

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Leonis Malburg (Respondent) was appointed Council Member for Respondent City of Vernon (City), and he became a local miscellaneous member of CalPERS on September 1, 1956. On June 22, 2008, the City contracted with CalPERS to give an enhanced benefit formula of 2.7% at 55 for local miscellaneous members who were actively employed on or after June 22, 2008.

Respondent submitted his retirement application on September 8, 2009. He retired from service with 57.479 years of service. Because he was actively employed by the City after June 22, 2008, he received the 2.7% enhanced benefit formula.

An indictment was filed against Respondent on October 25, 2007, containing various charges including one for perjury. The underlying facts established that Respondent's act of perjury was done in connection with the City's election on April 11, 2006, when Respondent was re-elected to the City Council.

On December 4, 2009, the Superior Court of California returned a guilty verdict on various charges, including one felony count of perjury. Respondent was placed on formal probation, and ordered to pay fines, restitution and penalties.

By letters dated March 17 and 23, 2011, CalPERS informed Respondent that it construed his conviction for perjury as being "in relation to your official duties as Council Member of the City" which triggered the pension benefit forfeiture provisions of Government Code section 1243 (re-codified as part of PEPRRA, Government Code section 7522.70). CalPERS informed Respondent that his service credit and monthly allowance would be reduced, that the reductions were retroactive, and that Respondent owed an overpayment. Respondent responded to CalPERS that any proposed reduction was improper because the perjury conviction was not yet final. CalPERS agreed to wait to impose forfeiture until final determination of Respondent's appeal.

Respondent timely appealed his conviction. On November 30, 2011, the Court of Appeals affirmed the conviction. The California Supreme Court denied Respondent's petition for review. Respondent's conviction became final on March 14, 2012.

On May 1, 2012, the Superior Court of California granted Respondent's motion for expungement. The trial court terminated Respondent's probation, set aside his conviction, entered a plea of not guilty to all counts, and dismissed the entire case pursuant to Penal Code section 1203.4.

On February 18, 2014, CalPERS informed Respondent that his perjury conviction was final, and it would go forward with the pension forfeiture. CalPERS determined that Respondent forfeited the portion of his service credit that arose after the term for which he was elected (October 2006) through the effective date of his retirement (July 2009). CalPERS also determined that Respondent was no longer eligible for the formula enhancement (2.7% at 55) because he was not actively employed after June 22, 2008.

Respondent appealed. A hearing on Respondent's appeal was completed on October 20, 2014. Respondent was represented by counsel.

The Administrative Law Judge (ALJ) found that Respondent's crime in 2006 was committed in connection with his re-election and disqualified him from continuing to serve in that capacity. Therefore, the ALJ held that Respondent's crime arose directly out of his duties on the City Council, and is a crime subject to forfeiture.

However, in 2012, Respondent's conviction including the perjury count was dismissed and expunged pursuant to Penal Code section 1203.4. When a conviction is dismissed under that statute, the convicted person "shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted." On its face, the ALJ found this language means that Respondent's expungement releases him from felony forfeiture as a result of his conviction.

The ALJ held that Respondent established by a preponderance of evidence that he is released from the penalty and disability imposed by the forfeiture provision of Government Code section 7522.72 as a result of his conviction being expunged in 2012. As Respondent's pension rights and benefits are not subject to forfeiture, the ALJ found that none of the reductions to his pension rights and benefits were warranted.

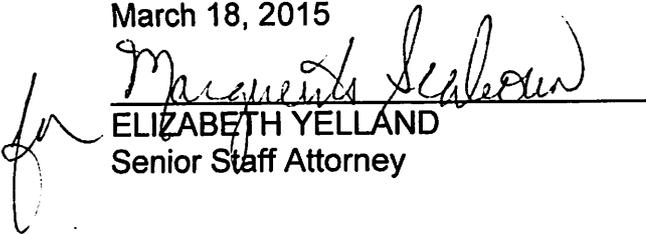
In the Proposed Decision, the ALJ considered CalPERS' argument that Government Code section 7522.72(c)(1), which provides that a public employee's pension rights and benefits "shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction," should be applied in this case. The ALJ disagreed with CalPERS' application of section 7522.72(c)(1) because the ALJ concluded that section 7522.72(c)(1) did not express a clear intent of retroactivity. Therefore, the ALJ found that section 7522.72(c)(1), which became effective on January 1, 2013, could not be retroactively applied to the circumstances of Mr. Malburg's expungement, which occurred in 2012.

The ALJ's ruling that section 7522.72(c)(1) could not be applied retroactively to an expungement that occurred in 2012 has no impact on section 7522.70(b), the felony forfeiture provision for elected officials. The case presents a very narrow ruling that should have no effect on the forfeiture provisions of 7522.70(b). As a practical matter, any criminal convictions which may be expunged due to Penal Code section 1203.4 in the future will be completed well after the January 1, 2013 effective date of PEPRA. Therefore, the Proposed Decision here is singularly limited to this case.

The ALJ concluded that Respondent's appeal should be granted. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member prevailed and is unlikely to appeal the Decision of the Board.

March 18, 2015


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