

**ATTACHMENT C**

**RESPONDENT(S) ARGUMENT(S)**

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5 **BOARD OF ADMINISTRATION**

6 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

7 In the Matter of the Appeal to Purchase Service Credit and ) Agency Case No.: 2022-0257  
8 Use of Classic Formula in Service Calculation of )  
SHERIF R. ADBOU, M.D., ) OAH No.: 2022090092  
9 Respondent, ) **RESPONDENT SHERIF R. ABDOU'S WRITTEN**  
10 and ) **ARGUMENT AGAINST**  
11 STATE PERSONNEL BOARD; CALIFORNIA ) **PROPOSED DECISION**  
12 CORCORAN STATE PRISON; AVENAL STATE ) Hearing Date: September 21, 2023  
13 PRISON; CALIPATRIA STATE PRISON; IRONWOOD )  
14 PRISON; CHUCKAWALLA VALLEY STATE ) Hearing Time: 9:00 a.m.  
CORRECTIONS AND REHABILITATION, ) Hearing Location: Remote  
15 Respondents. ) Administrative Law Judge: Hon. Cindy Forman

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17 **RESPONDENT SHERIF R. ABDOU'S WRITTEN ARGUMENT AGAINST PROPOSED DECISION**

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

22 The Proposed Decision of ALJ Forman relies upon the position that there is a third requirement to be  
23 considered a California State Employee for purposes of the California Public Employees' Retirement Law, which is  
24 derived from California Government Code § 18526. However, that section of the Government Code is not properly  
25 applicable to any portion of the Public Employees' Retirement Law ("PERL") administered by CalPERS. This is  
26 because Section 18526 of the Government Code is part of a "Definitions" section containing definitions of terms for  
27 purposes of Title 2, Division 5, Part 2 of the Government Code, subtitled STATE CIVIL SERVICE, which is NOT part  
28 of the PERL.

1 The definition of “employee” contained at Section 18526 is applicable **ONLY** to Title 2, Division 5, Part 2 of  
2 the Government Code, concerning the State Civil Service, and furthermore is only applicable to that subpart of Title 2  
3 “unless the context requires otherwise.” See Government Code § 18520, clarifying that “[u]nless the context requires  
4 otherwise, the definitions hereinafter set forth govern the construction of this part and the rules adopted hereunder.”

5 The honorable Hearing Officer is in error where her decision imports an inapplicable part of the California  
6 Government Code into an analysis of the Public Employees Retirement Law where it does not belong.

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

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

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

25 Because Dr. Abdou worked for the state as a prison doctor whose work duties and compensation were entirely  
26 controlled by the State of California, during the period from 2005 to 2012 (prior to the passage of PEPR), he satisfies  
27 all requirements for Classic CalPERS membership, because he constituted a state employee for purposes of the  
28 California Public Employees Retirement Law, as codified and amended at Part 3 of the California Government Code,  
Section 20000, et seq., including but not limited to the requirements set forth at Section 20028(a).

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

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

16 According to the *Metropolitan Water District* court, the Public Employees Retirement Law ("PERL"), as it  
17 existed prior to being amended by the passage of PEPRA in 2012, "incorporates common law principles into its  
18 definition" of an employee entitled to participate in CalPERS and requires public agencies or CalPERS itself to enroll  
19 in CalPERS all common law employees "except those excluded by a specific statutory or contractual provision." *Id.* at  
20 495. The Court continues by noting that, as of that time, "the PERL contains no broad exclusion for long-term, full-time  
21 workers hired through private labor suppliers." *Id.* at 497. Notably, Dr. Abdou's employment by the State from 2005  
22 through 2021 was precisely as a long-term, full-time worker hired through a private labor supplier.

23 Unlike the Definition of "employee" relied on by CalPERS, which is only applicable to Title 2, Division 5,  
24 Part 2 of the Government Code, the *Metropolitan Water District* decision is broadly applicable to all parts of the Public  
25 Employees Retirement Law, as it was prior to the passage of PEPRA in 2012. Indeed, the court specifically noted that  
26 "[a]ny change in the PERL to accommodate such long-term temporary hiring must come from the Legislature not from  
27 this Court, which cannot remake the law to conform to [] hiring practices." *Id.* at 497. Because the Legislature did not  
28 amend the PERL in relation to this issue until the passage of PEPRA in 2012, ALJ Forman is incorrect in concluding  
that Dr. Abdou became a CalPERS member only on January 3, 2022 and is also incorrect in concluding that Dr. Abdou  
constitutes a PEPRA member of CalPERS. Instead, CalPERS was required to enroll Dr. Abdou as a CalPERS Classic

1 Member during the period from November 2005 through December 2012, prior to the effective date of PEPRA on  
2 January 1, 2013. Unfortunately, CalPERS failed to meet its legal obligation to enroll Dr. Abdou in CalPERS during this  
3 seven-year period when Dr. Abdou was entitled to be enrolled.

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

7 Because CalPERS was required under prevailing law to enroll Dr. Abdou as a CalPERS Classic Member,  
8 during the period of his common law employment by the State prior to January 1, 2013, it is arbitrary and capricious, as  
9 well as a clear error of law, for ALJ Forman to conclude that Dr. Abdou did not enroll in CalPERS until January 2022.  
10 Instead, as the Court stated in *Metropolitan Water District*, 31 Cal. 4th at 495, the prevailing law prior to 2013 was that  
11 "the PERL requires [] public agencies to enroll in CalPERS all common law employees except those excluded under a  
12 specific statutory or contractual provision." Under this principle of prevailing law, as it existed at that time, ALJ Forman  
13 made an error of fact in determining the beginning date of Dr. Abdou's membership in CalPERS. The Board should  
14 recognize him as a CalPERS Classic member with a statutory right to purchase additional service credit based on his  
15 prior employment as a common law employee of CDCR and/or CCHCS and his presumptive status from 2005 through  
16 2012 as a CalPERS Classic member whom CalPERS was required to enroll.

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

23 Notably, Dr. Abdou was hired in 2005 at a time when California "was incapable of recruiting qualified  
24 personnel to fill the significant vacancies that existed throughout the system, and the CDCR's lack of a medical  
25 credentialing policy resulted in many CDCR clinicians practicing outside of their areas of medical expertise." *Plata*,  
26 2005 WL2932253 at \*19. As one of the outside doctors recruited to repair a damaged and dysfunctional state prison  
27 medical system, he was actually brought in because he had skills and credentials that the State needed and could not  
28 obtain through the civil service. As such, it is anachronistic, and entirely unjustified by statute, to argue that Dr. Abdou  
cannot be a state employee simply because he was brought in without the formality of taking the civil service exam,  
especially because his subsequent career makes clear his merit and fitness for the role of prison physician. This is

1 precisely why he has now been hired as a full-time state employee in the position of Receiver’s Medical Executive  
2 based on his superior qualifications.

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

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

23 Dr. Abdou argues that the key words of Section 20028(a) of the PERL are “Irregardless of the source.” These  
24 words authorize tracing funds back from an ostensible source (in this case labor suppliers RPS or PMS) to the state  
25 treasury that provided the funds, in cases where the funds pass through an intermediary entity such as a labor supplier.  
26 What is pivotal here is that the funds made their way from the state treasury to a common law state employee.  
27 Furthermore, Dr. Abdou must be recognized as a common law state employee under the principles outlined in the  
28 CalPERS internal guidance document titled “Employee or Independent Contractor?” which clarifies that CalPERS must  
use the traditional ABC test to determine whether someone is an employee or independent contractor, and that the  
determination must be made on a case on case basis. The test, incorporated at Section 2750.3 of the California Labor

1 Code, identifies someone as an employee rather than independent contractor if that person meets the following three  
2 provisions: the employee must be under “the control and direction of the hiring entity in connection with the  
3 performance of the work”; the person cannot perform work that is “outside the usual course of the hiring entity’s  
4 business”; and the person cannot be otherwise “customarily engaged in an independently established trade, occupation  
5 or business of the same nature as that involved in the work performed.” The test clearly identifies Dr. Abdou as a person  
6 who must be identified as a state employee for all purposes under the PERL.

7 ALJ Forman also erred in relying so heavily on the Hearing testimony of RPS Contract Specialist Ursula  
8 Reinhart, and particularly relying on the questionable claim that Dr. Abdou’s spouse, Dr. George, “wrote” two letters  
9 that were in fact prepared and signed by Ms. Reinhart and that plausibly reflected Ms. Reinhart’s genuine views. Dr.  
10 George did provide drafts of the letters to Ms. Reinhart, but it was Ms. Reinhart who ultimately wrote and signed them.  
11 Dr. Abdou argues that those two letters constitute Reinhart’s genuine opinion, whereas her Hearing testimony was  
12 unduly influenced by the demand of CalPERS personnel that she modify her testimony to present views approved by  
13 CalPERS. As the two letters written by Reinhart make clear, Dr. Abdou’s compensation was directly controlled by and  
14 flowed from the California State Treasury.

15 Based on the arguments hereinabove, in conjunction with the evidence presented at Hearing, Dr. Abdou asks  
16 that the Board REJECT the Proposed Decision of ALJ Forman and enter Judgment in favor of Dr. Abdou, to allow him  
17 to purchase additional service credit as authorized by the PERL.

18 Dr. Abdou further asks that ALJ Forman’s Proposed Decision should NOT be designated precedential, in order  
19 to protect Dr. Abdou’s privacy.  
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