

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the First Amended Statement
of Issues Against:

TAWNIE L. HANSEN,

Respondent,

and

CITY OF EUREKA,

Respondent.

Case No. 2011-0991

OAH No. 2011110365

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter on January 22 and 23, 2014, in Eureka, California.

Senior Staff Attorney Renee Salazar represented petitioner California Public Employees' Retirement System.

Alan Goldberg, Attorney at Law, assisted by Jim Niehaus, represented respondent Tawnie L. Hansen, who was present.

City Attorney Cyndy Day-Wilson represented respondent City of Eureka.

The record remained open for petitioner and respondent City of Eureka to file written closing argument, and for respondent Hansen to file a reply. (Respondent Hansen presented her initial closing argument at hearing on January 23.) A briefing schedule was established with which all parties complied. Petitioner CalPERS's brief was marked Exhibit 60. Respondent City of Eureka's brief was marked Exhibit 61. Respondent Hansen's reply brief was marked Exhibit S.

The record closed and the matter was deemed submitted on March 11, 2014.

SUMMARY

The issue is whether respondent Tawnie L. Hansen is entitled to service credit with CalPERS for the time she worked for the City of Eureka as an hourly employee between September 1996 and January 2006. City and CalPERS contend that she is not, because City's contract with CalPERS excludes employees who are paid on an hourly basis. The Public Employees' Retirement Law, however, provides that a part-time employee whose employment is on an irregular basis, such as limited-term, on-call, emergency or substitute, is entitled to membership after she completes 1,000 hours of service in a fiscal year; this provision supercedes any contract exclusion of temporary employees. During the time she worked on an hourly basis, respondent Hansen's employment was on an irregular basis. She was a temporary employee, and she worked more than 1,000 hours in five of the fiscal years between September 1996 and January 2006. Respondent Hansen is entitled to service credit for that time to the extent provided by PERL, notwithstanding the contract exclusion of hourly employees.

FACTUAL FINDINGS

City's contract with CalPERS

1. The California Public Employees' Retirement System (CalPERS) was created by the Public Employees' Retirement Law. (PERL, Gov. Code § 20000 et seq.¹) The system provides retirement benefits for state employees, and is authorized to enter into contracts with local agencies to provide retirement benefits for their employees. (Gov. Code, § 20460.) When a local agency contracts with CalPERS, the agency and its employees become subject to the terms of the PERL. (§ 20506.)

2. The PERL governs who shall be a member of CalPERS and who shall be excluded from membership. (See generally, § 20280 et seq.) With respect to local agency employees, the PERL requires that all employees of the local agency become members of CalPERS "except as exclusions in addition to the exclusions applicable to state employees may be agreed to by the agency and the board [of CalPERS]." (§ 20502.)

3. For local agency employees, therefore, the issue of membership involves an analysis of both the exclusions applicable to state employees, and the exclusions agreed upon by the contracting agency and CalPERS. In the case of part-time employees, section 20305 states the general rule that part-time employees are excluded from CalPERS. That section, however, goes on to state certain exceptions to the general rule, two of which are pertinent to this case. Under subdivision (a)(1) of section 20305, a part-time employee is not excluded from membership if she is a member at the time she renders the part-time service, so long as she is not otherwise excluded by a contract provision. Under subdivision (a)(3)(B) of section

¹ All statutory references are to the Government Code, unless otherwise noted.

20305, a part-time employee whose employment is on a “seasonal, limited term, on-call, emergency, intermittent, substitute, or other irregular basis,” and who completes more than 1,000 hours of service in a fiscal year, becomes a member of CalPERS after she has completed 1,000 hours. This provision supersedes any contractual provision that excludes persons who work on a temporary basis. (§ 20305, subd. (b).)

4. Respondent City of Eureka (City) became a local contract agency of CalPERS in 1967.

5. Since at least 1973, City’s contract has excluded from membership employees paid on an hourly, daily or weekly basis. The wording of this exclusion has changed slightly over the years. Originally, City’s contract stated, in relevant part, as follows:

The following classes shall be excluded from membership in [CalPERS]:

[¶]

PERSONS COMPENSATED ON AN HOURLY BASIS

PERSONS COMPENSATED ON A DAILY BASIS

PERSONS COMPENSATED ON A WEEKLY BASIS

In 1979, the contract was amended to read:

In addition to the classes of employees excluded from membership by [the PERL], the following classes of employees shall not become members of [CalPERS]:

