

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Bo Y. Kim (Respondent) established membership with CalPERS through her employment as a Pharmaceutical Consultant for Respondent Department of Health Care Services (Respondent DHCS) beginning on October 20, 2004. Respondent worked for Respondent DHCS until December 1, 2005.

Prior to her employment with Respondent DHCS, Respondent was employed by a private company, Electronic Data Systems (EDS). 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 worked as a contract pharmacist.

Later, beginning on April 6, 2009, Respondent was employed as a Pharmacist II by the California Department of Corrections and Rehabilitation (CDCR). Respondent worked for CDCR until December 18, 2012.

Respondent applied for industrial disability retirement in August 2011. By letter dated May 21, 2012, CalPERS informed Respondent that she was not eligible for industrial disability retirement because her alleged injury was not the result of a violent act at a correctional facility. CalPERS also informed Respondent that she was not eligible for regular disability retirement because she did not have five years of service credit with CalPERS.

Respondent requested that CalPERS treat her employment with EDS as a common law employee of Respondent DHCS so that she could establish eligibility for regular disability retirement.

After a thorough review of the information and relevant law, CalPERS determined that Respondent was not a state employee during her tenure with EDS but instead was a contracted worker employed and paid by EDS. First, CalPERS determined that Respondent did not meet the definition of "employee" as provided in Government Code section 18526 because she did not undergo the mandatory state civil service hiring process during the time she worked as an independent contractor. Second, even if Respondent met the definition of employee in Section 18526, CalPERS determined that Respondent did not meet the definition of "employee" set forth in the Public Employees Retirement Law (PERL) because she was not paid from funds directly controlled by the state. Finally, because the term, "employee" is clearly defined by statute, CalPERS did not apply the common law employment test as requested by Respondent. CalPERS issued a final determination denying Respondent's request to convert her independent contractor relationship with EDS to that of a state employee of DHCS by letter dated October 9, 2018.

Respondent 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 September 9, 2019. Respondent represented herself at the hearing. Respondent DHCS did not appear at the hearing.

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

CalPERS presented the testimony of program staff to explain its determination. Specifically, CalPERS' witness explained that the common law employment test does not apply when there is an existing definition of employee. With respect to state employees, the California Legislature has implemented a comprehensive statutory scheme governing state employees. The comprehensive statutory scheme requires that state employees undergo the civil service hiring process. CalPERS' witness testified that the common law employment test cannot be used to supersede the statutory definition of employee applicable to state workers. CalPERS also presented documents showing that Respondent was employed and paid by EDS and not Respondent DHCS.

Respondent testified on her own behalf regarding her educational and employment background. As to the time period when she was employed by EDS, Respondent testified that she reported to a state employee, Bruce T. Mizuno, and that her schedule was strictly controlled by him or another supervisor. She recounted that before working with DHCS, she had been sent by EDS to an interview conducted by a state employee. Respondent testified that she did not take a civil service exam prior to the time she sought employment with DHCS; her first civil service exam was in September 2004.

Respondent submitted documentation regarding her work which indicated significant control of her work by what appeared to be DHCS' staff. The documentation included statements from co-workers which suggested 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. These documents, while supportive of Respondent's claim to have been a common law employee during the years in question, were not probative of the issue concerning whether or not she was a statutory employee of the state during the relevant time period. Respondent admitted at the hearing that she did not take the civil service exam until September 2004 and was therefore not hired by the state during the time she was claiming to be a state employee.

After considering all of the evidence introduced, as well as legal arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent does not meet the definition of employee as defined in the Civil Services Act, which governs the employment of state workers. Government Code section 18526 provides that "Employee' means a person legally holding a position in the State civil service." Respondent testified that she did not take the civil service exam until September 2004.

The ALJ found that Respondent does not meet the definition of employee for the period from May 1, 2001 until October 19, 2004, when she was employed by EDS.

The ALJ further concluded that Respondent does not meet the statutory definition of an employee set forth in the Public Employees' Retirement Law (PERL). Government Code section 20028 provides in relevant part:

"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.
The ALJ further found that 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 established that Respondent was employed by EDS and paid out of funds controlled by EDS during the relevant time period.

In the Proposed Decision, the ALJ concludes that Respondent was not an employee of the state for the time she was employed by EDS.

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

December 18, 2019

Austa Wakily
Senior Attorney