

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Honorable Diego H. Edber (Respondent Edber) is a CalPERS member who was appointed to become a Judge of the Los Angeles County Superior Court in October 2018. By virtue of his appointment, Respondent Edber became a member of Judges' Retirement System II (JRS II), the retirement system for Superior Court judges appointed or elected to the bench on or after November 9, 1994. (Gov. Code §75500 et seq.)

The issue in this case is whether Respondent Edber should be enrolled in JRS II as a "new member," subject to the terms and conditions of the Public Employees' Pension Reform Act of 2013 (PEPRA), or whether Respondent Edber's prior membership in CalPERS and other retirement systems entitles him to be enrolled as a "classic member." If Respondent is a classic member, he is exempted from PEPRA's higher employee contribution rate, as well as other pension reforms applied to "new members" of JRS II by PEPRA.

As explained more fully below, PEPRA dictates that a person who becomes a member of a retirement system for the first time on or after January 1, 2013, is considered a "new member" of that system and thus, subject to PEPRA's reforms. A person with membership in another retirement system before PEPRA's effective date may be exempt from PEPRA's "new member" provisions, but only where that prior membership is "subject to reciprocity" with the person's "new membership" in a new system.

Relevant to this proceeding, CalPERS determined that even though Respondent Edber had membership in other retirement systems prior to PEPRA's effective date, his prior membership was not "subject to reciprocity" with his new membership in JRS II as a result of becoming a Superior Court judge. For these reasons, CalPERS determined that Respondent Edber should be a "new member" of JRS II.

Respondent Edber appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). Though a hearing was scheduled for January 27, 2020, the parties agreed to proceed on a set of stipulated facts and documents submitted to the Court, with written briefs to follow. Respondent Edber represented himself during this process.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with 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.

JRS II is governed by the Judges' Retirement System Law II (JRS II Law). Effective January 1, 2013, PEPRA (Gov. Code §§7522-7522.74), applies to JRS II. Section 75505 of JRS II Law provides that "[t]o the extent applicable, the Board of

Administration of the Public Employees' Retirement System shall administer [JRS II] in conformance with...[PEPRA]...to the same extent and with the same effect as if the provisions of the act are contained" in JRS II Law. In the event there is a conflict between PEPRA and JRS II Law, PEPRA controls. (Gov. Code §75505.) In similar fashion, PEPRA states it "shall apply to all state and local public retirement systems, and to their participating employers, including [CalPERS]...the Judges' Retirement System, the Judges' Retirement System II." (Gov. Code §7522.02(a)(1).) For these reasons, Respondent Edber's membership in JRS II is subject to PEPRA and its requirements.

PEPRA applies to "to public employees who are new members" of a retirement system. (Gov. Code §7522.02(b).) PEPRA defines "new members" as any of the following:

- (1) An individual who becomes a member of any public retirement system for the first time on or after January 1, 2013, and who was not a member of any other public retirement system prior to that date;
- (2) An individual who becomes a member of a public retirement system for the first time on or after January 1, 2013, and who was a member of another public retirement system prior to that date, but who was not subject to reciprocity under subdivision (c) of Section 7522.02; or
- (3) An individual who was an active member in a retirement system and who, after a break in service of more than six months, returned to active membership in that system with a new employer. For purposes of this subdivision, a change in employment between state entities or from one school employer to another shall not be considered as service with a new employer." (Gov. Code §7522.04(f) (1-3).)

Respondent Edber became a member of CalPERS on October 22, 2001 through employment with the California Department of Justice (DOJ) as a Deputy Attorney General. On February 23, 2007, Respondent Edber left CalPERS-covered employment, and his CalPERS contributions remained on deposit.

After leaving DOJ employment, Respondent Edber served as a Deputy City Attorney in Los Angeles City Attorney's Office February 26, 2007 through July 11, 2017. Through that employment, Respondent Edber established membership in Los Angeles City Employees' Retirement System (LACERS). Thereafter, by virtue of employment with Los Angeles County Superior Court as a Court Commissioner from July 12, 2017 through October 12, 2018, Respondent Edber also established membership in Los Angeles County Employees' Retirement Association (LACERA). LACERA classified Respondent Edber as a "classic" or Non-PEPRA member of the LACERA retirement system.

Pursuant to PEPRA, effective January 1, 2013, JRS II employers enroll judges into JRS II as either "classic members" or "new members." New members are subject to the

terms and conditions of PEPRA, which include higher contribution rates and a 36-month final compensation period. JRS II members who are not “new members” are considered classic members, not subject to PEPRA.

To evaluate his membership status, Respondent Edber completed a JRS II self-Certification Form, advising JRS II of his prior membership in LACERA, LACERS and CalPERS, due to his former employment in public service for agencies that provide retirement benefits through those systems. There is no reciprocal agreement between JRS II and LACERS. However, statutory authority for concurrent retirement is provided under Government Code section 75528 for JRS II members who retire concurrently from JRS II and CalPERS, or a retirement system subject to the County Employees Retirement Law of 1937 pursuant to Section 20639 or 31840.8 of the Government Code, such as LACERA. For these reasons, a judge who establishes membership in JRS II for the first time after PEPRA’s effective date, and has membership in CalPERS or LACERA, may be ‘subject to reciprocity’ under Gov. Code section 7522.02 and thus not a “new member” under PEPRA, provided they meet the other requirements of the statute and its implementing regulations. For example, CalPERS and JRS II have defined the phrase “subject to reciprocity” by regulation. (See 2 Cal. Code Regs 579.3(b)(3).) By regulation, the phrase “subject to reciprocity” as set forth in PEPRA means that an individual is eligible for reciprocity pursuant to a statute or reciprocity agreement, “provided he or she did not have a break in service of more than six (6) months immediately preceding the Applicable Date.” The Applicable Date is January 1, 2013, PEPRA’s effective date. (2 C.C.R. 579.3(b)(3).)

On or about December 14, 2018, Respondent Edber, through his representative, submitted correspondence to JRS II requesting he be considered a “classic member” of JRS II and not a “new member” subject to PEPRA. On or about February 15, 2019, JRS II determined that Respondent Edber should be enrolled in JRS II as a “new member” subject to PEPRA, and issued a determination letter stating the same, a true and correct copy of which was also submitted to OAH.

JRS II issued follow up correspondence on March 1, 2019, affirming its determination that Respondent Edber should be enrolled in JRS II as a new member. JRS II made this determination on grounds that (1) Respondent Edber’s prior membership in CalPERS is not “subject to reciprocity” because there was a greater than 6-month gap between membership in the systems; (2) JRS II does not have reciprocity with LACERS; and (3) even though a reciprocal-type relationship exists between JRS II and LACERA, Respondent Edber’s prior membership in LACERA did not occur prior to PEPRA’s effective date as the law requires.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent Edber’s appeal. The ALJ found that Respondent Edber had the burden to prove that he was incorrectly enrolled by JRS II as a new member subject to PEPRA. Respondent Edber argued he was not a new member of JRS II because of his former membership in LACERA in 2017, and because he was a classic member of LACERA in 2017. The ALJ rejected this argument, finding that Respondent Edber was only a member of LACERA from July 12, 2017 through October 12, 2018, and that the

reciprocity referenced in PEPRA “plainly refers to a reciprocity as between an individual’s new public retirement system on or after January 1, 2013, and another public retirement system of which the individual was a member prior to January 1, 2013.” For that reason, the ALJ found that Respondent Edber’s prior membership in LACERA does not exempt him from new membership in JRS II.

The ALJ also found that because Respondent Edber had an 11-year break between his service in CalPERS and his enrollment in JRS II, Respondent Edber was not subject to reciprocity under PEPRA and implementing regulations, which require less than six months of separation between membership in reciprocal systems. The ALJ also recognized that there is no reciprocity between LACERS and JRS II, and thus no grounds to exempt Respondent Edber from being a new member in JRS II on that basis. For all of the foregoing reasons, the ALJ found that Respondent Edber was properly enrolled in JRS II as a new member and denied his appeal.

The Proposed Decision appropriately applies the law to the stipulated facts to find that Respondent Edber should be enrolled in JRS II as a new member. For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

June 17, 2020

Kevin Kreutz
Senior Attorney