

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the Appeal of Forfeiture of Benefits of:**

**APRIL D. MYRES, Respondent,**

**and**

**CITY AND COUNTY OF SAN FRANCISCO, Respondent.**

**Agency Case No. 2021-0986**

**OAH No. 2022080731**

**PROPOSED DECISION**

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on January 10, 2023, via videoconference.

Deputy Attorney General Christopher M. Young represented complainant Kimberlee Pulido, Chief of the Retirement Benefit Services Division of the California Public Employees' System (CalPERS).

Respondent April D. Myres represented herself.

There was no appearance on behalf of the City and County of San Francisco.

The matter was submitted on January 10, 2023.

## **ISSUE**

The sole issue presented in this proceeding is whether respondent April D. Myres's felony criminal convictions were for "conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits. . ." under Government Code section 7522.72, subdivision (b)(1).

## **FACTUAL FINDINGS**

1. On July 26, 2022, complainant Kimberlee Pulido filed the statement of issues in her official capacity as Chief of the Retirement Benefit Services Division of CalPERS.

2. Respondent April D. Myres (Myres) was brought into CalPERS membership through employment with respondent City and County of San Francisco (City) on April 18, 1998, as a Deputy Sheriff for the San Francisco Sheriff's Office (SFSO). By virtue of her employment, Myres is a local safety member of CalPERS.

### **Criminal Proceedings and Retirement for Service**

3. On January 19, 2017, a criminal complaint was filed against Myres in the United States District Court, Northern District of California (District Court), by the Federal Bureau of Investigation (FBI). Among other things, the complaint alleged that Myres committed mail and wire fraud by submitting a fraudulent insurance claim following an alleged robbery. Some of the allegedly fraudulently claimed items were items provided to Myres by her public employer.

4. On February 14, 2017, Myres submitted an application for service retirement. Myres retired for service effective February 17, 2017, and her first retirement warrant was issued March 6, 2017.

5. On April 11, 2017, a grand jury issued an indictment, which became the operative pleading against Myres in the criminal trial that followed. In the indictment, Myres was again charged with mail fraud and wire fraud, specifically: devising, engaging, and participating in a scheme to defraud an insurer in connection with her claims of theft, vandalism, and missing property at her residence. The grand jury alleged that Myres caused her residence to appear burglarized on March 25, 2016; made false statements to multiple law enforcement agencies and her insurer about the purported burglary; fraudulently claimed that her SFSO-issued firearm (Service Firearm) was stolen from her residence on that date; and that she used mail and wire communications in interstate commerce in the commission of these acts.

6. The grand jury also charged Antoine Fowler with a violation of section 922, subdivision (g)(1) (felon in possession of a firearm), alleging that he was a convicted felon, and possessed Myres's Service Firearm from an unknown period through February 2, 2017.

7. The grand jury also charged Myres with a violation of section 4 of title 18 of the United States Code (misprision of felony). The grand jury alleged that she knew that Fowler possessed her Service Firearm in violation of section 922 but concealed this information by making false and fraudulent statements to the law enforcement agencies and her insurer about the purported burglary; and by omission and concealment of Fowler's habitation at her residence and failing to report Fowler's illegal possession of a firearm.

8. Other than Myres's Service Firearm, the indictment does not specifically refer to Myres's SFSO-issued radio or any other items reported stolen in connection with the purported burglary. However, Myres listed more than 40 items in her claim of loss to her insurer, including her SFSO-issued radio and other law enforcement equipment, as well as many personal items such as a mink jacket and designer purses and bags.

9. On February 2, 2017—more than 10 months after the purported March 25, 2016, burglary—Myres's Service Firearm was found in a car driven by Fowler. That same day, law enforcement officers searched Myres's residence and discovered three of the personal items she had listed as stolen in her insurance claim.

10. On June 26, 2019, after a jury trial in the District Court, Myres was found guilty of violating sections 1341 (mail fraud) and 1343 (wire fraud) of title 18 of the United States Code, felonies. The jury found Myres not guilty of violating section 4 of title 18 of the United States Code (misprision of felony).

11. On November 21, 2019, the District Court held a sentencing hearing. The prosecutor argued that Myres's sentence should be enhanced under the United States Sentencing Guidelines (Guidelines) because she abused her position of trust as a deputy sheriff. The District Court judge ultimately decided not to include such an enhancement, but stated on the record:

I note it is a close call for me on the abuse of trust enhancement. That said, I think at the end of the day I agree with the Probation Office's reason for not including it, in particular that the crimes for which the Defendant was actually convicted did not involve an abuse of a position of

trust that significantly facilitated the offense. And that is not to say her position of trust will not be important in my analysis in this case, but I don't think that it adds the abuse of trust enhancement for guideline calculation purposes.

