



September 25, 2017

Ms. Marcie Frost, CEO  
California Public Employees' Retirement System  
400 Q Street  
Sacramento, CA 95811

Dear Ms. Frost:

I am writing to express dire concern about some of the new rules that CalPERS has implemented for the ongoing elections to fill two seats on your board of administration. As you know, I am a candidate for one of those two seats.

My areas of concern generally fit into two broad categories. First, new rules governing this election, which CalPERS has implemented via the California Code of Regulations (CCR), directly violate California statute or the California Constitution. Second, having promulgated the CCR election rules, CalPERS is now violating these rules in critical respects or has indicated its intent not to comply at the point the rules become relevant.

These new rules have the effect of implementing, for the first time, a non-secret ballot for the ongoing elections. Not surprisingly, many of CalPERS' approximately 1.5 million members are reluctant to cast a vote without the protection of ballot secrecy. As a result, voter participation to-date is down significantly relative to the prior election four years ago.<sup>1</sup>

One wonders why CalPERS has jettisoned ballot secrecy, especially given the inextricable ties these elections have to the livelihood of CalPERS members working at government agencies around the state. These voters have a rational basis to fear that disclosure that they voted for a candidate disfavored by their employer or labor union could trigger retaliation against them.

### **CalPERS Election Regulations Violate CA Statue and the CA Constitution**

Article II, section 7 of the California Constitution reads, in its entirety, as follows:

**SEC. 7. Voting shall be secret.**

The new CalPERS election procedures cannot be squared with this constitutional requirement, due to both the identifying barcode serial number that CalPERS has, for the first time, affixed to the ballot card, as well as due to the new requirement that voters sign their marked ballot card in order for their votes to count.

As you know, three other candidates and I met with your staff and the voting administration contractors on September 20<sup>th</sup>. Among the issues I raised with the contractors was whether the barcode contains sufficient information to associate a completed ballot card with the CalPERS member who cast it. Initially, the contractors seemed to indicate that the barcode provides no way to identify a voter. However, when I

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<sup>1</sup> As of Friday, September 22, returned ballots totaled only 81.7% of the number received at the same point four years ago.

questioned them closely, they retreated from this position and acknowledged that in order to cancel and replace lost ballots, which CalPERS regulations require, the contractors must associate the barcode serial number of each ballot with the identity of the voter to whom it was mailed.

This acknowledgement by the election contractors, which I presume to be accurate, directly contradicts information provided by Kim Malm, a member of CalPERS staff, when she testified at a CalPERS board meeting that only demographic information is associated with the barcode, not members' personal identity:

**Ms. Malm:** The data regarding the member is stored in the bar code on the ballot, just like it was -- just like it is currently. And the data that's stored on there is just demographic data that the Board gets, reports on after the election, age, employer, gender.<sup>2</sup>

CalPERS has also violated ballot secrecy in a second, critical fashion, by requiring for the first time that voters sign the ballot card. While not everyone's signature is legible, many people's are, and these individuals' identity can be ascertained by a cursory inspection of their completed ballot card, which also contains the record of the votes they cast. **It is impossible to reconcile a requirement for names to be written on ballots with the California Constitution's requirement of voting secrecy.**

Voting secrecy is further undermined by the position of your general counsel who, in response to my question at the September 20<sup>th</sup> meeting, refused to rule out making available, in response to future Public Records Act requests, the unredacted, executed ballot cards from the current election. As a result, all prospective voters should understand that it is CalPERS' position that it may very well allow the executed ballot containing their signature and candidate selections to be inspected by their employers, labor unions, or the candidates themselves.

I hope you appreciate what a departure from democratic norms it represents to place signatures and identifying barcode serial numbers on the ballot cards themselves. Throughout the democratic world, in by-mail elections, these identifiers are always placed on the ballot envelopes, not on the ballots themselves, and the reason why is clear. Ballot cards contain the record of how people vote, and the envelopes contain the record of who voted. Ballot cards and envelopes are always separated and handled separately, thereby preserving anonymity of the ballot card. Again, this principle is self-evident to voting administrators worldwide, and was presumably evident to CalPERS in the past, since CalPERS' regulations governing elections prior to the current one required barcode serial numbers and signatures to be placed on the ballot envelope, not on the ballot.

Another problem with requiring signatures on ballots is that, not only is it unconstitutional, it is prohibited by California statute. The CA Elections Code §14287 states:

**No voter shall place personal information upon a ballot that identifies the voter. "Personal information" includes all of the following:  
(a) The signature of the voter.**

This provision of statute, which prohibits voters from signing ballots, directly contradicts CalPERS' own regulations, which state that voters must sign their ballots in order for them to count. This naturally raises the question of how CalPERS can enforce its own rule that excludes unsigned ballots from the tally when

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<sup>2</sup> CalPERS Finance and Administration Committee verbatim transcript. September 20, 2016. p. 20.

such a rule stands in opposition to statute. At a minimum, it seems to me that law requires that unsigned ballots be counted.

Similarly the California Elections Code §19205 states:

A voting system shall comply with all of the following:  
(a) No part of the voting system shall be connected to the Internet at any time.

For the first time, the ongoing CalPERS board election is offering Internet voting as an alternative to the mail-in ballot. Again, this seems to directly contradict §19205's prohibition against any part of the voting system being connected to the Internet. Further, at our September 20<sup>th</sup> meeting, the election contractors explained that all incoming ballots are scanned at a facility in Everett, Washington each day and the captured images are sent over the Internet to another facility in the San Diego area, where they reside on a computer awaiting tallying at the end of the voting process. This practice also seems to violate §19205.

It baffles me that CalPERS contends that these statutory provisions do not apply. Yet, as far as I am aware, CalPERS has never advanced an argument for why they are inapplicable. Nothing in the Elections Code would appear to limit that code's general provisions to only specific elections.<sup>3</sup> Instead, it seems reasonable to infer that ordinary precepts of statutory construction should apply, suggesting that, at a minimum, the general provisions of the Elections Code should be construed as applying to all elections for governmental office sponsored by the State of California or its localities. CalPERS is an agency of the State of California, and the elected members of the CalPERS board of administration hold "elective state office" per the language of Government Code § 82024, which states:

"Elective state office" means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature, member elected to the Board of Administration of the Public Employees' Retirement System, member elected to the Teachers' Retirement Board, and member of the State Board of Equalization.

### **CalPERS Is Violating or Intends to Violate Its Own Regulations in Administering the Election**

CalPERS promulgated §554.8 ("Ballot Counting and Runoff Election") of the CCR to specify how returned ballots should be handled and counted. As described by the election contractors at the September 20<sup>th</sup> meeting, CalPERS appears to be substantially violating these regulations and plans to violate them in new ways as the election process progresses.

In particular, §554.8(5)(b) specifies that, while the election is ongoing, returned ballots shall be:

...securely scanned solely for the purpose of validating the ballots and to ensure only one vote is cast per voter.

However, according to the election contractors, their ongoing procedures include scanning all incoming ballots each day at the Everett, WA facility for the purpose of creating an electronic image record of how each ballot card was voted, with the image then transmitted over the Internet to the San Diego area

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<sup>3</sup> The Elections Code does contain provisions that clearly apply to only particular elections. However, none of the provisions raised in this letter are in any way limited by their language to particular elections.

facility. The purpose of this scanning, which is best understood as a precursor to tabulation, is clearly other than the two purposes<sup>4</sup> “solely” for which scanning is allowed.

Critical reasons exist for why §554.8(5)(b) severely limits the purposes for which completed ballots may be processed. First, if election administrators are permitted to undertake activities that verge on ballot counting, which is what is occurring here, they may be tempted to actually count ballots in the midst of the election and to leak that information to favored candidates. Second, §554.8 limits the public portion of ballot processing to those activities occurring at the conclusion of the election, when election observers can ensure the integrity of the process. Allowing substantial ballot processing to occur prior to the end of the election therefore implies allowing ballots to be processed in secret.

It is also contrary to the language of §554.8(5)(b) to create an image of each ballot card and then determine the outcome of the election by tabulating those images rather than tabulating the actual ballots. The regulation states clearly that the actual paper ballots shall be tabulated in order to count votes:

On the date specified in the Notice of Election at the location designated by CalPERS, the validated paper ballots shall be tabulated publicly by an independent, neutral agent appointed by CalPERS for that purpose.

Despite this plain language, at the September 20<sup>th</sup> meeting, the election contractors stated their intention not to tabulate the paper ballots but instead to tabulate electronic facsimiles of them. Again, this is a planned departure from not only the plain language of the regulation but from widely accepted norms of democratic elections, where the marked ballot cards constitute the definitive indication of each voter’s intent and stand as a relatively tamper-proof record.

You may view these concerns as punctilious. However, you should recognize that election processes are inherently exacting, both legalistically and logistically. To allow otherwise opens the door to corruption and lawlessness, which is the threshold at which we stand currently.

### **Conclusion**

The ongoing election process represents a dire threat to democratic governance in California. I believe that you should recognize that reality and convey it to your board.

Unsigned ballots need to be counted. To do otherwise disenfranchises individuals who, in not signing, respected the California Constitution and statute, while CalPERS’ demand for a signature did not.

CalPERS needs to ensure that the ballot counting process complies with its own regulations.

CalPERS needs to inform candidates, so that they may attend, where the “paper ballots shall be tabulated publicly.” Your staff acknowledged at the September 20<sup>th</sup> meeting that they did not know whether this critical action would occur at the Everett facility or the San Diego area facility and promised to provide that information, but have not.

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<sup>4</sup> Per §554.8(5)(b), the allowable purposes of scanning are “validating the ballots and ensur[ing] only one vote is cast per voter.”

Should there be a runoff election for “seat B,”<sup>5</sup> CalPERS must revert to a secret ballot, and all future elections should be conducted by secret ballot.

Finally, some soul-searching and staff accountability needs to occur regarding why CalPERS did not recognize the conflict between its new, non-secret ballot plans and the California Constitution.

Thank you.

Sincerely,



Michael Flaherman

Copies to:  
members, CalPERS Board of Administration  
Matthew Jacobs, CalPERS General Counsel  
Alex Padilla, CA Secretary of State  
Xavier Becerra, CA Attorney General

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<sup>5</sup> My election for “seat A” has only two candidates and therefore will not be subject to a runoff.