

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal of Forfeiture of Benefits of:

ROBERT F. SANCHEZ,

and

CITY OF SAN LEANDRO,

Respondents.

Agency Case No. 2022-0280

OAH No. 2022080796

PROPOSED DECISION

Administrative Law Judge Sarah Sandford-Smith, State of California, Office of Administrative Hearings, heard this matter on December 8, 2022, by videoconference.

Deputy Attorney General Seth A. Curtis represented the California Public Employees' Retirement System (CalPERS).

Attorney Michael L. Rains represented respondent Robert F. Sanchez, who was present throughout the hearing.

There was no appearance by or on behalf of respondent City of San Leandro (City). The City was duly served with a Notice of Hearing. As a result, this matter

proceeded as a default hearing against the City pursuant to Government Code section 11520, subdivision (a).

The record was left open for briefing. The briefs were filed and marked for identification as follows: respondent Sanchez's post hearing brief is Exhibit F; CalPERS's response is Exhibit 8; and respondent's reply brief is Exhibit G. Respondent also submitted a transcript of proceedings, dated October 14, 2022, in *People v. Robert Sanchez*, Alameda Superior Court Case No. 20-CR-014195. Complainant did not file an objection to the transcript of proceedings, which has been marked as Exhibit E and admitted into evidence. The record closed, and the matter was submitted for decision on March 3, 2023.

ISSUES

1. Was CalPERS correct in its determination that respondent Sanchez's no contest plea to a felony violation of Penal Code section 487, subdivision (a) (grand theft) constitutes a felony requiring forfeiture under Government Code section 7522.72?

2. Does post-conviction relief under Penal Code section 1203.425 require CalPERS to restore respondent Sanchez's retirement benefits?¹

¹ At hearing, the parties limited the issues that were presented in the statement of issues in this matter. CalPERS confirmed receipt of respondent Sanchez's payment of overpaid benefits in the amount of \$10,073.28, and respondent Sanchez did not contest the forfeiture date.

FACTUAL FINDINGS

Procedural Background

1. Respondent Robert F. Sanchez was employed as a police sergeant with the San Leandro Police Department. By virtue of his employment, respondent Sanchez is a local safety member of CalPERS. On November 20, 2020, respondent Sanchez submitted an application for service retirement. Respondent Sanchez retired for service effective November 21, 2020, and his first retirement warrant issued January 6, 2021.

2. On October 27, 2020, in the Superior Court of California, County of Alameda, a felony criminal complaint was filed against respondent Sanchez. The complaint alleged a felony violation of Penal Code section 504 (embezzlement of public funds), occurring between August 15, 2019, and March 17, 2020, while respondent Sanchez was a sergeant with the San Leandro Police Department. The complaint also alleged three felony violations of Penal Code section 424 (public officer crime).

3. On June 14, 2021, upon his plea of no contest, respondent Sanchez was convicted of violating Penal Code section 487, subdivision (a) (grand theft), a felony. The parties stipulated that felony grand theft is a lesser-related offense to felony embezzlement which was alleged in the felony complaint. Imposition of sentence was suspended, and respondent Sanchez was placed on formal probation for two years, with terms and conditions including that he serve one day in county jail (with credit for one day served); complete 240 hours of community service; pay restitution in the amount of \$46,815.88 to respondent City; pay a restitution fine of \$300 under Penal Code section 1202.4, subdivision (b); and refrain from engaging in any activity

involving a fiduciary responsibility to another person or entity, except for immediate family, without permission of the court.

4. In July 2021, respondent City submitted to CalPERS a Forfeiture of Benefits Employer Form, showing that on June 14, 2021, respondent Sanchez was convicted of a felony, and that the earliest date for commission of the felony was August 15, 2019. Respondent City also submitted to CalPERS the related court documents.

5. On August 18, 2021, CalPERS sent a determination letter to respondent Sanchez and respondent City. This letter notified respondent Sanchez that CalPERS had determined that he had been convicted of a felony for conduct arising out of or in the performance of his official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits. The letter informed respondent Sanchez that the felony conviction mandated that respondent Sanchez's service credit for the period of August 15, 2019, through November 20, 2020, an equivalent of 1.328 years of service credit, be forfeited, pursuant to Government Code section 7522.72, subdivision (b)(1), which requires forfeiture when an employee "is convicted . . . of any felony under state law for conduct arising out of or in the performance of his . . . official duties." The letter also informed respondent Sanchez that his retirement benefit would be adjusted to reflect his 19.334 years of service credit earned before August 15, 2019. As a result of the adjustment, respondent Sanchez's monthly service benefit would decrease. Additionally, CalPERS sought reimbursement for overpayment of retirement benefits in the amount of \$10,073.28.

6. Through a letter dated September 17, 2021, respondent Sanchez appealed CalPERS's determination. In the letter, respondent Sanchez asserted that his

felony conviction for violating Penal Code section 487, subdivision (a) (grand theft), should be treated as a misdemeanor “for all purposes” pursuant to Penal Code section 17, subdivision (b), based on the superior court judge’s determination to suspend imposition of respondent Sanchez’s sentence and place him on probation subject to conditions.

7. In 2022, respondent Sanchez paid CalPERS \$10,073.28 as repayment for the overpayment of retirement benefits paid to him.

8. On July 26, 2022, Kimberlee Pulido issued the statement of issues in her official capacity as Chief of the Retirement Benefit Services Division, CalPERS.

Respondent Sanchez’s Evidence and Contentions

9. On October 14, 2022, respondent Sanchez appeared in the Superior Court of California, County of Alameda, on his motion for early termination of probation under Penal Code section 1203.3²; reduction of the offense to a misdemeanor under Penal Code section 17, subdivision (b); and dismissal of the conviction pursuant to Penal Code section 1203.425. As documented by the transcript of the proceedings, the Court denied respondent Sanchez’s motion to reduce his felony conviction to a misdemeanor and his request for dismissal pursuant to Penal Code section 1203.425, but granted respondent Sanchez’s request for early termination of probation.

² Penal Code section 1203.3 allows a court to revoke, modify, or change probation or mandatory supervision, or to terminate probation, when the good conduct and reform of the person on probation warrant such relief.

It is unclear from the documents filed with respondent Sanchez's motion for early termination of probation and the transcript of the October 14, 2022, criminal proceedings, whether respondent Sanchez was granted early termination of probation under Penal Code section 1203.425 or Penal Code section 1203.3. However, despite the arguments of the parties, a determination as to whether respondent Sanchez was granted post-conviction relief under Penal Code section 1203.425 is immaterial to the analysis, as set forth in Legal Conclusions 7 and 8, below.

10. On December 5, 2022, in his statement of issues and argument, respondent Sanchez argued that he is entitled to reinstatement of his forfeited service credit because he was granted early termination of probation pursuant to Penal Code section 1203.425, which allows for automatic post-conviction relief including dismissal and early termination of probation. (Pen. Code, § 1203.425, subd. (a)(2)(A).) This statute further provides, at subdivision (a)(2)(C):

Except as otherwise provided in paragraph (4) and in Section 1355 of the Vehicle Code, a person granted conviction relief pursuant to this section shall be released from all penalties and disabilities resulting from the offense of which the person has been convicted.

Penal Code section 1203.425, subdivision (a)(4), sets forth exceptions to the conviction relief provided for in the statute. None of the exceptions reference forfeiture of retirement benefits of a public employee pursuant to Government Code section 7522.72.

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11. Respondent Sanchez argues that post-conviction relief under Penal Code section 1203.425 is different than an expungement under Penal Code section 1203.4, which states, in pertinent part:

(a)(1) When a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interest of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if they are not then serving a sentence for an offense, on probation for an offense, or charged with the commission of an offense, be permitted by the court to withdraw their plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if they have been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which they have been convicted, except as provided in Section 13555 of the Vehicle Code. (Pen. Code, § 1203.4.)

Respondent Sanchez agrees (as CalPERS contends), that relief under Penal Code section 1203.4 "would not result in reinstatement of rights and benefits previously

forfeited” because Government Code section 7522.72, subdivision (c)(1), explicitly addresses expunged convictions, and provides that expungement does not entitle a person to reinstatement of forfeited benefits. Respondent Sanchez argues that the rules of statutory construction require the restoration of his retirement benefits because he was granted post-conviction relief, in the form of early termination of probation, under Penal Code section 1203.425 and not expungement under Penal Code section 1203.4.

CalPERS’s Contentions

12. CalPERS contends that its interpretation of Government Code section 7522.72, as applied to respondent Sanchez’s felony conviction should be entitled to great weight.

13. CalPERS contends that respondent Sanchez was convicted of a felony, and therefore would only be entitled to a restoration of his retirement benefits upon a final decision reversing his felony conviction, pursuant to Government Code section 7522.72, subdivision (h), which provides:

If a public employee's conviction is reversed and that decision is final, the employee shall be entitled to do either of the following:

- (1) Recover the forfeited rights and benefits as adjusted for the contributions received pursuant to subdivision (d).
- (2) Redeposit those contributions and interest that would have accrued during the forfeiture period, as determined by

the system actuary, and then recover the full amount of the forfeited rights and benefits.

14. CalPERS disputes the contention that the superior court granted respondent Sanchez relief under Penal Code section 1203.425, noting that this statute requires notice to the district attorney or probation department (Pen. Code, § 1203.425, subd. (b)(1)), and that respondent Sanchez was ineligible for relief under Penal Code section 1203.425 because he was still on probation (Pen. Code, § 1203.425, subd. (a)(1)(B)(v)(I)).

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.) In the matter at hand, CalPERS has the burden of proving that respondent Sanchez was convicted of a felony that requires forfeiture of his retirement benefits. Respondent Sanchez has the burden of proving that his retirement benefits should be restored. The standard of proof in this matter is the preponderance of the evidence. (*McCoy, supra*, 183 Cal.App.3d at p. 1051.)

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Propriety of Felony Forfeiture

2. Government Code section 7522.72, subdivision (b)(1), mandates forfeiture of a retirement 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.

3. On June 14, 2021, respondent Sanchez was convicted of felony grand theft arising out of or in the performance of his official duties. (Factual Finding 3.) Imposition of respondent Sanchez's sentence was suspended, and he was placed on formal probation for two years with specific terms and conditions. (Factual Finding 4.)

4. In *People v. Feyrer* (2010) 48 Cal.4th 426, 439, and *People v. Park* (2013) 56 Cal.4th 782, 793, the California Supreme Court explained that suspending imposition of sentence does not reduce a conviction for a "wobbler" offense (an offense that could either be charged as a felony or misdemeanor) from a felony to a misdemeanor without express indication from the court that it intended to do so. In the case at hand, respondent Sanchez pled no contest to a felony violation of Penal Code section 487, subdivision (a), a "wobbler" offense. The evidence did not establish that the superior court expressly indicated that it intended to reduce respondent Sanchez's felony conviction to a misdemeanor at the time of sentencing. Moreover, the court subsequently denied his request to reduce his felony conviction to a misdemeanor pursuant to Penal Code section 17, subdivision (b). Accordingly, the

evidence established that on June 14, 2021, respondent Sanchez was convicted of a felony for conduct that arose out of or in the performance of his official duties, and thus became subject to forfeiture of his retirement benefits pursuant to Government Code section 7522.72, subdivision (b)(1).

Restoration of Retirement Benefits Following Forfeiture

5. Retirement benefits that have been forfeited pursuant to Government Code section 7522.72, subdivisions (b), may only be restored, “[i]f a public employee’s conviction is reversed and that decision is final.” (Gov. Code § 7522.72, subd. (h).) Retirement benefits “remain forfeited notwithstanding any reduction in sentence or expungement of conviction following the date of the member’s conviction.” (Gov. Code, § 7522.72, subdivision (c)(1).)

6. A person who is granted post-conviction relief under Penal Code section 1203.425 “shall be released from all penalties and disabilities resulting from the offense of which the person has been convicted,” with certain exceptions. None of the exceptions reference Government Code section 7522.72, or the forfeiture of retirement benefits.

7. Respondent Sanchez’s argument that his retirement benefits should be restored because he was granted post-conviction relief pursuant to Penal Code section 1203.425 is not persuasive. As noted by the California Supreme Court in *People v. Pieters* (1991) 52 Cal.3d 894, 898, “[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend. [citations omitted].” Penal Code section 1203.4, like 1203.425, indicates that a person granted relief under that section shall be “released from all penalties and disabilities resulting

from the offense of which they have been convicted.” Respondent Sanchez concedes that relief granted under Penal Code section 1203.4 would not entitle him to restoration of retirement benefits. It would be an absurd result if the identical language in Penal Code section 1203.425 allowed for the restoration of retirement benefits, where Penal Code section 1203.4 does not.

The legislative intent behind Government Code section 7522.72 is to reward only faithful public service and to make criminal activity by public employees unprofitable. As noted by the court in *Wilmot v. contra Costa County Employees’ Retirement Association* (2021) 60 Cal.App.5th 631, 670, “The right to a pension is not infeasible, and an employee, though otherwise entitled thereto, may not be guilty of misconduct in his position and maintain his rights notwithstanding such dereliction of duty [citations omitted].” In order to further the legislative intent, Government Code section 7522.72, subdivision (h), only allows for restoration of retirement benefits after forfeiture if the underlying felony conviction is reversed, and that reversal is final. Thus, even if respondent Sanchez was granted post-conviction relief under Penal Code section 1203.425, he is still subject to forfeiture of his retirement because his criminal conviction was not reversed, as required by Government Code section 7522.72, subdivision (h).

8. The evidence established that respondent Sanchez was convicted of a felony offense that required forfeiture of his retirement benefits, and that any post-conviction relief under Penal Code section 1203.425 does not entitle respondent Sanchez to restoration of his retirement benefits. The evidence further established that respondent Sanchez already paid CalPERS \$10,073.28 as repayment for the overpayment of retirement money paid to him, and thus no order of repayment is necessary.

ORDER

The appeal of respondent Robert F. Sanchez is denied. CalPERS's determination that respondent Sanchez's felony conviction requires partial forfeiture of his retirement benefits under Government Code section 7522.72, subdivision (h), is upheld.

DATE: 03/30/2023



SARAH SANDFORD-SMITH

Administrative Law Judge

Office of Administrative Hearings