

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Brian C. Sperber's (Respondent) employment with the California Department of Fair Employment and Housing (DFEH) commenced on January 7, 2013. Respondent is an attorney with DFEH. By virtue of his employment as an attorney, Respondent is a state miscellaneous member of CalPERS.

On September 12, 2012, Governor Brown signed the California Public Employees' Pension Reform Act of 2013 (PEPRA), which became effective January 1, 2013.<sup>1</sup> PEPRA established a new retirement plan for all public employees who became CalPERS members on or after January 1, 2013. These individuals are defined in PEPRA as "new members." Individuals who enter membership prior to January 1, 2013, are considered as "classic members." PEPRA applies to all state and local public retirement systems and to their participating employers. PEPRA made several changes to the pension benefits for public employees who become CalPERS members on or after January 1, 2013, including setting a new maximum benefit, a lower-cost pension formula for safety and non-safety employees with requirements to work longer in order to reach full retirement age and a cap on the compensation amount used to calculate a pension.

When PEPRA became effective, CalPERS had to identify which members were subject to the new law. In 2018, CalPERS conducted an internal review to determine whether the myCalPERS system properly identified members as "new members" subject to PEPRA. During this review, CalPERS determined that individuals hired between January 1, 2013 and June 30, 2013, who were initially enrolled in the Alternative Retirement Plan (ARP) and did not immediately begin earning CalPERS service credit, were improperly classified as "classic members." Respondent was identified as an impacted member.

On July 20, 2018, Respondent was notified that he had been misclassified as a "classic member" of CalPERS instead of a "new member," as defined by PEPRA. As a "new member," Respondent's retirement benefit formula should have been identified as 2% at 62. CalPERS informed Respondent that it was obligated to correct mistakes under Government Code section 20160, and that he would be enrolled in the correct retirement formula as required by PEPRA.

On October 31, 2018, CalPERS issued Respondent its determination that Respondent must be enrolled in the correct retirement benefit formula, 2% at 62 under PEPRA, and that it was going to correct its' prior error of enrolling Respondent as a "classic member" with a 2% at 60 retirement formula. CalPERS determined that Government

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<sup>1</sup> Gov. Code sec. 7522 et. seq.

Code section 20160 of the Public Employees' Retirement Law (PERL) required CalPERS to correct its mistake.

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 December 9, 2019. Respondent, a practicing attorney, represented himself at the hearing.

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.

At the hearing, CalPERS presented evidence that Respondent became a member on January 7, 2013, the first day he provided services for DFEH and the first day of reported payroll. CalPERS presented evidence that, prior to January 7, 2013, Respondent did not provide services that are necessary to establish membership with CalPERS. In addition, CalPERS presented evidence that established Respondent's start date at DFEH was not impacted by any information he received from CalPERS.

CalPERS' witness explained that when PEPRA became effective, the myCalPERS system determined which benefit membership classification an individual received. Individuals who became members between January 1, 2013, and June 30, 2013, did not immediately receive CalPERS service credit. Instead, the individual was enrolled in the ARP and contributions were deposited into a separate savings account. At a later date, the individual could determine if he or she wanted to convert the savings to CalPERS service credit. CalPERS computer system erroneously classified the individuals subject to ARP hired between these dates as "classic members." Because the classification does not directly impact an individual employee until retirement, CalPERS was not initially aware of the error. CalPERS' witness testified that in 2018, during an internal review of the myCalPERS system, it was discovered that certain individuals were improperly classified. CalPERS' witness testified that it must correct mistakes that provide a member with benefits that are not allowed under the PERL.

At the hearing, CalPERS' witness also explained the numerous steps CalPERS took to inform the public of the impacts PEPRA would have on individuals who established membership after PEPRA's effective date. In November 2012, CalPERS published on its website a summary of PEPRA and the impacts it would have to anyone brought into CalPERS membership on or after January 1, 2013. CalPERS also issued a Circular Letter to all CalPERS employers on December 3, 2012, informing employers of PEPRA's impacts. In short, CalPERS provided readily accessible information letting employers and new hires know that if they started working on or after January 1, 2013, they would be subject to all of PEPRA's provisions, including a less rich defined benefit formula.

Respondent testified on his own behalf. Respondent primarily advanced two arguments in support of his appeal: (1) He worked for DFEH prior to January 1, 2013, so he should not be subject to PEPRA; and, (2) He was told by DFEH that he “beat” PEPRA, so he should not be subject to the new defined benefit formula.

First, Respondent testified that he actually started working prior to January 7, 2013, the first date DFEH reported to CalPERS that he earned compensation for performing services. Respondent testified that he performed work in connection with his job prior to January 1, 2013, and despite the fact he was not compensated for this work, his CalPERS membership date should be based on this uncompensated work. Respondent offered no evidence at the hearing to corroborate his testimony. In addition, Respondent offered no evidence to support this contention after the hearing, despite the ALJ’s offer to allow him to file supporting documents after the conclusion of the hearing.

Second, Respondent testified that he should not be subject to PEPRA’s benefit formula because he was told that he “beat” PEPRA because he was offered, and accepted, employment with DFEH prior to January 1, 2013. Respondent testified that he delayed starting his employment because his future supervisor, Annmarie Billotti, told him that his start date would not impact his CalPERS benefits. For this reason, Respondent claimed he decided to travel and wait until January 7, 2013, to begin his employment.

At the hearing, Respondent testified that he is a Legislative and Regulatory attorney for DFEH. Respondent admitted that he was aware of PEPRA at the time he determined his commencement date with DFEH. Despite this fact, Respondent testified that he did not conduct any independent research regarding PEPRA’s impact on his future retirement benefits. In addition, Respondent admitted that he did not contact CalPERS, or review CalPERS’ website, to obtain information regarding PEPRA’s impacts on his future retirement benefits. Instead, Respondent testified that he solely relied on Ms. Billotti’s statement that because he was “hired” in December 2012 he would not be subject to PEPRA.

Respondent testified that he is aware that other state agencies attempted to have new employees commence employment prior to January 1, 2013, to ensure these employees would not be subject to PEPRA.

Respondent did not call any other witness to testify on his behalf. He did submit a declaration from Ms. Billotti, which was admitted as hearsay evidence. Ms. Billotti declared that she did not know that Respondent’s start date could impact the terms, conditions, or privileges of his employment.

Respondent argued that CalPERS must keep him enrolled as a “classic member” and must provide him with the retirement benefits afforded to “classic members.” Respondent relied on a theory of equitable estoppel to support these contentions.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ determined that, as the party seeking

to correct a mistake, CalPERS had the burden of proof in this matter, meaning CalPERS is required to prove its case with evidence that has more convincing weight than that opposed to it. The ALJ found that CalPERS met its burden and proved its case.

The ALJ found that CalPERS established Respondent's retirement benefits are subject to PEPRA, Respondent should be enrolled as a "new member," and that CalPERS is required to correct its mistake and enroll Respondent in the correct retirement classification (2% at 62) as mandated by PEPRA. In making this finding, the ALJ rejected Respondent's argument that he is not subject to PEPRA because he began working prior to January 1, 2013 because he "offered no evidence to corroborate his unsupported assertion."

The ALJ also rejected Respondent's affirmative defense that CalPERS should be estopped from correcting its mistake. The ALJ found that Respondent must establish five elements to apply equitable estoppel against CalPERS in this matter. The elements include the following: (1) the party being estopped (CalPERS) must be apprised of the facts; (2) the party (CalPERS) must intend or reasonably believe that its conduct will be acted upon; (3) the party asserting the estoppel (Respondent) must be ignorant of the true state of facts; (4) the party asserting the estoppel (Respondent) must actually rely upon the other party's (CalPERS) conduct to his/her detriment; and, (5) the interests of the private party (Respondent) must outweigh any negative effect of the estoppel on public interests and policies.

The ALJ thoroughly analyzed the facts and found that Respondent failed to establish through credible evidence the elements necessary to apply estoppel against CalPERS.

With respect to the first element, the ALJ found that CalPERS was not aware of its mistake of misclassifying Respondent, and timely sought to correct the mistake when it became aware. In addition, there was no evidence that CalPERS knew that Respondent's supervisor provided him with erroneous advice.

With respect to the second element, the ALJ found that CalPERS did not intend for Respondent to rely on the mistake, and in fact accurately informed the public of the impacts PEPRA would have on "new members." Furthermore, the ALJ found that no evidence suggests CalPERS knew, or reasonably believed, a state agency would provide erroneous advice to an employee and/or new hire.

With respect to the third element, the ALJ did not find that Respondent's alleged ignorance of the true state of facts was reasonable. The ALJ specifically found that Respondent's reliance solely on his supervisor's representation was not reasonable.

With respect to the fourth element, the ALJ found that Respondent failed to establish he actually relied on CalPERS' conduct to his detriment. The ALJ determined that

Respondent's evidence was "too speculative and uncertain" to establish detrimental reliance.

With respect to the fifth element, the ALJ found that Respondent did not establish that the effect on public interest and policy of applying the doctrine of equitable estoppel to CalPERS in this case would be minimal.

Thus, in the Proposed Decision, the ALJ concludes that CalPERS is not estopped to reclassify respondent as a "new member" under PEPRA.

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

June 17, 2020

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Senior Attorney