

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

### *Case Background*

In October 2018, Eric Lund (Respondent), a Sergeant with the California Highway Patrol (CHP), was found guilty of possessing over 600 images of child pornography (including of prepubescent minors) under Penal Code section 311.11(c)(1). The judge later sentenced him to five years in prison.

The Court of Appeal affirmed Respondent's conviction in a published decision issued on June 1, 2021. (*People v. Lund* (2021) 64 Cal.App.5th 1119, 279 Cal.Rptr.3d 697.) The decision details the investigation by a Detective of the Vacaville Police Department (Detective) that led to Respondent's conviction.

In 2014, the Detective was investigating child pornography cases over peer-to-peer networks using a tool called the Child Protection System (CPS), which automates the process of searching peer-to-peer networks for child pornography. CPS identifies the software's randomly generated globally unique identifier (GUID), which is used to specifically identify the instance of the software being used. CPS logs the file names, IP addresses, the dates and times the files were detected and sometimes the software used for the files. Law enforcement then obtains records from internet service providers to determine the physical location of the computer associated with the files.

When logging on to CPS in August 2014, the Detective found a user, identified by a specific GUID, who possessed several suspected child pornography files. After confirming that the files were child pornography, the Detective noticed that the specifically identified GUID only showed activity overnight on Wednesday, Thursday, Friday and Saturday at a specific business location. The Detective obtained the physical addresses for the IP addresses used by the GUID, which were all businesses that were closed overnight, and conducted overnight surveillance there in early October 2014. During his surveillance, the Detective observed CPS activity from a business called the Yogurt Shack and also observed one vehicle parked at the Yogurt Shack at that time: a single California Highway Patrol cruiser with Respondent inside the vehicle. No confirmed child pornography was downloaded on this occasion.

The Detective then contacted the CHP to try to obtain the GPS location information pinpointing Respondent's locations while on duty. However, because Respondent had not been logging into his work vehicle's GPS tracker, no such data was available. Through a search warrant, the Detective then arranged for a GPS tracker to be placed on the CHP's vehicles used by Respondent. The first night after the trackers were installed, the GPS tracker showed Respondent, in a CHP cruiser, stopping at a Cordelia

park for over two hours near a house with open Wi-Fi access. CPS detected the target GUID with child pornography that night at the same location and time the GPS-tracked CHP cruiser was at the Cordelia park.

The Vacaville Police Department (Vacaville PD) then obtained search warrants and searched Respondent's desk at work and personal car, which was parked at CHP for his next shift. In Respondent's trunk, which was at Respondent's CHP station at the time of his search and arrest, Vacaville PD found three flash drives, external hard drives, a laptop (Laptop), and a USB Wi-Fi adaptor with a Mac address identical to the one recorded during the Detective's surveillance in October 2014. Two of the flash drives contained deleted child pornography that the Detective eventually recovered. The hard drives contained over 10,000 files suspected to be child pornography. The Detective confirmed 73 of the files from the hard drives to be child pornography. One of the hard drives contained the same eMule software as identified during the Detective's surveillance as the targeted GUID. The Laptop contained a copy of the same eMule software as the hard drive but also had the same GUID and port number as previously identified by CPS for the child pornography files. The Laptop showed it had connected to the business surveilled by the Detective in October 2014, but that it crashed after connecting to the business's internet. The investigation also confirmed that the Laptop had connected to the unsecured Wi-Fi near the Cordelia park.

CHP searched Respondent's desk, personal car and work locker at the Fairfield CHP building. A flash drive was found in Respondent's work locker, and analysis of the flash drive found 10 child pornography files marked for deletion that were forensically recoverable.

### *The Felony Forfeiture Statute*

Under Government Code section 7522.72:

If a public employee is convicted by a state or federal trial court of any felony under state or federal law for **conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary**, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction. (Section 7522.72(b)(1); emphasis added.)

Government Code section 7522.72(c)(1) provides that the date of the forfeiture is determined from the "earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive." The same section states "The rights and benefits shall remain forfeited notwithstanding any reduction in sentence or

expungement of the conviction following the date of the member's conviction." Benefits may only be restored if the "conviction is reversed and that decision is final." (Government (Gov.) Code section 7522.72(h).)

### *CalPERS' Felony Forfeiture Action*

CalPERS received a Forfeiture of Benefits Employer Form (Forfeiture Form) from Respondent CHP on December 27, 2018. CHP informed CalPERS that Respondent's felony conviction was work related. After review of the facts and documentation provided, CalPERS issued Respondent a felony forfeiture determination (Determination) on May 14, 2019. The Determination explained that 0.536 years of Respondent's service credit must be forfeited and that the forfeiture resulted in a total overpayment of retirement benefits of \$40,644.21. Because CHP informed CalPERS that the earliest date of commission of the felony was June 2014 (but likely as early as 2009), CalPERS determined the starting date of forfeiture was June 20, 2014.

Respondent appealed CalPERS' Determination and requested a hearing before the Office of Administrative Hearings (OAH).

