

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

**In the Matter of the Appeal to Purchase Service Credit Prior
to Membership of:**

**GAIL M. DONOGHUE and UNIVERSITY ENTERPRISES, INC.,
Respondents**

Agency Case No. 2019-0538

OAH Case No. 2019071025

PROPOSED DECISION

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on October 29, 2020, from Sacramento, California.

Ashante L. Norton, Deputy Attorney General, represents the California Public Employees' Retirement System (CalPERS).

Nicholas J. Gleichman, Senior Union Representative, Service Employees International Union, Local 1000, represents respondent Gail M. Donoghue (Donoghue).

John M. Melikian, Attorney at Law, represents respondent University Enterprises, Inc. (UEI). Prior to hearing, UEI filed a Notice of Joinder in CalPERS' position and was excused from participation at hearing.

Evidence was received,¹ and the record left open for the parties to submit closing briefs. On January 6, 2021, respondent Donoghue filed a closing brief, marked for identification as Exhibit 26. On February 5, 2021, CalPERS filed its closing brief, marked for identification as Exhibit 27. On February 26, 2021, respondent Donoghue filed a reply brief, marked for identification as Exhibit 28.

On February 26, 2021, Exhibits 26 through 28 were admitted as argument, the record was closed, and the matter was submitted for decision.

ISSUE

Is Donoghue eligible to purchase Service Prior to Membership (SPM) service credit for the period of December 11, 2003, through December 28, 2005 (the Relevant Period) pursuant to Government Code section 21020, subdivision (d)?²

¹ Prior to hearing, on September 4, 2020, the parties filed a Stipulation of Evidence, stipulating to the accuracy of 20 undisputed facts and the admission of 25 joint exhibits. Additional witness testimony was received at hearing.

² All further statutory references are to the Government Code, unless otherwise specified.

FACTUAL FINDINGS

Donoghue's Employment History

1. From November 4, 1975 through July 1, 1976, Donoghue worked as a state-hired student assistant for the California Department of Conservation. She was not eligible for CalPERS membership at that time.

2. On December 1, 1999, Donoghue first established membership with CalPERS through her employment with Mendocino County Schools, Mendocino Unified School District. She separated from that employment on July 1, 2001.

3. From December 11, 2003, through December 28, 2005, Donoghue was a part-time student assistant approved by UEI to work onsite at CalPERS. Details of this work are discussed below.

4. On January 3, 2006, Donoghue was hired as a Retirement Program Specialist II with the State of California at CalPERS. She was selected from the civil service certified eligibility list after successfully completing the state examination process for that classification. Donoghue remained employed by the State of California until her retirement in late 2020.

Donoghue's 2003-2005 Student Assistant Work

UEI'S STATUS AND FUNCTION

5. UEI, formerly known as "CSUS Foundation," is a non-profit, auxiliary organization to California State University, Sacramento (CSUS). UEI employs students from any qualifying educational institution as student assistants. Student assistants work on campus or off campus for government agencies and local businesses, thereby

providing “significant benefits to contracting agencies, campus programs and local businesses, while also offering a valuable work experience opportunity” to students.

6. UEI student assistants are paid on an hourly basis. They are required to complete UEI time sheets that reflect the hours worked at their respective job sites. Additionally, UEI undergraduate student assistants are required to be enrolled in a minimum of six semester units or nine quarter units while working. It is the student assistant’s responsibility to separate from the UEI program once he or she is no longer a student.

7. UEI specifically describes its student assistant positions at state agencies as “part-time, non-benefited positions. UEI Student Assistants are not eligible for benefits including any type of leave accruals and service credit regardless of the location of your work site or the department or project you work for . . . [UEI] contracts with State Agencies and other organizations to be the employer of record for Student Assistant employees. This means UEI is your employer even if you perform work off campus.”

8. UEI is a contracting agency under the California Public Employees’ Retirement Law (PERL). Thus, UEI’s eligible employees are CalPERS members. Eligibility for CalPERS membership is established by contract between UEI and CalPERS. At all times relevant to this matter, UEI’s retirement contact with CalPERS excluded from CalPERS membership UEI employees compensated on an hourly basis. CalPERS routinely reviews the validity of contract exclusions by contracting agencies to determine whether the exclusions are used appropriately or to circumvent membership rules. To date, CalPERS has not issued a non-validity determination with respect to UEI’s contract exclusion for employees compensated on an hourly basis.

2003-2005 ONSITE WORK AT CALPERS

9. Donoghue was placed to work at CalPERS as part of the UEI student program. However, she was not enrolled in any college classes during the Relevant Period. She did not take a civil service examination prior to starting work at CalPERS, nor was she hired from a certification list in accordance with the Civil Service Act.

10. While a UEI student assistant at CalPERS, Donoghue worked under the supervision of CalPERS Executive Secretary Beth Grussenmeyer, who was responsible for training Donoghue, assigning her work, appraising her performance, and coordinating her work schedule. Ms. Grussenmeyer also had the authority to terminate Donoghue's work at CalPERS. Donoghue was subject to the same manual and policies/procedures as the CalPERS employees with whom she worked. Donoghue used office space, equipment, machinery, stationary, and an e-mail account provided by CalPERS.

11. As a UEI student assistant, Donoghue worked part-time and was paid on an hourly basis. She completed UEI time sheets, which she submitted to Ms. Grussenmeyer for validation. Once validated, the time sheets were submitted to UEI, and Donoghue was paid directly by UEI. She did not receive compensation from the State of California or from any state-controlled funds, nor did she receive sick leave, vacation leave, or healthcare benefits from the State of California. She was issued W-2 forms by UEI, not the State of California.

Donoghue's 2009 Request to Purchase SPM Service Credit

12. On November 19, 2009, CalPERS received a "Request for Service Credit Cost Information – Service Prior to Membership" from Donoghue for the Relevant Period when she worked onsite at CalPERS as a student assistant. Donoghue requested

CalPERS to process the request pursuant to section 21020, subdivision (d) (credit for public service).

CALPERS' 2010 AND 2011 DENIALS

13. By letters dated March 3, 2010 and July 20, 2011, CalPERS informed Donoghue of its determination that she was not eligible to purchase SPM service credit for the Relevant Period. CalPERS explained that UEI's contract with CalPERS excluded UEI employees compensated on an hourly basis from CalPERS membership.

DONOGHUE'S 2011 APPEAL

14. On September 19, 2011, Donoghue submitted a letter appealing CalPERS' prior denials of her request to purchase SPM service credit for the Relevant Period. In that letter, Donoghue contended that she had been a common law employee of CalPERS, and not UEI, during the Relevant Period. Thus, the time should have been deemed purchasable as "public service" under section 21020, subdivision (d).

15. On September 19, 2011, CalPERS launched a new computer system and Donoghue's appeal letter was lost. For several years, Donoghue did not receive a complete determination of her appeal and was never offered formal appeal rights.

16. In November 2018, Donoghue inquired from CalPERS why she had never received a determination regarding her September 19, 2011 appeal letter. When CalPERS learned of its oversight, it agreed to another review of Donoghue's employment during the Relevant Period to determine if she was eligible to purchase the SPM service credit.

CALPERS' APRIL 2019 DENIAL

17. CalPERS management assigned the matter to Andrew Harris, an analyst in CalPERS' Employer Account Management Division. After performing a common law employment analysis, Mr. Harris initially concluded that Donoghue had been a common law employee of CalPERS during the Relevant Period, and internally recommended that her request be granted. However, after consultation with CalPERS' Legal Office regarding updated guidance and additional factors to be considered for state employment cases, CalPERS management reversed Mr. Harris's initial determination.

18. In an April 11, 2019 letter,³ CalPERS again denied Donoghue's request to purchase SPM service credit for the Relevant Period. The letter stated as follows:

Based on the information provided to us and our understanding of the facts surrounding your case, you were in the employ of the State, but you were not paid out of funds directly controlled by the State. Pursuant to Gov. Code section 20028(a), you were not an employee of the State because you were not paid out of funds directly controlled by the State. Therefore, you are ineligible for CalPERS membership for the period of December 11, 2003 through December 28, 2005.

³ The parties' Stipulation of Evidence also references a March 20, 2019 denial letter, which is not in the record.

DONOGHUE'S APRIL 2019 APPEAL

19. On April 30, 2019, Donoghue submitted a letter appealing CalPERS' April 11, 2019 denial of her request to purchase SPM service credit for the Relevant Period. In that letter, she again contended that she should be permitted to purchase the SPM service credit under section 21020, subdivision (d).

CALPERS' OCTOBER 2019 REVISED DENIAL

20. On October 15, 2019, CalPERS issued a revised denial of Donoghue's request to purchase SPM service credit for the Relevant Period. The revised denial stated that Donoghue was ineligible under section 21020, subdivision (d), because she had not been in the employ of the state during the Relevant Period.

21. The October 15, 2019 revised denial was CalPERS' final determination with respect to Donoghue's request to purchase SPM service credit. Donoghue's April 30, 2019 appeal was deemed to apply to CalPERS' October 15, 2019 revised denial.

Amended Statement of Issues

22. On October 21, 2019, Donald R. Martinez, Chief of CalPERS' Member Account Management Division, filed an Amended Statement of Issues for purposes of the appeal.⁴ The matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to section 11500 et seq.

⁴ The record does not contain the original Statement of Issues or the date on which it was issued.

Analysis

23. On appeal, Donoghue maintains that she is entitled to purchase SPM service credit for the Relevant Period pursuant to section 21020, subdivision (d). Additionally, Donoghue argues that CalPERS waived any defense to her claim under the doctrine of laches. Each argument is addressed separately below.

SECTION 21020, SUBDIVISION (D)

24. The parties agree that Donoghue was not paid with state-controlled funds while working at CalPERS as a student assistant during the Relevant Period. Donoghue contends that she is nonetheless entitled to purchase SPM service credit for that period pursuant to section 21020, subdivision (d), which allows a person to purchase service credit for public service including “[e]mployment by the state in which the person was not eligible for membership in this system if the ineligibility was solely because his or her compensation was paid from other than state-controlled funds.” To avail herself of section 21020, subdivision (d), Donoghue must establish that she was employed by the state during the Relevant Period.

25. As an initial matter, Donoghue contends that CalPERS in its April 11, 2019 denial letter conceded that she was employed by the state during the Relevant Period. However, CalPERS subsequently issued the October 15, 2019 revised denial, which concluded that she had not been employed by the state during that period. The October 15, 2019 revised denial is CalPERS’ final determination. In deciding this appeal, the court gives no deference to any prior determination and instead independently decides the matter on the record and applicable law.

26. Donoghue also argues that she should be deemed a common law employee of the state during the Relevant Period, because CalPERS, and not UEI,

exercised nearly complete control over her work at CalPERS. (*See Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531 [outlining various factors to consider to determine whether a common law employer-employee relationship exists, with the principal factor being the right to control the manner and means of the work performed].) Donoghue emphasizes that CalPERS trained her, supervised her, set her schedule, appraised her performance, supplied her work materials, and had the authority to terminate her work as a student assistant at CalPERS.

That argument is unpersuasive. The California Supreme Court has already held that the common law employment test applies to section 20028, subdivision (b), which relates to employees of contracting agencies, but suggested that it does not apply to subdivision (a), which relates to employees of the state. (*Metropolitan Water District v. Superior Court* (2004) 32 Cal.4th 491, 500-02.) That is because, for purposes of the PERL, subdivision (a) defines an employee as “[a]ny person in the employ of the state . . . whose compensation, or at least that portion of his or her compensation that is provided by the state . . . is paid out of funds directly controlled by the state.” (§ 20028, subd. (a); *see also Holmgren v. County of Los Angeles* (2008) 159 Cal.App.4th 593, 604 [where the term employee is “defined by the statute, the legislature’s definition controls and the doctrine of common law employment is irrelevant”].)

Section 21020, subdivision (d), crafts a unique exception to address service credit for instances where a state employee, for periods of his or her state service, were paid by funds not directly controlled by the state, such as pursuant to state-county or other intergovernmental agreements. However, that narrow exception does not mean that the common law employment test may now be invoked as a method for determining who is a state employee. To take advantage of section 21020, subdivision (d), the person must still have been a properly-appointed state employee in the first

instance. And unlike employees of contracting agencies, state employment has been extensively defined in the Civil Service Act.

Here, Donoghue has not demonstrated that she was hired and employed by the state during the Relevant Period. Donoghue never took a civil service examination prior to starting work as a student assistant at CalPERS, nor was she hired from a certification list in accordance with the Civil Service Act. Although some state employees are not hired through an examination process, Donoghue failed to provide evidence that she was appointed as a state employee through some alternative mechanism, such as a Career Executive Assignment. Indeed, she provided no documentary evidence that she was appointed to any particular position with the state.

By contrast, the evidence shows that Donoghue was an employee of UEI during the Relevant Period. She was placed to work at CalPERS as part of the UEI student program, which by its terms provides students with valuable work experience by working on campus or off campus in part-time, non-benefited positions. Donoghue completed UEI time sheets, she was paid directly by UEI, and UEI issued her W-2 forms. She did not receive sick leave, vacation leave, or healthcare benefits from the State of California.

It is unremarkable that Donoghue was supervised by and accountable to her CalPERS supervisor, because that is the nature of UEI student assistant work at any program placement. Additionally, that Donoghue may not have been enrolled in any college classes while working at CalPERS as a student assistant is inconsequential to this case. Any non-compliance with the UEI program's terms was a matter between Donoghue and UEI, but did not change the fundamental nature of her relationship with CalPERS during the Relevant Period.

27. In sum, Donoghue failed to establish that she was employed by the state during the Relevant Period. As such, she is ineligible to purchase SPM service credit for that period pursuant to section 21020, subdivision (d).⁵

⁵ In her closing brief, Donoghue also made passing references to eligibility for CalPERS membership during the Relevant Period under sections 20281 and 20305, subdivisions (a)(3)(B) and (b). Any such arguments are unavailing.

In this context, sections 20281 and 20305, subdivision (a)(3)(B), only apply to CalPERS enrollment upon or during state employment. Even though Donoghue established CalPERS membership prior to 2003, she is not entitled to purchase service credit for the Relevant Period if she was not employed by the state during that time.

Section 20305, subdivision (b), supersedes "any contract provision excluding persons in any temporary or seasonal employment basis and shall apply only to persons entering employment on and after January 1, 1975. Except as provided in Section 20502, no contract or contract amendment entered into after January 1, 1981, shall contain any provision excluding persons on an irregular employment basis." Donoghue contends that this provision renders UEI's contract with CalPERS excluding hourly UEI employees from CalPERS membership invalid. As an initial matter, section 20305, subdivision (b), would only potentially aid Donoghue if she were a UEI employee, which she does not claim. Moreover, the UEI contract exclusion at issue is for hourly employees; not temporary, seasonal, or irregular employees. For that reason, CalPERS has never determined it to be invalid.

LACHES

28. Finally, Donoghue's argument that CalPERS has waived any defense to her claim under the doctrine of laches is misplaced. Laches is traditionally an affirmative defense to a plaintiff's action when the plaintiff unreasonably delayed bringing suit. (*Green v. Bd. of Dental Examiners* (1996) 47 Cal.App.4th 786, 792.) Even assuming, without deciding, that Donoghue is an appropriate party to invoke the doctrine of laches, it is not available against a government entity "where it would nullify an important policy adopted for the benefit of the public." (*Mercury Ins. Co. v. Lara* (2019) 35 Cal.App.5th 82, 112.)

29. Section 20125 provides that "[t]he board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system." By enacting that statute, the Legislature intended to restrict CalPERS membership and benefits to specified persons to protect the CalPERS retirement funds and the state's taxpayers. Although Donoghue's frustration with the lengthy and unfortunate delay of her appeal is understandable, it would offend important public policy to allow Donoghue to invoke laches and obtain benefits to which she would otherwise not be entitled. Consequently, the doctrine of laches cannot apply here.

LEGAL CONCLUSIONS

1. As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051). Thus, Donoghue

has the burden of proving by a preponderance of the evidence that she is entitled to purchase SPM service credit for the Relevant Period.

2. A person may purchase credit for public service, which includes:

Employment by the state in which the person was not eligible for membership in this system if the ineligibility was solely because his or her compensation was paid from other than state-controlled funds. However, time spent in work as a work relief recipient under programs such as, but not limited to, the Works Progress Administration, the Civil Works Administration, the Federal Emergency Relief Administration, the National Youth Administration, and the Civilian Conservation Corps, shall not constitute public service.

(§ 21020, subd. (d).)

3. Based on the Factual Findings as a whole, and specifically, Factual Findings 24 through 27, Donoghue has not demonstrated that she was employed by the state during the Relevant Period. Thus, she is not entitled to purchase SPM service credit for that period pursuant to section 21020, subdivision (d).

4. Based on the Factual Findings as a whole, and specifically, Factual Findings 28 and 29, Donoghue cannot invoke the doctrine of laches in this case.

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ORDER

1. Respondent Gail M. Donoghue's appeal is DENIED.
2. CalPERS' decision to deny respondent Gail M. Donoghue's request to purchase Service Prior to Membership service credit for the period of December 11, 2003 through December 28, 2005 is AFFIRMED.

DATE: March 26, 2021

Wim van Rooyen

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings