

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Roberta Almeida (Respondent) began an 11-year relationship of providing information technology (IT) services to CalPERS pursuant to numerous successive independent contractor agreements. For about two years, those agreements were between CalPERS and Synergy Consulting Inc., and Respondent provided services pursuant to an agreement with Synergy. After those two years, Respondent 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, she began to feel she was being improperly treated as an "employee," rather than an "independent contractor," and she shared those feelings with other independent contractors. But in 2005, Respondent contacted CalPERS and asked why she had not received 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. Respondent's business was ultimately issued a Form 1099 for year 2009 only.

It is undisputed that CalPERS hired Respondent as a full-time employee effective June 30, 2009. On December 13, 2010, Respondent 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 Respondent appealed.

A hearing was held on April 21, 22, 23, and May 13, 14, and 18, 2015. The sole issue for determination was whether Respondent was an independent contractor or an employee during the time period from July 1, 1998 through June 29, 2009. The record was left open to allow post-hearing briefing on various issues. The matter was deemed submitted for decision on September 14, 2015. Respondent was represented by counsel at all phases of her hearing.

The evidence showed that Respondent 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 or Respondent's business.

When all the evidence was considered, the Administrative Law Judge (ALJ) found that Respondent, at a minimum, had notice of facts and circumstances which would put a woman of ordinary prudence and intelligence on inquiry as to her status no later than July 31, 2006. Therefore, the ALJ found that Respondent's appeal was barred by the affirmative defense of laches.

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. 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 v. Good Things* (2007) 153 Cal.App.4th 1144,1160-61)

The ALJ found that Respondent unreasonably delayed challenging her status as an independent contractor from July 1, 1998 through June 29, 2009. The ALJ found that she acquiesced to the very conduct about which she complains. Such acquiescence lulled CalPERS into relying on the status quo by continuing to enter into agreements with Respondent's business.

The ALJ concluded that Respondent's appeal should be dismissed because it is barred by the doctrine of laches. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

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