12. The judge also explained:

[W]hat tips the scale here is language in the cases that says that it has to have significantly facilitated. And even if you can mount the argument that it facilitated in some fashion, it didn't in my mind significantly facilitate. So that's the basis of my view.

13. In this sentencing hearing, counsel for the Government agreed with the Judge that the jury's verdict finding Myres guilty of mail fraud and wire fraud could have been based solely on a finding "that that the items found in her home were the ones that she misrepresented to Farmers." Myres's counsel, Michael J. Shepard, stated: "We don't know how many items -- all, some, none -- one -- the jury found in order to find her guilty. They only needed to have one."

14. Although the Judge declined to impose the abuse of trust enhancement, he viewed Myres's criminal convictions as inextricably intertwined with her employment for the City. He stated:

I think the Probation Department in the PSR put it better than I can put it and let me read it to you because it is, I think, right on.

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"It cannot be understated that the Defendant was a Sheriff's Deputy at the time of the incident offense. One cannot separate her job in law enforcement from her conduct. She was trusted by the [SFSO] and by her community, the community which she had taken an oath to protect."

"Defendant's career is not a mitigating factor in this case with a successful career as a Sheriff's Deputy. The Defendant should have known better when those sworn to uphold the law become the very ones who break the law, the entire criminal justice system is undermined."

I couldn't have said it better. That's my view.

15. At the conclusion of the sentencing hearing, Myres was adjudicated guilty of the mail fraud and wire fraud counts only and sentenced to serve 14 months in the custody of the United States Bureau of Prisons, followed by a three-year period of supervised release.

16. Myres appealed her conviction.

17. In an unpublished opinion dated February 16, 2021, the United States Court of Appeals for the Ninth Circuit affirmed Myres's criminal convictions, but held that the District Court erred in applying the Guidelines "when it failed to make findings on the record regarding Myres' intent with respect to the amount of intended loss." The court remanded the matter back to the District Court to "fully explain its reasoning" on the intended loss enhancement.

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18. On October 5, 2022, the District Court issued an amended judgment, changing Myres's term in custody from 14 months to time served.

### **Determination of Forfeiture and Request for Hearing**

19. CalPERS determined that Myres's two felony convictions arose out of the performance of her official duties as an employee of City and therefore: her service credit for the period May 4, 2016, through February 16, 2017, an equivalent of 0.803 years of service credit, is forfeited; and she is entitled to receive a retirement benefit based on the 18.232 years of CalPERS service credit accrued prior to May 4, 2016. CalPERS further determined that, as a result of the removal of 0.803 years of service credit, Myres's present monthly allowance was decreased and therefore there had been an overpayment of retirement benefits in the amount of \$17,495.56.

20. On November 9, 2021, CalPERS notified Myres and City of this determination, and Myres was given an opportunity to provide any argument, information, or documentation for consideration. In addition, Myres was notified that CalPERS is seeking to collect the overpayment of retirement benefits. CalPERS provided Myres two options (lump sum payment or actuarial equivalent reduction) to repay the overpayment, and informed her that if she did not choose a repayment option by December 10, 2021, CalPERS would apply an actuarial equivalent reduction in the amount of \$99.89 to her monthly retirement payments, beginning March 1, 2022.

21. On December 2, 2021, Myres provided additional information to CalPERS; requested CalPERS reverse its determination; and invoked her right to a hearing. This proceeding followed.

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22. Myres contends that her felony convictions did not arise out of the performance of her official duties as an employee of the City, but rather from her filing of an insurance claim related to the purported burglary of her residence.

### **Additional Evidence Presented at Hearing**

23. Shepard, Myres's criminal defense attorney, testified at hearing. He is a partner in a large international law firm and his practice area is primarily white-collar criminal defense. He is a former federal prosecutor in Chicago and the District of Columbia. He was appointed to represent Myres in the federal criminal action, but does not represent her in this proceeding.

24. Shepard reports that none of the charges against Myres contained an element that the offense arose out of her official duties; the misprision charge was closest to that, but she was acquitted of that charge. Shepard further reports that: the prosecutor argued that Myres was "in cahoots" with Fowler, based on their relationship that began while she was working in jail as deputy sheriff; but the defense proved at trial that she had broken up with Fowler before the burglary, and he committed it in revenge; and that by closing argument, the prosecutor was arguing that it did not "really matter" if Myres and Fowler were in "cahoots."

25. Shepard also reports that the defense team spoke to the jurors after the trial and the jurors reported that the reason they convicted Myres was focused on three of the more than 40 items on her insurance claim form, which were the purse, fur jacket, and boots that were found in Myres's home when FBI searched a year later; and that the jury found that those were fraudulently claimed because Myres still had them.

26. Myres testified at hearing. She previously worked at the San Francisco County Jail. She admits that she entered into a relationship with Fowler while he was

detained there. She knew that this was in violation of SFSO policy and that she had to hide this relationship from coworkers and supervisors. In August 2015, Myres became aware that the SFSO knew of her relationship with Fowler and had listened to some of their telephone calls. She stopped calling Fowler but continued the relationship.

27. After Fowler was released from jail, he and Myres continued their relationship. Myres denies that Fowler was living with her, but admits that Fowler stayed overnight and had belongings at her residence.

28. Myres reports that her son and Fowler had an argument over her Service Firearm and it was discharged. She reports that she and Fowler "broke up" soon thereafter and Fowler was "not happy about it" and threw a garbage can at her vehicle. Myres reports that Fowler also threatened to expose their relationship to her employer. Myres reports that her relationship with Fowler ended shortly before March 25, 2016, the date she reported the burglary.

29. Myres admits that, after she reported the burglary, she told investigating officers that she did not have any idea who the perpetrator was. She admits that she never mentioned Fowler to any of the law enforcement agencies that investigated. Myres testified at hearing that she did not suspect Fowler. She reports that she experienced many previous breakups without harm to person or property, and there had been other burglaries in the neighborhood.

30. However, Myres's claim that she did not suspect Fowler was contradicted by her own attorney. In the November 21, 2019, sentencing hearing, Shepard stated to the court:

I think what the Court needs to understand about that is the lies, which are primarily [Myres] didn't tell them about

Fowler. Those were not designed to defraud Farmers. And, in fact, there would have been nothing -- in terms of Farmers paying her claim, she could have said Fowler was there. That wouldn't have changed Farmers' obligation to pay the claim. So [Myres] wasn't trying to trick Farmers when she was not talking about Fowler being in her home. She was just trying to save her job.

31. Myres admits that she listed the Service Firearm and SFSO-issued radio in the claim to her insurer related to the purported burglary. She provided two explanations for this. She testified that she thought that she might be required to pay the SFSO for the cost of the firearm and radio. She reports that when the items were originally issued and later re-issued, she had to sign a form accepting responsibility for the items. She admits that the SFSO never did ask her to pay for the items, but reports that such a demand for payment could have come later. Myres's re-issued firearm and radio were confiscated when she was arrested.

32. After Myres's insurer asked for more information about the Service Firearm, she used an SFSO fax machine to send the insurer a second explanation for listing the firearm and radio in her claim: that certain SFSO property became hers after four years, based upon the San Francisco City Charter. At hearing, respondent testified that her supervisor had told her that.

33. Ronald Chu testified at hearing. Chu has been a deputy sheriff for the SFSO for more than 22 years. He is a Sergeant and was in charge of the SFSO's vehicle fleet and radios for 11 years. Chu's testimony was credible in all respects. Chu has never heard of the four-year rule that Myres reported to the insurer. Chu reports that employees were never allowed to keep an SFSO-issued radio.

34. In Myres's claim to her insurer for the SFSO-issued radio, she claimed the cost was \$5,000 and that she obtained it from "Galls." Chu reports that he is familiar with Galls, a store that sold law enforcement uniforms and equipment. However, Chu reports that the value of each radio at the time of purchase was approximately \$2,000 and the SFSO only purchased the radios directly from Motorola, never from Galls.

35. Myres reports that her insurer advised her that the SFSO would have to file a claim for the firearm and radio, she informed Deputy Chu of this, and she was therefore under the impression that the firearm and radio were "voided off" her personal insurance claim form.

36. Myres admits that her relationship with Fowler was a bad choice, but argues that it was not the basis of the federal charges.

## **Ultimate Findings**

37. In this proceeding, Myres's criminal convictions are conclusive evidence of her guilt of the offenses charged. (*Arneson v. Fox* (1980) 28 Cal. 3d. 440, 449.)

38. The elements of mail fraud under United States Code, Title 18, section 1341 are: (1) a scheme or artifice to defraud; (2) use of the United States mails in furtherance of the scheme; and (3) specific intent to deceive or defraud. (*Miller v. Yokohama Tire Corp.* (9th Cir. 2004) 358 F.3d 616, 620.) Similarly, the elements of wire fraud under section 1343 are "a scheme to defraud, use of the wires in furtherance of the scheme, and the specific intent to defraud." (*U.S. v. McNeil* (9th Cir. 2003) 320 F.3d 1034, 1040.)

39. Myres's mail fraud and wire fraud convictions were premised on the same scheme to defraud her insurer. So, for the purpose of this proceeding, it is

conclusively established that she formed a scheme to defraud her insurer, with the specific intent to defraud, and used the United States mail and interstate wires in furtherance of this scheme. (*Arneson, supra*, 28 Cal. 3d. at p. 449.)

40. The remaining factual questions involve the connection of this scheme to defraud with her employment as a deputy sheriff for the City.

41. It is undisputed that she included her SFSO-issued Service Firearm and radio in her claim to the insurer.

42. To the extent Shepard claims that the convictions were based only upon Myres's claim for the three personal items found in her home by the FBI 10 months after the burglary, that claim is not persuasive in light of his statement to the court in the sentencing hearing that the basis of the jury's finding of guilt was unknown. (See Factual Finding 13.)

43. Myres's contentions that she listed the SFSO-issued Service Firearm and radio on the claim to her insurer because of a belief that she was responsible for those items, or a belief that they became her property under the City charter after four years, were not credible. Those contentions were contradicted by the testimony of Chu, and the fact that she falsely claimed to have purchased the radio from Galls for \$5,000.

44. Myres's testimony that she did not suspect Fowler of the burglary and therefore did not intentionally conceal his role in the burglary from the investigators was not credible in light of her attorney's statements to the contrary during the sentencing hearing and her apparent lack of candor when testifying about the issues discussed in Factual Finding 43. The fact that the jury also found her not guilty of misprision of felony is not persuasive because a not guilty finding only shows that the

prosecutor did not establish that offense beyond a reasonable doubt; it is not a finding of innocence on that charge.

45. Similarly, the fact that the federal judge did not find cause to impose a sentence enhancement for abuse of trust weighs in favor of Myres's position, but does not carry the day. The judge explained that ruling hinged on his view that Myres's offenses were not "significantly facilitated" by her position as a deputy sheriff, but that is not the applicable standard in this proceeding.

46. Based on the evidence in this record, the scheme Myres formed to defraud her insurer included concealing her relationship with Fowler and the fact that he was the obvious suspect in the burglary that was the source of her insurance claim. Even if concealing Fowler's role in the burglary was primarily intended to protect her job as opposed to facilitate her fraud, this concealment furthered the fraud in that it reduced the chance of recovery of the stolen items. Myres's scheme to defraud the insurer also included claiming the losses of the SFSO-issued Service Firearm and radio, which she knew were not her property, regardless of whether those items were central to the jury's verdict.

## **LEGAL CONCLUSIONS**

1. CalPERS was established by state law in 1932 to provide retirement benefits for state employees. The California Employees' Retirement Fund, managed by CalPERS, is a trust fund devoted to providing benefits to members, retired members and their survivors and beneficiaries. (Gov. Code, §§ 20151, 20170, 20171 [All further statutory references are to the Government Code unless otherwise stated].) CalPERS

and its benefits are governed by the Public Employees' Retirement Law (PERL) (§ 20000 et seq.).

2. The laws relating to pension benefits should be liberally construed in favor of the applicant. (*Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559, 565.) Such a liberal interpretation can be used to effectuate, rather than defeat, the purpose to provide benefits for the employee. (*Button v. Board of Administration* (1981) 122 Cal.App.3d 730, 737.)

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

3. CalPERS argues that it is Myres's burden to show that her offenses do not trigger forfeiture. CalPERS cites section 11504 and argues that because this matter was pled as a statement of issues, Myres has the burden of proof. Generally, a statement of issues is the pleading for a hearing to determine whether a right or privilege should be granted, and an accusation is the pleading for a hearing to determine whether such a right or privilege should be revoked, suspended, or restricted. However, it was CalPERS that chose to label the pleading a statement of issues, and that label does not determine the burden of proof.

4. CalPERS further argues that it is Myres's burden because she seeks a benefit. CalPERS also cites *Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006) 139 Cal.App.4th 471, 472–473, for the proposition that CalPERS exercised its official duty in determining Myres's pension is subject to felony forfeiture and is therefore "entitled to the presumption that this official duty was regularly performed, which places the burden to rebut this presumption upon" Myres. In *Coffin*, the court of appeal held that an applicant for a liquor license bore the burden of proof in a proceeding where the agency had granted a conditional license to the applicant, but was considering the

objections of various parties. (*Id.* at p. 474.) However, this ruling was expressly premised on the fact that the agency had not yet issued a “final determination.” (*Id.* at p. 477.) Here, CalPERS made a final determination regarding Myres’s retirement benefits no later than March 6, 2017, when CalPERS began issuing retirement warrants to her. (Factual Finding 4.) As such, the holding in *Coffin* is inapposite. CalPERS seeks to reduce a final determination of Myres’s benefits and therefore bears the burden of proof.

5. The standard of proof is a preponderance of the evidence. (See *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.)

### **Myres’s Felony Convictions Arose out of the Performance of Her Duties under Section 7522.72, Subdivision (b)(1)**

6. Section 7522.72, subdivision (c), states:

(c)(1) A member shall forfeit all the rights and benefits earned or accrued from the earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive. The rights and benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the member's conviction. Rights and benefits attributable to service performed prior to the date of the first commission of the felony for which the member was convicted shall not be forfeited as a result of this section.

(2) Paragraph (1) shall apply to the extent permissible by law.



(3) For purposes of this subdivision, "forfeiture date" means the date of the conviction.

(§ 7522.72, subd. (c).)

7. Section 7522.72, subdivision (b)(1), states:

If a public employee is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.

(§ 7522.72, subd. (b)(1) [emphasis added].)

8. CalPERS contends that Myres's felony convictions arose from the performance of her official duties. Myres contends they did not.

9. CalPERS argues that the term "arising from" in section 7522.72, subdivision (b)(1), should be read broadly.

The judiciary's role in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of

the law. To this end, courts start with the words of the statute, giving them their usual and ordinary meaning.

(*Hipsher v. Los Angeles County Employees Retirement Association* [*Hipsher II*] (2020) 58 Cal.App.5th 671, 703 [internal citations omitted].) In this context, “arising” is a metaphorical term. In that usage, “arise” is typically defined as “to originate from a source.” (See Merriam-Webster, definition 1(b), [www.merriam-webster.com/dictionary/arise](http://www.merriam-webster.com/dictionary/arise), accessed Jan. 25, 2023.)

10. In *Hipsher II*, the court of appeal considered numerous challenges to a determination that a retired firefighter’s federal felony conviction for directing an offshore gambling operation dictated a partial forfeiture of benefits under section 7522.72, subdivision (b)(1). (*Id.* at p. 682–86.) The *Hipsher II* court used the term “job-related” 26 times in place of the statutory language “for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits.” CalPERS argues that this shows that the statutory language should be read broadly to mean that respondent’s convictions merely had to be “related to” her employment to trigger forfeiture under section 7522.72. However, the *Hipsher II* court was not considering the scope of “arising” and its use of the shorthand term “job related” is only mildly persuasive that the terms are synonymous for this purpose.

11. Finally, CalPERS argues that, because “Myres’s fraud involved not just submitting the claim forms, but devising a scheme to defraud, which includes and cannot be separated from her position as a Deputy Sheriff, the felony forfeiture statute must be applied in this case.” This argument is persuasive.

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12. An element of Myres's offenses is that she formed a scheme to defraud her insurer. (Factual Findings 38 & 39.) That scheme included Myres's concealment of her relationship with Fowler and the fact that he was the obvious suspect in the burglary underlying her insurance claim; and her claim of the losses of the SFSO-issued Service Firearm and radio, which she knew were not her property. (Factual Finding 46.) As the probation department and trial judge stated: "[o]ne cannot separate her job in law enforcement from her conduct." (Factual Finding 14.) Accordingly, it is found that Myres was convicted of felonies for "conduct arising out of or in the performance of" her official duties under section 7522.72, subdivision (b)(1).

## ORDER

It is found that respondent April D. Myres was convicted of felonies for "conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits. . ." under Government Code section 7522.72, subdivision (b)(1).

DATE: **02/08/2023**



MICHAEL C. STARKEY  
Administrative Law Judge  
Office of Administrative Hearings