

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Membership Reclassification
of:

STEVE H. TSUMURA

and

CITY OF EL SEGUNDO,

Respondents.

Case No. 2016-0278

OAH No. 2016060651

PROPOSED DECISION

John DeCure, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on December 14, 2016, in Glendale, California.

Elizabeth Yelland, Senior Staff Attorney, represented Complainant Renee Ostrander.

Jacob A. Kalinsky, Esq., represented Steve H. Tsumura (Respondent), who was present. Oliver Yee, Esq., represented the City of El Segundo (the City).

The record was closed and the matter submitted for decision on December 14, 2016.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Amended Statement of Issues was filed on Complainant's behalf in her official capacity as the Chief of the Employer Account Management Division for the California Public Employees' Retirement System (CalPERS).

2. Respondent was employed with the City as the Environmental Safety Coordinator in the City's safety classification on November 5, 1990.

3. CalPERS is a defined benefit plan. Benefits for its members are funded by employee and employer contributions, as well as by interest and other earnings on those

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FILED 12 Jan 2017
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contributions. The amount of an employee's contributions is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a rate to the payroll of the agency. Using certain actuarial assumptions specified by law, CalPERS' Board of Administration (the Board) sets employer contribution rates annually.

4. The City is a contracting agency with CalPERS for retirement benefits for its eligible employees. The provisions of the City's contract with CalPERS are governed by the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.)

The Dispute Concerning Respondent's Job Classification

5. Over the course of Respondent's career with the City, a dispute arose between CalPERS and the City as to what type of retirement plan Respondent's position as Environmental Safety Coordinator entitled him to receive. The City classified Respondent as a safety member when it hired him and over the entire course of his employment, maintained that his position deserved that classification. However, at various times during Respondent's employment, CalPERS contended he was a miscellaneous employee and instructed the City to consider him as such when it submitted the necessary employer/employee monetary contributions to the retirement fund. From time to time both sides asserted their respective positions in written correspondence between them, but for many years, the dispute lay dormant. In the meantime, Respondent amassed a lengthy record of employment with the City, planned his CalPERS retirement using information and benefits statements CalPERS supplied to him, and retired as a safety member, unaware that a dispute even existed. Approximately eleven months after Respondent retired, CalPERS reasserted its position that he should be classified as a miscellaneous employee, and altered his benefit. This matter ensued as a result. The significant facts are as follows.

6. Upon Respondent's initial employment in November 1990, the City represented to him that his safety classification entitled him to receive an enhanced benefit retirement formula of 3 percent at 55 years of age, making him a safety member. To Respondent, the enhanced safety member benefit made the position more attractive, and he relied upon the City's representation that he would be a safety member when he decided to accept employment. The City reported to CalPERS that Respondent was a safety member and began paying to CalPERS employer and member contributions at a safety-member rate, which is a higher rate than for a miscellaneous member. These safety-member contributions were paid to CalPERS over the entire course of Respondent's employment.

7. On February 28, 1991, CalPERS sent a memorandum to the City stating that upon its review of the duty statement for the Environmental Safety Coordinator position Respondent held, the position did not include "active firefighting" in its duties and was therefore a miscellaneous position for purposes of his CalPERS retirement. CalPERS cited to former Government Code section 20021.01 (which was superseded in 2001 by Government Code section 20434) as authority for its determination. CalPERS included a

Notice of Change form requesting the City to apply the miscellaneous member rate to Respondent's contributions.

8. On October 1, 1991, the City sent a letter to CalPERS indicating that it was taking steps to change Respondent's employee records to reflect miscellaneous status coverage. However, the City did not entirely acquiesce to CalPERS' request to change Respondent's retirement status, stating:

"it remains our view that the nature of this position's duties and responsibilities warrants safety coverage under PERS. Accordingly, we will shortly be submitting information to your office detailing the position's extensive exposure to hazardous conditions and ongoing participation in "active firefighting" related duties. At such time, we will ask that you redesignate the position to its original status as a member of the safety coverage group.

(Exhibit 12.)

9. Respondent was not made aware of the exchange of letters between CalPERS and the City in February 1991 and October 1991 as described above. Neither CalPERS nor the City consulted with him or provided him with copies of the letters. The City continued to report Respondent as a safety member and continued to submit employer/employee contributions to CalPERS at the higher safety member rate.

