

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 Membership Determination
of:**

DEBORAH A. GESKE and COUNTY OF NAPA, Respondents

Agency Case No. 2023-0146

OAH Case No. 2023090295

PROPOSED DECISION

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on March 7, 2024, by videoconference and telephone from Sacramento, California.

Cristina Andrade, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Deborah A. Geske (Geske) represented herself.

Douglas Parker, Deputy County Counsel, represented respondent County of Napa (County).

Evidence was received, the record closed, and the matter submitted for decision on March 7, 2024.

ISSUE

Did Geske qualify for CalPERS membership in her position as a Correctional Officer I – Extra Help with the County for the period of January 19, 1991, through July 5, 1991 (Relevant Period)?¹

FACTUAL FINDINGS

Jurisdiction

1. On June 2, 2021, CalPERS denied Geske’s request to purchase service credit for her employment with the County during the Relevant Period.² CalPERS ultimately determined Geske was ineligible for CalPERS membership during the Relevant Period because her position with the County was excluded under the County’s contract with CalPERS.

2. On July 1, 2021, Geske appealed CalPERS’s determination. On September 6, 2023, Renee Ostrander, in her official capacity as Chief of CalPERS’s Employer Account Management Division, signed and later filed the Statement of Issues for the appeal. The matter was set for an evidentiary hearing before an ALJ of the OAH, an

¹ At hearing, the parties stipulated on the record to amend the Statement of Issues to remove the second issue pled on page nine, lines 8 through 12.

² As noted below, Geske actually started working for the County on August 14, 1990. However, all parties agree she was not eligible to purchase service credit for the period before January 19, 1991.

independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.³

Retirement Contract between CalPERS and the County

3. Effective January 1, 1949, the County, as a public agency, contracted with CalPERS to provide retirement benefits for its eligible employees. The California Public Employees' Retirement Law, Government Code section 20000 et seq. (PERL) governs the terms of the County's participation in CalPERS.

4. In October 1989, the County amended its retirement contract with CalPERS, effective November 2, 1989 (1989 Amendment). The 1989 Amendment provided that "persons compensated on an hourly and/or per diem basis hired on or after May 1, 1969" shall not become CalPERS members.

5. In April 2003, the County again amended its retirement contract with CalPERS, effective April 2, 2003 (2003 Amendment). The 2003 Amendment removed the exclusion from CalPERS membership of "persons compensated on an hourly and/or per diem basis."

Geske's Employment by the County

6. On August 14, 1990, Geske began employment with the County as a Correctional Officer I – Extra Help. She worked in that position until July 5, 1991. She was compensated on an hourly basis at the rate of \$11.06. At the time, the County's extra help employees worked on an on-call, standby, or temporary basis. Their

³ All further statutory references are to the Government Code, unless otherwise specified.

positions were not considered budgeted or fully funded. They were not guaranteed to work a certain number of hours; they could work anything from zero hours to full time during a particular pay period. However, it is undisputed that Geske actually worked over 1,000 hours during the 1990/1991 fiscal year.

Geske was not offered CalPERS membership while she worked as a Correctional Officer I – Extra Help. The County excluded Geske from CalPERS membership under the retirement contract exclusion for “persons compensated on an hourly and/or per diem basis,” then in effect pursuant to the 1989 Amendment.

7. On July 6, 1991, Geske was appointed as a Correctional Officer I with the County. This was a permanent, full-time, salaried position, although she was still assigned an hourly rate of \$11.93 for accounting purposes and to comply with applicable labor laws. Geske became a CalPERS member by virtue of her employment as a Correctional Officer I.

1994 Circular Letter

8. On November 18, 1994, CalPERS issued Circular Letter No. 800-151 (1994 Circular Letter). The 1994 Circular Letter cautioned it was illegal for public agencies to withhold CalPERS membership from its employees as a cost saving device. It reminded public agencies that under former section 20334 (now section 20305), employees serving on a less than full-time basis are generally excluded from CalPERS membership unless certain prerequisites are met. One prerequisite is that a temporary or seasonal employee work more than 1,000 hours within a fiscal year. The 1994 Circular Letter further noted that former section 20334 [now section 20305] expressly supersedes “any contract provision excluding persons in any temporary or seasonal employment basis” and added:

This means that those contracts that contain exclusions for hourly rated or hourly based employees, or similar time-based exclusions, must be read in conjunction with section 20334's [now section 20305's] descriptions of mandated membership.

1995 Memorandum

9. On August 15, 1995, the CalPERS Legal Office issued a Memorandum expressing a legal opinion regarding the validity and effect of public agency contractual provisions that exclude hourly employees (1995 Memorandum). The 1995 Memorandum recognized that former section 20334 (now section 20305) "clearly supersedes public agency contract provisions that expressly exclude employees on a temporary or seasonal basis." However, it concluded that CalPERS had authority to approve public agency contract provisions that excluded hourly employees. It reasoned that former section 20334 (now section 20305) "does not as a general rule supersede contract provisions that exclude hourly employees." Notwithstanding former section 20334 (now section 20305), "an hourly exclusion operates to exclude all hourly paid employees from [CalPERS] membership, even though they may be predominantly temporary or seasonal employees."

1995 Letter

10. On December 21, 1995, CalPERS sent a letter to contracting public agencies, including the County (1995 Letter). The 1995 Letter attached a copy of the 1995 Memorandum and stated:

Based upon all the information, including a review by CalPERS Legal staff, it has been determined that as a

general rule [former section 20334 (now section 20305)] does not supersede contract provisions that exclude hourly based positions. It does however, specifically supersede the contract exclusion of temporary and/or seasonal positions. Therefore, the statement in [the 1994 Circular Letter] that hourly based exclusions are superseded by section 20334 [now section 20305] was too broad and should be disregarded.

Geske's Request to Purchase Service Credit

11. On December 1, 2020, CalPERS received Geske's Request for Service Credit Cost Information – Service Prior to Membership. Geske requested to purchase service credit for the Relevant Period based in part on statements by certain County officials that she would be eligible to purchase it.

12. On April 27, 2021, CalPERS initially informed Geske and the County that Geske was eligible for CalPERS membership during the Relevant Period because she had completed 1,000 hours of work during the 1990/1991 fiscal year. CalPERS determined that mandatory arrears applied, and that Geske and the County were responsible for their share of contributions.

13. The County appealed CalPERS's April 27, 2021 determination and provided additional information about its prior contractual exclusion of employees compensated on an hourly basis. On June 2, 2021, CalPERS reversed its April 27, 2021 determination. CalPERS found that Geske was ineligible for CalPERS membership during the Relevant Period because her hourly position with the County was excluded

under the County's contract with CalPERS at the time. Thus, CalPERS denied Geske's request to purchase the service credit.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Geske bears the burden of proving by a preponderance of the evidence that she qualified for CalPERS membership in her position as a Correctional Officer I – Extra Help with the County during the Relevant Period. (Evid. Code, § 500 [“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 [s]he is asserting.”]; Evid. Code, § 115 [“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”]; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) A preponderance of the evidence means “evidence that has more convincing force than that opposed to it.” (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Applicable Law

2. Under the PERL, an “employee” is defined to include “[a]ny person in the employ of any contracting agency.” (§ 20028, subd. (b).) The CalPERS Board of Administration “shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.” (§ 20125.)

3. A retirement contract between CalPERS and a contracting agency shall provide CalPERS benefits to all employees of the contracting agency, “except as

exclusions in addition to the exclusions applicable to state employees may be agreed to by the agency and the board.” (§ 20502, subd. (a)(1).) With exceptions not relevant here, the contracting agency and its employees shall also be subject to all provisions of the PERL. (§ 20506.)

4. Section 20305 provides, in pertinent part:

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

[...]

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

[...]

(B) The person completes 125 days, if employed on a per diem basis or, if employed on other than a per diem basis, 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 125 days or 1,000 hours of service were completed.

[...]

(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. ...

(§ 20305, subds. (a)(3)(B) & (b).)

Analysis

5. Generally, a contracting agency's employees must be offered CalPERS membership unless they are excluded by the PERL or by the retirement contract. (§§ 20502, 20506.) During the Relevant Period, the County's retirement contract with CalPERS specifically excluded from CalPERS membership "persons compensated on an hourly and/or per diem basis hired on or after May 1, 1969." That is because the Relevant Period falls between the effective dates of the 1989 Amendment and the 2003 Amendment. During that time, Geske worked for the County as a Correctional Officer I – Extra Help, a position for which she was compensated on an hourly basis. Thus, she was appropriately excluded from CalPERS membership on the basis of the hourly employee exclusion in the County's retirement contract with CalPERS.

6. Geske unpersuasively argues she qualified for CalPERS membership during the Relevant Period pursuant to section 20305. To be sure, she was arguably a temporary or seasonal employee and undisputedly worked more than 1,000 hours in the 1990/1991 fiscal year. However, she was not excluded from CalPERS membership because she was a temporary or seasonal employee, nor based on how many hours she worked. Instead, she was excluded because she was compensated on an hourly basis. As the 1995 Memorandum persuasively explained, section 20305, subdivision (b), does not generally supersede contract provisions that exclude hourly employees.

Thus, the hourly employee exclusion in the County's retirement contract with CalPERS was a valid exclusion that barred Geske from obtaining CalPERS membership during the Relevant Period.

7. Geske's argument that certain County officials told her she was eligible to purchase service credit for the Relevant Period, though sympathetic, is unavailing. "[CalPERS's] fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. [CalPERS] has a duty to follow the law." (*City of Pleasanton v. Bd. of Administration* (2012) 211 Cal.App.4th 522, 544.)

8. In sum, Geske failed to demonstrate by a preponderance of the evidence that she qualified for CalPERS membership in her position as a Correctional Officer I – Extra Help with the County during the Relevant Period. Thus, CalPERS's decision denying Geske's request to purchase the service credit must be affirmed.

ORDER

The appeal filed by Deborah A. Geske is DENIED.

DATE: March 27, 2024

Wim vanRooyen

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings