

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Appeal Regarding
CalPERS Membership of:

Case No. 2015-0303

PETER H. VAN AUKEN,

OAH No. 2016020997

Respondent,

and

COUNTY OF PLACER,

Respondent.

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on August 5, and October 17, 2016, in Sacramento, California.

Christopher C. Phillips, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Clayton T. Cook, Deputy County Counsel, represented the County of Placer (Placer).

Peter H. Van Auken (Van Auken) appeared on his own behalf.

Evidence was received and the record remained open for parties to submit written closing arguments. Placer and CalPERS timely submitted written closing arguments on December 5, 2016, which were marked for identification as Exhibit G and Exhibit 19, respectively. Placer timely submitted a written reply closing argument on December 19, 2016, which was marked for identification as Exhibit H. CalPERS did not submit a written reply closing argument. Van Auken did not submit any written closing argument. The record was closed and the matter was submitted on December 19, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED January 19, 2017

ISSUES

Whether Van Auken was an employee or an independent contractor of Placer during the period of September 6, 1988 through June 30, 1994?

FACTUAL FINDINGS

Jurisdictional Matters

1. Placer is a contracting agency with CalPERS, and its qualifying employees are members of CalPERS. The provisions for public agencies contracting with CalPERS are set forth in the Public Employees' Retirement Law (PERL).

2. On February 10, 2009, Van Auken signed a form entitled Request for Service Credit Cost Information - Service Prior to Membership, CETA & Fellowship, whereby Van Auken initiated a request to purchase service credit with Placer for the period of September 6, 1988 through June 30, 1994. The form was stamped received by CalPERS on March 10, 2009.

3. On October 8, 2014, CalPERS notified Placer of its determination that Van Auken was a common law employee of Placer during the period of September 6, 1988 through June 30, 1994, and that Van Auken should retroactively be treated as a CalPERS member during this period. CalPERS further notified Placer that this determination would make Placer and Van Auken liable for payment of contribution costs without interest.

4. On November 4, 2014, Placer sent a letter formally notifying CalPERS of its request for an appeal of CalPERS's determination. Van Auken did not join in Placer's appeal. CalPERS, in response to Placer's appeal, filed a Statement of Issues, made by Renee Ostrander in her official capacity as Chief, Employer Account Management Division, CalPERS. This hearing followed.

Van Auken's Employment Status

5. Van Auken was a licensed physician during all times relevant to this matter. Van Auken agreed with Placer by a series of written agreements beginning September 6, 1988 through June 30, 1994, to serve as the medical director of Placer County Mental Health Services. During this period of time, Van Auken was designated as an independent contractor, and was not offered CalPERS membership. Subsequently, during the period beginning on July 1, 1994, until Van Auken's retirement in June 2009, Placer designated Van Auken as an employee, and reported his earnings to CalPERS.

6. The written agreement between Van Auken and Placer covering the period of September 6, 1988 to June 30, 1989, could not be located by the parties and was not offered into evidence. The written agreements covering the period of July 1, 1989 through June 30,

1994, are substantively identical in all relevant respects, except for the amount of compensation. Van Auken's responsibilities as medical director are set forth in the written agreements as follows:

MEDICAL DIRECTOR: Shall use the premises solely for the practice of medicine and other duties at the mental health program as generally directed by the COUNTY, including but not limited to the supervision of medical activities, medical quality of care, prescribing medication, medical responsibility and coverage, consultation, evaluations, attendance at Medical Staff meetings, Quality Assurance Committees, court appearances and other services required by the Mental Health Program. The Medical Director or designee will determine needs and set priorities of the clinic.

7. The written agreements state that Van Auken is an independent contractor, as follows:

INDEPENDENT CONTRACTOR: In performance of the work, duties and obligations devolving upon him under this agreement, it is mutually understood and agreed that the MEDICAL DIRECTOR is at all times acting and performing as an independent contractor practicing his profession of medicine and specializing in Mental Health Program Services.

