

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the Appeal of**

**the Membership Determinations of:**

**JEFFREY D. CRITTENDEN and JAMES HALL,**

**Respondents,**

**and**

**CITY OF ONTARIO,**

**Respondent.**

**Agency Case Nos. 2020-0036 and 2020-1194**

**OAH No. 2022030139**

**PROPOSED DECISION**

Administrative Law Judge Deena R. Ghaly, Office of Administrative Hearings (OAH), State of California, heard this matter on August 1 and 31, 2022, by videoconference.

Attorney Helen L. Louis and Senior Attorney Preet Kaur represented Complainant California Public Employees Retirement System (CalPERS). Respondent

Jeffrey D. Crittenden (Respondent Crittenden) and Respondent James Hall (Respondent Hall) (collectively, Respondents) represented themselves. Respondent City of Ontario (Ontario) appeared and was represented by Attorney Isabel C. Safie, Best, Best, & Krieger.

Documentary evidence and testimony were received, and argument was heard during the hearing days. The record was kept open until October 5, 2022, for the parties to submit closing briefs and until October 19, 2022, for the parties to submit any responses to each other's submissions. CalPERS indicated at the close of the hearing it intended to order transcripts of the proceeding and the post-hearing schedule was set for dates intended to accommodate the time needed to prepare the transcripts. This ALJ also ordered that, if transcripts were prepared for Complainant, copies were to be lodged with OAH and served on each of the other parties.

Respondents timely filed their written closing briefs with OAH but failed to provide proof of service upon the other parties. CalPERS and Ontario timely filed their post-hearing closing briefs but CalPERS failed to lodge the transcript with OAH or serve copies to Respondents.

In an order dated October 11, 2022, this ALJ re-opened the record and directed Respondents to serve their closing statements to the other parties and file proofs of service with OAH by October 18, 2022 and directed CalPERS to file printed and electronic versions of the transcript with OAH and serve it upon Respondent through any mutually acceptable format also by October 18, 2022. The October 11, 2002, order also continued the due date of reply briefs for the parties from October 19, 2022 to November 2, 2022. In response to CALPERS's concern that copying and disbursing the transcripts violated court reporters' rights to fees normally charged for such services, this ALJ amended the October 11, 2022 order to state that the uploaded copies of

transcripts to OAH's evidentiary management system, Case Center, would suffice to meet CALPERS's obligation to serve them on Respondents.

All parties timely complied with the post-hearing orders and their closing statements and replies have been lodged with the record and considered in the preparation of the proposed decision. The record closed on November 2, 2022.

## **ISSUES**

1. Whether Respondent Crittenden qualified for CalPERS membership based upon his hourly employment with Ontario during the period of July 2, 1990, to July 5, 1992.

2. Whether Respondent Hall qualified for CalPERS membership based upon his hourly employment with Ontario during the period of August 5, 1991, to November 12, 1995.

## **FACTUAL FINDINGS**

### **Background**

1. CalPERS manages a defined benefit pension plan for California state employees and employees of public agencies other than the state which contract with CalPERS. Benefits for its members are funded by member and employer contributions and by interest and other earnings on those contributions. Generally, the amount of a member's service retirement allowance is calculated by applying a percentage figure based upon the member's age at retirement to the member's years of service and the member's final compensation.

2. Effective January 1, 1946, Respondent City of Ontario (Ontario) contracted with CalPERS to provide retirement benefits for its eligible employees. The terms of Ontario's participation in CalPERS is governed by the contract and by the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.)

3. Effective September 17, 1962, Ontario and CalPERS amended the 1946 contract. The contract amendments state in part:

The Board of Administration, State Employees' Retirement System, hereinafter referred to as Board, and the City Council of [Ontario], hereinafter referred to as Public Agency, having entered into a contract under date of January 17, 1946, and as amended effective February 1, 1950, February 1, 1952, and July 1, 1954, which provides for participation of Public Agency in said System, Board and Public Agency hereby agree as follows:

A. The words "NO ADDITIONAL EXCLUSIONS" appearing in Paragraph 3 shall be stricken from said contract and the following exclusions shall apply:

EXCLUDE EMPLOYEES COMPENSATED ON AN HOURLY BASIS WHO ARE HIRED OCTOBER 1, 1962 OR THEREAFTER.

B. This amendment shall be attached to said contract and shall become effective on the 1<sup>st</sup> day of November 1962.

(Exh. 15 [capitalized text in original].)

