ATTACHMENT A

THE PROPOSED DECISION

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BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding Post-Retirement Employment of:

DUDLEY J. LANG, Respondent

CITY OF INDUSTRY, Respondent

Case No. 2018-1112

OAH No. 2019020798

PROPOSED DECISION

Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 17, 2019, in Los Angeles.

John Shipley, Senior Attorney, represented the California Public Employees' Retirement System (PERS).

Brittany C. Jones, Esq., Martin & Venegas APC, represented Dudley J. Lang (respondent), who was present.

No appearance was made by or on behalf of the City of Industry (City).

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED August 8 20 19
LEA

The record was held open after the hearing for the submission of closing briefs, which were timely lodged and marked as follows: respondent's, exhibit F; PERS', exhibit 29. PERS also lodged an addendum closing brief on July 16, 2019, which was marked as exhibit 30. No objection was made, so exhibit 30 was considered. The record was closed and the matter submitted for decision on July 16, 2019.

SUMMARY

Respondent appeals PERS' determination that he engaged in unlawful post-retirement employment with his former employer, the City, which triggered his reinstatement to employment and the demand that he reimburse PERS the retirement benefits paid during the period of his purported unlawful employment.

However, it was established by a preponderance of the evidence that respondent had engaged in unlawful post-retirement employment by receiving hourly compensation greater than that allowed for a retired annuitant in his circumstances and by working more than the limit of 960 hours in one fiscal year. Respondent's argument was unpersuasive that a three-year statute of limitations prevents PERS from obtaining reimbursement of his retirement benefits received during the period of unlawful employment. Similarly, respondent is not entitled to the "error or omission" relief provided by statute, because he failed to make the kind of inquiry that a reasonable person would have made under similar circumstances.

Nonetheless, due process considerations prevent PERS from increasing the period of respondent's unlawful post-retirement employment by adjusting its commencement date one year earlier, i.e., January 4, 2011. Therefore, respondent is ordered to reimburse PERS $56,224.46, which is the remaining amount he owes of his retirement benefits received from January 4, 2012, through December 14, 2012.

FACTUAL FINDINGS

Parties and Jurisdictional Matters

1. On February 15, 2019, the Statement of Issues was filed on behalf of PERS in its official capacity. (Ex. 1.)

2. Respondent was employed by the City as City Controller. By virtue of his employment, respondent is a local miscellaneous member of PERS. Respondent had initially become a PERS member through his employment with the City of South Pasadena in 1964.

3. The City is a public agency that contracted with PERS, effective May 1, 1977, to provide retirement benefits for local miscellaneous employees. The provisions of the City's contract with PERS are contained in the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.) By way of its contract with PERS, the City agreed to be bound by the PERL, and to make its employees members of PERS subject to the PERL.

4. As discussed in more detail below, after retiring from service in October 2010 and beginning to receive his retirement benefit, respondent was hired by the City as a retired annuitant from January 4, 2011, through December 14, 2012. However, after PERS completed an audit of the City in 2016, it concluded that a portion of respondent's post-retirement employment violated provisions of the PERL.

5. By a letter dated January 25, 2018, PERS advised respondent and the City that it had determined some of his post-retirement employment with the City violated the PERL. Consequently, PERS determined respondent was subject to mandatory reinstatement for the period of unlawful employment, specified as January 4, 2012,

through December 14, 2012, and that respondent must repay all of the retirement benefits he received from PERS during that period. PERS also advised respondent and the City of their appeal rights. (Ex. 3.)

6. On February 23, 2018, respondent filed a timely appeal and requested an administrative hearing. (Exs. 4 & 5.) The record does not show whether the City did.

Respondent's Employment with and Retirement from the City

7. On June 1, 2008, respondent began working for the City as its Controller.

8. As Controller, respondent administered various municipal financial functions for the City and the Industry Urban Development Agency (IUDA). (Ex. 7.) The IUDA is not considered a separate entity, but rather a component unit of the City. Respondent's duties included supervising the City's and IUDA's accounting activities, redevelopment, bond issuance and maintenance. Respondent was, in effect, the City's financial advisor. (*Ibid.*)

9. Because respondent served both the City and IUDA, each contributed $10,000 per month to his salary, which totaled $20,000 per month and $240,000 annually. (Ex. 7.)

10. However, the City did not have a publicly available pay schedule for respondent's position. Through a resolution, which was publicly available, the City established the position of Controller with an annual salary range of $85,000-$120,000. Respondent admitted in his testimony during the hearing that while he was employed as Controller, there was no publicly available information concerning the additional $10,000 per month in salary he received through the IUDA.

11. On August 16, 2010, PERS received an application for service retirement from respondent. (Ex. 6.) Respondent retired for service effective October 1, 2010, and started receiving his retirement allowance on or around January 1, 2011.

12. A. PERS audited the City in 2011. The final audit report, issued on a date not established, concluded, in part, that respondent could not count the salary he received from both the City and IUDA as compensation earnable for purposes of calculating his retirement benefits; the compensation received from the IUDA was deemed to be beyond what was identified as his full-time work with the City and therefore considered to be overtime and not reportable to PERS. (Ex. 16, attach. D.1.)

B. In a letter he sent to PERS in the instant case, respondent described the result of the 2011 audit as follows: "A CalPERS Audit performed in 2011 . . . determined that my Redevelopment Agency pay was not usable 'overtime' pay and CalPers slashed my benefits in half. I accepted this ruling." (Ex. 16, p. 3.)

13. After respondent retired, and while considering whether to seek or accept post-retirement employment with the City, he read Publication 33, "A Guide to CalPERS Employment After Retirement" (January 2011), which read, in part:

> <u>CalPERS Employment in a Temporary Capacity</u>
>
> CalPERS approval is **not** required for temporary, limited-term employment as a retired annuitant. Eligibility requirements can vary depending upon whether you are retired for service, disability, or industrial disability, and your age at retirement. [Bold in original.]

Eligible retirees can work for a state agency[ ], university, public employer, or school employer contracted with CalPERS without reinstatement from retirement into active employment, if all of the following conditions are met.

- You have specialized skills needed to perform work of limited duration or your employment is needed during an emergency to prevent stoppage of public business.
- Your temporary employment will not exceed 960 hours in a fiscal year (July 1st through June 30th).
- The rate of pay received will not be less than the minimum nor exceed the maximum that is paid to other employees performing comparable duties.

[¶] . . . [¶]

<u>Eligibility to Work for a CalPERS Employer in a Temporary Capacity</u>

[¶] . . . [¶]

Note: *Temporary employment must not exceed the work limit of 960 hours per fiscal year. Both you and your employer are responsible for monitoring compliance with this work limit. If you exceed the work limit, both you and your employer will be held accountable for unlawful employment, the consequence of which can include mandatory reinstatement from retirement into active*

employment (membership) in the current position. [Italics added.]

Temporary vs. Permanent Employment

If your intention is to remain retired, you may only accept a temporary appointment as a "retired annuitant" with any CalPERS employer unless the employment is specifically allowed by law. If you are a safety member on service retirement, you must reinstate from retirement to accept a permanent position in a miscellaneous category.

Because many permanent part-time positions require less than 960 hours per fiscal year, there is often confusion about retiree employment in such positions. If you intend to work as a permanent employee with any CalPERS employer, even if the position requires less than 960 hours per fiscal year, the retirement law requires reinstatement from retirement into active employment. To ensure compliance, confirm with your prospective employer whether the position is a temporary or permanent appointment.

(Ex. 21, pp. 4-10.)

Respondent's Post-Retirement Employment with the City

14. After his former position went vacant for over two months, respondent sent a letter dated December 15, 2010 to the City Manager proposing he resume performing the Controller duties. (Ex. 7.)

15. Respondent's offer to resume his former duties as Controller was premised on the conditions that his post-retirement employment would be on a "temporary and part-time basis only;" his compensation would be no less than the minimum rate of pay that other employees would receive for similar and comparable duties; and his hours would not exceed the limit of 960 in a fiscal year. (Ex. 7.) Respondent concluded his letter by suggesting that his employment be re-examined one year later for a determination of further need. (*Ibid.*) The City Manager, then Kevin Radecki, signed respondent's letter where indicated, signifying his acceptance. (*Ibid.*)

16. On January 4, 2011, respondent began his post-retirement employment as a retired annuitant with the City, resuming his former position of Controller.

17. Respondent testified that his employment as a retired annuitant focused on special projects, such as feasibility studies and negotiations for the City/IUDA on a proposed NFL football stadium, a proposed (and eventually completed) gas turbine electric generation project, and numerous real estate developments.

18. Respondent also testified that he accepted the post-retirement position knowing that his work would not be for an indefinite period; rather, it would terminate once his assigned projects were completed, especially the NFL stadium project. He intended to review his work status each year with the City.

19. Respondent testified that the City's policy was to not have a publicly circulated recruitment program for a high-ranking position such as Controller. In respondent's case, the City inquired of other municipalities if they had any employees interested in applying for the position while respondent was engaged in his post-retirement employment.

20. Respondent's post-retirement employment with the City continued through December 14, 2012. According to a City Personnel Action Report, respondent separated from service on that date because his "Services [were] No Longer Required." (Ex. 8, p. 1.) No further evidence was presented on the issue.

21. Respondent was asked at the hearing if he contacted anyone at the City regarding restrictions on his post-retirement employment. He did not. He also did not contact anyone at PERS. He apparently relied only upon Publication 33.

RESPONDENT'S TOTAL WORK HOURS PER FISCAL YEAR

22. During his nearly two years of post-retirement employment, respondent worked a total of 2,185.50 hours: 785 hours in fiscal year 2010/2011; 990.50 hours in fiscal year 2011/2012; and 410 hours in fiscal year 2012/2013. (Ex. 10.)

23. Throughout his post-retirement employment, respondent kept track of his work hours on a form entitled "Semi-Monthly Timesheet," which tracked the dates he worked weekly, the hours each day he worked, and the daily totals. These timesheets were filled out by respondent weekly, signed by him, and then signed by his supervisor. A stamp on the bottom right corner of each document indicates the information was subsequently "entered" by another individual into City records. (Ex. 9.)

24. Respondent admits he exceeded the retired annuitant's 960-hour limit during the 2011/2012 fiscal year by working a total of 990.50 hours. Respondent testified he was unaware of that overage until he received a letter from PERS dated September 26, 2017, almost five years after his post-retirement employment with the City ended.

25. Prior to accepting his post-retirement employment, respondent was well aware of the 960-hour work limit. This is evidenced by his December 15, 2010 letter to the City, as well as the fact that he read Publication 33 before deciding to take the position, which several times notes the importance of not exceeding the limit. Despite this known restriction, respondent testified that he did not keep track of the number of hours he worked each fiscal year and had no idea how many hours he worked during fiscal year 2011/2012.

26. Respondent testified he exceeded the 960-hour limit due to a mathematical error he made when determining that he could work 20 hours per week and not exceed 960 hours. This testimony is troubling. First, a chart compiled by PERS for the 2011/2012 fiscal year shows that respondent exceeded 20 hours per week 19 times, and 16 weeks in a row; often during that period respondent worked 30 to 40 hours per week. (Ex. 10.) Respondent provided no explanation why that happened. Second, basic math should have shown respondent that if he worked 20 hours per week over the course of 52 weeks, he would work a total of 1040 hours. Last, it is hard to understand why respondent, who knew he could not work more than 960 hours in a fiscal year, and had worked as a municipal controller for many years, did not keep track of the number of hours he worked over the course of the fiscal year, especially given that respondent each week filled out a time sheet tracking his hours.

RESPONDENT'S TOTAL NUMBER OF MONTHS SERVED

27. On January 4, 2012, respondent had exceeded 12 months of post-retirement employment with the City. Respondent has consistently maintained in this case that, after reading Publication 33, he believed there was no restriction on the number of months he could work in his position, because Publication 33 listed no such

limitation. (Ex. 21.) Respondent believed he could continue working in a temporary position for as long as needed, provided that he not exceed 960 hours each fiscal year.

RESPONDENT'S PAYRATE

28. As evidenced by his December 15, 2010 letter, respondent contemplated an hourly payrate that would resemble his prior salary of $20,000 per month prior to retiring. He suggested an hourly rate of $135, to be paid solely by the IUDA. (Ex. 7)

29. Just prior to retirement, the portion of respondent's salary paid by the City was $10,609 per month, or $61.21 per hour. (Ex. 8, p. 3.) At the hearing, PERS Associate Government Program Analyst Susan Tasa persuasively testified that the publicly available information in place just after respondent retired had an annual salary range for the Controller position of $110,000-$185,000, which equals an hourly rate range of $52.88 to $88.94. This reflected the salary paid by the City, not the IUDA.

PERS' 2016 Audit of the City

30. In June 2016, PERS' Office of Audit Services (OFAS) conducted a public agency review of the City's payroll reporting and member enrollment processes related to the City's contract with PERS. In its review, OFAS examined employees, records, and pay periods from January 1, 2009, through December 31, 2015. (Ex. 11, p. 4.)

31. On June 23, 2016, OFAS issued its final audit report. (Ex. 11.) Finding 3 of the audit report reads:

> Retired annuitant's [referring to respondent] employment did not comply with Government Code requirements.

Condition:

The Agency unlawfully employed a retired annuitant. Specifically, the retired annuitant worked more than 960 hours in a fiscal year. The annuitant was also compensated at a rate of pay that exceeded amounts paid to other employees performing comparable duties.

The City Controller retired on October 1, 2010 and was hired as a retired annuitant on January 1, 2011 to perform the duties of the vacant City Controller position. During Fiscal Year 2011-12, the retired annuitant worked over 1,000 [actually, it was 990.50] hours and exceeded the 960 hours worked threshold set by Government Code Section 21224. The Government Code limits the hours worked by a retired annuitant to 960 hours for all employers in any fiscal year. The Agency did not reinstate the retired annuitant who exceeded the 960-hour threshold in Fiscal Year 2011-12.

The Agency also compensated the retired annuitant with a payrate that exceeded comparable amounts. Specifically, the retired annuitant received an hourly payrate of $135.00 to perform duties of the City Controller. The Agency stated that the City Controller position was vacant during the extent of the retired annuitant's employment and it did not have other employees performing comparable duties. The City Controller's payrate prior to retirement was $10,609.00 per month, or $61.21 per hour. Government Code Section

> 21224[1] states that the rate of pay for the employment shall not be less than the minimum, nor exceed that paid by the employer to other employees performing comparable duties. As a result, [OFAS] determined that the retired annuitant's rate of pay exceeded a comparable amount for the City Controller position. [¶] . . . [¶]

32. The City concurred with Finding 3 of the audit report concerning respondent's post-retirement employment. (Ex. 11, appen. B, p. 2.)

33. PERS' Employer Account Management Division's Membership and Post-Retirement Employment Audit (MAPA) group reviewed the final audit report. MAPA disagreed with OFAS' Finding 3 as to the applicability of Government Code section 21224.[2] (Ex. 12.) MAPA instead concluded that respondent's post-retirement employment was based on the City appointing him to an interim position under section 21221, subdivision (h).[3] (*Ibid.*) Consequently, section 21224 did not apply to

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[1] Government Code section 21224 is generally known as the "extra help" exception, in which retired annuitants may be used when specialized skills are needed to perform work of limited duration or during an emergency to prevent stoppage of public business.

[2] Undesignated statutory references are to the Government Code.

[3] As discussed in more detail below, section 21221, subdivision (h), is generally known as the "vacant position" exception, and it allows retired annuitants to be

respondent's appointment as initially determined. (*Ibid.*) At that time, appointments under section 21221, subdivision (h), were limited to a total of 12 months which, for respondent, would have expired on January 3, 2012. (*Ibid.*) Because his post-retirement employment was well in excess of that amount, MAPA concluded respondent engaged in unlawful post-retirement employment from January 4, 2012, through December 14, 2012. (*Ibid.*) MAPA concurred with OFAS' conclusion that respondent also violated the PERL by working in excess of the 960-hour limit in fiscal year 2011/2012. (*Ibid.*)

34. On September 26, 2017, PERS issued a "pre-deprivation" letter to respondent and the City, informing them of its determination that respondent's post-retirement employment with the City violated the PERL because his employment exceeded the above-described 12-month limit and that in fiscal year 2011/2012 he worked in excess of the limit of 960 hours. Because the 12-month period expired on January 3, 2012, PERS specified that respondent's unlawful post-retirement employment began on January 4, 2012. PERS also noted respondent exceeded 960 hours in fiscal year 2011/2012 on June 12, 2012. Respondent and the City were provided an opportunity to submit additional documentation for consideration before PERS made a final determination. (Ex. 12.)

35. By letters dated October 24, 2017, and November 18, 2017, respondent provided PERS with additional information for consideration. (Exs. 14 & 16.) He argued that the 12-month limit he was alleged with violating was not in effect at all times during the term of his employment. (Ex. 16, p. 2.) He also argued that he was misled

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appointed in a high-ranking position on an interim basis while the employer is actively recruiting a permanent replacement.

into believing he could work more than 12 months because Publication 33 contained nothing about a 12-month limit. If he exceeded the 960-hour limit, respondent described such was an "inadvertent mistake." (Ex. 16, p. 2.)

36. By a letter dated January 25, 2018, PERS notified respondent that it had considered the information and arguments he previously submitted, but that it had finalized its determination that respondent's post-retirement employment with the City was unlawful for the period of January 4, 2012, through December 14, 2012, for the reasons previously described to him. (Ex. 3.)

37. Respondent spoke on the telephone with Ms. Tasa about a resolution of the matter. Ms. Tasa told him PERS would be willing to "look into" an administrative resolution of this situation if the purported 12-month violation could be resolved.

38. On February 8, 2018, PERS received respondent's application for service retirement following reinstatement dated February 6, 2018. (Ex. 17.)

39. On April 11, 2018, PERS sent a letter to respondent notifying him that PERS was seeking to collect $65,952.49 in retirement benefits he received during the period of January 4, 2012, through December 14, 2012. (Ex. 18.)

40. By a letter dated June 4, 2018, respondent was advised that, because he was deemed to have been reinstated from retirement during the period of January 4, 2012, through December 14, 2012, his service credit increased from 18.303 years to 18.838 years, increasing his monthly retirement allowance by $154.66. (Ex. 19.) As a result, respondent was given a one-time retroactive payment of $9,728.09 to cover the

allowance increase, which was applied to his outstanding balance. PERS reduced its payment demand from $65,952.49 to $56,224.40. (*Ibid.*) Respondent's monthly retirement allowance payments now contain a deduction of $937.08 to cover the amount sought by PERS, which will take 60 months to complete. (Ex. 20.)

41. A. The Statement of Issues alleges respondent's post-retirement violated the PERL because he exceeded the 12-month limitation provided for in prior versions of section 21221 (as explained in more detail below), which subjected him to mandatory reinstatement after the 12-month period expired, i.e., from January 4, 2012, through December 14, 2012.

B. The Statement of Issues also alleges respondent violated the PERL by working more than 960 hours in fiscal year 2011/2012, though the date that violation began is not alleged. As explained above, though, PERS had previously advised respondent that period of unlawful post-retirement employment began on June 12, 2012.

C. The Statement of Issues alleges that the issue presented in this appeal is whether the period of respondent's unlawful post-retirement employment was from January 4, 2011, through December 14, 2012. (Ex. 1, p. 12.) But January 4, 2011 would only be the commencement date of the unlawful post-retirement employment if either respondent's hourly payrate violated the PERL (because respondent received that amount of compensation when he began his post-retirement employment on that date) or if no statutory exception covered any part of his post-retirement employment. Neither theory is alleged in the Statement of Issues.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The parties agree respondent bears the burden of proof in this matter. This includes respondent's limitations period argument based on section 20164. A limitations period is an affirmative defense; the party asserting its application bears the burden of proof. (*Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1301.) Respondent also argues for application of the "error or omission" relief provided by section 20160. That statute specifies the "party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right. . . ." (§ 20160, subd. (d).) Thus, respondent also bears the burden of establishing section 20160 applies in this case.

2. A preponderance of the evidence is the standard of evidence used in this case. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) A preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Post-Retirement Employment Generally

3. Article 8 (§§ 21220-21232) of Chapter 12 of the PERL governs post-retirement employment. Government Code section 21220, subdivision (a), provides, in relevant part: "A person who has been retired under this system, for service or for disability, shall not be employed in any capacity thereafter by . . . a contracting agency . . . unless he or she has first been reinstated from retirement pursuant to this chapter, or unless the employment, without reinstatement, is authorized by this article." Thus,

the default status of a retired employee receiving retirement benefits who engages in post-retirement employment for an agency contracting with PERS is reinstatement to employment, unless a provision of article 8 provides an exception. As PERS correctly notes in its closing brief, this statutory framework is meant to enforce a "policy to preclude retirees from displacing active employees, and to preclude public employees from drawing both public salaries and a publicly-funded retirement benefit. [Citation omitted.]" (Ex. 22, p. 9.)

4. Sections 21221 through 21232 describe the exceptions in which post-retirement employment for an agency contracting with PERS will not result in reinstatement from retirement. Of those statutes, the parties focus on two, sections 21221 and 21224, which are discussed in further detail below.

5. The consequences of post-retirement employment in violation of the PERL are drastic. Pursuant to section 21202, "[a] person employed in violation of Section 21220 shall be reinstated to membership in the category in which, and on the date on which, the unlawful employment occurred."

6. In addition, section 21220, subdivision (b), provides that any retired member employed in violation of the PERL shall:

> (1) Reimburse this system for any retirement allowance received during the period or periods of employment that are in violation of law.
>
> (2) Pay to this system an amount of money equal to the employee contributions that would otherwise have been paid during the period or periods of unlawful employment, plus interest thereon.

(3) Contribute toward reimbursement of this system for administrative expenses incurred in responding to this situation, to the extent the member is determined by the executive officer to be at fault.

7. Finally, section 21220, subdivision (c), provides that any public employer that employs a retired member in violation of the PERL shall:

(1) Pay to this system an amount of money equal to employer contributions that would otherwise have been paid for the period or periods of time that the member is employed in violation of this article, plus interest thereon.

(2) Contribute toward reimbursement of this system for administrative expenses incurred in responding to this situation, to the extent the employer is determined by the executive officer of this system to be at fault.

The Vacant Position Exception of Section 21221

8. The current version of the vacant position exception found in section 21221, subdivision (h), provides that a retired person may serve without reinstatement from retirement or loss or interruption of benefits if:

Upon interim appointment by the governing body of a contracting agency to a vacant position during recruitment for a permanent appointment and deemed by the governing body to require specialized skills or during an emergency to prevent stoppage of public business. A

> retired person shall only be appointed once to this vacant position. These appointments, including any made concurrently pursuant to Section 21224 or 21229, *shall not exceed a combined total of 960 hours for all employers each fiscal year.* The compensation for the interim appointment *shall not exceed the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule for the vacant position divided by 173.333 to equal an hourly rate.* A retired person appointed to a vacant position pursuant to this section shall not receive any benefits, incentives, compensation in lieu of benefits, or any other forms of compensation in addition to the hourly rate. A retired annuitant appointed pursuant to this section *shall not work more than 960 hours each fiscal year regardless of whether he or she works for one or more employers.* (Italics added.)

9. A. The statute was amended several times from 2011 through 2012. The earlier versions of section 21221, subdivision (h), including the one in effect when respondent's post-retirement employment began, had a specific time restriction that an appointment under this section could not continue past 12 months. The current version, which went into effect on January 1, 2012, omitted the 12-month limitation. Respondent and his counsel have consistently maintained that the 12-month limitation period does not apply to him and that the current version of the statute governs this case, in part, because of the statutory amendments. (See, e.g., exs. 4, 14, 16 & F.)

B. On the other hand, in both its September 2017 letter to respondent and the Statement of Issues, PERS contended the 12-month limitation in the earlier versions of section 21221 apply to this situation. However, in its closing brief, PERS conceded, "Initially a specific time restriction was provided: 12 months; however, the Legislature clarified on January 1, 2012, that the appointment should be of a limited duration while the agency is actively recruiting a permanent appointment" (ex. 29, p. 8), and that these amendments may be applied retroactively to respondent because they were matters of clarification of the law (*id.*, p. 7).

C. Therefore, PERS is no longer arguing that respondent was subject to the 12-month limitation in the earlier versions of section 21221, subdivision (h).

10. A. Nonetheless, PERS correctly argues respondent's appointment violated section 21221's restriction that his pay not exceed the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule. (Factual Findings 1-41.)

B. Specifically, respondent received $135 per hour for performing his post-retirement work. The salary range for the Controller position prior to respondent's post-retirement employment was $85,000-$120,000 per year. The publicly available pay schedule in effect subsequent to respondent's post-retirement employment showed the salary range for the Controller was $110,000-$185,000 per year. Consequently, using $185,000 as the maximum payrate, the maximum allowable hourly pay for respondent would have been $88.94. Respondent's payrate of $135 per hour was substantially greater than what was allowed.

C. Respondent argues the rate of pay does not violate the compensation restriction because he was earning $20,000 per month prior to

retirement as Controller. However, respondent's salary is not the same thing as a base salary paid to employees performing comparable duties as listed on a publicly available pay schedule. In fact, PERS audited the City in 2011 and informed respondent of this determination, when explaining why his retirement benefit could only be based on the part of his salary paid by the City and not the part paid by the IUDA. The publicly available payrate information for the Controller position was limited to the amount paid by the City, not the additional amount contributed by the IUDA. Therefore, respondent cannot include the additional $10,000 per month previously paid to him by the IUDA for his post-retirement payrate.

D. The language concerning a retired annuitant's compensation not exceeding the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule was added to section 21221, subdivision (h), when the statute was amended effective January 1, 2012. Respondent was still working for the City as a retired annuitant then. Amendments to statutes that are matters of clarification may be applied retroactively. (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 990, fn. 4.) Such clarifying amendments have such effect because the true meaning of the law remains the same. (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922.)

E. In this case, both parties agree the amendments to section 21221 may be applied retroactively and both contend the current version of the statute applies. Even if respondent argued this part of the statute does not apply to him retroactively, the law as amended was still in effect during the entire period of January 4, 2012, through December 14, 2012. As discussed below, due process considerations dictate that to be the period of respondent's unlawful post-retirement employment.

11. A. PERS also correctly points out that respondent exceeded the 960-hour work limitation during fiscal year 2011/2012. When he exceeded that amount on June 12, 2012, respondent's post-retirement employment no longer met the exception provided in section 21221, subdivision (h), and it became unlawful. (Factual Findings 1-41.)

B. Respondent admits he violated the statute in that way, but seems to argue he should be forgiven because he only exceeded the limit by 30.50 hours. Respondent also alludes to the conversation he had with Ms. Tasa of PERS concerning the overage being a de minimis amount. However, there is nothing in the PERL excusing a violation of the 960-hour limit by a de minimis amount, and the comments Ms. Tasa made to him during settlement discussions are not binding on PERS in the absence of a consummated settlement agreement.

C. Finally, respondent points to the portion of Publication 33 specifying that if a member "intend[s] to work as a permanent employee with any CalPERS employer, even if the position requires less than 960 hours per fiscal year, the retirement law requires reinstatement from retirement into active employment." (Ex. 21, p. 8.) Respondent seems to argue this is an "admission" by PERS that a member's intent can control whether the 960-hour limit has been violated. However, this excerpt of Publication 33 does not support respondent's argument. It simply advises a member that he may be reinstated to employment even if he works less than 960 hours if he takes a permanent position. This excerpt does not say one may inadvertently work more than 960 hours without penalty if he did not intend to exceed the limit. In any event, there is nothing in the PERL suggesting the 960-hour limit is contingent upon a member's state of mind.

12. PERS also argues respondent's appointment was not temporary and therefore does not fall within this statute, citing the fact he ended up working in the position for 23 months (well more than the 12 months specified in the earlier versions of the statute), there was no "active" recruitment during his appointment, and the parties periodically reassessed his status. However, as PERS conceded in its brief, there is no longer a time limit to such an appointment. While the City's recruitment may have been limited and discreet, it still was active. Finally, the totality of the evidence indicates respondent's appointment was meant to be temporary and not indefinite. PERS' argument here is unpersuasive.

The Extra Help Exception of Section 21224

13. Pursuant to the extra help exception of section 21224, subdivision (a):

> A retired person may serve without reinstatement from retirement or loss or interruption of benefits provided by this system upon appointment by the appointing power of a state agency or public agency employer either during an emergency to prevent stoppage of public business or because the retired person has specialized skills needed in performing work of limited duration. *These appointments shall not exceed a combined total of 960 hours for all employers each fiscal year.* The compensation for the appointment *shall not exceed the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule divided by 173.333 to equal an hourly rate.* A retired person appointed pursuant to this section shall not receive any

> benefit, incentive, compensation in lieu of benefits, or other form of compensation in addition to the hourly pay rate. A retired annuitant appointed pursuant to this section *shall not work more than 960 hours each fiscal year regardless of whether he or she works for one or more employers.* (Italics added.)

14. After PERS' 2016 audit and before the hearing of this matter, PERS contended section 21224 did not apply to respondent's situation. On the other hand, respondent has consistently maintained that, due to the nature of his duties, his post-retirement employment falls within section 21224. In its closing brief, however, PERS changed its position and conceded that, "[b]ased on respondent's testimony at the hearing, this would not be an unreasonable argument. Respondent testified that there was no 'active' recruitment for his replacement, he had specialized skills needed to perform work for the City, and his employment would likely end when a significant project, the potential construction of an NFL stadium, was concluded. Therefore, his appointment could fit under Section 21224." (Ex. 29, pp. 10-11.)

15. The prior version of section 21224, in effect in 2011, required that "the rate of pay for the employment shall not be less than the minimum, nor exceed that paid by the employer to other employees performing comparable duties." The current version of section 21224 went into effect on June 27, 2012, while respondent was still employed as a retired annuitant for the City. That amendment added the language concerning publicly available pay schedules, which is similar to the language added by contemporaneous amendment to section 21221, subdivision (h). Just as it was concerning section 21221, the 2012 amendment to section 21224 adding the publicly available pay schedule language is deemed to clarify existing law and therefore can be

retroactively applied to respondent. In any event, respondent argues in his closing brief that the current version of section 21224 applies in this case, just as he does concerning the current version of section 21221.

16. PERS correctly points out that even if section 21224 applies in this case, it also contains the 960-hour work limitation, as well as the restriction of a payrate greater than the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule. As explained above, respondent exceeded the 960-hour limitation in fiscal year 2011/2012, and received compensation greater than that listed on a publicly available pay schedule. Respondent's arguments to the contrary are not persuasive, as explained above. Therefore, respondent's post-retirement employment was unlawful under section 21224 for the same reasons it was unlawful under section 21221, subdivision (h). (Factual Findings 1-41.)

Respondent is Not Entitled to Error or Omission Relief

17. Respondent contends that even if he violated the PERL, his errors or omissions leading to those violations are excusable under section 20160, allowing PERS' Board of Administration to correct them instead of imposing the drastic penalties of section 21220.

18. Section 20160 provides in relevant part:

> (a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

[¶] . . . [¶]

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting

documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

19. In this case, respondent takes great pains to explain why he continued working more than 12 months, which PERS initially claimed violated the PERL, arguing he was misled into believing he had no such limitation because Publication 33 did not mention one. Respondent argues PERS' failure to include such information in Publication 33 was a breach of its fiduciary duty toward him as a member, and also induced a reasonable mistake on his part. However, as discussed above, PERS no longer contends the 12-month limitation period provided in earlier versions of the vacant position exception of section 21221 applies to respondent. This change of position renders moot the question whether respondent's working more than 12 months was an error or omission subject to correction by section 20160.

20. A. In his closing brief, respondent does not explain how his working more than 960 hours in one fiscal year is a correctable error or omission. To the extent respondent testified that he simply made a mistake in this regard, he failed to meet his burden of establishing by a preponderance of the evidence that such was a mistake, as used in Code of Civil Procedure section 473, warranting the relief of section 20160.

B. "Mistake" under Code of Civil Procedure section 473 may be either a mistake of fact or a mistake of law. (*Gilio v. Campbell* (1952) 114 Cal.App.2d Supp. 853, 857.) "A mistake of fact exists when a person understands the facts to be other than they are; a mistake of law exists when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts." (*Ibid.*) In *Gilio*, a default was entered against a defendant who failed to timely answer a complaint. The defendant sought relief under section 473. The court found no mistake of fact where "[a] mere reading of the summons served on the defendant would have informed him

that if he did not appear and answer the complaint within 10 days, a judgment could be taken against him. It is to be noted that the defendant does not claim that he was unaware of the contents of the summons and complaint. In any event, a failure to read the summons would furnish defendant no excuse." (*Ibid.*)

C. In this case, the 960-hour limit was well known to respondent. His purported mistake was a "mathematical error" in calculating 20 hours per week would keep him under the limit. But simple math belies his calculation. Even if it did not, respondent routinely worked more than 20 hours in a week, at one point working more than 20 hours for 16 consecutive weeks, many times working 30-40 hours per week. This suggests respondent was not laboring under the mistake of an erroneous mathematical calculation. In any event, even though he kept weekly logs of his work hours, respondent undertook no effort to verify his yearly total as he progressed through the fiscal year. Pursuant to *Gilio*, respondent's failure to add his total hours is tantamount to the failure to read a summons. Pursuant to section 20160, subdivision (a)(3), respondent's failure to make such calculations was a failure to make an inquiry that would be made by a reasonable person in like or similar circumstances, which therefore does not constitute an "error or omission" correctable under the statute. (Factual Findings 1-41.)

21. A. Nor does respondent discuss in his closing brief how his receipt of an excessive hourly payrate warrants relief under section 20160. As discussed above, respondent simply argues in his brief that his payrate was not excessive.

B. Assuming arguendo that respondent made a mistake of fact or law concerning his payrate, such is not correctable pursuant to section 20160, subdivision (a)(3), because respondent failed to make the kind of inquiry a reasonable person would have made under the circumstances. As a result of PERS' audit in 2011,

respondent was on notice that the portion of his salary paid by the IUDA was problematic and could not be compensation earnable for purposes of calculating his retirement allowance. Respondent advised PERS in this case that he accepted that determination. Yet, in deciding his hourly compensation for his post-retirement employment, respondent freely included his prior salary paid by the IUDA, without making any inquiry of PERS or the City. While it is true that the results of the 2011 audit were not made known to respondent until after he began his post-retirement employment, at no time thereafter did he make any inquiry about the propriety of including the prior salary paid by IUDA in his post-retirement employment compensation. A reasonable person would have done so. (Factual Findings 1-41.)

The Limitation Period of Section 20164 Does Not Apply

22. Section 20164, subdivision (b), provides a three-year limitation on actions regarding "payments into or out of the retirement fund" as follows:

> For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:
>
> (1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.
>
> (2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

23. A. Respondent argues that even if the "error or omission" relief provided in section 20160 does not apply, the three-year limitation period specified in section 20164, subdivision (b), prevents PERS from seeking reimbursement of the retirement allowance paid to respondent during the period of his unlawful post-retirement employment. Respondent argues this is because the provision contains the phrase "or otherwise", which indicates that even if the "error or omission" is not covered under section 20160, 20163, or 20532, in all other situations where an adjustment must be made, PERS has three years to do it.

B. Respondent argues that PERS made such an "erroneous payment to a member" when it paid respondent's retirement allowance during his period of unlawful post-retirement employment. Respondent argues that under section 20164, PERS' ability to collect any overpayment depends on when PERS discovered that an erroneous payment was made, which was when PERS discovered the problems with respondent's post-retirement employment as articulated in the final audit report issued by OFAS on June 23, 2016. Respondent concludes that three years prior to that date is June 23, 2013, which would be the earliest date from which PERS could seek reimbursement from respondent. Since all the payments in question were completed by December 2012, respondent argues the three-year limitation period contained in section 20164, subdivision (b), bars any reimbursement.

24. A. Respondent's argument is not persuasive. A plain reading of section 20164, subdivision (b), is that if PERS makes an erroneous payment to the benefit of a member, it has only three years to seek repayment; if PERS has erroneously withheld or underpaid a member, there is no limitation period for the member to be reimbursed.

B. In this case, there was no erroneous payment made to respondent; PERS made regular retirement allowance payments that were later deemed subject to reimbursement due to the unlawful post-retirement employment relationship of respondent and the City. Neither party contends any of the retirement allowance payments were in the wrong amount, withheld or otherwise erroneous. In addition, it is clear from section 21220 that the Legislature intended reinstatement of employees who engage in unlawful post-retirement employment and reimbursement of all retirement benefits paid during that period, regardless of the time such payments were made. Applying the three-year limitation period of section 20164, subdivision (b), to the penalties required by section 21220 would essentially cap violating employees and employers to liability for just three years of unlawful post-retirement employment, which would be contrary to the spirit of section 21220 and lead to absurd results.[4] (Factual Findings 1-41.)

Conclusion

25. As discussed above, respondent's entire post-retirement employment with the City did not meet the requirements of Article 8 of Chapter 12 of the PERL, including sections 21221 and 21224, and therefore was in violation of section 21220, subdivision (a). Pursuant to section 21202, respondent was subject to involuntary reinstatement of his employment with the City during the period that "the unlawful employment occurred." Respondent's reinstatement subjected him and the City to the

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[4] In light of the conclusion that section 20164, subdivision (b), does not apply to this case, it is unnecessary to decide PERS' argument that the three-year limitation period contained therein only begins to run after PERS discovers an erroneous payment.

penalties described in section 21220, subdivisions (b) and (c), including respondent reimbursing PERS the amount of his retirement allowance paid during the period of unlawful post-retirement employment.

26. A. Determining the period of respondent's unlawful post-retirement employment is not without complication. This is because PERS has stated different periods throughout this litigation.

B. For example, when OFAS, a division of PERS, issued its audit report in 2016, it concluded respondent's excessive payrate violated the PERL, which meant respondent's period of unlawful employment began immediately on January 4, 2011. However, MAPA, another division of PERS, disregarded the payrate issue and instead concluded respondent violated the 12-month limit contained in earlier versions of section 21221, subdivision (h); that violation of PERL only began on January 4, 2012, after respondent had served 12 months as a retired annuitant. Based on MAPA's conclusion, PERS advised respondent that his period of unlawful post-retirement employment occurred from January 4, 2012, through December 14, 2012; in fact, PERS has already begun to reduce respondent's monthly retirement allowance payments by an amount based on January 4, 2012 as the commencement date of his unlawful employment.

C. To further complicate things, the only pleading in this case, the Statement of Issues, alleges the issue in this case is whether respondent's unlawful post-retirement employment covered the period of January 4, 2011, through December 14, 2012, i.e., the entirety of respondent's post-retirement employment. That allegation is a complication because there is no factual or legal theory alleged in the pleading that would support the earlier commencement date of January 4, 2011. For example, it is not alleged that respondent's hourly payrate violated the PERL or

that his entire post-retirement employment was otherwise unlawful. Instead, the Statement of Issues seems to allege that section 21221, subdivision (h), applied to some of respondent's post-retirement employment, but that subsequent events (exceeding 12 months of work and 960 hours of work in the same fiscal year) resulted in his post-retirement employment becoming unlawful on or after January 4, 2012. The issue is muddled by the fact that both parties in their closing briefs discuss the payrate issue and a January 4, 2011 commencement date.

D. Respondent does not address this anomaly in his closing brief. PERS acknowledges it, arguing its determination "may not be disturbed if it is 'right upon any theory of law applicable to the case.' *(Board of Administration v. Superior Court* (1975) 50 Cal.App.3d 314, 319.)" (Ex. 29, p. 14.) Noting that the Statement of Issues alleges respondent's appeal is limited to whether his post-retirement employment from January 4, 2011, through December 14, 2012, was in violation of the PERL, PERS argues, "'There can be no prejudicial error from erroneous logic or reasoning or the process by which the result is achieved if the decision itself is correct.' *(Board of Administration v. Superior Court, supra,* 50 Cal.App.3d at 319.)" (*Ibid.*)

27. A. The disparity between the action already taken against respondent's retirement allowance payments, the theories alleged in the pleading, and the arguments made by the parties after the hearing triggers consideration of due process.

B. A person or entity subject to administrative adjudication is entitled to notice and an opportunity to be heard, including the right to present and rebut evidence. (Gov. Code, § 11425.10, subd. (a)(1).) This means that a person must at least be given notice of the impending deprivation and the facts on which it is based and

some opportunity to present an argument against the proposed action. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.)

C. In *Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891, 901, the appellant was told, in essence, that, if he requested a hearing, it would merely allow him to challenge the merits of the allegations of an enforcement order; in reality, the hearing reopened the issue of the extent of civil penalties, subjecting appellant to liability for monetary penalties greatly exceeding what was determined in the enforcement order. The *Tafti* court held that, as a result of the inadequate notice, the portion of the civil penalties imposed by respondent above the amount it previously determined in the enforcement order must be vacated. (*Ibid.*) However, a variance between the proof and the pleadings is not deemed material unless it actually misleads a party to his prejudice; a variance may be disregarded when the action has been fully and fairly tried on the merits. (*Cooper v. State Bd. of Medical Examiners* (1975) 49 Cal.App.3d 931, 941-942.)

28. A. While PERS proved respondent's hourly payrate violated the PERL, which would have supported a period of unlawful post-retirement employment beginning on January 4, 2011, PERS has consistently advised respondent that his unlawful employment actually began one-year later, on January 4, 2012, which was when his work exceeded the 12-month period contained in earlier versions of section 21221. The later commencement date is the basis on which PERS reinstated respondent's employment and calculated his additional service credit. Moreover, the factual and legal theories alleged in the Statement of Issues only support the later commencement date, i.e., based on the date he exceeded 12 months of post-retirement employment. However, the parties agree in their closing briefs that the 12-month period does not apply in this case.

B. As the *Board of Administration v. Superior Court* case indicates, PERS' prior determination that January 4, 2012 is the proper commencement date may not be disturbed if it is right upon any theory of law applicable to this case. Respondent's hourly payrate violated the PERL from the outset of his post-retirement employment, which pre-dated January 4, 2012. Pursuant to the *Cooper* case, due process is not offended here by considering a legal theory not alleged in the pleadings, since this case was thoroughly litigated on its merits and both parties addressed the theory during and after the hearing. Therefore, there is a legal theory supporting the unlawfulness of respondent's post-retirement employment during the entire period of January 4, 2012, through December 14, 2012.[5]

C. Determining that respondent's unlawful employment period commenced one year earlier, i.e., on January 4, 2011, based on a theory not alleged in the pleading or articulated as a basis for reducing respondent's retirement allowance payments, would expand respondent's financial liability in a way that would violate the dictates of the *Tafti* case. Therefore, cause was not established to deem January 4, 2011 as the commencement date of respondent's unlawful post-retirement employment. (Factual Findings 1-41; Legal Conclusions 1-27.)

ORDER

Respondent Dudley J. Lang's post-retirement employment with the City of Industry was in violation of the PERL, from January 4, 2012, through December 14,

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[5] Exceeding the 960-hour limit per fiscal year does not support a commencement date of January 4, 2012, because respondent only exceeded 960 hours for fiscal year 2011/2012 on June 12, 2012.

2012, and requires respondent Lang to repay to PERS the retirement benefits he received during that time period.

DATE: August 6, 2019

DocuSigned by:

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ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearing