



Investigations of Improper Activities by State Agencies and Employees

Wasteful and Improper Personnel Decisions,
Improper Contracting, Conflict of Interest,
Misuse of State Resources, and Dishonesty

October 2020

INVESTIGATIVE REPORT I2020-2





CALIFORNIA STATE AUDITOR

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October 29, 2020

Investigative Report I2020-2

The Governor of California
President pro Tempore of the Senate
Speaker of the Assembly
State Capitol
Sacramento, California 95814

Dear Governor and Legislative Leaders:

The California State Auditor, as authorized by the California Whistleblower Protection Act, presents this report summarizing some of the investigations of alleged improper governmental activities that my office completed between January 2020 and June 2020. This report details nine substantiated allegations involving several state agencies. Our investigations found wasteful and improper personnel decisions, improper contracting, a conflict of interest, misuse of state resources, and dishonesty. In total, we identified more than \$800,000 of inappropriate expenditures and millions of dollars more that the State will wastefully spend unless it takes appropriate corrective action.

For instance, several years ago the Department of State Hospitals began a telepsychiatry program and allowed its telepsychiatrists to receive State Safety retirement benefits even though they do not have regular, substantial, in-person contact with patients as required. We estimate that this decision will result in millions of dollars in overpaid retirement benefits if left uncorrected.

In another case, executives within the California Department of Veterans Affairs (CalVet) improperly approved 10 emergency contracts that totaled \$628,000 under circumstances that did not qualify as emergencies according to the law, including nearly \$187,000 to remodel two employee housing units intended for administrators. As a result, CalVet failed to solicit legally required competitive bids.

One more example involves a conflict of interest that occurred when a battalion chief for the California Department of Forestry and Fire Protection participated in making a \$100,000 contract with a construction company that employed his wife and was owned by his wife's family. The battalion chief's superiors knowingly allowed the conflict to occur.

State agencies must report to my office any corrective or disciplinary action taken in response to recommendations we have made. Their first reports are due within 60 days after we notify the agency or authority of the improper activity, and they continue to report monthly thereafter until they have completed corrective action.

Respectfully submitted,

A handwritten signature in black ink that reads "Elaine M. Howle". The signature is written in a cursive, flowing style.

ELAINE M. HOWLE, CPA
California State Auditor

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Summary

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Under the authority of the California Whistleblower Protection Act, the California State Auditor conducted investigative work from January 2020 through June 2020 on hundreds of allegations of improper governmental activity. These investigations substantiated numerous improper activities, including wasteful and improper personnel decisions, improper contracting, a conflict of interest, misuse of state resources, and dishonesty. Within this report, we provide information on a selection of these cases.

Department of State Hospitals

In 2016 the Department of State Hospitals (State Hospitals) began a telepsychiatry program and allowed its new telepsychiatrists to receive State Safety (safety) retirement benefits, which are enhanced benefits that the State provides to its employees who have certain public protection responsibilities and are exposed to a risk of physical injury, such as regular and substantial contact with incarcerated patients. However, telepsychiatrists do not meet the requirements for these benefits because they do not have regular, substantial, in-person contact with patients. State Hospitals failed to obtain approval from the California Department of Human Resources when it implemented the program and decided that its 17 telepsychiatrists qualified for safety retirement benefits. We estimate that State Hospitals' failure to perform its due diligence will result in millions of dollars in overpaid retirement benefits if left uncorrected.

California Department of Education

Senior-level managers and a former executive at the California Department of Education worked together to quickly hire a former contractor whom they preselected for a management position. They also improperly approved an inflated salary for the former contractor.

Department of Industrial Relations

Officials at the Department of Industrial Relations (Industrial Relations) unlawfully preselected a candidate for a management position before other candidates had submitted their applications. The officials also provided this candidate with a higher-than-minimum salary even though she did not meet the

Investigative Highlights . . .

State employees and agencies engaged in numerous improper activities including the following:

- » *A department inappropriately allowed new positions to receive enhanced benefits that the State provides to its employees who have certain public protection responsibilities. Unless the department corrects this error, the State will overpay these employees millions of dollars in retirement benefits.*
- » *Two departments preselected candidates for management positions and improperly approved inflated salaries.*
- » *One department improperly approved contracts totaling \$628,000 as emergencies when they did not qualify as such.*
- » *Officials at a department violated state law in making a \$100,000 contract for a construction project.*
- » *Several employees at various agencies misused state resources, including state-paid time, state computers, and state vehicles.*

requirements for it, resulting in about \$41,000 in overpayments to her during a four-year period. Furthermore, a manager at Industrial Relations incorrectly certified that another manager met the minimum qualifications for a higher-level position, leading to an improper promotion.

California Department of Veterans Affairs

A senior executive or his designee at the California Department of Veterans Affairs (CalVet) improperly approved 10 emergency contracts that totaled almost \$628,000 under circumstances that did not qualify as emergencies according to the law. The most egregious example involved nearly \$187,000 CalVet spent on renovations of two employee housing units for administrators. As a result of the improper emergency contracts, CalVet failed to solicit legally required competitive bids designed to ensure that the State receives the best value for such contracts.

California Department of Forestry and Fire Protection

Two assistant chiefs at the California Department of Forestry and Fire Protection (CAL FIRE) knowingly allowed a battalion chief to make a contract with a company in which he had a financial interest. Specifically, the construction company that CAL FIRE used to remodel a unit office was owned by the battalion chief's wife's family and employed his wife. In addition, the assistant chiefs failed to follow the State's contracting requirements with respect to public works contracts.

Business, Consumer Services and Housing Agency

An attorney employed by one of the state departments within the Business, Consumer Services and Housing Agency misused state resources to manage his personal rental properties and to conduct legal work unrelated to the department. The attorney misused his state-paid time and his state-issued computer at various times throughout his workdays and also directed a subordinate to assist him on two occasions.

California Department of Transportation

Several California Department of Transportation supervisors and another employee improperly used state-owned vehicles to commute to and from work. The combined cost of their misuse was about \$22,000.

California Department of Justice

A senior legal analyst and a legal secretary at the California Department of Justice consistently arrived late, departed early, and took extended lunch breaks without accounting for their missed time. The legal analyst's partial-day absences totaled 181 hours and cost the State approximately \$7,011.

Franchise Tax Board

A staff trainer at the Franchise Tax Board regularly arrived to work late and left early without accounting for the missed time. She reported on her timesheet nearly 159 hours that she did not actually work, resulting in a cost to the State of about \$6,717. In addition, the staff trainer improperly used her state-issued computer for personal purposes.

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Introduction

Under the California Whistleblower Protection Act (Whistleblower Act), anyone who in good faith reports an improper governmental activity is a whistleblower and is protected from retaliation.¹ An *improper governmental activity* is any action by a state agency or by a state employee performing official duties that does the following:

- Breaks a state or federal law.
- Is economically wasteful.
- Involves gross misconduct, incompetence, or inefficiency.
- Does not comply with the *State Administrative Manual*, the *State Contracting Manual*, an executive order of the Governor, or a California Rule of Court.

Whistleblowers are critical to ensuring government accountability and public safety. The California State Auditor (State Auditor) protects whistleblowers' identities to the maximum extent allowed by law. Retaliation against state employees who file reports is unlawful and may result in monetary penalties and imprisonment.

Ways That Whistleblowers Can Report Improper Governmental Activities

Individuals can report suspected improper governmental activities through the toll-free Whistleblower Hotline (hotline) at (800) 952-5665, by fax at (916) 322-2603, by U.S. mail, or through our website at www.auditor.ca.gov/contactus/complaint.

We received 1,418 calls and inquiries during 2019. Of these, 779 came through our website, 422 through the mail, 178 through the hotline, 36 through fax, two through internal sources, and one through an individual who visited our office. In addition, our office received hundreds of allegations that fell outside of our jurisdiction; when possible, we referred those complainants to the appropriate federal, state, or local agencies.

Investigation of Whistleblower Allegations

The Whistleblower Act authorizes our office, as the recipient of whistleblower allegations, to investigate and, when appropriate, report on substantiated improper governmental activity by state

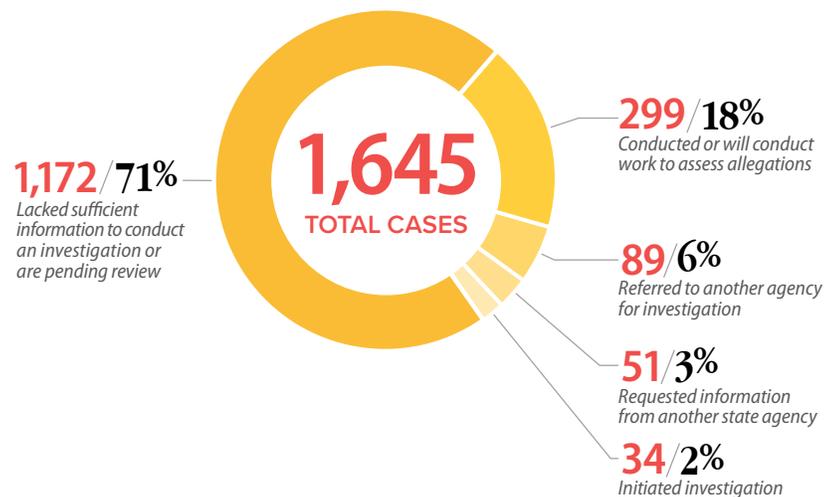
¹ The Whistleblower Act can be found in its entirety in Government Code sections 8547 through 8548.5. It is available online at <http://leginfo.legislature.ca.gov>.

agencies and state employees. We may conduct investigations independently, or we may request assistance from or elect to have other state agencies perform confidential investigations under our supervision. From 1993 through 2019, our investigative work led us to identify and make recommendations to remediate a total of \$579.9 million in state spending resulting from improper governmental activities such as gross inefficiency, theft of state property, conflicts of interest, and personal use of state resources.

During 2019 we conducted investigative work on 1,645 cases that we opened either in previous years or during 2019. As Figure 1 shows, 1,172 of the 1,645 cases lacked sufficient information for investigation or are pending preliminary review. For another 299 cases, we conducted work or will conduct additional work—such as analyzing available evidence and contacting witnesses—to assess the allegations. We notified the respective agencies for an additional 89 cases so they could investigate the matters further, and we independently initiated investigations for another 34 cases. Some of these cases may still be ongoing. Further, we requested that state agencies gather information for 51 cases to assist us in assessing the validity of the allegations.

Figure 1

Status of 1,645 Cases, January 2019 Through December 2019



Source: State Auditor.

For information about the corrective actions that state agencies have taken in response to our investigations program, please refer to the Appendix, starting on page 63.

Chapter 1

Wasteful and Improper Personnel Decisions

As the Introduction explains, state law requires the State Auditor to investigate allegations of improper governmental activities that whistleblowers report. Although some substantiated allegations may not involve significant individual losses to the State, the State Auditor's finding and reporting of numerous similar improprieties can identify weaknesses in the State's system of internal controls and, more importantly, can serve as a deterrent to state employees who might attempt to engage in such improprieties.

This chapter provides examples of three investigations in which we substantiated allegations regarding wasteful and improper personnel decisions related to hiring and promotions. The California Constitution and various state laws, also known as *civil service rules*, establish that the State must appoint and promote employees based strictly on merit, meaning the individuals' ability to perform the work in question. Civil service rules also establish a competitive process for appointments and promotions, and they require state agencies to seek approval and direction from the California Department of Human Resources (CalHR) in many instances. In addition, state law requires state employees to be wise stewards of the State's limited financial resources and to minimize waste. The examples in this chapter illustrate how employees within several state agencies disregarded the civil service rules and their obligations to avoid waste.

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DEPARTMENT OF STATE HOSPITALS

It Improperly Determined That Telepsychiatrists Qualify for Enhanced Retirement Benefits

CASE I2018-0767

Results in Brief

We initiated an investigation in response to an allegation we received that the Department of State Hospitals (State Hospitals) was providing State Safety (safety) retirement benefits to psychiatrists who have no in-person contact with patients and consequently should not receive these benefits. Our investigation determined that in 2016 State Hospitals began a telepsychiatry program and allowed its new telepsychiatrists to receive safety retirement benefits even though they do not have regular, substantial, in-person contact with patients. State Hospitals failed to obtain approval from CalHR when it decided that its 17 telepsychiatrists qualified for safety retirement benefits. We estimate that unless State Hospitals' error is corrected, its failure to perform its due diligence will result in the State's overpaying millions of dollars in retirement benefits to some of its highest paid civil servants.

Background

The State provides safety retirement benefits to some State Hospitals employees who have certain public protection responsibilities and are exposed to a risk of physical injury because of their regular and substantial contact with incarcerated patients. Safety retirement benefits are specific to job classifications that CalHR has deemed as involving a safety risk because of the criminal nature of incarcerated patients.

