ATTACHMENT E

THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

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.

Agency Case No. 2018-0413

OAH No. 2019120557

PROPOSED DECISION

Carmen D. Snuggs-Spraggins, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on January 24, 25, and 26, 2022.

John Shipley, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

John Michael Jensen and Daniel Nixon, Attorneys at Law, represented respondent Salvador R. Velasquez (Respondent). There was no appearance by or on behalf of Human Services Consortium of the East San Gabriel Valley, doing business as LA Works (LA Works).

Oral and documentary evidence was received. The record was held open to allow the parties to meet and confer regarding whether an additional day of hearing was needed for Respondent to address the allegations contained in the Amended Statement of Issues filed on January 25, 2022. The record was also held open to allow the parties to file closing briefs.

On February 2, 2022, CalPERS notified OAH, by way of a letter dated February 1, 2022, that Respondent informed CalPERS he had chosen not to request an additional day of hearing. The letter was marked and admitted as Exhibit 44. CalPERS's Closing Brief was marked as Exhibit 45 and its Reply Brief was marked as Exhibit 46. Respondent's Closing Brief was marked as Exhibit DD and his Reply Brief was marked as Exhibit EE. The record was closed, and the matter was submitted for decision on April 29, 2022.

Motion in Limine/Request for Continuance

Respondent's motion for a continuance, filed on January 20, 2022, was denied on January 24, 2022, for the reasons stated on the record. Respondent's motion in limine to exclude exhibits 7B-7H, and 7I through 7M is denied, and those exhibits are admitted for the limited purpose of supporting CalPERS' allegations regarding the scope of the audit conducted.

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Protective Order

Respondent provided his date of birth during his testimony. In addition, his date of birth is contained in Exhibit 8, at page A276, and the last four digits of his social security number is visible in various exhibits. A Protective Order will be issued separately that protects Respondent's confidential information by omitting his date of birth from any transcript prepared of the proceedings. In addition, Respondent's social security number is redacted from the exhibits.

SUMMARY

Respondent appeals CalPERS' determination that his post-retirement employment with his former employer, LA Works, violated the law and subjects him to (a) reinstatement to employment and (b) reimbursing CalPERS the retirement benefits paid during the period of the alleged unlawful employment.

CalPERS met its burden of establishing by a preponderance of the evidence that Respondent's post-retirement employment with LA Works was unlawful, in that Respondent received hourly compensation greater than that allowed for a retired annuitant as well as impermissible benefits. CalPERS also established that his appointment to his position, at times, was neither temporary or limited in duration. Accordingly, respondent must be reinstated and reimburse CalPERS according to the law.

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FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent initially became a CalPERS member through his employment with California State University Los Angeles in 1975. On December 1, 1979, Respondent became employed by LA Works, eventually becoming its Chief Executive Officer (CEO). By virtue of his employment, Respondent is a local miscellaneous member of CalPERS.

2. LA Works contracted with CalPERS effective December 1, 1979, to provide retirement benefits for local miscellaneous employees. The provisions of LA Works' contract with CalPERS are contained in the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.) By way of its contract with CalPERS, LA Works agreed to be bound by the PERL and to make its employees members of CalPERS subject to the PERL.

3. Respondent retired from service on December 31, 2002, and began receiving his retirement allowance in February 2003. Respondent was hired by LA Works as a retired annuitant beginning January 1, 2003, and fully retired on June 10, 2014.

4. After CalPERS completed an audit of LA Works in 2016, it concluded that the entire length of Respondent's post-retirement employment, 11.5 years, violated provisions of the PERL.

5. By letter dated January 17, 2018 (erroneously dated January 17, 2017), CalPERS advised Respondent and LA Works that: a) Respondent's post-retirement employment violated the PERL; b) CalPERS is required to terminate his retirement and

reinstate him for the period of January 1, 2003 through June 10, 2014; and c) CalPERS's Benefit Services Division would notify Respondent of the amount of overpayment of retirement benefits and his options for repayment. CalPERS also notified Respondent of his appeal rights.

6. On January 30, 2018, Respondent timely filed an appeal denying CalPERS's allegations and challenging CalPERS's jurisdiction and proceeding by way of a Statement of Issues.

7. On December 12, 2019, the Statement of Issues was filed on behalf of CalPERS in its official capacity, listing the issue to be decided as whether Respondent's post-retirement employment violated the PERL, making Respondent subject to mandatory reinstatement for the period of January 1, 2003 through June 10, 2014, and subject to repayment of retirement benefits paid by CalPERS during that period of time.

8. On January 25, 2022, an Amended Statement of Issues was filed on behalf of CalPERS in its official capacity. Paragraph XIV was amended to allege Respondent's "post-retirement employment compensation, including his payrate, exceeded that received by employees performing comparable work; and respondent Velasquez received benefits, incentives, compensation in lieu of benefits, and/or other forms of compensation in addition to the hourly pay rate." (Ex. 42, p. A806.) The issue to be decided was amended to include whether Respondent was subject to mandatory reinstatement for the period of January 1, 2003 through June 10, 2014, repayment of retirement benefits paid by CalPERS during that period of time, interest on the amount, and an amount equal to the employee contributions that would have been paid during the period of "unlawful employment." (*Id.* at p. A807.)

9. All jurisdictional requirements have been met as explained in Legal Conclusions 8 through 10.

CalPERS Publications and Circular Letter

10. CalPERS produced Public Agency Manuals, guides, and circular letters regarding employment after retirement and reinstatement from retirement that track changes to the PERL. (Exs. 20-24, and F through M).

11. Publication 33, dated November 2002, provides information about Employment after Retirement. Publication 33 provides, in part:

> There are some basic rules you need to know about working after retirement so you will not jeopardize your CalPERS retirement benefits – so be sure to review this information carefully.
>
> 3. You may work for a CalPERS-covered employer without reinstatement if your employer is temporary in nature or is in one of the categories permitted by law. The circumstances under which you may be employed are described on the following pages.
>
> Employment Permissible Without Reinstatement
>
> Temporary Employment – All CalPERS-Covered Employers
>
> You may be employed by a State agency, a CalPERS-covered agency based on the following conditions.

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Your employment must be either during an emergency to prevent stoppage of public business or because you have the skills needed in performing work of limited duration.

Your pay rate for your employment may not be less than the minimum, nor more than the maximum, paid to other employees performing comparable duties.

The combined amount of time you may work for *all* employers is limited to 960 hours. This may be based on either a calendar year or fiscal year, depending on the employer and type of employment shown below.

State agency, CalPERS-covered agency, or nonacademic position with the University of California – calendar year.

Appointive Positions

You may be appointed by the governing body of a CalPERS-covered agency to a position deemed by the governing body to be of a limited duration and requiring specialized skills. This appointment shall be only to fill a temporary vacancy until a permanent appointment can be made.

Consequences of Employment Not Allowed by Law

If you accept employment in a permanent full-time position with a CalPERS-covered employer before you have CalPERS written approval of your request for reinstatement, you may

> be subject to mandatory reinstatement from retirement. The law requires you to reimburse CalPERS for any retirement allowance received during the period of employment in violation of the law.
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> You will also have to pay CalPERS the amount of member contributions that would be due if you had been brought into active membership on a timely basis, plus interest.

(Ex. 22.)

12. Publication 33 was revised in September 2004 to add information about Independent Contractors. Specifically, it warns retirees that while they may be employed as an independent contractor by a CalPERS employer, if they are considered an employee under "common-law principles, [their] employment may be subject to CalPERS' restrictions." (Ex. 23, p. A479.) Retirees are directed to contact CalPERS if they have questions about their independent contractor status.

