

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent County of Placer (Placer) is a contracting agency with CalPERS, and its qualifying employees are members of CalPERS. Respondent Peter H. Van Auken, M.D. (Respondent Van Auken) is a miscellaneous member of CalPERS by virtue of his employment with Placer.

Beginning September 6, 1988, through June 30, 1994, Respondent Van Auken provided services to Placer as Medical Director by a series of written contracts. The contracts designated Respondent Van Auken as an independent contractor. As a result of being treated as an independent contractor, Respondent Van Auken was not reported to CalPERS by Placer as an employee and was not offered CalPERS membership.

Beginning July 1, 1994, Placer designated Respondent Van Auken as an employee and reported his earnings to CalPERS. There was no break in services provided by Respondent Van Auken. Placer reported Respondent Van Auken's earnings to CalPERS until his retirement in June 2009.

While preparing his application for service retirement, Respondent Van Auken mentioned to CalPERS staff that there was a period of time that he worked for Placer as an independent contractor and inquired if he could purchase the service credit. Respondent Van Auken was provided the Request for Service Credit Cost Information form, which he filled out and submitted. After performing a review of the services provided from 1988 to 1994, CalPERS determined that Respondent Van Auken was a common law employee of Placer. Rather than permitting Respondent Van Auken to purchase the service credit, CalPERS informed Placer and Respondent Van Auken that a correction was required and membership in CalPERS, along with the corresponding contributions, is required from September 6, 1988, through June 30, 1994. Placer filed a timely appeal.

A hearing was held on August 5, and October 17, 2016. Placer was represented by counsel and Respondent Van Auken chose to rely on CalPERS' presentation of evidence as he was in agreement with the determination at issue. The issue was whether Respondent Van Auken was a common law employee of Placer during the contracting period.

The Administrative Law Judge (ALJ) correctly utilized the common law employment test as set out in the California Supreme Court cases of *Metropolitan Water District v. Superior Court (Cargill)* (2004) 32 Cal.4th 491, and *Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, as well as the CalPERS precedential decision *In the Matter of the Application for CalPERS Membership Credit by Lee Neidengard* 05-01.

The ALJ likened this appeal to the *Neidengard* decision in that Respondent Van Auken was initially designated as an independent contractor pursuant to written agreements,

then transitioned to employee status. The substance of Respondent Van Auken's duties did not change with the transition. His job titled changed from Medical Director to Chief Physician, but his responsibilities remained the same. The primary change for Respondent Van Auken from independent contractor on June 30, 1994, to employee on July 1, 1994, was that he had employee benefits such as paid vacation and health benefits, and became a contributing member of CalPERS.


The ALJ found that the common law criteria from *Cargill* and *Tieberg* are consistent with employee status. Placer exercised considerable, if not complete control over the manner and means by which Respondent Van Auken performed his work. Placer furnished the space, equipment, supplies and personnel for Respondent Van Auken. Placer also determined Respondent Van Auken's clinic hours and prohibited him from assigning any of his rights or responsibilities to another professional.

Placer argued that CalPERS is barred by the doctrine of laches from retroactively determining that Respondent Van Auken was an employee during the contract period because it was prejudiced by the lapse of time. The ALJ dismissed the argument because the defense of laches will not be applied when it would preclude a state agency from taking action consistent with a fundamental public policy.

The ALJ concluded that Placer's appeal should be denied. 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. Placer may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

March 15, 2017



CHRISTOPHER PHILLIPS
Senior Staff Attorney