

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Gail M. Donoghue (Respondent) appealed CalPERS' determination that she is not eligible to purchase Service Prior to Membership (SPM) for the period of December 11, 2003 through December 28, 2005 pursuant to Government Code section 21020(d), while she was a student employed by University Enterprises, Inc. (UEI).

From December 11, 2003 through December 28, 2005, Respondent was a part-time student assistant approved by UEI to work onsite at CalPERS. While at CalPERS, Respondent worked under supervision of a CalPERS employee who was responsible for training Respondent, assigning her work, appraising her performance and coordinating her work schedule. CalPERS had the authority to terminate Respondent's work at CalPERS. Respondent was subject to the same policies/procedures as the CalPERS employees with whom she worked. She used office space, equipment, machinery, stationary and an email account provided by CalPERS.

Respondent was paid on an hourly basis. She completed UEI time sheets, which were submitted to UEI, and she was paid directly by UEI. She did not receive compensation from the State or any state-controlled funds. She did not receive sick leave, vacation leave or healthcare benefits from the State. She was issued W-2 forms by UEI.

UEI is a non-profit organization affiliated with California State University, Sacramento (CSUS). UEI employs students from any qualifying educational institution as student assistants. Student assistants work on or off campus for government agencies and local businesses, thereby earning work experience. UEI student assistants are paid on an hourly basis by UEI. They are required to complete UEI time sheets, be enrolled in a minimum of 6 semester units or 9 quarter units while working. It is the students' responsibility to separate from UEI once she is no longer a student.

In its contract with CalPERS, UEI specifically described its student assistant positions at state agencies as "part-time, non-benefited positions. UEI Student Assistants are not eligible for benefits including any type of leave accruals and service credit regardless of the location of your work site or the department or project you work for...[UEI] contracts with state agencies to be the employer of record for Student Assistant employees. This means UEI is your employer even if you perform work off campus."

At all times, UEI's retirement contract with CalPERS excluded from CalPERS membership UEI employees compensated on an hourly basis. CalPERS routinely reviews the validity of contract exclusions by contracting agencies to determine whether the exclusions are used appropriately or to circumvent membership rules. To date, CalPERS has never issued a non-validity determination with respect to UEI's contract exclusion for employees compensated on an hourly basis.

Respondent was hired full time as a Retirement Program Specialist II with CalPERS on January 3, 2006. She was selected from the civil service certified eligibility list after successfully completing the state examination process for that classification. She remained employed by CalPERS until her retirement in late 2020.

On November 19, 2009, CalPERS received Respondent's "Request for Service Credit Cost Information – Service Prior to Membership" for the time she worked as a UEI student assistant at CalPERS. By letters dated March 3, 2010 and July 20, 2011, CalPERS informed Respondent that she was not eligible to purchase SPM. CalPERS explained that UEI's contract with CalPERS specifically excluded UEI employees compensated on an hourly basis from CalPERS membership.

Thereafter, on September 19, 2011, Respondent appealed CalPERS' determination. She argued that she was a common law employee of CalPERS; thus, she should have been allowed to purchase "Public Service" time under Government Code section 21020(d). Also, in September 2011, CalPERS converted to a new computer system and Respondent's appeal was lost for several years.

Approximately eight years later, in November 2018, Respondent inquired why she had never received a determination regarding her September 2011 appeal. When CalPERS learned of its oversight, it completed another review of her Student Assistant time to determine whether she was eligible to purchase SPM.

CalPERS again denied Respondent's request to purchase SPM on April 11, 2019 and on October 15, 2019, CalPERS issued its final, formal determination, denying Respondent's request to purchase SPM.

On April 30, 2019, 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 October 20, 2020. Respondent was represented by a Senior Union Representative from SEIU Local 1000. Prior to the hearing UEI filed a Notice of Joinder in CalPERS' position, and UEI was excused from participation at the hearing.

Respondent testified that she is entitled to purchase SPM pursuant to Government Code section 21020(d), and that CalPERS waived any defense to her claim under the doctrine of laches.

The ALJ considered and rejected both of Respondent's arguments.

Government Code section 21020(d)

The parties agreed that Respondent was not paid with state-controlled funds while working as a Student Assistant. She argued that Government Code section 21020(d) allows a person to purchase Service credit for public service including, “[e]mployment by the state in which the person was not eligible for membership in this system if the ineligibility was solely because his or her compensation was paid from other than state-controlled funds.”

The ALJ found that Respondent must first establish that she was employed by the state during the relevant time period. Respondent argued that she was a common law employee of the state, because CalPERS exercised nearly complete control over her work. She emphasized that CalPERS trained her, supervised her, set her schedule, appraised her performance, supplied her work materials, and had the authority to terminate her work as a Student Assistant.

The ALJ found her arguments unpersuasive. Government Code section 20028(a) defines an employee as “[a]ny person in the employ of the state...whose compensation, or at least that portion of his or her compensation that is provided by the state...is paid out of funds directly controlled by the state.” Government Code section 21020(d) crafts a unique exception to that definition, to address service credit for instances where a state employee is paid by funds not directly controlled by the state (such as state/county or other intergovernmental agreements). However, the ALJ found that narrow exception does not mean that the common law employment test may be invoked as a method for determining who is a state employee. To take advantage of Government Code section 21020(d), a person must still be a properly appointed state employee, which Respondent was not.

The ALJ found that state employment has been extensively defined in the Civil Service Act. Respondent did not demonstrate she was hired and employed by the state during the time she was a student assistant. She never took a civil service examination prior to starting work as a student assistant, nor was she hired from a certification list in accordance with the Civil Service Act. She failed to provide any evidence she was appointed as a state employee through some alternative mechanism, such as Career Executive Assignment.

In contrast, the evidence shows Respondent was an employee of UEI. She was placed to work at CalPERS as part of the UEI student program, which by its terms provides students with valuable work experience by working off campus on part-time, non-benefited positions. She completed UEI time sheets, she was paid directly by UEI, and UEI issued her W-2 forms. She received no leave or benefits from the State.

The ALJ did not find Respondent’s argument that she was supervised by a CalPERS employee significant, because that is the nature of any student assistant work at any program placement.

Laches

The ALJ found Respondent's reliance on laches misplaced. Laches is traditionally an affirmative defense to a plaintiff's action when the plaintiff unreasonably delayed bringing suit. Even assuming that Respondent is the appropriate party to invoke the doctrine of laches, it is not available against a government entity where it would nullify an important policy adopted for the benefit of the public. Government Code section 20125 provides "[t]he Board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system." The ALJ found that by enacting that statute, the Legislature intended to restrict CalPERS membership and benefits to specified persons to protect the CalPERS retirement funds and state taxpayers. The ALJ found that it would offend important public policy to allow Respondent to invoke laches and obtain benefits to which she would not otherwise be entitled.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal and affirmed CalPERS' determination. The ALJ found that Respondent had the burden of proof to show she is entitled to purchase SPM for the relevant period. The ALJ held that Respondent did not demonstrate she was employed by the State during the relevant period. Thus, she was not entitled to purchase SPM pursuant to Gov. Code section 21020(d).

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

June 16, 2021

Elizabeth Yelland