment discipline of public employees who commit off-duty misconduct also misses the mark. As respondent correctly points out, those cases involve statutes in which the Legislature has specifically provided cause to discipline an employee for off-duty conduct in certain enumerated instances. Here, the felony forfeiture statute clearly provides for the deprivation of a public employee's vested pension rights only from conduct arising out of his or her public duties. In the case of crimes against a child, the Legislature has signaled there must be an even more direct relationship between the felony and public employment before action against the public employee's pension is appropriate.

14. Respondent's status at the time of his crimes as a mandatory reporter of child abuse due to his position as a peace officer does not render him subject to the felony forfeiture statute either.

As respondent correctly points out, Penal Code section 11166 requires mandatory reporting of suspected child abuse when such a suspicion arises

“in his or her professional capacity or within the scope of his or her employment.” Respondent’s felonies arose in his private life. Moreover, respondent was never charged with violating Penal Code section 11166, and even if he was, that crime is a misdemeanor, not a felony. It would be illogical for respondent’s vested pension rights to be reduced or eliminated by application of the felony forfeiture statute due to misconduct equating to a misdemeanor.

15. Finally, CalPERS’ citation to CHP manuals and policies does not support its argument. Most of those documents proffered by CalPERS were excluded during the hearing. CalPERS’ invitation in its closing brief for the ALJ to revisit those rulings is rejected. Moreover, what was admitted, Chapter 14 of HPM 10.3, only enumerates misconduct deemed incompatible with public service and justifying discipline. As explained above, that is a different concept than losing vested pension rights. Also, respondent was not charged with violating HPM 10.3, and even if he was, such a violation is not a felony. As respondent correctly points out, CHP is entitled to deference in interpreting its regulations, and by logical extension, its internal manuals and policies. Here, CHP advised CalPERS that respondent’s felony crimes were not work-related.

Disposition

16. Based on the above, CalPERS failed to meet its burden of establishing by a preponderance of the evidence that respondent’s felony convictions qualify for forfeiture mandated by section 7522.72. (Factual Findings 1-18; Legal Conclusions 1-15.)

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ORDER

Respondent's appeal is granted.

CalPERS' determination is reversed that, as a result of his final felony convictions, a portion of respondent's retirement benefit is subject to forfeiture.

CalPERS' determination is reversed that there has been an overpayment of retirement benefits to respondent.

DATE: 05/02/2022


Eric C. Sawyer (May 2, 2022 10:45 PDT)

ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings