

**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 Post Retirement  
Employment of:**

**DEBBRA M. HAVEN, Respondent,**

**and**

**SALINAS VALLEY STATE PRISON, CALIFORNIA DEPARTMENT  
OF CORRECTIONS AND REHABILITATION, Respondent**

**Case No. 2018-1106**

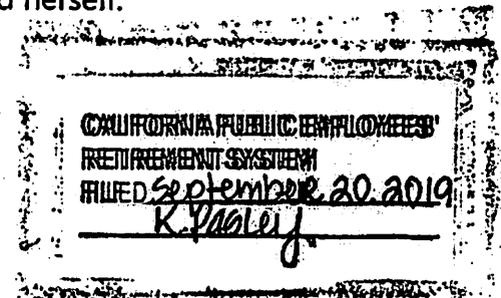
**OAH No. 2019030063**

**PROPOSED DECISION**

Administrative Law Judge Ed Washington, Office of Administrative Hearings,  
State of California, heard this matter in Sacramento, California, on August 7, 2019.

Senior Attorney Preet Kaur represented California Public Employees' Retirement  
System (CalPERS).

Debbra M. Haven (respondent) appeared and represented herself.



There was no appearance by or on behalf of respondent Salinas Valley State Prison, California Department of Corrections and Rehabilitation (CDCR), which was timely served with the Statement of Issues and Notice of Hearing. The matter proceeded as a default against the CDCR, pursuant to Government Code section 11520, subdivision (a).

The hearing concluded. The record remained open to allow the parties to submit written arguments. On August 19, 2019, both respondent and CalPERS submitted written closing briefs, which were marked for identification as Exhibit B and Exhibit 16, respectively. The record was closed and the matter was submitted for decision on August 19, 2019.

## **ISSUES**

Did CalPERS correctly determine that respondent's post-retirement employment, from August 14, 2017 through February 1, 2018, providing services to CDCR through a third-party labor agency violated the Public Employees' Retirement Law (PERL), Government Code section 20000, et seq?

If so, must respondent be reinstated from retirement, from August 14, 2017 through February 1, 2018, and repay all retirement benefits received during that time?

## **FACTUAL FINDINGS**

1. On March 4, 2019, Dana Hlawaty signed and thereafter filed the Statement of Issues on behalf of Renee Ostrander, in her official capacity only as Chief of CalPERS' Employer Account Management Division.

2. The Board of Administration of CalPERS is the agency of the State of California charged with the determining member compliance with the PERL.

3. Respondent first established CalPERS membership in 1994, through her employment with the County of Humboldt. On a date not established at hearing, but prior to January 6, 2014, respondent service retired.

4. On January 6, 2014, respondent reinstated from service retirement. On this same date, respondent began working for CDCR as a psychologist. By virtue of this employment, respondent is a state safety member of CalPERS.

5. Between July 11, 2014 and December 16, 2016, respondent contacted CalPERS on multiple occasions to discuss her retirement benefits. This included inquiring as to how long after reinstatement from service retirement she must work before retiring again; whether she would be entitled to state healthcare benefits upon retirement; how her final retirement benefit compensation would be determined; and the amount of her final retirement benefit compensation.

6. On April 24, 2017, respondent spoke with CalPERS representative A. Malm regarding working after retirement. Representative Malm discussed the service retirement processing times with respondent and also informed her that there is a 180-day wait period before a retiree may work for a CalPERS employer. On April 26, 2017, respondent spoke with CalPERS representative M. Board and asked when her retirement benefits checks would be received if she retired effective May 6, 2017. Respondent also inquired about exceptions to the rules governing her working after retirement. Representative Board informed respondent that an exception to the 180-day wait period may be granted if the employer certifies that the appointment is necessary to fill a critical need before 180 days have passed, the appointment has

been approved by the California Department of Human Resources (CalHR), and CalPERS has approved the exception.

7. On May 11, 2017, in response to respondent's inquiries, CalPERS mailed to respondent Publication 33 (Employment after Retirement) and Publication 37 (Reinstatement from Employment). Respondent service retired effective May 16, 2017, and began receiving her service retirement allowance on June 1, 2017.

8. Publication 33 includes the following information regarding post-retirement employment:

#### **POST-RETIREMENT EMPLOYMENT SCENARIOS**

##### **Working for CalPERS Employer**

If your post-retirement plans include working for a CalPERS employer, you have these options: reinstating from retirement, working as an independent contractor, or retired annuitant employment.

##### **Independent Contractor Employment**

You can be lawfully employed by a CalPERS employer as an "independent contractor," as a "consultant," or as an "employee of a third-party employer," including your own business entity, if there is no common law employer-employee relationship between you and the CalPERS employer.

