

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Appeal of Retirement Benefit Formula
of:**

TYLER DIAMOND; ALEX DUNCAN; RYAN P. LAWRENCE,

Respondents,

and

CITY OF BEVERLY HILLS,

Respondent.

(Statement of Issues)

Case No. 2021-0468

OAH No. 2021090259

PROPOSED ORDER

Cindy F. Forman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on February 1, April 13, and April 22, 2022.

John Shipley, Senior Attorney, represented complainant Renee Ostrander, Chief, Employer Account Management Division, Board of Administration, California Public Employees' Retirement System (PERS).

Richard A. Levine, Esq., Rains Lucia Stern St. Phalle & Silver, PC, represented respondents Tyler Diamond (respondent Diamond), Alex Duncan (respondent Duncan), and Ryan Lawrence (respondent Lawrence) (collectively, respondents).

Anni Safarloo, Esq., Liebert Cassidy Whitmore, represented respondent City of Beverly Hills (City).

The ALJ heard testimony and received documentary evidence. The ALJ kept the record open until August 12, 2022, to allow for briefing. The parties timely submitted the following briefs: Complainant's Closing Brief, marked as Exhibit 18; Respondents' Closing Brief, Respondents' Request for Official Notice, and Respondents' Reply Closing Brief, marked as Exhibits X, Y, and Z, respectively; and City's Closing Brief, City's Reply Closing Brief, and Respondent City's Objection to Request for Official Notice, marked as Exhibits N, O, and P, respectively.

The record closed on August 12, 2022.

Respondents requested the ALJ take official notice of the Second Amended Complaint (SAC) filed in Los Angeles Superior Court case number 19STCV34358, entitled *Beverly Hills Police Officers Association, Ryan Lawrence, Alex Duncan, and Tyler Diamond v. City of Beverly Hills* (Superior Court case). City objected to respondents' request, contending the truth of the statements contained within the SAC is in dispute and thus not subject to official notice. (See Evid. Code, § 452.) The ALJ thereby grants respondents' request but only takes official notice that respondents

filed a SAC in the Superior Court case and the SAC alleges four causes of action. The ALJ does not take official notice of the contents of the SAC.

SUMMARY

In 2012, City amended its contract with PERS based on negotiated changes in retirement benefits for sworn police officers set forth in City's 2011-2016 Memorandum of Understanding (2011 MOU) with its police officers' association. As a result of the amendment, PERS determined respondents' retirement benefits would be based on three percent of their final compensation for each year of credited service at age 55 (3% at 55), instead of three percent of the final compensation for each credited service year at age 50 (3% at 50). Respondents contend the contract amendment is based on an incorrect interpretation of the 2011 MOU and therefore is unenforceable. Respondents assert PERS should have applied the 3% at 50 formula to calculate their retirement benefits. Respondents request PERS correct the mistake by requiring a new amendment.

City asserts it made no mistake when drafting the contract amendment with PERS because the retirement provisions in the amendment are consistent with those in the 2011 MOU. City further asserts respondents therefore were correctly classified as local safety officers entitled to the 3% at 55 retirement formula when they became sworn police officers after the effective date of the contract amendment.

Complainant asserts PERS correctly interpreted the amendment to its contract with City and correctly deemed the 3% to 55 formula applicable to respondents based on the date they became local safety members. Complainant takes no position as to whether City erred in its interpretation of the 2011 MOU, except notes that City has

not acknowledged any error. Complainant also notes that any interpretation of the 2011 MOU in this proceeding is not binding because of rulings made in the pending Superior Court case.

Respondent's request for an administrative remedy is before OAH as a result of a ruling by the Honorable James C. Chalfant, Superior Court Judge, in response to PERS' demurrer to respondents' petition for a writ of mandate in the Superior Court case. Respondents sought a writ of mandate to direct PERS to request a new contract amendment with City reflecting respondents' entitlement to the 3% at 50 retirement formula. Judge Chalfant sustained PERS' demurrer and required respondents to exhaust all administrative remedies to determine whether PERS had correctly enrolled respondents in the 3% at 55 retirement plan under the contract amendment and the 2011 MOU.

