

**ATTACHMENT C**  
**RESPONDENT(S) ARGUMENT(S)**



## Respondent's Argument

Providing an accurate picture of my case in 6 pages is a challenge. I'll do my best. Since the beginning of the employment determination process five years ago there has not been an objective consideration of the facts. All I request is the same consideration that CalPERS gives to other members, and to have the same principles applied to my case. Instead, I have been put off and ignored, and overwhelmed with legal side issues leading to enormous legal expenses. CalPERS' defensive stance as an employer has made it impossible to act in its fiduciary role to give an objective determination and present unbiased interpretation of the PERL.

It was because of Arnold that I found out I was misclassified. In 2009 I applied for a civil service position, and on June 15<sup>th</sup> I accepted a job because the offer included the HAM (hiring above the minimum). My manager had not confirmed a start date. Then, Arnold threatened to change the retirement benefits effective July 1. I had been working on site at CalPERS continuously since 1998, so it seemed reasonable to expedite my start date. I found myself in a room with my manager where he told me that if I wanted a start date prior to July 1, I could not get the HAM. Under duress, I hesitated to decide. Then, he said that actually, I had better take the start date, because now, *even if I waited to start*, the liaison to HR had said she wasn't sure I could get the HAM. I was not given a real choice.

I was not seeking undue advantage. I was trying to preserve the offer that I had accepted. Why had CalPERS said that I might not get the HAM *even if I delayed my start date*? There was no valid reason to go back on their agreement.

The loss of the HAM was going to add up to over \$50,000 over the next few years. I attempted to work with CalPERS to resolve the HAM issue, and I was told that it could be done, but only under "extenuating" circumstances. I failed to see how 11 years of dedicated service to CalPERS was not "extenuating". I began investigating legal remedies, and soon realized that it could easily cost me more than the lost \$50,000 to get the HAM. However, in the process of investigating I became aware that I had been misclassified for the previous 11 years.

After notifying CalPERS that I had been misclassified, I was asked to fill out an Employment Relationship Questionnaire so that CalPERS could make a determination. Based on their subsequent insistence that common law factors did not apply to state, I don't understand why they asked me to fill out the questionnaire in the first place. Couldn't they have told me back then "This doesn't apply to state" and spared me and my family the years of legal nightmare and the accompanying emotional and financial stress?

I asked the analyst if she wanted me to reduce the amount of documentation, but she requested that I submit it all. In February of 2011, I submitted 500 pages, tabbed and neatly organized, which covered the period 1998 to 2009. The analyst informed me that she expected to have a determination in 30 days. Instead, I got nothing but delays and excuses for over 18 months.

This put me in a terribly unfair position as an employee of CalPERS. It was doubly awkward; not only was I putting CalPERS on the defensive about their own violations of the law, but I was trying to navigate the process while still inside the organization. As the body with responsibility to enforce the rules on other employers, and with the emphasis in recent years on transparency and ethics, I would have thought this issue would be important for CalPERS to address in a timely manner. But whenever I inquired about status, I was told it was being "under management review", that there were just a "few edits" to be done, that I would be given an update every 30 days going forward (which did not happen). I asked for estimated completion dates and could not get any response. When I was finally given an estimated date, the date came and went, and once again, my emails seemed to go into a black hole. Recent studies say being ignored is one of the worst forms of bullying. I understand that now. Out of desperation, I emailed Anne Stausboll at the CEO Mailbox and told her I had been waiting for 16 months for a reply I was told would take 1 month, and that my next step was to go before the Board during public comments to request a status. About two months later, the determination letter was issued. Otherwise, I believe it could have gone on for years. It isn't right that I had to do that.

When I read the determination letter, I was extremely disappointed. Primarily because it was not in my favor, but my biggest frustration came from the disconnection between what I submitted, how CalPERS addressed other cases, and the contents of that letter. It seemed as if no one had even looked at the information I submitted. They claimed to have applied the common law factors, the most significant being the "right to control manner and means of doing the work", but five out of seven pages focused on my contracts that stated I was an independent contractor. In other cases, such as the Cargill case, the Rudat case, the Kramer case, the Carnahan case, and the case most similar to mine, the Sean Bennett case, CalPERS discounted the existence of contracts with the employer as efforts to cloak an employee as an independent contractor. Why does CalPERS change the rules when applied to themselves? Doesn't virtually every case where CalPERS looks for misclassification involve a contract stating the person is an independent contractor? Ignoring the totality of the data and focusing only on a less significant factor was clearly self-serving and not appropriate behavior of a fiduciary.

The administrative remedy was to appeal the determination. Again, this put me in an extremely awkward position. By going to appeal, the burden of proof fell on me to prove that I was an employee. Normally, when CalPERS identifies a misclassified employee during an audit, the burden of proof is on the employer to prove that they were not. In many cases, CalPERS testifies on *behalf* of the employee at the hearing. In the Cargill case, they took it all the way to the California Supreme Court on behalf of thousands of misclassified employees. I was going into it at a disadvantage. Where was CalPERS for me in this process? There was never a point where CalPERS, the fiduciary, acted on my behalf. Instead, I ran into roadblock after roadblock from CalPERS, the employer.

If I'd had any idea it would take another three and a half years to get the case to hearing, I would have given up. Perhaps that is what CalPERS was hoping. In response to my appeal, CalPERS sent a letter telling me that the case had been sent to legal, and I should expect to be notified about a hearing date. But I was back in the same nightmare as before. The appeal was initiated in August, 2012. By January 25<sup>th</sup> of 2013, I still did not have a hearing date. Whenever I contacted CalPERS, whether by phone, by going into the area office, or through my attorney, I could not get an answer. In March, legal admitted they'd only received the case on January 29<sup>th</sup>. Where had it been for the 6 months prior to January, and why by March had the hearing date still not been scheduled? I cannot express how frustrating it was to be within CalPERS, having seen numerous occasions where someone with influence (e.g. a former Board member on behalf of a member) got same-day service, while I was being completely ignored. I didn't want special treatment; I just wanted what was fair. There are legal expenses just to have a case open. My witnesses were retiring, and people's memories were fading. I wanted the hearing within a reasonable time.

Instead of going to hearing, the next hurdle CalPERS put in front of me was a motion to bifurcate the case by requesting the ALJ to rule ahead of the hearing that the common law rules were not applicable to state employment. I am disappointed that CalPERS, knowing the legal expense involved, maliciously made me fight this motion. Their hypocritical decision to pursue it goes in the face of multiple facts:

- After 18 months to consider, CalPERS had cited the common law factors in my determination letter
- CalPERS issued a determination that Clark Kelso was a common law employee of the state.
- CalPERS cited the common law factors in the Linda Buzzini (state) determination.
- The **State Employer Handbook** published by CalPERS specifically says: "CalPERS uses the 'Common Law Control Test' as a guide to determining independent contractor status."
- EDD acknowledges that contractors working for the state can be misclassified and makes determinations using common law rules.
- On September 16, 2008, the Employer Services Division of CalPERS published Agenda Item #5 "Proposed Regulations: Determination of Employee Status" in which they stated: "The determination of employee status is crucial, because in order to preserve the tax-qualified status of the system, CalPERS must ensure it provides retirement benefits only to the common law employees of the *state*, school employers and contracting agencies". (italics added)

The above agenda item was recommended by CalPERS staff to codify the application of common law rules to use the factors from Cargill and Neidengard and apply them to all cases, including state. I don't know what became of these proposed regulations, but I very much resent that if CalPERS chose not to make the decision on this item with the input of the full Board of Administration back in 2008, that they would then try to resolve the issue at my personal expense. It's clear that CalPERS didn't want the common law factors applied to me because they knew I had a solid case. I felt like I was being punished for trying to hold CalPERS accountable.

The next frivolous and costly motion CalPERS brought up was to request all my tax records going back to 1998. CalPERS, who for 8 years straight had neglected IRS requirements to issue me 1099's, was suddenly concerned about my taxes. I would like to know if CalPERS requires tax returns for all employment determinations that are appealed. Did they require them for the thousand or more MWD employees that they enrolled? Their purported reasons for this intrusion were not justified; they would have the opportunity to interrogate me under oath during the hearing.

It wasn't until discovery that I saw the Employment Relationship Questionnaire filled out by CalPERS. CalPERS was late providing discovery. I had one weekend to review 5,172 pages of documents. Upon reading the employer questionnaire, I could see how if someone believed it was accurate, they could make an erroneous determination. CalPERS never contacted me to try to clarify the obvious contradictions between my questionnaire and the employer's. The employer questionnaire contains numerous material misstatements of fact; as an example, it states outright that I did not receive training, but in fact, CalPERS admitted in the hearing that I did. The rest of the misstatements are too numerous to address here, but evidence provided in the hearing contradicts those as well. That may be why CalPERS did not introduce the employer questionnaire as an exhibit during the hearing. They also did not call the

witness who filled it out. And yet, that employer questionnaire had significant impact on the initial employment determination. I implore the Board to read the Employment Relationship Questionnaire filled out by me and the one filled out by CalPERS.

I originally expected that the hearing would be a day, maybe two. At the pre-conference hearing, as CalPERS insisted they would need at least as many days as I would need for my testimony and witnesses, it grew into 10 days. All the parties involved seemed quite pleased that they were able to come up with dates that worked for the many calendars. I understand; to them it was just work. I was devastated, and considered dropping the case. In addition to using two weeks of vacation time, I was looking at two weeks of full-time attorney fees. Even if I won, I wasn't sure it would be worth the expense. I'd heard that the longest hearing from City of Bell took only 7 days. Since a lot of our witnesses overlapped, I didn't understand why CalPERS needed so much additional time. But, I had already waited so long and gone through so much to present my case that I couldn't just walk away. They say that justice delayed is justice denied. I feel the same way about justice that unnecessarily cost me my life savings. In the end, it took 6 days, and the CalPERS-only witnesses only took about two hours.

The hearing itself was very contentious. CalPERS had two attorneys to my one. During the hearing, CalPERS shut me down at every turn. I thought the point was to get the information out there for the judge to decide, and that the rules of evidence were not as strict as superior court. Instead, it was very disjointed. Several times, during the two and a half days as I testified under oath, I saw the CalPERS attorneys glance at each other and laugh. Maybe they weren't laughing at me, but it was a humbling experience; I would not put my worst enemy through that. They painstakingly took me through every contract I had had with CalPERS, but limited their line of inquiry to yes/no answers that could only be compared to the infamous "Have you stopped beating your spouse?" question. I was given no opportunity to explain. I know they were just doing their job, but I had waited so long to tell my story only to have them make a game of preventing relevant information from being introduced. If CalPERS was in the right, what information could I have that was so threatening?

When it was my turn to speak, between constant objections, I explained how the details of my work were controlled with Functional Requirements Documents, Technical Design Requirements and detailed procedures that must be adhered to, and I could feel eyes in the room glazing over. But that is how the work was done at CalPERS - I didn't just hand over a final "result". I worked as part of a team, and my work had to be signed off and documented each step of the way from requirements gathering to analysis, design, code reviews, unit testing, system testing, customer acceptance testing and implementation. If I proposed to make a change to program BCM200 that would have given the same final "result" as making the change in program BCM210, my technical lead would tell me to modify my technical design to put it in program BCM210 if he felt that was the right place to put it. I had to use their forms, follow their procedures. I didn't hand off completed work to be implemented by staff; I filled out the proper forms, got the customer's and my manager's signoff, and worked with staff every step of the way to get changes implemented in production. They had their reasons, but it is clear that CalPERS controlled "the manner and means" of my work.