10. For approximately six years, from October 1991 to October 1998, the dispute subsided.

11. On October 8, 1997, CalPERS sent a letter to the City reiterating the substance of CalPERS' February 28, 1991 letter and the City's October 1, 1991 letter of response. CalPERS further stated:

The City has to date continued to report [Respondent's] payroll to CalPERS under the local firefighter coverage (coverage groups 74101 and 74001). [Respondent] has never been reported to CalPERS under the miscellaneous coverage (coverage group 70002).

Once again I am instructing the City to stop reporting [Respondent] under the 74001 coverage and begin reporting him under the 70002 coverage.

(Exhibit 13.)

12. On December 23, 1997, CalPERS sent a letter to the City, written by Retirement Specialist II Sandra May, which once again reiterated the substance of CalPERS' February 28, 1991 letter and the City's October 1, 1991 letter of response. CalPERS further stated:

If I do not hear anything from the City by January 26, 1998 we will process a partial refund to [Respondent] to refund him the overpayment in member contributions.

(Exhibit 14.)

13. In 1997 the City's Fire Chief informed Respondent that CalPERS was disputing Respondent's classification as a safety member.

14. On January 20, 1998, the City attempted to rectify the dispute by bringing the matter before its City Council to approve an updated class specification for Respondent's position as Environmental Safety Coordinator. Respondent participated in the process of updating the classification to more comprehensively describe his job duties. The revised class specification, which the City Council approved by a unanimous vote, stated as follows:

DEFINITION

Under general supervision of the Fire Chief, develops and maintains fire suppression and hazardous materials response programs; implements applicable, local, state and federal laws and regulations; responds to and enters hazardous environments with firefighters for the identification and mitigation of chemical emergencies; perform related duties as required.

Duties may include, but are not limited to, the following:

1. Develops and maintains fire safety and hazardous materials emergency plans in accordance with Chapter 6.95 of the California Health and Safety [C]ode; develops and maintains City's area plan for chemical disasters.
2. Coordinates implementation and enforcement of all fire and chemical handling requirements related to hazardous materials; develops and maintains emergency responder chemical data for selection and determination of personal protection equipment and evacuation criteria; implements and maintains hazardous materials data base.
3. Routinely provides incident commander with technical data through the Incident Command System (ICS) and acts as

safety officer or other command/operation position assigned by the incident commander for active firefighting and hazardous materials response requirements.

4. Investigates hazardous materials or waste spills for potential illegal or dumping or hazardous waste; coordinates response efforts with other agencies during major fires or chemical emergencies[;] responds to hazardous materials emergencies and serves as hazardous materials specialist at the scene of the incident; including entry into hazardous environments requiring protective clothing and respiratory protection.

5. Provides and assists with platoon training activities related to active firefighting and hazardous materials; ensures readiness of response facilities, supplies, and equipment for hazardous materials identification and mitigation.

6. Investigates environmental contamination related complaints; inspects and evaluates various businesses and City buildings for correct use, storage and handling of chemicals and hazardous materials.

7. Develops and maintains hazardous materials and hazardous waste management program; coordinates mitigation efforts designed to eliminate or reduce the impact of potential hazards; reviews, interprets, and enforces laws, regulations, and directives pertaining to hazardous materials response and mitigation.

8. Responds to emergencies with firefighters and enters hazardous environments with firefighters to assist in the mitigation of hazardous incidents. [¶ . . . ¶]

(Exhibit 22.)

15. On January 21, 1998, the City sent a letter to CalPERS attaching the newly revised class specification for the Environmental Safety Coordinator and explaining that the City Council approved it as reflecting "a variety of 'active firefighting' related duties which [Respondent] has been performing during his service with the City of El Segundo." (Exhibit 15.)

16. On March 5, 1998, CalPERS sent what turned out to be its final letter to the City regarding the dispute over Respondent's class specification during the course of his employment with the City. The letter, written by Sandra May, stated:

Thank you for submitting the City's class specification for the Environmental Safety Coordinator. After review . . . it was determined that this class is a miscellaneous class.

If the City wishes to provide safety membership for this class, the City can amend their contract with CalPERS to include provisions of Government Code Section 20434.5 (hazardous materials duties). Without the inclusion of this section of the Government Code in your contract this position will remain a miscellaneous position.

Begin reporting [Respondent] with your miscellaneous coverage effective with your next payroll reporting. CalPERS will then refund to him the difference in what he paid under safety coverage and what he should have paid as a miscellaneous member. If the City amends their contract to include Government Code Section 20434.5 his past qualifying service will be reclassified to the safety coverage at no cost to the member. [¶ . . . ¶]

(Exhibit 16.)

17. The evidence was inconclusive as to whether CalPERS' March 5, 1998 letter was mailed by CalPERS, or if it was received by the City. The copy of the CalPERS letter Complainant provided is unsigned and bears no other indication that it was mailed. Ms. May did not testify at the administrative hearing, and Complainant offered no further evidence to authenticate the letter. By contrast, the previous letter from Sandra May to the City, dated December 23, 1997, bears Ms. May's signature. At any rate, the City claimed it never received the March 5, 1998 letter. In the City's written appeal filed in August 2015, which Complainant attached to the Statement of Issues in this matter, the City's legal counsel stated that the City "did not receive a response to the October 21, 1998 letter and assumed the changes were sufficient to confer safety member status under [PERL]." (Exhibit 1.) Accordingly, it was not established that the March 5, 1998 letter was mailed by CalPERS or received by the City.

18. Over the next 16 years, from October 1998 until May 2014, CalPERS' took no further action regarding the class-specification dispute. The City continued to pay its CalPERS employer and employee contributions for Respondent at the higher safety member rate. CalPERS continued to accept those contributions, as it did over the course of Respondent's career. In 2010 the City re-named Respondent's position as an Environmental Services Manager, but his job duties remained essentially unchanged. Respondent began to plan for his retirement. At the administrative hearing, Respondent submitted Annual Member Statements CalPERS had issued to him yearly from 2004 through 2014, each stating that his service credit for his employment with the City consisted of "Fire/EMT (3% at age

55 formula)." Despite a boilerplate warning on each such statement that the information in CalPERS calculations may be incorrect, Respondent had no reason to expect that he would receive anything other than a safety member retirement. Indeed, when Respondent retired effective November 14, 2014, after 24 years of employment with the City, CalPERS paid him a retirement benefit based on Respondent's safety member status.

19. Respondent's safety member retirement benefit was short-lived. In July 2015, CalPERS wrote to Respondent to inform him that his safety classification was incorrect, and that he should be receiving a benefit calculated at the two percent at age 55 (miscellaneous) formula. As a result, CalPERS decreased his monthly retirement benefit by \$2,580.65. Respondent is his family's sole breadwinner, and the sudden decrease in income caused him economic hardship, forcing him to return to the workforce.

Further Evidence Regarding Duties of Respondent's Employment

20. At the administrative hearing, Respondent described his duties as Environmental Safety Coordinator as responding to emergencies, accidents, and incidents involving fires, hazardous material spills, chemical spills and exposure, and numerous other hazardous situations. His immediate supervisor was the Fire Battalion Chief, and his primary duty was to respond to a wide variety of emergencies. While on duty, he responded when firefighters were dispatched, and he responded to major incidents regardless of whether he was on or off duty, "twenty-four-seven." (Respondent's testimony.) He was responsible for firefighter safety, and he wore full safety gear and breathing apparatus to enter dangerous sites, including burn areas, to determine whether firefighters could safely proceed without exposure to dangerous substance such as acids, cyanides, and other hazardous materials. In doing so, he sometimes entered dangerous sites before other firefighters did. As a condition of his employment, Respondent was required to maintain a firefighter's fitness for duty by maintaining the physical fitness and agility necessary to perform his functions.

21. Respondent investigated fires, chemical spills, and other hazardous situations involving chemicals, sewage, or toxic substances, and he trained firefighter and other City personnel in how to safely contend with a variety of such emergencies. During major fires or chemical spills, he and other firefighters would set up an Incident Command Post, where all the firefighters convened in order to receive directions. Respondent was part of a response team that included firefighter supervision and the Battalion Chief, and they would work together to strategize and develop a response referred to as an "Incident Command Plan."

22. Respondent was not a firefighter in the sense that putting out fires was his primary duty. It was not. Yet there were times when Respondent suppressed or extinguished smaller fires alone when, for instance, other firefighters were on another call. Respondent was often at fire scenes for many hours after the firefighters had departed, and under those circumstances, if a fire rekindled and burned again, he was responsible for extinguishing it.

23. Respondent worked closely with other firefighting personnel. He maintained, inspected, cleaned, serviced, and drove a City-issued emergency response vehicle equipped

with an automatic-lift tailgate, a generator, chemical absorbents and solvents, firefighting equipment, a crew cab for transporting firefighters, a flashing-light bar, a siren, and an electronic device capable of changing traffic lights from red to green as the vehicle sped to emergency calls.