The retirement benefits for these employees differ significantly from those for employees in other classifications. Specifically, employees with safety retirement benefits do not have to contribute a portion of their monthly earnings to Social Security and receive enhanced death and disability benefits. In addition, they are eligible to retire at an earlier age with a higher percentage of their wages used to calculate their retirement income than those in other classifications. This higher retirement percentage provides a significant increase in retirement income when compared to other employees without safety retirement benefits who have the same years of civil service and retire at the same age. For example, employees in a safety classification who retire at age 55 after 30 years of state service will collect

About the Department

State Hospitals oversees five state hospitals located throughout California that serve patients for whom a criminal or civil court judge has mandated treatment. Its employees include psychiatrists who provide mental health services to patients. Some employees of State Hospitals who have regular and substantial in-person contact with patients who pose an increased risk to the employees' safety are eligible for enhanced retirement benefits, referred to as *State Safety (safety)* retirement benefits.

Relevant Criteria

Government Code section 19816.20 provides safety retirement benefits to those in a civil service classification if the employees in that classification have an ongoing responsibility that includes regular, substantial contact with patients in state mental health facilities. In addition, it authorizes CalHR to determine which classifications meet the requirements for safety retirement benefits. In this role, CalHR defines and further interprets "regular, substantial contact" to mean that an employee spends more than 50 percent of his or her time having direct, in-person contact with inmates in state mental health facilities.

Government Code section 8547.2 provides that an economically wasteful decision constitutes an improper governmental activity.

State agencies must consult with CalHR when significantly modifying either the duties of a previously approved safety classification or the method by which employees execute those duties.

a pension equal to 75 percent of their highest income before retirement, whereas employees of the same age and tenure in other classifications would collect only 60 percent.²

CalHR has the statutory responsibility and authority to determine which job classifications meet the criteria for safety retirement benefits in accordance with governing laws. Consequently, state agencies must consult with CalHR when significantly modifying either the duties of a previously approved safety classification or the method by which employees execute those duties. State agencies may improperly allocate safety retirement benefits if they bypass CalHR in determining whether the changed duties of a preapproved safety classification still meet all of the criteria. CalHR's interpretation of the criteria includes, but is not limited to, employees having direct, in-person contact with incarcerated individuals during more than 50 percent of their work hours.

State Hospitals employs about 135 psychiatrists in a safety classification among the five state hospitals that it oversees in California. However, the psychiatrists are not dispersed evenly throughout the system of hospitals, in part because of the remote locations of some of the facilities. Figure 2 depicts the locations of the state hospital facilities and the approximate number of psychiatrists at each location as of April 2020.

In 2016 State Hospitals implemented a new approach to providing mental health services to state hospital facilities with insufficient on-site staff. Specifically, it began hiring telepsychiatrists who were physically located at offices at Patton State Hospital (Patton) and Metropolitan State Hospital (Metropolitan)—which are near cities—but who provided remote psychiatric services through telecommunication and technology systems to patients at Coalinga State Hospital (Coalinga), which is located in a rural area. Since 2016 State Hospitals has expanded its telepsychiatry services to include patients at Napa State Hospital. The Legislature recognizes this method as a legitimate means for an individual to receive health care services from a health care provider without in-person contact, which limits potential risk to a health care provider's physical safety.

² This example is based on employees who joined state service before September 1, 2010. For those employees, the safety retirement formula at age 55 is 2.5 percent times their years of service times their highest average monthly pay rate during 12 consecutive months of employment (if hired before 2007) or 36 consecutive months of employment (if hired during 2007 or later). For employees who are not in safety classifications, the percentage for the retirement formula decreases from 2.5 percent to 2 percent. Employees who joined state service after September 1, 2010, have a different safety retirement formula that also includes enhanced benefits.

Figure 2
135 Psychiatrists Work at State Hospitals' Five Facilities



Source: State Hospitals' records and CalHR.

Coalinga's HR staff confirmed that they did not involve CalHR in the decision to include telepsychiatrists in the safety classification and State Hospitals implemented telepsychiatry to eliminate the need for a psychiatrist to be present in the same room as a patient.

State Hospitals Failed to Consult With CalHR Before Placing Telepsychiatrists Into a Preexisting Safety Retirement Classification Despite Their Lack of Regular, In-Person Contact With Patients

State Hospitals violated the law when it failed to consult with CalHR before placing telepsychiatrists—who, unlike traditional psychiatrists, have no in-person contact with patients—into a safety retirement classification meant for traditional psychiatrists. Instead, it should have considered using a preexisting psychiatrist classification that does not receive safety retirement benefits. When interviewed, Coalinga's human resources (HR) staff confirmed that they did not involve CalHR in the decision to include telepsychiatrists in the safety classification. Coalinga's HR staff explained that given the urgency of getting psychiatric services to Coalinga's patients, the choice to use the established safety classification was a "quick decision and quick fix" to solve the problem of not being able to recruit enough psychiatrists at Coalinga. When asked, the HR staff indicated that they never considered using a non-safety psychiatrist classification. They noted that in retrospect, State Hospitals probably could and should have used the classification that did not receive safety retirement benefits.

The criteria for safety retirement benefits require an employee to have regular, in-person contact with patients, but State Hospitals implemented telepsychiatry to eliminate the need for a psychiatrist to be present in the same room as a patient. In its policy directive issued in May 2016, State Hospitals established that "the telepsychiatrists may provide consultation and assessment in every aspect of care *except for direct physical examination* [emphasis added]." In the draft operational directive for one of the hospitals that State Hospitals provided to us, the telepsychiatry procedures require that the patient be informed that the psychiatrist is located in another facility. Moreover, when a patient is determined to need seclusion or restraints, staff are instructed to notify in-house psychiatrists.

The interviews we conducted with some telepsychiatrists verified that they provide almost all of their services to their Coalinga patients from a private office at Patton or Metropolitan using a camera on their computers. As one telepsychiatrist stated, he does not see any patients in person on a typical day. Some telepsychiatrists told us that they choose to conduct on-site visits to Coalinga once a month; however, they informed us that these visits were voluntary and compensated separately from their telepsychiatry duties. Even though the telepsychiatrists are physically located on the grounds at Patton and Metropolitan, they officially work for Coalinga and are not allowed to treat patients located at Patton or Metropolitan.

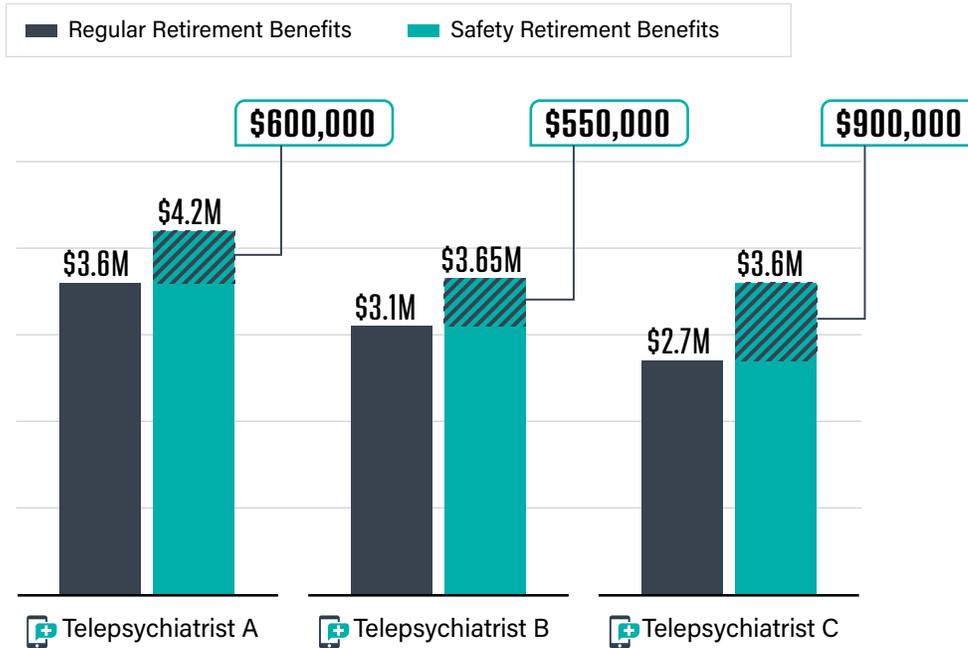
State Hospitals' Failure to Ensure That Telepsychiatrists are Entitled to Safety Retirement Benefits Will—if Uncorrected—Result in Significant Waste

CalHR has not officially assessed whether telepsychiatrist duties meet safety retirement benefit criteria. However, based on our investigation and a review of the applicable law, telepsychiatry positions are not entitled to safety retirement benefits because they do not have regular, substantial contact with incarcerated patients. CalHR staff whose work expertise is determining safety retirement benefit classifications highlighted that the key premise necessitating the benefits is that employees are at risk of being injured because of their proximity to incarcerated patients; hence, the classification receives enhanced benefits. CalHR staff opined to investigators that it would be difficult to justify providing safety retirement benefits for employees who do not work in close physical proximity with incarcerated patients for the majority of their time. Interestingly, one telepsychiatrist informed us that she assumed that telepsychiatrists did not receive safety retirement benefits because they have no in-person interaction with patients.

Because of the higher benefit factors and lower retirement ages designated specifically for safety retirement benefits, telepsychiatrists stand to improperly receive significantly more in retirement pension than they would have received had State Hospitals placed them in a non-safety classification. We analyzed three telepsychiatrists' projected retirement pensions over the span of 20 years, taking into consideration cost-of-living adjustments, previous employment in a safety classification, the year that each employee was hired, and the assumption that each will retire at the earliest age permissible and live for at least 20 years after retirement. As Figure 3 illustrates, we estimated that during their first 20 years of retirement, the accumulated pension payments for these three telepsychiatrists will increase by about \$550,000, \$600,000, and \$900,000, respectively, because of State Hospitals' decision to use the safety classification. As State Hospitals continues to expand and hire more telepsychiatrists, the total amount of retirement income for which the State must assume liability has the potential to cost millions of dollars more than if State Hospitals had used a non-safety classification.

Because of the enhanced safety retirement benefits, telepsychiatrists stand to improperly receive significantly more in retirement pension than they would have received had State Hospitals placed them in a non-safety classification.

Figure 3
Safety Retirement Benefits Will Increase Three Telepsychiatrists' Pensions by \$550,000 to \$900,000 Over 20 Years



Source: Analysis of projected pensions for three telepsychiatrists.

Note: These amounts are the total projected payments to each telepsychiatrist during their first 20 years of retirement.

Recommendations

To remedy the effects of the improper governmental activities this investigation identified and to prevent those activities from recurring, State Hospitals should take the following actions:

- Within 30 days, consult with CalHR to obtain its determination about whether telepsychiatrists meet the criteria for safety retirement benefits. If CalHR determines that telepsychiatrists do not meet the criteria for safety retirement benefits, take immediate action to reclassify telepsychiatrists to the appropriate retirement category and notify all affected employees.
- Within 30 days, consult with CalHR, California Public Employees' Retirement System, and the State Controller's Office (SCO) to retroactively correct any errors made to affected employees' retirement contributions, including Social Security deductions.

- Within 60 days, distribute CalHR's policy on the safety retirement benefits designation to HR staff at each state hospital facility and instruct staff to consult with CalHR as the law requires.

Agency Response

State Hospitals stated that it agrees with our recommendations and will take corrective action to address the improper governmental activities identified in this investigation. In September 2020, it submitted a request to CalHR to determine whether telepsychiatrists meet the criteria for safety retirement benefits and is awaiting its decision. Although State Hospitals expressed concern that any reduction in retirement benefits for telepsychiatrists could significantly hamper its recruitment efforts, it stated that if CalHR determines that the telepsychiatrists do not meet the criteria for safety retirement benefits, it will take immediate action to notify all affected employees, re-classify the position's retirement category appropriately, and retroactively correct any errors made to affected employees' retirement contributions. Further, State Hospitals stated that if CalHR determines that telepsychiatrists do not meet the criteria for safety retirement benefits, it will then provide CalHR's policy on safety retirement designation to HR staff at each state hospital and instruct staff to consult with CalHR as required by law.

State Hospitals disagreed with our interpretation of CalHR's policy and the state law governing safety retirement criteria. Specifically, it questioned whether the policy or law requires telepsychiatrists to have in-person contact with incarcerated patients and exposure to risk of physical injury through contact with these patients to qualify for the safety retirement benefits. However, we based our interpretation of safety retirement criteria on the totality of information obtained from CalHR and our legal analysis of state law. Further, we consulted with a CalHR subject matter expert who confirmed that the information we included on safety retirement eligibility was correct and that the intent of safety retirement benefits is to provide an enhanced benefit to employees who have in-person contact with individuals, such as incarcerated patients, who could pose a risk of physical injury.

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CALIFORNIA DEPARTMENT OF EDUCATION

Senior-Level Managers and an Executive Made Personnel Decisions That Violated Merit-Based Employment Principles

CASE I2018-0745

Results in Brief

Four senior-level managers and a former executive at the California Department of Education (Education) worked together to expedite the hiring of a former contractor whom they preselected for a permanent management position and improperly approved a higher-than-minimum salary.

Background

The California Constitution requires that all civil service appointments be based on merit through a competitive process. State law requires a state agency to make—and the employee to accept—civil service appointments in good faith. Good faith exists when each party intends to follow the spirit and intent of any applicable laws, regulations, and policies and when the agency acts in a manner that does not violate the rights and privileges of other people affected by the appointment, including other eligible candidates.

By contrast, a bad-faith appointment can include one for which the successful candidate is preselected—when the hiring decision makers have chosen the individual they intend to employ before, or in lieu of, conducting a fair and open competitive selection process.

