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October 23, 2020

CalPERS Legal Office

Attn: John Shipley, Senior Attorney

400 Q Street, Rm LPN 3340

Sacramento, CA 95811

Re: Response to Request for Public Comments re Designation of Board Decision in the Dudley J. Lang Matter as Precedential

Dear Mr. Shipley:

On behalf of the California State Association of Counties (CSAC), I am writing to express opposition to the adoption of the Decision “In the Matter of the Appeal Regarding Post Retirement Employment of DUDLEY J. LANG” as precedential. As we understand it, the Lang decision found, among other things, that no statute of limitations applies in cases involving post-retirement employment and that when CalPERS accuses a retiree of unlawful employment the burden falls entirely on the retiree to prove otherwise.

When combined with CalPERS’ incentive to recover funds, the consequences of this precedent would be far-reaching for retirees and member agencies. If CalPERS makes a habit of calling into question the post-retirement employment of members whose work took place 10 or more years ago, it’s likely that records in at least some cases will have been lost or degraded, especially if a retiree has passed away and their surviving family is in charge of their estate, leaving no way to meet the level of evidentiary proof required. In these circumstances, the burden of proving lawful employment would fall to the family and the cost of failure would be the payment to CalPERS tens of thousands of dollars or more (the “drastic penalties” noted by the Lang decision).

We are concerned because the CalPERS memorandum requesting comment on this matter states affirmatively that the Lang decision “determined that a respondent, and not CalPERS, has the burden of establishing that [their] post-retirement employment is lawful,” when in fact only a narrow aspect of the issue was argued in the case. If CalPERS is considering declaring a broad precedent based on narrow arguments, that would be particularly troubling.

Statutes of limitations exist for all but the most heinous acts for exactly the reason noted above, because as time wears on memories fade and records are lost, and also because a past indiscretion should not hang forever over a person’s head threatening “drastic penalties.” The Lang decision points to the Legislature’s apparently clear intent and the “absurd results” of

applying a limit, but without providing any kind of analysis whatsoever to support those conclusory statements, much less the kind of “clear and complete analysis” necessary for a decision to be deemed precedential. In fact, the “absurd results” seem to be nothing more than an indictment of the very notion of statutes of limitations, since the result would simply be that the conduct would in some cases go uncorrected.

Member agencies have reported passing multiple CalPERS audits, only to have a subsequent audit find a violation for a post-retirement relationship. Removing these limits does a disservice to members, retirees, and member organizations, which is why we oppose the adoption of the Lang decision as precedent. At the very least, the issues we note above regarding the burden of proof and the statute of limitations should be withheld from being declared precedent-setting.

Thank you for the opportunity to comment on this important issue.

Sincerely,



Geoff Neill
Legislative Representative

CC: Henry Jones, President CalPERS Board
Marcie Frost, Chief Executive Officer, CalPERS
Matthew G. Jacobs, General Counsel, CalPERS
Brad Pacheco, Deputy Executive Officer, Communications & Stakeholder Relations, CalPERS