

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Appeal to Purchase Service Credit Prior
to Membership of:**

**BO Y. KIM, Respondent, and DEPARTMENT OF HEALTH
CARE SERVICES, Respondent**

Agency Case No. 2019-0022

OAH No. 2019050824

PROPOSED DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on September 9, 2019, in Los Angeles, California.

Complainant was represented by Austa Wakili, Senior Attorney, California Public Employees' Retirement System (CalPERS). Respondent Bo Y. Kim appeared and represented herself. There was no appearance by Respondent Department of Health Care Services (DHCS), despite proper notice.

Oral and documentary evidence was received. The record was held open so that the parties could submit post-hearing briefs. Respondent Kim was given until September 23, 2019, to submit a brief, but she failed to do so. Complainant was given

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until September 30, 2019, to submit a brief, and did so in a timely manner. That brief is made exhibit 15 for identification.

The ALJ made further redactions in exhibit 8, including Respondent's social security number on one of her W-2 forms, as well as employer ID numbers.

The record was closed and the matter was submitted for decision on September 30, 2019.

FACTUAL FINDINGS

Jurisdictional Matters

1. Renee Ostrander filed the Statement of Issues in this matter while acting in her official capacity as Chief of the Employer Account Management Division of CalPERS.

2. Respondent Bo Y. Kim (Respondent) is a pharmacist. She worked as a pharmaceutical consultant for DHCS from October 20, 2004 until December 1, 2005. Later, beginning on April 6, 2009, she was employed by the California Department of Corrections and Rehabilitation as a pharmacist, until December 18, 2012. She is a miscellaneous member of CalPERS by dint of such employment.

3. Prior to Respondent's employment with DHCS, she was employed by Electronic Data Systems (EDS), a private company. Respondent worked for EDS between May 1, 2001 until October 19, 2004. EDS had a contract with DHCS to provide services, including the services of Respondent, who was employed as a contract pharmacist.

4. Respondent applied for industrial disability retirement in August 2011. On May 21, 2012, CalPERS wrote Respondent and informed her that she was not eligible for industrial disability retirement because she had not been injured as a result of a violent act in a correctional facility. CalPERS informed her that she might meet the requirements for regular disability retirement, except for the fact that she had not been a member of CalPERS for five years.

5. Thereafter, Respondent attempted to persuade CalPERS that her employment with EDS made her a common law employee of the State of California, and therefore entitled to further service credit, sufficient to establish eligibility for regular disability retirement. Respondent and CalPERS had several communications about the issue, and finally, in October 2018, CalPERS denied Respondent's requests, and gave her notice of her appeal rights. Respondent made a timely appeal, and this proceeding ensued. DHCS was given proper notice of the hearing and failed to appear. All jurisdictional requirements have been met.

Respondent's Employment History and Communications with CalPERS

6. As noted above, for a period of time after October 20, 2004, Respondent was indisputably a state employee. The issue in this case is whether she can be treated as a state employee for the period from May 1, 2001 until October 19, 2004, sometimes hereafter "the relevant time period." In a letter dated June 18, 2012, to the CEO of CalPERS, Respondent asserted that she was working for the DHCS, at one point under the Medi-Cal Southern Pharmacy section chief. She appended an e-mail from that person, Bruce T. Mizuno, to bolster her claim. The e-mail from Mizuno appears to give direction as to the handling of some claims, and was directed to Respondent and many others.

7. On the same day that she sent her letter to the CEO of CalPERS, Respondent submitted a form to obtain service credit for service prior to Respondent's membership in CalPERS. On June 22, 2012, a CalPERS staff person wrote Respondent and informed her that CalPERS did not have enough documentation to establish the service credit she requested. The letter stated that CalPERS was going to close her file, but sent her another form she could submit, and CalPERS requested a copy of the work agreement for the job she held prior to her membership in CalPERS.

8. It does not appear that a work agreement was forwarded to CalPERS by Respondent. At some point she did, however, send three W-2 forms, for the years 2001, 2002, and 2003, from the relevant time period.

9. All three of the W-2 forms identify the employer as EDS of Plano, Texas. They show Respondent as the employee, and EDS's employer number is listed on the documents. There is withholding noted, but none for retirement.

10. The record indicates that there were more communications between Respondent and CalPERS in 2015. On November 13 of that year, CalPERS staff wrote Respondent and took the position that she had not been a state employee. The letter speaks to legal tests for whether a person is an employee or an independent contractor, noting that a key issue is control of the worker's activities.

11. Respondent thereafter submitted documentation regarding her work, indicating significant control of her work by what appear to be DHCS staff. The documentation included statements from co-workers, which indicated control of matters including the length and timing of the workday. Respondent submitted numerous e-mails that gave direction on how certain matters were to be handled.

12. In March 2016 CalPERS staff wrote Respondent and informed her that after an extensive review, CalPERS had determined that she was not a state employee during her tenure with EDS, but instead was a contracted worker, employed and paid by EDS. CalPERS pointed out that Respondent had not undergone the civil service hiring process before the relevant time period, which it contended is necessary to be a state employee. Other legal authority was cited, including Government Code section 20028 which defines the term "employee."

13. The record does not indicate what, if any, communications followed the March 2016 letter, except that a letter from CalPERS was sent to Respondent on or about October 9, 2018. That letter reiterated that CalPERS had determined that Respondent was not a state employee, and the letter informed Respondent of her right to appeal the denial of the retirement benefits. Respondent submitted her timely appeal on October 18, 2018.

14. At the hearing, Respondent traced her educational background and employment background, including evidence regarding her injury at the state hospital where she was employed. As to the relevant time period when she worked at DHCS offices, Respondent pointed out that she reported to a state employee, such as Mizuno, and that her schedule was strictly controlled by him or another supervisor, Ms. Bradford. She recounted that before working with DHCS, she had been sent by EDS to an interview conducted by Bradford. She did not take a civil service exam prior to beginning her work with DHCS; her first civil service exam was in September 2004.

LEGAL CONCLUSIONS

1. Jurisdiction to proceed in this matter pursuant to California Code of Regulations, title 2, sections 555.1, 555.2, and 555.4 was established, based on Factual Findings 1 through 5.

2. (A) Respondent does not meet the Government Code's definition of an employee. Section 18526 provides that "'Employee' means a person legally holding a position in the State civil service." Respondent did not take the civil service exam prior to working with EDS at DHCS, and she was not in the Civil Service during the relevant time period. Thus, she was not an employee from that point of view. Likewise, Respondent does not meet another statutory definition of an employee, that set forth in the Public Employees' Retirement Law, or PERL.

(B) A provision of the PERL, Government Code section 20028, at subdivisions (a) and (b), provides as follows:

"Employee" means all of the following:

(a) Any person in the employ of the state, a county superintendent of schools, or the university whose compensation, or at least that portion of his or her compensation that is provided by the state, a county superintendent of schools, or the university, is paid out of funds directly controlled by the state, a county superintendent of schools, or the university, excluding all other political subdivisions, municipal, public and quasi-public corporations. "Funds directly controlled by the state"

includes funds deposited in and disbursed from the State Treasury in payment of compensation, regardless of their source.

(b) Any person in the employ of any contracting agency.

(C) A contracting agency is a public agency that has elected to have some or all of its employees become CalPERS members, and where that public agency contracts with CalPERS. It can include county agencies and some other public employers. (Gov. Code, § 20022.) EDS is a private firm, and not a public agency, and therefore its employees, which include Respondent, cannot be employees under the PERL.

(D) To satisfy the terms of Government Code section 20028, subdivision (a), Respondent would have to have been employed by the state, and paid out of funds directly controlled by it during the relevant time period. However, the evidence establishes that Respondent was employed by EDS and paid out of funds controlled by EDS during the relevant time period. This latter point is illustrated by Respondent's W-2 forms (Factual Findings 8 and 9) and a lack of evidence of payment by the state.

(E) EDS does not fit the definition of an employer, which definition mirrors the terms found in section 20028, subdivision (a). Thus, Government Code section 20030 states: "Employer' means the state, the university, a school employer, and any contracting agency employing an employee." Just as EDS was not a contracting agency within the meaning of the PERL, it was not an employer either.

(F) An independent contractor who is not an employee is excluded from membership in the retirement system. (Gov. Code, § 20300, subd. (b).)

3. (A) The case of *Metropolitan Water Dist. of Southern California v. Superior Court (MWD)*, (2004) 32 Cal.4th 491 does not support Respondent's claim. In *MWD*, the Supreme Court ruled that persons employed through a contractor by the water district were common law employees, and entitled to become members of CalPERS. That case is distinguishable from this case.

(B) In *MWD*, the employing party was a contracting agency, and thus the definition of an employee was controlled by Government Code section 20028, subdivision (b), and not by subdivision (a), which pertains to state employees. The Supreme Court ruled that the meaning of the term employee in subdivision (b) would include the common law test of employment, because the term employee was otherwise not defined by statute; the majority in *MWD* held that where the term is not defined in a statute, the common law test is read into it. Thus, in the facts and circumstances of that case the workers could be common law employees of a contracting agency, and thus could be members of CalPERS.

(C) The *MWD* court noted the distinction between the definition of state employee, contained in section 20028, subdivision (a), and that of contracting agency employees set out in subdivision (b), and the court pronounced the distinction as a "purposeful" act by the legislature. (*MWD, supra*, 32 Cal.4th at 502.) It is plain that the control of funds test set forth in section 20028, subdivision (a), was important to the analysis, as the court held that it could not be read into the definition of an employee of a contracting agency.

(D) Other distinctions are involved. As noted above, EDS is not a contracting agency, and thus Respondent cannot negate the control of payment funds proviso. Further, state employees are not employed by private firms, but instead are employed by the state, a county superintendent of schools, or the university. (Gov.

Code § 20028, subd. (a).) EDS made payment of salary; that payment was not made by funds controlled by the state.

4. Complainant's reliance on *Holgrem v. County of Los Angeles (Holgrem)*, (2008) 159 Cal.App.4th 593, is better placed. In *Holgrem* engineers were hired by contractors by the County of Los Angeles, and later sued, asserting they were common law employees, and entitled to benefits under the County's retirement system. (The county was not a contracting member of CalPERS, instead operating its own retirement system.) In deciding against the contractors, the Court of Appeal held that they were not common law employees. The court held that the common law rule was inapplicable because state law and county law provided a definition of a county employee, which included that the person was paid by the county, and their pay was fixed by the County's Board of Supervisors. (*Holgrem, supra*, 159 Cal.App.4th p. 605.) That specificity of the definition of an employee, specifically tied to payment source and approval of the government agency, controlled the definition. *Holgrem* teaches that the specific definition set out in section 20028, subdivision (a), should control as well.

5. Respondent was not an employee of the state, but was an employee of a private firm, which was not a contracting agency. She cannot resort to the common law definition of an employee in light of the authorities cited, and her appeal must be denied.

ORDER

The appeal of Respondent Bo Y. Kim is denied.

DATE: October 29, 2019

DocuSigned by:
Joseph D. Montoya
Joseph D. Montoya

Administrative Law Judge

Office of Administrative Hearings