

ATTACHMENT C
RESPONDENT'S ARGUMENT

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8 **CALPERS BOARD**

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| <p>10 Loomis Fire Protection District, Dave Wheeler 11 Respondents,</p> |) OAH Case No.:2014020769 Ref No. 2014-0152) RESPONDENT'S ARGUMENT) Date of Hearing: 10/21/2015 |
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15 I.

16 **INTRODUCTION**

17 If the CalPERS Board upholds the ALJ's proposed decision, they will be destroying the life
 18 of a decorated retired firefighter who has risked his life serving his local community as well as the
 19 entire Country. Respondent, Dave Wheeler worked for the Alameda County Fire Department and
 20 repeatedly risked his life including responding to the 9/11 World Trade Center Attack and the
 21 Hurricane Katrina disaster in New Orleans. While most people fled from these disasters, Wheeler
 22 saw it as his duty and calling to go and help those most in need even if it meant risking his own life.

23 If this Board upholds the ALJ's proposed decision, they will be forcing Wheeler to pay back
 24 almost half a million dollars in retirement benefits. In addition, if CalPERS staff has its way,
 25 Wheeler may also be losing his lifetime health benefits. What is most abhorrent about this proposed
 26 decision is that it conceals and ignores all of the errors and mistakes committed by CalPERS staff
 27 that was established at the hearing. CalPERS staff has made Wheeler and the Loomis Fire
 28 Protection District as scapegoats to hide their own incompetence and mistakes.

1 We urge this Board to carefully review the facts of this case as you hold Wheeler's future in
2 your hands. The evidence presented at the hearing demonstrated that any violations that occurred
3 were the direct result of errors and omissions caused by CalPERS staff. Neither Wheeler nor the
4 Loomis Fire Protection District should be punished and penalized for these mistakes. Respondents
5 respectfully ask this Board to reject the ALJ's proposed decision and enter a decision relieving
6 Respondents of any repayments that are owed since these were caused by CalPERS staff errors.
7 Alternatively, Wheeler and the Loomis District ask this Board to conduct a full hearing so that they
8 can hear the facts for themselves and make fair and impartial decision.

9 **II.**

10 **STATEMENT OF FACTS**

11 Respondent, Dave Wheeler retired after 28 years of service as an Assistant Chief from the
12 Alameda County Fire Department. During his time with Alameda County, Wheeler volunteered to
13 protect and serve in response to local, state and national catastrophes including the World Trade
14 Center 9/11 attack and the Hurricane Katrina disaster in New Orleans. While at the World Trade
15 Center, Wheeler served as the California Task Force leader for 62 personnel. In New Orleans,
16 Wheeler served as the operations section chief for all of the FEMA urban search & rescue task force.
17 Wheeler also served on the State incident command team for 7 years, responding state disasters.

18 After retiring from Alameda County, Wheeler moved to the Sacramento region. In 2007,
19 Wheeler learned after reading an article in the newspaper that the Loomis Fire District was going
20 broke and was considering dissolving. Wheeler stepped forward to help try and save the Loomis
21 Fire Department. When Wheeler first started working for Loomis Fire Protection District, the
22 Loomis firefighters did not have CalPERS retirement benefits. As a result of the low wages and lack
23 of retirement benefits, the turnover rate for the Loomis firefighters was high. Wheeler recognized
24 that having a high turnover rate posed a safety risk to the Fire Department and the Community as a
25 whole.

26 In order to help retain firefighters and also improve their benefits, Wheeler spear headed the
27 Department's efforts to obtain CalPERS retirement benefits for the firefighters. From the time
28 Wheeler commenced working for the District in 2007 up until the day that the District entered into a

1 contract with CalPERS for retirement benefits for its firefighters, the District was not a CalPERS
2 entity and Wheeler was not subject to the CalPERS rules for retired annuitants. If the District had
3 never entered into the contract with CalPERS, Wheeler would never have had restrictions or
4 limitations on the hours he could work or the amount of compensation he could receive. Had the
5 District never contracted with CalPERS, we would not be here today with Wheeler's future
6 livelihood at stake.

7 CalPERS Mistakes Before the Contract was Entered

8 In October of 2008, the District through Wheeler contacted CalPERS to inquire about the
9 possibility and cost of obtaining retirement benefits for the Loomis Firefighters Association
10 members. The Association consisted of Firefighter II, Engineers, and Captains totaling 6 employees.
11 As part of these discussions, both the District and Wheeler did not want the Fire Chief position to be
12 included in CalPERS retirement contract.

13 In October of 2008, Wheeler contacted CalPERS and was instructed to submit a new agency
14 questionnaire requesting CalPERS conduct an actuarial to determine the cost of enrolling
15 Association members into CalPERS. In the questionnaire, Wheeler expressly stated in writing that
16 the District wanted to exclude the fire Chief position from any agreement with CalPERS. Wheeler
17 also had telephone conversations with CalPERS staff informing them the District did not want to
18 include the fire chief position. No one from CalPERS ever told Wheeler or the District that their
19 request to exclude the Chief was not possible. In December of 2008, CalPERS sent a letter to
20 Wheeler identifying the positions of Firefighter II, Engineer, and Captain as the positions eligible for
21 safety membership in CalPERS. Since the letter did not reference the Fire Chief, Wheeler and the
22 District believed that CalPERS was excluding the Fire Chief position as they requested. During the
23 hearing before the ALJ, the evidence clearly showed that CalPERS staff committed an error by not
24 identifying the Fire Chief in this letter sent to Wheeler.

25 Following receipt of the letter, CalPERS sent Wheeler and the District two separate actuarials
26 reflecting the costs for retirement benefits for the firefighters. The actuarials only covered the
27 Firefighter II, Engineer, and Captain positions and did not cover the Fire Chief. This further led
28 Wheeler and the District to believe that the Fire Chief position was being excluded. The District

1 decided to proceed forward with entering a contract with CalPERS to provide retirement benefits for
2 its firefighter II, Captain and Engineer positions only. An election was held to determine whether
3 the Association members wanted CalPERS retirement. Wheeler did not vote since neither he nor the
4 District believed his position would be covered. On September 8, 2010 the District entered into a
5 contract with CalPERS for retirement benefits for its firefighters.

6 Throughout the process leading up to the execution of the contract, the District and Wheeler
7 had numerous communications with CalPERS staff about the process. The District and Wheeler
8 repeatedly expressed their desire to CalPERS staff both verbally and in writing that they wanted to
9 exclude the Fire Chief position. The evidence at the hearing before the ALJ confirmed that no one
10 from CalPERS ever corrected or informed Wheeler or the District that the Fire Chief position would
11 in fact be covered by the CalPERS contract.

12 CalPERS Mistakes After the Contract was Entered

13 More than two months after the contract was signed, CalPERS retirement specialist Liz
14 Burke sent Wheeler a letter telling him he either needed to resign or reinstate into active duty.
15 During the hearing, Burke admitted this letter should have been sent to Wheeler several months
16 before the contract was signed to give Wheeler time to decide what to do. In the letter, Burke also
17 explained how Wheeler could work as a retired annuitant pursuant to Government Code § 21224.
18 Wheeler sent a letter back to Burke advising her that he did not want to reinstate into active duty and
19 he would continue working under section 21224. Burke never responded to Wheeler's letter.

20 At the hearing, Burke admitted that Wheeler could not have worked as a retired annuitant
21 under section 21224 even though she had erroneously advised him in her letter that he could so.
22 Burke also admitted she never contacted Wheeler after receiving his letter to correct his
23 misunderstanding that he could work under section 21224.

24 III.

25 ARGUMENT

26 **A. THE ALJ'S DECISION COMPLETELY IGNORES THE MISTAKES COMMITTED**
27 **BY CALPERS STAFF AND THE ALJ FAILED TO APPLY GOVERNMENT CODE**
SECTION 20160 TO RELIEVE RESPONDENTS OF REPAYMENTS.

28 The ALJ's decision fails to address the applicability of Government Code section 20160.

1 Government Code section 20160 authorizes the CalPERS Board to correct errors or omissions of a
2 member or its employees affecting retirement benefits. "The board may, in its discretion and upon
3 any terms it deems just, correct the errors or omissions or any active or retired member." (Cal. Gov.
4 Code section 20160(a).). During the hearing, CalPERS staff admitted they have the authority to
5 change a reinstatement date to relieve an employee and an employer of repayments.

6 The evidence in this case is replete with examples of CalPERS errors and mistakes which
7 misled Respondents into believing that: One (1) the Chief's position was excluded from the
8 CalPERS contract and two (2) that Wheeler could continue working as a retired annuitant pursuant
9 to Government Code section 21224. The ALJ's decision ignores all of these facts which provides a
10 basis for relieving respondents of having to repay CalPERS.

11 Throughout the application process Respondents repeatedly asked to exclude the fire chief
12 from the CalPERS contract. Before the contract was signed CalPERS never told Respondents that
13 this request was improper. Rather, CalPERS did the opposite sending actuarials and safety
14 determinations to Respondents showing that the CalPERS chief was excluded.

15 Even after the contract was signed, CalPERS staff continued making mistakes to the
16 detriment of Respondents. CalPERS sent a letter to Wheeler explicitly stating he could work under
17 Government Code section 21224. Yet the author of this letter admitted that Wheeler could not work
18 under this section. Wheeler relying on this incorrect CalPERS letter sent a written response to
19 CalPERS stating he planned to work under section 21224. The CalPERS expert received Wheeler's
20 letter, knew Wheeler's understanding was wrong and chose not respond to him to correct this
21 misunderstanding. The ALJ ignored all this evidence.

22 **B. THE JUDGE IGNORED THE TESTIMONY OF THE CALPERS RETIREMENT**
23 **EXPERT WHO OPINED THAT NO VIOLATION COULD HAVE OCCURRED**
PRIOR TO SEPTEMBER 9, 2011.

24 During the hearing, Liz Burke the CalPERS retirement expert admitted and opined that no
25 violation occurred with Wheeler's employment until September 9, 2011 when he continued working
26 for the District. As such, according to CalPERS' own expert, no violation occurred from September
27 9, 2010 to September 8, 2011. Yet inexplicably, the ALJ's decision is requiring repayment by the
28 Respondents from January 1, 2011. The ALJ completely ignored and disregarded the opinion from

1 the CalPERS expert. At a minimum, the Board must modify the ALJ decision consistent with its
2 own expert's opinion.

3 **C. THE ALJ'S DECISION ONLY ORDERS REPAYMENT OF RETIREMENT**
4 **BENEFITS PAID AND DOES NOT ORDER WHEELER TO FORFEIT HIS**
5 **LIFETIME HEALTH INSURANCE.**

6 After the proposed ALJ decision was rendered, Wheeler was advised he would also forfeit
7 his lifetime health insurance through Alameda County. Nothing in the ALJ's decision required this
8 draconian order. Respondents request that the Board not revoke Wheelers health insurance.

9 **IV.**

10 **CONCLUSION**

11 Wheeler spent his whole career serving and protecting others. After retiring, Wheeler
12 continued serving others when he helped obtain retirement benefits for the Loomis Firefighters. If
13 Wheeler only wanted to continue receiving his retirement pay and pay from the District all he would
14 have had to do is prevent the Loomis firefighters from joining CalPERS. Instead, he did the
15 opposite. This clearly reflects what Wheeler's actual intentions were from the beginning. Wheeler
16 was not trying to take advantage of the system and was not trying to unlawfully receive retirement
17 pay. Wheeler was trying to improve the working conditions for the Loomis Firefighters.

18 We urge this Board to carefully look at the facts in this case and not ignore the clear mistakes
19 committed by CalPERS. We ask this Board to treat Respondents fairly and justly and not to punish
20 and ruin them for things that were outside their control. We request that this Board, relieve
21 Respondents of any repayment obligations. Alternatively, we ask that this Board order a full hearing
22 be held before them to review all the facts.

23 **RESPECTFULLY SUBMITTED.**

24 **DATED: October 9, 2015**

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Received

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CalPERS Board Unit