

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION**

Sherif R. Abdou, M.D. (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated December 1, 2023. For reasons discussed below, staff argues the Board should deny the Petition for Reconsideration and uphold its decision.

Respondent established CalPERS membership through his employment as Chief Medical Executive at Chuckwalla Valley State Prison, California Department of Corrections and Rehabilitation (CDCR). By virtue of his employment with CDCR, Respondent became a "new" member of CalPERS on January 3, 2022, subject to the provisions in the Public Employees' Pension Reform Act (PEPRA).

Prior to Respondent's appointment as Chief Medical Executive with CDCR, Respondent worked under a contract with the Registry of Physician Specialists (RPS) to provide medical care at various CDCR prisons. RPS is a third-party private company that since 2014 has contracted with Management Solutions, Inc., another private company, to provide physician services to CDCR and CA Correctional Health Care Services (CCHCS). Before 2014, RPS contracted directly with CDCR to provide independent contractor physicians to several CDCR prisons.

On March 24, 2022, Respondent requested to purchase service credit for Service Prior to Membership (SPM) with CalPERS. Respondent sought to purchase service credit for the physician services he provided to CDCR and CCHCS through RPS from September 1, 2005, to December 31, 2021.

Both before and after Respondent made his SPM request, Respondent, Respondent's wife, and CalPERS communicated about whether Respondent's employment with RPS made him a common law employee of the State and therefore entitled him to purchase SPM credit. Respondent maintained he should be classified as a "classic" member of CalPERS instead of a PEPRA member, because of his RPS employment.

On June 9, 2022, CalPERS denied Respondent's request to purchase SPM and reclassification because Respondent's services between 2005 and 2021 were provided through a third-party entity, not the State, and thus his time was not eligible for purchase or to be classified as classic.

On July 8, 2022, Respondent appealed this determination, and exercised his right to a hearing before an ALJ with the Office of Administrative Hearings. The hearing was held on September 21, 2023. Respondent was represented by counsel at the hearing. CDCR did not appear at the hearing.

At the hearing, CalPERS called RPS Contract Analyst Ursula Reinhart to testify. Ms. Reinhart explained the billing and payment processes for physicians who worked at CDCR facilities. On a monthly basis, CDCR collected Respondent's time sheets signed by his CDCR supervisor reflecting the hours he worked. At the same time, RPS would collect the time sheets from other contracting physicians. RPS would then bill the State monthly for all its physicians' services in a single invoice. The invoice also included an administrative fee payable to RPS. Until 2014, the State paid RPS a lump sum check to cover the costs of physician services and administrative fees. After being paid, RPS then compensated Respondent from the lump funds paid by the State. RPS never billed the State directly for Respondent's services, and the State never issued a separate check for Respondent individually. RPS did not receive any payments for Respondent's services from the individual prisons where he worked. After 2014, CDCR retained Management Solutions to handle RPS' bills. Management Solutions also paid RPS on a lump sum basis.

RPS issued Respondent's paychecks for his services from 2008 through 2021, and the checks named RPS as his employer. While contracting with RPS, Respondent did not pay any contributions to a state pension plan. He received no benefits, other than his salary. RPS made no deductions from his paycheck.

CalPERS presented testimony from a program analyst to explain why Respondent was not eligible to purchase SPM credits, and whether he could be switched from PEPR to classic. CalPERS' evidence showed that Respondent was not eligible because his compensation had not been paid by the State. Further, he could not be a State employee while working as an independent contractor for RPS because he had not taken a civil service examination until 2021.

Respondent testified that he took the civil service exam in 2021 for his current position as Chief Medical Executive of CDCR, Chuckwalla State Prison. He understood that he needed to take a civil service exam to become an employee of the State. In 2019 and 2020, Respondent acknowledged in a Declaration that he had never worked as a California civil servant, been in State employment, or been on a State eligibility list to obtain a position as a California civil servant. Nevertheless, Respondent testified that he should be considered a common law State employee because his work was under the State's control and because he was paid by funds directly controlled by the State.

Respondent presented two letters signed by Ms. Reinhart in support of his position. At hearing, Ms. Reinhart testified that Respondent's wife wrote both letters and that they were incorrect.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent had the burden of proof to show by a preponderance of the evidence that he was entitled to purchase service credit and to be classified as a classic member of CalPERS. The ALJ found that the California Constitution requires every State employee to be a member of the State civil service, and every permanent appointment to the State civil service must be based

on a competitive examination. Respondent never took a civil service examination to qualify for contacting work with RPS. He acknowledged he was not in State civil service while working for RPS.

The ALJ also found no evidence to support Respondent's claim that he was paid out of funds directly controlled by the State. While CDCR may have suggested his hourly rate, RPS paid his compensation and had exclusive control over the lump sum funds paid by the State. No funds were disbursed or earmarked by the State to specifically pay Respondent. That the State was the ultimate source of the funds used to pay Respondent's compensation does not mean the State directly controlled the funds that paid him.

Further, the ALJ found that Respondent in his independent contractor capacity did not meet the definition of an employee under the Public Employees' Retirement Law (PERL). He was not in the employ of the State, county or university while contracting with RPS, and he was not paid out of funds directly controlled by the State as required. RPS had complete control over the funds received by the State and decided what portion of those funds would comprise Respondent's compensation.

The ALJ held that Respondent was not a State employee when he worked at CDCR institutions through RPS. RPS was a private firm with sole control over the funds in its possession. RPS was the only party responsible for compensating Respondent and RPS' funds paid Respondent's compensation. Respondent is therefore ineligible to be classified as a CalPERS classic member for his work through RPS and is ineligible to purchase SPM service credit for the years he worked as a contract physician with RPS.

In the Petition for Reconsideration, Respondent generally avers that (1) the State Civil Service Act does not apply to him; (2) he is a "common law" employee of CDCR, and (3) PERL section 20028, subdivision (a) does not require compensation be paid of out funds "directly controlled by the State." Each argument is without legal or factual support, was made by Respondent at hearing, and dismissed by the ALJ.

Respondent's first argument is undermined by his testimony. Respondent knew he was required to take a civil service examination to become employed as a Physician for CDCR – he tried, but failed, to complete the examination in 2015. Also, Respondent admitted that he was not on a State eligibility list at any time prior to 2020. The ALJ properly rejected Respondent's argument that he was exempt from a competitive examination he failed to complete.

Respondent's argument that he is a "common law" employee of CDCR is equally without merit. The ALJ correctly found that Respondent's employment status is governed by PERL section 20028, subdivision (a). The "common law" employment test urged by Respondent under PERL section 20028, subdivision (b) does not apply to him and is not relevant to his status.

Finally, Respondent argues that this Board should ignore the language in PERL section 20028, subdivision (a) that limits the definition of State employee to individuals “whose compensation . . . is paid out of funds directly controlled by the State. . . .” Respondent acknowledges he was not paid from funds directly controlled by the State; therefore, he urges this Board to ignore the statute. As noted above, the ALJ addressed and rejected this argument in the Proposed Decision as well.

Respondent’s duplicative arguments were properly rejected by the ALJ and this Board at its January 16, 2024, meeting. No new evidence or legal analysis has been presented by Respondent that would alter the Proposed Decision.

For all the foregoing reasons, staff argues that the Board should deny the Petition for Reconsideration.

March 20, 2024

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