



California Public Employees' Retirement System
Customer Account Services Division
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Sacramento, CA 94229-2709
TTY: (877) 249-7442
888 CalPERS (or 888-225-7377) phone • (916) 795-4166 fax
www.calpers.ca.gov

February 12, 2015

Desi Alvarez
[REDACTED]
[REDACTED]

Dear Mr. Alvarez;

The California Public Employees' Retirement System (CalPERS) previously notified you and the Chino Basin Watermaster (the Agency) by letters dated February 20, 2013, and June 17, 2013, that compensation reported on your behalf by the Agency from May 3, 2011 through May 4, 2012, does not comply with the California Public Employees' Retirement Law (PERL) and will not be used to calculate your retirement benefits. This letter is a supplemental determination regarding the CalPERS membership status of the transition period defined in the Confidential Separation Agreement between yourself and the Agency.

CalPERS received your timely appeal of the June 17, 2013, determination letter and the Administrative Remedy Process is in motion. As a matter of efficiency these issues will be consolidated and the decision referred to in this letter will be incorporated into the hearing calendared for March 11-13, 2015 (revised date).

Government Code Section 20125 provides: "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." The California common law employment test is used by the courts and the CalPERS Board of Administration to determine "employee" or "independent contractor" status under the Public Employees' Retirement Law (PERL)¹. In determining whether one who performs services for another was an employee or an independent contractor, the most important factor was the right to control the manner and means of accomplishing the desired result. If an employer has the authority to exercise complete control, whether or not that right was exercised with respect to all details, an employer-employee relationship exists. Other factors taken into consideration are (a) whether or not the one performing services was engaged in a distinct occupation; (b) the kind of occupation with reference to whether, in the locality, the work was usually done under the direction of the principal or specialist without supervision; (c) the skill required; (d) whether the principal or the workman supplies the instrumentalities and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by

¹ See *Metropolitan Water Dist. v. Superior Court (Cargill)* (2004) 32 Cal.4th 491 which held the terms "independent contractor" and "employee" of a contracting agency must be defined with reference to California common law.

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the time or by the job; (g) whether or not the parties believe they are creating the relationship of employer-employee².

CalPERS utilizes the common law control test to determine the status of employment under any CalPERS covered agency. The Membership Analysis and Design Unit (MADU) of CalPERS has reviewed both the May 2011, Employment Agreement between yourself and the Agency, and the subsequent January 2012, Confidential Separation Agreement for common law factors.

The May 2011 Employment Agreement: Numerous factors contained in the Employment Agreement reflect common law control. The Employment Agreement specifies that the work shall be performed by you. It further defines specific duties and responsibilities, including administration and oversight, and providing day-to-day leadership of Agency functions. The Agreement also dictates that you report to, and are subject to control and direction by, the Agency Board of Directors. CalPERS has determined that under the terms of the 2011 Employment Agreement, an employer-employee relationship existed.

The January 2012 Confidential Separation Agreement: Although the Separation Agreement states it is an amendment to the existing agreement, CalPERS notes that the title of the agreement changes from "Employment Agreement" to "Separation Agreement", and that all compensation and benefits delineated in the agreement are specified as "Severance Compensation". Article 1 clearly terminates the previous employment as of November 9, 2011. While it states that you shall continue to be employed until May 2012 in a "transition period", it also clearly states that you have no authority and no duties within that transition period. The Agreement further states that you are free to pursue other work provided it is not detrimental to the Agency. Because the Confidential Separation Agreement provides no duties or responsibilities that indicate common law control by the Agency, CalPERS has determined that no employer-employee relationship exists for the transition period of November 10, 2011 to May 3, 2012, and this time period is not reportable to CalPERS.

In addition to reviewing the agreements for common law factors, MADU reviewed the Confidential Separation Agreement under the relevant membership provisions of the PERL. Government Code 20069(a) defines service for retirement purposes as;

"...service rendered as an employee or officer (employed, appointed, or elected) of the state, the California Institute for Regenerative Medicine and the officers and employees of its governing body, the university, a school employer, or a contracting agency, for compensation, and only while he or she is receiving compensation from that employer therefor, except as provided in Article 4 (commencing with Section 20990) of Chapter 11."

² The factors to consider are enunciated in *Tieberg v. Unemployment Ins. Bd.* (1970) 2 Cal.3d 943, 949 and *Empire Star Mines v. California Employment Com.* (1946) 28 Cal.2d 33, 43-44. See also CalPERS Precedential Decisions in the Matter of the Statement of Issues of *Lee Neldengard, Respondent and Tri-Counties Regional Center, Respondent*, Precedential Case No. 05-01 (2005) and in the Matter of the Application to Contract with CalPERS by *Galt Services Authority, Respondent, and City of Galt, Respondent*, Precedential Case No. 08-01 (2008).

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Because the transition period defined in the Confidential Separation Agreement carries no duties or responsibilities, there is no service rendered within the meaning of G.C. 20069(a).

Government Code 20028(b) defines an employee for retirement purposes as;

"Any person in the employ of any contracting agency."

Because there is no common law employer/employee relationship, and no service rendered, and because the severance pay is not compensation earnable for retirement purposes, the Transition Period does not constitute employment with a contracting agency, and CalPERS has deemed that you were not an employee of the Agency within the meaning of G.C. Section 20028(b) for the period from November 10, 2011 (revised date) through May 4, 2012, and this time is not reportable to CalPERS.

You have the right to appeal the decision referred to in this letter if you desire to do so, by filing a written appeal with CalPERS, in Sacramento, within thirty days of the date of the mailing of this letter, in accordance with Government Code section 20134 and sections 555-555.4, Title 2, California Code of Regulations. An appeal, if filed, should set forth the factual basis and legal authorities for such appeal. A copy of the applicable statute and Code of Regulations sections are included for your reference. If you file an appeal, the Legal Office will contact you and handle all requests for information.

Your appeal will be set for hearing with the Office of Administrative Hearings (OAH). The assigned CalPERS attorney will contact you to coordinate a hearing date. Depending on the current caseload of the OAH and the assigned attorney, the hearing date may be set several months after the case is opened. The OAH will typically offer its earliest available hearing date that meets the schedule of both parties.

If you choose not to be represented by an attorney, the assigned CalPERS lawyer will be in direct communication with you during the appeal process. If you do hire an attorney, please let CalPERS know immediately so our attorney can work directly with him or her.

Enclosed is an informational brochure on the General Procedures for Administrative Hearings.

After the hearing is completed, the Administrative Law Judge will issue a Proposed Decision in approximately 30 days. The CalPERS Board of Administration will then make a determination whether to accept or reject that Proposed Decision. If the Board rejects the Proposed Decision, they will hold a Full Board Hearing in order to review the entire hearing record again before finalizing their decision.

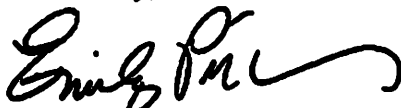
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Your appeal should be mailed to the following address:

RENEE OSTRANDER, Assistant Division Chief
Customer Account Services Division
P.O. Box 942709
Sacramento, CA 94229-2709

CalPERS remains committed to assisting our members in all matters related to their retirement within the statutory authority available to us. Should you have any further questions regarding this matter contact Christina Rollins, Manager of the Membership Analysis and Design Unit, at (916) 795-2999.

Sincerely,



EMILY PEREZ de FLORES, Manager
Membership Management Section
Customer Account Service Division

cc: Chino Basin Watermaster