

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Johnnie Swaim (Respondent) began working for the California Highway Patrol (Respondent CHP) in 1988, and last worked for Respondent CHP in December 2011. Respondent service retired effective February 15, 2016.

On November 17, 2011, Respondent was charged with four felony child molestation counts in the Superior Court of California, County of Imperial. The four counts charged against Respondent, under various sections of the Penal Code, were: 1) Lewd Acts Upon a Child; 2) Oral Copulation of a Person Under 14 under; 3) Lewd Acts Upon a Child; and 4) Oral Copulation of a Person Under 14. The Complaint alleged Felony Counts One and Two occurred between January 29, 1997 and January 29, 1999, and alleged Felony Counts Three and Four occurred between September 11, 2002 through September 11, 2004. An Information was filed on March 8, 2012. The counts charged, and dates of alleged felonies, remained the same.

A jury convicted Respondent of all four felony counts. Respondent filed a motion for a new trial, which the trial court denied on June 12, 2013. Respondent appealed his conviction to the Fourth District Court of Appeal. In its opinion, the Court of Appeal overturned Respondent's convictions on Counts Two and Four, but the felony convictions for Counts One and Three remained. The superior court did not alter the 10-year state prison sentence following remand. According to the Abstract of Judgment, Count One occurred between 1997 and 1999, and Count Three occurred between 2002 and 2004. The felony conviction date was February 5, 2013.

Government Code section 7522.72 provides:

If a public employee is convicted by a state... trial court of any felony under the state ...law for conduct arising out of or in the performance of his or her official duties, ... 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 subd. (c) and shall not accrue further benefits in that public retirement system, effective on the date of conviction.

The date of the forfeiture is determined from "the earliest date of the commission of any felony...to the forfeiture date, inclusive." (Gov. Code § 7522.72(c)).

CalPERS investigated the underlying facts comprising the felony convictions. CalPERS learned Respondent had been convicted of felonies for sexually molesting two minors while off duty, in his family home or on vacation. CalPERS sent a Forfeiture of Benefits Form (Form) to Respondent CHP to complete. Respondent CHP completed the Form

and checked the box at the top of the form indicating that the felony was not job related. CalPERS also reviewed the Court of Appeals decision, which states, “[w]hile we agree that a defendant’s use of his or her position as a law enforcement officer to commit a crime can be considered as an aggravating factor, there is no evidence that [Respondent] did so here.”

Nevertheless, CalPERS issued its Determination Letter on February 9, 2021, which notified Respondent that CalPERS was forfeiting 14.5 years of service credit from January 29, 1997, the earliest date of commission of his felonies. The Determination Letter also explained that the forfeiture resulted in an estimated overpayment in retirement benefits of \$412,833.52.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on January 31, 2022. Respondent was represented by counsel. Respondent CHP did not appear at the hearing.

No witnesses testified at the hearing. Instead, the parties submitted stipulated facts and evidence, which included records from Respondent’s criminal proceeding. The parties then submitted post-hearing briefs in support of their respective positions.

CalPERS argued that police officers like Respondent are held to a heightened standard of conduct, even when off-duty. In the context of discipline, the Court of Appeal previously stated that “[t]here are certain professions which impose upon persons attracted to them, responsibilities and limitations on freedom of action which do not exist in other callings. Public officials such as judges, policemen, and schoolteachers fall into such a category.” (*Ackerman v. State Personnel Board* (1983) 145 Cal.App.3d 395, 400, citing to *Board of Trustees v. Stubblefield* (1971) 16 Cal.App.3d 820, and *Titus v. Civil Service Commission* (1982) 130 Cal.App.3d 357, 364–365.) The Court of Appeal has also previously ruled in discipline cases that certain offenses like child molestation, when committed by police officers, are inherently more serious and damaging to the public faith in law enforcement. (*Fout v. State Personnel Board* (1982) 136 Cal.App.3d 817, 821).

Public trust is paramount to the successful operation of a public pension system. The legislature implemented felony forfeiture to reward faithful public service, and to protect the public by withholding pension inducement when public service is faithless. Egregious and immoral felonies by police officers erode that trust and are the antithesis of faithful public service.

Accordingly, CalPERS reasoned that there can be no official duty more central and necessary to a police officer’s job than maintenance of that public trust by living a private life beyond reproach. Felonious and immoral misconduct by police officers cannot be rewarded with a public pension. Withholding the inducement of a public pension following such off-duty morally reprehensible felonies by police officers fits squarely within the intent of the felony forfeiture statute by protecting the public through

disincentivizing such immoral acts. CalPERS thus concluded that Respondent's felonies subjected him to felony forfeiture.

Respondent argued the converse, that his felonies were not job related. Respondent presented the following facts in his argument: 1) Respondent did not commit his felonies while working a CHP shift, nor did he use the tools or instrumentalities of his job as a CHP officer to commit his felonies; 2) Respondent CHP submitted the Form to CalPERS, but checked the Form's box stating that the felony was not job related; and 3) in upholding Respondent's felony convictions, the Court of Appeal stated the felony convictions were not work related.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent's appeal. The ALJ found that Respondent's felonies were not job related because Respondent was neither working a shift nor using the tools of his job when he committed the crimes. Although the ALJ characterized Respondent's felonies as "despicable," he ultimately rejected CalPERS' arguments that the higher standard of conduct attendant to Respondent's position as a police officer subjected him to felony forfeiture.

The ALJ recognized that public pensions reward faithful public service. Felony forfeiture withholds that reward of a public pension following faithless public service, i.e. when public service turns into criminality. Because Respondent's felonies occurred in his home, and there was no evidence that the felonies were committed on the job or with tools of the job, the ALJ found no evidence that taking away Respondent's pension benefits for felony crimes had any nexus to a pension system's reward of faithful public service. Hence, the ALJ concluded that felony forfeiture did not apply, and CalPERS' determination forfeiting Respondent's benefits must be reversed.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

June 15, 2022

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