13. Publication 33 was revised in January 2011. It explains that retirees can work in a temporary, time-limited capacity as a retired annuitant without reinstatement from retirement if the individual has specialized skills needed to perform work of limited duration, the temporary employment will not exceed 960 hours in a fiscal year (July 1 through June 3), and the rate of pay will not be less than the minimum or more than the maximum paid to other employees performing comparable duties. It also explains that many independent contractor or consultant agreements are actually employee-employer relationships and subject to CalPERS restrictions. Retirees are directed to contact CalPERS for review of any proposed agreement and contract before signing the document and starting employment.

14. CalPERS circular letter 400-434, dated November 20, 1987, was sent to public agencies and provided notice that effective January 1, 1988, retirees would be liable for unlawful post-retirement employment, reinstated to membership as of the date the unlawful employment occurred, and required to reimburse CalPERS for any retirement received during the period of unlawful employment, pay the retirement system an amount equal to contributions the employee would have been paid during the period of unlawful employment, plus interest, and reimburse the retirement system any administrative expenses incurred. It also defined law CalPERS post-retirement employment as temporary employment with a public agency where the employment is of limited duration and the employee has specialized skills. (Ex. 28, p. A631.)

15. Circular letter 200-002-12, dated January 26, 2012, was sent to all public agencies regarding changes to Government Code sections 21221, subdivision (h), the vacant position exception to post-retirement employment, and 21224, the extra help exception to post-retirement employment. Both statutes provide an exception to being reinstated to CalPERS membership. The circular letter notes that the word "temporary" was added to section 21224, to clarify that appointments made under this statute were "extra help" appointments, for purposes of preventing the stoppage of public business or to perform work of a limited duration, i.e., to address work backlogs and perform work on special assignments. (Ex. 28, p. 633.) The circular letter notes that retirees should not be appointed to vacant permanent positions, even if the work will not exceed 960 hours per fiscal year, or the retiree would be subject to mandatory reinstatement for retirement. The word "specialized" was also included to clarify that retirees employed as temporary extra help must have specialized skills required to perform the work, as determined by the employer. (*Ibid.*) The circular letters also included reminders of the 960-hour limit, limits on the rate of pay, and that retirees

can work for more than one fiscal year if the employment is temporary extra help. (Ex. 28, p. A634.)

Respondent's Employment with and Retirement from LA Works

16. Respondent began working for LA Works on December 1, 1979. He was initially hired as a director and then served as the executive director before becoming the CEO in the 1990s.

17. On June 4, 2002, Respondent spoke with a CalPERS analyst regarding retirement and asked questions regarding working after retirement. The analyst's notes indicate that Respondent was made aware of "960 hrs limit time." (Ex. 18, p. A377.)

18. Respondent submitted a memorandum dated October 9, 2002, to LA Works' Board of Directors. The memorandum states:

> In this memo I am proposing a method for redesigning my current employment relationship with the LA Works organization. I have developed a plan that I believe will ensure the following:
>
> On-going stability of the organization
>
> Reduced salary expenses for the organization
>
> Restructuring to reflect changing demands
>
> In summary, I propose to "retire" under PERS effective January 1, 2003, while simultaneously continuing to lead LA Works as Chief Executive Officer (CEO). I plan on working a

three-quarter to full-time schedule annually. Under PERS I can work up to 960 hours. The remaining hours will be in kind.

LA Works will reduce the salary now paid to me by twenty-five percent.

For this proposal to work as planned I request the following Board action to be taken with an effective date of January 1, 2003:

Continued use of my automobile, health and life insurance benefits.

Approval to compensate me at seventy-five percent of my annual salary.

Payment of my salary distributed over 960 hours in an amount equaling three quarters of my current salary.

Continued opportunity for me to earn an incentive bonus as I have done in the past.

My anticipated final employment with LA Works is October 2007. In October 2005, I will present the Board with a specific exit plan. We will be well positioned to begin executing an orderly transition to a new Chief Executive Officer for LA Works.

(Ex. 8, pp. A306-A307.)

19. Respondent submitted a revised memorandum dated November 18, 2002, to LA Works' Board of Directors stating that following "additional discussions with CalPERS representatives and our attorney Ski Harrison. We believe that this meets the requirements as outlined by CalPERS." (Ex. 8, p. A287.) Respondent again proposed "to 'retire'" from PERS effective January 1, 2003, while simultaneously working to serve as LA Works' CEO. He noted that he could only work up to 960 hours, asserted that his salary would be reduced by twenty-five percent, and requested automobile, health and life insurance benefits, compensation of $88.42 per hour, payment of his salary distributed over 960 hours, and the opportunity to continue earning an incentive bonus. (Ex. 8, pp. A288-A289.) Respondent proposed that his contract would continue on a year-to-year basis, subject to annual review, and asserted that he would present a specific exit plan on an unspecified date.

20. On November 20, 2002, CalPERS received Respondent's Service Retirement Election Application. Respondent retired for service effective December 31, 2002, and began receiving his retirement allowance in February 2003.

Respondent's Post-Retirement Employment with LA Works

PAY RATE

21. Effective January 1, 2003, Respondent received an hourly rate of $88.42, "not to exceed 960 hours per year," health and dental insurance, life and long-term disability insurance benefits, and management deferred compensation benefits. (Ex. 8, p. A292.)

22. Pursuant to a 2013 Consulting Agreement (Agreement), LA Works purported to retain Respondent's services as a consultant through Respondent's business, Velasquez Consulting. Citing Government Code sections 21221 and 21224,

the Agreement's recitals state Respondent was a retired annuitant and, therefore, limited in the ability to accept public employment. Accordingly, Respondent was not to provide or be compensated for more than 960 hours of services. Respondent was to maintain a business office outside LA Works' principal offices and control the method of providing services to the agency. Respondent agreed to provide LA Works with strategic planning, oversight, public relations and advocacy. According to the Agreement, Respondent was to be paid $165 per hour, without withholdings, upon presentation of an invoice. Respondent was to serve in this role from March 1, 2013, through August 15, 2013. A memorandum dated August 15, 2013, to the Board of Directors seeks ratification of the Agreement.

23. Pursuant to a Board Resolution, Respondent was appointed Interim Chief Executive Officer of LA Works, effective August 15, 2013, until recruitment for a permanent CEO was complete, but not to exceed 960 hours within a 12-month period. Respondent's compensation was set at $100 per hour. (Ex. 8, p. A285.) The memorandum states the appointment was made pursuant to Government Code section 21221, subdivision (h).

24. From July 1, 2013, to August 31, 2013, Respondent was paid semi-monthly at a rate of $146.25 per hour. While those paycheck stubs refer to "Chief Executive Officer" in the section entitled "Department," the paycheck stub for the period of September 1, 2013, to September 15, 2013, lists the Department as "In-Kind" and Respondent was paid an hourly rate of $100. (Ex. 8, pp. A310-A314.) Respondent was paid $100 per hour from September 16, 2013, to June 15, 2014. His paycheck stubs for that time list the Department as "Chief Executive Officer." All of the paycheck stubs include an employee identification number for Respondent. LA Works issued a W-2 form for Respondent for tax year 2014. (Ex. 8, p. 277.)

INCENTIVES AND BENEFITS

25. In April 2012, Respondent proposed that the Board consider providing LA Works staff with incentive pay, including incentive pay for himself in the amount of $16,085 as the CEO. At its June 21, 2012 meeting, the Board authorized Respondent to disburse the incentive funds as proposed.

26. Respondent testified that prior to his retirement in 2002, he leased a car and LA Works paid for the lease, auto insurance, and gas as long as Respondent used the vehicle for work purposes. He received those same benefits after he retired but does not recall how long he did so. Respondent believed the automobile benefits stopped in 2012 when the law changed. However, Respondent's paycheck stubs from September 16 through December 15, 2013, and January 16 to June 16, 2014, include a vehicle lease in the list of deductions. The deduction was not taken each pay period. The year-to-date vehicle lease deductions for 2013 and 2014 were $1,385.34 and $755, respectively. Respondent also received mileage reimbursement in the amount of $573.22 in 2014.

27. From July 1, 2013, to June 10, 2014, LA Works periodically deducted amounts from Respondent's salary for life insurance and "Aflac". (Ex. 8, pp. A310 to A330.) Official notice is taken pursuant to Government Code section 11516 that Aflac is a supplemental insurance provider.

28. In a letter to the Chairman of the Board dated June 10, 2014, Respondent wrote he had completed the 960 hours per his contract and the PERL and that he would be moving into "full retirement." (Ex. 7G, p. A180.) On June 10, 2014, he acknowledged receiving a final paycheck from LA Works in the amount of $786, and

that deductions for AFLAC, life insurance, and social security and Medicare taxes were deducted from his salary.

CalPERS Audit of LA Works

29. LA Works' objective is to provide employment and training services to residents of the cities of Azusa, Covina, Glendora and West Covina as well as inmates of Los Angeles County Sheriff's Department (LACSD) facilities. On September 30, 2014, LA Works terminated all employees due to the loss of its contract with LACSD. Because LA Works intended to terminate its contract with CalPERS, CalPERS conducted an audit of LA Works to determine whether LA Works had complied with the PERL and the reporting and enrollment procedures prescribed in LA Works' contract with CalPERS.

30. Aileen Wong, Audit Manager with CalPERS' Office of Audit Services, was the auditor in charge of reviewing LA Works' reporting and enrollment procedures. She conducted a telephonic conference on April 27, 2015, with LA Works' Human Resource Manager and Accountant to understand LA Works' payroll processing and reporting to CalPERS and their membership enrollment procedures. On that same date, Ms. Wong also completed an Agency Operation Questionnaire during a separate telephonic meeting with LA Works' CEO, Human Resource Manager, and Accountant, to understand LA Works' operation and services.

31. In conducting the audit, OAS reviewed sampled employees' records, and pay periods from July 1, 2011 through May 14, 2015. Respondent was among the employees whose records were reviewed. With respect to Respondent, OAS reviewed Respondent's employment records from January 2003 to June 10, 2014. Ms. Wong testified she reviewed 31 boxes of documents, from which she obtained Respondent's personnel file, an employee roster, LA Works' organizational chart, board meeting

minutes, a description of the CEO's duties, pay roll records, and CalPERS's records. She did not interview Respondent.

32. Christina Rollins, CalPERS' Assistant Division Chief of the Employer Account Management Division (EAMD), testified at the hearing. Her duties include overseeing enrollment, calculating members' time and tenure, reviewing CalPERS retirement elections, and determining whether a member is an independent contractor or employee.

33. Ms. Rollins received and reviewed the audit report for LA Works for purposes of determining whether working after retirement laws were violated. She considered Government Code sections 21200, 21202, 21220, 21221, and 21224, and 21221. It is Ms. Rollins' understanding that Respondent received benefits from 2003 to 2014 and that he received incentive pay. She testified Respondent "violated all working after retirement laws." Ms. Rollins also concluded Respondent was not an independent contractor but an LA Works employee from 2013 to 2014.

34. Ms. Rollins explained the amendments that have been made to the PERL over the years. The PERL previously prohibited a retired annuitant from working more than 720 hours. In 1998, the law changed to increase the number of hours that could be worked to 960. Between 1998 to 2005, the PERL was clarified to explain that retired annuitants could only work for a limited duration (no longer than a year) and were required to have specialized skills. Between 2003 and 2005, the PERL was amended to state that the 960-hour terms could be extended. In 2012, the PERL was further amended to prohibit compensation in addition to a retired annuitant's hourly rate, such as benefits. In addition, the post-retirement law prohibits retired annuitants from earning more than an individual performing comparable duties or what is listed on a pay schedule. (See Factual Findings 10-15.) According to Ms. Rollins, a retired

annuitant's appointment is to be temporary and was never mean to be long term. She asserted that retired annuitants were not allowed to receive an automobile allowance, health benefits, or life insurance from January 2003 to June 2014.

35. Ms. Rollins determined Respondent violated the post-retirement law prohibiting more than 960 hours because he served as the CEO of LA Works for more than 12 months and she did not see any evidence of recruitment for the position. She clarified that for fiscal year 2013-2014, specifically July 15, 2013, to June 10, 2014, Respondent worked 726 hours and therefore did not exceed the 960 hour limit for that fiscal year. She offered the opinion that even if Respondent worked over 960 hours "in-kind" and was not compensated, he still violated the PERL, specifically Government Code Section 21221, subdivision (h), "because a retiree cannot work in a permanent position that has already been established at a public agency." From the record, it appears Respondent and LA Works understood his in-kind compensation to be in the form of benefits.

36. Respondent's highest monthly salary for one year prior to his retirement was $10,706.26. Ms. Rollins divided that amount by 173.333 pursuant to Government Code section 21221, subdivision (h), and concluded Respondent's pre-retirement hourly salary was $61.76 per hour. Ms. Rollins is unaware if Respondent was paid a monthly salary prior to 2003. She reviewed Respondent's personnel records showing Respondent was paid $88.42 per hour beginning January 1, 2003, and that he made $146 per hour in 2013, and $100 in 2013 and 2014. The payrate for LA Works' CEO was listed in its salary schedule as $145.25 per hour for the period of July 1, 2013, through June 30, 2014. Ms. Rollins concluded Respondent earned more than the maximum pay rate for comparable positions during his post-retirement employment at LA Works based on his previous salary in the same position.

37. Ms. Rollin's determination that Respondent was an LA Works employee and not an independent contractor, despite the Agreement between those parties that Respondent would serve as a consultant, was based upon her understanding of the common law definition of an employee. She considered who was controlling the work that Respondent performed, what his duties were, and the position Respondent held. Because Ms. Rollins was not provided with documents showing Respondent's duties differed from his duties prior to entering the Agreement with LA Works, and because independent contractors are typically not paid through an agency's payroll department like Respondent was here, she concluded Respondent was a LA Works employee. If CalPERS had determined Respondent was an independent contractor, post-retirement restrictions would not apply.

38. Ms. Rollins explained that the PERL requires retired annuitants who violate the PERL to be reinstated, and the CalPERS member must pay back any overpayments consisting of benefits received while in violation, cost of living increases, and CalPERS contributions that should have been made. The CalPERS member is reinstated until they complete a new retirement application. The amount of the overpayment CalPERS alleges Respondent must pay has continued to accumulate because he has not re-retired.

39. On October 27, 2016, OAS issued its final audit report. (Ex. 6.). Finding 4 of the audit report reads:

> Retired annuitants' [referring to Respondent and others sampled] employment did not comply with Government Code and [California Code of Regulations] requirements.
>
> Condition:

A. The Agency [LA Works] did not comply with employment after retirement laws. Specifically, a former CEO retired on December 31, 2002, but continued to work in the same position as a retired annuitant until June 10, 2014. Prior to retirement on December 31, 2022, the CEO proposed to the Agency's Board to retire under CalPERS effective January 1, 2003 while simultaneously working leading [LA Works] as the CEO. The proposal included a plan for the CEO to work a three quarter to full-time schedule with the understanding that CalPERS limits hours to 960. Therefore, the remaining 600 plus hours were to be in-kind. The proposal also suggested compensation at 75 percent of the annual salary of the CEO position distributed over 960 hours. Government Code Section 21221(h), in effect as of January 1, 2003, stated that a retired annuitant appointed to work under this subdivision could not exceed a total of one year. However, the retired annuitant worked as the CEO for eleven and a half years.

In addition to regular earnings, [LA Works] paid the retired annuitant various payments that totaled over $216,000.00 in calendar year 2013, and over $67,00 during the first six months in 2014. Government Code Section 21221 and 21224 revised in January 2013 specified that a retired person shall not receive any benefit, incentive, compensation in lieu of benefits, or other form of compensation in addition to the hourly pay rate. The retired

annuitant [received] additional benefits through June 10, 2014.

(Ex. 6, p. A68.)

40. OAS found other violations as described in Finding 4B. However, that condition does not apply to Respondent.

41. OAS citied Government Code section 21220, which addresses reinstatement as a condition of employment after retirement and violations of the post-retirement law. OAS recommended, among other things, that LA Works work with EAMD to determine a course of action to ensure compliance with post-retirement laws and report retired annuitants' payrates, hours worked and earnings in the CalPERS system.

42. In an undated letter to CalPERS (Ex. 6, pages A85-A86), LA Works agreed with the recommendations concerning Finding 4 of the audit report and did not object or otherwise indicate disagreement with Finding 4 concerning Respondent's post-retirement employment. OAS's Chief, Assistant Division Chief, and Senior Managers reviewed and approved the audit report.

43. On September 25, 2017, CalPERS issued a "pre-deprivation" letter to Respondent informing him that his post-retirement employment with LA Works violated the PERL because: a) it violated the 12-month limit; b) his employment as a Management Consultant from May 29 to June 10, 2014 was not as an independent contractor but as an employee (CEO); and c) Respondent was paid various benefits through June 10, 2014. CalPERS also notified Respondent that it was required to reinstate him from retirement for the period of January 1, 2003, until June 10, 2014. CalPERS copied LA Works on the letter. Respondent was provided an opportunity to

submit additional documents for consideration before CalPERS made a final determination. (Ex. 9.)

44. By letter dated November 21, 2017, Respondent, in response to the pre-deprivation letter, objected on the grounds that: a) CalPERS' allegations were indefinite and/or uncertain in violation of Government Code section 11506, subdivision (a)(3); b) compliance with CalPERS' letter "would result in material violation of other law affecting his substantive rights: c) any action by CalPERS is barred by the statute of limitations; d) CalPERS had not met its burden of producing evidence for moving forward with any action against Respondent; and e) CalPERS cannot reduce Respondent's pension or seek recoupment before a final administrative decision. (Ex. 10.) Respondent also asserted a reservation of rights, requested discovery, and made a Public Records Act request.

45. By a letter dated January 17, 2018, CalPERS notified Respondent that it considered the additional information provided and arguments made by Respondent's counsel, but its determination that Respondent's post-retirement employment with LA Works was unlawful for the period of January 1, 2003 through June 10, 2014, remained unchanged for the reasons previously described to him. (Ex. 4.) In addition, CalPERS informed Respondent that his request for discovery was premature and that it would respond to it, and it would reinstate Respondent from retirement (terminate his retirement for the period of June 1, 2003 until June 10, 2014). CalPERS also wrote Respondent would be notified of the exact amount of his overpayment of retirement benefits and options for repayment and his retirement benefits would stop after his March 1, 2018 check was issued. CalPERS further notified Respondent his monthly retirement checks would resume after the reinstatement and re-retirement application were processed.

CalPERS provided Respondent with instructions on how to process his re-retirement and indicated the earliest date Respondent could re-retire is June 11, 2014.

46. On or September 4, 2018, CalPERS' Member Health Collections Unit, Financial Reporting and Accounting Services Decision sent Respondent a Past Due Notice indicating Respondent owed $1,633,683.86 in overpayment that was due on June 3, 2018. Marlys Emery has been an Associate Governmental Program Analyst (AGPA) for the past six years in CalPERS' Retirement Benefit Services Division, Retirement Escalation and Support Unit. AGPA Emery testified her duties include conducting complex retirement calculations. With respect to Respondent, AGPA Emery checked the penalty amounts listed for Respondent and provided hypotheticals for possible settlement of the overpayment. On September 10, 2018, Respondent objected to the notice on the grounds that it violated his due process rights. (Ex. Y, p. B281.) In support of Respondent's argument, he noted that no administrative process had been initiated and CalPERS' remedy in this matter is to reduce his pension. (*Ibid.*) He demanded that CalPERS cease and desist from attempting to collect any funds from him.

47. On March 23, 2021, AGPA Emery conducted an "overpayment breakdown." (Ex. 13.) According to AGPA Emery, the total overpaid to Respondent is $1,638,846.43, and the net overpayment as of March 23, 2021, was $1,631,904.19. In calculating the amount of overpayment to Respondent, AGPA Emery took into consideration the retirement checks issued to Respondent between January 1, 2003, and April 30, 2018. The working after retirement unit EAMD provided her with the parameters for her calculations and she did not question whether the timeframe was correct. AGPA Emery made adjustments for one day of retirement (December 31, 2002), overpayments made, overpayments written off, and tax deductions. AGPA

Emery asserted that the initial overpayment notice (Ex. 12) is incorrect as it did not take those adjustments into consideration.

48. AGPA Emery explained that if Respondent were reinstated from January 2003 through June 2014, he would be credited with approximately 11.5 extra years of service if he worked full-time. If Respondent re-retired as of June 11, 2014, CalPERS would credit the amount of re-retirement to the overpayment amount, as Respondent would be entitled to retirement beginning July 1, 2014.

Respondent's Evidence

49. Respondent is 83-years-old. He earned an undergraduate degree in business administration and a master's degree in education before his employment with LA Works.

50. 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's employment as a retired annuitant at LA Works was renewed annually by the Board at the time it evaluated Respondent's performance.

51. According to Respondent, when he retired at the end of 2002, it was his understanding he could be paid for 960 hours of work. He initially testified that he may have exceeded the 960-hour requirement at times, but subsequently testified that he misspoke. Similarly, Respondent initially testified he worked more than 960 hours because he wanted to complete projects he was working on but did not claim the hours, but subsequently testified that he knew working more than 960 hours was prohibited and stated he did not do so. Respondent was aware that LA Works was required to look for a successor CEO and he could not earn more as a retired

annuitant than a full-time employee on an annual basis but did not know he was subject to a one-year limitation.

52. Respondent asserted that he attended a CalPERS workshop two months before his retirement. He contended only benefit packages were discussed at the workshop, but retired-annuitant law was not addressed.

