

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for CalPERS
Membership of:

ROBERTA ALMEIDA,

Respondent.

Case No. 2013-0069

OAH No. 2014010661

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on April 21 through 23 and May 13, 14, and 18, 2015, in Sacramento, California.

Deputies Attorney General Ashante L. Norton and Karli Eisenberg represented complainant California Public Employees' Retirement System (CalPERS).

Attorney James E. McGlamery of the Law Offices of James E. McGlamery represented respondent Roberta Almeida, who was present throughout the hearing.

Evidence was received, and the record was left open to allow the parties to submit written closing arguments and written briefs on the affirmative defense of laches. CalPERS's Opening Brief on Laches, Respondent's Initial Closing Argument, CalPERS's Closing Brief and Reply Brief on Laches, CalPERS's Request for Official Notice, Respondent's Closing Brief in Response to Closing Brief of CalPERS, and Respondent's Request for Official/Judicial Notice were received, and are marked as Exhibits 137, 532, 138, 139, 533, and 534, respectively. CalPERS also objected to an argument in respondent's final brief and her request for official/judicial notice. The objection is marked as Exhibit 140.¹ The record was closed, and the matter was submitted for decision on September 14, 2015.

¹ Neither party's request for official notice was considered because the record was closed for receiving evidence on May 18, 2015, and was left open for the sole purpose of receiving written arguments. CalPERS's objection to respondent's laches argument in Exhibit 533 is overruled. While respondent technically should not have included such argument in that brief, her argument did not raise any new issues so CalPERS was not prejudiced by it.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Oct. 12 2015
K. Eisenberg

SUMMARY

On July 1, 1998, respondent began an 11-year relationship of providing information technology (IT) services to CalPERS pursuant to numerous successive independent contractor agreements. Initially, those agreements were between CalPERS and Synergy Consulting, Inc., and respondent provided her services pursuant to a separate agreement with the latter entity. After doing so for more than two years, she contracted directly with CalPERS through the business she created solely for that purpose. Respondent knew she was acting as an independent contractor at the beginning of her relationship with CalPERS. Eventually, however, she began to feel she was being improperly treated as an "employee," rather than an "independent contractor," of CalPERS, and she shared those feelings with other independent contractors. But in 2005, respondent contacted CalPERS and asked why it had not sent her business any Internal Revenue Service Form 1099s (Miscellaneous Income) (Form 1099) for the previous years, despite her having received at least some of those documents while working as a subcontractor of Synergy Consulting, Inc. The business was ultimately issued a Form 1099 for 2009 only.

CalPERS hired respondent as a full time employee, effective June 30, 2009. On December 13, 2010, she contacted CalPERS and requested that it backdate the effective date of her employment to July 1, 1998, for purposes of determining her eligibility for membership in CalPERS. CalPERS denied her request, and she appealed the denial. For the reasons discussed below, respondent's appeal is barred by the doctrine of laches. Additionally, she did not become an "employee" for purposes of the Public Employees' Retirement Law (PERL) (Gov. Code, § 20000, et seq.) until June 30, 2009, and that is when she first became eligible for CalPERS membership. Therefore, respondent's appeal should be denied.

FACTUAL FINDINGS

Procedural Background

1. Respondent was appointed to a full time civil service position as a Staff Programmer Analyst (Specialist) with CalPERS, effective June 30, 2009.
2. On December 13, 2010, respondent contacted CalPERS and requested that the effective date of her employment be backdated to July 1, 1998, claiming she was misclassified as an independent contractor of CalPERS during the 11-year period she provided IT services pursuant to multiple independent contractor agreements. Had she been properly designated as an employee, respondent argued, she would have been eligible for CalPERS membership on July 1, 1998. CalPERS denied respondent's request, and she timely appealed the denial.

3. Karen DeFrank, Chief of the Customer Account Services Division of CalPERS, filed the Statement of Issues on January 17, 2014, solely in her official capacity. The sole issue for determination is whether respondent was an independent contractor or an employee under the PERL during the timeframe from July 1, 1998, through June 29, 2009.²

History of Respondent's Education and Employment

4. Respondent obtained her Bachelor of Arts in International Relations and Master's of Science in Agricultural Economics from UC Davis. She was recruited out of UC Davis by Electronic Data Systems, a computer information systems company that provided programming services to other companies. Upon graduation, she began working for that company as "a W-2 employee" performing programming and software development. She received a benefits package that included employer-sponsored health benefits and 401(k) plan.

5. Respondent worked on Foundation Health Federal Services's computer system while at Electronic Data Systems. Eventually, she left the latter company for the former, where she performed programming, analysis, design, and testing of its CHAMPUS Healthcare System, a system that processed health insurance claims submitted by military families. She "was a W-2 employee" of Foundation Health Federal Services, and received a benefits package that included health and vision insurance, participation in an employee assistance program, disability insurance, and merit-based bonuses.

6. Around the time Foundation Health Federal Services began the process of "sunsetting" the CHAMPUS Healthcare System, respondent was contacted by a former colleague who left Foundation Health Federal Services to work for Synergy Consulting, Inc., as an independent contractor. That former colleague eventually persuaded respondent to do the same. When asked at hearing whether the pay Synergy Consulting, Inc., offered her was significantly better than that which she received from Foundation Health Federal Services, respondent replied: "It depends because of the benefits. There's different factors. The security of a job versus contracting and not knowing when you're going to have your next job."

7. On May 22, 1998, respondent entered into an independent contractor agreement with Synergy Consulting, Inc., agreeing to provide IT services on its behalf. Synergy Consulting, Inc., then submitted a bid for an independent contractor agreement to provide IT services to CalPERS through consultants such as respondent.

² Therefore, issues related to respondent's status as an independent contractor or employee under the State Civil Service Act (Gov. Code, div. 5, pt. 2, ch. 1, art. 1, § 18501 et seq.) during that timeframe are not included in this appeal, and are left to the jurisdiction of the State Personnel Board. (Cal. Const., art. VII, § 3, subd. (a).)

8. Synergy Consulting, Inc.'s bid was accepted, and its first agreement with CalPERS commenced on January 1, 1998. Synergy Consulting, Inc., entered into a second agreement with CalPERS, and it extended its agreement with respondent.

9. Respondent submitted weekly invoices for the hours she worked to Synergy Consulting, Inc., and the latter paid her at the hourly rate specified in their agreement. Synergy Consulting, Inc., submitted its own weekly invoices specifying the hours respondent and its other consultants worked to CalPERS, and CalPERS paid for such work at the hourly rates specified in the agreement between the two entities. There was no evidence that respondent's payments from Synergy Consulting, Inc., were dependent on the latter receiving its payments from CalPERS.

10. After working as a subcontractor for Synergy Consulting, Inc., for more than two years, respondent opted to "cut out the middleman," formed the business "Roberta Almeida"³ as a sole proprietorship, and contracted directly with CalPERS through her business. She explained at hearing that she thought CalPERS entered into independent contractor agreements only with business entities, as opposed to individuals. Therefore, she formed Roberta Almeida for the sole purpose of being able to contract directly with CalPERS. The business had no employees, and respondent was the only person to provide services on its behalf. She obtained a small business certification from the State, applied annually for a business license from the City of Davis, and deducted her business expenses from her income taxes.

11. The first independent contractor agreement Roberta Almeida and CalPERS entered into commenced on January 1, 2001. Respondent continued to provide IT services to CalPERS on behalf of her business pursuant to successive agreements until CalPERS ran out of funds under the last agreement in June 2009. As did the agreements between Synergy Consulting, Inc., and CalPERS, each agreement between Roberta Almeida and CalPERS specified an hourly rate at which the latter agreed to pay for respondent's services, and respondent submitted weekly invoices to CalPERS.

12. Respondent paid for her own health insurance and contributed to a SEP IRA with her own funds during the entire 11-year period she provided IT services to CalPERS. Additionally, she was not paid for those days on which she did not provide any services. She provided her services exclusively to CalPERS during the entire 11-year period.

13. Synergy Consulting, Inc., provided respondent Form 1099s for the years she worked as a subcontractor, although she stated at hearing she did not receive all the Form 1099s she should have. She also explained she did not receive a Form 1099 for any of the years Roberta Alameda contracted directly with CalPERS, except for 2009. Respondent contacted CalPERS's fiscal unit in 2005 to ask why she had not received any Form 1099s.

³ To avoid confusion, Roberta Almeida the individual will be referred to as "respondent," while the business will be referred to as "Roberta Almeida."

She could not recall at hearing with whom she spoke, and explained she never followed up on the conversation.