24. In addition to performing investigations into regulatory violations and training others regarding hazardous materials, Respondent worked with other public agencies, businesses, schools, members of the public, and he acted as the City's official media spokesperson following major emergencies.

25. Andrew Harris, a CalPERS Retirement Program Specialist II, testified that Respondent is ineligible for a safety member classification because according to the City's job description for Respondent's Environmental Safety Coordinator position, Respondent is not engaged in active firefighting, which would involve fire suppression, ventilation, or fire rescue. Mr. Harris opined that pursuant to Government Code section 20134, if the City had wanted to reclassify Respondent's position from miscellaneous to safety member status, it should have amended its contract with CalPERS. Government Code section 20134 provides:

"Local firefighter" also means any officer or employee of a fire department or a contracting agency, except one whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise and whose functions do not clearly fall within the scope of active firefighting, fire prevention, fire training, hazardous materials, emergency medical services, or fire or arson investigation service, even though that employee is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active firefighting, fire prevention, fire training, hazardous materials, emergency medical services, or fire or arson investigation service, but not excepting persons employed and qualifying as firefighters of equal or higher rank, irrespective of the duties to which they are assigned.

This section shall not apply to the employees of any contracting agency nor to any contracting agency until the agency elects to be subject to this section by amendment to its contract with the board, made pursuant to Section 20474 or by express provision in its contract with the board.

Mr. Harris opined that because the City did not amend its contract with CalPERS to reflect such a change, Respondent was ineligible for safety member status. Mr. Harris candidly stated that had the City amended the contract, CalPERS would have had "no objection" to Respondent receiving safety member status. (Testimony of Andrew Harris.) Mr. Harris was familiar with CalPERS' member file for Respondent and stated that neither he, nor any other

CalPERS employees, had spoken with Respondent to obtain further information about Respondent's job duties.

26. Mr. Harris offered no opinion as to whether Respondent qualified for safety member status as a "local firefighter" pursuant to Government Code section 20433. That Government Code section is identical to the text of the first paragraph contained in Government Code section 20434. Section 20433 states:

"Local firefighter" also means any officer or employee of a fire department or a contracting agency, except one whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise and whose functions do not clearly fall within the scope of active firefighting, fire prevention, fire training, hazardous materials, emergency medical services, or fire or arson investigation service, even though that employee is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active firefighting, fire prevention, fire training, hazardous materials, emergency medical services, or fire or arson investigation service, but not excepting persons employed and qualifying as firefighters of equal or higher rank, irrespective of the duties to which they are assigned.

Government Code section 20433 does not contain the provision found in Government Code section 20434 that allows a contracting agency to amend its contract with CalPERS in order to change a classification.

27. Respondent argued that he met the statutory definition of "local firefighter" under Government Code section 20433.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476.)

2. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, the court considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found "the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence."

3. In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

4. In this case, the parties agree that Respondent has the burden of establishing by a preponderance of the evidence that his monthly retirement allowance is not subject to any reduction by CalPERS' by its reclassification of his retirement status from safety member to miscellaneous employee.

5. Under the California Constitution, Article XVI, section 17, subdivision (b), a retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty. In this case, that duty should have involved CalPERS making a plain, fair reading of the most applicable statutes relevant to Respondent.

Respondent is a Local Firefighter Pursuant to Government Code Section 20433

6. Legislative interpretation begins by examination of the language of the statute, giving the words their ordinary meaning and considering them in the context of the statutory framework. (*Barnes v. Dept. of Corrections* (1999) 74 Cal.App.4th 126,131. The PERL is applied liberally in favor of the pensioner, and any ambiguity or uncertainty in the construction of the statute is resolved in the pensioner's favor in a manner consistent with the clear language and purpose of the statute. (See *Hudson v. Board of Admin. of Public Employees' Retirement System* (1997) 59 Cal.App.4th 1310,1324; *Ventura County Deputy Sheriffs' Association v. Board of Retirement* (1997) 16 Cal.4th 483, 490.)

7. CalPERS maintained that Respondent's position with the City should be under the miscellaneous classification instead of the safety member classification the City repeatedly set forth. CalPERS further instructed the City to amend its contract with CalPERS pursuant to Government Code section 20434 to elect to include Respondent as a safety member. The City did not do so. Plainly, the City believed Respondent's position qualified him as a local firefighter, and it went as far as having its City Council formally reclassify the position's job description to provide CalPERS further information as to Respondent's active firefighting duties. That effort did not satisfy CalPERS. The question is which statute applies best to determine whether Respondent qualifies for safety member status.

8. By its own plain language, the second paragraph of Government Code section 20434 makes it an optional section. There is no evidence that the City ever elected to be subject to that statute, either by the terms of its contract with CalPERS or by its actions or intent. Thus, it does not apply here. CalPERS' insistence that the City amend its contract with CalPERS to resolve the issue of Respondent's safety member status was an irrelevant factor. The choice was always the City's to make.

9(a). Thus, the question becomes whether Respondent qualifies for safety member status as a "local firefighter" described in Government Code section 20433, which begins by stating that a local firefighter means any officer or employee of a fire department of a contracting agency. Respondent was certainly an employee of the City's fire department, as his supervisor was that department's Battalion Chief and his duties were deeply intertwined with the workings of the City's firefighting and emergency response apparatus. The statute then excepts from the "local firefighter" definition employees whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, *and* whose functions do not clearly fall within the scope of active firefighting or active firefighting or fire prevention, fire training, hazardous materials, emergency medical services, or fire or arson investigation service combined with other duties. These excepted positions all involve work of the routine, support-staff variety. Respondent's position was far more important, complex, and specialized than routine support work. As such, his position is well outside the class of excepted employees.

9(b). Even if Respondent were a routine staff employee, the second component of the employee exception would not be satisfied. Under the statute's plain language, excepted employees are those identified as support staff *and* whose functions *do not* involve active firefighting and fire prevention, fire training, hazardous materials, emergency medical services, or fire or arson investigation service. Here, Respondent's duties do indeed involve active firefighting, as follows.

9(c). Complainant argues that to be defined as a local firefighter, Respondent's principal duties must involve active firefighting, and because Respondent's job description does not primarily involve fire suppression, ventilation, and rescue, his stated job duties are insufficient for safety member status. Here, Complainant is compelled to look beyond the mere job classification and must analyze Respondent's actual duties. (See *Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815, 818; *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 977.) By fixing its attention on firefighting phraseology and the City's job description for Respondent's position, CalPERS overlooks Respondent's credible testimony describing the emergency response duties he fulfilled routinely, his coordinated leadership during major fires, and the direct support he provided to firefighters. Respondent employed fire suppression methods as needed, and sometimes alone. He was often exposed to the same hazardous conditions they faced, sometimes clearing the way, as the hazardous-chemicals expert, for the firefighters to enter the premises. (See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 62 [noting that "Airport Servicemen" should be classified as "local firefighters" because they were exposed to the same risks as firefighters].) While his job duties were many and varied, at the core Respondent was a key emergency response member under the supervision of the fire department's highest command.

9(d). For all of these reasons, Respondent qualifies as a "local firefighter" pursuant to Government Code section 20433.

10. Complainant's reliance on a CalPERS precedential decision, *In the Matter of the Statement of Issues Against Gary J. Lowrey and City of Bakersfield*, dated November 23, 2004, is misplaced, as the facts of the case and the legal theories that Lowrey, a fire department employee, relied upon are inapposite to the instant case. For instance, Lowrey conceded that he did not qualify as a local firefighter under Government Code section 20433, but instead contended that he fit into the local safety classification as stated in Government Code section 20434. Lowrey also did not claim safety member status as a firefighter, but tried to prove that his job duties as a fire prevention officer made him akin to law enforcement. Lowrey's employer, the City of Bakersfield, never considered his position to be that of a local safety member and never sought such a classification. Lastly, Lowrey's job duties were far beneath those of Respondent and did not involve emergency response to fires.

11. Respondent established by a preponderance of the evidence that his position as an Environmental Safety Coordinator qualifies him for safety membership. Because Respondent's pension rights and benefits as a safety member are not subject to forfeiture by CalPERS' reclassification of his pension rights as those of a miscellaneous employee, none of the reductions CalPERS made to his pension rights and benefits were warranted. That so, CalPERS' collection of a perceived overpayment of \$19,526.92 was unauthorized. (Factual Findings 1-27.)

ORDER

The appeal of Respondent Steve S. Tsumura is granted. CalPERS shall not reduce his pension rights and benefits from safety member to miscellaneous employee as proposed in its letter dated July 1, 2015.

CalPERS shall reimburse to Respondent the \$19,526.92 it collected from him as a perceived overpayment of his safety retirement benefit.

DATED: January 11, 2017

DocuSigned by:
John DeCure
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JOHN E. DeCURE
Administrative Law Judge
Office of Administrative Hearings