CalPERS testimony seemed to be focused on proving that I had contracts, and that hiring civil service employees is hard. I agree. I understand *why* they bypass civil service rules, but that doesn't make it *legal*. There was also an assertion that I was hired due my high level of expertise and ability to hit the ground running. The truth is I spent years on the Retirement Information and Benefits System (RIBS), but when I started at CalPERS, I did not know the Natural/ADABAS programming language it was written in (I was a COBOL expert, and COBOL was used in only small parts of that system). All the "expertise" to which CalPERS refers came about because of my strong analysis skills and from being *on the job at CalPERS for so long*. I also had no pension experience prior to coming to CalPERS. It feels like I'm being punished for providing good service to CalPERS.

CalPERS also asserted that IT work is not part of their core business, even though that factor is not addressed in the Employment Relationship Questionnaire, and did not prevent them from making an employee determination in the Sean Bennett case with another employer. It's a bit Kafkaesque that the California Public Employees **Retirement System**, would hire me to work on their **Retirement Information and Benefits System** and assert that it was not part of the core business. Several of my contracts were directly with the Benefits Division under management of IT. I was not hired to upgrade server memory. I was working directly with the business on the core functionality of retirement and death benefit calculation and payment processing. CalPERS gave me remote access from home for after-hours support. I assisted on numerous occasions when the monthly roll failed and the benefit warrants would not have been issued if someone did not fix the problem. The attached CalPERS newsletter (published circa 2001), shows how some consultants, including me, were seamlessly integrated into the org chart with staff.

Due to a procedural issue, the judge did not allow me to do rebuttal, so a lot of inaccurate CalPERS testimony remained uncontested.

As the hearing closed, despite the difficulties and the extreme frustration of preparing a rebuttal that was left unsaid, I felt that more than enough solid testimony and exhibits had been presented to make my case. I began to feel very relieved, knowing at least it would be over soon. Then, it happened. At the *very last minute, of the very last day*, CalPERS introduced the “laches” motion. They waited 5 years to introduce it, at the moment I could not offer any evidence in response. My entire case had rested on the premise of appealing the determination letter, not defending against a stealth motion. After 5 years of deny, deny, deny, delay, delay, delay, CalPERS came back with “OK, so maybe you are right, but you took too long.” At least that is my understanding of the principle of laches. It seems like an arbitrary statute of limitations that can be used when there is no statute of limitations. I don’t understand why Judge Wong allowed it. I thought the purpose of the hearing was to appeal the original determination, not introduce new issues. Also, the principle of laches requires that the person is aware of the remedy available to them. I was not. I’d never even heard of section 20028 of the PERL until I read the Cargill case after I had become official state staff.

After the hearing, the expense was not over. We still had to submit written closing arguments and address the laches motion. In that opening laches brief, CalPERS states, “In asserting that she was misclassified from 1998 through 2009, respondent complains that she had to attend CalPERS meetings, complete status reports, and work with CalPERS staff. (Respondent’s Statement of Issues, at p. 2.) As a preliminary matter, these complaints are largely dictated by the terms of her company’s contracts with CalPERS.” Exactly. CalPERS makes my point for me – they wrote the contracts, which when followed, created an employer/employee relationship according to the common law rules. Again, as was shown in testimony, just because I was annoyed because I had a sense that they weren’t supposed to make me fill out vacation requests, doesn’t mean I had any concept of the full implications of our employment relationship. I thought I was following the law, was doing a good job, and that everyone was pleased with my services. I didn’t realize the organization I was working for was hypocritically going to the highest court in the state to force employers to pull people into membership, while simultaneously denying me my own membership rights.

Laches. I was supposed to inform CalPERS of the rules of CalPERS. Does CalPERS use this criteria when evaluating misclassifications for other CalPERS employers? Is the burden really on the employee to be a legal expert in the PERL? Where were the internal auditors? Allowing laches certainly does not provide an incentive for employers to comply – if they just wait long enough, the problem goes away. I struggle to understand exactly what I was supposed to tell CalPERS. That they were making me fill out vacation requests? They knew that. That I was required to be available full time? It was in the contract they wrote. I was willing to be an independent contractor, but it was CalPERS behavior that changed the nature of our employment relationship. I was there to do the work. I was not hired as a legal expert.

I was totally open about how my work was done. In fact, in 2008, I was interviewed by Ed Gregory and Sheri Cheung of Steptoe and Johnson. They represented CalPERS in the Cargill case which went all the way to the California Supreme Court, requiring the employer, Metropolitan Water District, to bring thousands of contract employees into CalPERS membership. Ed and Sheri interviewed me due to a different lawsuit which was filed against CalPERS when retirees’ social security numbers were printed in the address portion of the retiree newsletter. My work was a part of the chain of evidence. I explained to them exactly how my work was assigned and completed, and who my manager was. They knew I was a contract employee. I was told by the legal department that if I was pulled in, they would represent me as employee in that lawsuit. As the employer, at that time, they should have been aware of section 20028 and notified me of my rights to membership. But seven years later, CalPERS acts like they didn’t know I existed. That is disingenuous.

I have to say that reading Judge Wong’s interpretation of the testimony feels a bit like a game of “telephone”; possibly because I was unable to correct some misconceptions in rebuttal. For example, I did not contact CalPERS to request a 1099 in 2005. Fiscal called me about something else, and I mentioned it to the analyst as a courtesy. I knew I did not need a 1099 in order to pay taxes because I knew exactly what I had been paid, and I was not going to demand one because tax professionals recommend that you not request one in case it is inaccurate. But CalPERS line of questioning in the hearing made it sound like the IRS requires the employee to enforce the issuance of 1099’s, not the employer. I also find it frustrating that lack of a 1099, which points to a lack of compliance on CalPERS’ part is somehow used against me, even though I submitted the California State std. 204 form (equivalent to a federal W-9 tax form) with each of my contracts.

Judge Wong also mentions that the determination relates to the PERL, and not the State Civil Service Act. And yet, my acknowledgement that I thought submitting vacation requests did not apply to independent contractors was based on IRS rules, and I had no idea I was possibly eligible for membership under the PERL. My understanding of the principle of laches was that the defending party had to be aware of their rights, and I was not.

CalPERS, the employer, is claiming prejudice from the delay, but doesn't CalPERS, the fiduciary have an interest in preventing laches? Why would the Board, when there is no statute of limitations, want to limit their authority? Is it solely because the employer in this case happens to be CalPERS? Isn't it true that "The determination of employee status is crucial, because in order to preserve the tax-qualified status of the system, CalPERS must ensure it provides retirement benefits only to the common law employees of the *state*, school employers and contracting agencies", regardless of the employer? Does the application of laches endanger the "tax-qualified status of the system"? How long is too long? One year? Two years? Why did CalPERS go back 10 years in the Carnahan case?

At least Judge Wong agreed that during part of the period I was paid directly out of state funds. But somehow the evidence presented was not enough to convince him regarding the control factor. I feel there was substantial evidence that showed significant control exercised over my work. I'm not sure why Judge Wong did not agree. When I compare my situation to the Clark Kelso case, where CalPERS determined a common law relationship existed, I imagine that I was under much more direct supervision regarding the details of my work than was Mr. Kelso.

During this process, I was accused by CalPERS of asking for a "gift of public funds". Even Judge Wong stated that asking for that to which I may be legally entitled is *not* requesting a "gift of public funds". To those who would judge me, I would like to point out that everything I have done has been to CalPERS' benefit by pushing them in the direction of compliance. I would also like to quote the California Supreme Court decision in the Cargill case, asking that the reader swap the words "CalPERS" where it says "MWD", and "Ms. Almeida" where it says "CalPERS":

"Though we cannot rewrite the PERL to relieve MWD of the consequences it foresees from application of the law to its employment practices, MWD itself seemingly has the power to avoid at least some of them. As CalPERS observes, '[i]t was MWD who chose to hire [plaintiffs] through the providers instead of through its own merit selection system.' If, as it claims, MWD fears 'favoritism, cronyism and political patronage' will result from giving workers hired outside the merit selection system employee status, the agency retains the option of applying its merit selection system more broadly to avoid these evils."

As members of the Board of CalPERS, please consider the consequences of approving Judge Wong's decision. The message is that CalPERS considers itself above the Public Employee Retirement Law that created it. It gives CalPERS license to maintain an entire shadow workforce. Having witnessed the shadow workforce first-hand at CalPERS, I can tell you that the consequences of the shadow workforce create an environment that is not at all in alignment with CalPERS core values.

The Core Values listed in the lobby at Enron were

1. **Communication** – We have an obligation to communicate.
2. **Respect** – We treat others as we would like to be treated.
3. **Integrity** – We work with customers and prospects openly, honestly, and sincerely.
4. **Excellence**– We are satisfied with nothing less than the very best in everything we do. (*Enron*, Annual Report, 2000, p. 29).

They sound hauntingly familiar. I request that the board, in considering my request, maintain the CalPERS core values in mind as more than just words on a plaque.

Under section 20125, "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." I request that the board to review the hearing transcripts and make a decision consistent with how CalPERS has applied the law in other cases.

Respectfully submitted,



Roberta Almeida

# A Close-up on CalPERS Enterprise Server Unit

## Making Mainframe Magic

With the many advances in computer technology over the past decade, it would seem CalPERS computer processing would be done on the head of a pin, with a host of angels dancing to the nanosecond timing of syncopated audio-electronics. Not so! Did you know that the vast majority of CalPERS' transactions are still processed on the mainframe computer? And that the care and feeding of those systems is still provided by people? These are the people of the Enterprise Server Unit, and they are here to help!

This unit, made up of 23 dedicated staff and managers and consultants, take care of problems or changes that are needed on CalPERS Active Member and Retired Member Systems. The Enterprise Server Unit tackles problems on a host of systems, including our Member, Participant, Employer, Contribution Reporting, Actuarial Valuation, Public Agency Billing, Benefit Equity, Employer Reserve, (whew!) Retirement Benefits, Pre-Retirement Death Benefits, Post Retirement Death Benefits, and Judges and Legislators Retirement Systems. (Or as some might know them: MBR, EMR, CRS, AVS, PA Billing, BE, EMP, RIBS, Pre & Post Death, J&L, etc.)

The hardworking members of this unit bring a wealth of information technology experience to CalPERS. Their work focuses on staff service requests and problem reports, and the development of parts and pieces to help these systems talk to newly developed technology. For example, the unit is currently developing many of the COMET P4P1 Backbridge and Refresh components. They have also provided the major technical services to support the Middleware project, AVS Mapping, Benefit Equity II, and SLIP II projects, and are making major improvements to the Service Credit Buyback Accounting components of CRS.

In their spare time, they are working on implementing new software engineering and project management practices to ensure that their development work continues to come in on time and within budget, meeting our requests and making us smile when we celebrate the successful implementation of our latest project.

It's not a walk in the park, though. There are late nights and weekends; a myriad of meetings and procedures that it takes to clarify requirements, to optimize design, to develop programs, to test the performance, to implement the latest project, and finally to support and maintain those programs until the next time they need changing.

Hats off to the Enterprise Server Unit. Keep up the great work!



*(Left to Right): Mary Chipman, Wade Malenchuk, Ruth Briggs, Edward Maxwell, Hap Pipes, Walt Welton, Robbie Almeida, Doug Swenson, Don Lai, Mike Morrison, Don Wroth, Scott LaVine, Robert Pimenta and Hany Aty*



*(Left to Right): Cindy Villines, Samir Elzahery, Sue Sloan, Jay Maistry, Mani Padmanabhen, Judy Brehm, Roberta Reagan, Dale Alvarez, Leslie Slabert, Earl Rogers, Ingrid Van Rooyen, Sukhie Dhaliwal, Jim Burnham, Marwan Aboudiab, Sandra de Beers and Lance Jackson*

**Thank you for your contribution  
to this issue!**

Wayne Breece, Kristen Claudy, Heidi Evans, Angela Glasgow, Rick Manness, Lindy Plaza, Patti Touhey, Leta Yee