///

4. Effective July 2, 1990, Ontario employed Respondent Crittenden as a part-time Police Cadet, for which he was paid on an hourly basis. Respondent Crittenden maintained his position as a Police Cadet until, on July 6, 1992, Ontario promoted him to Police Recruit, a salaried position. As a Police Recruit, Respondent Crittenden became a CalPERS member.

5. Effective February 23, 1992, Ontario employed Respondent Hall as a Public Service Trainee I, for which he was paid on an hourly basis. Respondent Hall maintained his position as a Public Service Trainee I until, on November 13, 1995, Ontario promoted him to Solid Waste Collector I, a salaried position. As a Solid Waste Collector I, Respondent Hall became a CalPERS member.

6. When Respondents were hourly workers, they worked irregular numbers of hours from one two-week pay period to the next. Respondent Crittenden's hours per two-week period ranged from 65 to 139 hours. (Exh. 23, pp. A197-A198.) Respondent Hall's hours per two-week period ranged from 40 to 112 hours (Exh. 32, pp. A231-A233.)

7. Respondents' positions were governed by Ontario's Temporary Employee Handbook (Handbook). (See Exh. 20.) The Handbook provides that employees in positions it governed could expect to work varying hours and be subject to regularly changing schedules. (Exh. 20, p. A176.) The Handbook also defines "temporary" appointments as those made "for a specified period of time." (Exh. 20, p. A176.) Personnel Action Forms (PAFs) set out the time periods for Respondents while they worked as hourly employees. (See Exhs. 21 and 30.) Generally, the PAFs were for sequential six-month periods. As noted by Respondent Hall, his PAF's were all signed on the same day in November 1995, shortly before he assumed his salaried position.

8. Neither the Handbook nor any other document introduced into evidence addresses pension benefits or the contractual exclusion from CalPERS membership for Ontario's hourly employees (contractual exclusion).

9. Respondents applied to purchase service credit for the periods they worked for Ontario in hourly positions. Respondent Crittenden applied to purchase the service credits on June 13, 2017, and Respondent Hall applied on October 21, 2019. CalPERS initially approved their applications, noting that, though as hourly workers they were subject to the contractual exclusion, because they each routinely worked 30 hours per week or more, their cases were subject to Government Code section 20305 (further code cites are to the Government Code unless otherwise designated). (See Exhs 25 and 37.) Section 20305 is a PERL provision which, under certain circumstances, supersedes contractual exclusions.

10. Ontario appealed CALPERS's determinations to allow Respondents to purchase service credit. CalPERS reconsidered the matter and reversed its decision as to both Respondents. Agency expert Andrew Harris testified the reversal was a result of a more careful consideration of the contractual conclusion, as well as of CALPERS's policies and analysis of contractual exclusions and the correct application PERS provisions superseding them.

### **CALPERS's Evidence**

11. CalPERS introduced several documents setting out CALPERS's interpretation of contractual exclusions in the context of PERL provisions which supersede these exclusions under certain circumstances: (i) the CalPERS-issued November 18, 1994 Circular Letter number 800-151; (ii) an August 15, 1995 memorandum prepared by CalPERS then-senior staff counsel Anne Stausboll (1995

Memorandum); and (iii) a December 21, 1995 letter from CalPERS Employer Service Division (1999 Employer Services Division). Additionally, in its closing brief, CalPERS set out the various iterations of PERL provisions superseding contractual exclusions throughout the relevant time periods, to demonstrate that earlier versions of the law, applicable during the times Respondents served as hourly employees, did not support a conclusion that PERL superseded contractual exclusions at that time.

12. Circular Letter number 800-151 states that, on July 1, 1994, section 20304 (now 20283) became operative and explained its requirements including that employers have a duty to enroll an employee into CalPERS membership within 90 days of eligibility or be responsible for members' arrears costs and a \$500 administrative fee. Further, Circular Letter number 800-151 provides:

[Section 20304] was added to the PERL to clarify it is illegal for agencies to withhold membership in the system from its employees as a cost saving device. In the past, some agencies ignored Government Code section 20334 which states that an employee serving a less than full-time basis is excluded from membership UNLESS:

- He or she is a member at the time the service is rendered, or
- the position requires regular, part-time service for one year or longer at an average of 20 hours per week or equivalent, or
- the position is full time for 6 months or more, or
- the person works more than 125 days [ ], if employed on a per diem basis, or
- the person works more than 1,000 hours within a fiscal year



Section 20334 also states that this criteria (*sic*) supersedes any contract provision that purports to exclude persons in any temporary or seasonal employment. 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 description of mandated membership.

(Exh. 11, pp. A82-A83 [underlined and capitalized text in original].)

13. CalPERS subsequently determined Circular Letter 800-151 was too broad and issued the 1995 Memorandum. The 1995 memorandum provided PERL generally does not supersede contract provisions excluding hourly based positions unless those positions are temporary or seasonal. Under a section entitled "An Hourly Exclusion Has the Effect of Excluding from PERS Membership Employees Who are Compensated On an Hourly Basis," the 1995 memorandum provides:

The standard contract provisions used in PERS-public agency contracts do not define the terms "hourly." Nor does the PERL provide an express definition. However, section 20862, which defines service credit, distinguishes "persons employed on an hourly basis" from employees paid on a daily or monthly basis.

The PERS Public Agency Manual, specifically a section on payroll reporting procedures, defines the term "hourly pay rate" as "that rate of compensation to which an employee is entitled under an employment agreement which provides

for compensation for each hour of regular time worked by the employee.” (PERS Public Agency Manual (10/92, p. 2-33.) The method of payment is contrasted with daily and monthly pay rates. (Ibid.) As described in the manual, an hourly-paid employee may be a full-time employee (Ibid.) The 1975 version of the PERS Public Agency Manual contained a similar definition. (PERS Public Agency Manual (1/75), p. 100.00.)

The language of a contract governs its interpretation and, as a general rule, the “words of a contract are to be understood in their ordinary and popular sense.” (Civ. Code secs 1635, 1638, and 1644.) The common meaning to the term “hourly” is: “1.a. Every hour. B. Frequent; continual. 2. By the hour as a unit; hourly pay . . .” (Emphasis in original. The American Heritage Dictionary of the English Language, New College Edition (1981).)

Thus, based on its plain meaning, as well as the references to hourly employees in the PERL and the PERS Public Agency Manual, we conclude that an hourly exclusion has the effect of excluding from PERS membership employees who are paid on an hourly basis.[ ]

(Exh. 12, p. A90.)

///

14. According to CALPERS's interpretation of its legislative history, the current PERL provision, Code section 20305, addressing when PERL supersedes contractual exclusions, is a combination of two provisions repealed in 1996 but operative during the periods Respondents served as hourly workers: sections 20334 and 20336. In 1980, section 20334 read:

An employee serving on a part-time basis is excluded from [CalPERS membership] unless:

(a) He is a member at the time he renders part-time service.

(b) His position requires service for at least an average of 20 hours a week or requires service which is equivalent to at least an average of 20 hours a week, and he is not excluded pursuant to Section 20336.

(c) He is a member of the Board of Prison Terms and elects to become a member of this system pursuant to Section 20360.

(d) He is included by specific provision of the board relating to the exclusion of part-time employees.

(CalPERS Closing Brief, p. 8.)

Also in 1980, section 20336 read as follows:

A person in employment which, in the opinion of the board is on a seasonal, limited-term, on-call, emergency, emergency, intermittent, substitute, or other irregular basis

is excluded from membership unless the employment is compensated and meets one of the following conditions:

(a) The appointment or employment contract fixes a term of full-time, continuous employment in excess of six months or, if a term is not fixed, full-time employment continues for longer than six months, in which case membership shall be effective not later than the first day of the seventh month of employment.

(b) The person is employed in one of the positions which provide state safety membership in accordance with Section 20017.6.

(c) The person is a member at the time of entering such employment.

(d) The person works more than 125 days, if employed on a per diem basis or, if employed on other than a per diem basis, 1,000 hours within the fiscal year, in which case membership shall be effective not later than the first day of the month following the month in which 125 days or 1,000 hours of service were completed.

(CALPERS's Closing Memorandum, p. 9.)

While both provisions were amended several times between 1980 and 1996, when they were both repealed, the amendments did not change them in ways relevant to the instant matter. Thus, during the periods Respondents were hourly employees,

the PERL provisions potentially superseding the contractual exclusion were sections 20334 and 20336 as set out above.

### Parties' Arguments

15. Respondent Crittenden based his claim for service credits during his tenure as a police cadet on the following: (i) he routinely worked between 30 and 40 hours per week, a schedule he argued is consistent with a "full-time" position as that term is commonly used; (ii) he qualified for CalPERS membership under section 20505, of "30 hours or more worked in a week, 125 days worked in a fiscal year and/or 1000 hours worked in a fiscal year." (Resp. C's closing statement); (ii) he became aware two other workers, Steven Hurst and Kimberly Tirre, successfully obtained service credits for their tenure as hourly workers; (iii) Respondent was not informed of his exclusion from CalPERS when he was hired as a police cadet.

16. Respondent Hall also argued he was essentially treated as a full-time employee without the benefits, including CalPERS membership. According to Respondent Hall, he was required to work 40 hours per week and absences for family emergencies were noted in his performance evaluation even though he was not paid when he did not work. He points to the consecutive six-month period PAF's as evidence the "hourly employee" designation was a ruse to save Ontario the expense of the benefits required for full-time employees and maintains they were completed and signed after the fact to create a paper trail supporting the City's position that he did not a fulltime employee while working on an hourly basis. Like Respondent Crittenden, Respondent Hall maintained his work schedule while an hourly employee qualifies him for service credit under section 20305. Finally, Respondent Hall maintains CalPERS told him he could buy additional service credits for the period he was an hourly employee, advice he relied upon.

17. CalPERS argued Respondents were properly denied service credits for periods they served as hourly employees because, as interpreted in its own policies and memoranda, Ontario's exclusion of hourly employees has been found valid and not superseded by section 20305 or its earlier iterations.

CalPERS further argued, contrary to assertions by Respondent Hall, it had determined Ontario was not using the hourly exclusion only to exclude temporary employees, citing Ontario Human Resources Executive Angela Lopez's testimony that salaried temporary workers are not excluded from CalPERS membership.

Regarding Respondents' argument that other employees had been allowed to buy service credits for their time as hourly employees with Ontario, CalPERS notes Respondents presented limited information about those cases and did not establish these other employees had circumstances, including employment terms, sufficiently similar to Respondents to establish an inconsistent application of Ontario's hourly employee exclusion provision by either Ontario or CalPERS.

Regarding Respondents' arguments that they were not informed of the contractual exclusion at their commencement of their hourly positions, CalPERS introduced versions of its Procedure Manuals effective between 1990 and 1995. (See Exhs. 3-10) The Procedure Manuals instruct the agencies to determine whether new employees qualify for CalPERS membership and recommends, but does not require, the agencies to inform employees that they do not qualify for CalPERS membership.

CalPERS acknowledges Respondent Hall's assertions regarding his reliance on advice he received from CalPERS informing him he was eligible to purchase service credit amounts to the affirmative defense of equitable estoppel. Equitable estoppel, in its basic terms, is a legal principle holding that, under certain circumstances, a party

cannot benefit if it provides incorrect information to an individual who detrimentally relies on that incorrect information. CalPERS argues that, while the equitable estoppel principle may be applied to government agencies when doing so would further the interests of justice, " "the power of a public officer cannot be expanded by application of this doctrine." " (CALPERS's Reply Brief, p. 10 [quoting *Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 667].)

18. Ontario acknowledges temporary and seasonal employees qualify for CalPERS membership by PERL provisions superseding contractually excluded employees. However, Ontario argues Respondents can neither be conflated into the ranks of full-time employees based on evidence they sometimes worked a full-time schedule nor can they be categorized among the employees covered by 20336 as temporary because they were paid hourly. Relying on a recent OAH decision upheld (though not designated precedential) by the CalPERS board, *In the Matter of the Appeal Regarding Membership Eligibility of Peter Wessel* (Wessel Decision), Ontario argued not all hourly employees are temporary:

In the [Wessel Decision], an employee was paid on an hourly basis in a temporary position and worked 40 hours per week in some periods, the presiding Administrative Law Judge emphasized the importance of applying an hourly exclusion consistently and across all employees where the defining feature was being employed on an hourly basis, stating that "temporary and seasonal employees are not the only ones receiving hourly wages, as the City employs some hourly compensated employees who work on a regular, continuing basis." (Exh. 42) As is the [instant case],

determining which employees are “compensated on an hourly basis” is not solely defined in the time-base by which employees are paid but also accounts for the intent behind how that employee is to be compensated when hired into the position and the compensation expectation connected with that employment.

(Ontario Closing Brief, pp. 6-7.)

Ontario also notes its exclusion provision does not apply to temporary salaried employees, further establishing its excluded class to be defined by compensation terms, i.e., hourly schedule of payment, not whether the employees are temporary, probationary, or permanent.

Ontario concurred with, and elaborated on, CALPERS’s other assertions and arguments. Regarding the equitable estoppel issue, Ontario further elaborated:

. . . the California Supreme Court has held that “no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations” (*Longshore v. County of Ventura* [(1979)] 25 Cal.3d 14, 28 []) because doing so would “directly thwart a clear constitutional policy against retroactive compensation and would effectively purport to enforce an employment contract in contravention of law.” (*Id.* at p. 29 [ ]). Respondent Hall has been statutorily excluded from membership due to being compensated on an hourly basis, and concluding that he is able to purchase service credit for



time worked as an hourly employee would provide him with a benefit not allowed under the law, in contradiction of the PERL.

(Ontario's Reply to Other Parties' Closing Brief, p. 11.)

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. Applicants seeking CalPERS benefits have the burden of proof. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn. 5.) Respondents must establish by a preponderance of the evidence the denial of CalPERS benefits was erroneous. (Evid. Code, § 115.) 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.)

### **CalPERS Authority and Mandate**

2. CalPERS is a "prefunded defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194,198). CalPERS is the state agency vested with authority to manage and control CalPERS, to make rules and regulations as it deems proper, and to implement and enforce the PERL and its accompanying regulations. (See § 20120, et seq.) The Board is "the sole judge of the conditions under which persons may be admitted to or continue to receive benefits under this system." (§ 20125.)

///

3. CalPERS, acting through the Board, owes a fiduciary duty to all its members. As the court in *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470 stated:

The "assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system."

[Citation] The fiduciary "shall discharge his or her duties with respect to the system with the care, skill, prudence, and diligence . . ." of "a prudent person acting in a like capacity and familiar with these matters . . ." [Citation].

(*City of Sacramento v. Public Employees Retirement System*, *supra*, 229 Cal.App.3d at 1494.)

4. Pursuant to section 20151, subdivision (a), the Board and its officers and employees are required to "discharge their duties with respect to this system solely in the interest of the participants and beneficiaries," for the exclusive purpose of (1) providing benefits to members, retired members, and their survivors and beneficiaries, and (2) defraying reasonable expenses of administering this system. The Board's duties also include "[m]inimizing the employers' costs of providing benefits under this part," and "investing with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims." (§ 20151, subd. (b), (c).)

5. A natural extension of these codified principals is that CalPERS must ensure that its members receive only those retirement benefits expressly authorized by law. To allow a member to receive retirement benefits in excess of what is authorized by law would cause harm to the other CalPERS members and the fund, thus violating its fiduciary duty.

## **Analysis**

6. PERL governs membership eligibility. (§ 20280 et seq.). When local agencies contract with CalPERS for pension benefits, 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 [CalPERS] board.” (§ 20502.)

7. Certain PERL provisions supersede contractual exemptions. Since 1965, there have been multiple iterations of PERL provisions addressing whether employees classified as part-time or hourly could be excluded from CalPERS membership. The relevant sections of PERL are those that were in effect at the time Respondents served as hourly employees with Ontario. (*McClung v. Employment Dev. Dept.* (2004) 34 Cal.4th 467, 475.)

8. Here, CalPERS established the only potential provisions for superseding the contractual exclusion in place at the time Respondents were hourly workers are sections 20334 and 20336. While 20334, subd. (b) seems to put some constraints on excluding hourly workers working in excess of 20 hours, the provision must be read in conjunction with section 20336, which limits its application to situations where “employment is, **in the opinion of the Board**, on a seasonal, limited-term, on-call, emergency, intermittent, substitute, or other irregular basis.” (Emphasis added.)

CalPERS has developed policy through various instruments establishing that regularly employed hourly employees do not fit the strictures of section 20336.

9. The remainder of Respondents' arguments they qualified for CalPERS membership are not persuasive. Though they both worked close to or, in instances more than full-time hours, their status was on an as-needed basis. As argued by Ontario, as an employer, Ontario was not obliged to compensate them for any minimum amount of hours and, to the extent they did, that did not change their status from hourly to salaried employees. Regarding Ontario's failure to give notice to Respondents that they were not eligible for CalPERS membership as hourly employees, Respondents did not produce any authority supporting their position or countering CALPERS's assertions to the contrary. Finally, CalPERS and Ontario's arguments that application of the equitable estoppel principle to award the relief sought is inappropriate in the instant case is credited. Equitable estoppel is extraordinary relief appropriate only for the most extraordinary cases. Here, it would result in an award in excess of statutory authority and inconsistent with CALPERS's longstanding practices.

///

///

///

///

///

///

///

## ORDER

The appeals of Respondent James D. Crittenden and James Hall from CALPERS's determination they do not qualify to purchase service credits for years they served as hourly employees of the City of Ontario are denied.

DATE: 12/02/2022

*Deena R. Ghaly*  
Deena R. Ghaly (Dec 2, 2022 09:29 PST)

DEENA R. GHALY

Administrative Law Judge

Office of Administrative Hearings