The issues therefore in this proceeding are whether PERS correctly interpreted the contract amendment with City and whether the contract amendment accurately reflected the retirement provisions in the 2011 MOU. As the party bearing the burden of proof, respondents failed to establish that PERS incorrectly interpreted the contract amendment or that the contract amendment was an inaccurate reflection of the 2011 MOU. When considered together, the language of the contract amendment, the language of the 2011 MOU, and the testimony offered at the administrative hearing prove the amendment is consistent with the provisions of the 2011 MOU and PERS correctly applied the retirement formulas stated therein. Thus, respondents are subject to the 3% at 55 retirement formula because they became local safety members after the date of the contract amendment.

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FACTUAL FINDINGS

Jurisdiction and Parties

1. PERS manages a defined benefit plan for California state employees and employees of contracting public agencies.

2. City is a public agency contracting with PERS to provide retirement benefits for its eligible employees.

3. On May 30, 2012, respondent Diamond initially established membership with PERS as a miscellaneous member upon his employment with City. On December 13, 2012, respondent Diamond graduated from City's Police Academy and became a sworn police officer. As a result, respondent Diamond was reclassified as a local safety member with PERS. Respondent Diamond is currently employed by City's Police Department.

4. On June 22, 2009, respondent Duncan initially established membership with PERS as a miscellaneous member upon his employment with City. On December 13, 2012, respondent Duncan graduated from City's Police Academy and became a sworn police officer. As a result, respondent Duncan was reclassified as a local safety member with PERS. Respondent Duncan is currently employed by City's Police Department.

5. On May 30, 2012, respondent Lawrence initially established membership with CalPERS as a miscellaneous member upon his employment with City. On December 13, 2012, respondent Lawrence graduated from City's Police Academy and became a sworn police officer. As a result, respondent Lawrence's membership

category was reclassified as a local safety member with PERS. Respondent Lawrence is currently employed by City's Police Department.

6. Pursuant to its agreement with City, PERS determined respondents' retirement benefits would be calculated using the 3% at 55 formula because they became sworn officers after July 1, 2012. On February 1, 2021, respondents contacted PERS and requested they be enrolled in the 3% at 50 benefit formula available to other local safety members employed by City. On February 2, 2021, PERS informed respondents the 3% at 55 formula applied to their benefit calculations was based on PERS' agreement with City. By letters dated February 22, 2021, respondents filed timely appeals of PERS' determinations and requested administrative hearings. Respondents contend PERS applied the wrong formula to determine their retirement benefits. They assert PERS should have used the 3% at 50 formula available to local safety members employed on or before July 1, 2012, to determine their retirement benefits and not the 3% at 55 formula.

7. Complainant, in her official capacity, filed a Statement of Issues, dated August 5, 2021, to determine whether PERS correctly applied the 3% at 55 Local Safety-Police benefit formula to respondents under Government Code section 20475 because respondents did not become sworn police officers until December 13, 2012.

Background

8. Per its contract with PERS, City agreed to be bound by its terms and by the California Public Employees' Retirement Law (PERL) (Gov. Code, § 20000 et seq.). City also agreed to make its employees members of PERS subject to all provisions of the PERL. Thus, the PERL governs the pension amounts provided to all City eligible employees.

9. A city employee who is a member of the PERS system may be classified as either "local miscellaneous" or "local safety," depending on the nature of the principal tasks and duties of the employee's position. (Gov. Code, § 20371.) Local safety members include all local police officers, local sheriffs, firefighters, safety officers, county peace officers, and school safety members. (Gov. Code, § 20420.) As stated in *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 33, "The distinction between the two classifications is important, as local safety members receive superior retirement benefits compared to those received by local miscellaneous members." (Citations omitted.)

10. The amount of a PERS member's pension is calculated by applying a percentage figure based upon the member's age on the date of retirement, to the member's years of service and the member's final compensation. The percentage figure is dependent on the member's classification, i.e., whether miscellaneous or safety, and age at retirement.

Relevant Facts

PERS CONTRACT WITH CITY

11. On July 1, 1941, City first entered into a contract with PERS to provide certain benefits, including retirement benefits, for its eligible employees (PERS Contract). (Ex. 10.) The PERS Contract was amended several times. In an amendment effective December 19, 2009 (2009 Amendment), City agreed to classify its police officers as local safety members. (Ex. 11.) The 2009 Amendment defined "normal retirement age" as age 55 for local miscellaneous members and age 50 for local safety members. (*Id.* at p. A63.) Under the 2009 Amendment, the retirement formula for local miscellaneous members in employment before January 8, 2005, was 2% at 55, for

those local miscellaneous members in employment after January 8, 2005, was 2.5% at 55, and for all local safety members was 3% at 50, regardless of their date of employment with City or when they were sworn. (*Id.* at p. A65.)

