

**ATTACHMENT A**

**RESPONDENT'S PETITION FOR RECONSIDERATION**

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7  
8 BEFORE THE BOARD OF ADMINISTRATION,  
9 CALPERS, STATE OF CALIFORNIA  
10

11 SALVADOR VELASQUEZ, ) OAH Case No.: 2019120557  
12 ) CalPERS Case No. 2018-0413  
13 Petitioner, )  
14 ) **REQUEST FOR RECONSIDERATION**  
15 vs. )  
16 ) **STAY OF EXECUTION OF DECISION**  
17 ) **REQUESTED**  
18 CALIFORNIA PUBLIC EMPLOYEES' )  
19 RETIREMENT SYSTEM; BOARD OF ) OAH Filing Date: 12/31/2019  
20 ADMINISTRATION OF THE CALIFORNIA ) Location: 320 W. Fourth St Suite 630  
21 PUBLIC EMPLOYEES' RETIREMENT ) Los Angeles CA 90012  
22 SYSTEM; ) OAH Hearing Date January 24-26, 2022  
23 Respondents and Real Parties in Interest. ) CalPERS Board Hearing July 13, 2022  
24 ) Served July 25, 2022  
25 )  
26 )  
27 ) By mail and email to  
28 ) Chree Swedensky, Assistant to the Board  
 ) Chree Swedensky@calpers.ca.gov  
 ) Executive Office CalPERS  
 ) BOX 942701  
 ) Sacramento CA 94229-2701  
 ) cc: John Shipley CalPERS Staff Attorney  
 ) john.shipley@calpers.ca.gov  
 )

1 **Petition for Reconsideration, Request for Stay in Execution of Decision.**

2 Petitioner Salvador Velasquez hereby files this *Petition for Reconsideration and Request*  
3 *For a Stay of the Decision* directed to Respondent California Public Employees' Retirement  
4 System and its Board of Administration (collectively "CalPERS"). Petitioner seeks  
5 reconsideration based on the following as well as other matters to be asserted:

6 **Prejudicial Errors In Decision.**

7 Petitioner Salvador Velasquez challenges the legal and factual basis of the Decision *In Re*  
8 *Salvador Velasquez* heard and decided by CalPERS on July 13, 2022, served July 25, 2022,  
9 including but not limited to the following bases:

10 **No Statutory Authority to Seize, Forfeit, Restitution.**

11 In the administrative process, CalPERS and its Board of Administration are limited to  
12 their statutory authority in the Public Employees Retirement Law ("PERL"). Under *Gov't Code*  
13 §21220 et al, the PERL grants CalPERS the right to seek repayment from the future unpaid  
14 CalPERS pension, but not Velasquez's personal property. (*Gov't Code* §20163) [recoupment of  
15 overpayments can only be made by reductions to pension allowance]. CalPERS had already  
16 stopped Velasquez's pension in May 2018, in violation of due process.

17 **Improper Pleading, Statement of Issues v. Accusation.**

18 Once in the administrative process, CalPERS wrongly used a Statement of Issues that  
19 failed to provide adequate notice or due process. At the least, CalPERS should have used an  
20 Accusation, bore the burden of proof and persuasion from the beginning, (which did not require  
21 Velasquez to act until CalPERS met its burden), and otherwise provide adequate notice and due  
22 process (in order to reduce his future pension). CalPERS did not do so.

23 **Seizure, Forfeiture of Velasquez's Private Property.**

24 While CalPERS has not directly sought seizure or restitution in its *Statement of Issues*, in  
25 reality, CalPERS seeks to void all of CalPERS' prior pension payments to Velasquez for the  
26 period of 1/1/2003 through 4/30/2018 and require Velasquez to repay CalPERS \$1,633,683.86,  
27 with interest. 2RT110:17-25. CalPERS repayment demand is in excess of the January 1 2003 to  
28

1 June 2014 period listed in the Statement of Issues (“SOI”). CalPERS already erroneously  
2 stopped Velasquez’s pension in May 2018, without due process.<sup>1</sup>

3 Incorrectly Conceptualized as One Period, Instead of Time Out of Compliance.

4 The Statement of Issues framed the dispute narrowly as “one issue”. The Decision also  
5 seems to conceptualize the whole period of January 1, 2003, to June 10, 2014, as one issue and  
6 one period. This then prompted the ALJ to make an “all or nothing” decision about the whole  
7 period as one finding. The Decision appears to find that a violation at any time within the period  
8 would make the whole period out of compliance. This is inconsistent with the Decision itself,  
9 and with the PERL which only addresses the period out of compliance (if any).

10 Lack of Notice.

11 In the Audit, letters, and Statement of Issues, CalPERS only gave notice of three potential  
12 violations: (1) vaguely alleging a single violation of the limited duration element by concluding  
13 that Velasquez worked 11.5 years in total (but not quantifying specifically how Velasquez  
14 purportedly violated the “limited duration” element for each period separately, as required); (2)  
15 alleging Velasquez was a common law employee for 11 days, when in fact CalPERS allegations  
16 related to the alleged independent contractor status of an entirely different person, Thomas  
17 Mauk, over a later period; and (3) alleging that Velasquez received additional benefits over the  
18 period from 2003 to 2014, (as “proven” by CalPERS expert witness’ testimony who stated that  
19 she believes that Velasquez received the benefits). However, the 2013 amendments to *Gov. Code*  
20 §21221<sup>2</sup> regarding the receipt of additional benefits were substantive and not retroactive.

21 In the 3-day administrative hearing, CalPERS added new issues and expanded others  
22 without adequate notice and without due process.

23 Incorrect Burden of Persuasion.

24 Both parties asserted that the other party had the burden of proof and persuasion. The  
25 burden of proof and persuasion was only resolved in the Final Decision, after the fact. Velasquez

26  
27 <sup>1</sup> On the condition that it does not prejudice him in any way, Velasquez accepted  
CalPERS’ offer for him to “re- retire” effective June 10, 2014. He reserves all rights.

28 <sup>2</sup> CalPERS’ Audit implicitly finds that the 2013 revision to §21221 prohibiting the  
receipt of additional benefits was a substantive new requirement and not retroactive.

1 agrees that CalPERS had the burden of proof, however, Velasquez challenges the Decision’s  
2 ruling that CalPERS’ burden of persuasion was “preponderance of the evidence”.

3 Clear and Convincing Evidence Standard Required.

4 Velasquez asserts that “clear and convincing” evidence (i.e. a “reasonable certainty” or a  
5 “high probability” that a proposition is true) is the proper standard. It represents a reasonable  
6 middle ground between the degree of proof required in criminal vs. civil cases. It is based on due  
7 process rather than a policy judgment. *Hughes v. Board of Architectural Examiners* (1998) 17  
8 CA4th 763, 788-789, fn. 9, *Grubb Co., Inc. v. Department of Real Estate*, 194 CA4th at 1502,  
9 *Ettinger v. Board of Med. Quality Assurance* (1982) 135 CA3d 853, 855-857. When an agency  
10 seeks to deprive a private party of a desired status, the agency must bear both the burden of  
11 production and the burden of persuasion. *Daniels v. Department of Motor Vehicles* (1983) 33  
12 C3d 532, 536, This is especially important as CalPERS was seeking forfeiture, repayment, or  
13 restitution of \$1.6 million from Velasquez. The correct application of the higher burden of proof  
14 and persuasion would have resulted in a different outcome in the Decision.

15 CalPERS Did Not Meet Burden Under Any Evidentiary Standard.

16 CalPERS did not meet its burden to prove that Velasquez was out of compliance for each  
17 period between 2003 and 2014. As an example, CalPERS did not meet its burden to prove that  
18 LA Works did not appoint Velasquez to multiple appointments of “one year” or “limited  
19 duration” in *Gov. Code* §21221 for at least 2003, 2004, 2005, and 2006.

20 Decision Incorrectly Shifts Burden of Proof onto Velasquez.

21 In several key elements, the Decision shifts the burden of proof to Velasquez without  
22 CalPERS having met its initial burden. For example, the Decision does not require CalPERS to  
23 prove that (1) LA Works did not appoint Velasquez to multiple “limited duration” appointments,  
24 and (2) that Velasquez was a common law employee from 2013 to 2014, (instead finding that the  
25 purported absence of evidence of a change in duties was persuasive), and (3) other errors.

26 Improper Retrospective Application of Substantive Statutory Amendments.

27 The Decision misapplied amendments to the PERL retroactively, even though the statutes  
28 did not indicate that they were retroactive, and the amendments imposed substantive changes that

1 placed additional restrictions that when applied retroactively made Velasquez “liable”  
2 retroactively. For example, *Gov. Code* §§21221 and 21224 allowed “multiple appointments”  
3 (plural) of “limited duration” or one-year periods from 2003 to 2011. The 2012 amendments  
4 restricting LA Works to a single appointment were not retroactive.

#### 5 Incorrect Retroactive Application of “Recruitment” of a Successor

6 The decision did not mention recruitment of a successor as being one of elements that  
7 *Gov. Code* §21221 required from 2003. Adding a substantive “during recruitment” requirement  
8 arising from a statutory amendment in 2012 newly creates substantive new elements that did not  
9 previously exist from 2003 to 2011. However, the Decision is vague or contradictory on whether  
10 the Decision applied the “recruitment” of a successor retroactively or not. It held: “Respondent’s  
11 post-retirement employment violated *Gov. Code* §21221, subdivision (h), even without  
12 retroactive application of the statute. (Emphasis added) Retiree appointments under *Gov. Code*  
13 §21221, subdivision (h), are to be limited in duration while the public agency actively recruits to  
14 fill a vacancy. (Emphasis added) ... To the contrary, Respondent held the CEO position from  
15 January 1, 2003, to March 2013. There was no evidence that LA Works actively recruited any  
16 individuals to fill the position during that timeframe”. ¶30, p. 37. (Emphasis added)

#### 17 Improper Statutory Construction.

18 The Decision misinterprets and misconstrues *Gov. Code* §21221 and §21224 at least for  
19 the period of 2003 to 2011 and 2013 to 2014 in a manner that prejudices Velasquez. For  
20 example, the decision misapplies or misconstrues whether the pay rate comparison is based on an  
21 hourly rate or a monthly rate.

#### 22 Intent Not a Statutory Element of “Limited Duration”, Improper Finding.

23 The decision found that Velasquez’s appointment as a retired annuitant was “not of a  
24 limited duration. ... Respondent initially proposed remaining in the CEO position for four years,  
25 supporting a reasonable inference Respondent *intended* to remain in the CEO position long-  
26 term”. (Emphasis added) Velasquez’s purported “Intent” is not relevant, see *Lang*.

#### 27 Decision Ignored Law and Evidence of “Multiple Appointments”.

1 Multiple “limited duration” appointments were allowed under both *Gov. Code* §§21221  
2 and §21224 until 2011. Only later, in 2011, did the legislature impose new substantive limits by  
3 amending *Gov. Code* §21221 to limit a retired annuitant to one appointment of “limited  
4 duration” or “one year.”

5 CalPERS acknowledges that Velasquez’s proposal to work as a retired annuitant was on a  
6 year-to-year basis for 2003, 2004, 2005, and 2006. A pre-retirement LA Works memo indicated  
7 that LA Works could appoint Velasquez to one-year “limited duration” appointments for 2003,  
8 2004, 2005, and 2006. As the later memo memorialized LA Works’ right to appoint Velasquez to  
9 four one-year or limited duration appointments, CalPERS did not prove that Velasquez did not  
10 satisfy the multiple “limited term” or “one year” appointments for 2003, 2004, 2005, and 2006.

11 Incorrect Application of “Limited Duration” Standard.

12 The Decision also did not correctly apply the 12-month or “limited duration” rule as  
13 interpreted by CalPERS in other cases, such as *Lang*.

14 Incorrect Application and Proof of Common Law Employee v. Independent Contractor.

15 In the Audit, pre-deprivation letter, and the SOI, CalPERS alleged an 11-day  
16 “independent contractor” period was in dispute, however that period related to a different  
17 employee Thomas Mauk, not Velasquez.

18 Improper, Arbitrary and inconsistent with Law, Without Substantive Evidence.

19 The Decision is "arbitrary, capricious, and constituted a prejudicial abuse of discretion".  
20 It misapplies the law, and is internally inconsistent with itself. Even if Velasquez’s and LA  
21 Works’ understanding and implementation of the retired annuitant law was imperfect at times, it  
22 did not violate the PERL over the time period and in the way that CalPERS alleges. The  
23 Decision is without substantive evidence to support the factual findings, especially as it used the  
24 “preponderance of the evidence” instead of the “clear and convincing” standard.

25 August 11, 2022

26 *Respectfully Submitted,*

27 *John Jensen*

28 John Jensen

Attorney for Petitioner Salvador Velasquez

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**PROOF OF SERVICE BY EMAIL and MAIL**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 11500 West Olympic Blvd., Ste. 550, Los Angeles, CA 90064.

On August 12, 2022, I served the following document by the method indicated below:

**VELASQUEZ REQUEST FOR RECONSIDERATION,  
REQUEST FOR STAY OF EXECUTION OF DECISION,**

Said document was served by transmitting it by mail and by email to the parties at the address listed below:

John Shipley  
CalPERS Legal Office  
P.O. Box 942707  
Sacramento, CA 94229-2707  
*John.shipley@calpers.ca.gov*  
Counsel for CalPERS

Chree Swedensky, Assistant to the Board  
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BOX 942701  
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Office of Administrative Hearings  
DGS  
Via its website

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 12, 2022, at Los Angeles, California.

John Jensen

John Jensen