

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT PROPOSED DECISION

Respondent David L. Wheeler (Respondent Wheeler) was employed by Alameda County Fire Department as an Assistant Fire Chief. By virtue of this employment, Respondent Wheeler is a local safety member of CalPERS. On or about October 30, 2006, Respondent Wheeler signed an application for service retirement. Respondent Wheeler retired for service effective December 27, 2006, and has been receiving his retirement allowance from that date. On or about September 1, 2007, Respondent Wheeler applied for and was hired by the Loomis Fire Protection District (Respondent District, or "District") as a Fire Chief pursuant to a series of written agreements. The District is a public agency which contracted with CalPERS for retirement benefits for its eligible employees (local safety firefighters and miscellaneous), effective September 11, 2010. Respondent Wheeler continued working as the Fire Chief for the District until his resignation, effective December 31, 2013. Respondent Wheeler acted as the liaison with CalPERS during the District's negotiations to contract as a participating CalPERS employer, and was the drafter of the series of his own employment agreements with the District.

On December 22, 2010, CalPERS notified Respondent Wheeler that, because of the new contract between the District and CalPERS, he must either immediately resign from his position with the District or reinstate into membership. On January 17, 2011, Respondent Wheeler indicated to CalPERS staff that he did not wish to reinstate and that the District had not yet retained a replacement Fire Chief. Further, that he understood that he would be allowed to run out his then-existing contract (which at that time had already expired). He had also previously indicated verbally to staff that he and the District believed his position as Fire Chief was excluded from the 2010 CalPERS contract for pension benefits. No mention of this contention was raised in Respondent Wheeler's letter of January 17, 2011.

Commencing March 2013, CalPERS' Office of Audit Services (OAS), conducted an agency audit of the District and determined that Respondent Wheeler was still employed by the District and that his employment violated the California Public Employees' Retirement Law (PERL). Following the audit, on January 8, 2014, the District was sent a determination letter stating that Respondent Wheeler had been employed in violation of the post-retirement provisions of the PERL. Specifically, his position was not excluded from the fire safety classification included in the pension contract with CalPERS, and he did not meet any statutory exception to the prohibition of working while in a retired annuitant status. Respondent Wheeler was told he was required to reinstate into membership and reimburse CalPERS for retirement benefits received from September 2010 to the date of his resignation with the District, December 31, 2013. In this same letter, Respondent Wheeler and the District were notified of their appeal rights. The District and Respondent Wheeler filed timely appeals and requested an administrative hearing.

The matter was heard by an Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH) on October 8, 9 and 10, 2014 and April 13 and 14, 2015. The appeal was limited to the issue of whether Respondent Wheeler's post-retirement

employment with the District was in violation of the PERL and Respondents' defenses thereto. Respondent Wheeler and the District were represented by legal counsel at all times during this appeal.

CalPERS contended that Respondent Wheeler's employment with the District after September 11, 2010 violated the PERL for the following reasons:

(1) Respondent Wheeler's employment in a permanent position as the District's Fire Chief was not authorized under the "working after retirement" statutes. Because the work performed as Fire Chief was permanent and not of limited duration, it did not meet the requirements of Government Code sections 21221¹, 21224² and 7522.56(c).³ At the time of the CalPERS audit, Respondent Wheeler continued to work as the District's Fire Chief and had done so continuously, without any break in service, for over five years, despite the fact that some employment agreements indicated he was performing a temporary assignment not to exceed one year.

(2) Contrary to Respondent Wheeler's assertions, his position of Fire Chief was not excluded from the pension contract between the District and CalPERS effective September 11, 2010. His position could not have been excluded even if the District had wanted to, because the PERL does not allow an employer to provide retirement benefits to some, but not all, members of his membership classification. (Gov. Code section 20479) Respondent Wheeler's position as Fire Chief falls under the definition of a "local firefighter" included in Government Code section 20433 and if local firefighters as a class are covered by the contract, all individuals within that membership classification must be included in the contract, as required by Government Code section 20479.

During the hearing, oral and documentary evidence was presented, including testimony by Respondent Wheeler, a member of the District's Board, other District staff and CalPERS staff. The testimony established that, at all pertinent times, Respondent Wheeler served as the liaison between the District and CalPERS in the negotiation of the pension contract between the District and CalPERS in 2010. Therefore, he had intimate knowledge of its provisions. The testimony also established that Respondent Wheeler personally drafted each of his employment agreements with the District.

¹ Gov. Code section 21221, as amended in 2012, addresses situations when a retired person may serve without reinstatement from retirement or loss or interruption of benefits provided by CalPERS. Under subd.(h), which is the only provision that could possibly apply to Respondent Wheeler's employment, among other things, the appointment must be filled during recruitment for a permanent appointment and must require specialized skills or be during an emergency to prevent stoppage of public business. A retired person shall only be appointed once to this vacant position.

² Gov. Code section 21224 requires that the appointment of a retired person be made either during an emergency to prevent the stoppage of public business or because the retired person has specialized skills needed in performing work of limited duration.

³ Similarly, Gov. Code section 7522.56(c) (included in PEPR) provides that a person who retires from a public employer may serve without reinstatement from retirement or loss or interruption of benefits provided by the retirement system upon appointment by the appointing power of a public employer either during an emergency to prevent the stoppage of public business or because the retired person has skills needed to perform work of limited duration.

In a letter dated January 17, 2011, just days before executing a further employment agreement on February 9, 2011, Respondent Wheeler wrote a letter to CalPERS staff stating that he understood that he would be allowed to complete the remaining three months of his contract which expired December 31, 2010, as a "retired annuitant." In that letter, Respondent Wheeler also stated the District had "not filled the position of Fire Chief and has retained my services as a temporary employee...for a period not to exceed one year." Respondent Wheeler did not mention in that letter his contention that the position was excluded from the District contract with CalPERS.

On February 9, 2011, the District and Respondent Wheeler entered into a retroactive employment agreement which changed substantively only in that it now was captioned as: "Agreement for Temporary Professional Services for Fire Chief." The agreement recited that Respondent Wheeler accepted "temporary employment" with the District and would work for the District for a period not to exceed one year commencing January 1, 2011, and would work no more than 960 hours per fiscal year in accordance with "Government Code section 21224."

On September 12, 2012, retroactive to January 1, 2012, the District and Respondent Wheeler entered into another "Agreement for Temporary Professional Services for Fire Chief" effective January 1, 2012, similar to that of January 1, 2011. The agreement again recited that the employment was pursuant to section 21224.

On February 13, 2013, Respondent Wheeler and the District executed another one-year employment agreement commencing January 1, 2013. The ALJ found significant that in this agreement the Respondents recited that the position of Fire Chief was "not included" in the CalPERS contract and that it specifically stated that Government Code section 21244 "does not apply."

The ALJ found that, pursuant to pertinent provisions of the PERL, the position of Fire Chief was covered and could not be excluded from coverage by the District's agreement with CalPERS. The ALJ did not make a finding that CalPERS had misrepresented any pertinent fact to Respondents. In fact, the ALJ referenced the fact that Ron Gow, a senior staff member of CalPERS Membership Analysis and Design Unit, had personally contacted by telephone and informed Respondent Wheeler that his position as Fire Chief for the District was not excluded from membership. The ALJ noted the testimony of a Staff Program Evaluator with the OAS who testified that CalPERS held an "entrance conference" with the District in March 2013. The entrance conference was attended by Respondent Wheeler and the District's secretary, Barbara Leak.

The Staff Program Evaluator was provided no documents indicating that the District had been recruiting for a replacement for Respondent Wheeler. However, as disclosed at the hearing, minutes of a District meeting on June 12, 2012, show that Respondent Wheeler was aware that, as a result of changes in the PERL, he would be required to resign his position as Fire Chief. The ALJ concluded that the minutes made it "clear that [Wheeler] had not been forthright" in his earlier representations to CalPERS staff.

After considering the testimony and documentary evidence, the ALJ held that Respondent Wheeler was a "local firefighter" as that term is defined under the PERL

and that the contract between the District and CalPERS did not exclude the position of the Fire Chief. The ALJ also found that Respondent Wheeler knowingly worked in CalPERS covered employment while also receiving retirement benefits from CalPERS after December 31, 2010, in violation of the PERL. Therefore, he ordered Respondent Wheeler to repay all retirement benefits he received after December 31, 2010. The ALJ concluded that permitting Respondents to draft their contracts to subvert the clear public policy contained in the laws on retired annuitants would elevate mere form over the legal substance. Thus, the ALJ concluded that Respondents' appeals must be denied and that Respondents are subject to all requirements of section 21220, subdivision (b). These include paying all applicable employee and employer contributions owed after December 31, 2010, and administrative expenses.

Pursuant to Government Code section 11517(c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." In order to avoid ambiguity, staff recommends that the Board modify the Proposed Decision by replacing the name "Barbara Leak" with the name "Liz Burke" on page 14, paragraph 39, line 1.

The Proposed Decision is supported by the law and the evidence. Staff argues that the Board adopt the Proposed Decision, as modified.

Because the Proposed Decision properly applies the law to the salient facts of this case, the risk of adopting this decision is minimal. The member and employer may file a petition for writ of mandate to seek judicial review of the decision of the Board.

October 21, 2015



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