

ATTACHMENT A

RESPONDENT'S PETITION FOR RECONSIDERATION

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5 **BOARD OF ADMINISTRATION**

6 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

<p>8 In the Matter of the Appeal to Purchase Service Credit) and Use of Classic Formula in Service Calculation of)</p> <p>9 SHERIF R. ADBOU, M.D.,)</p> <p>10 Respondent,)</p> <p>11 and)</p> <p>12 STATE PERSONNEL BOARD; CALIFORNIA) CORCORAN STATE PRISON; AVENAL STATE) 13 PRISON; CALIPATRIA STATE PRISON;) 14 IRONWOOD STATE PRISON; CHUCKAWALLA) VALLEY STATE PRISON; CALIFORNIA) 15 DEPARTMENT OF CORRECTIONS AND) REHABILITATION,)</p> <p>16 Respondents.)</p> <p>17)</p> <p>18)</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Agency Case No.: 2022-0257</p> <p>OAH No.: 2022090092</p> <p>RESPONDENT SHERIF R. ABDOU'S PETITION FOR RECONSIDERATION OF THE DECISION OF THE BOARD OF ADMINISTRATION</p> <p>Decision Date: January 22, 2024</p> <p>Hearing Date: September 21, 2023</p>
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20 **RESPONDENT SHERIF R. ABDOU'S PETITION FOR RECONSIDERATION**
21 **OF THE DECISION OF THE BOARD OF ADMINISTRATION**

22 **I. THE DECISION CONTAINS ERRORS IN CONSTITUTIONAL AND STATUTORY**
23 **INTERPRETATION THAT REQUIRE RECONSIDERATION BY THE BOARD**

24 This case revolves around the interpretation of Section 20028(a) of the California Public Employees'
25 Retirement Law, which defines the characteristics of a state employee of the State of California for all
26 purposes relating to the Public Employee's Retirement Law. That section articulates two required
27 characteristics for a person to constitute a state employee entitled to enrollment in CalPERS. Respondent's
28 position is that Dr. Abdou meets both requirements.

1 The Decision adopted by the Board of Administration relies upon the position that there is a third
2 requirement to be considered a California State Employee for purposes of the California Public Employees’
3 Retirement Law, which is derived from California Government Code § 18526. However, that section of the
4 Government Code is not properly applicable to any portion of the Public Employees’ Retirement Law
5 (“PERL”) administered by CalPERS. This is because Section 18526 of the Government Code is part of a
6 “Definitions” section containing definitions of terms for purposes of Title 2, Division 5, Part 2 of the
7 Government Code, subtitled STATE CIVIL SERVICE, which is not part of the PERL.

8 Furthermore, the Decision supports its erroneous application of Government Code Section 18526 in
9 this case with an erroneous interpretation of Article VII, section 1, of the California Constitution, asserting
10 that “Article VII, section 1, of the California Constitution requires every State employee to be a member of
11 the State civil service and every permanent appointment to the State civil service to be based on a
12 competitive examination.” Decision at pg. 11. Respondent’s Petition for Reconsideration must be granted
13 because this interpretation of the California Constitution is wrong and cannot be supported in light of Article
14 VII, section 4(j), which exempts “member, inmate, and patient help in . . . correctional institutions” from the
15 state civil service. Because he was employed by the State of California at numerous correctional institutions
16 where he provided help to inmate patients, Dr. Abdou is part of a category of California State employees
17 exempted from Article VII, section 1, of the California Constitution. For this reason, the Decision’s
18 erroneous reliance on Article VII, section 1 provides good cause to GRANT this Petition for
19 Reconsideration.
20

21 As for the Decision’s reliance on Government Code Section 18526, that also provides grounds to
22 GRANT this Petition for Reconsideration. Specifically, the definition of “employee” contained at Section
23 18526 is applicable only to Title 2, Division 5, Part 2 of the Government Code, concerning the State Civil
24 Service, and furthermore is only applicable to that subpart of Title 2 “unless the context requires otherwise.”
25 See Government Code § 18520, clarifying that “[u]nless the context requires otherwise, the definitions
26 hereinafter set forth govern the construction of this part and the rules adopted hereunder.”

27 The Decision is in error where it imports an inapplicable part of the California Government Code
28 into an analysis of the Public Employees Retirement Law where it does not belong. It is also in error in

1 applying Art. VII, Sec. 1 of the California Constitution to analysis of Dr. Abdou’s case, because Art. VII,
2 Sec. 4(j) makes clear that Dr. Abdou is exempt from the requirements created by Art. VII, Sec. 1.

3 **II. RESPONDENT’S VIEW OF THE APPLICABLE STATUTORY FRAMEWORK**

4 Under Section 20028(a) of the Public Employees Retirement Law, there are two required
5 characteristics of a state employee. First, a state employ must be “in the employ of the state.” Second, a state
6 employee must be “paid out of funds directly controlled by the state. . . excluding all other political
7 subdivisions, municipal, public, and quasi-public corporation.” The key term “directly controlled by the
8 state” is further sub-defined as “funds deposited in and disbursed from the State Treasury in payment of
9 compensation, regardless of the source.”

10 Both required characteristics pertain to control. In determining whether a person is in the “employ of
11 that state,” CalPERS applies the common-law employment test, which revolves around the question of
12 whether the state or another entity is entitled to control the conduct of the employee. Because Dr. Abdou was
13 employed by the state as a prison doctor, his performance of work and conduct at work were entirely under
14 the direct control of the State, with essentially no control exercise by the labor supplier, RPS, that was his
15 ostensible employer. See Testimony of Dr. Abdou at Hearing Transcript, p. 28, lines 15-25; p. 29, lines 1-20;
16 p. 31, lines 9-19; p. 32, lines 19-25.

17 In determining whether a person is paid from funds “directly controlled by the state,” the question of
18 control is equally central. All the testimony presented at the Hearing made clear that the State retained
19 complete control at all times of the funds to be paid to Dr. Abdou, as the funds were earmarked to
20 compensate him for specific hours he had worked, after those hours were reviewed and approved by a state
21 employee. See Testimony of Dr. Abdou at p. 50, lines 18-25; p. 51, lines 21-25; and see Testimony of Ursula
22 Reinhart at p. 66, lines 7-10; p. 67, lines 9-18; p. 74, lines 6-19 [payments to Dr. Abdou were based on his
23 time sheets and had to be approved by a State employee]; p. 79, lines 16-25 [same]; p. 81, lines 1-14 [Abdou
24 would receive a set percentage of money paid to RPS for his services, which was predicated on the amount
25 stated in his approved time sheets].
26

27 Because Dr. Abdou worked for the state as a prison doctor whose work duties and compensation
28 were entirely controlled by the State of California, during the period from 2005 to 2012 (prior to the passage

1 of PEPRA), he satisfies all requirements for Classic CalPERS membership, because he constituted a state
2 employee for purposes of the California Public Employees Retirement Law, as codified and amended at Part
3 3 of the California Government Code, Section 20000, et seq., including but not limited to the requirements
4 set forth at Section 20028(a).

5 **III. ABDOU WAS A COMMON LAW STATE SAFETY SERVICES EMPLOYEE**

6 In addition to misplaced reliance on inapplicable definitions pulled from the wrong part of the
7 Government Code, the Decision also relies on the theory that Dr. Abdou cannot be a state employee for
8 purposes of the Public Employees Retirement Law because he signed multiple contracts of adhesion (signing
9 of which was a required condition of continued employment) that represent that Dr. Abdou was not a
10 member of the state civil service. However, the contracts of adhesion executed by Dr. Abdou have no
11 relevance to CalPERS' duty to enroll certain persons in CalPERS pursuant to Section 20028 of the Public
12 Employees Retirement Law, based on the familiar principle that contracts entered into between private
13 persons do not generally change or modify the duties owed to those persons by governmental entities.
14

15 Because Dr. Abdou was employed, beginning in 2005, as a common law state employee providing
16 state safety services, he was entitled to be enrolled and required to be enrolled as a CalPERS Classic
17 Member, pursuant to the decision of the California Court of Appeal in the matter of *Metropolitan Water*
18 *District v. Superior Court* (Cal. 2004) 31 Cal. 4th 491, 495. This 2004 decision held that CalPERS was
19 required to enroll all common law state employees as CalPERS Classic Members. ALJ Forman is incorrect
20 when she attempts to limit the application of the Metropolitan Water District to a sub-class of common law
21 state employees, when in fact that decision should be applied to all workers employed by the state of
22 California who constitute common law employees.

23 According to the *Metropolitan Water District* court, the Public Employees Retirement Law
24 ("PERL"), as it existed prior to being amended by the passage of PEPRA in 2012, "incorporates common law
25 principles into its definition" of an employee entitled to participate in CalPERS and requires public agencies
26 or CalPERS itself to enroll in CalPERS all common law employees "except those excluded by a specific
27 statutory or contractual provision." *Id.* at 495. The Court continues by noting that, as of that time, "the PERL
28 contains no broad exclusion for long-term, full-time workers hired through private labor suppliers." *Id.* at

1 497. Notably, Dr. Abdou's employment by the State from 2005 through 2021 was precisely as a long-term,
2 full-time worker hired through a private labor supplier.

3 Unlike the Definition of "employee" relied on by CalPERS, which is only applicable to Title 2,
4 Division 5, Part 2 of the Government Code, the *Metropolitan Water District* decision is broadly applicable to
5 all parts of the Public Employees Retirement Law, as it was prior to the passage of PEPRA in 2012. Indeed,
6 the court specifically noted that "[a]ny change in the PERL to accommodate such long-term temporary hiring
7 must come from the Legislature not from this Court, which cannot remake the law to conform to [] hiring
8 practices." *Id.* at 497. Because the Legislature did not amend the PERL in relation to this issue until the
9 passage of PEPRA in 2012, ALJ Forman is incorrect in concluding that Dr. Abdou became a CalPERS
10 member only on January 3, 2022 and is also incorrect in concluding that Dr. Abdou constitutes a PEPRA
11 member of CalPERS. Instead, CalPERS was required to enroll Dr. Abdou as a CalPERS Classic Member
12 during the period from November 2005 through December 2012, prior to the effective date of PEPRA on
13 January 1, 2013. Unfortunately, CalPERS failed to meet its legal obligation to enroll Dr. Abdou in CalPERS
14 during this seven-year period when Dr. Abdou was entitled to be enrolled.
15

16 Notably, *Metropolitan Water District v Superior Court* constituted the prevailing law on this topic
17 from the time it was decided in 2004 until December 31, 2012, and the Legislature did not change the
18 prevailing law until the passage of PEPRA, which only became effective on the first day of 2013.

19 Because CalPERS was required under prevailing law to enroll Dr. Abdou as a CalPERS Classic
20 Member, during the period of his common law employment by the State prior to January 1, 2013, it is
21 arbitrary and capricious, as well as a clear error of law, for ALJ Forman to conclude that Dr. Abdou did not
22 enroll in CalPERS until January 2022. Instead, as the Court stated in *Metropolitan Water District*, 31 Cal.
23 4th at 495, the prevailing law prior to 2013 was that "the PERL requires [] public agencies to enroll in
24 CalPERS all common law employees except those excluded under a specific statutory or contractual
25 provision." Under this principle of prevailing law, as it existed at that time, the Decision made an erroneous
26 finding of fact in determining the beginning date of Dr. Abdou's membership in CalPERS. The Board
27 should Reconsider the Decision and instead should recognize Dr. Abdou as a CalPERS Classic member with
28 a statutory right to purchase additional service credit based on his prior employment as a common law

1 employee of CDCR and/or CCHCS and his presumptive status from 2005 through 2012 as a CalPERS
2 Classic member whom CalPERS was required to enroll.

3 The Decision erroneously concluded that Dr. Abdou could not have been a state employee from
4 2005 through 2012 because he was not hired through the civil service process after completing a civil service
5 examination, but this idea is based entirely on the Decision's inappropriate and unsupported reliance on
6 Government Code § 18526. Looking at § 18526 in its proper context, it is unsurprising that, in the subpart of
7 the Government Code dealing only with the State Civil Service, the term "employee" is defined as a person
8 "legally holding a position in the State civil service." However, this definition simply has nothing to do with
9 Dr. Abdou or CalPERS or any other party to this case.

10 Notably, Dr. Abdou was hired in 2005 at a time when California "was incapable of recruiting
11 qualified personnel to fill the significant vacancies that existed throughout the system, and the CDCR's lack
12 of a medical credentialing policy resulted in many CDCR clinicians practicing outside of their areas of
13 medical expertise." *Plata*, 2005 WL2932253 at *19. As one of the outside doctors recruited to repair a
14 damaged and dysfunctional state prison medical system, he was actually brought in because he had skills and
15 credentials that the State needed and could not obtain through the civil service. As such, it is anachronistic,
16 and entirely unjustified by statute, to argue that Dr. Abdou cannot be a state employee simply because he was
17 brought in without the formality of taking the civil service exam, especially because his subsequent career
18 makes clear his merit and fitness for the role of prison physician. This is precisely why he has now been
19 hired as a full-time state employee in the position of Receiver's Medical Executive based on his superior
20 qualifications.

21 Furthermore, PERL, as interpreted by the *Metropolitan Water Authority* case, and as interpreted and
22 applied by CalPERS itself in the *Breeze*, *Sandhu*, *Dowswell*, *Abid-Cummings*, and *Sousa* matters, requires
23 that employees of public agencies contracting with CalPERS cannot be excluded from CalPERS enrollment
24 even if the contracting agency has a merit hiring or civil service system that usually determines who can be
25 considered a permanent CalPERS employee. *See Metropolitan Water Authority*, 32 Cal.4th 491, 505
26 ("Participation in the CalPERS retirement system does not depend on whether an agency chooses to classify
27 an employee as eligible for benefits under civil service or local merit selection rules.")
28

1 Pivotaly, Section 20028(a) of PERL defines a state employee as a worker who was compensated
2 “out of funds directly controlled by the state.” Though Dr. Abdou was paid by Registry of Physicians
3 Specialists ("RPS"), that entity, and its associated entity Pacific Management Services (“PMS”), actually
4 constituted mere intermediaries and pass-through entities for Dr. Abdou’s salary, which can be traced back to
5 the State Treasury. The State Treasury remained fully in control of its own funds when the State authorized
6 Dr. Abdou to be paid through intermediaries for his work as a doctor at various California state prisons. As
7 such, the financial intermediaries, RPS and PMS, were obligated to pay Dr. Abdou the portion of the funds it
8 received from the State that matched the amount of Dr. Abdou’s salary that the State had agreed to. Had the
9 intermediaries declined to pay Dr. Abdou’s salary, they would have breached their contractual arrangement
10 with the State governing the use of the funds in question. As such, the economic truth of the situation is that
11 the intermediaries had no discretion and were required to pay over to Dr. Abdou an amount of money
12 provided to them by the State for the specific purpose of paying Abdou’s salary. The legal status of Dr.
13 Abdou’s salary is best understood as a constructive trust, where money was paid to intermediaries who then
14 had a specific duty to transfer the money to Dr. Abdou who was the intended recipient.

15
16 Dr. Abdou argues that the key words of Section 20028(a) of the PERL are “Irregardless of the
17 source.” These words authorize tracing funds back from an ostensible source (in this case labor suppliers
18 RPS or PMS) to the state treasury that provided the funds, in cases where the funds pass through an
19 intermediary entity such as a labor supplier. What is pivotal here is that the funds made their way from the
20 state treasury to a common law state employee. Furthermore, Dr. Abdou must be recognized as a common
21 law state employee under the principles outlined in the CalPERS internal guidance document titled
22 “Employee or Independent Contractor?” which clarifies that CalPERS must use the traditional ABC test to
23 determine whether someone is an employee or independent contractor, and that the determination must be
24 made on a case on case basis. The test, incorporated at Section 2750.3 of the California Labor Code,
25 identifies someone as an employee rather than independent contractor if that person meets the following
26 three provisions: the employee must be under “the control and direction of the hiring entity in connection
27 with the performance of the work”; the person cannot perform work that is “outside the usual course of the
28 hiring entity’s business”; and the person cannot be otherwise “customarily engaged in an independently

1 established trade, occupation or business of the same nature as that involved in the work performed.” The test
2 clearly identifies Dr. Abdou as a person who must be identified as a state employee for all purposes under the
3 PERL.

4 **IV. CONCLUSION**

5 The Board of Administration has ample grounds to RECONSIDER the Decision, including

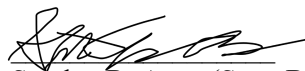
- 6 a. An erroneous interpretation of Art. VII, Sec. 1 of the California Constitution, which fails to
7 consider that Art. VII, Sec. 4(j) EXEMPTS Dr. Abdou from the civil service requirements,
8 because Dr. Abdou provided inmate help and patient help within state correctional institutions;
9 b. Erroneous statutory construction and interpretation related to the scope of application of
10 Government Code section 18526,
11 c. Errors in fact finding related to the date on which Dr. Abdou qualified as a Classic Member of
12 CalPERS.

13
14 For these reasons, and based on the arguments set forth in this Petition, Dr. Abdou asks that the
15 Board RECONSIDER the Decision and instead enter Judgment in favor of Dr. Abdou, to allow him to
16 purchase additional service credit as authorized by the PERL.

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18 Respectfully submitted on this 15th day of February, 2024,

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21
22 By:



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