August 26, 2017

CalPERS Board of Administration
P.O. Box 942701
Sacramento, CA 94229-2701

SUBJECT: Petition for Reconsideration

Dear Board Members:

In the Matter of the Appeal Regarding Membership Eligibility of PETER J. WESSEL, Respondent, and CITY OF THOUSAND OAKS, Respondent, please reconsider the following and remand the subject case back to the Office of Administrative Hearings for the taking of further evidence.

- Mid-hearing, CalPERS caused a change in the Respondent's evidence needed;
- Respondent had previously dismissed a partial sample of that evidence as unnecessary;
- That evidence had not been fully developed as it had been previously unnecessary;
- That evidence is readily available and decisive; and
- The proposed decision was decided without an opportunity to address the changed circumstances caused by CalPERS.

CalPERS changed the facts needed mid-hearing. Those facts have yet to be demonstrated and I ask that you allow me to do so. Attached, for reference, is my original argument to the Board. Thank you for your time and reconsideration.

Very truly yours,

Peter J. Wessel

ec: CalPERS Executive Office Fax (916) 795-3972, c/o Cheree Swedensky, Assistant to the Board
Matthew G. Jacobs, General Counsel, Fax (916) 795-3659
August 26, 2017

Via mail and email

Marybel Batjer, Secretary
Government Operations Agency
915 Capitol Mall, Suite 200
Sacramento, California, 95814

SUBJECT: Lack of Explanations and Unwillingness to Assist - CalPERS

Dear Ms. Batjer:

With "transparency" being one of the buzzwords of modern government, I'm not finding transparency or responsiveness with my interactions with CalPERS on my membership determination for additional service credit. I am respectfully requesting that you step-in and provide me with assistance and a response.

Attached, please find correspondence for which there have been "no explanations" from CalPERS. I suspect that CalPERS believes unexplained denials are sufficient. Must explanations come from the Superior Court? This is overly burdensome for an individual respondent if attempting to foster a transparent environment.

This determination would not have been sent to hearing if CalPERS had been following the legal analysis they introduced at the hearing. That analysis, written by former CalPERS CEO Anne Stausboll, would have had the CalPERS Office of Audit Services looking closely at the City of Thousand Oaks' practices prior to making a determination. I am simply looking for that opportunity, but the CalPERS Board has denied this without explanation.

For your information, the method CalPERS used to make the original determination was statements supplied and attested to by the City of Thousand Oaks. The City has a vested interest in membership denial due to their own fiscal impact. CalPERS hasn't done any of the investigation suggested in the Stausboll analysis nor as alleged as violations of State statute in my inquiries from "day
'one' several years ago. The more I learned, the more convicted I have become that there are no efforts being made to look at this with a critical eye or cooperatively.

I have a final opportunity on my denial with the CalPERS Board at their September meetings. I am hoping they will remand my case back to the administrative law judge to allow me to do what they have been unwilling to do—additional difficult work and oversight. If someone doesn't do it, the employer abuse will continue. It's time to end "contract hourly exclusions", a relic from the 1960's that are no longer necessary with current law.

This appeal has been a difficult and disappointing process for me and I appreciate your assistance on this matter. I simply want the opportunity to prove my case. I have been excluded from additional service credit unfairly. I thank you very much for your time.

Very truly yours,

Peter J. Wessel

cc: Governor Jerry Brown, c/o State Capitol, Suite 1173, Sacramento, CA 95814
    Marcie Frost, Chief Executive Officer, CalPERS, P.O. Box 942701, Sacramento, CA 94229-2701
    ec: Marcie Frost, marcie.frost@calpers.ca.gov
July 22, 2017

CalPERS Board of Administration
P.O. Box 942701
Sacramento, CA 94229-2701

SUBJECT: Respondent PETER J. WESSEL's Argument to Remand the Case

Dear Board Members:

In the Matter of the Appeal Regarding Membership Eligibility of PETER J. WESSEL, Respondent, and CITY OF THOUSAND OAKS, Respondent, please consider the following causes and relevance to remand the subject case back to the Office of Administrative Hearings for the taking of further evidence.

1. Foreseeable and Unfair Controversy Regarding the Dismissal and Introduction of Key Evidence in Hearing

CAUSE: Upon my initial cross-examination of CalPERS witness Jamila Nelson on a key piece of evidence in support of my position (CalPERS Circular Letter 800-151, dated November 18, 1994), CalPERS counsel Mr. Phillips interjected that the evidence had been rescinded. I objected to his motion to strike the evidence due to its magnitude and because Mr. Phillips had accepted the evidence and was delivered said Circular Letter in discovery. My opposition was overruled by Judge Reyes and he allowed for the record to be left open on a possible "replacement memo", but only as to the topic of current questioning. No subsequent evidence, testimony, questioning, or argument for any of the topics to be concluded during that day would be allowed. Following this, the replacement memo was provided by Mr. Phillips, accepted into evidence and the case closed on a rapidly alternating two-week schedule for each portion of written closing briefs.

RELEVANCE: At the beginning of the hearing, I agreed to dismiss many items of evidence as I believed the Circular Letter was clear and convincing evidence of an improper membership exclusion. The "replacement memo" (CalPERS Legal Memorandum from Anne Stausboll to Gary M. Jones dated August 15, 1995) is a post-hearing comprehensive internal legal analysis that newly
introduced and further corroborated a topic that I had already raised in emails even prior to the formal CalPERS denial, namely that the City disguises a prohibited exclusion of temporary and seasonal employees as an "hourly exclusion".

While the dismissed evidence strongly favored my argument, the replacement evidence does as well, but in a different manner. Had that evidence been available as it should have during discovery, my overall argument would have been dramatically different and my evidence gathering and questioning would have been dramatically different.

The "new", post-hearing topic text in support of my case is (page 15, Stausboll Legal Memo). Any sections described as follows have again been re-numbered in bold text by me for clarity as shown in current law.

"C. If An Hourly Exclusion Is Being Used to Circumvent the Statutory Prohibition on Exclusions of Irregular Employees, The Exclusion May Be Superseded By Section 20334 [current section 20305]."

As originally enacted, section 20334 (formerly section 20336) [current section 20305] provided that no contract or contract amendment entered into after January 1, 1975 could exclude a provision that excluded temporary and seasonal employees. The statute was later amended and provided that a contract or amendment entered into after January 1, 1981 could not exclude irregular employees.

A contract provision that is in violation of a statutory provision is void. (Civ. Code secs. 1599 and 1667. [unknown if sections are current]) Therefore, in our opinion, if an hourly exclusion was included in a public agency contract as a means of circumventing section 20334 (former section 20336) [current section 20305], it would be void. In that situation, the hourly exclusion may actually be a temporary and seasonal (or irregular) exclusion "in sheep's clothing."

Such situations, if brought to light, would need to be analyzed on a case-by-case basis. It is possible that the sheep's-clothing logic might not apply, for example, even though only the agency's temporary or seasonal employees are paid hourly. Under that scenario, the agency may have properly applied its hourly exclusion. (An analogous situation would involve an exclusion for "lifeguards," all of whom are temporary employees.)
 Respondent WESSEL's Argument to Remand the Case

We do not know whether the "sheep's clothing" scenario described above has actually occurred. If staff believe that this is in fact an issue, we recommend that some type of survey or audit be conducted.

Furthermore (Page 20, top):

"Section 20334(a)(3) [current section 20305(a)(3)] may also be controlling, depending upon all the circumstances, if an employer uses an hourly exclusion to circumvent the statutory prohibition on temporary and seasonal contract exclusions."

At the hearing, prior to the revelation of this information, one of many items I had agreed to dismiss were 39 samples of "Notice of Exclusion from CalPERS Membership" forms requested randomly out of the total 243 hourly City employees listed in the Transparent California 2015 data (I am incredibly grateful to Mr. Chiang for some very valuable information that is otherwise very difficult to obtain).

What is shown on this random sample of "hourly employees" is that none of the 39 notice forms list any permanent part-time or temporary full-time (or seasonal full-time) employees. Either the "temporary" term of appointment was selected or it was blank. The same was true for time base, either part-time was checked or no time base was selected at all.

This works entirely against Mr. Phillip's closing argument statement that "[i]n order for respondent Wessel to meet his burden of proof and prevail in his appeal, he would need to demonstrate that the City, in its application of the hourly exclusion, uses the exclusion to improperly target only temporary and seasonal employees, thereby demonstrating that the hourly exclusion was merely pretext for an otherwise impermissible exclusion." As you can see from my closing arguments, I don't agree that the standard of proof is "only", but in the random sample I've already collected, that is the case. More investigation is needed on this topic.

Some questions arise: What measures and techniques of "survey and audit" decide if the contract exclusion is being used to circumvent section 20305 as I suggest? Is it appropriate to define those measures now or is it acceptable to define them after conducting a survey? Must "employees compensated on an hourly basis" be exclusively either temporary or seasonal to constitute a sham? I expect to bring strong evidence of "pretext/circumventing". What is the standard of proof?
Respondent WESSEL's Argument to Remand the Case

After the proposed decision was issued, I tried to discuss these questions with any supervisor for membership auditing so I would be prepared for writing this letter and getting a good start in resuming an arduous discovery if my request is granted. In my phone call to customer service, they would only allow me to speak with Mr. Phillips, which is not something I wanted to do prior to your consideration. My opinion is that an audit determination of measures and standards should be made by the Office of Audit Services (OAS) of what "pretext/circumvent" means prior to further review.

If you choose to remand, I would welcome that an audit or survey of the hourly exclusion be conducted by OAS so that it is done in a manner agreeable to CalPERS. It also saves everyone a tremendous amount of work and can be done much more efficiently and reliably by OAS.

If this cannot be directed by the Board, I expect to do an immediate and diligent discovery via multiple approaches. I believe there are several key indicators, but CalPERS has not stated any guidelines that I am aware of. I would appreciate any advance guidance on this to not waste the time of all involved.

2. Incorrect Factual Finding as to Regular Part-Time Employees

CAUSE: Factual Finding #8 is not supported by any direct evidence and any record testimony should be the subject of further review for admissibility. It states that "[t]he City employs some regular, part-time employees it compensates on an hourly basis". This review would also be in light of the events described above. Since the term "compensated on an hourly basis" can be vague, this type of evidence must be "tested against the PERL and PERS Public Agency Manual" (Stausboll Legal Memo). This has not been done, nor was an opportunity to examine the witness with advance proper discovery due to the events described in Item 1.

RELEVANCE: Factual Finding #8 is required for the Judge's legal conclusion. Legal Conclusion #5 informs the Judge's opinion that "[r]espondent's arguments about City misuse of the hourly compensation exclusion are unpersuasive."

3. Relevant Facts Regarding Designated Part-Time Employees Require Further Investigation

CAUSE: Direct written evidence was admitted to the record from the 2015-2017 General Employee’s Memorandum of Understanding (MOU) that
some Designated Part-Time employees, all of whom are “hourly paid”, remain enrolled in CalPERS.

RELEVANCE: While Factual Finding #4b, is still historically valid, the MOU evidence violates the City’s own interpretation of the exclusion. Again, further discovery is needed in light of the presentation of the Stausboll legal memorandum mid-case.

Conclusion

Current PERL section 20305 was passed as law through the Board’s guidance in 1994 to curb pension abuse. The CalPERS Hourly Exclusion Removal Project (HERP) followed shortly thereafter. Though HERP was a significant reform, it eventually resulted in an employer stalemate. Unfortunately the Board hasn’t taken action to eliminate this type of contract exclusion altogether. As a result, the City of Thousand Oaks uses the hourly exclusion to circumvent section 20305(b). I would have otherwise been enrolled due to prior membership.

Due to the causes and relevance detailed herein, I respectfully request the case be remanded to the Office of Administrative Hearings for the taking of additional evidence for a period of at least nine months. The reason for this duration is the large amount of research and questioning that will need to be done during additional discovery.

Also, on personal time limitations, my home is for sale and I expect to move twice in the next couple months. This appeal has been a difficult and disappointing process for me and I appreciate your assistance on this matter. I thank you very much for your time and consideration.

Very truly yours,

Peter J. Wessel

cc: CalPERS Executive Office Fax (916) 795-3972,
    c/o Cheree Swedensky, Assistant to the Board
cc: Beliz Chappuie, Chief, Office of Audit Services, CalPERS,
    P.O. Box 942701, Sacramento, CA 94229-2701
    Renee Ostrander, Chief, Employer Account Management Division, CalPERS,
    P.O. Box 942709, Sacramento, CA 94229-2709
    Carene Carolan, Chief, Member Account Management Division, CalPERS,
    P.O. Box 942709, Sacramento, CA 94229-2709
Date: 8/29/2017

From: PWA TransdeptAdmin

To: WESSEL - Petition for Reconsideration

Ms. Swedensky & Mr. Jacobs, Esq.,

Attached, please find my petition for reconsideration for the September Board agenda. Please acknowledge receipt of 8 pages not including any transmittal pages.

Best regards,

Pete Wessel

Note:
If any of these faxed copies are illegible, or you have not received the fax in its entirety, please contact us immediately.