

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal of Benefit Formula of:

DIETER C. DAMMEIER, Respondent.

Agency Case No. 2022-0969

OAH No. 2023020721

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on May 25, 2023.

Rory J. Coffey, Senior Attorney, represented Kimberlee Pulido (complainant), Chief, Retirement Benefit Services Division, Board of Administration (Board), California Public Employees' Retirement System (CalPERS).

Dieter C. Dammeier (respondent) appeared and represented himself.

Oral and documentary evidence was received, and argument was heard. The record remained open after the hearing until June 9 and June 16, 2023, for both parties to submit simultaneous closing and reply briefs, respectively. Parties timely submitted their closing briefs, which were marked for identification as Exhibit 13 (CalPERS' closing brief) and Exhibit J (respondent's closing brief). Although CalPERS did

not submit a reply brief, respondent timely submitted a reply closing brief, which was marked for identification as Exhibit K.

On June 22, 2023, the ALJ issued an Order requesting supplemental briefing on the issue of mootness. The Order set forth the following deadlines: respondent's supplemental closing brief due on July 7, 2023; CalPERS' supplemental closing brief due on July 21, 2023; and respondent's supplemental closing reply brief due on July 28, 2023. All supplemental briefs were timely submitted and marked for identification as Exhibit L (respondent's supplemental closing brief), Exhibit 14 (CalPERS' supplemental closing brief), and Exhibit M (respondent's supplemental closing reply brief).

The record was closed, and the matter was submitted for decision on July 28, 2023.

SUMMARY

Effective January 1, 2013, the California Public Employees' Pension Reform Act of 2013 (PEPRA) established a new retirement plan for all public employees who became members after its effective date. Respondent was initially a CalPERS member from 1989 to 1999. After a separation of approximately 22 years, he became a CalPERS member again on March 7, 2022. In 2022, CalPERS provided two retirement estimates to respondent. Both estimates were based on a retirement date of March 7, 2023. Moreover, both estimates were calculated using two different final compensation amounts, one from the time respondent was a classic member (pre-PEPRA from 1989 to 1999) and one from the time respondent was a PEPRA member (March 7, 2022, to March 7, 2023). Respondent appeals these estimates contending that a single final

compensation amount, covering both his classic membership and PEPRA membership, should be used to calculate his retirement benefit. However, respondent did not retire as of March 7, 2023, and continues to work in state service. Consequently, the appeal is moot and must be dismissed, as OAH lacks jurisdiction to hear this matter.

FACTUAL FINDINGS

1. On February 9, 2023, complainant filed the Statement of Issues in her official capacity.
2. CalPERS is the state agency responsible for the administration of the Public Employees' Retirement Law, Government Code section 20000 et seq. (All further references are to the Government Code, unless otherwise designated.)
3. Respondent established membership with CalPERS through employment with the City of Claremont from April 3, 1989, to February 15, 1999, and with the City of Cypress from June 26, 1989, to January 25, 1991. From 1999 to 2022, respondent separated from CalPERS membership, as he worked in private practice. On March 7, 2022, respondent returned to public service and began his employment as an ALJ with the California Unemployment Insurance Appeals Board (CUIAB). By virtue of this employment, respondent is a state miscellaneous member of CalPERS.
4. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions and by interest and other earnings on those contributions. The amount of a member's contribution is determined by applying a fixed percentage to the member's compensation. The amount of a member's service retirement allowance 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."

5. On September 12, 2012, the Legislature enacted PEPPRA, which became effective January 1, 2013. PEPPRA established a new retirement plan for all public employees who became members on or after January 1, 2013, defined as "new members" under the legislation. PEPPRA applies to all state and local public retirement systems and to their participating employers. PEPPRA made several changes to the pension benefits for new members, including setting a new maximum benefit, a lower-cost pension formula for safety and non-safety employees with requirements to work longer to reach full retirement age, and a cap on the compensation amount used to calculate a pension.

6. Pursuant to its authority under section 20121, the Board promulgated regulations to implement PEPPRA. Specifically, under California Code of Regulations, title 2, section 579.24 (Rule 579.24), members may separately accrue service credit as a new member (post-PEPPRA) and as a classic member (pre-PEPPRA). Additionally, Rule 579.24, subdivision (b), provides, "Where a member has accrued service credit as a classic member and separately accrues service credit as a new member, each with a period of service resulting in a different final compensation amount, CalPERS will apply one final compensation amount for the service credit accrued as a classic member, and a second final compensation amount for the service credit accrued as a new member. CalPERS will then use both figures to calculate the total retirement benefit owed."

7. In a letter dated August 24, 2022, CalPERS provided to respondent a retirement estimate (Estimate #1) based on the retirement date of March 7, 2023. The Estimate #1 shows that it used a final compensation amount of \$838.93 for the services respondent accrued as a classic member (pre-PEPPRA) while employed with the

Cities of Claremont and Cypress, and a final compensation amount of \$9,242.30 for the services respondent accrued as a PEPRA member with CUIAB. (Ex. 6, p. A42.)

8. In a letter dated September 3, 2022, respondent disputed CalPERS' method of calculating his retirement benefits using two different final compensation amounts, one for his classic membership and one for his PEPRA membership. Respondent wrote, in relevant part: "My pension should be based on my 'final compensation' which in my case will be the average of three years 'multiplied by the number of years of service in the system' as required by Government Code Section 7422.20(a). This means all years in the 'system', which would include both classic and PEPRA time." (Ex. 7, p. A48.)

9. In a letter dated September 28, 2022, CalPERS provided respondent with an updated estimate (Estimate #2) of his retirement benefit, also based on a retirement date of March 7, 2023. Estimate #2 was computed again using two different final compensation amounts, one for his classic membership, and one for his PEPRA membership. (Ex. 8.)

10. In a letter dated October 25, 2022, CalPERS further explained its computation methods as follows:

As clarified in your conversation with our CalPERS team member, Classic and PEPRA final compensation and benefit amounts are calculated separately and then aggregated to arrive at your total retirement allowance. It was also communicated that your final compensation amount is your highest average annual compensation during your consecutive 12- and 36-month periods of employment for

Classic and PEPRAs service, respectively, and we use your full-time payrate, not your earnings, for those calculations. After the discussion, a retirement estimate was generated and mailed to you to assist you in your retirement decision.

(Ex. 9.)

11. In a letter dated November 9, 2022, respondent appealed CalPERS' computation of his retirement benefits using two different final compensation amounts, one for his classic membership and another for his PEPRAs membership. Respondent contends that only one final compensation amount, covering his service years for both his classic membership and PEPRAs membership should be used to calculate his retirement benefit.

12. Respondent did not retire as of March 7, 2023. He continues to work in state service as an ALJ for CUIAB.

13. The facts in this case are undisputed. The appeal is limited to the following issues of law: (1) whether OAH has jurisdiction to hear this matter or whether the appeal is moot; (2) if the issue is not moot, then whether respondent's final compensation should be calculated in accordance with Rule 579.24, subdivision (b).

LEGAL CONCLUSIONS

1. The Administrative Procedure Act (APA), commencing with section 11400, governs this proceeding. (§ 599.518, subd. (e)(1).) Under section 11504 of the APA, a Statement of Issues initiates "[a] hearing to determine whether a right, authority, license, or privilege should be granted, issued, or renewed. . . ." Here, the Statement of

Issues filed in this matter concerns respondent's appeal of Estimate #1 and Estimate #2. However, because respondent did not retire on March 7, 2023, which was the retirement date set forth in both estimates, there is no "right, authority, license, or privilege" to be granted or issued in this matter. In essence, there is no relief that can be granted under the Statement of Issues, given respondent has not retired and continues to work for the state. The issue regarding the validity of Rule 579.24, subdivision (b), is therefore moot.

2. Citing to *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal. App. 4th 473, 479, respondent contends the issue of the regulation's validity is not moot because (1) it presents an issue of broad public interest that is likely to recur; (2) there may be a recurrence of the controversies between the parties; and (3) there is a material question remaining for the court's determination. (Ex. L, p. B62.) Respondent's contention is not persuasive; none of the three exceptions to the mootness doctrine applies here.

3. The first exception, where questions of general public interest do not become moot, is essentially an exception for declaratory relief on an issue of broad public interest. For example, in *County of Madera v. Gendron* (1963) 59 Cal.2d 798, 804, the Supreme Court held that the issue of the constitutionality of a statute barring Madera County's District Attorney from engaging in the private practice during his term of office was a question of general public interest. Thus, the issue was not moot even if the ensuing judgment may no longer be binding on the parties. (*Ibid.*) The second exception, where there is a continuing controversy ripe for decision, is also essentially an exception for declaratory relief under unusual, recurrent circumstances that preclude appellate review. For example, in *DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, the Supreme Court held the validity of a regulation

prohibiting the referrals of agricultural workers to fruit orchards during a strike was not rendered moot by the end of the harvest season. The Supreme Court reasoned: "The very shortness of harvest seasons would preclude appellate review in mandate proceedings if the end of each season were treated as rendering the appeals moot." (*Id.* at p. 58.)