12. On July 24, 2012, PERS received City's Resolution 19 No. 12-R-12884: "Resolution of Intent to Approve an Amendment to Contract Between the Board of Administration California Public Employees' Retirement System and the City Council City of Beverly Hills" dated July 3, 2012 (2012 Resolution). (City Ex. G.) The 2012 Resolution informed PERS of City's intent to amend the PERS Contract to reflect a change in the retirement formula for local safety members. According to the 2012 Resolution, the retirement formula for those local safety members entering membership for the first time in the safety classification after the effective date of the contract amendment would be 3% at 55. This represented a change from the 2009 Amendment providing a 3% at 50 formula for all local safety members, regardless of when they entered the safety classification, i.e., when police officers were sworn.

13. On August 7, 2012, PERS and City amended the PERS Contract to conform with the 2012 Resolution (2012 Amendment). (Ex. 12.) The 2012 Amendment became effective September 8, 2012. (*Id.* at p. A72.) Instead of defining "normal retirement age" as 50 for all local safety members, the 2012 Amendment divided local safety members into two groups. For those local safety members entering membership in the safety classification on or before the effective date of the 2012 Amendment, the normal retirement age continued to be 50; for those who entered membership for the first time in the safety classification after the amendment's effective date, the normal retirement age was now 55. (*Id.* at p. A68.) The 2012 Amendment also provided the following percentage retirement formulas for the two local safety member groups:

9. The percentage of final compensation to be provided for each year of credited prior and current service as a local safety member entering membership in the safety classification on or prior to the effective date of this amendment to contract shall be determined in accordance with Section 21362.2 of said Retirement Law (3% at age 50 Full).

10. The percentage of final compensation to be provided for each year of credited current service as a local safety member entering membership for the first time in the safety classification after the effective date of this amendment to contract shall be determined in accordance with Section 21363.1 of said Retirement Law (3% at age 55 Full).

(*Id.* at p. A70.) Thus, those employees who became sworn police officers, i.e., entered the safety classification, before or on the effective date of the 2012 Amendment were eligible for a more favorable retirement formula than those who became sworn officers after the effective date of the Amendment.

THE 2011 MOU

14. The 2012 Amendment was prompted by the 2011 MOU between City and the Beverly Hills Police Officers' Association (Association). The Association is the employee organization recognized by City as the exclusive representative of all police officers, both sworn and unsworn, and police sergeants employed by City.

15. The 2011 MOU became effective on October 8, 2011, and expired on October 6, 2016. (City Ex. E, p. E101.) The City Council approved the 2011 MOU in March 2012. (City Ex. F.) However, because of a compounding issue raised by PERS, City modified the 2011 MOU and then readopted it in November 2012. (City Ex. E.) Both the March 2012 and November 2012 versions contain identical retirement provisions.

16. The 2011 MOU is an integrated agreement. By its terms, it reflects the "entire understanding" of the agreement of the parties. It also supersedes all prior memoranda of understanding and any verbal agreements between the parties. (City Ex. E, p. E101.)

17. The 2011 MOU distinguishes between Pre-Service employees and sworn Police Officers. Under the 2011 MOU, City considers all newly hired entry-level police officers as "Pre-Service employees" who serve as non-sworn civilian employees until they graduate from the Police Academy and are sworn in as police officers. (City Ex. E, p. E102.) Pre-Service employees receive similar benefits as sworn police officers except for retirement and workers' compensation benefits. (*Ibid.*) Pre-Service employees are classified as local miscellaneous employees under the PERS Contract. Thus, respondents could not be classified as "local safety members" and receive local safety member retirement benefits until they graduated from the Police Academy and became sworn police officers. Until that time, respondents were entitled only to those retirement benefits, including the 2.5% at 55 percentage formula, accorded to City miscellaneous employees. (See Ex. 11, p. A65.)

