

ATTACHMENT C

RESPONDENT'S ARGUMENT

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Respondent's Argument Ref. No. 2018-0413 In the Matter of the Appeal Regarding Post Retirement Employment of SALVADOR R. VELASQUEZ, Respondent

To Ms. Cheree Swedensky,

Mr. Salvador Velasquez submits this Respondent's Argument including for four purposes: (1) to urge the Board of Administration to not adopt the Proposed Decision because of several misapplications of law and/or improper factual findings in the Proposed Decision; (2) to reiterate that CalPERS and the Board of Administration do not have the jurisdiction or power in the administrative process to hold a hearing that seeks to lay the foundational basis for or to effect a legal claim to seize, forfeit, or make a claim on Mr. Velasquez's private personal assets (other than claims that relate to the prospective value of the as yet unpaid portion of Mr. Velasquez's CalPERS pension that CalPERS controls); (3) to give notice that under protest and with a full reservation of rights that Mr. Velasquez accepts CalPERS offer that Mr. Velasquez may "re-retire" on June 11, 2014 to the extent that it does not prejudice his other rights in any way or fashion; (4) to give notice that to the extent that there is any claim of overpayment, that Mr. Velasquez seeks offset by the amount of pension payable from June 11, 2014 to the present, including as may be increased by additional years of service, a higher benefit factor, higher pay rate, or other matters.

In the Statement of Issues, CalPERS specifically pled two issues:(1) purported violation of the one- year or "limited duration" rule in effect in 2003 under either *Government Code* §21221(h) or §21224; and (2) an 11 day period of independent contractor employment from May 29 to June 10, 2014. However, CalPERS later admitted the independent contractor question was incorrectly included in the SOI, was not related to Mr. Velasquez, but instead was related to Thomas Mauk.

As far as the law governing work after retirement that was in effect in 2003 is concerned, two *Government Code* sections provide alternative avenues to legally work for a CalPERS contracting employer after retirement, including based on whether a Member (like Velasquez) has specialized skills or not.

In 2003, a retired annuitant with specialized skills could work for a limited duration subject to a 960 hours limit per appointment for a CalPERS contracting employer under *Government Code* §21221.

In 2003, a retired annuitant without specialized skills could work for a limited duration subject to a 960 hours limit per appointment for a CalPERS contracting employer under *Government Code* §21224). Since Mr. Velasquez had specialized skills, he could work as a retired annuitant under either Section 21221 or §21224.

The SOI alleged that Sal Velasquez violated the retired annuitant law by violating the 12-month limitation. However, the SOI and the Proposed Decision did not correctly apply the 12-month or “limited duration” rule. Under the law, a retired annuitant violates the 12-month or “limited duration” (such that it exists) at the time he/she exceeds the 12-month or “limited duration” period. Instead, the SOI alleged and the Proposed Decision found that the violation occurred on the first day of the retired annuitant period (January 1, 2003).

The terms of Section 21211 and §21224 in effect in 2003 were vastly different than the subsequently revised terms, especially those after 2011. For example, there was no payrate restriction under §21221(h) in effect in 2003. Under Section 21221, Velasquez would not be bound by any pay rate restriction. However, section 21224 contained a pay rate limitation in 2003. CalPERS seeks to apply and incorporate the pay rate limitation in §21224 into §21221 for 2003-2011. (An hourly pay rate restriction was later included in §21221(h) in 2012 that divided a monthly salary by 173.33 but it was not retroactive.

Limited Duration. From 2003 to 2011, CalPERS had no evenly applied standards about how long “limited duration” lasts. CalPERS admitted that in 2003 there was no specific guidance about what limited duration meant. 2RT166:17-167. Instead, CalPERS’ witness testified: The intent of §21221H, they’re of limited duration. So limited duration and the year. It’s always been -- let me go back. It’s always been the intent of the -- of the working after retirement statute that an appointment for a retired annuitant is of limited duration. It’s a temporary appointment because retirees cannot serve in permanent positions established at a city 2RT165:1-7.

