

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DECLINE TO ADOPT THE PROPOSED DECISION AND REMAND TO THE OFFICE OF ADMINISTRATIVE HEARINGS

Except as expressly authorized by statute, the Public Employees Retirement Law (PERL) generally prohibits a retired member from being employed in any capacity by a CalPERS-covered employer without reinstating to active membership. At all times relevant to this matter, Government Code section 21202¹ provided that a retired member who is employed in violation of the PERL “shall be reinstated to membership in the category in which, and on the date on which, the unlawful employment occurred.” Additionally, Government Code section 21220, subdivision (b)(1) requires the member to “reimburse the system for any retirement allowance received during the periods of employment that are in violation of law.” These provisions are commonly referred to as the “working after retirement” laws.

DETERMINATIONS ADVERSE TO MEMBERS ON COMMON LAW EMPLOYMENT AND POST-RETIREMENT EMPLOYMENT VIOLATIONS

Respondent Tarlochan Sandhu; Margaret Souza; David Dowswell; and Estate of Douglas Breeze (On Behalf of Douglas Breeze) (Respondent Members) were retired members of CalPERS.

In 2018, CalPERS received information demonstrating that Respondent Members may be unlawfully employed by Respondents City of Capitola; City of Alameda; Town of Los Altos Hills; City of Union City; City of Hughson; City of Dixon,² and City of Atascadero³ (Respondent Agencies), all in violation of the “working after retirement” laws.

CalPERS began investigating the violations and requested additional information from Respondent Members and Respondent Agencies.

In June 2019, CalPERS issued preliminary determinations informing Respondent Members that they were potentially in violation of the working after retirement laws and provided them with an opportunity to submit additional information.

On January 10, 2020, CalPERS issued final determinations (“2020 Determinations”) to Respondent Members, notifying them that they were common law employees of the respective Respondent Agencies for which they worked following their retirements. The determinations further notified them that the employment relationships violated California Government code sections 7522.56, subdivision (b) and 21220 during certain time periods, and that Respondent Members were subject to reinstatement.

¹ Effective January 1, 2022, Government Code section 21202 was amended to allow CalPERS the discretion not to reinstate a retired member from retirement and instead offer an “administrative remedy” by allowing the retired member to remain in retirement status but reimburse CalPERS any retirement allowance received by the retired member during the period of unlawful employment.

² Respondent Dowswell retired in 2011 and was employed by the City of Dixon between April and July 2015 as a Community Development Director.

³ Respondent Breeze retired in 2007 and was employed by the City of Atascadero between July and November 2014 as a Public Works Director.

Respondent Members appealed CalPERS' 2020 Determinations.

Between March and April 2021, CalPERS filed a Statement of Issues with the Office of Administrative Hearings (OAH) as to whether Respondent Members were common law employees of Respondent Agencies and subject to reinstatement and repayment of retirement benefits during the periods of violations.

The matter was heard before OAH and proposed decisions were issued in favor of CalPERS on September 17, 2021.

On November 17, 2021, CalPERS adopted the proposed decisions as its own decisions ("2021 Decisions"), finding Respondent Members were common law employees of the respective Respondent Agencies and violated the post-retirement employment laws. As a result, Respondent Members were subject to reinstatement. The 2021 Decisions established reinstatement periods for all Respondent Members and payrates for most of them. The 2021 Decisions did not address the issue of overpayments resulting from the reinstatements, noting the issue was not before the Administrative Law Judge (ALJ).

In 2022, CalPERS reinstated Respondent Members and issued collection notices for the overpayments CalPERS had determined were owed because of the 2021 Decisions. Respondent Members appealed CalPERS' determination that they were common law employees by filing a petition for writ of administrative mandate in the Superior Court of California, County of Sacramento. Respondent Members did not appeal the issue of whether their employment was unlawful based on the post-retirement laws. At the outset of their appeal, Respondent Members secured an injunction requiring CalPERS to unwind the reinstatements. CalPERS did so.

In October and November of 2023, the Superior Court issued judgments in CalPERS' favor, finding that Respondent Members were common law employees. Respondent Members appealed those judgments to the Court of Appeal of California, Third Appellate District.

In November 2023, Respondent Members moved for an injunction, requesting the appellate court to stay CalPERS from reinstating them during the pendency of their appeal. On January 19, 2024, the appellate court denied Respondent Members' request to enjoin CalPERS from implementing the reinstatements.

In January 2024, Respondent Members requested the Supreme Court of California review the denial of the stay. On February 21, 2024, the Supreme Court denied Respondent Members' petition for review and application for stay, allowing CalPERS to move forward with reinstatement.

MEMBERS REINSTATED BY CALPERS

In August 2024, CalPERS issued preliminary determination letters that informed Respondent Members that they would be reinstated and provided them with the amount of overpayments they owed. CalPERS issued final determinations to that effect in October 2024, with minor adjustments to the overpayment calculations.

Before the reinstatement deadline of October 31, 2024, Respondent Members filed their third request for injunction, again seeking to prevent CalPERS from implementing the reinstatements, this time in federal court. CalPERS agreed to stay the implementation of the reinstatements until the injunction hearing. In late January 2025, the federal court denied Respondent Members' request for injunction.

On February 6, 2025, CalPERS notified Respondent Members that they would be reinstated effective February 18, 2025, and requested they file their re-retirement applications if they chose to re-retire. Respondent Members did so.

On February 18, 2025, CalPERS reinstated Respondent Members and began processing their re-retirements.

Between February 2025 and August 2025, the appellate court issued opinions holding that Respondent Members were common law employees of the Respondent Agencies. The appellate court did not address the issue of whether Respondent Members worked in violation of the post-retirement employment laws because Respondent Members had not appealed that issue.

OAH HEARING REGARDING THE 2024 DETERMINATIONS

Respondent Members appealed CalPERS' October 2024 determinations to reinstate them and collect overpayment penalties because of their post-retirement employment violations.

A hearing was held before an ALJ with OAH on October 1, 2025, October 2, 2025, and January 1, 2026. Respondents were represented by counsel at the hearing.

The primary and determinative issue for the ALJ to address was whether Respondent Members must reimburse the system for any retirement allowance received during the periods of employment that are in violation of the law, as mandated by section 21220 of the working after retirement laws.⁴ CalPERS' Statement of Issues submitted to the ALJ did not raise the applicability of Government Code section 20164, subdivision (b)(1), which states that "where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment."

Similar to the Board's prior decision in *In the Matter of the Appeal Regarding Post-Retirement Employment of Dudley J. Lang and City of Industry*, August 6, 2019, OAH No. 2019020798 (*Lang Decision*), CalPERS argued at the hearing that Government Code section 20164 was inapplicable. Section 20164 only applies where there is an erroneous payment into or out of the system. Here, the retirement benefits were not paid in error. The retirement benefits were correctly paid but were later subject to reimbursement because Respondent Members violated the post-retirement laws.

⁴ Other issues included whether: 1) Respondent Members were subject to mandatory reinstatement or whether CalPERS may use its discretion under Government Code section 21202, as amended on January 1, 2013, to offer an "administrative remedy"; 2) CalPERS was barred from recovering the overpayments pursuant to any doctrine of equity, including laches, unclean hands, or equitable estoppel; 3) CalPERS had authority to remove retiree health benefits and COLAs as a result of the reinstatement; and 4) the periods of violation, established by the 2021 Decision for Respondent Sandhu, must be altered by CalPERS as requested by Respondent Sandhu.

Furthermore, applying Government Code section 20164 to post-retirement employment matters would be contrary to the purpose of Government Code section 21220 and lead to absurd results. Based on the plain language of section 21220, the Legislature intended reimbursement of all retirement benefits paid during that unlawful employment period, regardless of when those payments were made. Oftentimes, CalPERS is not privy to the post-retirement employment violations until CalPERS conducts an audit or receives an ethics report because the post-retirement employment transaction primarily occurs between the retired member and the employer. If section 20164 is applied, many violating members will escape accountability because CalPERS will not discover the violation well past the three years of the unlawful employment. Application of section 20164 would therefore effectively eliminate the penalty provision of section 21220 and would undermine the legislative intent of that provision.

The reduction or elimination of penalties for these violations would incentivize CalPERS members to violate the “working after retirement” law. In instances where, as here, CalPERS mandatorily reinstates the member, application of Government Code section 20164 will result in “double-dipping” by the members because the members will receive service credit, possibly free of cost, for the unlawful employment and keep their retirement benefits for the same period. Rather than penalizing members for violating the law as section 21220 intended, CalPERS would be rewarding them. In this instance, the 2021 Decisions and appellate court opinions, which held that Respondent Members were common law employees and violated the post-retirement employment laws, would be rendered meaningless because there would be no consequence for Respondent Members having violated the working after retirement laws.

At the OAH hearing on their appeal, Respondent Members argued that, although the 2021 Decisions held that their post-retirement employment violated the PERL, CalPERS was not entitled to collect any of the retirement allowances Respondent Members received during their unlawful post-retirement employment. Respondent Members argued that because their post-retirement employment ended by July 2016 and CalPERS did not issue determinations until January 2020 and did not finally reinstate them until 2025, more than three years after the unlawful employments, CalPERS was barred under Government Code section 20164 from recovering any retirement allowances Respondent Members received during their unlawful employment.

In response, CalPERS urged the ALJ to review the *Lang Decision*⁵ and to reject Respondent Members’ argument that the three-year statute of limitations in Government Code section 20164, subdivision (b)(1) prevents the collection of the overpayments here. CalPERS argued that section 20164 does not apply to this matter. CalPERS reasoned that, because there was no erroneous payment made to Respondent Members, section 20164 does not apply. Respondent Members were correctly paid the retirement benefits but were later required to reimburse those benefits under section 21220 as a penalty for violating the post-retirement employment rules.

⁵ Pursuant to *City of Oakland v. CalPERS* (2002) 95 Cal.App.4th 29, 57; citing *Styne v. Stevens* (2001) 26 Cal. 4th 42, 53, fn. 4, the court may consider nonprecedential decisions as to demonstrate administrative construction.

PROPOSED DECISION

The ALJ granted Respondent Members' appeal, holding that the three-year limitation period in Government Code section 20164 applied to bar CalPERS from collecting overpayment penalties from Respondent Members. The ALJ failed to consider the *Lang* Decision and failed to analyze whether, in light of the *Lang* Decision, relevant legislative history, and other post-retirement employment decisions by the Board,⁶ section 20164, subdivision (b) applies to bar recovery in post-retirement employment matters.

In reaching this decision, the ALJ took issue with CalPERS' delay in implementing the reinstatements yet failed to recognize that Respondent Members' pursuit of various legal remedies, including multiple appeals and multiple efforts to seek injunctions of CalPERS' actions, delayed the process for years and prevented CalPERS from implementing the reinstatements. The ALJ also admonished CalPERS for not providing a breakdown of alternative repayment penalties that would apply if the three-year limitation in section 20164 barred full recovery. However, the ALJ failed to recognize that CalPERS does not apply the three-year limitation to working after retirement violations.⁷

REQUEST TO REMAND

For all the above reasons, staff argues that the Board of Administration should decline to adopt the Proposed Decision in its entirety and should remand the matter back to OAH for the taking of further evidence. The issue on remand should be limited to whether, considering the *Lang* Decision, other Board decisions interpreting the post-retirement employment laws, and any relevant legislative history, Government Code section 21220 applies to determine the remedy for violations of the working after retirement laws or Government Code section 20164 applies in this case as a matter of law.

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⁶ *In the Matter of the Appeal Regarding Post-Retirement Employment of: Salvador R. Velasquez, Respondent, and Human Services Consortium of the East San Gabriel Valley dba LA Works, Respondent*, July 31, 2022, OAH No. 2019120557; *In the Matter of the Appeal Regarding Post-Retirement Employment of: William H. Hampton, Respondent, and County of Sutter and Levee District Number One of Sutter County, Respondents*, May 17, 2017, OAH No. 2016081162; *In the Matter of the Appeal Regarding Post Retirement Employment of: Kim C. Townsend, Respondent, and Los Angeles County Schools, Respondent*, May 15, 2019, OAH No. 2018110616; *In the Matter of the Appeal of Post Retirement Employment of Matthew J. Hoch, Respondent, and Chino Valley Independent Fire District, Respondent*, February 19, 2025, OAH No. 2024060958; *In the Matter of the Appeal Regarding Post Retirement Employment of Vincent J. Leone, and Respondent, Hemet Municipal Water District, Respondent*, March 20, 2019, OAH No. 2018100169.

⁷ In addition, the repeated calculation of alternative hypothetical repayment amounts for multiple members is complex and would impose a significant administrative burden on CalPERS.