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10 CALIFORNIA ATTORNEYS, ADMINISTRATIVE
11 LAW JUDGES AND HEARING OFFICERS IN
12 STATE EMPLOYMENT

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF FRESNO**

15 CALIFORNIA ATTORNEYS,
16 ADMINISTRATIVE LAW JUDGES AND
17 HEARING OFFICERS IN STATE
18 EMPLOYMENT,

19 Plaintiff,

20 vs.

21 CALIFORNIA DEPARTMENT OF HUMAN
22 RESOURCES; ERAINA ORTEGA as
23 Director of the California Department of
24 Human Resources, and DOES 1-200,

25 Defendants.

) Case No.:

) [UNLIMITED CIVIL CASE]

) **COMPLAINT FOR DECLARATORY**
) **RELIEF**

26 Plaintiff, CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES AND
27 HEARING OFFICERS IN STATE EMPLOYMENT, complains and alleges as follows:

28 **THE PARTIES**

1. Plaintiff, CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES
AND HEARING OFFICERS IN STATE EMPLOYMENT (hereafter "CASE") is, and at all times
herein mentioned was, a nonprofit corporation organized and existing under the laws of the state of
California, with its principal place of business in the County of Sacramento, State of California.

1 CASE is the exclusive collective bargaining representative of approximately 4,500 legal
2 professionals in State Bargaining Unit 2 (“BU 2”) pursuant to Government Code section 3520.5.
3 BU 2 members are employed in more than 100 different state departments agencies, boards and
4 commissions. At least three of Plaintiff CASE’s largest BU2 employers have offices in Fresno,
5 including the office of the Attorney General, the Department of Industrial Relations, and State
6 Compensation Insurance Fund. These employers account for almost half of all CASE members.
7 Fresno is also centrally located for the majority of the BU2 membership that is dispersed throughout
8 numerous locations in California.

9 2. Defendant CALIFORNIA DEPARTMENT OF HUMAN RESOURCES is a
10 statutorily created department pursuant to Government Code sections 18502 and 19815.2. The
11 Department, known as “CalHR,” is vested with “those powers, duties, and authorities necessary to
12 operate the state civil service system pursuant to Article VII of the California Constitution. . .” as
13 set forth in Government Code section 18502. CalHR has extensive duties relating to all state
14 employees, including maintaining a master roster of all employees (Govt. Code §19816.12),
15 performing audit and certification of payrolls for all persons in state civil service (Govt. Code
16 §19816.14), administering employee benefit programs (Govt. Code §19816.17). CalHR is also
17 responsible for administering the Personnel Classification Plan (Govt. Code §19818.6) and has
18 authority to direct the various state appointing powers to allocate positions in accordance with that
19 classification plan (Govt. Code §19818.14).

20 3. Defendant ERAINA ORTEGA is the Director of CalHR, appointed pursuant to
21 Government Code section 19815.3. Defendant ORTEGA is sued in her official capacity as Director
22 of CalHR.

23 4. Defendants DOES 1 through 200 are other state departments, agencies, boards, and
24 commissions that, as appointing powers, may be responsible for employing retired annuitants in
25 violation of state law.

26 5. The true names and capacities, whether individual, corporate, associate or otherwise
27 of Defendants DOES 1 through 200, inclusive, are unknown to Plaintiff who therefore, sues said
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1 Defendants, and each of them, by such fictitious names.

2 6. Plaintiff is informed and believes and thereon alleges that each of the Defendants
3 designated herein as a fictitiously named Defendant is, in some manner, responsible for the events
4 and happenings herein referred to, either contractually or tortiously, and caused the damages to the
5 Plaintiff as herein alleged. Plaintiff will amend this Complaint to allege such true names and
6 capacities when same are ascertained.

7 7. At all times herein mentioned, based upon information and belief, each of the
8 Defendants was the agent, servant and/or employee of each of the remaining Defendants; and in
9 doing or omitting to do the things herein alleged were acting within the course and scope of such
10 agency, service and/or employment with the permission and consent (implied, actual or
11 constructive) of each principal; and each Defendant ratified the acts or omissions of each agent,
12 servant and/or employee.

13 8. The actions and inactions, as well as, the obligations sued upon herein occurred
14 and/or were entered into or incurred by Defendants within the jurisdictional boundaries of the above-
15 entitled Court, and this Court is the proper Court for the trial of this action.

16 9. Each and every reference herein to Defendants or to any of them, is a reference to all
17 Defendants, and to each of them, including all fictitiously named Defendants, unless the reference
18 is otherwise specifically qualified.

19 **JURISDICTION AND GOVERNING LAW**

20 10. Venue is proper in this judicial district, pursuant to California Code of Civil
21 Procedure, because the Defendants are state agencies and/or officials, and actions against such
22 defendants may be commenced in any city or county in which the Attorney General has an office,
23 pursuant to Code of Civil Procedure section 401. The California Attorney General has an office
24 within the City of Fresno making Fresno County an appropriate venue. (Code of Civ. Proc. § 401.)
25 Moreover, at least three of Plaintiff CASE's largest BU2 employers have offices in Fresno,
26 including the office of the Attorney General, the Department of Industrial Relations, and State
27 Compensation Insurance Fund. These employers account for almost half of all CASE members.

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1 Fresno is also centrally located for the majority of the BU2 membership that is dispersed throughout
2 numerous locations in California.

3 11. This Court has jurisdiction over this action pursuant to California Code of Civil
4 Procedure Section 410.10. The amount in controversy, exclusive of interest and costs, exceeds
5 \$25,000.00. Defendants engaged in conduct and transact business in the County of Fresno, and are
6 within the jurisdiction of this Court for purposes of service of process.

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GENERAL ALLEGATIONS

9 12. CalHR enjoys broad statutory authority over the employment practices of all state
10 departments, agencies, boards, and commissions (hereinafter generally, “departments.”) Those
11 departments employ retired persons as Retired Annuitants (“RAs”) in positions that are statutorily
12 required to be occupied by rank-and-file state employees. By law, RAs are supposed to be
13 temporary positions, but CalHR has allowed, and continues to allow, state departments to employ
14 RAs indefinitely. In addition, state law restricts departments from hiring RAs until at least 180 days
15 have passed since their date of retirement. CalHR has allowed, and continues to allow state
16 departments to employ RAs earlier than 180 days after their respective retirement date. Moreover,
17 state law permits a department to employ RAs if the “retired person has specialized skills needed in
18 performing work of limited duration.” CalHR has refused to enforce the requirement that
19 departments show that their RAs have any specialized skills that do not exist among rank-and-file
20 state employees and has refused to enforce the requirement that RAs be employed for only a limited
21 duration. CASE seeks to end the unlawful employment of RAs – at least as to attorneys and judges
22 – and obtain from this court an interpretation of state law regarding the proper employment of RAs.

23 The State’s Use of Retired Annuitants to Indefinitely Fill BU 2 Positions Harms CASE

24 13. The State of California employs attorneys, judges, and other legal professionals in
25 more than 100 state departments, agencies, boards and commissions. It also employs RAs to work
26 as attorneys or judges in at least 50 of those same departments.

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1 14. The State benefits from the employment of RAs in several ways. First, because the
2 RA has by definition already retired and has begun collecting their pension earned through State
3 employment, the State no longer has to pay the employer’s contribution to CalPERS. Second, health
4 insurance coverage for RAs is generally paid for, sometimes as much as 100%, such that the
5 employer of the RA no longer has to contribute to the RA’s monthly allowance for health coverage.
6 In addition, the state benefits from the savings related to a variety of other payroll taxes and
7 employer contributions that are not necessary for RAs.

8 15. CalHR performs periodic compensation surveys for all state employees. The most
9 recent survey for employees in BU 2 was published in 2020. That survey found that the cost of
10 benefits for employees in BU 2 was 64%, meaning that for every dollar the state spends on salary
11 for BU 2 employees, it spends an additional 64 cents on employee benefits. The employment of
12 RAs substantially reduces the cost of that “benefit load” and makes employment of RAs much more
13 financially attractive than hiring rank and file employees. There is a substantial financial incentive
14 for the State to hire RAs in what would otherwise be rank-and-file civil service positions, but using
15 RAs for extended periods of time without justification violates the State’s civil service laws.

16 16. RAs almost invariably are employed to work at the department from which they
17 retired, and typically served at that department as a rank-and-file employee for many years. As a
18 result, RAs do not require any training, any orientation or onboarding, and are generally able to be
19 productive workers from the first day of employment as an RA. As such, departments perceive the
20 use of RAs as more attractive in the short term than hiring and training new employees.

21 17. The State of California currently employs at least 173 persons as RAs in BU 2
22 positions, distributed amongst at least 50 state departments.

23 18. The employment of RAs fills positions (sometimes known as Full Time Equivalents
24 or “FTEs”) that would otherwise be filled by rank-and-file BU 2 members.

25 19. The use of RAs is detrimental to the state’s attorney and judge work force because it
26 deprives rank and file attorneys and judges of opportunities for growth, professional development,
27 and promotion.

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1 20. The use of RAs also deprives the union of the opportunity to recruit new rank and file
2 members who would otherwise be hired to fill the positions occupied by retired annuitants, thus
3 undermining the union's opportunity to grow its ranks and limiting the ability of the union to
4 generate revenue in the form of member dues. The State's use of RAs in violation of state law is a
5 direct attack on the union's ability to act as the exclusive representative of its members.

6 21. Prior to the United States Supreme Court's decision in 2018 in *Janus v. AFSCME*,
7 138 S. Ct. 2448 (2018), state employee unions were authorized by state law to collect fair share fees
8 from bargaining unit members who did not elect to join the union, because they benefitted from the
9 contract negotiation and enforcement services performed by the union. Those fair share fees
10 typically amounted to approximately 97% of full member dues, because resources spent for political
11 purposes were not charged to fair share feepayers. After the *Janus* decision, the collection of fair
12 share fees was deemed unconstitutional.

13 22. As a result of the *Janus* decision, CASE's revenue decreased immediately by
14 approximately 40%. The only source of revenue for CASE is the recruitment of new members. In
15 the years since *Janus*, CASE has been investing a tremendous amount of resources into recruiting
16 BU 2 employees to join the union. These efforts have generally been successful, as CASE
17 membership has recently been growing on average more than 1 percent per month, or 13% per year.

18 23. CASE can only recruit membership from BU 2 positions. RAs typically do not
19 become members of the exclusive representative for the RA's classification, as they are generally
20 at the end of their career, are already collecting a pension based on salary increases previously
21 negotiated on their behalf by the union during their career, and are receiving retiree-health care
22 benefits that are largely governed by statute rather than the collective bargaining process. As such,
23 RAs do not generally believe membership in a union will offer them any additional benefit. By way
24 of example, of the 173 individuals currently employed as RAs in BU 2 positions, only one has
25 elected to become a CASE member.

26 24. CASE's membership rate currently is approximately 61%, meaning that 61% of all
27 BU 2 rank and file employees have elected to join CASE, and that percentage is steadily increasing.

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1 25. The State’s use of at least 173 RAs in BU 2 positions rather than rank and file
2 attorneys and judges means that the State is depriving CASE of the opportunity to recruit at least
3 105 (61% of 173) new members. These 105 potential new members would represent a significant
4 increase in CASE membership, revenue, and collective bargaining leverage.

5 **CASE Has Repeatedly Tried to Address the State’s Illegal Use of RAs in Multiple Venues**

6 26. CASE has previously challenged use of RAs at various state departments. CalHR
7 has refused CASE’s pleas to intercede, but has acknowledged it has discretion to direct departments
8 regarding their employment of RAs.

9 27. For example, on July 22, 2021, CASE implored CalHR to use its authority to rein in
10 the unchecked use of RAs at one of its largest source of members, State Compensation Insurance
11 Fund. (See Exh. 1.) CalHR did not respond for more than two months.

12 28. When CalHR finally did respond on September 30, 2021, CalHR acknowledged that
13 there are statutory limitations on the use of RAs by state departments. Cal HR further acknowledged
14 that CalHR approval is required for the employment of any RAs who return to work within 180 days
15 of their retirement date. (See Exh. 2.)

16 29. CalHR also acknowledged it has authority to review the duties being performed by
17 RAs to ensure the integrity of the classification plan employed by the state departments. (See Exh.
18 2.)

19 30. Notwithstanding these admissions by CalHR, CalHR dismissed CASE’s concerns,
20 refused to exercise any oversight of State Compensation Insurance Fund’s use of RAs, and simply
21 accepted State Compensation Insurance Fund’s purported justifications without any independent
22 review. (See Exh. 2.)

23 31. The September 30, 2021, response from CalHR falsely states: “The July 2021
24 correspondence makes arguments but lacks substantive evidence or facts where State Fund violated
25 any statutes. Departments are fully delegated to manage their use of retired annuitant employees
26 making the decisions of how to accomplish and the methods and tools in which to accomplish
27 operations.” (See Exh. 2.)

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1 32. In fact, CASE presented CalHR with detailed evidence including the names of the
2 RAs employed at State Fund, the length of time they had been so employed, the number of hours
3 worked by the RAs, the nature of the work they performed, and State Fund’s purported justification
4 for each RA. (See Exh. 1.) Notwithstanding that undisputed evidence, CalHR ignored the plain
5 meaning of the Government Code that a retired person “may be employed temporarily in a civil
6 service position.” (See e.g., Govt. Code § 19144.) CalHR illegally and unlawfully condoned the
7 open-ended, non-temporary use of RAs in blatant violation of the Government Code.

8 33. CASE has requested relief from the State Personnel Board (“SPB”) which is
9 constitutionally charged with protecting the merit principle of the state civil service merit system.

10 34. Specifically, CASE filed a Merit Issue Complaint with SPB on March 14, 2022
11 alleging that State Compensation Insurance Fund illegally employs RAs to perform work that should
12 be done by rank-and-file BU 2 members. (See Exh. 3.) This complaint contained an attachment
13 which identified the factual basis for various statutory violations, including Government Code
14 section 21224, which limits RAs to “performing work of limited duration.” (See Exh. 4.)

15 35. In a bizarre, one-paragraph letter, SPB determined that it lacked jurisdiction over
16 CASE’s complaint regarding the use and misuse of RAs in BU 2 positions and has referred CASE
17 to the California Department of Human Resources for redress. (See Exh. 5.) This peculiar decision
18 by SPB leaves the Plaintiff with no legal remedy other than to institute litigation to redress the illegal
19 conduct that has damaged and continues to damage it since CalHR has already refused to remedy
20 the illegal practice of employment of RAs indefinitely rather than for a limited duration, as set forth
21 herein.

22 **The Use of Retired Annuitants is Strictly Limited by State Law**

23 36. In general, a retired person may obtain employment as an RA in one of two
24 circumstances: either 1) during an emergency to prevent stoppage of public business or 2) because
25 the retired person has specialized skills needed in performing work of limited duration. (Govt. Code
26 § 21224, subd. (a).) RAs are limited to working a maximum of 960 hours per fiscal year.

27 37. The Government Code reiterates in other sections that a retired person “may be
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1 employed temporarily in a civil service position.” (See e.g., Govt. Code § 19144.).

2 38. CalHR defines RAs in its Human Resource Manual as “persons retired from a state
3 agency who are appointed to perform mission critical work that is temporary in nature.” [(See
4 <https://hrmanual.calhr.ca.gov/Home/ManualItem/1/1206>.)

5 39. Notwithstanding the temporally limited nature of employment of RAs (either during
6 emergencies or when specialized skills are necessary for work of limited duration), CalHR has
7 permitted numerous state departments to employ RAs to perform BU 2 work for years. Many of
8 the 173 RAs currently employed in BU 2 positions have been so employed for many years, and have
9 been working as RAs despite the fact that there has neither been an emergency threatening the
10 stoppage of public business, nor has there been work of limited duration needing the specialized
11 skills of the RAs.

12 40. RAs in many departments do not perform mission-critical work. They typically
13 perform the same type of work they performed as rank-and-file attorneys and judges. Occasionally
14 they will illegally take on management responsibilities and direct the work of rank-and-file attorneys
15 and judges under the guise of “mentoring.”

16 41. In response to numerous complaints from various unions about the State employing
17 RAs for lengthy periods, CalPERS is currently considering a regulation to define “limited duration”
18 in the context of RAs. The draft regulations were released for public comment on June 17, 2022.
19 The deadline to submit public comments was August 1, 2022. CASE submitted comments prior to
20 the deadline. CalPERS has announced it will respond to the public comments at the CalPERS Board
21 meeting currently scheduled for November 14 through 16, 2022.

22 42. The draft regulation makes a mockery of the phrase “limited duration” as it expressly
23 allows RAs to work for years on end with almost no limit. What few limits exist may be
24 circumvented by mere certification by the employing department, and if those limits are reached,
25 CalHR may authorize the department to continue to employ RAs for even more years.

26 43. The regulatory process that is currently underway will not address “limited duration”
27 in a way to meaningfully limit the abusive practice of hiring RAs instead of rank-and-file attorneys

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1 and judges. Worse, the final regulation may establish a definition of “limited duration” that is
2 contradictory to the plain meaning of the statutory phrase “limited duration.”

3 44. By law, retired persons are not eligible to return to work for at least 180 days
4 following their retirement, without first obtaining approval from CalHR. (Govt. Code § 7522.56,
5 subd. (f).) Notwithstanding these prohibitions, CalHR has permitted many of the 173 RAs currently
6 employed in BU 2 positions to commence work sooner than 180 days after retirement, without first
7 obtaining the necessary CalHR approval.

8 45. CalHR provides in its Human Resource Manual that “[a]ppointing authorities are
9 authorized to hire RAs, after the RA has been retired for a period of 180 days, to perform duties that
10 have been deemed by the department to be critical to the department’s core mission. RAs are to be
11 temporary in nature.” (See <https://hrmanual.calhr.ca.gov/Home/ManualItem/1/1206>.)

12 **FIRST CAUSE OF ACTION**

13 **(By CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES AND HEARING**
14 **OFFICERS IN STATE EMPLOYMENT For Declaratory Relief Against CALIFORNIA**
15 **DEPARTMENT OF HUMAN RESOURCES; ERAINA ORTEGA as Director of the**
16 **California Department of Human Resources, and DOES 1-200, Inclusive)**

17 46. Plaintiff hereby incorporates by reference all of the foregoing paragraphs as if fully
18 set forth herein.

19 47. State law expressly provides that departments may employ RAs if the “retired person
20 has specialized skills needed in performing work of limited duration.” However, the terms
21 “specialized skills” and “limited duration” are not otherwise further defined.

22 48. CalHR’s Human Resource Manual gives examples of the proper use of RAs, including
23 “mentoring new employees, transferring knowledge and providing expertise to other employees,
24 and completing a time limited project.” The manual also provides that “RAs cannot be appointed
25 to a budgeted position on a permanent basis; instead, RAs should be appointed in the temporary
26 help blanket.” (See <https://hrmanual.calhr.ca.gov/Home/ManualItem/1/1206>.)

27 49. Plaintiff CASE desires a declaration of its rights with respect to Defendants’
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1 interpretation, application, and enforcement of the law that requires that RAs have “specialized skills
2 needed in performing work of limited duration.” Currently, CalHR’s interpretation, application,
3 and enforcement of the law allows departments to employ RAs indefinitely, with no showing that
4 they possess any specialized skills.

5 50. Such a declaration is necessary and appropriate at this time in order to prevent Plaintiff
6 CASE from continuing to suffer additional and irreparable financial and reputational harm.
7 CalHR’s failure enforce the law by directing state departments under its control to cease the
8 employment of RAs for anything other than a limited duration will undermine Plaintiff CASE’s
9 ability to recruit members, remain financially viable, and maintain any bargaining leverage.

10 51. As a matter of law, Defendants lack the authority to defy California’s statutes
11 regarding the employment of RAs.

12 52. Therefore, Plaintiff seeks a declaration that Defendants are in violation of the State’s
13 laws by failing to confine the employment of RAs to work of limited duration that requires the
14 specific specialized skills of the RAs so employed.

15 53. Both CASE and the public at large have an interest in ensuring that the State follows
16 civil service laws. Clarification of the extent to which California may employ RAs through this
17 declaratory relief action will constitute the enforcement of an important right affecting the public
18 interest. Limiting the use of RAs, and clearly articulating the circumstances under which RAs can
19 be employed by the State, will result in a significant benefit being conferred upon the general public.

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1 **WHEREFORE**, Plaintiff prays for judgment against Defendants, and each of them, as follows:

2 1. The Court issue a declaration that Defendants' interpretation, application, and
3 enforcement of the term "limited duration" is contrary to state law.

4 2. The Court issue a declaration that Defendants' interpretation, application, and
5 enforcement of the term "specialized skills" by the Retired Annuitants in State employment at the
6 time of the filing of this complaint is contrary to state law.

7 3. The Court issue a declaration of the meaning of "limited duration" under state law.

8 4. The Court issue a declaration of the meaning of "specialized skills" applicable to the
9 hiring of Retired Annuitants under state law.

10 5. For costs of suit incurred herein.

11 6. For reasonable attorney's fees as permitted by law.

12 7. For such other and further relief as the court may deem just and proper.


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14 DATED: October 17, 2022

THE LAW OFFICE OF PATRICK WHALEN

15

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By: 

PATRICK J. WHALEN
Attorney for Plaintiff
CALIFORNIA ATTORNEYS, ADMINISTRATIVE
LAW JUDGES AND HEARING OFFICERS IN
STATE EMPLOYMENT

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