8. The written agreements further state that Placer shall furnish space, equipment, supplies and personnel deemed necessary, for the medical director's use during the times arranged by the county. Additional terms include but are not limited to the following: the medical director will be allowed a maximum of four days per year to attend continuing education programs away from the work site; the county shall pay the medical director per scheduled hour of clinic services, in a dollar amount stated in each of the separate agreements; the medical director shall present the county with detailed billings as a precondition of payment; the medical director's work schedule will average 40 hours per week, 48 weeks per year, on a schedule to be determined by the county; the medical director is not permitted to assign any rights under the agreement; the term of the agreement is for one year, and either party shall have the right to terminate the agreement on 30 days written notice to the other party; the county shall provide, at its own expense, malpractice insurance coverage for the medical director; the medical director shall hold the county harmless for injury or damages arising from the medical director's performance under the agreement; and the county shall pay the medical director mileage expenses incurred to meet the contract obligations.

9. During the period of September 6, 1988 through June 30, 1994, Van Auken provided medical director services on the county's premises. The county provided Van Auken with an office, office supplies, letterhead, and business cards. He worked under the

general supervision of the director of Placer County Mental Health Services. The director of Mental Health Services was a licensed clinical social worker, and did not supervise Van Auken regarding his medical decision-making.

10. Placer paid Van Auken at his normal hourly rate for the designated four days per year of continuing education during the period of September 6, 1988 through June 30, 1994. Beyond the paid malpractice insurance, Placer did not provide to Van Auken any other fringe benefits such as paid health benefits or paid vacation. During this time, Placer did not withhold taxes or make any other payroll deductions for Van Auken. Instead, at the end of each year, Placer gave Van Auken an Internal Revenue Form 1099, indicating sums paid to Van Auken during the year. Van Auken believed his status during this period of time was as an independent contractor.

11. Effective July 1, 1994, Van Auken was designated as an employee by Placer. There was no change in Van Auken's responsibilities or job duties as medical director between the end of his contract on June 30, 1994, and the initiation of his status as an employee. His job title changed to chief physician, but his responsibilities remained substantially the same. The primary change for Van Auken was that he had employee benefits such as paid vacation and health benefits, and became a contributing member of CalPERS.

Defense of Laches

12. Placer asserts that CalPERS is barred by the doctrine of laches from retroactively determining that Van Auken was an employee during the period of September 6, 1988 through June 30, 1994. Placer contends it was prejudiced by the fact that Van Auken waited until February 10, 2009, to initiate his request to purchase service credit for the period of September 6, 1988 through June 30, 1994, and that CalPERS waited until October 8, 2014, to notify Placer of its determination that Van Auken was a common law employee during the period of September 6, 1988 through June 30, 1994. As discussed in Legal Conclusion 7, below, the defense of laches will not be applied when it would preclude a state agency such as CalPERS from taking action consistent with a fundamental public policy.

Discussion

13. Based on the Factual Findings and the applicable law set forth in the Legal Conclusions below, Van Auken was a common law employee during the period of September 6, 1988 through June 30, 1994. Placer's evidence and arguments to the contrary have been considered and are unpersuasive. For these reasons, and as discussed below, Placer's appeal must be denied.

LEGAL CONCLUSIONS

1. The law governing CalPERS is set forth in the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq. Government Code section 20022 defines a "contracting agency" to mean "any public agency that has elected to have all or part of its employees become members of this system and that has contracted with the Board for that purpose." Government Code section 20028, subdivision (b), defines an "employee" to mean "[a]ny person in the employ of any contracting agency."

2. Pursuant to Government Code section 20125, the Board determines who are employees under the PERL, 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.) The California Supreme Court held in *Metropolitan Water District v. Superior Court (Cargill)* (2004) 32 Cal.4th 491, 509, that CalPERS must apply the common law test for employment when determining whether individuals are employees of a public agency. In *Cargill* the court used the common law employment test to provide CalPERS pension benefits to employees.

3. In *Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, 949 (quoting *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43-44), the California Supreme Court explained the common law test for employment as follows:

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. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations.] Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, 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 the time or by the job; (g) whether or not the work is part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (Rest., Agency, § 220; Cal. Ann., § 220.)

In *Tieberg*, the California Supreme Court applied the common law employment test and upheld the lower court's determination that freelance writers were employees because the employer exercised considerable control and direction over the work product through the process of revision and approval of drafts.

4. CalPERS issued a precedential decision relying upon the *Cargill* and *Tieberg* holdings, *In the Matter of the Application for CalPERS Membership Credit by Lee Neidengard*, Board of Administration's Precedential Decision 05-01. The *Neidengard* matter involved a physician who worked for an organization contracting with CalPERS. The organization transitioned the physician from employee to independent contractor status, during which time the physician signed a series of professional services agreements stating that he was an independent contractor. The physician was subsequently transitioned back to employee status. The compensation arrangements changed with the transitions from employee to independent contractor and back to employee, but the substance of the physician's work responsibilities did not. After applying the common law test set forth in *Tieberg*, the decision in *Neidengard* was that the physician was in fact an employee during the entire period of his work, notwithstanding the fact that the professional services agreements signed by the physician stated that he was an independent contractor.

5. This matter is similar to *Neidengard*. Van Auken was initially designated as an independent contractor pursuant to written agreements signed by the parties, then transitioned to employee status. The substance of Van Auken's responsibilities did not change with the transition. Also, the common law criteria set forth in *Tieberg* are consistent with employee status. First, Placer exercised considerable if not complete control over the manner and means by which Van Auken performed his work. Placer furnished the space, equipment, supplies and personnel for Van Auken. Placer also determined Van Auken's clinic hours, and prohibited him from assigning any of his rights or responsibilities to another professional. In these ways, Placer exercised substantial control over the manner and means by which Van Auken performed his services.

6. The secondary factors outlined in *Tieberg* are also consistent with CalPERS's determination that Van Auken was an employee and not an independent contractor during the period of September 6, 1988 through June 30, 1994. Placer supplied the office space, equipment, supplies, and personnel to staff the clinic and facilitate Van Auken's work. (*Tieberg* factor (d).) The method of payment was measured by the hour. (Factor (f).) The work performed by Van Auken was part of Placer's regular business. (Factor (g).) Other factors, if considered in isolation, would point to independent contractor status. Specifically, factors (a) (distinct occupation), (c) (skill), and (h) (whether the parties believe they are creating an employer-employee relationship) do not individually support a conclusion that Van Auken was an employee. However, "the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351.) The factors taken as a whole are consistent with the conclusion that Van Auken was an employee during the time in question.

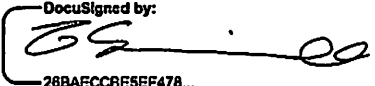
7. The equitable doctrine of laches may be applied when a public agency unreasonably delays in taking action against a party, and the party is prejudiced as a result of the delay. (*City and County of San Francisco v. Pacello* (1978) 85 Cal.App.3d 637, 644-645.) But the doctrine of laches will not be applied to preclude a state agency from taking action when the action concerns a public policy. (*City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 395.) CalPERS's authority to administer the public retirement system is a matter of great and fundamental public policy, protected by the California Constitution. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1493; Cal. Const., art. XVI, § 17.) For these reasons, the defense of laches will not be applied to bar CalPERS from retroactively determining that Van Auken was an employee during the period of September 6, 1988 through June 30, 1994.

8. For all of the foregoing reasons set forth in the Factual Findings and Legal Conclusions, Van Auken was a common law employee of Placer during the period of September 6, 1988 through June 30, 1994. Therefore, the rights and obligations of CalPERS membership during this period apply.

ORDER

Placer's appeal is denied, and CalPERS's determination to allow Van Auken to purchase service credit for the period of September 6, 1988 through June 30, 1994, is upheld.

DATED: January 17, 2017

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TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings