

**VIA EMAIL**

April 16, 2024

EMAIL: [REDACTED]

Michael Milligan
[REDACTED]

RE: Response to Service Purchase Request to San Bernardino County Employees' Retirement Association

Dear Mr. Milligan:

This letter is in response to your request to purchase service credit and corresponding February 14, 2024, Hearing Brief (the "Brief") in San Bernardino County Employees' Retirement Association ("SBCERA") for non-membership service with San Bernardino County (the "County") for the period of July 1996 through December of 1999 (the "Requested Purchase Period"). For the reasons discussed below, your request to purchase service credit for the time you worked during the Requested Purchase Period is denied. This letter serves as the written determination in response to your request pursuant to SBCERA's Benefits Policy No. 25 (Requests and Appeals for Pension Benefits), a copy of which is attached as Exhibit A for your reference.

1. Factual Background Concerning Your Service Purchase Request

During the Requested Purchase Period, you worked as a Deputy Public Defender for the County. As you note in the Brief and your accompanying declaration, you were never provided with a County employment contract during the Purchase Period. Further, as noted in the brief and your accompanying declaration, you were not paid from a County payroll account, and your hiring was not authorized by the County Board of Supervisors. As noted in the November 30, 2023, letter to you from SBCERA's Chief Financial Officer, Amy McInerney, County records indicate that your pay during the Purchase Period came from a County account used to pay third-party vendors, not County employees. (A copy of those records is attached as Exhibit B.) Further, in response to SBCERA's request, the County Human Resources office has declined to identify you as a County employee during the Purchase Period.

You contend in the Brief that you qualified as a common-law County employee during the Purchase Period and are entitled to purchase SBCERA service credit on that basis.

Michael Milligan
RE: Service Purchase Request to SBCERA
April 16, 2024
Page 2

2. CERL's Service Purchase Rules

The County Employees Retirement Law of 1937 ("CERL"), which, among other laws, governs SBCERA's operations, provides that SBCERA members may purchase SBCERA service for previously performed work in certain circumstances. First, members who were in "public service" before entering SBCERA may purchase SBCERA service for that prior "public service" time. (Gov. Code § 31641.1.) Second, members who were in "county service" before entering into SBCERA membership, but who were excluded from SBCERA membership because of the "tenure" of that "county service". (Gov. Code § 31641.5.) CERL defines "public service" and "county service," respectively, as "service rendered as an officer or *employee* of a public agency" and as "the *employment* of a person by a county, district, municipal court, or superior court." (Gov. Code §§ 31479 [defining "public service"], 31640 [defining "county service"], italics added to both.) CERL further defines "employee" as, among other classifications not relevant here, "any officer or other person employed by a county whose compensation is fixed by the board of supervisors or by statute and whose compensation is paid by the county, and any officer or other person employed by any district within the county." (Gov. Code § 31469(a).)

3. CERL and Common-Law Employment Doctrine

Whether or not your work during the Requested Purchase Period constitutes employment under the common-law test does not determine your entitlement to purchase service for the Purchase Period under CERL. Because CERL specifically defines "employee" as described above, "eligibility for CERL benefits is entirely dependent on the statutory definition . . . the common law doctrine does not apply in this context." (*Holmgren v. County of Los Angeles* (2008) 159 Cal.App.4th 593, 605 [independent contractors not "employees" under CERL even if their duties were indistinguishable from employees].)

In the Brief, you argue that *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, in which the California Supreme Court held that common-law employees are entitled to CalPERS membership under the Public Employees' Retirement Law ("PERL"), requires SBCERA to allow you to purchase SBCERA service for the Purchase Period. *Metropolitan Water*, however, does not apply to CERL systems such as SBCERA—whereas PERL leaves the term "employee" statutorily undefined, thereby incorporating common-law employment doctrine, CERL specifically defines "employee." (*Holmgren*, 159 Cal.App.4th at 605 [distinguishing between PERL and CERL on this point and distinguishing *Metropolitan Water* on that basis].) "Where (as here) the term is defined by the statute, the legislature's definition controls and the doctrine of common law employment is irrelevant." (*Id.* at 604.)

Michael Milligan
RE: Service Purchase Request to SBCERA
April 16, 2024
Page 3

4. Statute of Limitations Issues

To the extent that the Brief argues that your alleged status as a common-law County employee during the Requested Purchase Period entitles you to reclassification by the County that would qualify your work during the "Requested Purchase Period" as "employment" under CERL, that claim would be barred by the statute of limitations. (See *Leahey v. Department of Water and Power of City of Los Angeles* (1946) 76 Cal.App.2d 281, 288 [statute of limitations bars suit seeking employment reclassification sixteen years after alleged wrongful classification].) SBCERA cannot, consistent with its fiduciary obligations, "pay greater benefits than the statutes allow." (*Chaidez v. Board of Administration* (2014) 223 Cal.App.4th 1425, 1431.) This includes the statute of limitations, which would be—at most—four years from the date of purported misclassification by the County. (See Code Civ. Proc. §§ 338(a), 343.)

5. Conclusion

During the Requested Purchase Period, you were not an "employee" of the County as defined by CERL, as your compensation was not fixed either by the Board of Supervisors or by statute. Because you did not meet the definition of "employee" under CERL, and it was not your "tenure" in "county service" that prevented you from enrolling in SBCERA membership during the Requested Purchase Period but rather your status as an independent contractor who was paid as such by the County, you are ineligible to purchase SBCERA service for your work during the Requested Purchase Period. Further, because CERL prohibits you from purchasing SBCERA service for your work during the Requested Purchase Period, SBCERA has no discretion to grant an exemption: SBCERA has "no authority to disregard" CERL and no authority "to pursue a practice that is contrary to" CERL. (*Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* (2020) 9 Cal.5th 1032, 1069.) Finally, if your request is more understood to be a request to be reclassified as a full-time employee during the Requested Purchase Period such that you would have been enrolled in SBCERA membership during that time, the request is over twenty years too late.

You may appeal this decision pursuant to SBCERA's Benefits Policy No. 25.

Sincerely,

DocuSigned by:

08DBE0D1C62140B...

Debby S. Cherney
Chief Executive Officer

DC:BMH:ycb
Enclosures

EXHIBIT A

**SBCERA Benefits Policy No. 025
Requests and Appeals for Pension Benefits**

Status **Active** PolicyStat ID **12890238**San Bernardino County Employees'
Retirement Association

Origination	11/2019
Last Approved	12/2022
Effective	12/2022
Last Revised	12/2022
Next Review	11/2025

Area	Benefits
Applicability	SBCERA systemwide

Requests and Appeals for Pension Benefits

POLICY NO. 025

1. General Instructions.

Requests for the award or change of any pension benefit, other than disability benefits, should begin with the member addressing the request, in writing, to the Chief Executive Officer (CEO) or designee.

2. Initial Determination.

The CEO or designee shall provide a written determination of the member's request that either approves or denies the request. For any request the CEO denies, the member shall have 30 days to submit a request to appeal the CEO's determination.

3. Board Adoption of Initial Determination.

In the event the member fails to appeal the CEO's determination, then the CEO's determination will be placed on the Board's next consent agenda with a recommendation to adopt the CEO's determination. The Board's adoption of the CEO's determination shall be final. Staff will provide a summary of the determination to the member prior to the Board's decision.

4. Member Appeal of Initial Determination.

The member may request to appeal the CEO's denial to the SBCERA Board. As part of the written appeal request, the member may submit additional documentation, including affidavits, to the CEO or designee within thirty (30) days after the date upon which the recommendation was sent to the member.

5. Board Hearing of Appeal.

Thirty (30) days from receipt of the member's written appeal, the member's appeal shall be placed on the agenda at the next regularly scheduled SBCERA Board meeting. The CEO or designee will provide copies of the member's written request for benefits, staff recommendation and supporting documentation, along with any additional documentation from the member to the Board. The member may attend the Board meeting and may address the issue consistent with the Board's policies on public comment, which may be modified in such instances in the sole discretion of the Board Chair, prior to the Board's decision on the matter.

6. Board Decision Upon Hearing Appeal.

A decision by the Board is final unless the Board refers the matter to an Administrative Hearing as governed by *Procedures for Disability Retirement Applications and Formal Hearings*.

Judicial review of final retirement decisions shall be subject to the Code of Civil Procedure Section 1094.6. Judicial review of final compensation earnable and/or pensionable compensation decisions shall be subject to Code of Civil Procedure Section 1085.

Following final decision on disputed matters, the CEO or designee shall send to the member written notice of their appeal rights.

COPY

EXHIBIT B

SBCERA Letter to Michael Milligan
dated November 30, 2023

Sent Via US Mail


San Bernardino County Employees'
Retirement Association
348 W. Hospitality Lane, Suite 100
San Bernardino, CA 92408
P: 909.885.7980

November 30, 2023

Michael Milligan


Subject: Service Purchase Request

Dear Michael Milligan,

This letter is in response to your request to purchase credit for non-membership service with San Bernardino County for the period of January 1995 through December 1999 as an independent contractor with the Office of the Public Defender. After reviewing the information provided by you and San Bernardino County Human Resources, your request to purchase credit for the period 1995 through 1999 is denied.

The San Bernardino County Human Resources has declined to certify the service you claim in your request. County Human Resources replied that "the Public Defender does not have any data that Mr. Milligan worked as a County contract employee prior to April 22, 2000." You provided a copy of records from the ATC's office titled the County of San Bernardino-Accounts Payable, which pertain to payments made to you during the relevant period. (Attachment A)

Regarding the documentation provided, you are listed as a vendor and not an employee. Also, there are no payments to you as a vendor for the year 1995 or for January 1996 through July 1996. Given that third party vendors and not employees of San Bernardino County, are paid through the ATC accounts payable system, as you were here, your work as a third-party vendor (i.e., an independent contractor) cannot be purchased under the County Employees' Retirement Law as the position of an independent contractor does not qualify for membership in San Bernardino County Employees' Retirement Association (SBCERA) because persons hired as independent contractors do not meet the statutory definition of "employee" as provided in Government Code section 31649, and thus, are not entitled to membership. SBCERA is without sufficient information as to the terms of your contractual relationship with San Bernardino County for the period of January 1995 through December 1999, except that San Bernardino County Human Resources on behalf of San Bernardino County could not certify you as an "actual employee" for that period.

Without San Bernardino County Human Resources certifying and providing records of your service as an employee of San Bernardino County, you are not eligible to purchase service credit as permitted by the County Employees' Retirement Law.

You may appeal this decision pursuant to SBCERA's Benefits Policy 025 – Requests and Appeals for Pension Benefits, a copy of which is enclosed. Please send your request to appeal

to Debby Cherney, Chief Executive Officer, San Bernardino County Employees' Retirement Association, 348 W. Hospitality Lane, Suite 100, San Bernardino, California 92408.

Sincerely,

A handwritten signature in black ink, appearing to read 'Amy McInerney', written in a cursive style.

Amy McInerney
Chief Financial Officer
SBCERA

Status **Active** PolicyStat ID **12890238**



San Bernardino County Employees' Retirement Association

Origination	11/2019
Last Approved	12/2022
Effective	12/2022
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Approval Signatures

Step Description	Approver	Date
HR Final Review & Distribution	Iliana Torres	01/2023
Board Approval - Policy Owner Quality Assurance Review	Barbara Hannah: Chief Counsel	01/2023
Board Approval - Policy Owner Quality Assurance Review	Yolanda Bullock: Sr Legal Secretary	01/2023
Committee - Policy Owner Quality Assurance Review	Yolanda Bullock: Sr Legal Secretary	01/2023
Committee - Policy Owner Quality Assurance Review	Barbara Hannah: Chief Counsel	12/2022
Chief Executive Officer Review	Debby Cherney: Chief Executive Officer	12/2022
Policy Owner & Chief Counsel Review	Barbara Hannah: Chief Counsel	12/2022



Ensen Mason CPA, CFA

John Johnson

DECLARATION OF CUSTODIAN OF RECORDS

I, Rhawnie Berg, declare:

That I am the Custodian of Records for the County of San Bernardino – Accounts Payable and have the authority to certify said records.

That attached hereto are the true and complete copies of all records pertaining to payments made to Michael P Milligan for the period of January 1995 through December 1999.

That all said records were prepared by the personnel of the Office of the Auditor-Controller/Treasurer/Tax Collector and are contained in the County's official system of record (Financial Accounting System -FAS).

I declare, under penalty of perjury, that the foregoing information is true and correct to the best of my knowledge.

Executed on this date, Monday, May 8, 2023, at San Bernardino, California.

Rhawnie Berg, APM
Deputy Chief, Disbursements Division





Payments issued to Michael Milligan
 For the period of January 1995 through December 1999
 As contained in San Bernardino County Financial Accounting System - FAS

Year	Date	Warrant #	Amount	VEND NAME
1995	No payments found			
1996	No payments found			
1996	8/1/1996		606.25	MICHAEL MILLIGAN
1996	8/23/1996		1,200.00	MICHAEL MILLIGAN
1996	9/16/1996		1,200.00	MICHAEL MILLIGAN
1996	10/2/1996		1,400.00	MICHAEL MILLIGAN
1996	10/24/1996		1,400.00	MICHAEL MILLIGAN
1996	11/14/1996		1,200.00	MICHAEL MILLIGAN
1996	12/18/1996		1,800.00	MICHAEL MILLIGAN
1997	1/9/1997		1,800.00	MICHAEL MILLIGAN
1997	1/31/1997		1,200.00	MICHAEL MILLIGAN
1997	3/4/1997		2,000.00	MICHAEL MILLIGAN
1997	3/25/1997		2,000.00	MICHAEL MILLIGAN
1997	4/9/1997		1,200.00	MICHAEL MILLIGAN
1997	5/13/1997		1,800.00	MICHAEL MILLIGAN
1997	6/4/1997		1,800.00	MICHAEL MILLIGAN
1997	7/30/1997		1,800.00	MICHAEL MILLIGAN
1997	7/30/1997		2,200.00	MICHAEL MILLIGAN
1997	7/30/1997		1,000.00	MICHAEL MILLIGAN
1997	8/28/1997		2,400.00	MICHAEL MILLIGAN
1997	9/29/1997		2,800.00	MICHAEL MILLIGAN
1997	11/10/1997		2,400.00	MICHAEL MILLIGAN
1998	1/21/1998		4,200.00	MICHAEL MILLIGAN
1998	1/21/1998		3,000.00	MICHAEL MILLIGAN
1998	3/10/1998		2,200.00	MICHAEL MILLIGAN
1998	3/10/1998		2,400.00	MICHAEL MILLIGAN
1998	3/27/1998		2,400.00	MICHAEL MILLIGAN
1998	5/7/1998		2,600.00	MICHAEL MILLIGAN
1998	9/24/1998		2,400.00	MICHAEL MILLIGAN
1998	3/18/1999		2,400.00	MICHAEL MILLIGAN
1998	7/2/1998		2,400.00	MICHAEL MILLIGAN
1998	7/2/1998		2,400.00	MICHAEL MILLIGAN
1998	7/2/1998		2,000.00	MICHAEL MILLIGAN

Year	Date	Warrant #	Amount	VEND NAME
1998	8/12/1998		1,600.00	MICHAEL MILLIGAN
1998	8/12/1998		2,375.00	MICHAEL MILLIGAN
1998	8/25/1998		1,950.00	MICHAEL MILLIGAN
1998	9/1/1998		2,400.00	MICHAEL MILLIGAN
1998	10/22/1998		2,400.00	MICHAEL MILLIGAN
1998	11/18/1998		2,600.00	MICHAEL MILLIGAN
1998	12/7/1998		40.65	MICHAEL MILLIGAN
1998	12/7/1998		2,725.00	MICHAEL MILLIGAN
1999	2/16/1999		5,200.00	MICHAEL MILLIGAN
1999	4/26/1999		3,200.00	MICHAEL MILLIGAN
1999	4/26/1999		2,400.00	MICHAEL MILLIGAN
1999	4/26/1999		80.00	MICHAEL MILLIGAN
1999	4/26/1999		2,175.00	MICHAEL MILLIGAN
1999	4/26/1999		2,062.50	MICHAEL MILLIGAN
1999	5/26/1999		2,400.00	MICHAEL MILLIGAN
1999	6/4/1999		2,880.00	MICHAEL MILLIGAN
1999	6/4/1999		811.82	MICHAEL MILLIGAN
1999	6/11/1999		273.57	MICHAEL MILLIGAN
1999	6/11/1999		960.00	MICHAEL MILLIGAN
1999	6/11/1999		267.19	MICHAEL MILLIGAN
1999	6/11/1999		960.00	MICHAEL MILLIGAN
1999	8/2/1999		1,680.00	MICHAEL MILLIGAN
1999	8/2/1999		960.00	MICHAEL MILLIGAN
1999	8/2/1999		264.34	MICHAEL MILLIGAN
1999	8/2/1999		255.69	MICHAEL MILLIGAN
1999	8/2/1999		960.00	MICHAEL MILLIGAN
1999	8/2/1999		502.58	MICHAEL MILLIGAN
1999	8/2/1999		234.97	MICHAEL MILLIGAN
1999	8/2/1999		960.00	MICHAEL MILLIGAN
1999	8/17/1999		2,880.00	MICHAEL MILLIGAN
1999	8/17/1999		811.82	MICHAEL MILLIGAN
1999	9/15/1999		3,360.00	MICHAEL MILLIGAN
1999	9/15/1999		462.78	MICHAEL MILLIGAN
1999	10/1/1999		243.90	MICHAEL MILLIGAN
1999	10/1/1999		1,920.00	MICHAEL MILLIGAN
1999	10/26/1999		3,696.00	MICHAEL MILLIGAN
1999	10/26/1999		116.29	MICHAEL MILLIGAN
1999	11/30/1999		6,650.00	MICHAEL MILLIGAN