

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

On February 27, 2013, Sheldon K. Scarber (Respondent) submitted an application for industrial disability retirement (IDR). Because he was terminated from his job, CalPERS cancelled his application due to operation of *Haywood* and its progeny. Respondent appealed this decision. On March 15, 2017, following a Full Board Hearing, Respondent was granted the right to apply for IDR. On April 5, 2018, CalPERS approved Respondent's IDR application.

On June 4, 2018, CalPERS learned that Respondent pled *nolo contendere* to the crime of conspiracy to commit a crime, in violation of Penal Code section 182(a)(1), a felony. The felony conviction of conspiracy states that between December 11, 2012 and February 16, 2013, Respondent, his wife, his daughter and his son committed the crime of conspiracy by engaging in the following acts: They unlawfully conspired to help Respondent's son flee to Mexico in order to willfully fail to appear in court on charges of rape, sexual penetration, burglary and robbery, in violation of Penal Code section 1320.5, a felony. In order to carry out the objectives and purpose of the conspiracy, steps taken by the conspirators include but are not limited to, the following: (1) On December 12, 2012, Respondent reported to law enforcement that his son was missing and last seen at approximately 1:30 am. (2) On December 12, 2012, Respondent staged a phony crime scene. (3) On December 12, 2012, Respondent's wife and daughter traveled in a vehicle registered to Respondent and his wife and entered Mexico from California at 3:24 am. (4) On December 12, 2012, Respondent's wife and daughter walked back to California from Mexico using the San Ysidro pedestrian border crossing at 4:44 am. (5) On December 19, 2012, one of the conspirators ran computer searches for information on Mexico and crossing the border. (6) Respondent used his connections as a California Highway Patrol (CHP) Officer to facilitate actions taken to unlawfully move his son to Mexico, including using the California Law Enforcement Tracking System (CLETS) to check his daughter's driving record. (7) Respondent used his work computer to move documents regarding his son's arrest to his home computer, including police reports and court records.

California Public Employees' Retirement Law Felony Forfeiture section 7522.72 states:

(b) (1) If a public employee is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system,

effective on the date of the conviction.

...

(c) (1) A member shall forfeit all the rights and benefits earned or accrued from the earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive. The rights and benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the member's conviction. Rights and benefits attributable to service performed prior to the date of the first commission of the felony for which the member was convicted shall not be forfeited as a result of this section.

...

(d) (1) Any contributions to the public retirement system made by the public employee described in subdivision (b) on or after the earliest date of the commission of any felony described in subdivision (b) shall be returned, without interest, to the public employee upon the occurrence of a distribution event unless otherwise ordered by a court or determined by the pension administrator.

On August 30, 2018, CalPERS determined:

- 1) CalPERS cannot consider services performed after December 10, 2012, to calculate Respondent's benefits, based on his plea of *nolo contendere*;
- 2) Respondent was not substantially incapacitated from performing his job duties from December 11, 2012 through August 29, 2013 because he was employed full-time with Respondent CHP up through August 29, 2013;
- 3) Because there is no medical substantiation demonstrating Respondent was substantially incapacitated beginning December 10, 2012, CalPERS canceled his IDR and he was returned to service retirement;
- 4) Respondent forfeited the portion of his service credit accrued from December 11, 2012 through August 29, 2013, an equivalent of 0.668 years of service; which reduced his service credit from 25.123 years to 24.445 years, which in turn reduced his final compensation from \$14,553.62 to \$13,951.72; and which in turn resulted in an overpayment of retirement monies paid;
- 5) Respondent's monthly allowance was reduced by \$702.65;
- 6) Respondent was overpaid from December 11, 2012 to August 29, 2013, and the total amount of overpayment is \$41,488.30;
- 7) During the period of time from December 11, 2012 through August 29, 2013, Respondent made member contributions of \$11,187.18. That amount was applied to his overpayment, reducing the amount due to \$30,301.12.

- 8) Respondent made monthly repayments, which lowered the overpayment balance to \$21,884.12 as of the date of hearing.

On August 30, 2018, Respondents Scarber and CHP were notified of CalPERS' determination and were advised of their appeal rights.

On October 23, 2018, Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on July 23, 2019. Respondent represented himself at the hearing. Respondent CHP did not appeal or appear at the hearing.

The appeal was limited to the following issues pursuant to Section 7522.72:

- 1) Whether CalPERS is correct in reducing Respondent's service credit for the period of December 11, 2012 through August 29, 2013, so that an equivalent of 0.668 years of service credit is forfeited;
- 2) Whether CalPERS is correct in reducing Respondent's retirement benefit attributable to the reduction in service credit during the forfeiture period of December 11, 2012 through August 29, 2013;
- 3) Whether CalPERS is correct in placing Respondent back on service retirement and removing him from the disability retirement roll; and
- 4) Whether CalPERS is correct that Respondent must reimburse CalPERS for the total amount of overpayment in the amount of \$30,301.12.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

Respondent did not testify at the hearing, nor did he call anyone to testify on his behalf. He submitted three exhibits; none of which were in dispute.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied in part and granted in part Respondent's appeal. The ALJ found:

- 1) CalPERS correctly reduced Respondent's service credit for the period of December 11, 2012 through August 29, 2013, an equivalent of 0.668 years of service credit, which was forfeited as a result of Respondent's felony conviction;
- 2) CalPERS correctly reduced Respondent's retirement benefit attributable to the reduction in service credit during the forfeiture period;
- 3) CalPERS incorrectly removed Respondent from the disability retirement roll and placed him back on service retirement;

- 4) Respondent must reimburse CalPERS for the total amount of overpayment in an amount to be calculated by CalPERS reflecting Respondent's monthly industrial disability retirement reduced by 0.668 years.

The ALJ reasoned that pursuant to Section 7522.72 (c)(1), Respondent was convicted of a felony by a state tribunal on June 4, 2018 (the date of his plea). The ALJ rejected Respondent's arguments that he was not convicted of a felony because his conviction was later reduced to a misdemeanor. Case law provides if a felony is later reduced to a misdemeanor, the crime is *thereafter* regarded as a misdemeanor for all purposes. Moreover, Section 7522.72 specifically states: "the rights and benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of conviction." The ALJ similarly rejected Respondent's argument that his conduct did not arise out of or in the performance of his official duties, finding that he used his connections as CHP officer to facilitate steps taken in furtherance of the conspiracy. Therefore, the ALJ found that Respondent's service credit was properly reduced by 0.668 years of service (December 11, 2012 to August 29, 2013). The ALJ also found that Respondent must repay CalPERS for overpayment of retirement benefits based on the reduction of service credit of 0.668 years. Further, the ALJ found that the Respondent did not lose the right to continue on industrial disability retirement. That finding will not have a monetary impact on the amount of his benefit.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

February 19, 2020

---

Elizabeth Yelland  
Senior Attorney