

**ATTACHMENT B**

**Staff Argument**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Salvador R. Velasquez (Respondent) was employed by Respondent Human Services Consortium of the East San Gabriel Valley, dba LA Works (LA Works), at all relevant times, as its Chief Executive Officer (CEO). On November 18, 2002, Respondent submitted an application for service retirement indicating that he was retiring as LA Works' CEO effective December 31, 2002. He began receiving his retirement allowance in February 2003.

Unbeknownst to CalPERS, at the time Respondent submitted his retirement application, he had devised a plan that would allow him to earn nearly \$85,000 per year as a part-time employee of LA Works while collecting a retirement allowance in excess of \$96,000. On October 10, 2002, Respondent submitted a plan to LA Works' Board of Directors (Board) to "retire' under PERS effective January 1, 2003, while simultaneously continuing to lead LA Works as Chief Executive Officer...." Respondent planned on "working a three-quarter to full-time schedule annually;" however, because he could only work 960 hours under the Public Employees' Retirement Law (PERL), "[t]he remaining 600 hours will be in-kind." Under Respondent's plan, his salary would be reduced "by twenty-five per cent," and LA Works would save additional money because "the PERS contribution now paid in my name will cease." He would be compensated "at seventy-five per cent of [his] annual salary," his salary would be "distributed over 960 hours in an amount equaling three quarters of my current salary," and "he would continue to have the opportunity to earn an incentive bonus." Respondent proposed that he work until at least October 2007, at which time he agreed to "present the Board with a specific exit plan."

On November 18, 2002, (the same day he submitted his retirement application), Respondent submitted a revised plan to LA Works' Board by which he would "retire" as LA Works' full-time CEO "while simultaneously continuing to lead LA Works as Chief Executive Officer." This new plan provided that he would "work up to 960 hours;" however, despite working a half-time schedule, LA Works would only "reduce the salary now paid to [Respondent] by twenty-five per cent." Under Respondent's plan, he would be paid \$88.42 per hour, (or nearly \$27 per hour more than he received as a full-time CEO), his salary would be distributed over 960 hours; he would continue to have the opportunity to earn an incentive bonus, and he would continue to use "my automobile, health and life insurance benefits." The proposal was to "be on a year-to-year basis" and Respondent was to "present the Board with a specific exit plan." There is no evidence that Respondent ever submitted a "specific exit plan" to LA Works' Board.

Respondent's plan to continue working as LA Works' CEO was approved by LA Works' Board. Effective January 1, 2003, (the day after he purportedly retired), Respondent was appointed as LA Works' CEO, earning an hourly rate of \$88.42. In addition, he

“continue[d] to receive health and dental insurance, life and long-term disability insurance benefits, and management deferred compensation benefit.”

On June 10, 2014, Respondent finally quit working as the CEO for LA Works and received his final paycheck. Respondent informed the Chairman of the LA Works’ Board that “[i]t is now time for me to move into full retirement. The 38 years I spent leading LA Works has been an incredible journey....”

The PERL generally prohibits a retiree from receiving a retirement allowance from CalPERS while at the same time working and receiving a publicly funded salary. However, the PERL does provide limited exceptions to this general rule. Relevant to this matter, Government Code section 21221, subdivision (h),<sup>1</sup> allows an employer to appoint a retiree to a vacant position during recruitment for a permanent appointment.<sup>2</sup> 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>3</sup> Sections 21221, subdivision (h), and section 21224 each contain certain restrictions on post-retirement employment. Namely, these sections limit the number of hours that can be worked to 960 hours per fiscal year, indicate the appointment should generally be of a limited duration, and limit the compensation the retiree can receive to the maximum amount paid to employees performing comparable duties as listed on a publicly available pay schedule.

On April 27, 2015, CalPERS’ Office of Audit Services (OFAS) commenced an audit of LA Works because LA Works’ contract with CalPERS was in the process of being terminated. LA Works lost its funding as a result of Respondent’s allegedly illegal conduct, which led to its inability to pay employer contributions to CalPERS, and a devastating reduction in retirement benefits for LA Works’ current and future retirees. OFAS determined that Respondent violated numerous PERL post-retirement employment restrictions because he worked as CEO of LA Works from January 1, 2003, to June 10, 2014; he worked in excess of 960 hours per year; and he received both regular earnings as CEO plus retirement benefits totaling \$283,000.

CalPERS’ Employer Account Management Division (EAMD) was responsible for reviewing the audit findings and implementing changes to Respondent’s CalPERS membership necessitated by his unlawful post-retirement employment. EAMD agreed with the audit’s findings that Respondent’s post-retirement employment violated the PERL: Respondent was improperly employed as LA Works’ CEO for nearly 11.5 years, he worked more than 960 hours per year, and he received retirement benefits in addition to regular earnings. Respondent was informed that he would be reinstated, he

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<sup>1</sup> Unless otherwise specified, all further statutory references are to the California Government Code.

<sup>2</sup> Section 21221, subdivision (h) is generally known as the “vacant position” exception and allows a retiree to be appointed to a high-ranking position on an interim basis while the employer is actively recruiting a permanent replacement.

<sup>3</sup> Section 21224 is generally known as the “extra help” exception in which a retiree may be used when specialized skills are needed to perform work of limited duration or during an emergency to prevent stoppage of public business.

would need to complete an application to re-retire, and that he would need to repay the retirement allowance he received from January 1, 2003, to May 1, 2018.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on January 24, 2022. Respondent was represented by counsel at the hearing. Respondent LA Works did not appear at the hearing.

At the hearing, CalPERS presented evidence that Respondent's post-retirement employment as LA Works' CEO started on January 1, 2002 and ended on June 10, 2014. CalPERS argued that this violated the PERL's 12-month and/or limited duration restriction contained in section 21221 subdivision (h). CalPERS presented evidence that Respondent worked more than 960 hours per year. CalPERS argued that Respondent could not avoid the PERL's 960-hour restriction by "volunteering" 600 hours "in-kind." CalPERS presented evidence that Respondent received benefits such as auto allowance, health and dental insurance, and bonus pay. CalPERS argued that this violated the PERL's restriction that a retiree cannot receive compensation in addition to regular or base earnings. CalPERS also presented evidence that the rate of pay Respondent received for his post-retirement employment, \$88.42 - \$165.00 per hour, exceeded the rate of pay that Respondent received as CEO immediately prior to his retirement, \$61.76 per hour. This violated the PERL's restriction that a retiree cannot earn more than the payrate available to a similarly situated employee in the same position or performing comparable duties. Based on the evidence, CalPERS argued that Respondent's violation of the PERL's working after retirement laws commenced on January 1, 2003 and continued until the date he actually stopped working as CEO of LA Works on June 10, 2014.

As a result of Respondent's unlawful post-retirement employment, CalPERS argued that section 21220 requires Respondent to reimburse CalPERS "any retirement allowance received during the period or periods of employment that are in violation of law." Moreover, CalPERS presented evidence that Respondent, despite being informed of his right to do so, failed to submit a retirement application after being reinstated. Consequently, CalPERS argued that Respondent is required to reimburse CalPERS the amount of retirement benefits he received from January 1, 2003, to May 1, 2018.

Respondent testified that when he resigned from LA Works in 2002, it was his intention to continue to provide leadership to the organization as CEO. Respondent testified that his employment after retirement was renewed annually by LA Works' Board. He admitted that he worked more than 960 hours as a retired annuitant, did not believe he was paid for more than 960 hours, but that he may have been. For these reasons, he thought he did not violate the PERL's 960-hour restriction.

Respondent testified that he received employment benefits as a retired annuitant; however, he believed he did not receive these benefits after the law changed on January 1, 2013, to prohibit a retired annuitant from receiving excess benefits.

Respondent was unable to explain why LA Works' payroll records demonstrated that he continued to receive these benefits in 2013 and 2014.

Respondent testified that he did not recall his monthly salary in December 2002, when he retired. He also testified that he did not recall how much he received as a retired annuitant, but he had no reason to believe he was not paid between \$88.42 - \$165.00 per hour as a retiree. Respondent admitted that he knew he should not earn more as a retiree than he earned as a full-time employee.

Respondent claimed that he did not intend to work as LA Works' CEO indefinitely after he "retired" on December 31, 2002; however, he did not recall presenting any type of exit plan to LA Works' Board. Respondent admitted that he knew he was required to look for a successor as LA Works' CEO, but that he did not even begin a search for a CEO until August 2013.

Respondent argued that CalPERS is barred from recovering the retirement benefits he unlawfully received by the statute of limitations contained in section 20164. Respondent also argued that CalPERS is barred from asserting that he violated the PERL's post retirement restrictions by the affirmative defenses of laches and estoppel. Finally, Respondent argued that CalPERS violated his due process rights.

Overall, the ALJ found "Respondent's testimony is not credible given his position as CEO with LA Works and his tenure as a CalPERS member."

Respondent called David Truax as a witness. Mr. Truax served as Chairman of the LA Works Board for two years ending in 2003. Mr. Truax testified that neither he nor LA Works' Board were responsible for devising the "plan" that allowed Respondent to "retire" but continue working as a LA Works' CEO. Mr. Truax believes that Respondent personally prepared these plans.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that CalPERS had the burden of establishing that Respondent's post-retirement employment violated the PERL's restrictions. CalPERS does not agree with the ALJ's legal conclusion that CalPERS bears the burden in this matter. However, this issue is irrelevant because the ALJ held that CalPERS established "Respondent's post-retirement employment from January 1, 2003, to June 10, 2014, violated the PERL. Accordingly, Respondent is subject to reinstatement and required to reimburse the retirement system."

The ALJ agreed with CalPERS that Respondent's post-retirement employment violated the PERL's restrictions that appointments be for a limited duration while the public agency actively recruits to fill a vacancy. The ALJ found that Respondent's appointment was not of a limited duration and there was no evidence that LA Works actively recruited any individuals to fill the CEO position for years.

The ALJ rejected Respondent's argument that he was a consultant, and therefore immune from the PERL's post retirement restrictions. The ALJ found the evidence demonstrated Respondent was an employee, and that he improperly received benefits, including a car allowance and insurance. The ALJ also found that Respondent exceeded the 960-hour limit, and his payrate exceeded allowable limits.

The ALJ rejected Respondent's arguments that laches and estoppel prevent CalPERS from reinstating him and seeking that he reimburse CalPERS for the benefits he unlawfully received.

With respect to laches, the ALJ found no evidence to support a finding that CalPERS unreasonably delayed notifying Respondent that he violated the PERL, and that it would be reinstating him. The ALJ also found no evidence to support Respondent's arguments that he was prejudiced by the alleged delay, a necessary element for a laches defense. For example, Respondent presented no evidence that he could not locate witnesses or that witnesses are deceased because of the passage of time.

With respect to estoppel, the ALJ found no evidence to support a finding that CalPERS was aware of Respondent's post-retirement employment before it conducted its audit of LA Works, and no evidence to support a finding that CalPERS intended for Respondent to work as a retired annuitant in violation of the PERL and receive retirement benefits at the same time. Under these circumstances, CalPERS' unknowing payment of retirement benefits to Respondent while he worked 11.5 years as a retired annuitant in violation of the PERL, does not support an estoppel remedy. The ALJ also found that there is a strong public policy against allowing retired annuitants to "double dip," by receiving both retirement benefits and a salary by working in contravention of the PERL, thereby skirting the requirement to contribute to the retirement system when employed by a CalPERS-covered agency. The ALJ concluded that applying equitable estoppel to CalPERS under the facts of this case would have a disruptive effect on the administration of the retirement system.

The ALJ also rejected Respondent's argument that CalPERS is barred from collecting benefits he unlawfully received by the three-year statute of limitations contained in section 20164. The ALJ found that Respondent did not demonstrate that CalPERS made an error with respect to his retirement benefits. Moreover, the ALJ found that section 20164 does not apply to the penalty the Legislature created by enacting section 21220 in an attempt to prevent unlawful post-retirement employment. The ALJ found that pursuant to section 21202 "CalPERS was required to reinstate Respondent and directed Respondent to re-retire; however, Respondent did not do so and had not done so as of date of the hearing."

In the Proposed Decision, the ALJ concludes that Respondent's post-retirement with LA Works from January 1, 2003, to June 10, 2014, violated the PERL, and requires Respondent to be reinstated for that period, repay certain retirement benefits paid by CalPERS, and pay an amount equal to the employee contributions that would have been paid during that period, plus interest.

For all the above reasons, staff argues that the Proposed Decision should be adopted by the Board.

July 13, 2022

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