14. Respondent began applying for vacant positions with the State of California as a Staff Programmer/Analyst (Specialist) and Senior Programmer/Analyst (Specialist) no later than August 13, 2008. However, she "was interested in State employment for years, and I always had a contract going, so you would get on the exam and -- get on the list was my backup plan for the --." Her best estimate was that she began taking state job examinations in 2003. But she did not apply for any positions relative to those examinations because "they sent out a notice; and if I was in the middle of the contract, I would not walk away from the current contract for an unknown." Respondent could not recall any examinations being offered for positions in which she was interested between 2004 and the first part of 2008, but she took two examinations in December 2008, one of which was for the position for which she was ultimately hired.

15. Respondent became a full time employee of CalPERS on June 30, 2009.

Laches - Respondent Knew or Should Have Known That She May Have Been Improperly Characterized as an Independent Contractor

16. At hearing, respondent admitted she understood she was providing IT services to CalPERS as an independent contractor the entire time she did so on behalf of Synergy Consulting, Inc., and she understood the same while providing services pursuant to the first three agreements between Roberta Almeida and CalPERS. But when respondent signed the fourth agreement (Statement of Works for RIBS - Enhancements and Mandated Legislation) on January 7, 2003, she began to view her relationship with CalPERS as one pursuant to which "I was working directly for CalPERS and they were paying me for my services." During that agreement, she told other consultants at CalPERS that "CalPERS should not be telling us that we had to ask for vacation and that type of thing." She also explained that she did not like "that they were being so controlling." And while providing services under the Statement of Work for Consulting Services (Programming) - Maintenance Programming Services (Legacy Mainframe Applications) between June 20, 2005, and July 31, 2006, respondent told other consultants that she felt she was not being treated as an independent contractor, but rather as an employee of CalPERS. However, in 2005 she began wondering why CalPERS had not issued any Form 1099s for her business while Synergy Consulting, Inc., issued her at least some Form 1099s for the years she worked as its subcontractor.

Nonetheless, respondent signed eight more agreements with CalPERS on behalf of her business after the Statement of Work for RIBS - Enhancements and Mandated Legislation, and four more after the Statement of Work for Consultant Services (Programming) - Maintenance Programming Services (Legacy Mainframe Applications). In total, she provided IT services to CalPERS between July 1, 1998, and June 29, 2009, pursuant to 12 separate independent contractor agreements between CalPERS and either

Synergy Consulting, Inc., or Roberta Almeida. She earned in excess of \$1,659,473⁴ doing so.

17. The persuasive evidence established that respondent knew, or should have known, her designation as an independent contractor was potentially erroneous no later than July 31, 2006. She admitted she was an independent contractor while serving as Synergy Consulting, Inc.'s, subcontractor and while providing services pursuant to Roberta Almeida's first three agreements with CalPERS. She understood the distinction between working as an independent contractor versus an employee at all times relevant, as evidenced by the following answer to the question whether Synergy Consulting, Inc., paid more than Foundation Health Federal Services: "It depends because of the benefits. There's different factors. The security of a job versus contracting and not knowing when you're going to have your next job."

While respondent claimed at hearing she did not understand the significance of being misclassified until shortly before her attorney sent the December 13, 2010 letter to CalPERS, she began feeling she was being treated as an employee instead of an independent contractor no later than January 7, 2003. She continued to have those feelings while providing services between June 20, 2005, and July 31, 2006. And despite having received at least some Form 1099s while subcontracting for Synergy Consulting, Inc., respondent waited until sometime in 2005 before inquiring about such forms not having been issued to Roberta Almeida.

When all the evidence is considered, respondent, at a minimum, had "notice of facts and circumstances which would put a [woman] of ordinary prudence and intelligence on inquiry" no later than July 31, 2006. (*Garstang v. Skinner* (1913) 165 Cal. 721, 727; *McNulty v. Lloyd* (1957) 149 Cal.App.2d 7, 10-11 ["In order to impute laches to one who seeks relief in equity, it should clearly appear that he either had actual knowledge of the facts or failed to acquire such knowledge after having notice thereof"].) Therefore, respondent's appeal is barred by the doctrine of laches as explained further in the Legal Conclusions.

18. Respondent's reliance on the California Supreme Court's holding in *Richards v. CH2MHill, Inc.* (2001) 26 Cal.4th 798, is misplaced. There, the Court analyzed when the statute of limitation applicable to a claim based on a continuing violation of the law begins to run. But respondent concedes there is no applicable statute of limitation here. And while statutes of limitation and the doctrine of laches are both intended to promote justice by precluding stale claims asserted after evidence has been destroyed, memories have faded, and witnesses can no longer be found, the former "effectuates these policies by a fixed rule which, absent tolling, bars the proceeding without proof of prejudice. Laches, on the other hand, requires proof of a delay which results in prejudice or change of position." (*Brown v. State Personnel Board* (1985) 166 Cal.App.3d 1151, 1161.)

⁴ This amount is based only on payments CalPERS issued Roberta Almeida between February 1, 2001, and July 8, 2009.

19. Respondent's argument that applying laches would nullify the important public policies of "loss of tax revenue to the state and federal governments in the form of lower tax revenue, lower unemployment insurance and workers compensation funds, lack of overtime for workers and lack of pensions and related benefits" is also unpersuasive. As previously explained, the sole issue on appeal is whether respondent was improperly designated an independent contractor under the PERL prior to June 30, 2009. And her arguments that the doctrine of laches does not apply because CalPERS knew or should have known of its improper designation of respondent and CalPERS did not prove that respondent was fully aware at all times that she was entitled to benefits under the PERL were not supported by any legal authority and were not persuasive.

Manner of Determining the Nature of Respondent's Relationship with CalPERS Prior to June 30, 2009

20. The PERL defines an employee of the State of California as "any person in the employ of the state ... whose compensation ... is paid out of funds directly controlled by the state ... 'Funds directly controlled by the state' includes funds deposited in and dispersed from the State Treasury in payment of compensation, regardless of their source." (Gov. Code § 20028, subd. (a).) There was insufficient evidence to support a finding that respondent was "paid out of funds directly controlled by the state" while working as a subcontractor of Synergy Consulting, Inc. The evidence established that respondent was paid pursuant to weekly invoices she submitted to Synergy Consulting, Inc., which accounted for her time. And CalPERS paid Synergy Consulting, Inc., pursuant to weekly invoices the latter submitted, which accounted for each of its subcontractor's time. There was no evidence that respondent's payment from Synergy Consulting, Inc., was dependent on the latter's payment from CalPERS. Therefore, respondent did not meet the definition of a state employee under the PERL from July 1, 1998, through December 31, 2000.

21. However, respondent was "paid out of funds directly controlled by the state" while providing services directly to CalPERS pursuant to the various agreements between CalPERS and Roberta Almeida. While CalPERS paid for her services by writing a check to her business, the business was a sole proprietorship and "a sole proprietorship is not a legal entity separate from its individual owner." (*Ball v. Steadfast-BLK* (2011) 196 Cal.App.4th 694, 701.)

But the source of the funds used to pay compensation is only one of the prongs of the definition of state employee under the PERL, and Government Code section 20028, subdivision (a), does not define the second prong -- "in the employ of the state." For the reasons explained below, the nature of respondent's relationship with CalPERS prior to June 30, 2009, is determined under the common law test for employment.

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22. CalPERS's reliance on the definition of "employee" in Government Code section 18526 is misplaced. Government Code section 18520 provides that such definition is limited to that term as it is used under the State Civil Service Act. And as previously discussed, the nature of respondent's relationship with CalPERS under the State Civil Service Act is not at issue.

Common Law Test of Employment

23. Courts use the common law test of employment when a statutory scheme refers to the term "employee" without defining it. (*Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500-501.)⁵ The California Supreme Court explained in *Empire Star Mines Co. v. California Employment Commission* (1946) 28 Cal. 2d 33: "In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired." (*Id.*, at p. 43; overruled on different grounds by *People v. Sims* (1982) 32 Cal.3d 468, 479, fn. 8 [collateral estoppel may apply to decisions made by administrative agencies].) But the analysis also requires consideration of the following criteria: 1) whether the person providing the services is engaged in a distinct occupation or business; 2) whether the services provided are generally performed under someone else's supervision; 3) the amount of skill required to perform the services; 4) which party provides the instrumentalities, tools, and place of work; 5) the duration for which the services are to be provided; 6) whether compensation is based on the amount of time spent or by the job; 7) whether the services provided are normally part of the principal's regular business; and 8) the parties' subjective intent regarding the nature of their relationship. (*Id.*, at pp. 43-44.)

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⁵ The ALJ recognizes that *Metropolitan Water District of Southern California* is not directly applicable because the Court was analyzing the phrase "in the employ of any contracting agency" in Government Code section 20028, subdivision (b). But neither party cited a case that analyzed the phrase "in the employ of the state" in Government Code section 20028, subdivision (a), and the ALJ found none. (See, *In the matter of the Application for CalPERS Membership Credit by Lee Neidengard* (2005) PERS Dec. No. 05-01) [applying the common law analysis in determining whether respondent was an employee of a contracting agency].) Besides, using the common law test of employment when the applicable statutory scheme does not define the term "employee" is well-settled in California case law. (*Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, 946-950 [unemployment insurance law]; *McFarland v. Voorheis-Trindle Co.* (1959) 52 Cal.2d 698, 702-706 [workers' compensation exclusivity]; *People v. Palma* (1995) 40 Cal.App.4th 1559, 1565-1566 [Welf. & Ins. Code, § 14107.2]; *Service Employees International Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 769-770 [public employee collective bargaining law].)

Right to control

24. Each of the 12 agreements pursuant to which respondent provided IT services required her to participate in regular staff meetings with other independent contractors as well as CalPERS employees and to provide weekly status reports to CalPERS management. And while she was allowed some flexibility in determining her work hours, she was expected to abide by a schedule once one was set. She was also expected to coordinate her vacation days with her CalPERS manager.

Such requirements did not give CalPERS the right to control the manner and means of how respondent accomplished projects, but rather provided it with the ability to review her “work product only to the extent of completeness, cohesiveness, and ability to integrate with other systems.” The nature of the projects respondent worked on made it necessary for CalPERS to be able to closely monitor “every phase and entity involved with the continual legacy operations and peripheral systems” and “any coordination with CalPERS’ [sic] supervisors, managers, other contractors, and staff was essential in the process and development of the multiple stages of each contracted phase of development.” Therefore, “it was imperative that CalPERS maintain control for the result, not the manner and means of how the program code was to be developed.” (Underlining original.)

Respondent’s evidence that one of the CalPERS managers believed she had unfettered authority and discretion to terminate respondent or any other consultant whose work she was unhappy with, even if true, does not support a finding that CalPERS had the right to control the means and the manner in which respondent performed her job because such unfettered authority and discretion is wholly inconsistent with the State Civil Service Act. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 206 [recognizing that permanent civil service employees have “a property interest in the continuation of [their] employment which is protected by process”])

Distinct occupation or business

25. From July 1, 1998, through June 29, 2009, respondent operated her own professional business providing IT services, first through Synergy Consulting, Inc., and then on behalf of Roberta Almeida. She formed Roberta Almeida for the sole purpose of contracting directly with CalPERS, obtained a small business certification from the State, maintained a City of Davis business license, and deducted her business expenses from her income taxes. Respondent did not engage in any other business or occupation during the entire 11-year period.

Amount of supervision

26. Respondent did not introduce any evidence of the amount of supervision she was subjected to by CalPERS management, other than her having to regularly participate in staff meetings, provide regular status updates to CalPERS management, abide by a set work schedule, and coordinate her vacation days with her CalPERS manager. Lisa Ostrander, one

of respondent's CalPERS managers, explained at hearing that she did not oversee respondent's day-to-day work activities because she was not qualified to do so since she "did not have coding expertise to watch [respondent] code." Robert Lew, another one of respondent's CalPERS managers, did not have sufficient expertise to supervise respondent's day-to-day work activities either. He described his duties with regard to respondent and other consultants as "making sure that they work within the Statement of Work, that I monitor, you know, the hours that was [sic] allocated on the contract and that we spend according to what we have planned the workload was for."

Amount of skill

27. Respondent was a highly-skilled provider of IT services. Electronic Data Systems recruited her out of college because of her skills. The purpose of the request for proposal pursuant to which Roberta Almeida was subsequently awarded several contracts with CalPERS was "to solicit proposals from qualified information technology service providers (herein called Proposers) that can provide varied and specialized services in order to establish a pool of information technology service providers." Ms. Ostrander explained that in evaluating the various proposals submitted, "we were looking for expertise because with a consultant we were not doing the full development of an employee. We were looking for someone that could hit the ground running and would be able to perform very specific tasks or projects of work." She contrasted that procedure with the procedure she goes through when hiring an employee, which she described as follows: "in the hiring of State staff you may hire someone who already has background in that area or you may not. You may be hiring somebody and developing them throughout their career."

Mr. Lew said the following about respondent's specific skills: "I highly regard Ms. Almeida for her abilities, her knowledge, what she knew. So I relied on her as consultant to provide mentorship and knowledge transfer to staff or other consultants." And explaining why he had higher expectations for consultants than state employees in terms of work performance, Mr. Lew stated: "Yes. I did not have to be a manager. I did not have to worry about staff development. I did not have to worry about their performance because, as a contract manager, if they weren't performing, I'll go back to the contract and reference what those requirements were."

Provider of work instruments

28. It was undisputed that at all times CalPERS provided respondent a cubicle to work out of, which included a desk, computer, and telephone. She was provided a nameplate to hang outside her cubicle, just as CalPERS employees were. For the most part, respondent was required to work out of CalPERS's office, rather than being allowed to work from home.

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Duration of services

29. Each of the 12 independent contractor agreements pursuant to which respondent provided services was for a finite period of time. While some of those agreements were ultimately extended, such extensions were nonetheless for a finite period of time. And once an agreement expired and was not renewed, respondent could no longer provide any further services unless and until she executed a new agreement on behalf of Roberta Almeida.

Manner of compensation

30. While respondent was compensated based on the number of hours she worked rather than a flat sum under each agreement, she was nonetheless paid "by the job" because each agreement specified the hourly rate which CalPERS agreed to pay for her services under the particular agreement.

CalPERS's regular business

31. CalPERS is a retirement system created by statute for the purpose of administering retirement, disability, and death benefits for California state employees in accordance with the provisions of PERL. (Gov. Code, § 20001.) It also provides such services to employees of other governmental entities that choose to participate in the CalPERS pension system by contract. (Gov. Code, § 20460.) CalPERS requires IT services so that it can fulfill its duties to provide retirement benefits. It does not provide such services to others, and is not in the regular business of providing IT services. IT services are incidental services CalPERS receives in order to carry out its duty to manage the investments that fund the pensions of its members.

Parties' subjective intent

32. While it was undisputed that CalPERS always believed respondent was providing services as an independent contractor prior to June 30, 2009, respondent presented conflicting evidence of her subjective beliefs about the nature of her relationship with CalPERS. But resolving such conflict is not necessary for the reasons discussed below.

33. Applying the common law test of employment to the evidence adduced at hearing, respondent did not establish she was a common law employee of CalPERS at any time prior to June 30, 2009, as explained in the Legal Conclusions.

Other Arguments

34. Any other arguments raised by the parties which are not addressed above are found to be without merit.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. CalPERS bears the burden of proving each of the elements of the affirmative defense of laches. (*Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786, 793.) The parties agreed respondent bears the burden of proving she was improperly designated as an independent contractor. The standard of proof applicable to both issues is the preponderance of the evidence standard. Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

CalPERS Membership

2. Government Code section 20281 provides for compulsory membership in CalPERS as follows: "All members of the retirement system immediately prior to the time this part becomes operative continue to be members of the system. An employee of a contracting agency on the effective date of its contract with the board becomes a member immediately. Every other employee becomes a member upon his or her entry into employment." A "state miscellaneous member" includes all members employed by the state and university, except National Guard, industrial, patrol, state peace officer/firefighter, and state safety members." (Gov. Code, § 20380.)

But the following people are expressly excluded from CalPERS membership: "Independent contractors who are not employees." (Gov. Code, § 20300, subd. (b).) And "the 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." (Gov. Code, § 20125.)

Affirmative Defense of Laches

3. The elements of laches are unreasonable delay and either acquiescence to the act about which the plaintiff complains or prejudice to the defendant caused by the delay. (*In re Estate of Kampen* (2011) 201 Cal.App.4th 971, 997.) There is no inflexible rule for determining how long of a delay constitutes an "unreasonable delay" for purposes of laches, and such determination depends on the particular circumstances of the case in which the defense is asserted. (*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.* (1962) 200 Cal.App.2d 322, 324-325.) Delay is unreasonable "when its purpose is to capitalize on the value of the alleged infringer's labor by determining whether the infringing conduct will be profitable." (*Magic Kitchen LLC v. Good Things International Ltd.* (2007) 153 Cal. App.4th 1144, 1160-11; *Danjaq LLC v. Sony Corp.* (9th Cir.2001) 263 F.3d 942, 954.)

4. Acquiescence without prejudice is sufficient to support laches. (*In re Estate of Kampen, supra*, 201 Cal.App.4th 971, 1000.) “A defendant has been prejudiced by a delay when the assertion of a claim available some time ago would be “inequitable” in light of the delay in bringing that claim ... [and] ensues when a defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed.” (*Magic Kitchen LLC v. Good Things International Ltd., supra*, 193 Cal.App.4th 1194, 1162; quoting, *Hot Wax Inc. v. Turtle Wax, Inc.* (7th Cir.1999) 191 F.3d 813, 824.) “[P]rejudice may also be established by detrimental reliance by the affected party upon the status quo.” (*Brown v. State Personnel Board, supra*, 166 Cal.App.3d 1151, 1162.)

In *Brown*, California State University at Sacramento terminated a professor based on three separate allegations of sexual harassment. The University discovered the first two allegations five years before serving the professor with notice of dismissal. The professor had been granted tenure the year the University learned of those allegations, notwithstanding the tenure committees’ knowledge of the allegations. Concluding the professor was prejudiced by the University’s unreasonable delay in imposing discipline based on the first two allegations of sexual harassment, the appellate court explained, “the loss of four years at the outset of an academic career is a considerable change of position in reliance upon the status quo that works a sufficient prejudice to transform the unreasonable delay in this case into the bar of laches. Accordingly, the disciplinary action may not be founded upon the 1975 offenses.” (*Brown v. State Personnel Board, supra*, 166 Cal.App.3d at pp. 1162-1163.)

5. As previously explained, respondent unreasonably delayed challenging her status as an independent contractor from July 1, 1998, through June 29, 2009. And the evidence established that she acquiesced to the very conduct about which she now complains as explained in Factual Findings 16 through 19. Such acquiescence lulled CalPERS into relying on the status quo by continuing to enter into agreements with Roberta Almeida. Therefore, respondent’s appeal is barred by the doctrine of laches.

The Nature of Respondent’s Relationship with CalPERS Prior to June 30, 2009

6. “An independent contractor is one who renders service in the course of an independent employment or occupation, following his employer’s desires only as to the results of the work, and not as to the means whereby it is to be accomplished.” (*McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 788.) An agreement describing one party as being an independent contractor of the other, while not conclusive, is “a significant factor for consideration” (*Tieberg v. Unemployment Insurance Appeals Board, supra*, 2 Cal.3d at p. 952.)

If the entity who hired the worker has the right to exercise complete control over the means and manner in which the result for which the person was hired is accomplished, then an employment relationship has been established as a matter of law. (*Wickham v. The Southland Corporation* (1985) 168 Cal.App.3d 49, 58.) But “if control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established.” (*Tieberg v. Unemployment Insurance*

Appeals Board, supra, 2 Cal.3d 943, 947.) “Otherwise the right to control was an important factor to be taken into consideration along with the seven other factors enumerated.” (*Wickham v. The Southland Corporation, supra*, 168 Cal.App.3d at p. 58.)

7. Respondent did not meet Government Code section 20028, subdivision (a)'s, definition of a state employee for the reasons discussed in Factual Findings 20 through 22. And when her relationship with CalPERS is analyzed using the common law test of employment, the evidence established that she was acting as independent contractor prior to June 30, 2009, as explained in Factual Findings 23 through 33.

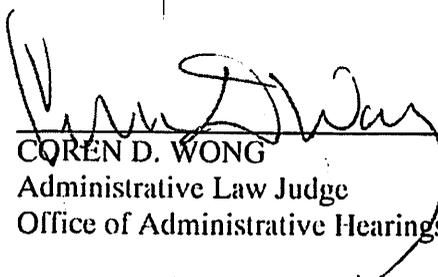
Conclusion

8. Respondent's appeal from CalPERS's denial of her request that the effective date of her employment be backdated to July 1, 1998, is barred by the doctrine of laches as explained in Legal Conclusions 3 through 5. But even if she did not unreasonably delay challenging her status as an independent contractor, her appeal should be denied for the reasons explained in Legal Conclusions 6 and 7.

ORDER

Respondent Roberta Almeida's appeal from CalPERS's determination that she was acting an independent contractor from July 1, 1998, through June 29, 2009, is **DISMISSED** pursuant to the doctrine of laches.

DATED: October 7, 2015


COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings