

**ATTACHMENT D**

**STAFF'S ARGUMENT**

**STAFF'S ARGUMENT IN SUPPORT OF DESIGNATION OF SEPTEMBER 18, 2019,  
DECISION AS PRECEDENTIAL**

On September 18, 2019, the Board adopted the Proposed Decision *In the Matter of the Appeal Regarding Post Retirement Employment of DUDLEY J. LANG, Respondent, and CITY OF INDUSTRY, Respondent*. The Board denied Respondent Dudley J. Lang's (Respondent) Petition for Reconsideration and the Decision of the Board became final and effective on December 20, 2020.<sup>1</sup> For the reasons discussed below, staff argues the Board should designate the *Lang Decision* as precedential.

**FACTUAL BACKGROUND**

Respondent retired as the City of Industry's (City) City Controller on October 1, 2010. On December 15, 2010, Respondent sent a letter to the City's City Manager offering to return to work part-time as the City Controller. Respondent's letter made clear that he was aware of CalPERS' restrictions on post-retirement employment. Respondent's letter provided that his post-retirement employment would be on a "temporary and part-time basis only" and that he "cannot and will not work for more than 960 hours." In addition, Respondent's letter provided that he "would not expect to receive the same compensation or the same benefit package" as a full-time employee, but that he "expect[s] to receive no less than the minimum rate of pay that other employees or consultants would receive for similar and comparable duties." Respondent's letter indicated that he was compensated \$20,000 per month prior to retirement, or \$115.38 per hour, for performing work for the City and the City's redevelopment agency (IUDA).<sup>2</sup> Respondent's letter suggested that he be paid \$135 per hour and that his post-retirement employment salary be solely paid by the IUDA. The City agreed to Respondent's terms.

Evidence at the hearing established Respondent read CalPERS' publication on employment after retirement (Publication 33) prior to beginning his post-retirement employment. Publication 33 emphasizes that the following conditions must be met for post-retirement employment to be lawful: (1) the employment must be temporary; (2) the employment will not exceed 960 hours in a fiscal year; and (3) the rate of pay will not exceed the maximum that is paid to other employees performing comparable duties. The language in Respondent's employment offer letter mirrors language contained in Publication 33.

Respondent's post-retirement employment began on January 4, 2011 and ended nearly two years later, on December 14, 2012. During Respondent's post-retirement employment, his hourly compensation (\$135 per hour) was more than two times the

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<sup>1</sup> The Board's Decision will be referred to as the *Lang Decision*.

<sup>2</sup> Respondent testified that his \$20,000/month salary comprised of \$10,000/month from the City's general fund and \$10,000/month from IUDA's funding.

maximum hourly payrate contained in the City's Resolution that created the City Controller position (\$57.69 per hour).<sup>3</sup> In fact, it was even more than the hourly rate he had previously received for performing both of his positions with the City and IUDA (\$115.38 per hour). In sum, Respondent was being paid more per hour than he had previously received when working in two positions while at the same time receiving his retirement allowance.

In addition, despite stating in his employment offer letter that he "cannot and will not work for more than 960 hours," Respondent failed to track of the number of hours he worked, and in fact worked more than 960 hours. Respondent worked 2,185.50 hours during his post-retirement employment, or an average of almost 1,100 per year. He worked in excess of 960 hours in fiscal year 2011-2012. Respondent's testimony that he mistakenly worked more than 960 hours because he thought he could work 20 hours per week was deemed "troubling" by the Administrative Law Judge (ALJ). As explained by the ALJ, Respondent only needed to use basic math to determine working 20 hours per week would result in 1040 hours per year and as the City's Controller, performing such basic math should have easily been within his skill set. Respondent's post-retirement employment meant that he collected a retirement allowance from CalPERS while simultaneously working almost two years in the same position he was in immediately prior to his retirement, and his payrate was nearly double what he previously received for acting as the City Controller.

## LEGAL BACKGROUND

The Legislature enacted working after retirement laws to prevent people who are retired, and receiving a publicly funded retirement allowance from displacing active employees and those who seek to join the public workforce. If retirees are allowed to simultaneously work and collect a retirement allowance it severely restricts the ability of those seeking a job from obtaining one. The Legislature provides limited exceptions to ensure public business continues during an emergency<sup>4</sup> and while an agency actively recruits to replace someone.<sup>5</sup> However, the Legislature made clear that the employment should be of a limited duration, the payrate the retiree receives should not exceed what is available on a publicly available pay schedule, and the retiree should not work more than 960 hours in a fiscal year. In 1987, the Legislature recognized that the penalty for violating the working after retirement laws, refunding the salary earned during the unlawful employment to the employer, was not achieving the desired outcome and revised the

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<sup>3</sup> Subsequent to Respondent's retirement, CalPERS discovered that the City did not have a publicly available pay schedule for the City Controller position, but that the resolution creating the position provided the annual salary range would be \$85,000-\$120,000, or an hourly payrate of \$40.87-57.69. Since the City Controller position is considered a full-time position, the compensation Respondent received for performing additional services for the IUDA could not be included when determining Respondent's payrate for purposes of calculating his final compensation and retirement allowance.

<sup>4</sup> Government Code 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.

<sup>5</sup> Government Code Section 21221, subdivision (h), allows an employer to appoint a retiree to a vacant position during recruitment for a permanent appointment.

penalty. The revised penalty requires the retiree to reimburse CalPERS all of the retirement benefits he or she received while working in violation of the law.

Respondent's post-retirement employment was the exact type of abuse the Legislature sought to prevent when it enacted working after retirement restrictions and revised the penalty for violations of the law.

The *Lang Decision* made two key factual findings. First, the *Lang Decision* found that Respondent's post-retirement employment violated the Public Employees' Retirement Law's (PERL<sup>6</sup>) post retirement restrictions because he worked in excess of 960 hours in one fiscal year. Second, the *Lang Decision* found that Respondent received compensation in excess of the amount available on a publicly available pay schedule.

More importantly, the *Lang Decision* made two critical legal determinations. First, the *Lang Decision* determined that a respondent has the burden of establishing that his or her post-retirement employment is lawful. Second, the *Lang Decision* determined that a retiree must reimburse CalPERS all of the retirement allowance that was received during the period(s) of unlawful post-retirement employment, and the three-year period of limitation for correcting erroneous payments in Section 20164(b) does not apply to post retirement violations.

In regard to the statute of limitations issue, the ALJ determined there was no erroneous payment made to Respondent. The ALJ further explained:

PERS made regular retirement allowance payments that were later deemed subject to reimbursement due to the unlawful post-retirement employment relationship of respondent and the City. Neither party contends any of the retirement allowance payments were in the wrong amount, withheld or otherwise erroneous. In addition, 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. Applying the three-year limitation period of section 20164, subdivision (b), to the penalties required by 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.

The *Lang Decision* made this determination based on the clear language of the statutes. Here, there were no erroneous payments to correct so there is no basis for applying Section 20164 to correct an error or an omission. Furthermore, Section 21220's language makes clear the penalty is that the offending party must reimburse all benefits received during the period(s) of unlawful employment. The *Lang Decision* also made clear that if the three-year limitation was applied it would "lead to absurd results." The *Lang Decision* ultimately found that CalPERS correctly determined that Respondent's

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<sup>6</sup> Unless otherwise specified, all further statutory references are to the California Government Code.

post-retirement employment violated the PERL's working after retirement restrictions. The *Lang Decision* rejected Respondent's argument that he is not required to reimburse CalPERS any of the retirement allowance he received in 2011 and 2012 while unlawfully employed because those payments were not received within the last 3 years. The *Lang Decision* determined that the correct penalty for Respondent violating the PERL's restrictions is that he must reimburse CalPERS all of the retirement allowance he received during his period of unlawful employment.

Currently, there is no precedential decision of the Board that addresses the two critical legal findings related to post-retirement employment that were made in the *Lang Decision*. It is important for the Board to adopt the *Lang Decision* as precedential to ensure there is no dispute as to what qualifies as lawful post-retirement employment, who has the burden of establishing employment is lawful, and what the penalty will be if one violates these laws.

## ARGUMENT

### 1. The Board is Authorized to Designate Certain Decisions as Precedential

Pursuant to Government Code section 11425.60 in the California Administrative Procedure Act (APA), the Board is authorized to designate all or part of a quasi-judicial administrative decision of the Board as precedential:

(a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). 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 precedent decision is not subject to judicial review.

(c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997. (Emphasis added.)

## 2. The Precedential Effect Should Minimize Future Litigation of These Issues

In general, the effect of making a Board decision precedential is to give it “precedential effect,” which in this context means:

- The decision may be officially cited in other administrative hearings, and also in 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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

Designating the *Lang Decision* precedential should reduce litigation relating to post-retirement employment in the future.

The Board’s precedential decisions are published in compliance with subdivision (c) of section 11425.60 and are listed in a special on-line index on the Board’s website, at:

<https://www.calpers.ca.gov/page/about/board/precedential-decisions-appeals-hearings>

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<sup>7</sup> See: 13 CCR 1290 (Office of Administrative Hearings regulation); official *Calif. Law Revision Comments* regarding APA section 11425.60, where it is stated that the statute “[r]ecognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking,” and “[i]s 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; 21 *Jour. Nat. Ass’n Admin. Law Judges* 247 (2001), 265-267.

<sup>8</sup> *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.

<sup>9</sup> *City of Oakland, supra*, 57.

### 3. Consideration Under the Board's Policy Supports a Precedential Designation

The Board's established policy regarding the designation of precedential decisions is based on subdivision (b) of Government Code section 11425.60 and calls for consideration of the following two questions:

- Does the decision contain a significant legal or policy determination of general application that is likely to recur?
- 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."

#### A. This Case Involves a "Significant Legal or Policy Determination of General Application that is Likely to Recur"

The significant legal determinations presented in the *Lang Decision* are the following: (1) clearly articulating who has the burden of establishing that post-retirement employment is lawful; and, (2) establishing the appropriate penalty assessed when a member violates the PERL's working after retirement 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 from a CalPERS participating employer and a 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 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* provides definitive guidance that a respondent, and not CalPERS, has the burden of establishing that the retiree's post-retirement employment is lawful. The *Lang Decision* also provides definitive guidance that, notwithstanding other PERL limitations on the collection of overpayments, 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 repeatedly informs retirees, as well as employers, of the penalty associated with violating the PERL's working after retirement restrictions. CalPERS issues Publication 33 which provides guidance regarding these matters. Nonetheless, CalPERS repeatedly has had 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. As was the case in the *Lang Decision*, retirees often argue that CalPERS is limited, under the three-year period of limitation found in Section 20164, from imposing any penalty, even if the violation is acknowledged. The *Lang Decision* conclusively rejected this argument, recognizing it would prevent CalPERS from effectively implementing the Legislature's desired "policy to preclude retirees from displacing active employees, and to preclude public employees from drawing both public salaries and a publicly-funded retirement benefit."

Currently, there is no Precedential Decision that addresses these two important legal issues to provide clear guidance to CalPERS staff, members, retirees, and employers. In addition, there has been inconsistent administrative application of the appropriate penalty when a retiree violates the PERL's post-retirement employment restrictions. Therefore, a Precedential Decision definitively providing analysis regarding who has the burden of establishing lawful post-retirement employment, as well as the appropriate penalty when a violation occurs, will provide members, retirees and employers with clear 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 *Lang Decision* describes how Respondent knew what was, and was not, allowed with respect to post-retirement employment at the time he offered to return to work as the City's Controller. 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* described how, despite Respondent's knowledge, he nonetheless violated the PERL's post-retirement employment restrictions.

The *Lang Decision* also addresses two important legal issues related to post-retirement employment. First, the *Lang Decision* correctly determines that a respondent has the burden of establishing that post-retirement employment complies 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 he or she 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 made precedential, will provide useful, specific rules for staff, members, retirees, and employers and will likely reduce the amount of future litigation. Accordingly, staff recommends the *Lang Decision* be adopted as a Precedential Decision.

### C. Results of the Requests for Public Comments

On February 26, 2020, a letter was mailed to over 1,600 public agencies, 338 state entities, 63 school districts, and the Respondents in this case, asking for comments on whether to designate as precedential the Decision in *In the Matter of the Appeal Regarding Post Retirement Employment of DUDLEY J. LANG, Respondent, and CITY OF INDUSTRY, Respondent*. Initially, the deadline for submitting public comment was March 27, 2020.

CalPERS received requests from attorney Isabel Safie of Best Best & Krieger LLP and Dillon Gibbons, Senior Legislative Representative for California Special Districts Association (CSDA) to extend the deadline for submitting public comments. Due to the challenges associated with responding to Covid-19, CalPERS determined that the deadline for providing public comment should be extended. On March 27, 2020, CalPERS sent notice electronically that the public comment period would be extended until May 15, 2020.

Staff received four calls from local agencies who essentially asked questions regarding the process of the decision and chose not to provide comments.

Staff received two (2) written comments, which are summarized and analyzed below.

#### **Comment No. 1:**

On March 28, 2020, Kenneth W. Herrscher, Sr. Systems Engineer for the Southern California Regional Rail Authority, submitted a comment in support of the proposed action. Mr. Herrscher stated that Respondent knew CalPERS' rules, violated them, and should be held accountable. Mr. Herrscher concluded that if you do not hold people accountable for violating the law, the door would be opened to more people violating the law.

#### **Analysis of Comment No. 1:**

Staff concurs with Mr. Herrscher's comment.

## **Comment No. 2:**

On May 15, 2020, the CSDA submitted a comment opposed to the proposed action. The public comment expressed the following concerns: 1) CSDA is disappointed that CalPERS did not indefinitely extend the time period for comment until the state of emergency related to the COVID-19 pandemic has ended; 2) CSDA believes that considering making the *Lang Decision* as precedential does not comport with other CalPERS efforts to ease restrictions during the state of emergency related to COVID-19; 3) CSDA does not believe that the *Lang Decision* contains analysis as to why the three year statute of limitation contained in Section 20164(b) should not be applied; and 4) CSDA believes the impact of the *Lang Decision* would be worse if SB 266 (Leyva) is enacted.

## **Analysis of Comment No. 2:**

The concerns expressed by CSDA do not warrant a delay and are not sufficient reasons to not adopt the *Lang Decision* as precedential.

First, CalPERS initially sent the request for public comment on February 26, 2020. The deadline for submitting public comment was extended from March 27, 2020 until May 15, 2020 in response to a specific request from CSDA. In addition, CalPERS allowed public comment to be submitted electronically by email to avoid any delays with regular mail, as evidenced by Comment No. 1. Staff believes that this period of time was more than sufficient for any interested party to submit a comment.

Second, there is no conflict between CalPERS, or the Governor, easing working after retirement restrictions and the Board considering the designation of the *Lang Decision* as precedential. The working after retirement statutes specifically contemplate emergency situations in which working after retirement restrictions would be eased. Designating the *Lang Decision* as precedential does not impact an employer's ability to utilize retirees during such an emergency situation.

Third, despite CSDA's comment to the contrary, the *Lang Decision* actually does provide analysis as to why Section 20164(b)'s three-year period of limitation does not apply. The *Lang Decision* provides the relevant statutory language from Section 20164 and Section 21220. The *Lang Decision* provides analysis as to why the three-year SOL does not apply in Paragraphs 22-24. For example, in Paragraph 24B of the *Lang Decision*, the ALJ explained that Section 20164 is not applicable because this is not a case in which the retirement allowance payments were in the wrong amount, withheld or otherwise erroneous. In addition, the *Lang Decision* explains the Legislature's intent with respect to Section 21220 ("retirement benefits should be reimbursed regardless of the time such payments were made") and concludes that applying the three-year Statute of Limitations would cap violating employees' and employers' liability to just three years. The *Lang Decision* correctly determined that this result would be contrary to the spirit of section 21220 and lead to absurd results. In short, the *Lang Decision* does provide clear analysis

as to why, based on the language of the statutes and the Legislature's intent, the three-year period of limitations found in Section 20164 does not apply in this matter.

Fourth, the fact that the Legislature may enact legislation in the future is not a valid basis for the Board delaying the consideration of designating the *Lang Decision* as precedential. The *Lang Decision* correctly analyzed the law as it currently exists. If the Legislature does not agree with the manner in which the law is applied, the solution is not to disregard existing law. The solution is for the Legislature to revise the law to comport with what it believes the law should be. Until that occurs, CalPERS must administer the PERL as it is currently written. To do otherwise would be unlawful and would exceed the authority conveyed by the Legislature to CalPERS through the PERL.

### Conclusion

For the reasons stated above, staff argues that the Decision in *In the Matter of the Appeal Regarding Post Retirement Employment of DUDLEY J. LANG, Respondent, and CITY OF INDUSTRY, Respondent*, be designated as precedential.

September 16, 2020

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