53. According to Respondent, his role as CEO changed after January 1, 2003, in that he worked less to adhere to the 960-hour limit and delegated some of his duties to LA Works' senior staff. He stated his role of interim CEO starting in 2013 changed again, but he could not recall how. Respondent's testimony regarding the change in his duties was vague and not credible given the length of employment with LA Works and that fact that he served in a lead role. In his role as CEO after January 1, 2003, Respondent worked with the community and businesses to attract more resources to LA Works. Respondent was experienced in working with the education, political, and business communities; therefore, his knowledge and contacts were beneficial to LA Works. Respondent contended that no one else at LA Works had those skills. Respondent testified that on his last day of employment at LA Works, June 10, 2014, he was an at-will employee. Specifically, Respondent testified that he was an at-will employee from August 13, 2013, to June 10, 2014, when he was the interim executive director. LA Works did not engage in a concerted effort to find a full-time CEO until after Respondent began serving as Interim CEO from August 13, 2013, to June 10, 2014.

54. Respondent asserted he could not recall whether he was compensated for working more than 960 hours but may have been. He also asserted that at some point he became aware of the change in the PERL that prohibited retired annuitants from receiving employment benefits as of January 1, 2013. Respondent contended that

he contracted away his benefits by way of the Agreement; however, LA Works' payroll records demonstrate that he continued to receive life insurance, a car allowance, and other benefits as described above. Respondent testified he continued to work 960 paid hours pursuant to his 2013 contract with LA Works.

55. Respondent does not recall the amount of his monthly salary when he retired, whether LA Works prepared a publicly available pay schedule, or the amount of his bonuses before he retired. He acknowledged receiving $16,085 in incentive pay in 2012 for work he performed in 2011. Respondent does not recall why the word "retire" is in quotes in his 2002 memoranda to the Board, or why he indicated that any hours he worked over 960 would be in-kind because he was aware volunteering hours is not allowed under the PERL.

56. With respect to an exit plan from working as LA Works' CEO, Respondent does not recall anticipating presenting any plan to the Board.

57. With respect to the $88.42 per hour pay rate referenced in the November 2002 memoranda, Respondent asserted the memorandum was prepared by LA Works staff and he does not know how they arrived at that amount. He does not know if that is the rate he was paid, but has no reason to believe he was not paid that amount. Respondent also asserted that he is not familiar with the term "management deferred compensation" and does not know if he received it although it is contained in LA Works' personnel record, which Respondent initialed. (Ex. 7G, p. A178.)

58. Respondent asserted he did not receive any of the CalPERS circular letters as the CEO of LA Works prior to his retirement or during his post-retirement employment. He further asserted that he did not recall any discussion of the circular letters by LA Works human resources personnel, nor receiving Publication 33 or any

other CalPERS publication regarding working after retirement. Respondent's testimony is not credible given his position as CEO with LA Works and his tenure as a CalPERS member.

59. David Truax served on LA Works' Board of Directors for two years and was chairman of the board during his tenure, which ended in 2003. Mr. Truax offered the opinion that LA Works ran well under Respondent's leadership. According to Mr. Truax, Respondent's leadership ability and knowledge motivated the entire organization (LA Works) to accomplish its mission. He does not know of anyone who could have taken over the role of CEO if Respondent had decided to leave LA Works altogether.

60. Mr. Truax recalled Respondent's retirement at the end of 2002. He also recalled that Respondent worked as a retired annuitant. It was Mr. Truax's understanding that Respondent would still be involved in the day-to-day operations although the number of hours Respondent could work would be limited. Mr. Truax recommended that the Board of Directors accept Respondent's 2002 proposal to work as a retired annuitant because of Respondent's knowledge of LA Works. He believed Respondent would make less money and there would be cost savings in other areas. Mr. Truax did not believe there was anything improper about Respondent's proposal.

61. Mr. Truax did does not recall discussing retired annuitant requirements or Respondent's original proposed final date of employment of 2007. He could not recall why changes were made to Respondent's memorandum proposing his post-retirement employment, ultimately resulting in the November 2002 memorandum, nor whether the Board of Directors discussed hiring someone when it was notified Respondent intended to retire.

LEGAL CONCLUSIONS

Burden of Proof

1. The party asserting the affirmative at an administrative hearing has the burden of proof, including the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, and fn. 5 (*McCoy*).

2. The parties dispute which party has the burden of proof concerning whether Respondent's post-retirement employment violated the PERL.

3. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) Thus, the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (*McCoy*, supra, 183 Cal.App.3d at p. 1051.) Put another way, there is a built-in bias in favor of the status quo; the party seeking to change the status quo usually has the burden of proving it. (*In re Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1388, as modified on denial of reh'g (July 28, 2006).)

4. Here, CalPERS is seeking to change the status quo. Respondent retired several years ago and had been receiving his vested retirement allowance benefits starting February 5, 2003. Based on an audit completed almost two years after Respondent's post-retirement work in question, CalPERS asserts Respondent should not have received his retirement allowance from February 2003 through May 2018 because he had been unlawfully employed from January 1, 2003, through June 10, 2014. PERS seeks to retroactively change respondent's employment dates and force

Respondent to reimburse it a significant sum. Thus, CalPERS should bear the burden of proving Respondent's post-retirement employment was unlawful, and that Respondent is subject to the penalties/overpayment reimbursement it seeks in this case. (Factual Findings 1 through 5.)

5. CalPERS unpersuasively argues that Respondent is the moving party and has the burden to prove that that he did not violate the PERL's after retirement laws. CalPERS essentially argues Respondent is asserting affirmative claims to retirement allowances earned during post-retirement employment. (Citing *McCoy* and the administrative matter entitled *In the Matter of the Appeal Regarding Post-Retirement Employment of Dudley J. Lang, Respondent, and City of Industry, Respondent* (*Lang*), CalPERS Case No. 2018-1112, OAH Case No. 2019020798. However, *McCoy* involved a county employee applying for an industrial disability retirement, which his employing county denied. The *McCoy* court found the employee was seeking to change the status quo by seeking a disability retirement, and thereby it was he who was asserting the affirmative entitlement and thus had the burden. This case is distinguishable because it is CalPERS seeking to change the status quo. The fact that Respondent is appealing from CalPERS's determination does not shift the burden. To rule otherwise, every party in every case involving a CalPERS determination about the propriety of retirement allowance payments would bear the burden of proof because these cases arise only after and as a result of a CalPERS determination. Further, the *Lang* decision is unpersuasive as to the burden of proof. In that case, the parties stipulated that the Respondent had the burden. (Ex. 34, p. A706.)

6. CalPERS points out that its determinations of membership and benefits are entitled to deference. (*City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 539.) But

CalPERS cites no authority indicating such deference changes the burden of proof. The two concepts are not mutually exclusive; a party's decisions can be given deference, but they can still hold the burden of proof. Finally, CalPERS argues it should not have the burden of proof because its determinations are presumed to be correct, citing to Evidence Code section 664, *McCoy*, and a few other cases involving retirement decisions. Evidence Code section 664 only states "it is presumed that official duty has been regularly performed." That does not mean once an agency makes a decision, the opposing party bears the burden of proving otherwise. Neither *McCoy* nor any other cited authority holds as CalPERS contends.

7. Based on the above, CalPERS has the burden of establishing by a preponderance of the evidence that Respondent's post-retirement employment violated the PERL, and that Respondent should be retroactively reinstated from retirement for the period of January 1, 2003, through June 10, 2014, as a consequence of violating the PERL.

CalPERS Properly Proceeded by Way of a Statement of Issues

8. Respondent argues that CalPERS, by proceeding by way of a Statement of Issues instead of an Accusation, has violated his constitutional and due process rights. In support of his argument, Respondent contends CalPERS seeks to seize Respondent's private property by seeking repayment of pension benefits and shifts the burden of proof to Respondent to "prove that his private assets should not be forfeited." (Ex. DD, p. 1027.)

9. Under the Government Code, a hearing to determine whether a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned (section 11503), whereas and a statement of issues is filed when the hearing concerns

whether a right, authority, license, or privilege should be granted, issued, or renewed shall be initiated (section 11504). CalPERS matters regarding post-retirement employment, however, do not neatly fall into either category. CalPERs therefore adopted regulations that set forth when an accusation versus a statement of issue must be filed. California Code of Regulations (Regulations), title 2, section 555.2, provides that CalPERS' Executive Officer shall execute a statement of issues when an applicant files an appeal of any action taken on an application for retirement. Any further citation to the Regulations shall be to title 2, unless otherwise indicated, Regulations, section 555.3, requires the filing of an accusation when the Executive Officer determines that a CalPERS member shall be retired for disability.

10. How the pleading is styled is of secondary importance; the important functional difference between an accusation and a statement of issues is which party bears the burden, and here that's CalPERS. (Legal Conclusions 2-7.)

Post-Retirement Statutes

11. Government Code section 21220, subdivision (a) (further undesignated statutory references are to the Government Code), provides:

> A person who has been retired under this system, for service or for disability, may not be employed in any capacity thereafter by the state, the university, a school employer, or a contracting agency, unless the employment qualifies for service credit in the University of California Retirement Plan or the State Teachers' Retirement Plan, unless the person has first been reinstated from retirement pursuant to this chapter, or unless the employment, without

> reinstatement, is authorized by this article. A retired person whose employment without reinstatement is authorized by this article shall acquire no service credit or retirement rights under this part with respect to the employment.

12. Sections 21221 through 21232 describe the exceptions in which post-retirement employment for an agency contracting with PERS will not result in reinstatement from retirement. CalPERS argues that section 21221, subdivision (h), most appropriately applies to the facts of this case, but Respondent's post-retirement employment also violated section 21224. Those sections are discussed in further detail below.

13. The consequences of post-retirement employment in violation of the PERL are serious. Pursuant to section 21202, "[a] person employed in violation of Section 21220 may be reinstated to membership in the category in which, and on the date on which, the unlawful employment occurred."

14. Section 21220, subdivision (b), provides that any retired member employed in violation of the PERL shall:

> (1) Reimburse this system for any retirement allowance received during the period or periods of employment that are in violation of law.
>
> (2) Only if reinstated pursuant to Section 21202, pay to this system an amount of money equal to the employee contributions that would otherwise have been paid during the period or periods of unlawful employment, plus interest thereon.

(3) Contribute toward reimbursement of this system for administrative expenses incurred in responding to this situation, to the extent the member is determined by the executive officer to be at fault.

SECTION 21221

15. When Respondent's post-retirement employment with LA Works began in January 2003, section 21221, provided as follows:

> A retired person may serve without reinstatement from retirement or loss or interruption of benefits provided by this system, as follows:
>
> (h) Upon appointment by the governing body of a contracting agency to a position deemed by the governing body to be of a limited duration and requiring specialized skills or during an emergency to prevent stoppage of public business. These appointments, in addition to any made pursuant to Section 21224, shall not exceed a total for all employers of 960-hours in any calendar year. When an appointment is expected to, or will, exceed 960-hours in any calendar year, the governing body shall request approval from the board to extend the temporary employment. The governing body shall present a resolution to the board requesting action to allow or disallow the employment extension. The resolution shall be presented prior to the expiration of the 960-hour maximum for the

> calendar year. The appointment shall continue until notification of the board's decision is received by the governing body. The appointment shall be deemed approved if the board fails to take action within 60 days of receiving the request. Appointments under this subdivision may not exceed a total of one year. (Ex. 32, p.A673.)

16. Effective January 2006, to December 31, 2011, section 21221, subdivision (h), provided that appointments under that section could not exceed 960 hours in any fiscal year and could not exceed 12 months.

17. Section 21221, subdivision (h), was amended effective January 1, 2012, through June 27, 2012, to clarify that the appointment is to be "interim," and made to a vacant position during recruitment for a permanent appointment. (Ex. 32, p. A676.) In addition, the appointment should not exceed 960 hours in any fiscal year, and the appointment could only be made once. Language was added prohibiting compensation for the appointment to exceed the maximum compensation listed in a published pay schedule for the vacant position.

18. Effective June 27 to December 31, 2012, section 21221, subdivision (h), was amended to prohibit the person appointed to a vacant position from receiving compensation that exceeds the "maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule for the vacant position divided by 173.333 to equal an hourly rate." (Ex. 32, p. A681.) Under the amendment, the appointee is prohibited from receiving "benefits, incentives, compensation, or any other forms of compensation in addition to the hourly rate." (*Ibid.*") The statute was further amended to indicate that its provisions also applied to appointments made concurrently under section 21224.

19. Section 21221, subdivision (h), was amended effective January 1, 2013, in a way that is inconsequential for purposes of this case.

SECTION 21224

20. When Respondent began his post-retirement employment with LA Works on January 1, 2003, section 21224 provided as follows:

> A retired person may serve without reinstatement from retirement or loss or interruption of benefits provided by this system upon appointment by the appointing power of a state agency or any other employer either during an emergency to prevent stoppage of public business or because the retired employee has skills needed in performing work of limited duration. These appointments shall not exceed a total for all employers of 960 hours in any calendar year, and the rate of pay for the employment shall not be less than the minimum, nor exceed that paid by the employer to other employees performing comparable duties.

21. Section 21224 was amended effective January 1, 2005, to December 31, 2005, in a way that is inconsequential to this case.

22. Effective January 1, 2006, to December 31, 2011, section 21224, subdivision (a), was amended so that it applied to a retired employee's appointment to public agencies and prohibited the retiree for working more than 960 hours in a fiscal year as opposed to a calendar year.

23. Section 21224, subdivision (a), was amended effective January 1, 2012, to June 26, 2012, to require the appointment to be temporary and that the appointee have specialized skills.

24. Effective June 27, 2012, and thereafter, section 21224, subdivision (a), was amended to state that "The compensation for the appointment shall not exceed the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule divided by 173.333 to equal an hourly rate." (Ex. 33, p. A686.) The amendment also prohibited the appointee from receiving a benefit, incentive, compensation in lieu of benefits, or other form of compensation in addition to the hourly pay rate.

RETROACTIVE APPLICATION OF SECTION 21221 AND/OR 21224

25. Amendments to statutes that are matters of clarification may be applied retroactively. (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2001) 157 Cal.App.4th 983, 990, fn. 4.) Such clarifying amendments have such effect because the true meaning of the law remains the same. (*Carter v. California Dept. of Veterans Affairs* (2000) 38 Cal.4th 914, 922.)

26. On the other hand, "if the amendment changed the law and imposed personal liability for earlier actions, the question of retroactivity arises. 'A statute has retrospective effect when it substantially changes the legal consequences of past events.' [Citation omitted.] (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472, citing *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 270.) A statute with retrospective effect might make a party liable for past conduct. In addition, where substantial changes are made, application to existing rights would be retroactive because the legal effects of past conduct would be changed, and the

statute would be interpreted to apply to future conduct, unless the legislative intent to the contrary is clear. (*Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 394.)

27. Section 21221, subdivision (h), from the time Respondent retired in 2002 and beyond, has always required the retiree to have specialized skill, prohibited a retired annuitant from working more than 960 hours in one year and restricted appointments to one year. Amendments to the statute limiting post-retirement employment to a fiscal year, allowing for extensions of the appointment, and providing directions on how to calculate a retiree's pay rate, merely clarify the statute's effect.

28. But the language added to section 21221, subdivision (h), effective January 1, 2012, concerning a retired annuitant's compensation not exceeding the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule did not merely clarify the statute; it substantively changed it, notwithstanding the 2002 version of Publication 33. Similarly, the 2012 amendment prohibiting a retired annuitant from receiving benefits and incentive pay is also a substantive change and not a clarification of the law. Accordingly, these amendments will not be applied retroactively to Respondent's post-retirement employment.

29. At the time Respondent retired in December 2002 and thereafter, section 21224 required appointments to be of a limited duration, and prohibited retirees from making more than employees performing comparable work or working more than 960 hours per year. The amendments to the statute, defining a year as a fiscal versus a calendar year, adding the word "temporary" before the word appointment, and describing how to calculate a retiree's hourly pay to ensure the retiree is not making

more or less than an individual preforming comparable work are clarifying and can be applied retroactively to Respondent's entire post-retirement. However, the June 27, 2012 amendment disallowing benefits, incentives, and compensation in lieu of benefits is a substantive change and not subject to retroactive application.

Respondent's Post-Retirement Employment with LA Works Violated the PERL

30. Respondent's post-retirement employment violated section 21221, subdivision (h), even without retroactive application of the statute. Retiree appointments under section 21221, subdivision (h), are to be limited in duration while the public agency actively recruits to fill a vacancy. CalPERS established by a preponderance of the evidence that Respondent's employment as a retired annuitant in the position of CEO of LA Works was not of a limited duration. To the contrary, Respondent held the CEO position from January 1, 2003, to March 2013. There was no evidence that LA Works actively recruited any individuals to fill the position during that timeframe. Further, Respondent initially proposed remaining in the CEO position for four years, supporting a reasonable inference Respondent intended to remain in the CEO position long-term. In addition, the evidence established that Respondent was an LA Works employee despite his claims that he was a consultant and he testified that he was an at-will employee when he fully retired from LA Works. Respondent's contention that he was a consultant is not persuasive. Respondent received paychecks from LA Works which refer to him as CEO and he did not credibly describe how his duties changed. Respondent violated section 21221, subdivision (h), when he received benefits in 2013 and 2014 that included a car allowance, mileage reimbursement, and life and supplemental insurance after the statute was amended to prohibit the receipt

of such benefits effective June 12, 2012, including in his final paycheck on June 10, 2014.

31. Respondent's post-retirement employment with LA Works from January 1, 2003, to June 10, 2014, violated section 21221, subdivision (h), for the reasons stated in Legal Conclusions 15 through 18, 25 through 28, and 30.

32. CalPERS established that Respondent's post-retirement employment with LA Works violated section 21224, subdivision (a), in that his employment or appointment was not limited in duration and was not temporary. In addition, immediately after retiring in December 2002, Respondent made $88.42 per hour as CEO of LA Works starting January 1, 2003, more than his highest hourly salary of $61.67 pre-retirement in the same position. This violates the statute's prohibition against compensating retired annuitants more than an employee in a comparable position. It is unreasonable to find that Respondent's salary increased more than $20 per hour the day after he retired. Also, Respondent received benefits in 2013 and 2014 in violation of the statute's 2012 amendment prohibiting such benefits.

33. CalPERS established that Respondent's post-retirement employment with LA Works from January 1, 2003, through June 10, 2014, violated section 21224, subdivision (a), as set forth in Legal Conclusions 20 through 26, 29 and 32.

Respondent's Post-Retirement Employment Did Not Violate the PERL

34. CalPERS did not establish that Respondent's post-retirement employment violated section 21221, subdivision (h), with respect to his pay rate from January 3, 2003, to December 31, 2011, as the statute cannot be applied retroactively for the reasons stated in Legal Conclusion 28. CalPERS also did not establish that Respondent violated the statute with respect to his pay rate from January 1, 2012, to

June 30, 2013, in that no evidence of the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule for CEO at that time was presented. While Respondent's hourly salary was no greater than $61.67 prior to his retirement, it is reasonable to infer that a CEO's salary would increase between 2002 and 2012. Also, although Respondent's consultant Agreement stated Respondent would be paid $165 per hour from March 1, 2013, to August 15, 2013, the only paycheck stubs submitted by CalPERS during that time period were for those from July 1, 2013, to August 31, 2013. They show Respondent was paid $146.25 per hour, which is comparable to the rate contained in the pay schedule reviewed by CalPERS during its audit.

35. CalPERS did not establish that Respondent's post-retirement employment violated section 21221, subdivision (h), with respect to his pay rate from July 1, 2013, to June 10, 2014. CalPERS found that Respondent's post-retirement employment during fiscal year 2013-2014 did not violate the PERL because the payrate listed on the salary scheduled was $145.25 per hour and Respondent earned $100.

36. CalPERS did not establish that Respondent's post-retirement employment violated section 21221, subdivision (h), with respect to the number of hours worked from July 1, 2013, to June 10, 2014. Respondent worked 726 hours during the 2013-2014 fiscal year, well below the 960-hour limit.

37. CalPERS did not establish that Respondent's post-retirement employment violated section 21221, subdivision (h), by receiving incentive pay in 2012, as the statute cannot be applied retroactively, as stated in Legal Conclusion 28. The amendment to section 21221, subdivision (h), prohibiting incentives became effective June 28, 2012. Although the Board approved disbursement of incentive pay of $16,085

on June 21, 2012, CalPERS presented no evidence of when the disbursement was made.

38. CalPERS did not establish that Respondent's post-retirement employment with LA Works violated section 21224, subdivision (a), with respect to his pay rate from March 1, 2013, to August 15, 2013, under Respondent's consultant Agreement. Although the Agreement stated Respondent would be paid $165 per hour from March 1, 2013, to August 15, 2013, the only evidence of Respondent's pay rate during that time period are Respondent's paycheck stubs from July 1, 2013, to August 31, 2013. They show Respondent was paid $146.25 per hour, which is comparable to the rate contained in the pay schedule reviewed by CalPERS during its audit.

39. CalPERS did not establish that Respondent's post-retirement employment with LA Works violated section 21224, subdivision (a), with respect to his pay rate from July 1, 2013, to June 10, 2014, in that the payrate list in LA Works' salary schedule was $145.25 per hour and Respondent earned $100.

40. CalPERS did not establish that Respondent's post-retirement employment with LA Works violated section 21224, subdivision (a), with respect to the number of hours worked during the 2013-2014 fiscal year. Respondent worked 726 hours during that timeframe, well below the 960-hour limit.

41. CalPERS did not establish that Respondent's post-retirement employment violated section 21224, subdivision (a), by receiving incentive pay in 2012, as the amendment to the statute prohibiting incentive pay cannot be applied retroactively as set forth in Legal Conclusion 28. In addition, the amendment to section 21224, subdivision (a), prohibiting incentives became effective June 27, 2012. Although

the Board approved disbursement of incentive pay of $16,085 on June 21, 2012, CalPERS presented no evidence of when the disbursement was made.

Laches

42. Respondent contends that CalPERS is barred by both the defenses of laches and estoppel from asserting Respondent violated the PERL, requiring his reinstatement, and demanding he reimburse the retirement system. The defense of laches requires unreasonable delay plus either acquiescence in the act about which CalPERS complains or prejudice to Respondent due to the delay. (*Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 263.) The defense of equitable estoppel requires that the party to be estopped must be apprised of the facts and must intend their conduct will be acted upon, and that the other party must be ignorant of the true facts and must have relied upon the conduct to his injury. (*Id.* at p. 257.) The elements necessary to support a defense of laches or estoppel are not present in this matter.

43. Regarding laches, the evidence does not support a finding that CalPERS unreasonably delayed in notifying Respondent that he violated the PERL, and it would be reinstating him. CalPERS began its audit of LA Works in 2015 and prepared its final audit report in October 2016. In September 2017, CalPERS then sent Respondent a pre-determination letter notifying Respondent of its findings, its intent to reinstate him, and the consequences of violating the PERL. After considering Respondent's November 2017 response to the pre-determination letter, CalPERS issued its final determination letter in January 2018.

44. "Delay alone ordinarily does not constitute laches. What makes the delay unreasonable in the case of laches is that it results in prejudice. [Citation.]" (*Lam v.*

Bureau of Security & Investigative Services (1995) 34 Cal.App.4th 29, 36.) Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue [citation.]" (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624). While Respondent argues he cannot locate witness, or witnesses are deceased because of the passage of time, Respondent presented no evidence of this at the hearing.

45. The evidence also does not support a finding that CalPERS acquiesced in Respondent's post-retirement employment.

46. The four elements of equitable estoppel are: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or act in such a manner that the party asserting the estoppel could reasonably believe that he intended his conduct to be acted upon; (3) the party asserting the estoppel must be ignorant of the true state of the facts; and (4) he must rely upon the conduct to his injury." *Crestline Mobile Homes Mfg. Co. v. Pacific Finance* Corp. (1960) 54 Cal.2d 773, 778.) The evidence does not support a finding that CalPERS was aware of Respondent's post-retirement employment before it conducted its audit of LA Works, and it did not intend for Respondent to work as a retirement 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.

47. Moreover, the defenses of estoppel and laches are not available if an important public policy adopted for the benefit of the public would be nullified. (*Golden Gate Water Ski Club* , 165 Cal.App.4th 249, 263, quoting F*eduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381. "[E]stoppel does not apply to

contravene statutory requirements." (C*haidez v. Board of Administration of California Public Employees' Retirement System* (2014) 223 Cal.App.4th 1425, 1432.) This holding is consistent with the principle that estoppel is not available where "[p]ublic interest and policy would be adversely affected [and] [m]anifestly, it would have a disruptive effect on the administration of the retirement system." (*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 584.) Here, 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. Applying equitable estoppel to CalPERS under the facts of this case would have a disruptive effect on the administration of the retirement system.

Statute of Limitations

48. Respondent contends that CalPERS is barred by the three-year statute of limitations contained in section 20164, governing adjustment of errors or omissions of payments made into or out of the retirement system. Respondent also argues that section 20160, governing corrections of errors and omissions of any active or retired CalPERS member under specific circumstances, provides a limitation period barring CalPERS' action against him.

49. Respondent argues CalPERS erred by ceasing to pay his retirement benefits in 2018. While not precedential, the Legal Conclusion reached in *Lang* regarding the applicability of the statutes cited by Respondent is persuasive and is applicable here.

> In this case, there was no erroneous payment made to respondent; [CalPERS] made regular retirement allowance

> payments that were later deemed subject to reimbursement due to the unlawful post-retirement employment relationship of respondent and the [public agency]. Neither party contends any of the retirement allowance payments were in the wrong amount, withheld, or otherwise erroneous. In addition, it is clear from section 21220 that the Legislature intended reinstatement of employees who engage in unlawful post-retirement employment and reimbursement of all retirement benefits paid during that period, regardless of the time such payments were made. Applying the three-year limitation period of section 20164, subdivision (b), to the penalties required by section 21220 would essentially cap violating employees and employers to liability for just three years of unlawful post-retirement employment, which would be contrary to the spirt of section 21220 and lead to absurd results.

(Ex. 34, p. A721.)

50. Section 20160 provides that the "party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right." (§ 20160, subd. (d).) Respondent argues in his closing brief that "CalPERS made many errors through this case. Some of them described above. If nothing else, Government Code Sections 20160 and 20164 apply to bar CalPERS from seeking repayment as CalPERS erroneously stopped paying [Respondent] his retirement allowance in May 2018, more than three years before this administrative hearing began." (Ex. DD, p. B1053.) Respondent did not demonstrate

that CalPERS made an error by ceasing Respondent's retirement benefits. 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. There is no need to discuss whether relief under section 20160 is necessary to fix any mistake, as the term is used in Code of Civil Procedure section 473, as Respondent has not contended that he made a mistake with respect to his post-retirement employment with LA Works. Accordingly, Respondent is not entitled to error or omission relief.

Due Process

51. Respondent contends CalPERS violated his due process rights because the original Statement of Issues did not include allegations or provide facts related to CalPERS' allegations that Respondent violated the PERL in the ways described in the Amended Statement of Issues. Respondent also argues that CalPERs provided no notice of its argument that it "could seek money from [Respondent] in addition to the future value of CalPERS pension." (Ex. EE, pp. B1092-B1093.) Respondent's arguments are unpersuasive. While not contained in the original Statement of Issues, CalPERS in its pre-determination and final determination letters notified Respondent that he would be reinstated for the period of January 1, 2003, to June 10, 2014. The final determination letter also notified Respondent of the alleged violations of the PERL, including those listed in Respondent's closing brief. More importantly, those alleged violations are included in the Amended Statement of Issues, which was properly filed before this matter was submitted for decision. (Gov. Code, § 11507.) Respondent was given the opportunity to request additional hearing time to address the Amended Statement of Issues but declined to do so. (Ex. 44.) Accordingly, Respondent has not established that he was denied due process.

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Reimbursement Period

52. Respondent contends that the period of reimbursement owed to CalPERS should start in 2014, as that is when any violation of the PERL, if at all, occurred. (Ex. EE, p. B1099.) However, as set forth in Legal Conclusions 30 through 33, 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 amount of the overpayment is not decided here, as the issue to be decided is limited to whether Respondent's post-retirement employment as a CEO "from January 1, 2003 through May 28, 2014, and Management Consultant from May 29, 2014, through June 10, 2014, for LA Works" violated the PERL, subjecting him to the consequences contained in section 21220, subdivision (b). (Ex. 42, p. A807). However, in calculating Respondent's overpayment, CalPERS should take into consideration the Legal Conclusions 34 through 41, setting forth the instances where Respondent's post-retirement employment with LA Works did not violate the PERL.

Other Matters

53. All evidence presented at the hearing has been considered. Any arguments or contentions raised by the parties that are not specifically addressed in this Proposed Decision were deemed not established by the evidence, not persuasive, immaterial, and/or surplusage.

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ORDER

Respondent Salvador R. Velasquez's post-retirement employment with Human Services Consortium of the East San Gabriel Valley, doing business as LA Works, was in violation of the PERL, from January 1, 2003, through June 10, 2014, and requires Respondent Velasquez to be reinstated for the period of January 1, 2003 through June 10, 2014, repay certain retirement benefits paid by CalPERS during that period of time, and pay an amount equal to the employee contributions that would have been paid during the period, plus interest.

DATE: 05/31/2022

Carmen Snuggs-Spraggins

CARMEN D. SNUGGS-SPRAGGINS
Administrative Law Judge
Office of Administrative Hearings