[¶]

EXCLUDE PERSONS COMPENSATED ON AN HOURLY BASIS

EXCLUDE PERSONS COMPENSATED ON A DAILY BASIS

EXCLUDE PERSONS COMPENSATED ON A WEEKLY BASIS

And in 1995, City’s contract was amended to read:

In addition to the classes of employees excluded from membership by [the PERL], the following classes of employees shall not become members of [CalPERS]:

- a. PERSONS COMPENSATED ON AN HOURLY BASIS;
- b. PERSONS COMPENSATED ON A DAILY BASIS;
- c. PERSONS COMPENSATED ON A WEEKLY BASIS;

Respondent Hansen argues that this change in language is significant. She asserts that the 1973 contract excluded an hourly employee from membership, while the 1979 and 1995 versions state that hourly employees shall not become members. In her view, the 1995 language does not prohibit an hourly employee from earning CalPERS service credit if she was previously a member of CalPERS by virtue of prior service.

Respondent's argument is not persuasive. It is plain from the history of this provision that City did not intend to provide CalPERS retirement benefits for an hourly employee, whether or not she was already a member of CalPERS.

6. On August 13, 1999, CalPERS wrote to City about its exclusion of hourly employees. CalPERS informed City that "[t]his is a valid contract exclusion." The system, however, asked City to clarify its "use and interpretation" of the exclusion. In a letter dated September 13, 1999, City's Director of Human Resources replied,

We interpret our contract exclusion to include, in addition to the classes or categories of employees excluded from membership in PERS law, all employees employed by the City of Eureka and compensated on:

- 1) an hourly basis
 - 2) a daily basis
 - 3) a weekly basis;
- [¶]

The Eureka City Council, during their annual budget process, allocates a specified number of regular full-time and regular part-time positions. These regular positions are salaried and are afforded benefits including membership in PERS. Any person who is employed by the City and is not employed in an allocated position is paid on an hourly, daily or weekly basis, does not receive any benefits and is not eligible for PERS membership.

To simply characterize Eureka's PERS contract exclusion as "an hourly exclusion" would be incorrect.

(Original emphasis.)

City informed CalPERS that its interpretation was grounded in various internal documents, including its ordinances, personnel rules and memoranda of understanding (MOU's) with employee representatives. City noted that, under the MOU's, employees paid on an hourly, daily or weekly basis, and who do not hold an allocated position, are "known by names such as temporary, seasonal, extra help or intermittent." City also informed CalPERS that, under its municipal code, temporary employees are paid on an hourly basis.

7. From 2004 until she retired in 2008, Susan Christie was City's Director of Personnel. Christie worked in City's personnel department for 22 years. At hearing, Christie expanded further on City's distinction between "regular" employees and temporary employees. Regular employees, whether full-time or part-time, hold positions allocated by the City Council in City's annual budget; they are ongoing positions. Temporary employees hold no allocated positions. City departments are given "a pot of money" by the Council to meet their needs during the particular budget period. In City's view, temporary employees did not earn benefits and their earnings were not reported to CalPERS.

Respondent Hansen's employment with City

8. Respondent Hansen was first employed by City on June 25, 1990, in a full-time, salaried position in the Building Department. By virtue of her position, respondent became a local miscellaneous member of CalPERS.

9. Between 1990 and 1995, respondent worked continuously as a full-time, salaried employee in several City departments: the Building Department; the Police Department as a dispatcher; the Finance Department; and then back to the Police Department as a dispatcher. Respondent worked as a dispatcher until on or about May 21, 1996, when she went on maternity leave.

10. On September 11, 1996, respondent's maternity leave ended and she returned to her full-time, salaried position as a dispatcher.

11. When she returned to work, however, respondent found that she did not want to work full-time. She spoke to her superiors in the police department, who had no objection to her working part-time.

12. Respondent had a choice of working as a regular part-time employee or as a temporary part-time employee. As respondent understood it, a regular part-time employee was required to work a minimum of 20 hours per week, and earned one-half the benefits of a full-time employee. But the police department set the schedule for its regular, part-time employees; respondent could be required to work nights and weekends, which she did not

want to do. Respondent understood that temporary, part-time employees received no health or retirement benefits but, as a temporary employee, she could set her own hours. She knew that, as a temporary employee, she would be paid at an hourly rate.

