

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

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6 **BOARD OF ADMINISTRATION**
 7 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

9	In the Matter of the Appeal Regarding)	Agency Case No. 2015-0303
10	CalPERS Membership of)	OAH Case No. 2016020997
11	PETER H. VAN AUKEN,)	
12	Respondent,)	RESPONDENT COUNTY OF PLACER'S
13	and)	ARGUMENT
14	COUNTY OF PLACER,)	
15	Respondent.)	
16)	

17
 18 Respondent County of Placer submits its response to the proposed decision of the
 19 Administrative Law Judge (ALJ) in this matter and requests that the Board of Administration of the
 20 California Public Employees' Retirement System (CalPERS) decline to adopt the decision. In
 21 addition, the County of Placer requests that the decision not be designated as precedent if it is
 22 adopted since it is not supported by legal precedent and would cause significant injury to all public
 23 entities with persons contributing to CalPERS.

24 The ALJ ruling in this matter involves a determination whether the respondent, Peter Van
 25 Auken, was an employee or an independent contractor for the period of 1988 to 1994. Dr. Van
 26 Auken filled out a Request for Service Credits document in February of 2009 where he indicated that
 27 he believed he was an employee of the County of Placer from 1988 to 1994. The request spawned an
 28 investigation by CalPERS which resulted in a determination that Dr. Van Auken was an employee.

1 The County of Placer appealed the determination and an administrative hearing was conducted. Dr.
 2 Van Auken testified, but no County of Placer employees who were employed between 1988 and
 3 1994 were called to testify since all had either retired or left employment and were unable to be
 4 reached or did not recall the circumstances of the contracts. The passage of twenty-five to thirty
 5 years caused a severe detriment to the County since it was unable to provide evidence of the working
 6 relationship between Dr. Van Auken and the County. Nonetheless, the ALJ ruling held that the
 7 defense of laches could not as a matter of law be applied against CalPERS. The decision barring the
 8 County's equitable defense of laches, and then determining that Dr. Van Auken was indeed an
 9 employee, are misguided and ultimately prejudiced the County since it was required to defend a case
 10 without any percipient witnesses.

11 I.

12 **THE EQUITABLE DEFENSE OF LACHES SHOULD BE APPLIED**

13 The ALJ ruling wrongly concludes that the equitable remedy of laches is not available to an
 14 entity to contest improper delay by either the employee or CalPERS, and that an employee's right to
 15 petition a classification decision exists regardless of the level or length of neglect by either the
 16 employee or CalPERS. (See Proposed Decision, Factual Finding No. 12 (determining that defense of
 17 laches cannot as a matter of law apply to CalPERS), Legal Conclusion No. 7.) The finding is not
 18 supported by the case law, and creates a significant injustice because its reasoning allows virtually
 19 any actions brought involving CalPERS regardless of whether the issue was brought up thirty, forty
 20 or even fifty years afterwards. Then, the public entity is forced to defend those decisions with little to
 21 no resources at its disposal. Further, courts have acknowledged the possibility of equitable arguments
 22 with respect to employee classification decisions, and the conclusion reached by the ALJ ruling
 23 contradicts that precedent. (See *City of Oakland v. Public Employees' Retirement System* (2002) 95
 24 Cal.App.4th 29.) In *City of Oakland*, CalPERS sought retroactive contributions from the city for
 25 approximately 55 Airport Servicemen for a 22 year period. (*Id.* at 52.) The court noted that
 26 CalPERS "simply failed to investigate the information that it discovered" for over ten years, and that
 27 the equities all pointed in favor of the city. (*Id.* at 51-52.) The court then provided a roadmap where
 28 the equitable defense of laches should be raised in similar situations. Ultimately, the court declined

1 to apply the defense since it was not raised by the city during the lower court proceedings and was
2 only mentioned cursorily in the city's arguments at the appeal stage. (*Id.* at 52.) The Court's ruling
3 nonetheless identifies the viability of the equitable argument for laches.

4 The defense of laches has been applied in other similar proceedings against other state
5 agencies like the California Personnel Board. See *Brown v. State Pers. Bd.* (1985)166 Cal. App. 3d
6 1151.) In that case, the Third District Court of Appeal held:

7 In civil actions laches is a bar to equitable relief. (7 Witkin, Summary of Cal. Law (8th
8 ed. 1974) Equity § 14, pp. 5239-5240; *Stevenson v. Boyd* (1908) 153 Cal. 630, 636 [96
9 P. 284].) It has been made applicable to quasi adjudicative proceedings as a common
10 law policy pursuant to the "inherent power [of courts] independent of statutory
11 provisions to dismiss an action on motion of the defendant where it is; not diligently
12 prosecuted." (*Steen v. City of Los Angeles* (1948) 31 Cal.2d 542, 546 [190 P.2d 937];
13 cf. *Gates v. Department of Motor Vehicles* (1979) 94 Cal.App.3d 921, 924-925 [156
14 Cal.Rptr. 791]; see generally Cal. Administrative Hearing Practice (Cont. Ed.Bar
15 1984) Proceedings Before Hearing, § 2.21.) "The policy to expedite justice underlying
16 the rule, exists where the proceeding is before a local administrative agency exercising
17 quasi judicial functions such as the board in the instant case. By analogy a proceeding
before such a board should be dismissed where an unreasonable time has elapsed
-- where the proceeding is not diligently prosecuted." (*Steen, supra*, at pp. 546-
547.) In such cases" the appointing power is analogous to what in a civil action would
be the plaintiff, and the employee the defendant." (*Id.*, at p. 547.) Thus the
administrative agency must diligently pursue the disciplinary action as if it were
seeking equitable relief. In measuring diligence the courts will apply notions of laches
borrowed from the civil law.

18 (*Id.* at 1158-59 (emphasis added).)

19 Here, there were significant delays and neglect by both the employee, Dr. Van Auken, and by
20 CalPERS, which led to the County of Placer being forced to defend a factual scenario that occurred
21 over two decades earlier. The most significant delay was a period of fifteen years where Dr. Van
22 Auken did nothing to contest his classification as an independent contractor. The reason for the delay
23 was because Dr. Van Auken believed, and continues to believe, that he was indeed an independent
24 contractor during the period at issue (1988-1994). Dr. Van Auken made the following statement in
25 regards to his submission of the Request for Service Credits to CalPERS:

26
27 And I believe that, you know, I was an independent contractor. All was clear, above
28 board. I don't imagine that I would have asked for a credit for that time because I
considered myself not to have been eligible for that time. The first I heard of a

1 possibility that I might be eligible was when I was contacted by CalPERS [in
2 November 2009]...

3 I would not have asked for time that I didn't believe I was entitled to. And I certainly
4 didn't think I was entitled to it then. Since then[,] CalPERS raised the question that
5 maybe it was improper to call me a contract employee. But I – that was the first – that
6 was a complete surprise for me. I had no recollection of signing any form.

7 (Day 2 Hearing Transcript, 104:2-106:9 (emphasis added).) He further emphasized his point later in
8 the hearing. "Well, in 2009, I had no thought in my head of buying back time from Placer County
9 because I thought that they were right, I was a contract employee." (*Id.* at 128:18-21 (emphasis
10 added).) He then stated:

11 I'm surprised that there was a request specifically for time from Placer County. It
12 doesn't make sense because I believed I was a contract employee. Nobody had
13 suggested to me at the time that I might not be a contract employee but a regular
14 employee.

15 (*Id.* at 130:4-8.) Dr. Van Auken did not request CalPERS' inquiry into whether he was an
16 employee (*Id.* at 102:11-17), and believed that he filled out the Request for Service Credits to buy
17 back time from his prior position with Napa State Hospital, not Placer County, since the document
18 he filled out "ha[d] nothing to do with buying back county time prior to '94." (*Id.* at 106:12-24,
19 127:23-128:4.) As a result, Dr. Van Auken actually believed CalPERS was asking him to request
20 service credits for a different period of employment, with a completely different entity and was not
21 actually contesting his status as an independent contractor. During that decade and a half prior to the
22 request, he never filed a lawsuit for breach of contract, he never contested the decision with the
23 County, nor did he file a request with CalPERS. He chose to do nothing.

24 CalPERS also slept on its duties for over four years, which by itself is longer than
25 comparable statutes of limitations.¹ CalPERS initially investigated the matter in 2009, but then set it

26 ¹ The defense of laches requires an unreasonable delay plus either acquiescence in the act about which plaintiff
27 complains or prejudice to the defendant resulting from the delay. (*Brown v. State Pers. Bd.* (1985) 166 Cal.App.3d 1151,
28 1158-1159.) "[T]here is no fixed rule as to the circumstances that must exist or as to the period of time which must elapse
before the doctrine of laches can be appropriately applied." (*Id.* at 1159.) However, "in cases in which no statute of
limitations directly applies but there is a statute of limitations governing an analogous action at law, the period may be
borrowed as a measure of the outer limit of reasonable delay in determining laches." (*Id.* at 1159-1160.) The statute of
limitations for a mistake is three years (CCP 338, subd. (d)), while the statute of limitations for a breach of a written
contract is four years (CCP 337).

1 aside for four years before deciding to dig up old files and check on their status in late 2013. During
 2 the four years between November 2009 and December 2013, there were no communications or
 3 discussions from CalPERS regarding the service period of 1988 to 1994, and there was essentially
 4 nothing done on the case. The CalPERS representative, Jamila Nelson, noted that the delay was
 5 because information was missing, she was working on other more completed cases and she was
 6 juggling a full workload. When she finally did make a decision, it was based on the information she
 7 had in her possession in 2009.

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 9 The conclusion by CalPERS that Dr. Van Auken was an employee was made in October of
 10 2014, five-and-a-half years after Dr. Van Auken's initial request for service credits, and twenty-plus
 11 years after the timeframe of work at issue in the determination. The delay of time was injurious to
 12 the County. The County was missing pertinent information. It was unable to find one of the five
 13 years of contracts because they had been logged as standard business contracts, not as employment
 14 records. It also no longer employed any of the people who worked with Dr. Van Auken. In specific,
 15 Dr. Van Auken's alleged supervisors, Joel Sorum and Barbara Madsen were no longer employed by
 16 the County, nor was Fred Johnson. Those persons were the parties who signed the service
 17 agreements between 1989 and 1994 as well, and were the persons with information about the actual
 18 working relationship with Dr. Van Auken. Therefore, the County had little information outside of
 19 the statements from Dr. Van Auken by which it could determine the status of his working
 20 relationship with the County twenty years before. Even if it could find witnesses, those persons
 21 would be asked about seemingly insignificant details occurring two decades earlier. As evidenced by
 22 Dr. Van Auken's recollection of the events, and his testimony at the hearing, any memories on those
 23 issues would be spotty at best. As a result, there was a significant prejudice to the County in
 24 defending against the claims. CalPERS' counsel astutely noted the issue in his opening statement
 25 when he reported with respect to the facts at issue, "Yes, it did happen over 20 years ago, which is
 26 exactly why it's going to be extremely difficult for the County to meet its burden of proof." The
 27 County was forced to rely on the testimony of Dr. Van Auken to determine the facts, and when he
 28 provided a confusing and inaccurate description of the state of his relationship with the County
 between 1988 to 1994, it was left with no ability to counter the initial CalPERS decision.

1 Accordingly, equitable remedies should be available to an entity to contest improper delay by either
2 the employee or CalPERS with respect to an employment classification decision, specifically when
3 there has been a level of neglect by the employee and/or CalPERS.

4 II.

5 **THE DECISION SHOULD NOT BE DESIGNATED AS PRECEDENT**

6 The County of Placer requests that the decision not be designated as precedent if it is adopted
7 since it is not supported by legal precedent and would cause significant injury not only to the County
8 of Placer, but also to all other entities with persons who participate in CalPERS. Requiring entities to
9 defend against actions with no resources, specifically when the delay has been caused either by the
10 employee or by CalPERS is unjust and severely prejudices the entities. Therefore, the decision
11 should not be designated as precedent.

12 III.

13 **CONCLUSION**

14 The facts of this case create a situation where laches should be applied to prevent Dr. Van
15 Auken's claim for service credits during the period of 1988 to 1994. Even if this decision is upheld,
16 it should not be designated as precedent because of the significant impact to all entities of a blanket
17 immunity from a laches defense on any CalPERS related claim.

18 Dated: March 2, 2017

19 PLACER COUNTY COUNSEL'S OFFICE

20 By: 

21 CLAYTON T. COOK
22 Attorney for Respondent
23 COUNTY OF PLACER
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DECLARATION OF PROOF OF SERVICE

I, JEANETTE A. LOVEJOY, declare:

I am a citizen of the United States and am employed in the County of Placer. I am over the age of eighteen (18) years and not a party to the within-entitled action. My business address is 175 Fulweiler Avenue, Auburn, Placer County, California.

On March 3, 2017, I served the within document(s):

RESPONDENT COUNTY OF PLACER'S WRITTEN ARGUMENT IN RESPONSE TO PROPOSED DECISION

- BY U.S. MAIL: By placing a true copy thereof enclosed in a sealed envelope with the postage fully prepaid and depositing said envelope(s) with the United States Postal Service at Auburn, California, addressed as set forth below.
- BY OVERNIGHT MAIL: By placing the document(s) listed above in a sealed envelope and depositing said envelope(s) with delivery fees paid or provided for, in a box or other facility maintained by Federal Express.
- BY ELECTRONIC SERVICE: In addition to service by mail, I caused the document(s) to be sent to the persons at the electronic service addresses listed below.
- BY FACSIMILE TRANSMISSION: In addition to service by mail, I faxed the document(s) to the person(s) at the fax number(s) listed below.

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701
Fax: 916-795-3972

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 3, 2017, at Auburn, California.


JEANETTE A. LOVEJOY