### *The September 30, 2021 OAH Hearing*

OAH heard the matter on September 30, 2021. Respondent was represented by counsel at the hearing, but did not appear himself. CalPERS Staff testified at the hearing that CalPERS received the Forfeiture Form and began the forfeiture process. CHP's Forfeiture Form indicated that Respondent's felony arose from his work at Respondent CHP. Staff contacted the CHP to confirm the felony was related to Respondent's job and learned that a flash drive with child pornography was found in Respondent's work locker. CalPERS then issued its felony forfeiture Determination.

The Detective testified at the OAH hearing and discussed his investigation. He confirmed the investigation of child pornography downloads, which led to the Detective's surveillance of the Yogurt Shack, which confirmed Respondent's presence in the CHP cruiser. The Detective also explained the warrant he obtained for the placement of a GPS tracker on the CHP cruisers. The GPS trackers confirmed Respondent was parked at the Cordelia park in his CHP cruiser at the same time child pornography was downloaded from an unsecured network next to the park. The Detective was present for Respondent's arrest on the CHP's premises, and was also present for the search of Respondent's personal vehicle. The Laptop and hard drives were found in Respondent's trunk and those items contained confirmed child pornography. Detective also stated his conclusion that Respondent had downloaded child pornography while on duty.

Respondent called a Vacaville PD Sergeant (Sergeant) as a witness in his defense at the OAH hearing. The Sergeant was present at the Yogurt Shack surveillance, and he confirmed Respondent's presence. Sergeant did not personally observe Respondent downloading child pornography.

Respondent did not appear or testify at the hearing, but his attorney presented some former performance evaluations in support of his case. The performance evaluations were admitted into evidence as administrative hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions (Gov. Code section 11513(d).)

### *The Proposed Decision*

The ALJ granted Respondent's appeal. Although Respondent had the burden of proof, the ALJ held that CalPERS could not link Respondent's felonious conduct to his job duties. Although CalPERS presented persuasive evidence from Detective regarding the investigation and history of Respondent's on-the-job possession of child pornography, the ALJ declined to consider it because CalPERS only learned of it after its Determination. In other words, the ALJ limited her analysis to the evidence CalPERS obtained before it issued the Determination, which in the ALJ's view, did not sufficiently tie Respondent's conduct to his work.

### *The Proposed Decision Should Be Rejected and Remanded for the Taking of Further Evidence.*

In reaching her Proposed Decision, the ALJ did not consider any of the evidence CalPERS obtained after issuing its May 14, 2019 Determination. That evidence included the Detective's investigation into Respondent, the GPS surveillance that led to Respondent's arrest, Respondent's arrest on Respondent CHP's premises, the police reports detailing the investigation, and the Court of Appeal opinion upholding the felony conviction. All of that evidence should have been considered by the ALJ.

Moreover, the ALJ improperly relied on performance evaluations in the Proposed Decision. The evaluations were admitted as administrative hearsay. Hearsay evidence may be used to supplement or explain other evidence, but over timely objection shall not be sufficient in itself to support a finding (Gov. Code section 11513(d).)

The Administrative Procedure Act (APA) governs administrative hearings. Government Code section 11507.6 provides for pre-hearing discovery, which allows all parties to obtain all relevant evidence from the other parties following the service of the Statement of Issues (SOI).<sup>1</sup> Discovery allows all parties, including CalPERS, to obtain and rely on new information following the issuance of the determination and SOI. Government Code section 11513(c) requires the admission of all relevant evidence. Failure to consider newly discovered evidence that directly supports a party's case, as the ALJ has done here, would render the APA's discovery procedures meaningless.

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<sup>1</sup> The SOI, similar to a complaint in a civil lawsuit, initiates the case at OAH. The SOI always follows CalPERS' determination.

The ALJ may have thought CalPERS' post-determination evidence was a variance from the pleadings, but if she did, she still should have considered it. A variance between a pleading and the evidence presented is not material unless it has misled or prejudiced the adverse party. (*Stearns v. Fair Employment Practice Commission* (1971) 6 Cal.3d 205, 212-213.) This is because the primary purpose of the pleading rules is to put the opposing party on notice of what she or he must defend against. (*Nelson v. Dept. of Alcoholic Beverage Control* (1959) 166 Cal.App.2d 783.)

In this case, the pleadings gave Respondent more than fair notice that the key issue at hearing would be whether his felonious conduct was work related. He was represented by competent counsel. He suffered no undue prejudice from the presentation of post-determination evidence at the hearing. In short, Respondent was fully aware that the issue for hearing was whether his felony was job related, and he knew that Detective would testify at least a year before the hearing began.<sup>2</sup> Moreover, CalPERS provided Respondent with all documents and evidence that it intended to introduce well in advance of the hearing.

Staff recommends that the Board reject the Proposed Decision, and remand it for the ALJ to consider whether Respondent's felony conviction concerned "conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary..." The ALJ should have considered all of the evidence introduced at the September 30, 2021 hearing, and should not have allowed the hearsay evidence to support any finding.

January 18, 2022

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<sup>2</sup> The OAH hearing was delayed due to deference to the priority of the criminal case. The Court of Appeals issued its Opinion on June 1, 2021.