13. Respondent elected temporary, part-time status. Effective September 21, 1996, respondent resigned from her full-time position and, on September 24, 1996, she started work as a part-time Communications Dispatcher. In that capacity, respondent was a temporary employee, paid on an hourly basis.

14. Respondent continued to work as a temporary, part-time Communications Dispatcher, and later as a temporary, full-time Senior Communications Dispatcher, for almost 10 years, until mid-January 2006. In both of these assignments, respondent was informed that she was a temporary employee, and she was paid on an hourly basis.

15. Between 1996 and 2006, City's Personnel Department advised the police department, and City's other operating departments, not to let temporary employees work more than 999 hours per year. This advice was based on the PERL provisions, described in Finding 3 and quoted in Legal Conclusion 1, that provide retirement benefits for temporary employees who work 1,000 hours or more in a fiscal year. A Personnel Action Form dated October 16, 2000, documented an increase in respondent's hourly rate of pay and also stated: "NOTE: Temporary and Seasonal Employees may not work more than 999 hours in a fiscal year for the City, regardless of the Department in which they work." Retired Personnel Manager Christie testified that the personnel department wanted the police department to go to the City Council to get an allocated position if it needed to use a temporary employee for more than 999 hours per year. The police department declined to follow the advice of the personnel department on the ground that it was hard to find and retain dispatchers. Christie stated that it was "highly unusual" to retain an employee, like respondent, in a temporary capacity for 10 years.

16. During the time she worked as an hourly, part-time Communications Dispatcher and as an hourly, full-time Senior Communications Dispatcher, respondent's employment was on a limited-term, on-call, emergency, substitute, or other irregular basis.

17. Respondent's available² payroll records reveal that, during the time she was a temporary employee being paid on an hourly basis, she worked more than 1,000 hours in fiscal years 1998-99, 1999-00, 2002-03, 2003-04, and 2004-05. Between 1996 and January 2006, when respondent was working on an hourly basis, City did not report her earnings to CalPERS.

18. Effective January 16, 2006, respondent became a regular, full-time Senior Communications Dispatcher holding an allocated position. As a full-time Senior Communications Dispatcher, respondent was paid a monthly salary. In that position,

² City informed respondent that some of her payroll records have been destroyed, and some could not be located.

respondent earned health benefits, and retirement contributions to CalPERS were deducted from her paycheck.

19. On September 1, 2009, respondent retired for disability. She had 9.8 years of credited service with CalPERS when she retired.

Respondent's appeal

20. At some time after she retired, respondent learned that if she had retired with at least 10 years of service, her monthly retirement allowance would have been substantially greater. Respondent began a series of inquiries with CalPERS to see if she could purchase service credit for the time she was on maternity leave, or if she could receive service credit for any or all of the time between 1996 and 2006 when she was working as an hourly employee. On March 3, 2011, CalPERS informed respondent of its determinations that she could not purchase service credit for her maternity leave, and that she was not entitled to service credit during the time she was working as an hourly employee. Respondent filed a timely appeal. Petitioner filed a statement of issues and then a first amended statement of issues, and this hearing followed.³

LEGAL CONCLUSIONS

1. Section 20305 governs the membership of part-time employees and it is central to this case. It provides, in relevant part, as follows:

(a) An employee whose appointment or employment does not fix a term of full-time, continuous employment in excess of six months is excluded from this system unless:

(1) [S]he is a member at the time . . . she renders that service and is not otherwise excluded pursuant to this article or by a provision of a contract.

(2) [H]er position requires regular, part-time service for one year or longer for at least an average of 20 hours a week

(3) [H]er employment is, in the opinion of the board, on a seasonal, limited-term, on-call, emergency, substitute, or other irregular basis, and is compensated and meets one of the following conditions:

(A) . . .

³ At hearing, respondent withdrew her appeal regarding her request to purchase service credit for the time she was on maternity leave.

(B) The person . . . completes 1,000 hours within the fiscal year, in which case, membership shall be effective not later than the first day of the first pay period of the month following the month in which . . . 1,000 hours of service were completed.

(C) The person is employed by the Department of Forestry and Fire Protection

(4) [S]he is a temporary faculty member of the California State University and meets one of the following conditions:

(A)

(B)

(5) [S]he is a member of the Board of Prison Terms

(6) [S]he is participating in partial service retirement

(7) [S]he is included by specific provision of the board relating to the exclusion of less than full-time employees.

