

September 25, 2015

VIA CERTIFIED MAIL

Mr. Rob Feckner
Board of Administration
CalPERS
Lincoln Plaza North
400 Q Street
Sacramento, CA 95811

RE: DEMAND THAT CALPERS' BOARD OF ADMINISTRATION RESCIND ANNE STAUSBOLL'S AND OTHER EMPLOYEES' COMPENSATION AWARDS AS NON-COMPLIANT WITH BAGLEY-KEENE OPEN MEETING ACT REQUIREMENTS

Dear Mr. Feckner:

CalPERS appears to have engaged in repeated violations of the requirements of the Bagley-Keene Open Meeting Act of 2004 ("Bagely-Keene") by conferring compensation awards in closed session. This letter demands that the Board of Administration rescind all compensation awards made in the September 17, 2015 closed session (Item 13). If CalPERS is to make such awards for the 2014-2015 year, it must place them on the agenda of a future board meeting and conduct the process in an open session.

Background

Since at least 2011, CalPERS' Board of Administration has violated the requirements of Bagley-Keene, both by conferring compensation awards of senior officers in closed session and by failing to describe clearly in the published board agenda that the personnel review included compensation awards.

The California Attorney General's Office has given extensive guidance to state and local bodies on their obligations under Bagley-Keene, in "A Handy Guide to the Bagley-Keene Open Meeting Act of 2004"¹. On pages 11-12, it states (emphasis ours):

Only certain categories of subject matter may be considered at a closed session authorized under the personnel exception. (§ 11126(a)(1).) The purpose of the personnel exception is to protect the privacy of the employee, and to allow the board members to speak candidly. It can be used to consider appointments,

¹ (http://ag.ca.gov/publications/bagleykeene2004_ada.pdf).

employment, evaluation of performance, discipline or dismissal, as well as to hear charges or complaints about an employee's actions. Although the personnel exception is appropriate for discussion of an employee's competence or qualifications for appointment or employment, **we do not think that discussion of employee compensation may be conducted in closed session** in light of an appellate court decision interpreting a similar exception in the Brown Act, (the counterpart to the Bagley-Keene Act which is applicable to local government bodies).

Notwithstanding this legal guidance from the Attorney General, CalPERS has since at least 2011, in the course of conducting legally permissible personnel reviews in closed session, used that forum to impermissibly conferred bonus awards and salary increases out of the public eye. This illegal use of closed session can be inferred by examining press reports from each year since 2011. These reports describe CalPERS executives receiving raises without any action of the CalPERS board to award the raises in open session:

2011

Marc Lifsher of the *Los Angeles Times* reported on October 8, 2011, in "CalPERS awards \$4.5 million in bonuses to managers,"²:

Top administrators and investment managers at the California Public Employees' Retirement System were awarded \$4.5 million in bonuses, averaging 41% of their base salaries for the year that ended June 30....

The CalPERS board approved the bonuses in a closed-door meeting last month. The information was released Friday. At the same meeting, the board approved salary increases averaging 2% for the current year.

2012

In 2012, the agenda for September 12, 2012 board meeting³ has Item 13 as the sole matter scheduled for closed session:

Annual Performance Evaluation of Chief Executive Officer and Chief Investment Officer; Review of Chief Executive Officer's Performance Evaluations of General Counsel and Chief Actuary; Oversight of Performance Evaluations of Chief

² <http://articles.latimes.com/2011/oct/08/business/la-fi-calpers-bonuses-20111008>

³ <https://www.calpers.ca.gov/page/about/board/board-meetings/full-201209>

Operating Investment Officer, Senior Investment Officers, and Senior Portfolio Managers.(Gov. Code sections 11126(a)(1) and (g)(1)

CalPERS disclosed its bonus decisions later that September, as shown by a report in Pensions & Investments, "CalPERS cuts bonuses to retirement system's investment pros"⁴.

2013

In 2013, the agenda items for what appears to be the salary and bonus review are less complete, with the only potential reference to compensation listed as item 14 on October 16th as (emphasis original):

Chief Executive Officer's Report of Performance Evaluations of Senior Investment Officers, Senior Portfolio Managers and Portfolio Managers **(Gov. Code sections 11126(a)(1))**

Nowhere on the agenda is the item for Anne Stausboll's performance review. Yet it appears to have taken place, or else one must conclude the board conferred an award without having reviewed her performance. Bloomberg reported on the CalPERS bonus awards on November 4, 2013, including Stausboll's bonus⁵:

Three executives outside the Calpers investment office were paid a total of \$221,805 in bonuses last year, the fund said. Anne Stausboll, chief executive officer, was paid a \$99,547 bonus. Chief Actuary Alan Milligan earned \$75,198 and Chief Financial Officer Cheryl Eason was paid \$47,060.

2014

The October 15 board meeting described Item 15, in closed session, was (emphasis original):

Performance, Compensation & Talent Management Committee Report and Actions **(Gov. Code sections 11126(a)(1) and (g)(1))**

This agenda item continues the pattern of recent years of making less and less complete disclosure of the nature of decisions being made in close session. There is no

⁴ <http://www.pionline.com/article/20120921/ONLINE/120929964/calpers-cuts-bonuses-to-retirement-systems-investment-pros>

⁵ <http://www.bloomberg.com/news/articles/2013-11-04/california-pension-freezes-executives-pay-cuts-bonuses>

indication whatsoever as to what employees are included, nor is it clear that this session apparently includes compensation.

It appears the awards were made in the October board meeting, since the November 17-19 board meeting had no agenda items related to personnel matters.

Bloomberg reported on the compensation decisions on November 24, 2014⁶:

Four executives outside the Calpers investment office were paid a total of \$295,930 in bonuses last year, the fund said. Anne Stausboll, chief executive officer, got \$113,679; Chief Actuary Alan Milligan earned \$75,748 and Chief Financial Officer Cheryl Eason was paid \$89,703, almost double a year earlier.

Bloomberg also pointed out that bonuses were up 14% despite its shortfall of total assets versus actuarial commitments having increased by 19% over the past year.

Pattern of Illegal Actions Leading up to 2015

Looking at the agendas from 2011-2014, there appears to be a pattern of:

1. Failure to disclose in board meeting agendas when compensation decisions are made; the best assumption is that they are included in the performance reviews
2. Improper discussion of compensation award in closed session
3. Public disclosure of bonuses and salary increases within five weeks of the board meeting at which they appear to have been awarded

Given this well-established pattern, it appears virtually certain that agenda item 13 in the September 17, 2015 board meeting⁷ included not just the review of staff performance but also the compensation reviews (emphasis original):

Review of 2014-2015 Performance: Chief Executive Officer; Review of Chief Executive Officer's Direct Reports: Chief Investment Officer, Chief Actuary, General Counsel and Chief Financial Officer **(Gov. Code section 11126(a)(1) and (g)(1))**

The California Attorney General points out in the above-referenced guide (p. 14) that:

⁶ <http://www.bloomberg.com/news/articles/2014-11-24/california-pension-fund-bonus-payouts-climb-14-from-prior-year>

⁷ <https://www.calpers.ca.gov/page/about/board/board-meetings/full-201509>

The Act provides for misdemeanor penalties against individual members of the body if the member attends a meeting in violation of the Act with the intent to deprive the public of information to which he or she knows, or has reason to know, the public is entitled to receive. (§ 11130.7).

Given the relatively short tenure of many board members and your general counsel, it appears that none of them may have been aware of the requirements of Bagley-Keene. Moreover, now that the CalPERS board has been notified that the award of salary increases and bonus awards is a violation of Bagley-Keene, proceeding to confirm them and announce them may constitute a misdemeanor crime for members of the board pursuant to G.C. § 11130.7.

CalPERS' Remedy

The Attorney General recommends that, when possible, bodies subject to Bagley Keene should revisit decisions made in a manner non-compliant with the act, rather than incur the risk of having them overturned via a court challenge. Again from p. 14:

Although the body is permitted to cure and correct a violation so as to avoid having its decision overturned, this can be much like trying to put toothpaste back in the tube. If possible, the body should try to return to a point prior to when the violation occurred and then proceed properly. For example, if the violation involves improper notice, we recommend that the body invalidate its decision, provide proper notice, and start the process over.

I urge CalPERS to proceed in accordance with the Attorney General's advice, and rescind any bonus awards and salary increases made in closed sessions in September 2015 and put them on the agenda as open session items as soon as possible. It would be best for all parties to avoid the cost and embarrassment, should someone challenge the validity of the pay raises in court due to the faulty award process, which would leave your staff who received such tainted compensation in the awkward position of having obtained trust fund assets via illegal means.

Sincerely,

Susan Webber

CC: Matthew Jacobs