

ATTACHMENT C

RESPONDENT'S ARGUMENT

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

In the Matter of the Appeal of Membership Determination

of:

MICHAEL G. COOK, and

CITY OF SAN BRUNO,

Respondents,

Case No. 2023-0366

OAH No. 2024050321

RESPONDENT'S ARGUMENT

Esteemed Members of the CalPERS Board of Administration:

Per Article XVI, Section 17(b), to wit, "The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty."

I respectfully encourage you **reject** Judge Dylan's proposed decision and call for a full Board Hearing for the following reasons:

I became a CalPERS member July 26, 1986. I retired June 6, 2020.

My membership in the Retirement System was confirmed by CalPERS and is not disputed.

As a member of the CalPERS Retirement System, I relied on each of my employers to make appropriate contributions on my behalf, and to withhold appropriate payroll deductions for my benefit. I trusted my employers when I was told my part-time service did not count. It was only after I applied for retirement that I learned **all** service rendered as a member to a member agency was eligible for service credit.

I believe the rejection of my arguments in Legal Conclusions 1 through 9 are incorrect and submit there is no basis to deny a member of the Retirement System service credit.

Burden and Standard of Proof

The sole statement of issues as filed by Brad Hanson on April 19, 2024 was limited to the issue of whether I qualified for CalPERS membership based upon my hourly employment with the City for the period of October 15, 2018, through April 18, 2020.

CalPERS stipulated that I was, in fact, a member of the Retirement System for the time period in question.

The Public Employment Retirement Law (PERL) addresses membership in the retirement system. Government Code section 20370 reads ""Member" means an employee who has qualified for membership in this system and on whose behalf an employer has become obligated to pay contributions."

The statement of issues was amended to whether I was eligible for service credit for the time period in question.

The PERL does not provide for the withholding of service credit for a member of the Retirement System.

As my membership in the Retirement System is not in question, and CalPERS has several publications and videos stating when you work for a CalPERS employer, you're earning service credit, and the PERL does not provide for the withholding of service credit for members of the Retirement System, service credit for the time period in question should be granted.

Applicable Law

The City agreed to be bound by the terms of the contract and the PERL.

The contract and amendments as written are unambiguous.

In the original contract between CalPERS and the City of San Bruno dated April 27, 1945, effective January 1, 1945, the only employees excluded from membership (by way of the statement) "In addition to the employees excluded from membership by said Retirement Act, the following employees shall not become members of said Retirement System:" were:

“Persons employed after March 1, 1944 who have attained the age of 60 years prior to employment, shall be excluded.”

This language was changed as follows in the contract amendment dated March 6, 1963, effective April 1, 1963:

EXCLUDE PERSONS EMPLOYED AFTER MARCH 1, 1944 WHO HAVE ATTAINED THE AGE OF 60 YEARS PRIOR TO EMPLOYMENT

EXCLUDE PERSONS COMPENSATED ON AN HOURLY BASIS WHO ARE HIRED APRIL 1, 1963, AND THEREAFTER

This clearly reads as exclusion from membership in the Retirement System, and thereby cannot apply to me as I was already a member of the Retirement System.

These contract exclusions were allowed by CalPERS as a way to eliminate what had been determined to be a financially burdensome process – for both employers and employees – for part-time positions (think summer lifeguard / recreation program leader) whereby both the employer and the employee would make mandatory contributions to the Retirement System, only to have those contributions refunded once it was determined the employee would never become a vested member of the Retirement System.

These contract exclusions do not apply to existing members of the Retirement System, are not meant as a way to withhold contributions from the Retirement System, or deny service credit and retirement benefits for career members of the Retirement System.

On November 18, 1994, CalPERS distributed Circular Letter 800-151 to Board Members and Related; Managers, Public Agencies; County Superintendents of Schools with the subject line “Penalty for Withholding Memberships”. This letter advised it was illegal to withhold membership as a cost saving device.

In the case of part-time employees, section 20305 states the general rule that part-time employees are excluded from the CalPERS system unless (a)(1) He or she is a member at the time he or she renders that service and is not otherwise excluded pursuant to this

article or by a provision of a contract.

Again, CalPERS and the City refer to the contract exclusion, which reads 'become a member of the Retirement System'. As I was already a member of the Retirement System the exclusion does not apply to me.

The City's erroneous application of the contract exclusion *from membership* to my employment, and subsequent failure to withhold deductions or make contributions to CalPERS to fund pension benefits on my behalf is an administrative error.

As I was a member of the Retirement System the City should have made contributions towards my retirement and should have withheld payroll deductions for the time periods in question. The fact that they did not do so is now being used as one of the reasons to deny me service credit.

CalPERS and the City's reliance on the contract exclusion of ALL hourly employees ignores the clear language of the contract and thereby denies benefits due to me as a member of the Retirement System. (Please note: During this same time period, CalPERS determined I **was** entitled to Service Credit for the part-time service I provided to the City of Burlingame and the City of Los Altos. These arrears determinations were made after I submitted my application for retirement.)

The parties' course of conduct over a long period of time showing that their intention was to exclude hourly employees regardless of prior membership should be deeply troubling to the Board, as it may demonstrate a deliberate disregard of their financial obligations to the Retirement System.

CalPERS employee Andrew Harris testified that CalPERS has administered benefits (or the lack thereof) the same way with respect to the other 200 employers which have contract exclusions very similar to the City's exclusion for hourly compensated employees. This should also be very troubling to the Board, as it may indicate a substantial lack of

contributions to the Retirement System in the form of both agency contributions and payroll deductions for each and every member of the Retirement System who, like me, has returned to provide part-time service and has erroneously not received credit for that service.

The 1,000 hour exception referenced by Judge Dylan is a metric which requires an employer to enroll an employee into CalPERS as a System Member. This exception is moot, as I had been a member of the Retirement System since July 26, 1986.

Recap Summary

I became a CalPERS member July 26, 1986. I retired June 6, 2020.

My membership in the Retirement System was confirmed by CalPERS and is not disputed.

The City should have made contributions towards my retirement and withheld payroll deductions for the time periods in question.

I look forward to discussing this matter with you all in greater detail at a full Board Hearing at a future date.

Thank you for your consideration.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Michael G. Cook", written in a cursive style.

Michael G. Cook