(b) This section shall supersede any contract provision excluding persons in any temporary or seasonal employment basis and shall apply only to persons entering employment on and after January 1, 1975. Except as provided in Section 20502, no contract or contract amendment entered into after January 1, 1981, shall contain any provision excluding persons on an irregular employment basis.

2. Petitioner and City rely on the contract exclusion of hourly employees to support their position that respondent is not entitled to service credit for the time she worked as an hourly employee. They acknowledge that respondent was already a member of CalPERS when she began her hourly service but they assert – correctly – that the exception set forth in section 20305, subdivision (a)(1), only applies if respondent was “not otherwise excluded” by a contract provision. As City’s contract expressly excludes hourly employees, the exception offered by subdivision (a)(1) is not available to her.

3. Respondent, however, falls squarely within the exception established by subdivision (a)(3)(B). When she worked as an hourly employee, respondent’s employment was on a limited-term, on-call, emergency, intermittent, substitute or other irregular basis; she was compensated for her work; and she completed at least 1,000 hours of service in fiscal years 1998-99, 1999-00, 2002-03, 2003-04, and 2004-05. It is true that City’s contract with CalPERS expressly excludes hourly employees. As City explained to CalPERS in 1999, however, its exclusion of employees paid on an hourly, daily or weekly basis was

intended to apply to employees working on a “temporary, seasonal, extra help or intermittent” basis who do not hold allocated positions. Under subdivision (a)(3)(B), such employees become members of CalPERS after they complete 1,000 hours of service in a fiscal year; subdivision (b) states that this provision supercedes local agency contracts that would exclude such employees from membership.

4. CalPERS and City do not dispute that, factually, respondent’s employment fell within the exception established by subdivision (a)(3)(B) – that is, that she was employed on an irregular basis and that she completed more than 1,000 hours of service in various fiscal years. CalPERS argues, however, that because respondent does not meet the exception established by subdivision (a)(1), she is not eligible for membership under any other exception. In CalPERS’s words, “each subsection [of section 20305] stands alone, and once the subsection that covers an employee’s employment/membership status is identified, that subsection is applied to determine if she is excluded from the system/membership.” To support its argument, CalPERS invokes the rule of statutory construction that “effect should be given . . . to each word and clause, thereby leaving no part of the provision useless or deprived of meaning.” City’s brief does not address respondent’s eligibility for membership under subdivision (a)(3)(B).

5. Section 20305 does not support petitioner’s argument. Nothing in section 20305 states that an employee who does not fall under the exception established by subdivision (a)(1), is not eligible for the exception established by subdivision (a)(3)(B). In the course of “interpreting” section 20305, petitioner may not insert words into the statute that are not there. (*People v. National Automobile & Casualty Ins. Co.* (2002) 98 Cal.App.4th 277, 282.) Petitioner asserts that its interpretation is necessary to give effect to every clause of the statute, but just the opposite is true: petitioner’s interpretation violates that principle by failing to give effect to subdivision (a)(3)(B). Moreover, petitioner’s interpretation would lead to an absurd result: a City employee whose temporary service was identical to respondent’s would earn service credit under subdivision (a)(3)(B), but respondent would not solely because she had established CalPERS membership earlier in her career. Section 20305 is clear and unambiguous: no interpretation is necessary and no interpretation should be indulged in. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800.) Temporary employees who work more than 1,000 hours in a fiscal year become members of CalPERS, notwithstanding a contractual provision that would exclude them from membership.

6. During the time that respondent worked for City as an hourly employee, City knew that she would be entitled to retirement benefits if she worked 1,000 hours or more in a fiscal year. City, however, did not enforce that limit on respondent’s service.

7. Respondent is entitled to service credit for her hourly employment calculated in the manner, and to the extent, authorized by section 20305, subdivision (a)(3)(B).

8. In its closing brief, City asserts that respondent waived her claim for CalPERS service credit in a release she signed 2010, when other litigation between City and respondent was resolved. This issue was not presented at the beginning of the hearing, when

the issues to be decided were identified. City's brief does not cite to any evidence to support its assertion, and none has been found. The evidence fails to establish that respondent has waived her claim for CalPERS service credit.

ORDER

The appeal of respondent Tawnie L. Hansen is granted. She is entitled to service credit for her hourly employment with the City of Eureka calculated in the manner, and to the extent, authorized by Government Code section 20305, subdivision (a)(3)(B).

DATED: April 14, 2014



DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings