



Board of Administration

Agenda Item 9c1

February 19, 2020

Item Name: Precedential Decision – In the Matter of the Appeal Regarding Post Retirement Employment of DUDLEY J. LANG, Respondent, and CITY OF INDUSTRY, Respondent.

Program: Employer Account Management Division

Item Type: Action

Recommendation

Staff recommends that the Board of Administration direct the CalPERS Legal Office team to solicit written comments from the public regarding whether the Board's Decision in this matter should be designated as precedential.

Executive Summary

Pursuant to section 11425.60 of the California Administrative Procedure Act, an agency is authorized to designate all or part of a quasi-judicial administrative Decision as precedential, if the Decision contains a significant legal or policy determination of general application that is likely to recur. An agency's designation of a Decision or part of a Decision, or failure to designate a Decision or part of a Decision, as a precedential Decision is not subject to judicial review. The Board's established policy regarding the designation of precedential Decisions calls for consideration of the following two questions:

- A. Does the Decision contain a significant legal or policy determination of general application that is likely to recur?
- B. Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made and how the law was applied?

From the staff's perspective, the answer to both these questions is "Yes." Therefore, Staff recommends that public comment be solicited on adoption of the Decision *In the Matter of the Appeal Regarding the Post Retirement Employment of Dudley Lang, Respondent, and City of Industry, Respondent (Lang Decision)* as precedential. Once comments are received, staff will bring back an item for the Board to consider designating the *Lang Decision* as precedential.

Background

On September 18, 2019, the Board adopted the Proposed Decision in this matter. The Proposed Decision determined that Respondent Lang's (Respondent) post-retirement employment violated the Public Employees' Retirement Law (PERL) restrictions relating to working after retirement, and as a result, Respondent was obligated to reimburse CalPERS the retirement benefits he received while unlawfully employed. On October 10, 2019, Respondent submitted a Petition for Reconsideration with the Board. On November 20, 2019, the Board denied Respondent's Petition for Reconsideration. The Board's Decision became final and effective on December 20, 2019. All appeal timelines have expired.

Analysis

In general, making a Board Decision precedential gives it a "precedential effect," which in this context means:

- The decision may be officially cited in other administrative hearings and also in other court proceedings.
- The decision is considered "case-made" law, comparable to agency rule-making in its legal effect and may be applied broadly to other cases and the parties involved in other cases. The decision-maker in another administrative matter may expressly rely on the Precedential Decision to decide the matter, that is, give the law or policy in the Decision binding effect in a case involving the same issue as it affects other parties, unless the other case can be factually or legally distinguished.¹

A Precedential Decision of the Board is not binding on the courts, which remain the final arbiters of the law; but a Board Precedential Decision, as the decision of the agency most knowledgeable and responsible for administering and making policy with respect to the PERL, is normally accorded great weight or given deference by the courts.² If a Board Decision is not designated as precedential, its effect is more limited. It may be referenced in other administrative matters or to a reviewing court to inform the judge regarding the Board's administration or interpretation of the PERL, but it has no precedential effect.³

The Board's established policy regarding the designation of Precedential Decisions calls for consideration of the following two questions:

- A. Does the Decision contain a significant legal or policy determination of general application that is likely to recur?
- B. Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied?

¹ See: Cal. Code. Regs., tit 12, §1290 (Office of Administrative Hearings regulation); official *Calif. Law Revision Comments* regarding APA section 11425.60, where it is stated that the statute "recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking" and "is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision." Also, see: *Pac. Legal Foundation v. Unemployment Insur. App. Board* (1991) 29 Cal.3d 101, 109.

² *City of Oakland v. Pub. Employees' Ret. System* (2002) 98 Cal.App.4th 29, 39; *Hudson v. Board of Administration of the Calif. Pub. Ret. Sys.* (1997) 59 Cal.App.4th 1310, 1324-1325.

³ *City of Oakland, supra*, at p. 57.

A. The Lang Decision Involves a “Significant Legal or Policy Determination of General Application That is Likely to Recur”

The significant legal and policy determination presented in the *Lang* Decision is the explanation and application of the PERL’s working after retirement restrictions, and the penalty assessed when a member violates those restrictions. The Legislature enacted working after retirement laws to preclude retirees from displacing active employees and to preclude retirees from simultaneously receiving a publicly funded salary and retirement allowance from CalPERS, which is commonly referred to as “double dipping.” In 1987, the Legislature amended the PERL’s working after retirement restrictions because the law, at that time, did not provide a mechanism to deal effectively with improper employment practices or double dipping. Before the law was amended, the penalty for violating the PERL’s working after retirement restriction was for the retiree to return the compensation received while unlawfully employed back to the employer. This failed to provide a significant deterrence, and the law was amended to ensure that someone who violates these restrictions is required to forfeit all of the retirement benefits they received while violating the working after retirement restrictions.

The *Lang* Decision details the applicable analysis to be performed when determining whether post-retirement employment falls within the limited exceptions to the general rule. In addition, the *Lang* Decision provides definitive guidance that a respondent, and not CalPERS, has the burden of establishing the retiree’s post-retirement employment is lawful. Finally, the *Lang* Decision provides definitive guidance that the law requires that a retiree reimburse CalPERS all of the retirement allowance that was received during the period(s) of unlawful post-retirement employment.

CalPERS staff repeatedly issue guidance and make determinations with respect to post-retirement employment. Those determinations often involve CalPERS explaining that the PERL contains strict restrictions with respect to post-retirement employment. Increasingly, CalPERS is reviewing situations where retirees are collecting a retirement allowance, while at the same time working for the employer from which they retired. CalPERS has repeatedly informed retirees, as well as employers, that this is generally prohibited. In addition, CalPERS has repeatedly informed retirees, as well as employers, of the penalty associated with violating the PERL’s working after retirement restrictions. CalPERS issues a publication providing guidance regarding these matters. Nonetheless, CalPERS repeatedly has to litigate the following issues: (1) whether a retiree’s post-retirement employment complies with the PERL’s restrictions; and (2) the appropriate penalty to impose when it is determined that a retiree’s post-retirement employment does not comply with the PERL.

Currently, there is no Precedential Decision relating to these issues to provide full guidance to CalPERS staff, members, retirees, and employers. In addition, there has been inconsistent application of the appropriate penalty when a retiree violates the PERL’s post-retirement employment restrictions. Therefore, a Precedential Decision definitively providing analysis regarding the exceptions to the working after retirement restrictions, as well as the appropriate penalty when a violation occurs, will provide members, retirees and employers with guidance and likely reduce the amount of future litigation.

B. The *Lang* Decision Includes a “Clear and Complete Analysis Sufficient for an Understanding of Why the Finding of Facts Were Made and How the Law Was Applied”

The factual findings in the *Lang* Decision are straightforward and easy to understand. The Decision describes how post-retirement employment generally works. Importantly, the *Lang* Decision provides a detailed explanation regarding the exceptions to the general rule; that simultaneously collecting a retirement allowance and a publicly funded salary is prohibited. The Proposed Decision provides detailed analysis regarding the restrictions placed on post-retirement employment. Specifically, the *Lang* Decision discusses the requirement that the retiree work less than 960 hours per year, that the appointment be temporary, and that the retiree’s pay not exceed what the position provides on a publicly available pay schedule. Then the *Lang* Decision applies the law to the facts of this case to determine whether post-retirement employment violates the PERL’s restrictions.

The *Lang* Decision also addresses two important legal issues related to post-retirement employment. First, the *Lang* Decision correctly determines that the Respondent has the burden of establishing that post-retirement employment is in compliance with the PERL. Second, the *Lang* Decision correctly determines that a retiree who violates the PERL’s post-retirement employment restrictions is required to forfeit all retirement benefits received during the period(s) of unlawful employment.

The *Lang* Decision finds that a retiree who violates the PERL’s post-retirement restrictions is obligated to reimburse CalPERS the retirement benefits they received for the period(s) that violated the law. As described, the *Lang* Decision is therefore constructed logically and properly explains how working after retirement generally works, how the exceptions are to be analyzed, and the proper penalty for violating the law.

Staff therefore believes that the findings and legal conclusions of the *Lang* Decision, if the Decision is made precedential, will provide useful, specific rules for staff, members, retirees, and employers and likely reduce the amount of further litigation. Accordingly, staff recommends the *Lang* Decision be adopted as a Precedential Decision.

Benefits/Risks

The benefits to making the *Lang* Decision precedential have been described in detail in the above Analysis section. In summary, there are no other Precedential Decisions of the Board addressing all of the issues related to post-retirement employment and the penalty for violating post-retirement employment, which are addressed in the *Lang* Decision. Since these issues recur repeatedly in litigation before the Office of Administrative Hearings, a Precedential Decision regarding these matters would assist CalPERS staff in making these determinations, and likely reduce the number of appeals and associated cost filed by retirees who violate the post-retirement employment restrictions. In addition, it will likely reduce the number of retirees who violate the post-retirement employment restrictions since the penalty for such a violation will be definitive. There is very little risk in adopting the *Lang* Decision as precedential, as an agency’s designation of a Decision as precedential is not subject to judicial review. If, in the future, the Precedential Decision becomes outdated by future developments in the law, there is a procedure by which the Board could remove the precedential designation.

Alternatives

- A. For use if the Board wants further argument on the issue of whether to designate its Decision, or parts of its Decision, as adopted on September 18, 2019, as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, requests the parties in this matter concerning the Respondent's appeal, as well as interested parties, to submit written comments regarding whether the Board's Decision in this matter, or parts of its Decision, should be designated as precedential, and that the Board will consider the issue whether to designate its Decision as precedential at a time to be determined.

- B. For use if the Board decides to designate its Decision, as adopted on September 18, 2019, as precedential, without further argument:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, hereby designates its Decision concerning the Respondent's appeal as a Precedential Decision of the Board, effective immediately.

- C. For use if the Board decides to designate certain parts of its Decision, as adopted on September 18, 2019 as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, hereby determines to designate the following parts of its Decision concerning Respondent's appeal as precedential, effective immediately: [Board to insert here a description of the parts to be designated as precedential].

- D. For use if the Board decides that at this time it does not want to take further action with respect to its Decision, as adopted on September 18, 2019:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, hereby determines, at this time, to take no further action with respect to its Decision, as adopted on September 18, 2019.

Attachments

Attachment A: Decision of the Board

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