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18. The retirement formulas applicable to sworn officers are described in Section 16C and Section 16D of the 2011 MOU. Section 16C provides as follows:

3% at 50 Formula

The City's contract with PERS provides for the 3% at 50 retirement formula set forth in California Government Code Section 21362.2 for all current sworn police personnel hired prior to July 1, 2012.

(City Ex. E, pp. E120–E121.)

19. Section 16C acknowledges the existing PERS Contract entitles sworn police personnel to the 3% at 50 retirement formula per Government Code 21362.2, which applies to local safety personnel. The provision is the same as that found in the previous 2007-2011 MOU except for two additions: the word "current" and the phrase "hired prior to July 1, 2012." (City Ex. D, p. E91.) Thus, under the revised provision, only those "current sworn police personnel hired prior to July 1, 2012" are now eligible for the 3% at 50 formula.

20. Section 16D of the 2011 MOU was added to the 2011 MOU as a result of negotiations between City and the Association. It states:

3% at 55 Formula - For Employees Hired On Or After July 1, 2012. The City will amend its contract with PERS to provide for the 3% at 55 retirement formula set forth in California Government Code section 21363.1

(City Ex. E, p. E121.) Government Code section 21363.1 applies to local safety personnel.

21. Peter Brown, a law partner of Liebert Cassidy, was the Chief Negotiator on behalf of City in its negotiations with the Association over the 2011 MOU. Mr. Brown offered the only testimony regarding those negotiations. None of the negotiators for the Association testified. As a result, Mr. Brown's account of what happened during the negotiations and the purpose and meaning of the 2011 MOU is unrefuted.

22. According to Mr. Brown, negotiations for the 2011 MOU began in the fall of 2011. At the time of the negotiations, City was intent on reducing its pension obligations because of recessionary economic pressures. To effect such reduction, City proposed a two-tier retirement plan that would provide a less favorable pension formula for newly hired sworn personnel.

23. The different proposals for that less favorable formula are reflected in drafts exchanged between City and the Association. (City Ex. A, B, C, & D.) Although the drafts used the term "employees" rather than "safety member" or "sworn officer" when outlining the formula proposals, Mr. Brown testified the terms were interchangeable because the parties understood the proposed second formula would apply only to sworn police personnel, not Pre-Service employees. This was so, according to Mr. Brown, because, as miscellaneous employees, Pre-Service employees are not entitled to sworn officer retirement benefits.

24. According to Mr. Brown, City and the Association intended the 3% at 50 retirement formula to apply to "all current sworn police personnel hired prior to July 1, 2012" and the 3% at 55 retirement formula to apply to all other sworn officers, i.e., those hired on or after July 1, 2012. Mr. Brown explained the negotiating parties referred to "sworn police personnel" and "employees" in Sections 16C and 16D interchangeably. He further noted the citations to Government Code sections 21362.2

and 21363.1 in Section 16C and Section 16D, respectively, confirmed that the two sections were directed solely to sworn police personnel as both statutes outline formulas available only to safety officers. Mr. Brown testified neither he nor any Association negotiator discussed retirement benefits for Pre-Service employees or the purported significance of the hiring dates for such employees. Mr. Brown further testified the 2011 MOU makes no mention of the retirement benefits for Pre-Service employees.

RESPONDENTS' COMMUNICATIONS WITH CITY

25. Respondents each acknowledged City hired them as Pre-Service employees. They understood their employment as police officers with City was contingent on the successful completion of their training at the Police Academy.

26. Respondents each testified they understood at the time of their hiring they would become eligible for the 3% at 50 formula when they became sworn police officers. Respondent Duncan testified Arlene Vargas, Director of City's Human Resources Department, told him he was one of the last few police officers to qualify for the 3% at 50 formula because his hiring date was before July 1, 2012. Respondent Diamond testified Sergeant Jay Kim and Police Officer Jennifer Ayer told him he was lucky to be hired before the July 1, 2012 cut-off for the second-tier retirement formula.

27. Respondents each received a packet of informational materials from City at the commencement of their employment. In the packet was a letter stating their position title is "Police Officer" and a memo entitled "Sworn Police Benefits." That memo states as follows: "Membership in the Public Employees Retirement System (CalPERS, www.calpers.ca.gov) 3%@50, single highest year . . ." (Respondents' (Resp.) Ex. I, p. B128.)

28. On November 18, 2012, respondent Lawrence emailed Sheryl Jacobson, a City Human Resources Analyst, inquiring why PERS had classified him under the 2.5% at 55 retirement formula instead of under the 3% at 50 retirement formula, which he believed applicable. (Resp. Ex. T, p B160.) On November 19, 2012, Ms. Jacobson responded by email, informing respondent Lawrence that PERS had classified him under the 2.5% at 55 plan for miscellaneous employees until he graduated from the Police Academy, at which point PERS would switch him to the 3% at 50 plan. (Resp. Ex. U, p. B161.)

29. On January 24, 2013, Ms. Jacobson followed up on her November 19, 2012 email, and informed respondent Lawrence and the other respondents she had checked with PERS to see if respondents were entitled to the 3% at 50 formula. Ms. Jacobson noted PERS placed respondents in the safety member group but still applied the 2.5% at 55 formula. Ms. Jacobson further stated she gave PERS the correct information so PERS would use the applicable retirement formula. (Resp. Ex. D, p. B59.)

30. Sergeant Jay Kim, a City police officer for 27 years and the Police Personnel and Training Supervisor from 2011 through 2017, testified at the hearing. Sergeant Kim, as Personnel and Training Supervisor, worked with City's Human Resources Department, in recruiting and hiring police officers. Sergeant Kim was aware City was moving to a two-tier retirement system, and it was his understanding the cut-off date for the 3% at 50 formula was July 1, 2012. He recalled speaking with the Human Resources Department about respondents' retirement status and confirming with Ms. Jacobson that respondents would be eligible for the 3% at 50 formula. Sergeant Kim testified he was also aware, as Officer Ayres' supervisor, of her conversations with respondents confirming their eligibility for the 3% at 50 formula.

According to Sergeant Kim, discussing retirement benefits was one of the tools he used to recruit new officers.

31. Respondents presented no evidence showing Ms. Jacobson, Ms. Vargas, Sergeant Kim, or Officer Ayres were privy to the negotiations for the 2011 MOU. Shelly Ovrom, director of City's Human Resources Department since April 2017 and a City Human Resource Manager since June 2012, testified that neither Sergeant Kim, Ms. Jacobson, nor Ms. Vargas was authorized to enter into any contracts, oral or otherwise, on behalf of City.

Other Proceedings

32. On September 26, 2019, the Association and respondents (plaintiffs) filed the Superior Court case, seeking damages and injunctive relief based on City's failure to apply the 3% at 50 retirement formula to respondents. Plaintiffs added PERS as a defendant in the SAC filed on February 24, 2020. The SAC is the operative pleading in the action.

33. The SAC alleged four causes of action: (1) breach of the 2011 MOU; (2) breach of respondents' employment agreements with City; (3) a petition for a writ of mandate (writ); and (4) a request for declaratory relief to resolve the contract dispute. (Resp. Ex. Y.) On August 24, 2020, the court, in response to a PERS demurrer, ordered plaintiffs to dismiss the writ third cause of action or have the action bifurcated and the writ heard by a writs and receivers department. The writ action was later transferred to writs and receivers department 85, and the court stayed the remaining causes of action while the writ action was pending.

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34. PERS and City then demurred to the writ on the grounds plaintiffs had failed to exhaust their administrative remedies. On December 17, 2020, Superior Court Judge Chalfant sustained the demurrers without leave to amend. He found that “Administrative exhaustion of the MOU issue is required.” (Resp. Ex. V, p. B173.). Judge Chalfant then returned the matter to Department 72 to resolve the remaining causes of action alleged in the SAC.

35. After the return of the matter to Department 72, a new judge was assigned to the case. On October 25, 2021, the Honorable Curtis A. Kin, Superior Court Judge, ruled on PERS’ demurrer to the remaining three causes of action in the SAC. Judge Kin sustained PERS’ demurrer to the breach of contract and breach of employment causes of action, finding PERS was not a signatory to the 2011 MOU and respondents were not employees of PERS. Judge Kin denied PERS’ demurrer to the declaratory relief cause of action. The court rejected PERS’ argument that plaintiffs were required to seek relief through PERS’ administrative appeals process before seeking declaratory relief. Contrary to Judge Chalfant’s ruling, Judge Kin found PERS had no authority to determine the proper interpretation of the 2011 MOU between City and plaintiffs, and therefore the interpretation of the MOU was for the court. The court refused to dismiss PERS from the action because, in the event the court found in favor of the plaintiffs, the court could order PERS to accept City’s contract amendment to provide plaintiffs with relief. (Ex. 17.)