4. Significantly, the cases respondent cites in support of applying these two exceptions to the present case are all appellate cases, where the reviewing courts hold the ultimate authority to provide declaratory relief. The ALJ in this matter does not have similar authority. The ALJ, when presiding alone over a hearing under the APA, is acting only in her capacity as a deputy of the agency and has no ultimate adjudicative authority. (§ 11517, subd. (c); *Frost v. State Personnel Bd.* (1961) 190 Cal.App.2d 1, 3.) The APA also does not empower an ALJ sitting alone to conduct adjudicative proceedings for declaratory relief. The only entity to which the APA has granted authority to conduct adjudicative proceedings for such relief is the agency. (§ 11465.10.) "Agency" is defined under section 11405.30 as "a board, bureau, commission, department, division, office, officer, or other administrative unit, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head. . . ." In the instant matter, the agency is CalPERS. Consequently, only CalPERS, not the ALJ, has the authority to conduct adjudicative proceedings for declaratory relief.

5. Respondent also contends he may seek declaratory relief without full compliance with provisions of the APA and the regulations promulgated thereunder because "there was substantial compliance." (Ex. L, p. B65.) However, the present hearing was conducted as an adjudicative formal hearing (§ 11500 et seq.) in which

CalPERS, at its discretion, has delegated the case to be heard by an ALJ sitting alone. (§ 11517, subd. (a).) Section 11465.40 states: "The provisions of a formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaratory decision except to the extent provided in this article or to the extent the agency so provides by regulation or order."

6. The APA and the regulations promulgated thereunder also prescribe specific procedures for the issuance of a declaratory decision, which are entirely different from the procedures for formal hearings. (§ 11465.10 et seq.; Cal. Code Regs., tit 1, § 1260 et seq.) Under the APA, the ALJ, in fact, has no role in the issuance of a declaratory decision. The agency has the sole discretion to accept or to decline an application for declaratory decision. (§ 11465.20, subd. (b); Cal. Code. Regs., tit 1, §§1272, 1274.) If the agency decides to accept an application for declaratory decision and to hold a hearing, the agency conducts the hearing, and in its discretion, permits each party equal time to make oral presentations with no opportunity for cross examination. (Cal. Code. Regs., tit 1, § 1284, subd. (b).) The agency issues the declaratory decision based on the statement of undisputed facts submitted by the parties, written comments, oral presentations, and any other matters deemed appropriate by the agency. (Cal. Code. Regs, tit. 1, § 1288, subd. (a).)

7. Under these circumstances, OAH has no jurisdiction to hear any matters pertaining to declaratory relief, regardless of whether the first two exceptions to the mootness doctrine applies in this case or not. If respondent seeks declaratory relief, he must comply with the requirements under the APA and the regulations promulgated thereunder by applying for such relief directly with CalPERS. (§ 11465.10 et seq.; Cal. Code Regs., tit. 1, § 1260 et seq.)

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8. Finally, the third exception to the mootness doctrine generally applies in cases where material issues regarding liability, damages, or attorney's fees still remain for determination, even though other questions may be moot. (See *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 205 (mootness doctrine not applicable because liability and attorney's fee remain material issues for the court's determination); *Grier v. Alameda-Contra Costa Transit Dist.* (1976) 55 Cal.App.3d 325, 330 (mootness doctrine not applicable because damages remain a material issue for the court's determination).) In this case, however, there is no such issue for this tribunal to determine.

9. Respondent argues in his supplemental closing brief that the third exception applies because "[i]f CalPERS' determination was left unreversed, CalPERS would make an argument that [r]espondent may be foreclosed from litigating the issue in the future." (Ex. L, p. 63.) This argument is not compelling, as respondent may certainly challenge the validity of Rule 579.24, subdivision (b), if he were to retire and appeal from another retirement estimate or final award of compensation in the future. Clearly, this Decision is not a determination of whether respondent's retirement benefits should be calculated using one final compensation amount for his classic membership and another for his PEPRAs membership. This question may be appropriately addressed only when respondent retires.

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ORDER

Respondent Dieter C. Dammeier's appeal is dismissed.

DATE: 08/22/2023

Ji-Lan Zang

JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings