

ATTACHMENT C
RESPONDENT'S ARGUMENT

Attachment C

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

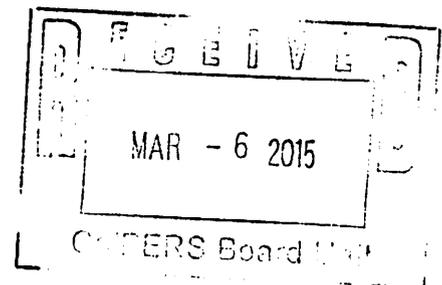
In the Matter of the Amended Statement of
Issues Against:

LEONIS C. MALBURG and
CITY OF VERNON,

Respondents.

Case No. 2014-0542

OAH No. 2014080341



Respondent's Argument

INTRODUCTION

Respondent concurs with all parts of the Proposed Decision with one exception. Respondent disputes only the Proposed Decision's legal conclusion titled "*Did Respondent's Crime Arise Directly Out of His Duties as an Elected Public Officer?*" If this Board agrees with the Proposed Decision on all other issues, it will be unnecessary to resolve this single disputed issue. Therefore, Respondent first addresses the issues he does not dispute, then the disputed issue.

ARGUMENT

I. Expungement of Respondent's Conviction Prevents Forfeiture.

The Proposed Decision correctly concludes that the May 1, 2012 expungement of Respondent's convictions under Penal Code section 1203.4, including expungement of the perjury count, prevents forfeiture of Respondent's pension benefits. When the Los Angeles Superior Court entered the expungement decree, there were no relevant exceptions to section 1203.4. Therefore, the expungement dismissed all counts against Respondent and released him "from *all* penalties and disabilities resulting from the offense[s] of which he ... has been convicted. . . ." (Emphasis added.)

After the 2012 expungement, the Legislature adopted the California Public Employees' Pension Reform Act of 2013 (PEPRA), which became effective on January 1, 2013. PEPRA amended and renumbered section 1243 as section

7522.70(b). PEPRA added section 7522.72(c)(1) providing for the first time that a public employee's pension rights and benefits "shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the employee's conviction."

As the Proposed Decision correctly reasons, when Respondent's convictions were expunged in 2012 the pension forfeiture statute that applied was section 1243, and "there was nothing in section 1243 that provided an exception to the relief provided by Penal Code section 1203.4 similar to that now contained in section 7522.72." (Proposed Decision p. 8, ¶ 11.) Therefore, as the Proposed Decision concludes, before PEPRA became effective in January 2013:

[T]he relief provided by Penal Code section 1203.4 [i.e., expungement] *was available to vitiate forfeiture* provided by section 1243. Otherwise, there would have been *no purpose* in adding the provision in section 7522.72, subdivision (c)(1), plainly stating that such relief is no longer available. (P. 8, ¶ 11A, emphasis added.)

Further, as the Proposed Decision points out, statutes – here section 7522.72, effective on January 1, 2013 – do not apply retroactively unless the Legislature intended them to do so. *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243. The Legislature did not provide for retroactive application of section 7522.72. The Proposed Decision further notes that, "Complainant does not argue that section 7522.72 can be retroactively applied; in fact, *Complainant does not urge application of section 7522.72 at all.*" (*Id.*, p. 8, ¶ 11B, emphasis added.) The reason Complainant does not argue that section 7522.72 should be retroactively applied appears clear and also well founded. It is settled that pension rights may not be retroactively changed to the material detriment of the pensioner. *See, Wallace v. Fresno* (1954) 42 Cal.2d 180, 185 (holding that an amendment to a pension plan purporting to retroactively terminate pension rights of police officers based on their felony convictions after retirement was not a reasonable modification of the plan and was therefore invalid).

Bonelli v. State of California (1977) 71 Cal.App.3d 459 similarly struck down an attempt to retroactively impose a forfeiture of pension benefits even in the face of admitted wrongdoing by a public official. Bonelli, a member of the State Board of Equalization, was indicted for accepting bribes, promptly fled to Mexico and died while still a fugitive. His widow filed a claim for survivor benefits. The Court of Appeal assumed Bonelli had received the bribes. Nevertheless, in reliance on settled California law, the Court held that once a public employee becomes eligible for retirement his right to a pension cannot be destroyed

retroactively even though “he is subsequently removed from office for his own misconduct.” *Id.*, at 465-6. Here, of course, Respondent was not removed from office. He retired before he was convicted.

Thus, Claimant obviously did not urge retroactive application of section 7522.72 because such an argument would have exposed PEPR to being held invalid under these settled principles.

Finally, for these additional reasons set forth in the Proposed Decision, the expungement order issued in 2012 effectively expunged Respondent’s convictions: (1) Complainant’s claim that expungement does not release a person from “civil” penalties is without merit; (2) “preclusion” from public employment does not apply here (*Id.*, ¶ 12B); and (3) “preclusion” from public employment to protect the public does not apply here. (*Id.*, ¶¶ 12C and D.)

The Proposed Decision correctly concludes that for all of these reasons, “Respondent established by a preponderance of the evidence that he is released from the penalty and disability imposed by the forfeiture provision of section 7522.70 as a result of his conviction being expunged in 2012 pursuant to Penal Code section 1203.4. As his pension rights and benefits are not subject to forfeiture, *none* of the reductions to his pension rights and benefits proposed by PERS are warranted. (Factual Findings 1-24.)” (*Id.*, p. 10, ¶ 13, emphasis added.)

II. The Perjury Conviction Was Not a Crime “Arising Directly Out of” Respondent’s Official Duties.

The Proposed Decision impermissibly expands the scope of the explicit, facially-clear language of Govt. Code section 7522.70. The Proposed Decision recognizes that “Respondent’s argument under section 7522.70 *has some merit on its face . . .*” (P. 7, ¶ 7. Emphasis added.) But the Proposed Decision then fails to follow the plain language of the statute.

Mr. Malburg was convicted of perjury in falsely stating that his son “lived at 3384 E. 50th Street, Vernon.” Proposed Decision p. 3, ¶ 13. That statement did not arise “directly out of his or her official duties as an elected public officer . . .”, as required by section 1243 (now section 7522.70(b)). Mr. Malburg *had no official duty* to state where his son lived.

Section 7522.70 applies only to the crimes specifically enumerated in subdivision (b) – including perjury – and only if the commission of the crime arose “*directly out of his or her official duties as an elected public officer . . .*” (Emphasis added.) The language could not be more plain: the crime listed in

subdivision (b) must arise not only out of the officer's "*official duties*", but also "*directly*" out of those official duties. (Emphasis added.) The Proposed Decision holds that the language "arising *directly* out of a public official's official duties," *should not be as narrowly interpreted* as Respondent suggests. (P. 7, ¶ 7, emphasis added.) Instead, in paragraph 7 the Proposed Decision *broadens* its interpretation to include commission "*in the process* of being re-elected to City Council. . . ." (*Id.*, emphasis added.) Thus, the language "arising *directly*" becomes "arising *in the process.*" (Emphasis added.)

In paragraph 8, the Proposed Decision further expands the language of section 7522.70(b): there "arising *directly*" becomes arising "*related to*" the official's official duties. (Emphasis added.)

In paragraph 9, the Proposed Decision again broadens the statutory language: here the Proposed Decision states that, "the requirement that a qualifying crime is one '*arising directly* out of' the duties of an elected public officer should be *more generally construed* as meaning the crime has a *reasonable connection* with the public official's position." (Emphasis added.)

Substituting these various phrases for the specific language of the statute distorts the statutory language beyond recognition. The language of section 7522.70(b) is not ambiguous, and the Proposed Decision does not find that the language is ambiguous. "If the language is unambiguous, the Legislature is presumed to have meant what it said and the plain meaning of the statute governs." *Hunt v. Superior Court* (1999) 2 Cal.4th 984, 1000; *Ohio Pub. Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself"). "In the construction of a statute. . . the office of the judge is simply to ascertain what is in terms or substance contained therein, not to insert what has been omitted or omit what has been inserted." *Ardon v. City of Los Angeles* (2014) 232 Cal.App. 4th 175, 182, citing *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274.

Moreover, the California Constitution in section 17(b) requires that a pension system be construed *solely to provide benefits*:

The members of the retirement board of a public pension or retirement system shall discharge their duties *solely in the interest of, and for the exclusive purposes of providing benefits* to participants and their beneficiaries. . . . (Emphasis added.)

The Proposed Decision, by expanding the clear statutory language of section 7522.70(b), does not recognize or comply with this guiding principle of construction.

Section 7522.70(b) in plain language requires that forfeiture of pension benefits be allowed only for commission of a crime "*arising directly out of* the official duties of a public official. (Emphasis added.) This language is clear, not ambiguous and it must be strictly followed. It does not say that the qualifying crime be committed "in the process of being re-elected," or "in connection with his re-election," or "related to his being re-elected," all phrases the Proposed Decision substitutes for the statutory language "*arising directly out of.*" (P. 7, ¶¶ 7,8.) Nor does construing the language "more generally" comply with the Constitutional command that members of a pension system "*shall discharge their duties solely* in the interest of, and for the *exclusive purposes of providing benefits* to participants and their beneficiaries." (Calif. Const. Sec. 17(b), emphasis added.)

Finally, the Proposed Decision erroneously reasons that "[c]onstruing section 7522.70 as Respondent suggests would lead to the absurd result outlined above, i.e., Respondent could commit a crime *related to* his being elected to office, be disqualified from continuing to serve in office, disgorge his compensation earned while serving in office after his crime and yet continue to increase his pension benefits after committing his crime." (P. 7, ¶ 9, emphasis added.) That result could only be termed "absurd" under these circumstances: (1) if the plain statutory language is broadened by defining the qualifying crime not as the statute does – one "*arising directly out of his official duties*" – but by *expanding* the scope of the language by substituting for the statutory language phrases not in the statute such as "in the process of being reelected," "in connection with his reelection," or "related to his being re-elected;" and (2) by hypothetically assuming Respondent could "be disqualified from continuing to serve in office," ignoring the fact that *Respondent retired* from office on July 1, 2009 *before* he was convicted on December 4, 2009.

Section 7522.70 provides a specific standard defining the conduct that may result in pension forfeiture. Not just any electoral conduct qualifies. Only conduct arising directly out of official duties complies. This *official-duty standard* is clear and specific. It should be applied.

Mr. Malburg was convicted of falsely stating that his son "lived at 3384 E. 50th Street, Vernon." Proposed Decision p. 3, ¶ 13. This was not conduct "arising

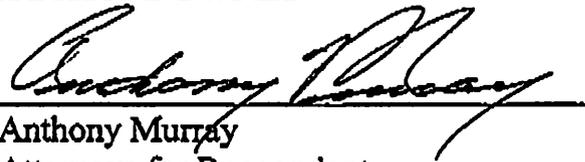
directly out of his official duties"as a Vernon council member. Mr. Malburg had no official duty to state where his son lived.

CONCLUSION

For all of these reasons, Respondent asks that the Board affirm the ORDER of the Proposed Decision that "PERS shall not reduce [Respondent's] pension rights and benefits as proposed in its letter dated February 18, 2014."

Dated: March 6, 2015

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PROOF OF SERVICE

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Executed on March 6, 2015, at Los Angeles, California.


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