36. A trial on the remaining claims in the SAC is scheduled to begin on February 14, 2023.

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LEGAL CONCLUSIONS

Burden of Proof

1. Respondents are the moving parties seeking governmental relief. As such, they have the burden of proving they are entitled to the 3% at 50 retirement formula. Their burden of proof is the preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) A preponderance of the evidence means evidence that has more convincing force than opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Applicable Statutory Law

2. The management and control of PERS are vested in the PERS Board of Administration (Board). The Board is "the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system," following a hearing if necessary. (Gov. Code, §§ 20120, 20125; *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 503–505.)

3. The Board may hold a hearing to determine any question presented to it "involving any right, benefit, or obligation" of a person. (Gov. Code, § 20134.) If the Board holds a hearing, the proceedings shall be held per the California Administrative Procedures Act, Government Code section 11500, et seq.

4. Government Code section 20160, subdivision (a), authorizes the Board to correct the errors or omissions of any active or retired member or their beneficiaries under certain circumstances. Subdivision (b) authorizes the Board to correct all actions taken as a result of errors or omissions of any contracting agency. City is a contracting agency because it has elected to have all or any part of its employees become

members of PERS. (Gov. Code, § 20022.) The party seeking correction of an error or omission has the burden of presenting documentation or other evidence establishing the right to correction. (Gov. Code, § 20160, subd. (d).)

5. Under Government Code section 20475, a contracting agency may amend its contract with PERS, or earlier amendments to its contract, to reduce or provide different benefits provided the contracting agency has fully discharged all its obligations, including its collective bargaining obligations. The amendments must “apply uniformly with respect to all members” within a classification. (Gov. § 20475, subd. (a).) Subdivision (b) of section 20475 provides that an existing member can be subject to the new amendment if “after the effective date of the contract amendment, the member . . . receives service credit for the first time within a classification . . .”

Jurisdiction

6. Complainant contends the scope of this proceeding is limited to whether the 2012 Amendment authorizes PERS to calculate respondents’ retirement benefits using the 3% at 55 formula. Citing Judge Kin’s decision of October 25, 2021, complainant asserts OAH has no authority to rule on the proper interpretation of the 2011 MOU, the agreement giving rise to the Amendment. Complainant further asserts any interpretation of the 2011 MOU in this proceeding would not be binding. (Ex. 18, pp. A282–283.)

7. Respondents and City do not address Judge Kin’s decision regarding the interpretation of the 2011 MOU. However, both advocate for a more expansive scope for this proceeding than that proposed by complainant. Both City and respondents assert Government Code section 20160 authorizes PERS to correct any error of a contracting agency and can do so after holding a hearing under the APA. According to

respondents, City erred in amending the CalPERS Contract and thus the Contract is subject to correction by the Board under Government Code section 20160 pursuant to a hearing under Government Code section 20134. Respondents also cite Judge Chalfant's ruling that they are "required to exhaust their administrative remedies to receive a determination of the proper interpretation of the MOU." (Ex. V, p. B168.)

8. Complainant's position ignores the full scope of PERS' administrative authority and respondents' administrative rights under the PERL. By statute, members have the right to seek a hearing about any right or benefit owed to them under the PERL. (Legal Conclusion 3.) Members and contracting agencies also have the right under the PERL to determine whether a mistake has been made in connection with a member's retirement. (Legal Conclusion 4.) Limiting the scope of this hearing to whether PERS correctly interpreted the 2012 Amendment without considering the basis for the 2012 Amendment thus would interfere with respondents' rights to fully exhaust their administrative remedies. The PERL authorizes PERS to determine the meaning of the 2012 Amendment as well as whether the 2012 Amendment is predicated on a mistake made by City in determining respondents' benefits.

9. Thus, jurisdiction is established to determine (1) whether PERS and City acted in compliance with Government Code 20475 and (2) whether City committed any error in applying the 3% at 55 retirement formula to respondents under Government Code sections 20475 and 20160. The ALJ must consider the language of the 2011 MOU to make these determinations. The potential impact of the ALJ's findings outside of this proceeding is not determinative of the resolution of the issues here. However, the ALJ's authority is limited to claims based on the PERL; no other claims have been considered.

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Absent a Finding of Mistake, PERS Acted Correctly

10. Absent a finding of mistake, PERS correctly determined the 3% at 55 formula available to police officers sworn after September 8, 2012, applied to respondents. Respondents first became local safety members on December 13, 2012, when they were sworn in as police officers for City. (Factual Findings 3–5.) They entered the safety classification after the effective date of the 2012 Amendment, i.e., after September 8, 2012. (Factual Finding 13.) Thus, absent evidence of a mistake, PERS correctly enrolled respondents in the 3% at 55 formula pursuant to Government Code section 20475. (Factual Finding 13, Legal Conclusions 2 & 5.)

Respondents Did Not Prove Mistake

11. Respondents contend PERS and City lacked authority to implement the provisions of the 2012 Amendment under Government Code section 20475 because the Amendment was based on a mistaken interpretation of the 2011 MOU. According to respondents, the 2012 Amendment focuses improperly on when an employee first enters the safety classification instead of the date when an employee is hired. Respondents assert they are entitled to the 3% at 50 retirement formula set forth in Section 16C of the MOU because they were hired as police officers before July 1, 2012, to perform sworn duties following graduation from the Police Academy. Respondents further contend Section 16D, which proscribes the 3% at 55 formula, only applies to employees hired on or after July 1, 2012, and is therefore inapplicable to them because they were hired before that date. Respondents further assert that City employees represented to respondents, both during and after the hiring process, that they would be entitled to the 3% at 50 formula when they became sworn police officers.

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12. City asserts the 2012 Amendment is wholly consistent with the retirement terms outlined in the 2011 MOU and therefore contains no errors. Citing Mr. Brown's undisputed testimony, City contends respondents are mistaken in their interpretation of the 2011 MOU. According to City, respondents are not eligible for the 3% at 50 retirement formula set forth in Section 16C because they were not "current sworn personnel" as of the July 1, 2012 cut-off date set forth in the 2011 MOU, nor in March 2012 when City first adopted the 2011 MOU, nor in November 2012, when City readopted it. Respondents did not become sworn officers until December 13, 2012, and therefore are eligible only for the 3% at 55 retirement formula. City asserts the interpretation of the 2011 MOU advocated by respondents would lead to absurd results because the more generous retirement formula would not accrue to employees based on their seniority as sworn police officers but on the date they were first employed as local miscellaneous employees, regardless of the timing or the length of their service in the safety member classification. City further contends representations regarding respondents' benefits have no bearing on the interpretation of the 2011 MOU and are not binding on either City or PERS.

13. Resolution of whether the 2012 Amendment erroneously represents the retirement provisions contained in the 2011 MOU is predicated on the interpretation of the pertinent language of the 2011 MOU. To resolve a dispute over the meaning of contract language, the language of the contract itself and extrinsic evidence of the parties' intent must be considered. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 798.) The *Badie* court summarized the main tenets of interpreting contract as follows:

We ascertain the intent of the parties by considering an agreement as a whole, not by interpreting a provision in isolation. (Citations.) We may consider the circumstances

under which an agreement was made, including its object, nature, and subject matter (Citations) and must be mindful of the rule that, "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract" (Citation). We must also provide an interpretation that will make an agreement lawful, operative, definite, reasonable, and capable of being carried into effect, and must avoid an interpretation that would make it harsh, unjust or inequitable. (Citations.) We interpret the words used in an agreement according to their ordinary and popular sense, unless the parties ascribed a special or technical meaning to them (Citation), and we also interpret any ambiguous language in the sense in which the promisor believed, at the time the agreements were entered into, that the promisee understood it (Citation). Finally, if the uncertainty is not removed by application of the other rules of interpretation, a contract must be interpreted most strongly against the party who prepared it. (Citations.) This last rule is applied with particular force in the case of adhesion contracts. (Citations.)

(Id. at pp. 800-801.)

14. Application of the foregoing rules does not support respondents' contention of error by either City or PERS in effectuating the 2012 Amendment. (Factual Findings 11–24, Legal Conclusions 2–5.) The retirement provisions in the 2011

MOU focus exclusively on benefits for sworn officers as such benefits are only available to sworn officers. Both Section 16C and Section 16D address only the retirement benefits accorded to sworn police officers. The retirement formulas cited in the two 2011 MOU sections are based on Government Code sections 21362.2 and 21363.1, both of which pertain solely to safety members. There is no reference in the 2011 MOU to retirement benefits owed to Pre-Service personnel, and no evidence that the negotiating parties discussed such benefits.

15. Respondents offered no evidence to support their claim they became sworn police officers before July 1, 2012. That respondents were hired with the expectation they would become police officers does not make them eligible for sworn police officer benefits based on the date they were hired. Section 16C only pertains to "current sworn police personnel hired prior to July 1, 2012." Respondents were not "current sworn police officers" as of July 1, 2012, or in March or November 2012, when City adopted the 2011 MOU. They only became sworn officers on December 13, 2012. Until that time, they were miscellaneous employees entitled to miscellaneous employee retirement benefits.

16. As Mr. Brown testified, City intended the 2011 MOU to create an additional tier for sworn police officers. The previous MOU did not have a cut-off date for sworn officers; any sworn officer was eligible for the 3% at 50 formula. The 2011 MOU added the cut-off date to distinguish between officers sworn before July 1, 2012, and those sworn after. Those officers sworn before July 1, 2012, fall within Section 16C and are eligible to receive the more favorable formula because of their seniority. Those officers more recently sworn, i.e., those sworn after July 1, 2012, fall within Section 16D and receive the less favorable 3% at 55 formula. While Section 16D states it applies to "employees hired on or after July 1, 2012", Mr. Brown testified without refutation that

the reference to “employees” pertains to “sworn police officers” and Section 16D is the flipside to Section 16C.

17. Under respondents’ interpretation of the 2011 MOU, eligibility for preferential sworn officer retirement benefits depends on the date when a sworn officer was hired as a miscellaneous employee, not on the date the officer was sworn. Thus, long-serving miscellaneous employees would receive the more favorable retirement formula, not because of the employee’s status as a sworn officer but because the employee was hired before July 1, 2012. This interpretation is contrary to the evidence. Respondents offered no evidence that the 2011 MOU negotiators intended the hiring dates of Pre-Service Employees to be determinative of a sworn officer’s retirement benefits. Mr. Brown’s testimony made clear the negotiators never discussed such dates in their negotiations. Moreover, there is no policy reason why retirement benefits available only to sworn officers should be conditioned on the officer’s date of hire as an unsworn employee.

18. The 2012 Amendment adopts the two-tier formula set forth in the 2011 MOU. The Amendment divides sworn officers into the two categories outlined in Section 16C and Section 16D, albeit using different terminology and slightly different cut-off dates. Consistent with Section 16C, those employees who became sworn officers and thus entered the safety classification before the 2012 Amendment became effective, i.e. as of September 8, 2012, receive the more preferential 3% at 50 retirement formula. And, consistent with Section 16D, those who entered the safety classification after September 8, 2012, receive the less preferential retirement formula.

19. Respondents have not made clear the relevance of the various communications respondents received regarding their eligibility for the 3% at 50 formula to the issues in this proceeding. (Factual Findings 27–31.) None of City’s

employees who represented that respondents qualified for the 3% at 50 formula participated in the 2011 MOU negotiations. Thus, City employees' professed understandings of the 2011 MOU are not determinative of its meaning, and, as the 2011 MOU is an integrated agreement, none of their representations can modify its terms. There was also no evidence offered that respondents relied on the subject representations to their detriment. Thus, while the representations of City's employees may be relevant to the issues in the Superior Court proceeding, their statements do not affect the determination of whether the 2012 Amendment correctly reflects the 2011 MOU.

20. In summary, respondents failed to prove by a preponderance of the evidence that PERS misapplied the 2012 Amendment when determining their retirement formulas or that the 2012 Amendment was based on a mistaken interpretation of the 2011 MOU. Accordingly, PERS correctly applied the 3% at 55 retirement formula to respondents.

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ORDER

Respondents' appeal is denied. PERS correctly determined that respondents Tyler Diamond, Alex Duncan, and Ryan Lawrence were correctly enrolled by the City of Beverly Hills in the 3% at 55 Local Safety-Police retirement benefit formula.

DATE: **09/12/2022**



CINDY F. FORMAN

Administrative Law Judge

Office of Administrative Hearings