

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Dudley J. Lang (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated August 6, 2019. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent was employed by Respondent City of Industry (City) as the City Controller. On August 16, 2010, Respondent submitted an application for service retirement with an October 1, 2010, retirement date. Respondent has been receiving service retirement benefits since his retirement.

On December 15, 2010, Respondent sent a letter to the City's City Manager offering to work as the City Controller in a temporary capacity. Respondent's letter informed the City that he could not and would not work more than 960 hours per fiscal year pursuant to CalPERS' restrictions. Respondent offered to perform services as the City Controller for the City in exchange for being compensated \$135 per hour. The City accepted Respondent's offer, and his post-retirement employment began on January 4, 2011.

The Public Employees' Retirement Law (PERL) generally prohibits a retiree from receiving a retirement allowance from CalPERS while at the same time working and receiving a publicly funded salary. However, the PERL does provide limited exceptions to this general rule. Relevant to this matter, Government Code Section 21221, subdivision (h),¹ allows an employer to appoint a retiree to a vacant position during recruitment for a permanent appointment.² Section 21224 allows an employer to appoint a retiree 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.³ Sections 21221, subdivision (h), and Section 21224 each contain certain restrictions on post-retirement employment. Namely, these sections limit the number of hours that can be worked to 960 hours per fiscal year, indicate the appointment should generally be of a limited duration, and limit the compensation the retiree can receive to the maximum amount paid to employees performing comparable duties as listed on a publicly available pay schedule.

In June 2016, CalPERS' Office of Audit Services conducted an audit of the City's payroll reporting and member enrollment processes. As part of the audit, CalPERS determined that Respondent's post-retirement employment did not comply with the PERL. CalPERS

¹ Unless otherwise specified, all further statutory references are to the California Government Code.

² Section 21221, subdivision (h) is generally known as the "vacant position" exception and allows a retiree to be appointed to high-ranking position on an interim basis while the employer is actively recruiting a permanent replacement.

³ Section 21224 is generally known as the "extra help" exception in which a retiree may be used when specialized skills are needed to perform work of limited duration or during an emergency to prevent stoppage of public business.

found that Respondent's post-retirement employment failed to comply with the restrictions contained in Section 21224 which prohibits a retiree from working more than 960 hours per fiscal year and from receiving compensation that exceeds the payrate paid to employees performing comparable duties. Respondent violated Section 21224 because he worked more than 960 hours in fiscal year 2011-2012 and the compensation he received, \$135 per hour, exceeded the payrate he received immediately prior to his retirement, \$61.21 per hour. The City concurred with CalPERS' finding that Respondent's post-retirement employment violated the PERL.

CalPERS' Employer Account Management Division (EAMD) was responsible for reviewing the audit findings and implementing changes to Respondent's membership with CalPERS necessitated by Respondent's unlawful post-retirement employment. EAMD agreed with the audit's findings that Respondent's post-retirement employment violated the PERL. However, EAMD determined that Respondent's post-retirement employment was governed by Section 21221, subdivision (h), and not Section 21224 because Respondent was temporarily working in the vacant City Controller position and he was not extra help performing work of a limited duration during an emergency to prevent stoppage of public business.

EAMD determined that Respondent's post-retirement employment violated Section 21221 because he worked 990.5 hours in Fiscal Year 2011-2012, which is more than the allowable 960 hours. In addition, CalPERS determined that Respondent's employment, which lasted from January 4, 2011, until December 14, 2012, exceeded the 12-month duration restriction that was contained in Section 21221 at the time of Respondent's appointment. On January 25, 2018, CalPERS issued a final determination letter to Respondent.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. A hearing was held on June 17, 2019. Respondent was represented by counsel at the hearing. Respondent City did not appear at the hearing.

At the hearing, CalPERS presented evidence that (1) Respondent worked 990.5 hours in Fiscal Year 2011-2012; (2) Respondent's post-retirement employment started on January 4, 2011, and ended on December 14, 2012; (3) Respondent's rate of pay for his post-retirement employment, \$135 per hour, exceeded the rate of pay that Respondent received as City Controller immediately prior to his retirement, \$61.21 per hour; and (4) The publicly available pay schedule for City Controller had a salary range of \$110,000-\$185,000 per year, which equals an hourly rate of pay of \$52.88 to \$88.94.

Based on this evidence, CalPERS argued that Respondent's post-retirement employment violated the PERL beginning on January 4, 2012, the date his employment exceeded the 12-month duration restriction contained in Section 21221 at the time of his employment. In addition, CalPERS argued that Respondent's post-retirement employment violated the PERL for Fiscal Year 2011-2012 because he worked in excess of 960 hours.

CalPERS also argued that Respondent's rate of pay was in excess of the hourly rate of pay contained in a publicly available pay schedule. Consequently, Respondent's post-retirement employment violated the PERL's restriction that he receive compensation not to 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.

CalPERS also offered argument to rebut Respondent's position that his post-retirement employment was governed under Section 21224, and that under Section 21224 his employment was lawful.

First, CalPERS offered evidence that Section 21224, like Section 21221, subdivision (h), restricts post-retirement employment to 960 hours. CalPERS' evidence that Respondent worked 990.5 hours in violation of Section 21221, subdivision (h), also requires a finding that Respondent violated Section 21224's restrictions on working more than 960 hours per Fiscal Year. Second, CalPERS' evidence that Respondent's rate of pay was \$135 per hour, which is more than the maximum amount on the City's publicly available pay schedule, requires a finding that he violated Section 21224's restriction that his compensation not exceed what is provided to other employees performing comparable duties as listed on a publicly available pay schedule.

As a result of Respondent's unlawful post-retirement employment, CalPERS argued that Section 21220 requires Respondent to reimburse CalPERS "any retirement allowance received during the period or periods of employment that are in violation of law."

Respondent testified on his own behalf. Respondent testified that his post-retirement employment with the City focused on special projects, such as a proposed NFL football stadium, a proposed gas turbine electric generation project and numerous real estate developments. Respondent testified that he accepted the post-retirement position knowing that his work would terminate once his assigned projects were completed, and that he intended to review his post-retirement work status with the City each year. Respondent testified that it was not the City's policy to have a publicly circulated recruitment program for a high-ranking position, such as the City Controller.

Prior to accepting his post-retirement position, Respondent reviewed Publication 33; CalPERS' Guide to Employment After Retirement. Publication 33 informs retirees, or future retirees, of the restrictions related to post-retirement employment. The version of Publication 33 that Respondent reviewed provided that post-retirement employment should be temporary, limited to 960 hours in a Fiscal Year, and the rate of pay should not exceed the maximum that is paid to other employees performing comparable duties. Respondent testified that he did not contact anyone at CalPERS or the City to discuss the legal restrictions provided in Publication 33 relating to his post-retirement employment.

Respondent did not dispute CalPERS' evidence establishing his violations of the PERL's post-retirement employment restrictions. Respondent admitted that he worked 990.5 hours in Fiscal Year 2011-2012. Respondent also admitted that he worked from

January 4, 2011, until December 14, 2012, and was paid \$135 per hour for the work he performed during this time.

Respondent argued that his violation of the 960-hour restriction should be forgiven because it was a minor amount and it was the result of a mistake. Respondent claims that he made a mathematical error when reaching the erroneous determination that he could work 20 hours per week, which led to him working more than 960 hours in Fiscal Year 2011-2012.

Respondent argued that his rate of pay, \$135 per hour, was similar to employees who performed comparable duties because he was paid \$20,000 per month when he was employed full-time as the City Controller.⁴ Consequently, Respondent argued that he was not paid more than other employees performing comparable duties.

Respondent also argued that CalPERS' determination was incorrect because his post-retirement employment was not subject to Section 21221, subdivision (h)'s restrictions for temporary employment for a vacant position because he was appointed under Section 21224 as extra help. Respondent argued that Section 21224 does not contain a 12-month duration limitation; therefore, the fact he worked in excess of 12 months could not be a basis for a determination that his post-retirement employment violated the PERL. In the alternative, Respondent argued that CalPERS failed to fulfill its fiduciary duty by informing him that his post-retirement employment under Section 21221, subdivision (h) was subject to a 12-month duration limitation.

Last, Respondent argued that even if CalPERS is correct and that his post-retirement employment violated the PERL, CalPERS is not entitled to collect any of the retirement allowance he received during his unlawful post-retirement employment. Respondent argued that because the audit was issued on June 23, 2016, CalPERS can only collect payments issued to him three years prior to this date, or on or before June 23, 2013. Respondent argued that because his post-retirement employment ended on December 14, 2012, CalPERS was prevented, under Section 20164, from recovering any of the retirement allowance he received during his period of unlawful employment.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent had the burden to establish CalPERS' determination was incorrect. In addition, the ALJ found that Respondent had the burden to establish CalPERS' right to reimbursement of retirement allowance received during the period of unlawful employment is subject to the statute of limitations contained in Section 20164, subdivision (b), and that he was entitled to correct his mistake under Section 20160. The ALJ found that the Respondent did not meet his burden on any of these issues.

⁴ Even if one accepts Respondent's argument that \$20,000 per month was the rate of pay that should be used when analyzing the lawfulness of his post-retirement employment, his hourly rate of pay (\$135 per hour) exceeded the hourly rate he received when he was paid \$20,000 per month. The hourly rate of pay for someone earning \$20,000 per month is \$115.38. Consequently, his rate of pay exceeded what is allowed even if one uses the amount Respondent argues should be used.

First, the ALJ found that Respondent violated the 960 hours per Fiscal Year restriction contained in both Section 21221, subdivision (h) and Section 21224. The ALJ rejected Respondent's argument that his error, working more than 960 hours, was a correctable error under Section 20160. The ALJ found it should have been obvious to Respondent that working 20 hours per week would result in him working 1040 hours per year. The ALJ also questioned Respondent's position that he thought he could work 20 hours per week because it contradicts the evidence that Respondent routinely worked more than 20 hours. Last, the ALJ found that a reasonable person who knew they were under the 960-hour limitation would have kept track of the number of hours they worked, and that Respondent's failure to do this precluded him from relying on Section 20160 to correct his alleged error.

Second, the ALJ found that Respondent received compensation in excess of what is allowed for post-retirement employment. The ALJ rejected Respondent's argument that his rate of pay, \$135 per hour, was comparable to employees performing similar duties. The ALJ found that Respondent was improperly attempting to rely on his salary prior to retiring, \$20,000 per month, and that the appropriate rate is that which is available on a publicly available pay schedule. In this matter, the ALJ found that CalPERS offered credible evidence that the publicly available pay schedule for City Controller had a salary range of \$110,000-\$185,000 per year, which equals an hour rate of pay of \$52.88 to \$88.94. Consequently, the ALJ found that Respondent's rate of pay violated the restrictions contained in PERL's post-retirement employment restrictions because his compensation exceeded the allowable amount.

Third, the ALJ rejected Respondent's argument that the three-year statute of limitations contained in Section 20164, subdivision (b), prevents CalPERS from collecting the retirement allowance he received while unlawfully employed. The ALJ found that Section 20164 does not apply to this matter. The ALJ found that Section 20164 applies when CalPERS makes an erroneous payment to a member; however, in this matter "there was no erroneous payment made to [R]espondent." The ALJ found that "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." The ALJ concluded applying the three-year limitation period of Section 20164, subdivision (b), to the penalties contained in 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."

In the Proposed Decision, the ALJ concludes that Respondent's post-retirement employment with the City was in violation of the PERL from January 4, 2011, through December 14, 2012. However, the ALJ found that because CalPERS' determination letter and Statement of Issues informed Respondent that CalPERS was only seeking to recover the retirement allowance he received from January 4, 2012, through December 14, 2012, CalPERS' recovery should be limited to this time period. For these reasons, the ALJ concludes that Respondent is required to repay CalPERS the retirement benefits he received from January 4, 2012, through December 14, 2012.

The Board of Administration adopted the Proposed Decision at its September 18, 2019 meeting. Respondent was notified of the Board's decision on September 23, 2019.

On October 10, 2019, Respondent submitted a Petition for Reconsideration. The Petition largely presents the same evidence and arguments that were presented at the hearing and rejected by the ALJ. The only new argument Respondent raises is a claim that he and his attorney were purportedly blindsided and not prepared to refute CalPERS' accusation that the compensation he received violated the PERL's post-retirement employment restrictions. Respondent's claim is without merit.

Respondent's claim that CalPERS initially raised the compensation issue at the hearing is factually incorrect for two reasons. First, it was Respondent, and not CalPERS, who actually raised the compensation issue at the hearing. Respondent raised this issue by virtue of his affirmative claim that CalPERS was improperly analyzing his post-retirement employment under Section 21221, subdivision (h). Respondent argued that Section 21224 governed his post-retirement employment. CalPERS informed Respondent that if Section 21224 is applicable, his post-retirement employment violated the compensation restriction. Second, the hearing is not the first time that Respondent was informed that the compensation he received was in violation of Section 21224. As previously discussed, CalPERS issued an audit report in June 2016, informing Respondent and Respondent City that the compensation he received violated the PERL's post-retirement employment restrictions. The audit report was provided to Respondent and his counsel prior to the hearing, and was admitted as evidence at the hearing. Consequently, Respondent's argument that he and his counsel were blindsided by this new evidence is devoid of merit.

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the September 18, 2019, meeting was well reasoned and based on the credible evidence presented at hearing.

For all of the foregoing reasons, staff recommends that Respondent's Petition for Reconsideration be denied.

November 20, 2019

JOHN SHIPLEY
Senior Attorney