

March 19, 2018

Priya Mathur
CalPERS Board President
California Public Employees' Retirement System
400 Q Street
Sacramento, CA 95811

DEMAND FOR REVOCATION OF ILLEGAL, SECRET LOCK-OUT FROM CALPERS FACILITIES

Dear Priya:

I received your March 16 email informing me that you personally "have decided to limit [my] board chambers access to only board meeting dates." This action denies me physical access to my board member office at CalPERS headquarters, as well other undefined areas of "board chambers," which could subject me to arrest for trespassing should I enter those areas on days when, for example, CalPERS board committees but not the board itself meets, or when the numerous other state agencies that use the auditorium meet.

You present this action as a punishment of me for: 1) purported violations of rules that your email acknowledges that you invented yourself; and 2) for purported violations of law that your email describes others, but not me, as having committed.

The purpose of this letter is two-fold. First, I demand that you rescind this lock-out from CalPERS facilities that you remove the shadow of potential arrest that hangs over me, and that you lift the veil of secrecy that you have imposed over this matter. This lock-out action is legally indefensible for numerous reasons, including:

You lack authority as board president to unilaterally promulgate rules and then punish those who do not comply;

There was no violation of purported "rules" or law;

The board president lacks authority to lock-out board members from CalPERS board member facilities, since doing so constitutes willful interference with that board member's execution of her fiduciary duties and her other legal duties as an officer of the State of California;

The lock-out occurred in conjunction with blocking me from reviewing closed session transcripts, suggesting potentially impure motives

Second, if you believe that I have engaged in any actions that should subject me to discipline, I demand that the discipline be conducted IN PUBLIC pursuant to the provisions of V(B)(2) of the Board Governance Policy, which provides that, rather than the board president acting unilaterally and in secret to punish members:

"The Board will be responsible for implementing **public** [emphasis added] disciplinary action against a Board member whose conduct fails to meet the standards outlined in or violates this Governance Policy, or whose conduct is otherwise inconsistent with Board policies."

Prior to the imposition of the lock-out, I was never presented with the charges against me, nor was I ever afforded an opportunity to offer evidence or arguments in my defense. I demand these procedural due process rights and believe that they can only be secured via a public process. I would also note that whenever individuals charged with wrong-doing beg for a public trial and their governmental accusers resist it, there exists a strong presumption on the part of the public that an injustice is being worked against the accused.

The board president lacks authority to unilaterally promulgate rules and then punish those who do not comply.

California law and the board's own governance policy are quite clear that the power to set rules resides with the board itself, not with the board president. Government Code § 20121 (section entitled "Rules.") states in full:

The [CalPERS] board may make such rules as it deems proper.

The CalPERS board has delegated certain of its powers to the board president pursuant to the board's "Governance Policy." Notably, that document does NOT delegate any rule-making power to the board president. In VIII(B)(2)(a) the Governance Policy does give the board president certain powers in enforcing rules, but later in VIII(B) makes clear via explicit reference that the scope of the board president's power is "pursuant to rules adopted by the Board."

By contrast, you claimed in an email to me that I should have been aware of the rule I purportedly violated because it was promulgated by you:

"I [Priya Mathur] made this expectation clear in that closed session and had previously communicated the prohibition...through a written email from Karen Perkins"

It shocks me that you not only claim rule promulgation authority that, by law, you do not possess, but you go even further by claiming the authority to promulgate, clarify, justify, or, as you described it, to have "made this expectation clear" in CLOSED SESSION. As you must know, for you to raise topics related to board rules in closed session is a clear-cut violation of the Bagley-Keene Open Meeting Act. Even if I otherwise acknowledged your authority to unilaterally promulgate rules, which I do not, I would be duty-bound in my observance of the Bagley-Keene Act to ignore any such pronouncements you make in closed session.

Further still, you claim that a written email from Karen Perkins, your executive assistant, had previously put me on notice regarding the purported rule. As your executive assistant, she possesses no authority that you do not possess, which means that she also lacks authority to unilaterally promulgate board rules.

Moreover, I have a copy of the email that I believe you are referencing, and, even though it has no legal or governance force, it nevertheless EXPRESSLY allows what you are now claiming that it prohibits. How shall we resolve our conflicting representations of Ms. Perkins' email? As I said before, let us hold a public process, where the board and the general public can assess each of our claims. I am eager for such a public process. If you are not, the public will judge harshly the validity of your claims.

There was no violation of purported rules or law.

As I discussed in the previous section, an email from CalPERS staff constitutes the only written record of the purported "rule" that you allege I, as opposed to a third party, violated. This email expressly allows the action that I took that resulted in your decision to lock me out of my CalPERS office.

The other violation that you assert involves an action of a third party for which you hold me responsible. You allege that this action violates a section of the California Government Code, which section you cited in an email to me. However, in citing the particular section that you claim was violated, you failed to acknowledge other language in the same section of the Government Code that expressly provides a legal safe harbor for the action in question.

Once again, one is shocked that a legal argument condemning me would be put forward without acknowledging relevant, fully exculpatory sections of the law. This failure on your part results directly from not allowing me to respond to the charges against me, since had I been afforded this basic due process right, I would have been able to point out the exculpatory, safe harbor language.

Moreover, I note that in justifying your lock-out you make no effort to establish a chain of responsibility leading back from the actions of this third party to me, which is logically and legally indefensible.

Locking board members out of CalPERS facilities constitutes willful interference with those board members' fiduciary and other state officer duties.

Locking me out of my office materially interferes with my ability to adequately prepare for CalPERS board meetings, conduct private meetings with CalPERS members, and potentially to receive critical information about wrong-doing offered by CalPERS staff member whistle blowers. As such, lock-out is not validly available as a punishment for any rule infraction short of one that would result in the removal of a board member pursuant to a court-supervised legal process. It is effectively the equivalent of preventing via force certain members of a legislative body from entering the chambers where they cast their vote. Such tactics are common in banana republics. Your pursuit of it at CalPERS will only further weaken public trust in our institution.

Also, I note that numerous state agencies hold public meetings in the CalPERS board chambers. By locking me out, you have deprived me of my right to attend such meetings in clear violation of numerous provisions of statute, constitutional protections, and case law.

The lock-out occurred in conjunction with blocking me from reviewing closed session transcripts, suggesting potentially impure motives.

As part of the process of orienting myself to the board, which I joined in January 2018, I requested that I be provided closed session transcripts of Investment Committee and Board of Administration meetings for all of 2017.

My request to staff was forwarded to you, and you replied in writing that I did not have an automatic right to read such transcripts and that I had to offer a reason that you personally considered compelling in order to be allowed to read them.

You then orchestrated various delaying tactics, including insisting that I meet first with the CalPERS CIO to be briefed on private equity strategy before being allowed access.

After repeatedly insisting, I was eventually provided with just a small portion of the transcripts I requested. Astonishingly, portions of entire pages in what I was provided were blacked out, suggesting that you believe that there are some transcripts of prior board meetings that I am not entitled to read.

Moreover, even though I stated in writing that I had allocated three entire work days to reading the transcripts, at the point I was provided access, I was told by Karen Perkins, your executive assistant, that I would only be allowed two hours to read them. Finally, when I returned for a second day to continue reading them, Ms. Perkins told me that my right to read the transcripts had been revoked by you due to my alleged rule violations that are the subject of this letter. Given this history, it is difficult not to see a nexus between my demand to read the closed session transcripts, your attempts to thwart me, and your ultimate revocation of my right to read them via these Trumped (*sic*) up charges against me.

Conclusion

The U.S. Constitution guarantees the accused with the right to be presented with the charges against them and the right to mount a defense. I demand the same right. This matter will attract public attention, and CalPERS members will judge you harshly if you persist in the current course.

Should you decline to rescind this lock-out, or, at a minimum, to hold a public process pursuant to V(B)(2) of the Board Governance Policy, it is my intention to contact the Assembly and Senate pension oversight committees and call to their attention the effort to withhold closed session transcripts to the point of blacking out portions that are provided to board members. I am sure that such shenanigans will attract their attention and may very well produce subpoenas for the redacted documents as well as questions about why such secrets are being kept.

Sincerely,

Margaret Brown

Margaret Brown
CalPERS Board Member

copies to:

CalPERS Board of Administration