In most cases, a newly hired employee will start at a position's minimum salary. However, in some instances, an agency may offer an applicant a salary that is greater than the position's minimum salary (higher-than-minimum salary). To do so, the agency must demonstrate that the applicant meets the requirements set forth by law, such as having extraordinary qualifications.

About the Department

Education employs about 2,250 individuals who oversee the State's public school system and who are responsible for managing the education of more than seven million children and young adults in more than 9,000 schools statewide. Education is responsible for enforcing education laws and for continuing to reform and improve public elementary and secondary school programs, adult education programs, some preschool programs, and child care programs.

Relevant Criteria

California Constitution Article VII, section 1, requires that a permanent civil service appointment and promotion must be made under a general system based on merit ascertained by competitive examination.

California Code of Regulations, title 2, former section 249 and currently section 243, holds that a valid civil service appointment exists only when the appointing power makes—and the employee accepts—the appointment in good faith. A good faith appointment is one in which the appointing power makes its best effort to follow the spirit and intent of any applicable laws.

California Code of Regulations, title 2, section 243.2, which came into effect on July 1, 2018, authorizes the State Personnel Board to void an appointment that has been in effect for more than one year when either the appointing authority or the employee acted in other than good faith.

California Code of Regulations, title 2, section 250, which governs the hiring process for most civil service appointments, requires the hiring process to be competitive and involve an assessment of the qualifications of the candidates. The hiring process may include standardized, written, and simulations tests, as well as other selection procedures designed to objectively and fairly evaluate each candidate's qualifications.

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California Code of Regulations, title 2, section 249.2, effective July 1, 2017, requires that all job announcements be posted on the CalHR-designated website.

Government Code section 19572 identifies incompetency and other failure of good behavior that causes discredit to an appointing authority as reasons for discipline of state employees.

Government Code section 19836 allows CalHR, in specific instances, to authorize salaries for new hires at greater than the minimum rate, including for the hiring of a person who has extraordinary qualifications. Furthermore, CalHR's *Human Resources Manual* section 1707 delegates its authority to agencies, including Education, to approve exceptions to hire above the minimum salary rate for employees new to state service. Finally, CalHR's *Human Resources Manual* details the following standards that must be met before an agency can hire employees for a salary higher than the minimum rate:

- The would-be employee to which the agency proposes to pay the higher-than-minimum salary is equipped to make a significant contribution beyond the apparent ability of other applicants.
- The agency has had difficulty recruiting a fitting candidate at the minimum salary.

Senior-Level Managers Worked Together to Circumvent the State's Hiring Process for a Former Contractor

Several management staff worked together to ensure that they appointed a preselected candidate to a specific civil service position. The candidate had worked for Manager A as a contractor at Education for six years. Manager A stated that when he learned that the funding for the contractor's position was due to expire at the end of 2019, he consulted with Manager C and an executive to determine how to hire the contractor as a civil service employee so she could continue her work for his division. Manager A attempted to appoint the contractor to a vacant education program consultant position in his division. However, Manager C informed him that the contractor did not meet the minimum qualifications for the position. Manager A then worked with Manager C and her staff to reclassify that vacant position. Based on the contractor's education and experience, Manager C determined that the highest possible position the contractor would qualify for was a staff services manager I (SSM I) position.

Typically, agencies that wish to fill a job vacancy post the vacant position online and then invite the most competitive candidates into the interview process. However, Manager A requested that Manager B waive the requirement to advertise the SSM I position. After initially denying Manager A's request, Manager B later approved the request, claiming that she did so after an executive spoke to her. When questioned, the executive did not recall having a conversation with Manager B about the SSM I position.

Manager A admitted that he did not want to advertise the SSM I position because he intended to hire the contractor. After he received Manager B's approval to waive the requirement to advertise the SSM I position, he interviewed the contractor and no other candidates. When the investigators interviewed her, the contractor said that she knew the position had been created for her to continue the work she had been doing for Manager A. By working together, Managers A, B, and C, and the executive acted in bad faith when they prevented competition for an SSM I position in order to preselect the contractor.

Moreover, we determined that Managers B and C used a long-standing, improper process that waives the requirement to advertise positions for open competition. The individuals interviewed during this investigation all reported they were aware of a process enabling hiring managers to submit to Manager B a request to waive the advertisement of positions. Manager C recalled that this process existed for several decades in coordination with Manager B's division. Manager B told us that before her tenure in the position, her predecessor approved requests to waive advertisement, so she did not consider use of the waivers to be a concern. Further, Manager B generally was not involved in the hiring process and stated she did not receive much guidance or training. When the investigators asked Manager B to provide a legal basis and criteria for approving or denying requests, she said that she did not use any specific criteria. She stated that when she received such a request, she would consult with Manager C and forward Manager C a copy of the email after she approved the waiver.

Evidence shows that Manager C, who had a duty to ensure that Education followed civil service hiring laws, was aware of Manager B's waiver process but did not raise any concerns regarding it. In fact, when our investigators questioned her, Manager C—despite having extensive experience in the hiring process—claimed that the waiving of advertising requirements “was all I ever knew to do. I didn't know if it was good, bad, or indifferent.” Our interviews with Managers B and C and email evidence indicate that the waiver process improperly bypassed competition and that the resulting appointments may have been improper. Both Managers B and C have a duty to ensure that Education is following civil service hiring laws, and failure to do so demonstrates incompetence.

HR Division Staff Improperly Approved Hiring the Former Contractor at a Higher-Than-Minimum Salary Even Though Neither the Candidate nor the Department Satisfied the Applicable Criteria

HR staff failed to exercise due diligence when they approved Manager A's request for a higher-than-minimum starting salary for the contractor. State law requires that a request for a higher-than-minimum salary meet several standards, including that an employee can make a greater contribution than other available applicants and that the department has had difficulty recruiting for the position. At Education, Manager D and an associate personnel analyst are responsible for reviewing and approving requests from managers to hire candidates at salary rates that are greater than the minimums CalHR has designated for the applicable civil service classifications. Manager D stated that she relies on her staff to review supporting documents and to fact-check hiring documents before submitting a recommendation to her for approval.

Our interviews with Managers B and C and email evidence indicate that the waiver process improperly bypassed competition and that the resulting appointments may have been improper.

The personnel analyst told investigators that she relies on the justification that a hiring division provides regarding a candidate's ability to make a greater contribution to the agency over others.

However, when Education hired the former contractor, the personnel analyst did not confirm whether it had advertised the SSM I position. We question how the personnel analyst and Manager D knew the contractor possessed extraordinary qualifications if the position was not advertised to other candidates. Manager D admitted that she had concerns about Manager A's request to hire the contractor at a higher-than-minimum salary but still approved the request. Based on the evidence we presented to Manager D, she agreed that the contractor did not appear to meet the criteria for a higher-than-minimum salary.

Recommendations

To remedy the effects of the improper governmental activities this investigation identified and to prevent those activities from recurring, Education should take the following actions:

- Immediately cease approving any exemptions from advertising vacant positions without appropriate legal authority.
- Immediately cease any higher-than-minimum salary approvals without proper justification.
- Work with CalHR to determine whether Education's delegated authority to approve higher-than-minimum salaries should be withdrawn. If CalHR allows Education to retain the authority, Education should work with CalHR to develop eligibility, review, and documentation criteria for higher-than-minimum salary approval and to provide training to HR staff.
- Ensure that all HR staff and managers attend training on the State's hiring process to understand the constitutional requirement that appointments to state civil service be based on merit and open to competition.
- Work with CalHR and the State Personnel Board (Personnel Board) to determine whether any of the appointments that involved Manager B and Manager C's waiver process were illegal and take appropriate steps to void those appointments.
- Take appropriate corrective and disciplinary actions against the managers and HR staff discussed in this report regarding the actions they took or their failures to take action.

Agency Response

In September 2020, Education reported that it concurs that the waiver process we describe in the report should not have been used to hire the contractor. However, it disagreed with the report and is concerned that certain statements attributed to Education staff were presented without context and thus could result in mistaken inferences. Although we understand Education's concerns, our interviews with the managers referenced in this report were recorded and conducted in the presence of two investigators, and we believe the information presented in the report is a fair representation of the statements provided by Managers B and C.

In response to the recommendations that Education immediately cease approving any exemptions from advertising vacant positions without proper legal authority and work with the Personnel Board to determine if any of the appointments that involved the waiver process were made in bad faith, Education reported that it no longer uses the waiver process. Education claimed that it developed the process as an additional level of review to ensure it met legal requirements set forth in California Code of Regulations, title 2, section 249.1. Education therefore believes that appointments it made under this process are valid. However, we stand by our recommendation that Education work with the Personnel Board to review the appointments involving Manager B to determine whether any of the appointments that involved Manager B and Manager C's use of the waiver process violated civil service laws.

In response to the recommendation that it immediately cease higher-than-minimum salary approvals without proper justification and work with CalHR to determine whether its delegated authority should be withdrawn, Education disagrees with the report's conclusion that the approval process for the contractor's higher-than-minimum salary is indicative of problems with all its higher-than-minimum salary approvals. Specifically, Education reported that it processes higher-than-minimum salary appointments in compliance with the requirements set forth by CalHR. Education cited a Personnel Board compliance review covering the period from March 1, 2019, through November 20, 2019, as support that it complies with civil service laws. Furthermore, Education believes the contractor's higher-than-minimum salary was appropriately approved based on the contractor's contribution to Education and the fact that recruiting another candidate with the contractor's specific knowledge would be impossible. Education reported that the contractor's specific experience meets the higher-than-minimum salary requirements.

As we state in our report, state law requires that a request for a higher-than-minimum salary meet several standards, including that the employee can make a greater contribution than other available applicants and that the department has had difficulty recruiting for the position. Because the SSM I position was not advertised, Education cannot show that it faced difficulties in recruiting for it. Further, we question how Education can conclude that the contractor possessed superior qualifications than other candidates if there was no attempt to find other candidates. Finally, the fact that the personnel analyst and Manager D approved the request without knowing whether the position was advertised suggests that hiring the most qualified candidate was not a factor considered during the approval process. We stand by our recommendation that Education should cease higher-than-minimum salary approvals without proper justification and work with CalHR because of its expertise on the matter.

In response to our recommendation that Education ensure that all HR staff and managers attend training on the state hiring process, Education reported that HR staff participated in various trainings offered by CalHR within the last 24 months and that it will continue to provide all appropriate HR staff training as courses become available.

Lastly, Education reported it will consider the information in the report and determine whether corrective or disciplinary actions are warranted.

DEPARTMENT OF INDUSTRIAL RELATIONS

Officials Violated Hiring Laws for Two Appointments

CASE I2019-0044

Results in Brief

An executive official and other officials at the Department of Industrial Relations (Industrial Relations) unlawfully preselected a candidate for a staff services manager I (SSM I) position and hired her at a pay rate greater than the position's minimum salary even though she did not meet the requirements to be awarded the higher salary. As a result, Industrial Relations overpaid the candidate by approximately \$41,000 during the course of her employment. In addition, an Industrial Relations' HR manager incorrectly certified that a management employee met the minimum qualifications for another position, leading to that employee's improper promotion.

Background

California Constitution and various state laws passed by the Legislature require that all civil service appointments and promotions be made under a general system based on merit, often referred to as the *merit principle*. The basic tenet of this principle is that state agencies must base hiring and promotional decisions on job-related qualifications and that these decisions must be free of illegal discrimination and political patronage. State law requires a state agency to make—and the employee to accept—civil service appointments in good faith. Good faith exists when each party intends to follow the spirit and intent of any applicable laws, regulations, and policies and when the employing agency acts in a manner that does not violate the rights and privileges of other people affected by the appointment, including other eligible candidates. By contrast, a bad-faith appointment can include one for which the successful candidate is preselected—when the hiring decision makers have chosen the individual they intend to employ before, or in lieu of, conducting a fair and open competitive selection process.

About the Department

Industrial Relations administers and enforces laws governing wages, hours and breaks, overtime, retaliation, workplace safety and health, apprenticeship training programs, and medical care and other benefits for injured workers.

Relevant Criteria

The California Constitution, article VII, section 1, requires that a permanent civil service appointment and promotion must be made under a general system based on merit ascertained by competitive examination.

California Code of Regulations, title 2, former section 249, which was in effect at all times relevant to this investigation, holds that a valid civil service appointment exists only when the appointing power makes—and the employee accepts—the appointment in good faith. A good-faith appointment is one in which the appointing power makes its best effort to follow the spirit and intent of any applicable laws.

California Code of Regulations, title 2, section 237, prohibits state employees from participating in a promotional examination unless they meet the minimum education and experience qualifications and any license, certificate, or other evidence of fitness prescribed for the classification for which the examination is given.

California Code of Regulations, title 2, section 243.2, provides that after the Personnel Board determines that an appointment is unlawful, it may take corrective action, which can include voiding the appointment if the action is taken within one year after the appointment and one of the following conditions applies:

1. The appointing power or employee or both parties acted in other than good faith.
2. The appointment was accepted and made in good faith by both the appointing power and employee and the appointment would not have been made but for some mistake of law or fact that, if known to the parties, would have rendered the appointment unlawful when made.

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California Code of Regulations, title 2, section 243.2, authorizes the Personnel Board to void an appointment that has been in effect for more than one year when either the appointing authority or the employee acted in other than good faith.

Government Code section 19680 prohibits any person from providing any special or secret information for the purpose of either improving or injuring a prospective employee's examination or certification chances.

Government Code section 19836 permits state departments to authorize payment to employees at any step above the minimum salary limit to classes or positions if doing so is necessary to meet recruiting problems; to obtain a person who has extraordinary qualifications; to correct salary inequities resulting from actions by the department or the Personnel Board; or to give credit for prior state service in connection with appointments, promotions, reinstatements, transfers, reallocations, or demotions.

As part of this merit-based hiring system, the State develops classification specifications that dictate minimum qualifications and corresponding minimum and maximum salary ranges for each state job classification. When making a hiring or promotional decision, an agency must first ensure that an applicant meets a position's specified minimum qualifications. The State typically allows applicants to meet the minimum qualifications through multiple options, such as education, state work experience, or relevant work experience from other employers. Eligible applicants may take and pass an examination for a specified position to demonstrate that they meet the minimum qualifications. In most cases, a newly hired employee will start at a position's minimum salary. However, in some instances, an agency may offer an applicant a salary that is greater than the position's minimum salary (higher-than-minimum salary). To do so, the agency must demonstrate that the applicant meets the requirements set forth by law, such as having extraordinary qualifications.

In many cases, a state agency also has the authority to promote an employee who meets the minimum qualifications for the next-level position in a classification series and demonstrates a willingness and ability to competently perform assigned job tasks. As part of this process—often called a *promotion-in-place*—an employee's current position is upgraded and the employee takes on additional responsibilities and more complex duties. An agency that complies with the rules for a promotion-in-place is not required to advertise the new position. Although an agency must generally inform eligible candidates of vacant positions, a promotion-in-place involves upgrading an employee's current position rather than creating a new vacancy.

After we received complaints that officials at Industrial Relations unlawfully preselected a candidate for a position, awarded her a higher-than-minimum salary, and improperly promoted another employee, we requested assistance in conducting an investigation. CalHR and the Personnel Board examined these allegations because of their expertise regarding hiring laws, regulations, and policies.

Industrial Relations Officials Unlawfully Preselected a Candidate and Paid Her a Higher-Than-Minimum Salary Without Justification

In 2015 an executive official, an administration official, and HR officials at Industrial Relations failed to act in good faith when appointing a candidate to an SSM I position. They took a variety

of improper actions before the advertisement of the vacancy and before the final application period ended for the SSM I position, including the following:

- The officials first reviewed the candidate's qualifications to determine the highest level position for which she qualified and only then posted the vacancy at the SSM I level.
- The officials gave special attention to the candidate's application by advising her on when to take the SSM I examination and how to improve her application.
- The officials discussed possible future promotions-in-place for the candidate.
- The officials discussed and pursued a higher-than-minimum salary for the candidate before the final application period had even ended.

These actions demonstrate that the officials acted in bad faith and did not intend to adhere to the spirit and intent of the State's merit-based hiring process because they had already preselected this candidate before reviewing the qualifications of all other eligible candidates.

Furthermore, these officials improperly approved a higher-than-minimum salary for the candidate even though she did not meet the requirements to receive the higher salary. As a result, from 2015 through 2019, Industrial Relations overpaid the employee by approximately \$41,000—the difference between the amount she was paid and the amount she would have earned during the same four-year period if she had been appointed at the minimum salary for the position, as is typical.

Industrial Relations Officials Acted in Bad Faith by Unlawfully Preselecting the Candidate

The Industrial Relations officials posted the recruitment for an SSM I position vacancy only after they first reviewed the candidate's qualifications to determine the highest level position for which she qualified—in other words, the officials created a position that best matched a candidate they wished to hire, whereas merit-based hiring principles require an agency to define a new position based on business need and then fill that job with the best-qualified candidate available. At the direction of the administration official, one HR official asked another in an email to determine the highest possible job classification for which the candidate's background would qualify her. HR staff concluded that the best position for this

These officials improperly approved a higher-than-minimum salary, and from 2015 through 2019, Industrial Relations overpaid the employee by approximately \$41,000.

Officials unlawfully provided special information to this applicant specifically to improve her chances for an expeditious hire.

candidate would be an SSM I. This was the first of many actions that the Industrial Relations officials took that demonstrated they had already chosen the candidate they intended to employ before conducting a fair and competitive selection process.

Industrial Relations officials gave special attention to the candidate's application, including advising her about when to take the SSM I examination and how to improve her application. The executive official emailed another executive asking about how to expedite the hiring process and wrote, "I am getting a bit concerned because I am afraid I will lose *my* candidate if we can't move quickly enough on this [emphasis added]." After the position was advertised but before the application period had ended, the executive official asked the administration official to contact the candidate and to "work with her" to get her application and examination completed in a timely manner. The executive official also contacted the administration official to confirm whether he had received the candidate's application and request that he begin the process to be able to hire her at a higher-than-minimum salary. Finally, the administration official contacted the candidate and advised her on how to strengthen her application, including expanding on the duties she performed at her prior positions. Given that not all applicants received this level of attention, these officials unlawfully provided special information to this applicant specifically to improve her chances for an expeditious hire.

In further violation and circumvention of merit-based principles, Industrial Relations officials discussed the possibilities of future promotions-in-place for the candidate before advertising the SSM I position. In fact, after becoming aware that the candidate met the minimum qualifications for only the SSM I position, the executive official began openly discussing the idea that Industrial Relations could promote the candidate without competition at the soonest possible time after hiring her as an SSM I. The following year, just two days after the now-employed candidate met the minimum qualifications for the SSM II position, HR officials and the administration official attempted to begin the process to promote her without competition, which demonstrates their intention to follow through on the executive official's plans from the prior year.

In another example of preselection, officials discussed and pursued a higher-than-minimum salary for the candidate both before advertising the SSM I position and before the date for eligible candidates to apply had passed. In particular, the executive official asked other officials to begin the process to justify and offer the preselected candidate a higher-than-minimum salary. Because one of the requirements for a higher-than-minimum salary during this time period was that a candidate's salary at his or her existing job must be above the position's minimum salary, HR staff subsequently

requested copies of the candidate's tax records and pay stubs to show that her salary was above the SSM I minimum salary. As we discuss in more detail in the following section, given that another requirement for a higher-than-minimum salary is that a candidate must possess extraordinary qualifications beyond what other candidates can offer, we question how these officials knew that this particular candidate possessed superior qualifications if all eligible candidates had not yet even submitted their applications.

The Personnel Board's investigation of this matter concluded that the involved officials unlawfully preselected the candidate for the SSM I position by having chosen her before conducting a fair and open competitive selection process. To remedy this issue, the Personnel Board directed Industrial Relations in January 2020 to void the candidate's SSM I appointment. Because the candidate's SSM I position qualified her for her SSM II position, which then qualified her for her eventual SSM III position, the Personnel Board directed Industrial Relations to also void the candidate's SSM II and SSM III appointments. Industrial Relations has initiated action to void these appointments, and the process is still ongoing. In addition, the Personnel Board directed Industrial Relations to take disciplinary actions against any civil service employees who participated in the unlawful appointment. The executive official referenced in this report no longer works for Industrial Relations.

Industrial Relations Officials Provided the Candidate With a Higher-Than-Minimum Salary Despite Her Failure to Meet the Requirements

The higher-than-minimum salary process allows agencies to offer candidates a salary above the minimum rate in the salary range of a classification if those candidates have extraordinary qualifications. State agencies must verify that potential candidates meet the requirements set forth by law before providing them a higher-than-minimum salary for any given position. During the time period relevant to this investigation, these requirements included the following:

- The candidate's private sector salary at his or her existing job had to be greater than the new position's minimum salary.
- The candidate had to have extraordinary qualifications and expertise significantly beyond what other candidates could provide.
- The agency had to have difficulty in recruiting for the position.

The Personnel Board's investigation concluded that the involved officials unlawfully preselected the candidate for the SSM I position by having chosen her before conducting a fair and open competitive selection process.

In this case, the Industrial Relations officials ultimately awarded the candidate a higher-than-minimum salary, even though she did not meet all of the requirements we list above. Although she met the income requirement, her qualifications were not extraordinary compared to other candidates who applied for the SSM I position. In fact, she did not have the highest level of education or the most relevant experience in the applicant pool. In terms of the third requirement, Industrial Relations did not have difficulty recruiting for the SSM I position. CalHR noted that agencies historically do not have difficulty in recruiting for this classification. CalHR also found that when Industrial Relations posted for the SSM I vacancy in 2015, more than 600 candidates were listed in the county in which the position was going to be located. Based on this information, CalHR concluded that the candidate did not qualify for the higher-than-minimum salary.

We calculated that during the approximately four-year period from 2015 to 2019, Industrial Relations overpaid the candidate by about \$41,000. To remedy this issue, CalHR directed Industrial Relations to initiate an accounts receivable to recover as much of the overpayment as possible. Government Code section 19838 provides that the State can only recover overpayments when its action to recover is initiated within three years from the overpayments. In October 2019, Industrial Relations ultimately concluded that of the \$41,000, the candidate is required to pay back to the State nearly \$27,500, while the remaining amount is beyond the three-year statute of limitations for recovering overpayments. Industrial Relations has initiated the process to recoup the overpayment, and that process is still ongoing.

Industrial Relations Promoted Another Employee to a High-Level Management Position Although He Failed to Meet the New Position's Minimum Qualifications

In 2018 an Industrial Relations HR manager incorrectly concluded that certain aspects of an employee's private sector experience could be used to meet the minimum qualifications, leading to the employee's improper promotion. For the position in question, in addition to meeting the educational requirement, candidates have two options for meeting the experience requirement—through state work experience and non-state work experience. The employee did not meet the minimum qualifications through the first option because he lacked sufficient state work experience. The manager believed that the employee met the minimum qualifications through the second option based on his private sector experience. However, CalHR concluded that the employee did not meet the minimum qualifications through this option because the duties

An Industrial Relations HR manager incorrectly concluded that certain aspects of an employee's private sector experience could be used to meet the minimum qualifications, leading to the employee's improper promotion.

he performed at his private sector position did not sufficiently relate to those of the new management position into which he was promoted.

Since the employee's appointment had been in effect for less than one year, CalHR directed the SCO to void the employee's promotion. We confirmed through state employment records that the SCO took this action in 2019, reverting him back to his previous position.

Recommendations

To address the improper governmental activities we identified in this investigation, we recommend that Industrial Relations take the following actions:

- Within the next 60 days, complete the process of voiding the candidate's appointments to the SSM I, SSM II, and SSM III positions.
- Within the next 60 days, initiate an accounts receivables to collect the overpayments given to the candidate to prevent additional funds from exceeding the statute of limitations.
- Take corrective action against any civil servant who facilitated the candidate's unlawful appointment.
- Work with the executive official's current employer to take appropriate steps to ensure she is prevented from taking similar actions. In addition, Industrial Relations should work with her current employer to ensure she undergoes CalHR or Personnel Board training on the requirements for making good-faith appointments.

Agency Response

Industrial Relations informed us that it issued an unlawful appointment notice to the candidate and that she subsequently separated from the department. In addition, Industrial Relations stated that its accounting unit has taken steps to recover the candidate's overpayment and that it has collected a portion of the amount she owed. Further, Industrial Relations stated that it had served one of the HR officials with adverse action for a prior investigation and that this official separated from the department in November 2019. Finally, Industrial Relations added that the other HR official and the administration official have retired.

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Chapter 2

Improper Contracting and Conflict of Interest

We provide two examples in this chapter of investigations that we completed that involve improper contracting, one of which included a conflict of interest. Unless specific conditions exist, state law requires state agencies to seek competitive bids for contracts, to help ensure that the State obtains the best value for its dollar. State law also prohibits public employees from making or participating in making contracts from which the employees stand to financially benefit. The employees involved in these investigations failed to comply with these requirements.

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CALIFORNIA DEPARTMENT OF VETERANS AFFAIRS

A Senior Executive Improperly Authorized 10 Emergency Contracts for Nonemergencies

CASE I2018-0519

Results in Brief

From January 2018 through April 2019, a senior executive or his designee at the California Department of Veterans Affairs (CalVet) improperly approved 10 emergency contracts for the Veterans Home of California–Yountville (Yountville), none of which involved circumstances that qualified as emergencies under state law. As a result, CalVet failed to solicit legally required competitive bids designed to ensure that the State receives the best value for its contracts. The most egregious example involved nearly \$187,000 of renovations of two employee housing units intended for administrators at Yountville. Ultimately, CalVet spent almost \$628,000 for the 10 improper emergency contracts.

Background

Each state agency is generally responsible for its own contracting program, but all must adhere to state law and the *State Contracting Manual*. Among the responsibilities that agencies must fulfill are the following:

- Ensure the necessity of services.
- Comply with laws and policies.
- Write contracts in a manner that safeguards the State's interest.
- Obtain required approvals, including approvals from the Department of General Services (General Services) when necessary.

Although noncompetitive contracts are appropriate in some situations, state law generally requires agencies to use a competitive bidding process when possible because it helps to ensure fair competition and to eliminate favoritism, fraud, and corruption. Further, economic experts agree that competition in public contracts benefits the public by providing lower prices, greater innovation, and improved products and services.

About the Department

CalVet oversees eight veterans homes across the State. The homes provide residential, medical, and rehabilitative services to the veterans who reside there. Yountville in Napa County was founded in 1884 and is the largest veterans home in the United States. Yountville houses about 1,000 residents on a site that covers more than 600 acres. An administrator manages Yountville's day-to-day operations and reports to executives at CalVet headquarters.

Relevant Criteria

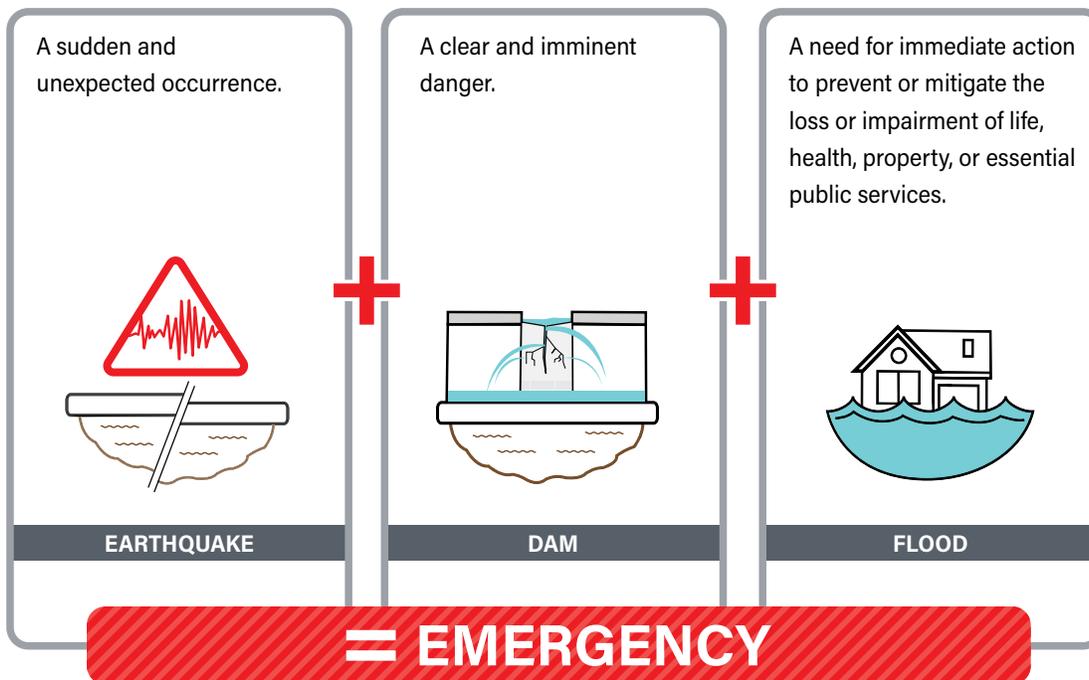
Public Contract Code section 10340 requires state agencies to secure at least three competitive bids or proposals for every state contract except in certain cases. One allowable exception to this rule is during an emergency when a contract is necessary for the immediate preservation of the public health, welfare, or safety or for the protection of state property.

Public Contract Code section 1102 defines an *emergency* as a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.

The *State Contracting Manual*, volume 1, section 3.10, further explains that to qualify as an emergency, the situation giving rise to the contract must meet all elements of the statutory definition. It states that these contracts are exempt from the need for advertising and competitive bidding.

When a state agency encounters a situation that meets the legal definition of an *emergency*, the agency may use accelerated emergency contracting procedures instead of the default competitive bidding process. To use the emergency contracting process, the occurrence must meet all three elements of the definition, as Figure 4 shows. If the agency cannot meet all three elements, competitive bidding is normally required.

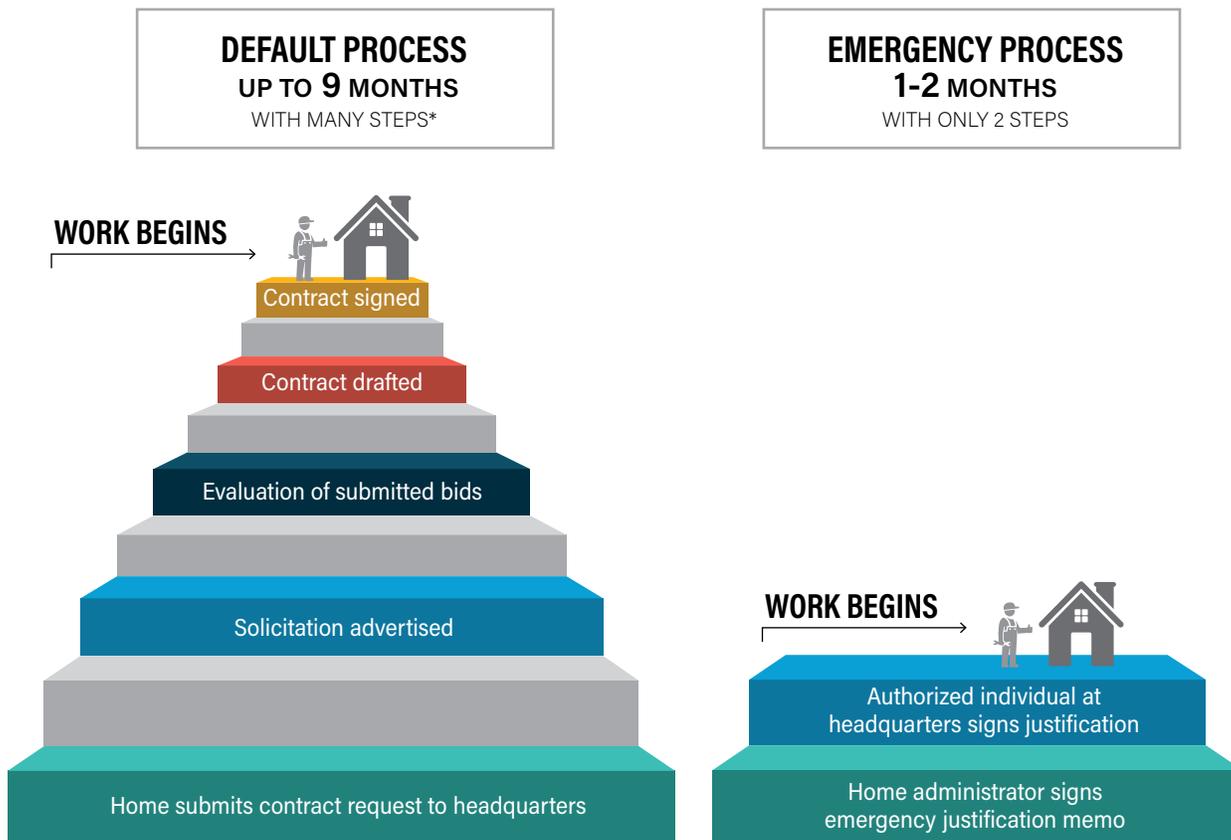
Figure 4
Three Elements are Necessary for a Valid Emergency for Contracting Purposes



Source: Public Contract Code section 1102.

An emergency contract allows services to be rendered more quickly than a typical state contract does. In the *State Contracting Manual*, General Services provides that the typical bidding process often takes three to eight months from advertisement to award. With a competitively bid contract, the contracting process at CalVet can take up to nine months before the contractor can begin working. However, when an agency employs the emergency exemption, a contractor can begin working quickly with just the approval of the agency head or authorized designee, as Figure 5 shows. Typically, CalVet requires an authorized individual at its headquarters to declare an emergency by approving a memorandum to enter into an emergency agreement for services (emergency justification). After the contractor completes the work, CalVet prepares and executes the contract retroactively.

Figure 5
 The Emergency Contract Process Allows Work to Be Completed Sooner Than CalVet’s Competitive Bidding Process



Source: CalVet’s contract manager training materials and *Contract Management Handbook*.

* For the purposes of this figure, we identified a selection of the key steps in the default contracting process.

The Senior Executive Did Not Follow the Law for State Emergency Contracts

From January 2018 through April 2019, CalVet approved 16 emergency justification memoranda (emergency justifications). For 10 of these, we found that the senior executive or his designee approved inadequate justifications that resulted in improper emergency contracts. Although most of the work the contractors performed appeared to be for necessary services, none of the situations met the legal elements of an emergency. Therefore, the senior executive should not have approved the emergency justifications and should have solicited competitive bids or used another appropriate contracting method. Figure 6 lists these 10 contracts, which involved renovations in state-owned employee housing, elevator repair and modernization, water supply issues, kitchen refrigeration repair, and electrical work.

Figure 6

CalVet Improperly Authorized 10 Emergency Contracts at Yountville From January 2018 Through April 2019

CONTRACTS	
Yountville Veterans Home	
Date 01/2018 – 04/2019	
Contract Description	Amount
Repair of main kitchen's refrigeration system	\$168,192
Renovation of home administrator's vacant residence	138,953
Modernization of elevators in Lincoln Hall	118,640
Maintenance and repair services for all Yountville elevators	49,999
Renovation of skilled nursing facility administrator's vacant residence	47,705
Repair of rector reservoir spillway	32,542
Groundwater monitoring, sampling, and preparation of technical report - Part 2	27,320
Groundwater monitoring, sampling, and preparation of technical report - Part 1	17,335
Troubleshooting and repair of main kitchen refrigeration units	14,963
Repair of automatic transfer switch breaker	11,581
Total: \$627,230	

Source: CalVet contracting files.

None of the 10 Emergency Contracts Involved a Sudden or Unexpected Occurrence

The first element necessary to meet the legal definition of emergency for the purpose of contracting is that the occurrence must be sudden or unexpected. An example of a sudden or unexpected occurrence is a natural disaster such as a fire, earthquake, or a lightning strike. None of the situations surrounding CalVet's 10 emergency contracts were sudden or unexpected.

The most egregious examples were the renovations of two employee housing units in April 2018, totaling nearly \$187,000. Our investigation found that the senior executive directed staff to pursue an emergency contract to renovate two vacant units. One unit was assigned to the home administrator and the other was assigned to the skilled nursing facility administrator. The two personnel positions, which were eventually filled by appointees under the former governor's administration, had been vacant for five to 11 months before the renovations.

The original emergency justifications prepared in April 2018 for both housing units show that these were not sudden or unexpected occurrences but rather previously identified needs. Both justifications asserted that "the need to renovate was identified in prior planning; however, the labor and funding [had] not been available." The emergency justifications also asserted that the current recruitment of new administrators had compressed the time frame for preparing the residences for occupancy; however, we found that the recruitments had been ongoing for five to 11 months. Because this situation did not include the requisite element of suddenness, CalVet should have employed another contracting method.

Another example of circumstances that were not sudden or unexpected involves a service contract in July 2018 to modernize two of Yountville's elevators one day after the expiration of an earlier yearlong emergency contract to modernize the same two elevators. If CalVet did not believe it could repair the elevators under the prior contract, it should have known before that contract's expiration that it should begin pursuing a new contract using the nonemergency options available to it. The total cost of the contract was \$118,640.

Yountville's March 2018 contract to repair the refrigeration system at its main kitchen is another example that failed to meet this criterion. According to emails we reviewed, Yountville had multiple refrigerators available for use and staff were aware that some of the main kitchen refrigerators needed repair eight months before the emergency contract. One email in particular between Yountville's

The most egregious examples of improper emergency contacts relate to the renovations of two employee housing units in April 2018, totaling nearly \$187,000.

staff members acknowledged that the issue was not unexpected and stated that Yountville would have a “tough time selling this one as an emergency.” When asked by headquarters staff about the emergency contract request, Yountville staff asserted that “the root cause was an engineer who failed to handle cascading equipment failure” and that as a result, nothing was repaired in a timely fashion. Thus, the circumstances surrounding this issue were not sudden or unexpected. The total contract cost was \$168,192.

None of the 10 Emergency Contracts Involved a Clear and Imminent Danger

The second element necessary for declaring a valid emergency is a clear and imminent danger. For example, if a large vehicle crashed into a state-owned building, creating a large hole and debris that could cause people to injure themselves, it would represent a clear and imminent danger. However, none of the 10 improper emergency contracts we identified involved clear and imminent dangers.

The renovations of the employee housing units we discuss previously were the most egregious examples of the emergency contracts that failed to meet this criterion. Those two emergency justifications asserted that the residences were not in safe condition for occupancy, but our review concluded that the “imminent risks” listed did not support this assertion. For example, to justify the purchase of new appliances for the home administrator’s residence, one of the imminent risks identified was that “appliance failures may result in possible flooding and fires.” However, CalVet’s claim of imminent risk was not plausible because at the time the justification was drafted, the unoccupied residence did not have any appliances.

Further, a housing appraisal conducted one month earlier conflicts with the emergency justification’s assessment of the residences. The appraisal stated that the units were in “average” or “average plus” condition. It declared that the home administrator’s residence, shown in Figure 7, would be ready for occupancy with kitchen appliances, minor cleaning, and paint. These comments signify that clear and imminent danger was not present and that this requisite element was not met. Therefore, the senior executive should have pursued a different contracting method.

Another example of a lack of clear and imminent danger involves two service contracts starting in July 2018 for a vendor to test Yountville’s groundwater and prepare a report for the regional water board. The emergency justification asserts just one imminent danger: that CalVet could be assessed fines in excess of \$365,000 if it did not submit the report (which was a year overdue), which

Two emergency justifications asserted that the residences were not in safe condition for occupancy, but our review concluded that the “imminent risks” listed did not support this assertion.

could impact Yountville's ability to fund other critical repairs. However, a threat of fines does not satisfy the element of clear and imminent danger. Moreover, CalVet had identified the need for this report in September 2015, almost three years before it initiated the emergency contract. Thus, CalVet's inaction created an urgent situation, but it was not a valid emergency under state law. The total cost of the two contracts was \$44,655.

Figure 7

Photos From March 2018 Show That the Home Administrator's Residence Was in Average Condition Before Its Renovations



Source: March 20, 2018, appraisal report for home administrator's residence.

None of the 10 Emergency Contracts Required Immediate Action to Prevent or Mitigate the Loss or Impairment of Life, Health, Property, or Essential Public Services

The final element necessary for declaring an emergency is a situation that requires immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services. An example might be a serious virus outbreak within the State, requiring immediate action to avoid further infection. None of the 10 improper emergency contracts met this third element.

The same two renovation contracts are again the most egregious examples because the residences were vacant; therefore, no person's life or health was at immediate risk. Moreover, the properties were not under immediate risk of damage and did not provide essential public services. Consequently, the senior executive should have

CalVet should have actively moved forward with the process to create a new nonemergency contract.

pursued a different contracting method to complete this work. The senior executive also claimed that the presence of mold in the home administrator's unit compelled him to pursue an emergency contract; however, we could not substantiate his claims, as neither the emergency justification nor the contract made any mention of the presence of mold or the need for mold abatement. The senior executive later acknowledged that he did not obtain a professional assessment of the mold situation in the residence and stated that the replacement of the flooring addressed his concerns.

Another notable example of circumstances that did not require immediate action to prevent or mitigate significant losses involves a service contract in March 2019 to maintain and repair the 26 elevators at Yountville after the previous elevator maintenance and repair vendor terminated its contract. The emergency justification indicated that the emergency contract request was to ensure Yountville did not experience a lapse in elevator services while a new contract was executed. The emergency justification did not articulate any immediate need for elevator services; hence, CalVet should have actively moved forward with the process to create a new nonemergency contract. If an emergency elevator situation had arisen, it could have then initiated an emergency contract request. The total contract cost was \$49,999.

CalVet Had Other Contracting Methods Available to It

The State provides many different procurement methods, and according to CalVet's *Contract Management Handbook*, CalVet had several other viable contracting options for completing the needed work. The estimated length of time for completing these contracts ranges from one to nine months. The contracts that require some element of competitive bidding generally take longer than those that do not.

Because expediency was a major consideration in these improper emergency contracts, CalVet could have considered the use of the small business or disabled veterans business enterprise (SB/DVBE) procurement option. CalVet's *Contract Management Handbook* specifies that a contract using the SB/DVBE option can be executed in about the same time frame as an emergency contract: one to two months. Just like the emergency exception, using the SB/DVBE option allows CalVet to award a contract for less than \$250,000 without going through the lengthy advertising and bidding process. Under the SB/DVBE option, CalVet would have had to obtain two quotes from two small businesses or two disabled veterans business enterprises to move forward. This option would have provided greater assurance that it received a fair price for the work performed while also financially benefitting disabled veterans and

small businesses. The senior executive admitted that he was not sufficiently aware that the SB/DVBE procurement option also provided expediency.

Recommendations

To address the improper governmental activities we identified in this investigation, CalVet should take the following actions within 60 days:

- Work with the Governor's Office to take corrective action against the senior executive for his decisions related to the improper emergency justifications.
- Request that General Services provide training to the senior executive, the Homes Division's management, and the veteran homes' management regarding the appropriate use of emergency exceptions for contracts.
- Implement written procedures within the emergency justification approval process to require (1) an evaluation of whether another procurement option is viable for each proposed emergency justification request and (2) a legal review of whether the situation described in the justification meets the elements of an emergency as defined by state law.

Agency Response

In July 2020, CalVet reported that instead of working with the Governor's Office to take corrective action against the senior executive as we recommended, the secretary of CalVet, a Governor's appointee, admonished both senior executives through written memoranda to abide by the *State Contracting Manual* procedures. In response to our second recommendation that General Services provide training to the senior executive, the Homes Division's management, and the veteran homes' management regarding the appropriate use of emergency exceptions for contracts, CalVet stated that it plans to have General Services provide this training in October 2020. Lastly, CalVet stated that it would update its policies and procedures as recommended, will require that its staff perform an analysis to assess the appropriateness of other procurement options before executing an emergency contract, and will mandate that its legal office review all emergency justification requests to verify that the circumstances meet the elements for an emergency. It plans to update its policies and procedures by November 2020.

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CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION

Senior Leaders Failed to Follow Contracting Requirements and Executed a Contract in Which One Had a Financial Interest

CASE I2018-1988

Results in Brief

Two assistant chiefs in the California Department of Forestry and Fire Protection (CAL FIRE) allowed a battalion chief, whom they supervised, to make a contract with a company in which the battalion chief had a financial interest: the construction company CAL FIRE used to remodel a unit office was owned by the battalion chief's wife's family and employed his wife. The two assistant chiefs knew about the battalion chief's financial interest, but they failed to prohibit the battalion chief's involvement in the contract. In addition, the assistant chiefs failed to follow the State's contracting requirements with respect to public works contracts. For example, they did not obtain approval from General Services before executing the contract.

Background

State law prohibits employees from having a financial interest in any contract they make in their official capacities that results in their having a conflict of interest. This prohibition includes a state employee participating in the making of a contract with a vendor that employs the employee's spouse because the employee has a financial interest in the spouse's income and thus in the vendor.

Furthermore, each state agency is responsible for ensuring that its contracts safeguard the interests of the State and that its contracting practices comply with applicable laws and policies. The *State Contracting Manual* provides agencies with policies, procedures, and guidelines to promote sound business decisions and practices in securing necessary services for the State. It describes *public works contracts* as those that involve alteration, repair, or improvements of any public structure, and it requires agencies to follow specific guidelines in developing such contracts.

About the Department

CAL FIRE is dedicated to the fire protection and stewardship of more than 31 million acres of California's privately owned wildlands. With 21 unit offices throughout the State, CAL FIRE provides varied emergency services in 36 of the State's 58 counties through contracts with local governments. One unit chief oversees each unit with the assistance of multiple assistant chiefs, who themselves oversee battalion chiefs.

Relevant Criteria

Government Code section 87100 prohibits a state employee from making or participating in any governmental decision in which she or he has a financial interest.

Government Code section 87103 provides that a state employee has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on a source of income.

Public Contract Code section 100 directs that the State's contracting laws were enacted to eliminate favoritism, fraud, and corruption in the awarding of public contracts.

The *State Contracting Manual*, volume 1, chapter 10, defines *public works contracts* as agreements for the erection, construction, alteration, repair, or improvement of any public structure, building, or other public improvement of any kind. It also identifies requirements for such contracts, which include obtaining approval from General Services, advertising in the *California State Contracts Register*, and preparing an agreement that includes language protecting the State's interests.

Government Code section 19572 specifies the following as reasons for discipline of state employees: incompetency, inexcusable neglect of duty, and other failure of good behavior, either during or outside of duty hours, that is of such a nature that it causes discredit to the appointing authority or the person's employment.

After we received a complaint alleging that a battalion chief had a financial interest in a contract in which he participated in selecting and working with a vendor, we initiated an investigation and requested CAL FIRE's assistance to conduct it.

Two Assistant Chiefs Assigned a Battalion Chief to Manage a Contract With a Construction Company in Which He Had a Financial Interest

Two assistant chiefs who supervised a battalion chief assigned that battalion chief to manage a \$100,000 remodel construction project for a unit location and to contract for that work with a construction company that employed the battalion chief's wife and was owned by his wife's family. State law deems the income of a state employee's spouse a source of income to the employee. Because he receives income from his wife's employer, the battalion chief should not have participated in making this contract.

When we interviewed the battalion chief, he explained that his responsibilities included contacting potential vendors, including the construction company employing his wife, to receive quotes for the remodeling work. One of the assistant chiefs who oversaw the battalion chief confirmed that the battalion chief was involved in discussions to select the vendor. Furthermore, the battalion chief also approved some of the purchase orders authorizing the work. The battalion chief acknowledged that he was the point of contact between the construction company and CAL FIRE and that he handled payments to the company. Witnesses also corroborated that the battalion chief was in charge of coordinating the construction project and that the invoices from the construction company were sent directly to him. The battalion chief directed other employees to pay the company using their state-issued debit cards because he said he lost his own card. As a result of the battalion chief's financial interest in the contract, we forwarded the findings of this investigation directly to the Fair Political Practices Commission, which is responsible for ensuring that public officials act in a fair and unbiased manner in the government decision-making process.

As a result of the battalion chief's financial interest in the contract, we forwarded the findings of this investigation directly to the Fair Political Practices Commission.

The battalion chief informed us that he told the assistant chiefs of his relationship with the construction company when he learned that they were putting him in charge of the construction project and contract. Even though both assistant chiefs were aware of his relationship to the company, they did not identify any concerns. When questioned, one of the assistant chiefs acknowledged that he was aware of the relationship but did not think that it was a conflict because the unit had used the construction company for projects before the battalion chief started working in that unit. However, if the assistant chief wished to contract with this construction

company for the remodel, he should have ensured that the battalion chief did not participate in any aspects of the contract, including discussing the contract, selecting the vendor, obtaining opening bids or quotes, and authorizing purchases.

The Chiefs Failed to Follow the State's Requirements for Public Works Contracts

The approximate \$100,000 contract with the construction company involved the remodeling of a state-owned building and property and therefore constituted a public works contract. As the text box illustrates, state agencies must follow the *State Contracting Manual's* specific guidelines for public works contracts.

Ultimately, the assistant chiefs and the battalion chief failed to ensure that the contract with this construction company represented the best value for the State. They failed to follow all three requirements listed in the text box: they did not obtain approval from General Services, they did not advertise the bid opportunity, and they did not include the appropriate contract language—such as contract amendments, dispute resolutions, and antitrust claims—that would have protected the State's interests. Had they obtained approval from General Services, they might also have received a better deal for the State because General Services' purpose is to provide centralized services, such as planning, acquisition, construction, and maintenance of state buildings and property.

Evidence shows that the subjects of this investigation bypassed these *State Contracting Manual* requirements for the sake of expediency and because the assistant chiefs lacked sufficient knowledge about aspects of the State's contracting requirements, including the advertising process. According to a witness, one of the assistant chiefs forewent the formal review processes by General Services because doing so would have taken too long. That assistant chief acknowledged to us that he tried to ensure expediency and added that he was not aware of requirements related to advertising. Because these chiefs failed to follow the steps in the *State Contracting Manual*, there was no external review of the contract to ensure that it protected the State's interests.

Selection of *State Contracting Manual* Requirements for Public Works Contracts

- Obtain approval from General Services for work involving renovation, structural repair, alteration, or additions to existing buildings and facilities.
- Advertise in the *California State Contracts Register* and include information such as description of work to be done, bid opening date and time, and contract duration.
- Award the contract to the lowest responsible and responsive bidder by preparing a standard agreement that should include a statement of work, costs and payments, and other language that protects the State's interests.

Source: *State Contracting Manual*.

The two assistant chiefs and the battalion chief each retired or resigned before the conclusion of this investigation. One of the two assistant chiefs did not respond to our requests for an interview.

Recommendations

To remedy the effects of the improper governmental activities this investigation identified and to prevent those activities from recurring, CAL FIRE should take the following actions:

- Consider placing a notice of the investigation in each of the chiefs' personnel file, as all three chiefs are no longer employed by CAL FIRE.
- Establish a process regarding procurement decisions to ensure that contracts undergo applicable state requirements.
- Provide contract and procurement training to applicable CAL FIRE employees, including those involved in drafting, negotiating, or approving contracts. The training should include a review of the *State Contracting Manual* to ensure that staff understand the policies, rules, and statutes applicable to external review and to procuring vendors and awarding contracts.

Agency Response

In September 2020, CAL FIRE reported that it agreed with the recommendations in our report. It informed us that it would ensure that appropriate documentation regarding this investigation is placed into the chiefs' personnel files. In addition, CAL FIRE stated that its business services office has a contracting section responsible for developing and implementing policies and procedures for non-information technology contracts and that these contracts should be routed to the business services office for processing. CAL FIRE believes that the chiefs referenced in this investigation did not follow these established procedures and added that it will ensure that all CAL FIRE employees follow these procedures by providing them with annual reminders. Finally, CAL FIRE reported that although it already has established training in place regarding policies, rules, and statutes applicable to external review, procuring vendors, and awarding contracts, it will develop a refresher course and require employees to receive consistent and current training.

Chapter 3

Misuse of State Resources and Dishonesty

This chapter provides examples of four investigations in which we substantiated allegations involving the misuse of state resources. State law prohibits state employees from using state resources—including land, buildings, facilities, equipment, supplies, vehicles, and state-compensated time—for personal purposes. The investigations that we highlight here focus on state employees who misused state-owned vehicles (state vehicles), state computers, and state-compensated time. In some of these instances, the employees were untruthful regarding their improper behavior, which is an additional cause for discipline.

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BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY

A Department Attorney Misused State Time and Resources for Personal Purposes

CASE I2018-0236

Results in Brief

An attorney employed by one of the 11 state departments within the Business, Consumer Services and Housing Agency (Consumer Services) used paid state time and resources to manage his personal rental properties and to conduct legal work unrelated to the state department. Although department management attempted to address the attorney's actions and notified him that he was prohibited from working on outside legal matters, his misuse continued until he retired from state employment during this investigation.

Background

Consumer Services provides oversight to 11 state departments, boards, panels, and councils, which it refers to collectively as *departments*. The attorney discussed in this report worked at one of these departments. Attorneys for the department provide advice and counsel on legal matters to department officials. The attorneys also review and make recommendations on proposed actions to ensure compliance with relevant statutes and regulations.

In response to an allegation we received that an attorney misused state time and resources for personal purposes, we initiated an investigation and requested the assistance of Consumer Services—the oversight agency—to conduct it. Consumer Services subsequently retained the California Department of Justice (DOJ) to conduct the investigation on its behalf.

The Attorney Used State Time and Resources to Manage His Personal Rental Properties

The investigation found that the attorney spent a significant amount of state time managing his personal rental properties and that he used state resources to carry out his personal business. Not only did these resources include his state-paid time and state-issued computer, he also directed a subordinate employee to sign documents

About the Agency

Consumer Services assists and educates consumers regarding the licensing, regulation, and enforcement of professionals and businesses in California. The department at issue is one of 11 state departments that fall within Consumer Services' oversight, but we do not identify it in this report to maintain the confidentiality of those employees involved.

Relevant Criteria

Government Code section 8314 prohibits state employees from using public resources, including state-compensated time, for personal or other purposes that exceed minimal and incidental use.

Government Code section 19990 prohibits state employees from engaging in activities that are clearly inconsistent, incompatible, in conflict with, or inimical to their duties as state employees. These types of activities include using state time, facilities, equipment, or supplies for private gain or advantage, as well as failing to devote their full time, attention, and efforts to state employment during work hours.

Government Code section 19572 specifies the following as reasons for discipline of state employees: misuse of state property, dishonesty, and other failure of good behavior, either during or outside of duty hours, that is of such a nature that it causes discredit to the appointing authority or the person's employment.

related to his rental property on two different occasions. The employee stated that she felt uncomfortable with following his direction but believed that she had to comply because the attorney supervised her.

The attorney acknowledged to the investigator that he and his wife jointly owned multiple rental properties and both managed the properties, but he claimed that his wife was the primary manager and that he only occasionally worked on property management activities during his lunch hour. However, the investigator discovered on the attorney's work computer 22 personal documents related to the rental properties, including leases, amendments to leases, cover letters to renters, and reminders to renters. Furthermore, three witnesses reported that they frequently heard or observed the attorney on personal calls related to his properties during state work hours. In total, the evidence—witness statements, phone records, emails sent from the attorney's work email, and a review of the documents on his work computer—confirms that the attorney performed work related to his rental properties throughout his workdays.

When asked about these investigative findings, the attorney admitted that he answered calls on his personal cell phone during workdays, but he maintained that the calls occurred during his lunch time, which was generally from 12 p.m. to 1 p.m. However, a review of the attorney's cell phone records contradicted his claims. For instance, during the week of April 15, 2019, the attorney made or received 56 calls during work hours, and only four of these calls occurred between 12 p.m. and 1 p.m.

The attorney used state resources to locate and recoup money owed to him from previous tenants.

The attorney also used state resources to locate and recoup money owed to him from previous tenants. The investigator showed the attorney background reports and notes found in his computer specific to two individuals. The attorney admitted they were both former renters against whom he wanted to enforce judgments to recover money owed to him personally. After the investigator confronted the attorney with the records on his work computer, the attorney conceded that he undertook efforts to locate the two former renters during his work hours at the office by conducting online research, calling various companies, and hiring a process servicer and a private investigator.

The Attorney Used State Resources to Provide Legal Services to Family Members and Other Clients on State Time

The attorney provided legal services for personal clients and family members and spent a substantial amount of time during work hours on phone calls, drafting letters, corresponding through email,

traveling to court, and attending court hearings that were not in the service of the department. In the summer of 2018, the attorney represented his sister-in-law in a legal dispute with her neighbor, which required him to travel to a local courthouse multiple times during his regular work hours. In addition, the attorney used his state email account and state office supplies extensively in relation to this matter. The attorney admitted that he neither informed anyone at the department nor obtained permission to represent his family member in this matter. The attorney also admitted that he clearly understood that he was prohibited from performing legal work for any other client while employed at the department, regardless of whether he received compensation for that outside legal work.

That same summer, the attorney represented his niece to negotiate a monetary settlement and to obtain a certificate of title for a vehicle she purchased from a car dealership. The attorney admitted that he used his state computer to create and print a bill. Computer and email records further show that he used his state computer over the course of a full month to conduct negotiations and create letters, which included a demand letter that he emailed from his state email account to the car dealership that disclosed a \$600 fee for the attorney's services.

After the investigator directly asked the attorney about a matter involving his nephew, the attorney further admitted that he represented his nephew in a criminal matter. During his three years of employment at the department, the attorney attended a total of seven legal conferences for his nephew at a superior court. The attorney claimed that the conferences were brief and took minimal time away from his duties at the department; however, court records show that these court appearances occurred at various times throughout the attorney's workday and were located up to 34 miles from his office. Timesheet records indicate that the attorney did not use any personal leave to account for the time away from the office to attend these court appearances. Finally, the attorney did not inform his supervisor that he was representing his nephew or attending these court appearances.

The attorney initially denied that he continued to represent any of the clients with whom he had worked before his employment by the department; however, after the investigator once again presented to him numerous documents discovered on his work computer, the attorney conceded that he continued to provide legal representation to these other clients. The investigation revealed that he represented a former client and produced a letter on his state-issued computer to settle a contractual dispute. Additional documents on the attorney's state computer identified him as the attorney of record on a civil complaint, for several settlement conferences, and for a request for payment.

The attorney did not inform his supervisor that he was appearing in court to represent his nephew in a criminal matter.

The Attorney's Supervisor Took Only Minimal Steps to Correct His Behavior

The supervisor made a few efforts to address the attorney's misconduct, but they were ineffective and he continued to misuse state resources until his retirement. Witnesses told the investigator that they reported to the supervisor their observations of the attorney conducting work related to his personal rental properties as early as 2017. Although the supervisor claimed that she never personally heard the attorney managing his rental properties while at work, she reminded him in February 2017 that by virtue of his position with the department, he was prohibited from working on outside legal cases. The supervisor claimed that she believed that the attorney ceased conducting outside legal services after the February 2017 discussion and denied that anyone reported to her that he continued to engage in outside legal work. However, on or about May 8, 2017, the supervisor issued the attorney two memorandums memorializing and reiterating the directive that he was not to perform any legal work unrelated to the department. Further, one witness said she informed the supervisor of the attorney misusing state resources in the summer of 2018. The investigator concluded it is more likely than not that the supervisor failed to look into the allegation. Not surprisingly, the attorney continued to misuse state resources for private matters until he retired during this investigation.

Recommendation

To remedy the effects of the improper governmental activities this investigation identified and to prevent those activities from recurring, the department should document in the attorney's personnel file that he was under investigation for misuse of state time and resources when he retired.

Agency Response

In September 2020, the department reported that it intends to implement the recommendation.

CALIFORNIA DEPARTMENT OF TRANSPORTATION

Several Supervisors Misused State Vehicles, Costing the State More Than \$22,000

CASE I2018-1979

Results in Brief

Several employees in a maintenance division at the California Department of Transportation (Caltrans) improperly used state vehicles to commute to and from work. Specifically, from June 2018 through May 2019, six employees, all but one of whom were supervisors at differing levels, misused state vehicles for their personal commutes. We calculated the combined cost of the employees' misuse to be about \$22,000.

Background

Employees in Caltrans' maintenance divisions sometimes use state vehicles to perform their regular job duties, which include maintaining, repairing, and inspecting roadway structures and equipment. The divisions typically store state vehicles at assigned maintenance stations. When a legitimate need exists, such as when employees' job duties require them to respond to emergency calls outside of regular work hours, state law allows them to store a state vehicle at their home overnight. However, the law requires employees to obtain an approved vehicle home storage permit (storage permit) if they store a state vehicle at or in the near vicinity of their home for more than 72 nights over a 12-month period or for more than 36 nights over a three-month period.

In response to an allegation that six Caltrans maintenance employees had been using state vehicles for at least parts of their personal commutes, we initiated an investigation and requested Caltrans' assistance to conduct it.

About the Department

Caltrans manages more than 50,000 miles of California's highway and freeway lanes. Caltrans' maintenance efforts help conserve the public's investment in the highway system and ensure that it will continue to provide maximum benefits to the public. Caltrans operates with a fleet of more than 8,600 state vehicles, many of which maintenance employees use as they provide ongoing care and upkeep of the State's highways.

Relevant Criteria

Government Code section 19993.1 prohibits state employees from using, or permitting the use of, any state vehicle other than in the conduct of state business.

Government Code section 8314 prohibits state employees from using public resources, such as state vehicles, for personal purposes.

Government Code section 19572 specifies misuse of state property as a reason for discipline of state employees.

California Code of Regulations, title 2, section 599.802, provides that misuse of a state vehicle includes, with limited exceptions, using it to commute between an employee's home and work location after completion of the workday.

California Code of Regulations, title 2, section 599.808, requires an employee to obtain a vehicle home storage permit in advance from his or her agency to frequently store a state vehicle at or in the vicinity of the employee's home, regardless of the reason for storage. For the purpose of enforcing this rule, the law defines *frequently* as storing a state vehicle at or in the vicinity of an employee's home for more than 72 nights over a 12-month period or for more than 36 nights over any three-month period.

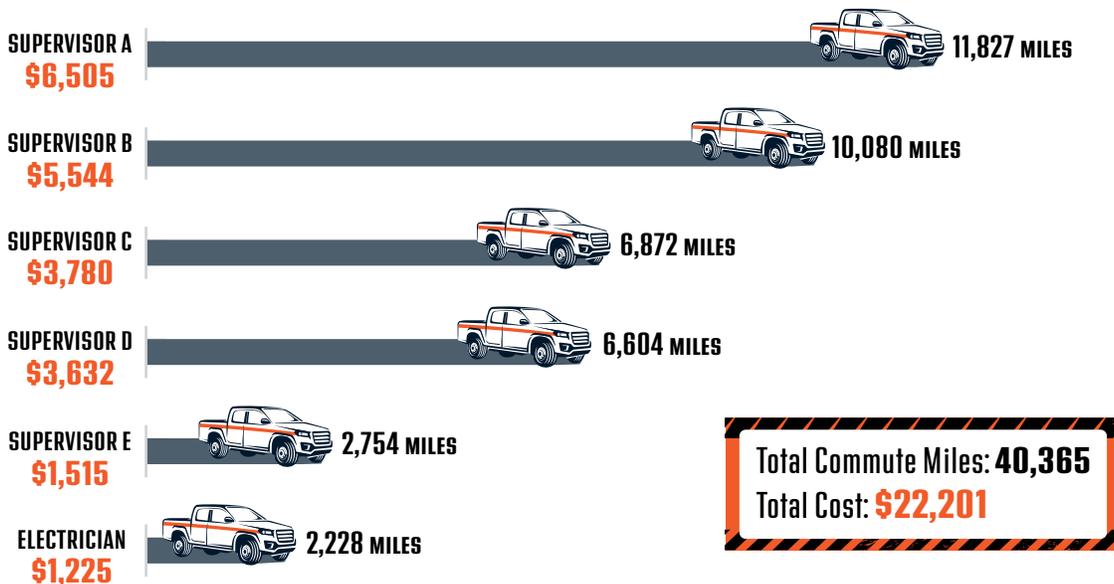
Caltrans Employees Misused State Vehicles by Using Them for Their Personal Commutes and Storing Them Improperly

A review of the GPS data for the employees' state vehicles from June 1, 2018, through May 31, 2019, revealed that two supervisors and one electrician used state vehicles to commute directly from their homes to their assigned work locations between 50 and 90 times. The remaining three supervisors partially commuted with state vehicles by first driving their personal vehicles to locations situated in between their homes and assigned work locations; once at these locations, which included Caltrans maintenance stations and an unsecured public parking facility, the employees would pick up state vehicles to finish their commute to their assigned work locations. These three supervisors misused state vehicles for parts of their commutes between 100 and 220 times.

Many of the employees commuted significant distances in the state vehicles—half exceeded 50 miles and one exceeded 100 miles round trip—which, coupled with the frequency with which the employees used the vehicles, resulted in a significant cost to the State. Specifically, as Figure 8 illustrates, the employees collectively traveled more than 40,000 commute miles in state vehicles, for a total cost to the State of about \$22,000.

Figure 8

The Employees Commuted More Than 40,000 Miles in State Vehicles, for a Total Cost of \$22,000



Source: Analysis of state vehicle miles driven and the associated costs.

The investigation revealed that some employees took advantage of upper management's permission to use state vehicles for legitimate state business. Specifically, the employees' former deputy district director allowed some of the supervisors to pick up state vehicles from a Caltrans maintenance station that was located between their homes and their assigned headquarters because the supervisors often needed to visit other maintenance stations in their assigned areas before reporting to their headquarters. When interviewed, the former deputy district director stated that he did not intend for this option to provide a means for the employees' daily commute to their primary office location. However, when investigators asked Supervisor C if he ever commuted in his state vehicle, the supervisor responded that he would pick up a state vehicle at a specific maintenance station almost daily to drive to his headquarters, at which point he would use it for state business. Supervisor A, who benefited the most in partial commute costs, admitted to regularly storing a state vehicle without permission at a public parking lot located less than six miles from his home. The parking lot was neither a secured maintenance station nor a facility where Caltrans staff worked. This practice allowed Supervisor A to travel 83 percent of his commute miles at the State's expense.

Other employees took advantage of the nature of their job duties to misuse state vehicles. Specifically, the electrician was occasionally required to be available to respond to after-hours emergencies and was therefore permitted to store a state vehicle at home on those occasions. However, his former supervisor knowingly allowed him to extend his use of a state vehicle beyond these specific circumstances when the electrician's personal vehicle became nonoperable and he needed a way to travel to and from work. The electrician informed investigators that he used the state vehicle in lieu of his personal vehicle for maybe a month or more.

In an additional violation of state law, none of the employees in this investigation had storage permits, yet half of them stored a state vehicle at or in the vicinity of their homes beyond the length of time that is permissible without a storage permit. Further, the former deputy district director explained that typically Caltrans would not have issued storage permits to four of the six employees because of their job positions. Caltrans issues storage permits to its employees to facilitate state business efficiently, not as justification for regularly commuting from home to headquarters.

Storing a state vehicle without permission at a public parking lot located less than six miles from his home allowed Supervisor A to travel 83 percent of his commute miles at the State's expense.

Recommendations

To remedy the effects of the improper governmental activities this investigation identified and to prevent those activities from recurring, Caltrans should take the following actions:

- Within 60 days, initiate appropriate corrective actions against the employees and their supervisors where necessary for misusing state vehicles to commute.
- Within 60 days, determine the options available for cost recovery and recoup the costs associated with the vehicle misuse, if feasible.
- Within 120 days, determine whether other individuals within the employees' division regularly drive state vehicles home. If so, it should determine whether they have a legally permissible reason for doing so, ensure that they meet the qualifications for and have received storage permits, and investigate vehicle misuse as necessary.

Agency Response

Caltrans reported that it took corrective action against the five employees who were still working for Caltrans at the time of this report. The actions included issuing letters of warning and returning a manager who was on probation down to his previous position. The sixth employee had retired. In addition, Caltrans reported that it is in the process of determining whether it can recoup any costs associated with the employees' misuse of state vehicles. Lastly, it reported that it is developing an independent quality assurance process to review vehicle assignments and usage within the employees' district to access whether employees are using state vehicles appropriately. Caltrans stated that this process will include periodic reviews of storage permits to ensure compliance with departmental policies and directives.

CALIFORNIA DEPARTMENT OF JUSTICE

Two Legal Staff Members Failed to Account for Their Late Arrivals, Early Departures, and Extended Lunch Breaks

CASE I2019-0939

Investigative Results

We received an allegation that a senior legal analyst (analyst) and a legal secretary (secretary) at the DOJ consistently arrived late, departed early, and took extended lunch breaks without accounting for their missed time. We asked DOJ to assist in the investigation, and it determined that during a 10-month period, both employees failed to account for partial-day absences on their timesheets even though they had arrived late, left early, or taken extended lunches.

From April 2019 through January 2020, the analyst failed to account for hours that she did not work when she arrived late or departed early on at least 123 days. Her partial-day absences totaled 181 hours—or the equivalent of more than 22 workdays—and resulted in a cost to the State of about \$7,011. The analyst’s work schedule was from 7:30 a.m. to 5 p.m. on most days, but the electronic entry and exit data from DOJ’s parking lot indicated that she regularly arrived around 8 a.m. or later and regularly departed around 4:30 p.m. or earlier. The data align with the observations of a witness, who said that the analyst regularly arrived about 30 minutes after her scheduled start time and departed about 30 minutes before the end of her work shift.

During the same time period, the secretary regularly arrived late, departed early, and took extended lunch breaks without accounting for her missed time. DOJ’s electronic building access data and database activity reports did not allow investigators to quantify her time abuse over the 10-month period; however, it indicated that she routinely arrived between 7:45 a.m. and 8 a.m. and departed around 4:45 p.m., even though her work schedule was from 7:30 a.m. to 5 p.m. on most days. Further, this evidence, witness statements, and the secretary’s own acknowledgements confirmed that she also regularly extended her lunch breaks by 30 minutes or more.

In addition to failing to devote their full time, attention, and efforts to their state employment during work hours, the two employees engaged in dishonesty when they falsely reported on their timesheets that they

About the Department

Among its responsibilities, DOJ ensures the fair and impartial enforcement of state laws and provides legal services to state agencies and officials. It operates several regional offices throughout the State and has more than 4,500 employees, including about 130 senior legal analysts and 252 legal secretaries.

Relevant Criteria

Government Code section 19990 prohibits state employees from engaging in activities that conflict with their state duties, including failing to devote their full time, attention, and efforts to their state employment during work hours.

Government Code section 8314 prohibits state employees from using state resources, including state-compensated time, for personal purposes that exceed minimal or incidental use.

California Code of Regulations, title 2, section 599.665, requires that each appointing power keep complete and accurate time and attendance records for all employees over whom it has jurisdiction.

Government Code section 19572 specifies that employee dishonesty is a reason for discipline.

The parking lot's electronic data showed that the analyst did not stay late after her shifts on any of the 123 days in question, and she did not record leave usage on her timesheets.

had worked full days when they had arrived late, departed early, or taken extended lunches. During the analyst's interview with investigators, she acknowledged her attendance issues but claimed that she made up time when she arrived late by staying after her shift, using leave hours, or working at home. However, the parking lot's electronic data showed that she did not stay late after her shifts on any of the 123 days in question, and she did not record leave usage on her timesheets. Because she was not truthful about staying late in the office or using leave hours to cover missed time, the analyst's claim of taking work home to make up missed time is not credible. Further reducing her credibility, the evidence revealed that the analyst accomplished little on a project that lasted nearly two months, despite the large number of hours she claimed to have worked on it. The secretary also asserted that she maintained accurate attendance records and made up missed time, but the evidence proved that she did not.

A lack of effective supervision facilitated the employees' improper behavior. When interviewed, the analyst's former supervisor claimed that he was unaware of her late arrivals and early departures and that he had not heard complaints from others about her attendance. Although the former supervisor was located on a different floor than the analyst, he was responsible for ensuring that his subordinates complied with their work schedules. Although the analyst's current supervisor is situated on the same floor as the analyst, the supervisor acknowledged that she had not spoken to the analyst about attendance expectations and that she rarely had occasion to see if the analyst was in her office. The secretary's former and current supervisors told the investigator they were aware of her attendance issues and made efforts to monitor her, but one administrator who oversaw the secretary described her pattern of attendance as similar to a roller coaster. Their efforts appear to have been unsuccessful and were hampered by frequent supervisor changes.

Recommendations

To remedy the effects of the improper governmental activities this investigation identified and to prevent those activities from recurring, DOJ should take the following actions:

- Initiate appropriate corrective or disciplinary actions against the analyst and secretary for their time abuse and dishonesty.
- Determine whether it can quantify any of the overpayments made to the secretary and either recover overpayments made to both the analyst and secretary or adjust their leave balances to account for the missed work time.

- Initiate steps to improve supervision of the analyst and secretary, including ensuring that their supervisors work in close proximity to them to monitor their arrival and departure times.

Agency Response

DOJ reported that it agrees with our recommendations and intends to take corrective actions to address the misconduct identified in this investigation. Specifically, DOJ stated that it plans to take disciplinary action against both employees and will develop a plan to train supervisors and managers who oversee legal staff on appropriate and effective attendance policies, procedures, and tracking.

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FRANCHISE TAX BOARD

A Staff Trainer Misused State Resources and Was Dishonest About the Hours She Worked

CASE I2019-0873

Investigative Results

We received an allegation that a staff trainer at the Franchise Tax Board (FTB) regularly arrived to work late and left early without accounting for the missed time. We asked FTB to investigate, and it determined that for at least one year, the staff trainer reported on her timesheet 158.75 hours—or more than 19 workdays—that she did not actually work, resulting in a cost to the State of about \$6,717.

During the one-year period from December 2018 through December 2019, the staff trainer failed to account for her late arrivals, early departures, and two full days that she did not work. Even after her former supervisor initiated efforts to hold her accountable for her missed work hours by monitoring her attendance and imposing certain time-reporting requirements, the staff trainer continued her abuse of time and attendance. Witnesses confirmed that the staff trainer had a reputation for coming to work late. When interviewed, the staff trainer said that she always made up her time or reported leave when taking time off. However, the evidence, including the office building's electronic badge data, video surveillance, and email exchanges between her and her former supervisor, confirmed that she was dishonest about making up time on 14 occasions and about two entire days during which she did not work at all. The investigation proved that the staff trainer missed a total 158.75 hours of work—nearly an average month of work time.

The investigation also revealed that the staff trainer misused physical state resources by using her state-issued computer, specifically instant messaging and email, for personal purposes. During the two-year period from January 2018 through December 2019, the staff trainer sent more than 5,000 instant messages, a majority of which were not work-related. Further, in only four months of the two-year period, the staff trainer sent and received more than 350 emails that did not relate to work. During her interview, the staff trainer acknowledged the misuse. She agreed to discontinue any misuse of her state-issued resources, to delete any emails that did not relate to her work, and to unsubscribe from any email subscriptions that did not relate to her work.

About the Department

FTB helps taxpayers file state tax returns, the proceeds of which fund important services for Californians. One of the ways that FTB accomplishes its mission is by providing its employees in contact centers, public service counters, and collection programs with extensive classroom training. FTB currently employs about 30 staff trainers statewide.

Relevant Criteria

Government Code section 19990 prohibits state employees from engaging in activities that conflict with their state duties, including using state time, facilities, equipment, or supplies for private gain and failing to devote their full time, attention, and efforts to their state employment during their hours of duty as state employees.

Government Code section 8314 prohibits state employees from using state resources, including state-issued computers and state-compensated time, for personal purposes that exceed minimal or incidental use.

California Code of Regulations, title 2, section 599.665, requires that each state agency keep complete and accurate time and attendance records for all employees over whom it has jurisdiction.

Government Code section 19572 specifies that employee dishonesty is a reason for discipline.

Recommendations

To remedy the effects of the improper governmental activities this investigation identified and to prevent those activities from recurring, FTB should take the following actions:

- Take appropriate corrective or disciplinary action against the staff trainer for improperly reporting hours worked and misusing her state-issued computer.
- Recover overpayments made to the staff trainer or adjust the staff trainer's leave balances to account for the missed work time.

Agency Response

FTB reported that it agreed with our recommendations. It delivered to the staff trainer a notice of termination for misconduct, including her misuse of state resources and her dishonesty, and stated that it would recoup the overpayments made to the staff trainer for the missed work time.

Respectfully submitted,



ELAINE M. HOWLE, CPA
California State Auditor

October 29, 2020

Appendix

CORRECTIVE ACTIONS TAKEN IN RESPONSE TO INVESTIGATIONS

Under the Whistleblower Act, the State Auditor may issue public reports when investigations substantiate improper governmental activities. When issuing public reports, the State Auditor must keep confidential the identities of the whistleblowers, any employees involved, and any individuals providing information in confidence to further the investigations.

The State Auditor may also issue nonpublic reports to the head of the agencies involved and, if appropriate, to the Office of the Attorney General, the Legislature, the relevant policy committees, and any other authority the State Auditor deems proper. For nonpublic reports, the State Auditor cannot release the identities of the whistleblowers or any individuals providing information in confidence to further the investigations without those individuals' express permission.

The State Auditor performs no enforcement functions: this responsibility lies with the appropriate state agencies, which are required to regularly notify the State Auditor of any actions they take in response to the investigations, including disciplinary actions, until they complete their final actions. The chapters of this report describe the corrective actions that state agencies implemented on some of the individual cases for which the State Auditor completed investigations from January 2020 through June 2020. In addition, the table summarizes all corrective actions that state agencies took in response to investigations from the time that the State Auditor opened the hotline in July 1993 until December 2019. These investigations have also resulted in many state agencies modifying or reiterating their policies and procedures to prevent future improper activities.

Table
Corrective Actions
July 1993 Through December 2019

TYPE OF CORRECTIVE ACTION	TOTALS
<i>Convictions</i>	12
<i>Demotions</i>	25
<i>Job terminations</i>	91
<i>Resignations or retirements while under investigation</i>	40*
<i>Pay reductions</i>	59
<i>Reprimands</i>	345
<i>Suspensions without pay</i>	32
Total	604

Source: State Auditor.

* The State Auditor began tracking resignations and retirements in 2007, so this number includes only those that occurred during investigations since that time.

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