Multiple Limited Duration Appointments. By using the plural “appointments”, Section 21221 allows multiple appointments of “limited duration” or “one year” in succession. There could be multiple appointments of “limited duration” or “one year” before 2011. CalPERS admits that there can be successive appointments under Section 21224. Only later, in 2011, did the legislature limit multiple appointments in §21221.

Limited Duration in Lang. In the *Lang* decision, CalPERS recognized and admitted in 2012 that “limited duration” in §21221(h) was not 12 months and not a year, but instead that the appointment should be on a limited duration while the agency is actively recruiting a permanent appointment (active recruitment was not included not in §21221(h) in 2003 to 2011. In *Lang*, CalPERS argued that the amendments deleting the 12 month or one year limitation “may be applied retroactively to respondent because they “were matters of clarification of the law.” CalPERS’ argument is not consistent, nor based on the law or the facts. It is clear that Section 21221 did not include single appointments in 2003 through 2011. In 2012, the Legislature

revised 21221 to add restrictions in the number of appointments, an hourly rate comparison, and no benefits allowed. These were not retroactive. In 2012, the Legislature kept out the “limited duration” and “one-year” requirements

Lang, Retroactivity of Changes to Section 21221 in 2010-2012. In the *Lang* decision, CalPERS argued that the legislative changes to *Government Code Section 21221* in 2011 and 2012 deleted the “limited duration” and one year” elements. In *Lang* CalPERS argued that the amendments deleting the 12-month or one-year limitation “may be applied retroactively to respondent because they “were matters of clarification of the law.” CalPERS argued that a retired annuitant could stay in the retired annuitant position for longer than a “limited duration” or “one year” (as long as he/she worked less than 960 hours a fiscal year).” Indeed, CalPERS appears to opine that a retired annuitant under Section 21221 can remain a retired annuitant for as much time as needed to find a replacement for the permanent position. CalPERS even sought to make *Lang* a precedential case.

In this case, CalPERS reverses its opinion. In this case, CalPERS asserts that Velasquez violated the “limited duration” or “one-year” rule as the basis of its SOI. CalPERS asserts that there was a “limited duration” and “one-year” rule applied to Velasquez in 2003.

But if the 2011 and 2012 amendments to Section 21221 deleting “limited duration” and “one-year” limits are retroactive, then CalPERS has no right and no claim to say that Velasquez violated the law on those grounds. They don’t exist. The LA Works Board was not able to find a successor with the specialized skills required. Velasquez was able to remain in a retired annuitant position until they found his successor. Without a “limited duration” or “12 months” limitation in law, then all of Velasquez’s retired annuitant employment is compliant including under the SOI.

Mr. Velasquez re-asserts herein all of the arguments, facts, law, and issues that he raised in the administrative process, in his Administrative Briefing, Post Hearing Brief, and Reply Brief.

CalPERS Has No Right To Seizure, Forfeiture, Repayment from Velasquez’s Private Assets. CalPERS is without power to seize, to forfeit, or take Velasquez’s private assets in its administrative process. CalPERS does not have statutory authority, an administrative remedy, or an administrative forfeiture statute that authorizes CalPERS to require Velasquez to pay money from his private assets to CalPERS. (*Gov’t Code* §20163 [recoupment of overpayments can only be made by reductions to pension allowance], §20085 [restitution may be ordered only by a court in a criminal action].)

CalPERS only has the right to reduce his future unpaid pension allowance (especially in an administrative process). In May 2018, CalPERS reduced Velasquez’s pension to zero. CalPERS made no further payments. Since Velasquez is no longer receiving an allowance from CalPERS, there is no authority, law, jurisdiction, or issue on which CalPERS can proceed, no rights that it can claim, and no remedy that it can fashion in the administrative process that would authorize a result where CalPERS could seize, forfeit or claim his private assets (especially when using a Statement of Issues).

No Jurisdiction and No Authority to Seize Velasquez's Private Assets, Establish Basis for Liability. While CalPERS has not directly sought seizure in its *Statement of Issues*, in reality, CalPERS seeks to establish that Velasquez must repay \$1,633,683.86 consisting of all of the pension payments paid to Velasquez for the period of 1/1/2003 through 4/30/2018. 2RT110:17-25. CalPERS repayment demand is in excess of January 1 2003 to June 2014 period listed in the SOI. (CalPERS' remedy is limited to reducing future pension payments.)

CalPERS has no authority under the Public Employees Retirement Law ("PERL") to seize Velasquez's private assets by, through, or in this process. 2RT134:18-135. As its administrative process is limited to reducing future CalPERS pension payments, CalPERS has no jurisdiction to use this process (i) to set a foundation for seizure or (ii) to seize his private assets.

In the SOI seeking repayment, CalPERS (i) gives no value to Velasquez's existing pension rights, (ii) seeks to seize Velasquez's whole pension under the guise of Velasquez purportedly not filing a re-retirement application, (iii) without notice voids the effect of his November 2002 retirement; (iv) ignores CalPERS' prior representations that Velasquez could re-retire on June 10, 2014 as was CalPERS customary practice and (v) then demands that Velasquez must repay as much as \$1,633,683.86 from Velasquez's personal assets.

Form of Pleading, Accusation v. Statement of Issues. CalPERS' administrative process violates Velasquez's constitutional and due process rights. Velasquez has consistently tried to compel CalPERS to proceed by an Accusation, give fair notice, assert authority for its actions and demands, and bear the burden of proof and persuasion.

If it intended to seek repayment in any way including from Mr. Velasquez's existing CalPERS pension, CalPERS was required to proceed by *Accusation* pursuant to *Government Code* section 11503 which governs an action "to determine whether a right, authority, license, or privilege *should be revoked, suspended, limited, or conditioned* [and which] shall be initiated by filing an accusation..." (*Gov't Code*, §11503, emphasis added). CalPERS refused. Instead, CalPERS decided to proceed by a SOI. A *Statement of Issues* pursuant to *Government Code* section 11504 governs an action "to determine whether a right, authority, license, or privilege *should be granted, issued, or renewed*..." (*Gov't Code*, §11504, emphasis added). CalPERS has no authority to pursue this action via a Statement of Issues and instead can only proceed by Accusation and its attendant legal obligations

Moreover, CalPERS did not meet its burden to prove all the elements of a seizure of Mr. Velasquez's private property outside his CalPERS pension via CalPERS seeking "repayment" of purportedly "overpaid" pension benefits.

Initially, the Los Angeles County District Attorney brought criminal charges against Mr. Velasquez about the retired annuitant issues that are now pending in this administrative process. At CalPERS' behest, LA County District Attorney then dismissed the criminal charges in order for CalPERS to proceed administratively. If CalPERS had wanted penalties, seizure, forfeiture, or seek restitution from Velasquez's private assets, then CalPERS should have maintained its interest in the criminal case, which is now closed.

Due Process Violations. The audit, the preliminary determination letter, the pre-deprivation letter, and SOI did not contain any notice of (i) seizure of his pension, (ii) seizure of payments after 2014; (iii) that CalPERS rejected and voided Velasquez's valid already accepted retirement application, (iv) that CalPERS took his contributions or refunds; (v) required Velasquez to file a re-retirement application (while this dispute was pending which would possibly be considered an admission that he had not retired in 2002); (vi) withdrew its offer for Velasquez to re-retire on June 11, 2014 and (vii) otherwise. Exhibit 17.

The SOI does not contain facts or legal theories that would support: (1) repayment of the pension over the period of January 1, 2013 to June 10, 2014; (2) seizure of the pension payments from July 2014 to May 2018; (3) withholding pension payments from May 2018 to the present; (4) seeking repayment from Mr. Velasquez's private assets outside his future CalPERS pension rights; and (5) other relief express or implied in CalPERS seeking more than \$1.6 million.

Res Judicata, Collateral Estoppel, No Right to Pursue Recovery from Velasquez In Another Action. Velasquez has demanded that CalPERS proceed by accusation, but it refused. CalPERS has required this administrative process. Now CalPERS must accept the consequences of unconstitutionally proceeding by a Statement of Issues including that putatively placed the burden of production, persuasion and proof onto Velasquez. Since the hearing violates his due process rights, and CalPERS failed to produce evidence to sustain any burden of proof, then Mr. Velasquez is entitled to assert res judicata, collateral estoppel, and preclusion such that no other avenue to seek the seizure of his private assets is available to CalPERS. Indeed, since the criminal proceeding is completed, CalPERS no longer has any right to seek Mr. Velasquez's personal assets outside the future unpaid CalPERS pension.

Re-Retirement Retroactive to June 10, 2014 (if Retired Annuitant Violations Found). Mr. Velasquez gives notice that under protest and with a full reservation of rights that Mr. Velasquez accepts CalPERS offer that Mr. Velasquez may "re-retire" on June 11, 2014 to the extent that it does not prejudice his other rights in any way or fashion. Velasquez relied on CalPERS' representation that he could re-retire in June 2014. CalPERS now tries to rescind it without notice as a way of seizing his pension from 2014 to the present. Since Velasquez is still entitled to re-retire in June 2014, Velasquez is also entitled to a pension payment from July 2014 to the present. If he is determined to have violated any retired annuitant restrictions, Velasquez would be subject to re-retirement at the end of the putative violation, but additional years of service and higher benefit factors would be applied.

With the re-retirement application effective as of June 11, 2014 (with a reservation of rights, and no prejudice to any rights), Mr. Velasquez would be entitled to a pension payment from July 2014 to the present. His beneficiary Mrs. Velasquez would also be entitled to a survivor allowance after Mr. Velasquez's death, if he predeceases her.

If Board Finds a Violation, Offsets To Repayment Must Be Considered. Mr. Velasquez gives notice that to the extent that there is any claim of overpayment, that Mr. Velasquez seeks offset by the amount of pension payable from June 11, 2014 to the present, including as may be increased by additional years of service, a higher benefit factor, higher pay rate, or other matters. For example, CalPERS SOI asserted that Velasquez violated the "one

year” or “limited duration” rule, however, it ignores that the violation starts at the time the “one year” or “limited duration” rule is violated. Under this scenario, Velasquez would be entitled to the approximately \$100,000 or more in pension payments for the first period of “one year” or “limited duration”.

But if there is any exposure for violating the RA laws, then the largest scope of the potential violation could be from mid-2004 (when the purported “limited duration” could first potentially end) to mid-2013 when Velasquez became an independent contractor and consultant (which is not governed by retired annuitant laws). At most, the pension paid under the terms of the most expansive violation from mid-2004 to mid-2013 would be less than \$900,000, which would be further offset by the first “limited term” or one-year period where he was owed \$100,000. Under CalPERS’ representations, Velasquez could re-retire in June 2014.

In this example, if found in violation, Velasquez’s pension benefit would increase for the additional 8.5 years of service for the reinstatement period. He would also be entitled to an increased benefit factor. Velasquez would be entitled to his pension benefit starting June 10, 2014 to the present. CalPERS has no grounds to seize the pension payment of \$425,000 (which may be slightly higher with additional years of service and higher benefit factors) already made between July 2014 and May 2018. CalPERS has no right to seize his benefits from June 2014 to May 2018.

CalPERS would also owe Velasquez a pension between June 2018 and the present. CalPERS has no right to withhold his benefits from May 2018 to the present. Any putative overpayment would also be offset by the unpaid pension from June 2018 to the present which is more than \$400,000(or higher with additional years of service and a higher benefit factor). In addition, the actual market actuarial value of his future pension benefit under prevailing interest rates is greater than \$250,000, which would also be used to offset any putative overpayment. In addition, Velasquez has a property right in his future pension and the survivor benefits for his spouse. This has a significant value which CalPERS voids. In addition, Mrs. Velasquez has a property right in survivor benefits.

If the Board finds that Mr. Velasquez violated the retired annuitant law for a period of time, Mr. Velasquez asserts that CalPERS would still not have any right to seek repayment from Velasquez’s private assets, especially in his administrative hearing. CalPERS has no right to seize or seek purported repayment from Velasquez’s personal assets outside his future CalPERS pension. *CalPERS only has the right to reduce his future pension allowance, especially in an administrative process.*

Mr. Velasquez reserves all rights to assert all claims, defenses, and other rights of any kind.

Respectfully submitted,

John Jensen

Attorney For Sal Velasquez