

**ATTACHMENT A**  
**PROPOSED DECISION**

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

In the Matter of the Application for CalPERS  
Membership of:

DAVID J. LANCASTER,

Respondent

and

DEPARTMENT OF FISH AND GAME,

Respondent.

Case No. 8253

OAH No. 2011100201

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings (OAH), State of California, heard this matter on August 14, 2012, in Sacramento, California.

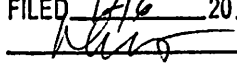
Carol A. McConnell, Senior Staff Counsel, represented California Public Employees' Retirement System (CalPERS).

Respondent David J. Lancaster represented himself and appeared by videoconference and telephone from Redding, California.<sup>1</sup>

No appearance was made by or on behalf of respondent California Department of Fish and Game (DFG).

Evidence was submitted and the record was left open to permit CalPERS to present evidence establishing proper service of the pleadings on DFG. On September 13, 2012, CalPERS filed the Declaration of Carol A. McConnell in Support of Petitioner's Request to Take the Default of Respondent Department of Fish and Game, which was marked as Exhibit

<sup>1</sup> Mr. Lancaster appeared by videoconference from the California Department of Transportation in Redding, California. Due to technical difficulties with the videoconference equipment, he could not be heard. Therefore, he appeared by telephone as well.

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RETIREMENT SYSTEM  
FILED 12/6 2012  


25 for identification. Exhibit 25 is admitted for all purposes, without objection. The record was also left open to allow the parties to submit written closing briefs. Mr. Lancaster's Closing Brief was filed September 7, 2012, and was marked for identification as Exhibit B. CalPERS' Closing Brief was filed October 12, 2012, and was marked for identification as Exhibit 26. Mr. Lancaster's Closing Brief, Follow-Up was filed November 2, 2012, and was marked for identification as Exhibit C.<sup>2</sup> The record was closed, and the matter was submitted for decision on November 9, 2012.

## SUMMARY

The sole issue presented for determination in this matter is whether Mr. Lancaster is eligible for membership in CalPERS for the period from January 20, 1998, through August 13, 2000. As discussed below, he is not because he was not an employee of the State or a contracting agency during that period. Instead, he was employed by the California State University Foundation, paid by them, and was not compensated with funds directly controlled by the State. And the contracts between the California State University Chico Research Foundation and DFG established Mr. Lancaster was an independent contractor and therefore not eligible for membership in CalPERS as a matter of law.

## FACTUAL FINDINGS

### *Procedural Background*

1. By letter dated August 10, 2006, Mr. Lancaster asked CalPERS to determine whether he qualified for CalPERS membership as a common law employee of DFG during the time he worked full time on DFG projects while employed by the California State University Chico Research Foundation (Foundation), which was from January 20, 1998, through August 13, 2000.<sup>3</sup>

2. CalPERS conducted a review of the working relationship between Mr. Lancaster and DFG during the period in question and erroneously determined he was in fact

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<sup>2</sup> Mr. Lancaster's brief consists solely of the following sentence: "I do not have anything further to add to my Closing Brief of September 6, 2012." His courtesy of filing his response is appreciated so staff at OAH was not left wondering whether his response was lost in transmission.

<sup>3</sup> There is a discrepancy in the evidence about the date on which Mr. Lancaster's employment relationship with the Foundation ended. The Notice of Personnel Action Report of Appointment (Exhibit 12) showing his appointment to a permanent, part-time position with DFG effective August 14, 2000, is the more persuasive evidence that his employment relationship with the Foundation ended on August 13, 2000.

a common law employee of DFG during that period. Mr. Lancaster was notified of CalPERS' determination by letter dated December 11, 2006.

3. In a letter dated April 3, 2007, CalPERS informed Mr. Lancaster that while he met the common law definition of "employee," he did not meet the statutory definition of "employee" codified in Government Code section 20028. Therefore, CalPERS concluded he was not entitled to membership in CalPERS during the period he was employed by the Foundation. The letter informed Mr. Lancaster of his right to appeal CalPERS' decision.

4. On April 19, 2007, Mr. Lancaster appealed CalPERS' decision.

5. On January 5, 2012, Karen DeFrank, CalPERS Division Chief, Customer Account Services Division, filed a Statement of Issues solely in her official capacity. The following day, DFG was properly served with the Statement of Issues and a Notice of Hearing pursuant to Government Code section 11505, subdivision (c). On April 27, 2012, DFG was properly served with the Notice of Continued Hearing pursuant to Government Code section 11505, subdivision (c).

6. This matter was called on the date and at the time and location specified in the Notice of Continued Hearing. No one appeared for or on behalf of DFG, and an evidentiary hearing on its rights and responsibilities in this matter was conducted as a default proceeding pursuant to Government Code section 11520.

#### *Factual Background*

7. DFG is an agency of the State of California. Its qualifying employees are members of CalPERS.

8. The Foundation is a 501(c)(3) non-profit corporation, which was incorporated in 1997. Prior to 1997, it had been part of an auxiliary organization authorized by the California Education Code. The Foundation assumed responsibility for grants and contract administration for the California State University, Chico campus, along with entrepreneurial activities. The Foundation is self-financed and receives no State appropriations, and it regards its employees as Foundation employees, not State employees.

9. DFG is statutorily authorized to "enter into contracts for fish and wildlife habitat preservation, restoration, and enhancement with public and private entities whenever [it] finds that the contracts will assist in meeting [its] duty to preserve, protect, and restore fish and wildlife." (Fish & G. Code, § 1501.5, subd.(a).) Additionally, "the Department of Fish and Game shall augment its existing staff, whenever possible, by contracting for those services necessary for the administration of [the Wildlife and Natural Areas Conservation Act (Gov. Code, § 2700 et seq.).]" (Fish & G. Code, § 2729, subd. (a).)

10. In 1998, there were several large scale construction projects involving the installation of utility lines within DFG's jurisdiction. The contractors on these projects were

required by law to monitor their construction activities for compliance with state law protecting the environment and fish and wildlife. It was standard practice for the contractors to contract with DFG to monitor such compliance. DFG, in turn, entered into contracts with the Foundation, pursuant to Fish and Game Code sections 1501.5, subdivision (a), and 2729, subdivision (a), to augment DFG staff so there would be sufficient staff to monitor the various construction projects.

11. In December of 1997, James R. Nelson, DFG Staff Environmental Scientist, was serving as Project and Contract Manager in DFG's Redding office. Mr. Nelson needed additional staff to monitor the various construction projects. He interviewed Mr. Lancaster, contacted the Foundation and requested that it hire Mr. Lancaster as a Biologist Monitor. The Foundation hired Mr. Lancaster as an employee and entered into a contract with DFG to provide his services to DFG. Mr. Lancaster's first day of employment with the Foundation was January 20, 1998.

12. The funds for Mr. Lancaster's salary and benefits were not appropriated as part of DFG's budget, and DFG lacked the approval from the Department of Finance to fund full-time positions. Instead, he was paid with Foundation funds.

13. For the next two and one-half years, Mr. Lancaster worked in the DFG Redding office monitoring multiple projects. He had assigned office space, identified himself as a DFG employee on letterhead and rosters, wore a DFG uniform, and used DFG equipment, including a vehicle. He received DFG employee training and was periodically evaluated by his supervisor, Mr. Nelson and later Craig P. Martz.<sup>4</sup> Mr. Nelson authorized the Foundation to promote Mr. Lancaster to Environmental Field Coordinator and give him a merit wage increase. Mr. Nelson also authorized the Foundation to add Mr. Lancaster to new projects and extend his period of employment. Mr. Martz did the same after he assumed supervision of Mr. Lancaster.

14. Mr. Lancaster completed timesheets, which were approved by Mr. Nelson or Mr. Martz, and submitted those timesheets to the Foundation for payment. The Foundation paid Mr. Lancaster the compensation agreed upon in its contracts with DFG. The Foundation made employer contributions towards Mr. Lancaster's benefits, taxes and 401k Plan and deducted payroll taxes and employee contributions for his 401k Plan and benefits.

15. On August 14, 2000, DFG hired Mr. Lancaster for a permanent, part-time position as a Wildlife Biologist. He was promoted to a permanent, full-time position as an Environmental Specialist III with DFG, effective September 25, 2000. At that time, he became a State employee and was eligible for membership in CalPERS. (See, Legal Conclusion 3.)

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<sup>4</sup> Mr. Martz, a DFG Staff Environmental Scientist, assumed supervision of Mr. Lancaster in October of 1999.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. Government Code section 20160, subdivision (b), requires the Board of Administration for CalPERS (Board) to correct any errors or omissions made by a state agency or CalPERS. The party seeking the correction bears the burden of proving entitlement to such correction. (Gov. Code, § 20160, subd. (d).) Therefore, Mr. Lancaster has the burden of proving his eligibility for membership in CalPERS during the time he was employed by the Foundation, which was from January 20, 1998, through August 13, 2000.

### *Applicable Law*

2. The shorthand title of the relevant body of law is the Public Employees' Retirement Law (Gov. Code, div. 5, pt. 3, ch. 1, § 2000 et seq.) (PERL).

3. All state employees, except those excluded by statute, are members of CalPERS. (Gov. Code, § 20280.) Additionally, public entities may choose to have some or all their employees become members of CalPERS by entering into a contract with the Board. (Gov. Code, §§ 2022; 20460.) Part-time employees are not eligible for membership as a matter of law (Gov. Code, § 20305, subd. (a)), as are independent contractors (Gov. Code, § 20300, subd. (b)).

4. Membership in CalPERS is mandatory for all eligible employees. (Gov. Code, §§ 20281; 20502.) And membership begins upon employment. (Gov. Code, § 20281.)

5. For purposes of eligibility for CalPERS membership, "employee" is defined by Government Code section 20028, which provides, in relevant part:

(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....

"Contracting agency" means "any public agency that has elected to have all or any part of its employees become members of this system and that has contracted with the board



for that purpose. ‘Contracting agency’ also means any county office of education, school district, or community college district that has elected to have all or part of its employees participate in a risk pool and that has contracted with the board for that purpose.” (Gov. Code, § 20022.)

6. As set forth in Factual Finding 8, the Foundation is not a “contracting agency,” and neither party argued otherwise.

7. Mr. Lancaster based his claim of eligibility for membership in CalPERS on two conflicting arguments. In his appeal letter, he claimed eligibility for membership based on his purported status as a common law employee of DFG, relying on the California Supreme Court’s decision in *Metropolitan Water District of Southern California v. Superior Court of Los Angeles* (2004) 32 Cal.4th 491. He also argued he was compensated with funds controlled directly by the State.

But in his Closing Brief, Mr. Lancaster argued his status as an “employee” pursuant to Government Code section 20028 was irrelevant because he performed services for DFG pursuant to a personal services contract between DFG and the Foundation mandated by Fish and Game Code section 2729, subdivision (a). According to him, such contract was subject to the standards for state agencies entering into personal services contracts with private persons set forth in Government Code section 19130. He claimed to have formed an “employment relationship” with DFG by providing services pursuant to such contract as an employee of the Foundation. Therefore, he posited he was a DFG employee pursuant to Government Code section 19130, subdivision (c), and eligible for CalPERS membership.

8. CalPERS, on the other hand, conceded that it originally reached the erroneous conclusion that Mr. Lancaster was eligible for membership as a common law employee of DFG. It later, however, changed its position and concluded he was not eligible for membership because the common law test for employment is not applicable when such status is statutorily defined, as it is here in Government Code section 20028. Additionally, CalPERS posited, Mr. Lancaster did not satisfy the statutory definition of “employee” because he was not paid with funds controlled directly by the State.

9. The doctrine of common law employment does not apply when the employment relationship is statutorily defined, as it is for state employees in Government Code section 20028, subdivision (a). (See, e.g., *Holmgren v. County of Los Angeles* (2008) 159 Cal.App.4th 593, 604 [“Where (as here) the term is defined by statute, the legislature’s definition controls and the doctrine of common law employment is irrelevant.”]; see, *People v. Palma* (1995) 40 Cal.App.4th 1559, 1565-1566 [“As a general rule, when ‘employee’ is used in a statute without a definition, the Legislature intended to adopt the common law definition and to exclude independent contractors.”]) Mr. Lancaster’s reliance on the decision in *Metropolitan Water District* is misplaced since the sole issue decided by the Supreme Court was whether the doctrine of common law employment applied to someone claiming to be an employee of a *contracting agency*. (*Metropolitan Water District of Southern California v. Superior Court of Los Angeles*, *supra*, 32 Cal.4th 491, 496; see,

*Contra Costa Water District v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660 [“Opinions are not authority for issues they do not consider.”]) Besides, the Supreme Court quoted the decision in *Palma* as support for its conclusion that the doctrine of common law employment applies to the determination of the employment relationship between a contracting agency and one claiming to be an “employee” of that agency because PERL does not define employee with regard to contracting agencies. (*Metropolitan Water District of Southern California v. Superior Court of Los Angeles*, *supra*, 32 Cal.4th at pp. 500-501.)

Additionally, Mr. Lancaster did not meet the statutory definition of a state employee because his compensation was paid by the Foundation, not “out of funds *directly* controlled by the state . . . .” (Gov. Code, § 20028, subd. (a); italics added; Factual Findings 12 and 14.) The fact that the Foundation was paid by the State to provide the services of Mr. Lancaster pursuant to a personal services contract does not change the fact that he was paid with Foundation money, regardless of its source. Any other conclusion would be inconsistent with the explicit statutory authorization for personal services contracts such as those between the Foundation and DFG. (Fish & G. Code, § 2729, subd. (a) [“For the purpose of administering this chapter, the Wildlife Conservation Board and the Department of Fish and Game shall augment its existing staff, whenever possible, by contracting for those services necessary for the administration of this chapter. . . .”]; Gov. Code, § 19130, subd. (b) [authorizing personal services contracts under certain limited circumstances].)

10. It is beyond the scope of this proceeding to determine whether the contract entered into between the Foundation and DFG for the personal services of Mr. Lancaster was consistent with the state civil service mandate or whether Mr. Lancaster should have been considered to be a civil service employee pursuant to Government Code section 19130, subdivision (c). These issues are for the State Personnel Board (SPB) to Decide. Because Mr. Lancaster’s services were provided to DFG through a contract with the Foundation, which has not been determined by the SPB to be improper, Mr. Lancaster cannot be considered to have been a civil service employee during the time period in question.

11. In sum, Mr. Lancaster was not eligible for membership in CalPERS for the period of January 20, 1998, through August 13, 2000, during which he was an employee of the Foundation and paid with Foundation funds. Only an employee of a state agency or a contracting agency is eligible for membership in CalPERS, and Mr. Lancaster was neither. And the contracts between the Foundation and DFG established Mr. Lancaster was an independent contractor and not eligible for membership as a matter of law.

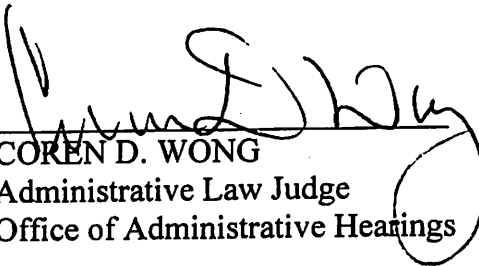
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ORDER

David J. Lancaster's appeal from CalPERS' determination that he was not eligible for membership during the period from January 20, 1998, through August 13, 2000, is DENIED.

DATED: December 4, 2012



COREN D. WONG  
Administrative Law Judge  
Office of Administrative Hearings