

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Debbra M. Haven (Respondent Haven) was employed by Respondent Salinas Valley State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR), as a Psychologist. On May 16, 2017, Respondent Haven service retired and began receiving her service retirement allowance on June 1, 2017. Respondent Haven has been receiving service retirement benefits since her retirement.

Prior to her retirement, Respondent Haven inquired with CalPERS regarding working after retirement. Respondent Haven was informed that there is a 180-day wait period before a retiree may work for a CalPERS employer. Respondent Haven was also informed about certain exceptions to this rule. Respondent Haven was also mailed Publication 33, Employment after Retirement, which provided more detailed information about working after retirement, the 180-day rule and exceptions to the 180-day rule.

On August 14, 2017, Respondent Haven began working for Respondent CDCR as a Psychologist through Intuitive Health Services, Inc.

On August 3, 2018, CalPERS issued a final determination letter to Respondent Haven and Respondent CDCR stating that Respondent Haven's post retirement services with Respondent CDCR from August 14, 2017 to February 1, 2018, were in violation of the PERL. Thus, Respondent Haven is subject to mandatory reinstatement and must repay all retirement benefits received during that time.

Respondent Haven appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on August 7, 2019. Respondent Haven represented herself at hearing. Respondent CDCR did not appear at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent Haven and the need to support her case with witnesses and documents. CalPERS provided Respondent Haven with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Haven's questions and clarified how to obtain further information on the process.

The Public Employees' Retirement Law (PERL) generally prohibits a retiree from receiving a retirement allowance from CalPERS while at the same time working and receiving a publicly funded salary. However, the PERL does provide limited exceptions to this general rule. Relevant to this matter, Government Code section 7522.56, subdivision (b) provides, "A retired person shall not serve, be employed by, or be employed through a contract directly by, public employer in the same public retirement system from which the retiree receives the benefits without reinstatement from

retirement, except as permitted by this section.” Subdivision (f) provides that 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 the employer certifies that the employment is necessary to fill a critically needed state employment position before 180 days and the appointment is approved by Department of Human Resources.”

Government Code section 21202 provides that any “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.” Government Code section 21220 requires the retiree member reimburse CalPERS “any retirement allowance received during the period or periods of employment that are in violation of law.”

For purposes of determining whether post-retirement employment laws have been violated, CalPERS applies the common law employment test.

The common law employment test was articulated by the California Supreme Court in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949. Under that test, “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.” (*Ibid.*) If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*Id.* at p. 946-947.)

Tieberg noted the following other factors may be taken into account:

(a) whether or not 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 (*Id.* at p. 949.)

The *Tieberg* court noted one of the most important of those secondary factors is “whether the parties believe they are creating the relationship of employer-employee,” especially as specified in a written agreement. (*Id.* at p. 949.)

Respondent Haven testified on her own behalf. Respondent Haven testified that she was unaware of CalPERS' post retirement employment rules. Respondent Haven also claimed that she was an independent contractor and thus not an employee of Respondent CDCR.

CalPERS presented evidence demonstrating that Respondent Haven was informed regarding post retirement employment rules numerous times. A CalPERS witness testified that Respondent Haven was counseled regarding post retirement employment rules and informed she should not enter post retirement employment until CalPERS has approved the post retirement employment. Further, a CalPERS witness testified that although Respondent Haven testified she was hired by intuitive as an independent contractor, for all practical purposes she was actually working as a CDCR employee based on an application of common law control test.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent Haven's appeal. The ALJ found that Respondent Haven was a common law employee of Respondent CDCR from August 14, 2017 through February 1, 2018. The ALJ reasoned that Respondent CDCR had exclusive right to control Respondent Haven's work during the relevant timeframe. Further, the ALJ held that Respondent Haven's employment was subject to the 180-day rule under Government Code section 7522.56, subdivision (f) and there was no evidence demonstrating any exception applied to these facts.

In the Proposed Decision, the ALJ concludes that Respondent Haven "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)."

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

November 20, 2019

PREET KAUR
Senior Attorney