[1] . . . [1]

If a common law employer-employee relationship exists, the employment is subject to the retired annuitant restrictions even if the employment agreement claims to be for an independent contractor. If the work you will perform is the same or similar to the work you performed as an active employee or is work performed by an active employee of that employer, and employer employee relationship exists and the appointment is subject to the retired annuitant restrictions.

If you work as a supposed independent contractor and are later determined to be an employee and that employment violates any of the retired annuitant restrictions, your retirement will be terminated.

Independent contractors are not "employees" and are excluded from membership in CalPERS by government code section 20300 (b). A true independent contractor, consultant, or third-party employee is someone who contracts to provide a service or completed task according to his or her own methods. This person is not subject to the contracting entities control as to the end product, final work result, or manner and means by which the work is performed.

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## Retired Annuitant Employment

A retired annuitant is a CalPERS retiree who works as an at will employee of a CalPERS employer with certain restrictions so as not to jeopardize his or her retirement allowance (pension payments). . . . If you intend to remain retired and worked for CalPERS employer, you should only apply for and accept a retired annuitant position.

Appointment to any permanent or regular staff position (part- or full-time, intermittent, hourly, seasonal, on-call, exempt from civil service, exempt from membership, etc.) requires reinstatement from retirement. This applies to all CalPERS member classifications (miscellaneous, safety, police, fire, etc.).

[¶] . . . [¶]

The retired annuitant employment restrictions for extra help positions [include the following]:

**960 Hour Limit.** The hours you work cannot exceed 960 hours in a fiscal year [July 1 through June 30] for employment with all CalPERS employers combined. There are no exceptions to this limit.

9. On August 14, 2017, respondent began working for CDCR as a psychologist, through Intuitive Health Services, Inc. (Intuitive), a third-party employer. On December 19, 2017, respondent contacted CalPERS and spoke with representative Ta. Respondent explained to representative Ta that she was working as a retired

annuitant and asked what would happen if she exceeded the 960-hour limit that a retired annuitant may work during a fiscal year. Representative Ta inform respondent that if she worked as a retired annuitant for a state agency for more than 960 hours in a fiscal year she would need to reinstate from retirement. Respondent called CalPERS four times, on December 22, 2017, and inquired about the restrictions placed upon retirees who work for the state as independent contractors.

10. On January 3, 2018, respondent provided CalPERS with a copy of the independent contractor agreement (Agreement), between herself and Intuitive, specifying the terms of her post-retirement employment providing services as a psychologist to CDCR. That agreement, in pertinent part, provides follows:

This Agreement shall commence on August 14, 2017 and shall continue in effect until terminated earlier pursuant to the express provisions of this Agreement.

INTUITIVE is engaged in the business of providing licensed health and medical professionals to work at [CDCR], Department of State Health (DSH), Department of Mental Health (DMH) facilities or Assigned Institution; and

Service provider is a duly licensed professional qualified two-person services for the CDCR, DSH, DMH or Assigned Institutions; and

INTUITIVE desires to assist the Service Provider with locating and placing Service Provider with available opportunities within the CDCR, Management Solution, DMH, DSH or Assigned Institution; and

The Service Provider has expertise in providing the services required under this agreement and is willing to offer such services to the CDCR, Management Solution, DSH, DMH or Assigned Institution through INTUITIVE health services contract with Management Solution, CDCR, DSH or Assigned Institution; through INTUITIVE health services contract with Management Solution, CDCR, DSH, DMH or Assigned Institution

**Intuitive Health Services responsibilities:**

Search for and locate available opportunities with the CDCR, management solution, DSH, or assigned institution and present Service Providers qualifications for such available opportunities.

Payment for authorized service at CDCR. Payments due hereunder will be made once we receive payment from management solutions and after receiving timesheet from management solutions. A supervisor at [CDCR] must sign off on all timesheets indicating verification of hours on timesheets. All hours on timesheets are approved for management solutions before issuing the payments.

**Service Provider's responsibilities:**

Cooperate with intuitive health services in providing information necessary to locate and place Service Provider and available positions.

Provide the requested services, as directed by CDCR, management solution, DSH, DMH or assigned institution, and compliance with all professional ethical and licensing requirements.

**Control of Work Environment:** Service Provider understands that intuitive health services has no control over the CDCR, management solution, DSH, DMH or assigned institutions hiring, disciplinary or placement decisions, length of appointment or conditions of the work environment, or the assignments or directions given to the Service Provider by the CDCR, management solutions, DSH, DMH or assigned institution. Service provider will not receive direction from intuitive health services regarding the manner in which Service Provider performs the work for the CDCR, management solutions, DSH, DMH or assigned institution. Service provider is responsible for providing any tools or equipment necessary for performing services under this agreement. It is understood that Service Provider is an independent contractor, and engaged in his/her own business separate and apart from the services being provided under this agreement.

**Independent Contractor:** The parties intend that the Service Provider's relationship with intuitive health services shall, for all purposes, be that of an independent contractor, not an employee. In no event will intuitive health services be

responsible for paying salary, federal, state or local taxes, for Service Provider. . . . Service provider can only become eligible for the company's intuitive health services employee program if Service Provider will become a direct employee of intuitive.

(Capitalization in original.)

11. CalPERS reviewed the Agreement and concluded that respondent's post-retirement services with CDCR were subject to mandatory reinstatement. On May 2, 2018, CalPERS issued to respondent a predetermination letter informing respondent of their decision and giving respondent the opportunity to provide additional documentation for consideration before making a final determination.

12. On May 25, 2018 CalPERS received additional information for consideration from respondent. By letter dated August 3, 2018, CalPERS informed respondent and CDCR that respondent's post-retirement employment from August 14, 2017 through February 1, 2018 providing services to CDCR in the position of psychologist was in violation of the PERL, requiring that respondent be reinstated from retirement and repay all retirement benefits received during that time. The correspondence also informed respondent and CDCR of their respective rights to appeal CalPERS's determination. Respondent timely appealed and this hearing followed.

### **Testimony of Kae Saechao**

13. Kae Saechao is an Associate Governmental Program Analyst for CalPERS. For the past two years he has been a member of the CalPERS Membership and Post Retirement Employment Determination Team. He reviews complex CalPERS

membership retirement cases that involve post-retirement employment to determine whether retirees are working as employees or independent contractors. Before working in his current position, Mr. Saechao performed audits in the CalPERS Department of Business Oversight and provided CalPERS system webpage support in the CalPERS Business Partner Support Unit.

14. Mr. Saechao is familiar with the post-retirement employment activities, which resulted in CalPERS reinstating respondent from retirement. His supervisor prepared and signed the May 2, 2018 predetermination letter CalPERS sent to respondent. Mr. Saechao testified that respondent had to wait 180 days before working in any capacity for a CalPERS covered employer unless an exception applied and has been approved. He noted that respondent retired from state service effective May 16, 2017, and then began providing services as a psychologist for the state on August 14, 2017. Mr. Saechao testified this violated the PERL as respondent did not wait 180 days before returning to work for a CalPERS covered employer. He also testified that the information CalPERS received from respondent and CDCR failed to demonstrate that CalHR had authorized an exception to the 180-day rule due to a critical employment need, nor that respondent had obtained CalPERS's approval to work under an exception. Mr. Saechao emphasized that the hiring employer must first obtain approval from CalHR to hire a retired annuitant less than 180 days into retirement and that the annuitant must obtain approval from CalPERS before beginning any work.

15. Mr. Saechao testified that the post-retirement services respondent provided to CDCR also violated the PERL as respondent worked as a psychologist for CDCR, while retired, performing the same or similar work she performed for CDCR before her retirement in May 16, 2017. Mr. Saechao testified that although respondent

was reportedly hired by Intuitive as an independent contractor to perform services for CDCR, for all practical purposes she was actually working as a CDCR employee. Mr. Saechao reached this conclusion based on his application of the common law control test to the facts and circumstances surrounding respondent's post-retirement employment.

**16. The CalPERS's Membership and Post Retirement Employment**

Determination Team uses the common law control test as a guide to determine whether a worker is an employee or an independent contractor. Mr. Saechao testified that pursuant to the common law control test the more control a worker has over how a service is provided the more likely they are to be considered an independent contractor, who is generally not subject to the contracting entity's control as to the final results of the work or manner and means by which the work is performed. The more control an entity has over specifically how a worker will perform a service, the more likely it is the worker is a common law employee.

17. Mr. Saechao noted that the Agreement permitted respondent to work as a psychologist for CDCR, which is an established position within CDCR personnel structure. The Agreement specifies that respondent would provide these services for CDCR, and that her timesheets must be signed and verified by a supervisor at CDCR, and then approved by Management Solutions before she is paid. He added that the Agreement reflects that respondent's work must be provided as directed by CDCR and that respondent understands that Intuitive has no control over CDCR, or any decisions related to hiring, disciplinary or placement decision, length or employment, or the assignments or directions given to respondent by CDCR.

18. Additionally, CalPERS obtained written confirmation from CDCR during its investigation which confirmed that the supervising psychologist at CDCR supervised

respondent while she performed her post-retirement duties for CDCR, and provided her with the same direction and supervision provided to civil servants in the same position. Mr. Saechao testified that this was the basis for CalPERS's determination that respondent's post-retirement employment violated the PERL and subjected her to mandatory reinstatement.

### **Respondent's Testimony**

19. Respondent testified that she did not intend to "double dip" when she performed services as a psychologist for CDCR after retirement. Based on her pre-retirement calculations and information she received from CalPERS, respondent was under the impression she would receive a certain amount each month as her retirement pension. In reality, that amount was less than expected and she realized that she had to return to work. She initially considered working in private industry, but decided to return to work at the prison system because they were significantly understaffed and in need of psychologists.

20. Salinas Valley State Prison is a high security institution with a very understaffed outpatient mental health program. According to respondent the clinicians' caseloads were more than double what was permitted by policy, and they often could not provide psychoeducational groups or weekly meetings as required. She asserted that the lack of clinicians to provide services made the work environment more dangerous.

21. In an effort to help, respondent contacted Intuitive and begin the application process to return to CDCR to work as a psychologist post-retirement. She contacted CalPERS to learn how this could be done without affecting her retirement benefits and was told she would have to wait 180 days before she could contract to

work for CDCR again. However, she was also told that there were exceptions to that rule and agreed to send a contract to CalPERS for review.

22. Respondent was unable to secure a contract for CalPERS to review prior to accepting post-retirement employment with CDCR through Intuitive. She began post-retirement employment August 14, 2017. Approximately four months later respondent learn that she might be limited to working no more than 960 hours in the fiscal year. In December 2017 and January 2018, respondent contacted CalPERS to determine whether she was limited to working 960 hours per year. In January 2018, respondent sent a copy of her employment contract to CalPERS for review. Later that same month, CalPERS informed respondent that she was limited to working 960 hours in a fiscal year. Respondent terminated her post-retirement employment contract with Intuitive effective February 1, 2018. In May 2018 respondent received CalPERS is predetermination letter informing her that the post-retirement services she provided to CDCR, through her agreement with Intuitive violated the PERL and subjected her to mandatory reinstatement from retirement.

23. Respondent emphasized that she always complied with the CalPERS post-retirement work restrictions as she understood them. She made multiple attempt to discuss her post-retirement employment circumstances with CalPERS to gain a better understanding of what she was permitted to do. However, she found it extremely challenging to reach anyone who could provide her with useful information.

## **Discussion**

24. The facts pertinent to this appeal were undisputed. Respondent is a state safety member of CalPERS by virtue of her employment as a psychologist with CDCR. She service retired effective May 16, 2017. On August 14, 2017, she began providing

services to CDCR as a psychologist, through Intuitive, a third-party employer. Less than 180 days after her retirement, she contracted to perform services for CDCR that were the very same services she provided to them prior to retirement. No evidence was presented at hearing to establish that she performed post-retirement services for CDCR pursuant to CalPERS approved hiring exception authorized by CalHR. While respondent testified that she chose to work for CDCR after retirement because they were understaffed, she did not establish that she was hired to perform services as a psychologist during an emergency to prevent stoppage of public business or because she had skills needed to perform work of limited duration. Although respondent contracted with Intuitive to provide post-retirement psychological services to CDCR, the method in which she provided those services was controlled exclusively by CDCR. This demonstrates that she was a CDCR employee, despite the contractual maneuverings, rather than an independent contractor. In *Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, 949 (quoting from *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 omitted.]

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 the 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 a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. [Citations omitted.]

25. When all the evidence is considered, CalPERS established that, while receiving CalPERS retirement benefits, respondent was a common law employee of CDCR performing work as a psychologist within 180 days of her retirement. There was no evidence that respondent received this appointment pursuant to a hiring exception authorized by CalHR and approved by CalPERS. Therefore, respondent's appeal from CalPERS's determination to reinstate her from service retirement, for the period of August 14, 2017 through February 1, 2018, should be denied.

26. In the Statement of Issues, CalPERS specifies that it "is seeking to collect the overpayment of retirement benefits in the amount of \$17,896.22." However,

CalPERS provided no evidence at hearing to demonstrate how it determined that respondent was overpaid \$17,896.22.

## **LEGAL CONCLUSIONS**

1. CalPERS is the state agency responsible for the administration of the PERL, Government Code section 20000 et seq. The CalPERS Board of Administration is responsible for determining who qualifies as employees under 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.)

### **Burden and Standard of Proof**

2. Respondent bears the burden of proving her post-retirement employment with the CDCR did not violate the limitations on post-retirement employment specified in the PERL. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to his claim of relief or defense that he is asserting"].) She also bears the burden of proving any affirmative defenses. (*Prince v. Kennedy* (1906) 3 Cal.App. 404, 407 [party asserting an affirmative defense bears the burden of proof].) The applicable standard of proof in this matter is the preponderance of the evidence standard. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

## **Restrictions on Post-Retirement Employment**

3. Government Code section 7522.56, in pertinent part, provides as follows:

(a) This section shall apply to any person who is receiving a pension benefit from a public retirement system and shall supersede any other provision in conflict with this section.

(b) A retired person shall not serve, be employed by, or be employed through a contract directly by, a public employer in the same public retirement system from which the retiree receives the benefit without reinstatement from retirement, except as permitted by this section.

(c) A person who retires from a public employer may serve without reinstatement from retirement or loss or interruption of benefits provided by the retirement system upon appointment by the appointing power of a public employer either during an emergency to prevent stoppage of public business or because the retired person has skills needed to perform work of limited duration.

[¶] . . . [¶]

(f) A retired person shall not be eligible to be employed pursuant to this section for a period of 180 days following the date of retirement unless he or she meets one of the following conditions:

(1) The employer certifies the nature of the employment and that the appointment is necessary to fill a critically needed position before 180 days have passed and the appointment has been approved by the governing body of the employer in a public meeting. The appointment may not be placed on a consent calendar.

(2) (A) Except as otherwise provided in this paragraph, for state employees, the state employer certifies the nature of the employment and that the appointment is necessary to fill a critically needed state employment position before 180 days have passed and the appointment has been approved by the Department of Human Resources.

4. Government Code section 21202 provides that "a person employed in violation of Section 21220 shall be reinstated to membership in the category in which, and on the date on which, the unlawful employment occurred."

5. Government Code section 21200, in pertinent part, provides as follows:

When any person is reinstated from retirement under this article, his or her retirement allowance shall be canceled immediately, and he or she shall become a member of this system as of the date of reinstatement. His or her individual account shall be credited with an amount that is the actuarial equivalent of his or her annuity at the date of reinstatement, not to exceed the amount of his or her

accumulated contributions as it was at the date of retirement.

6. Government Code section 21220 restricts a member's ability to work after retiring as follows:

(a) A person who has been retired under this system, for service or for disability, may not be employed in any capacity thereafter by the state . . . unless he or she has first been reinstated from retirement pursuant to this chapter, or unless the employment, without reinstatement, is authorized by this article. A retired person whose employment without reinstatement is authorized by this article shall acquire no service credit or retirement rights under this part with respect to the employment.

(b) Any retired member employed in violation of this article shall:

(1) Reimburse this system for any retirement allowance received during the period or periods of employment that are in violation of law.

(2) Pay to this system an amount of money equal to the employee contributions that would otherwise have been paid during the period or periods of unlawful employment, plus interest thereon.

(3) Contribute toward reimbursement of this system for administrative expenses incurred in responding to this situation, to the extent the member is determined by the executive officer to be at fault.

(c) Any public employer that employs a retired member in violation of this article shall:

(1) Pay to this system an amount of money equal to employer contributions that would otherwise have been paid for the period or periods of time that the member is employed in violation of this article, plus interest thereon.

(2) Contribute toward reimbursement of this system for administrative expenses incurred in responding to this situation, to the extent the employer is determined by the executive officer of this system to be at fault.

## **Violations of the PERL**

7. Based on the Factual Findings and Legal Conclusions as a whole, respondent was a common law employee of CDCR from August 14, 2017 through February 1, 2018, when she provided services as a psychologist to CDCR, through her employment agreement with Intuitive. Respondent failed to provide persuasive evidence to the contrary. Consequently, respondent must be reinstated from retirement for the period of August 14, 2017 through February 1, 2018, and must reimburse the system as set forth in Government Code section 21220, subdivisions (b)(1) and (b)(2).

## ORDER

1. The appeal of respondent Debra M. Haven is DENIED.
2. Pursuant to Legal Conclusion 4, respondent shall be reinstated for the period from August 14, 2017 through February 1, 2018, as required by Government Code section 21202.
3. Pursuant to Legal Conclusion 5, respondent shall reimburse the system, for all retirement benefits she received from August 14, 2017 through February 1, 2018, as required by Government Code section 21220, subdivisions (b)(1) and (b)(2).

DATE: September 18, 2019

DocuSigned by:  
*Ed Washington*  
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ED WASHINGTON

Administrative Law Judge

Office of Administrative Hearings