

ATTACHMENT E

THE PROPOSED DECISION

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

**In the Matter of the Appeal to Purchase Service Credit and
Use of Classic Formula in Service Calculation of:**

SHERIF R. ABDOU, M.D.

Respondent,

and

**STATE PERSONNEL BOARD; CALIFORNIA CORCORAN STATE
PRISON; AVENAL STATE PRISON; CALIPATRIA STATE
PRISON; IRONWOOD STATE PRISON; CHUCKWALLA VALLEY
STATE PRISON, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,**

Respondents.

Agency Case No. 2022-0257

OAH No. 2022090092

PROPOSED DECISION

Cindy F. Forman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 21, 2023.

Austa Wakily, Senior Attorney, California Public Employees' Retirement System (CalPERS), represented complainant.

Stanley R. Apps, Attorney at Law, represented respondent Sherif R. Abdou, M.D. (respondent), who attended the hearing.

Marta C. Barlow, Staff Counsel, appeared on behalf of respondent State Personnel Board (SPB). At the outset of the hearing, SPB moved to be dismissed from the case. CalPERS and respondent did not object to SPB's dismissal, and SPB's motion was granted.

No appearances were made on behalf of respondents California Corcoran State Prison, Avenal State Prison, Calipatria State Prison, Ironwood State Prison, and Chuckwalla Valley State Prison, California Department Of Corrections and Rehabilitation.

The Administrative Law Judge received testimony and documentary evidence. The record was kept open until December 4, 2023, for the filing of post-hearing briefs. Both parties timely filed their briefs. CalPERS' closing brief and reply brief are marked for identification as Exhibit 26 and Exhibit 27, respectively. Respondent's closing brief and reply brief are marked for identification as Exhibit N and Exhibit O, respectively.

The record closed and the matter was deemed submitted on December 4, 2023.

SUMMARY

Respondent appeals the denial by CalPERS of his request to purchase certain service credits for the period from 2005 to 2021 and to be designated as a classic member of CalPERS based on his request for membership beginning in 2005. Under California law, to qualify for CalPERS membership as a California state employee, an individual must be employed by the State and compensated from funds directly controlled by the State or disbursed from the State Treasury. CalPERS demonstrated respondent was not a member of the California civil service during the relevant period and he was paid as an independent contractor by a private firm. Respondent therefore did not prove by a preponderance of evidence he is eligible either to purchase service credits for his independent contractor work or to be designated as a classic member of CalPERS as of 2005. Accordingly, respondent's appeal is denied.

FACTUAL FINDINGS

Jurisdiction

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

2. Respondent is a physician. On January 3, 2022, respondent was employed by the California Department of Corrections and Rehabilitation (CDCR) as the Chief Medical Executive at CDCR Chuckwalla Valley State Prison in Blythe, California. By virtue of his employment by CDCR, respondent became a PEPR (Public Employees' Pension Reform Act) member of CalPERS on January 3, 2022. (Exhibit 5.)

3. Before respondent's employment as Chief Medical Executive with CDCR, respondent worked under a contract with the Registry of Physician Specialists (RPS) to provide medical care at various CDCR prisons. RPS is a third-party private company that since 2014 has contracted with Management Solutions, Inc., another private company, to provide physician services to CDCR and California Correctional Health Care Services (CCHCS). Before 2014, RPS contracted directly with CDCR and CCHCS to provide independent contractor physicians to several CDCR prisons.

4. On March 24, 2022, respondent requested to purchase service credit for Services Prior to Membership (SPM) with CalPERS. Specifically, respondent sought to purchase service credit for the physician services he provided to CDCR and CCHCS through RPS from September 1, 2005, through December 31, 2021. (Exhibit 11, p. A71.)

5. Both before and after respondent made his SPM service credit purchase request, respondent, respondent's wife, Sarah Sophia George, Pharm. D. (Dr. George), and CalPERS communicated about whether respondent's employment with RPS made him a common law employee of the State of California and therefore entitled him to purchase SPM credit. Respondent also maintained he should be classified as a classic member of CalPERS instead of a PEPRAs member because of his RPS employment.

6. On June 9, 2022, CalPERS denied respondent's request for SPM credits and reclassification because respondent's services between 2005 and 2021 were provided through a third-party private entity, not the State, and thus the time was not eligible to be purchased as SPM service credit or to be classified under the classic CalPERS plan (June 9 determination). (Exhibit 17.)

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7. On July 8, 2022, respondent filed a timely appeal of the June 9 determination and requested a hearing. (Exhibit 18.) Respondent filed an Amended Notice of Defense on September 14, 2023. (Exhibit A.)

8. According to the Amended Statement of Issues, the appeal in this matter is limited to the issue of whether respondent is eligible to purchase SPM service credit for the period of November 2005 through December 2021 and should be allowed to use the classic formula instead of the PEPR formula in the calculation of his service.

Respondent's Employment and Communications with CalPERS

9. Respondent is a fellow of the American College of Physicians and a specialist in correctional medicine. He has devoted much of his career to improving the healthcare system in California prisons.

10. From 2008 through December 2021, respondent through his contract with RPS provided physician services, including addiction medical services, to CDCR and CCHCS. While working at CDCR facilities, respondent was trained by prison staff and supervised by the Chief Medical Officer or equivalent employee at each particular CDCR facility. He did not receive instruction or training regarding his medical duties from RPS.

11. Respondent's 2010 employment contract with RPS provided respondent was an independent contractor and not RPS's employee, RPS would compensate respondent for his services to CDCR and CCHCS, and RPS received payment from the State of California that funded respondent's salary. (Exhibit 22.) No evidence was presented showing the 2010 employment contract differed significantly from any of respondent's other employment contracts with RPS. (See Exhibit 23.)

12. RPS Contract Analyst Ursula Reinhart testified at hearing and provided a credible account of RPS's contracting and payment practices. Ms. Reinhart has worked at RPS for more than 25 years. She first worked on billing issues and then was responsible for preparing contracts with the State. She also was in charge of collecting funds from RPS's clients and paying physicians offering their services through RPS.

13. RPS Contract Analyst Reinhart explained the billing and payment process for physicians such as respondent who worked at CDCR facilities. On a monthly basis, CDCR collected respondent's time sheets signed by his CDCR supervisor reflecting the hours he worked. At the same time, RPS would collect the time sheets from its other contracting physicians. RPS would then bill the State monthly for all of its physician's services in a single invoice. The invoice would also include an administrative fee for RPS's services. Until 2014, the State paid RPS a lump sum check to cover the costs of those physician services and administrative fees. RPS then compensated respondent from the lump funds paid by the State. RPS never billed the State directly for respondent's services, and the State never issued a separate check for respondent individually. RPS also did not receive any payments for respondent's services from the individual prisons where respondent worked. After 2014, CDCR retained Management Solutions to deal with RPS's bills. Management Solutions paid RPS in the same manner as the State, i.e., on a lump sum basis.

14. RPS issued respondent's paychecks for his services at several state prisons from 2008 through 2021, and the paychecks named RPS as the employer issuing his compensation. (Exhibits 8, 19.) Contrary to respondent's claim, there is no evidence respondent contracted with or was paid by RPS from 2005 through 2008. While contracted with RPS, respondent did not pay any contributions to a State

pension plan. Respondent received no benefits, other than his salary, from his contractual work with RPS. RPS did not deduct anything from respondent's paycheck.

15. Respondent did not take a civil service examination as a prerequisite for his contract with RPS or to work at any of the CDCR facilities assigned through RPS. In 2019 and 2020, respondent acknowledged in a declaration under penalty of perjury he had never worked as a California civil servant or been on a State employment or eligibility list to obtain a position as a California civil servant. (Exhibits 20, 21.)

16. In investigating respondent's work arrangements with RPS, CalPERS communicated with respondent's wife, Dr. George. Dr. George maintained respondent was a State common law employee and attached a February 25, 2022 letter and an April 29, 2022 letter signed by RPS Contract Analyst Reinhart in support of her contention. The February 25, 2022 letter states respondent was "paid by money deposited in and dispersed by the state treasury in payment of compensation." (Exhibit 12.) The April 29, 2022 letter certifies that RPS had employed respondent as a common law employee for CDCR and repeated that respondent was paid by money deposited by the State. (Exhibit 15, p. A82.) At hearing, Ms. Reinhart testified Dr. George wrote both letters.

17. On May 12, 2022, RPS Contract Analyst Reinhart informed CalPERS the statements in the April 29, 2022 letter were incorrect, stating:

This letter was written by Dr George. In re-reading it, it has come to my attention that RPS is not a government agency, and [respondent] was not an employee of RPS.

As to payment, we billed the State of California for a group of prisons and doctors. No individual invoice was submitted

in [respondent's] name, When the State paid us, only the invoice #'s were referenced, we did not receive payment for [respondent's] services directly.

(Exhibit 15, p. A81.)

18. In a second email set on May 12, 2022, RPS Contract Analyst Reinhart informed CalPERS that the statements in her February 25, 2022 letter were also incorrect.

Again, [RPS] did not get paid by CDCR directly for [respondent's] services. From 2014 on, we billed and were paid by Management Solution. Prior to that we billed the State for a group of services, for work done by any number of doctors and the State would pay us in lump sums. We then paid [respondent]. We never received direct pay for him in his name.

(Exhibit 16, p. A83.)

19. At hearing, respondent indicated he took the civil service exam in 2021 for his current position as Chief Medical Executive of CDCR, Chuckwalla State Prison. Respondent attempted to take the exam in 2015 but could not recall if he completed it. At the time, respondent understood that he needed to take the civil service exam to become an employee of the State.

20. Rita Jenkins, an Associate Governmental Program Analyst in the CalPERS Post Retirement Employment and Audits Team within the Employer Account Management Division for eight years, was the analyst assigned to review respondent's

account. Ms. Jenkins testified at hearing regarding her efforts to determine whether respondent was eligible to purchase SPM credits for the time when he served as an independent contractor and whether respondent could be switched from PEPRRA to the classic CalPERS plan. As part of her investigation, Ms. Jenkins contacted several of the state prisons where respondent worked during the 2008 to 2021 period to confirm respondent worked as an employee instead of as an independent contractor. The state prisons informed her they either lacked employment records for respondent or that respondent was an independent contractor whose payroll records were in the possession of a third party. Based on her investigation, Ms. Jenkins determined respondent was not eligible for membership in the classic plan or to purchase SPM service credit because his compensation had not been paid by the State. Additionally, respondent could not be a State employee while working as an independent contractor for RPS because he had not taken a civil service examination for such work.

21. CalPERS issued an Amended Final Determination letter dated June 9, 2022, reflecting Ms. Jenkins' findings. (Exhibit 17.) The letter informed respondent that he did not meet the definition of employee for the State stated in Government Code section 20028, subdivision (a). The letter also informed respondent that his contract for services with RPS did not bring respondent into the State civil service and that respondent was not compensated by funds directly controlled by the state. Accordingly, CalPERS concluded respondent was not eligible to purchase SPM service credit for the period of his RPS contract relationship and could not be reclassified under the CalPERS classic plan.

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LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Respondent has the burden of proof as the moving party to establish he is entitled to purchase service credit. The standard of the burden of proof is the preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) A preponderance of the evidence means evidence that has more convincing force than opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Analysis

2. CalPERS is governed by the Public Employment Relations Law, Government Code sections 20000 et seq (PERL). (All further undesignated statutory references are to the Government Code.) Under the PERL, a CalPERS member is an "employee who has qualified for membership in this system and on whose behalf an employer has become obligated to pay contributions." (§ 20370, subd. (a).) A person hired as an employee of the State "becomes a member upon his or her entry into employment" while an "employee of a contracting agency on the effective date of its contract with the board becomes a member immediately." (§ 20281.) Thus, only State or contracting agency employees can become members of CalPERS. Independent contractors who are not employees are excluded from CalPERS membership. (§ 20300, subd. (b).)

3. Respondent seeks to be reclassified as a CalPERS classic member as of the date he commenced employment with the CDCR through RPS and requests to purchase SPM service credit for the years he spent working for CDCR through RPS. To

be allowed to do so, respondent must prove he qualified for membership in CalPERS either as a State employee or an employee of a contracting agency when he started working at CDCR prisons. (§ 20931 [credit for prior service is only granted to those members who were employed by the State at the time of such service].) Under the PERL, CalPERS is prohibited from allowing the purchase of nonqualified service credit. (§ 7522.46.)

4. Respondent has not proven by a preponderance of evidence that he was an employee of the State eligible for service credit while working as an independent contractor for RPS. Article VII, section 1, of the California Constitution requires every State employee to be a member of the State civil service and every permanent appointment to the State civil service to be based on a competitive examination. Thus, a State employee is required to be a member of the State civil service after taking a civil service examination. (§ 18526.) Respondent never took a civil service examination to qualify for contracting work with RPS. He also acknowledged he was not in the State civil service while working for RPS.

5. Respondent in his independent contractor capacity also does not meet the definition of an employee under the PERL. Those employees are defined in section 20028 as follows:

(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 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.

[¶] . . . [¶]

6. Respondent's work through RPS does not fall within either subdivision (a) or (b) of section 20028. As noted in Legal Conclusion 4, respondent was not in the employ of the State, a county, or a university while contracting with RPS, a private company. Respondent was also not paid out of "funds directly controlled by the State," as required by subdivision (a). The evidence demonstrated respondent was paid during the relevant period from funds directly controlled by RPS, not by the State. There was no evidence the State directly issued a check to respondent or made a separate payment to RPS for respondent's services. Rather, respondent received a check from RPS reflecting a lump sum payment from the State covering the costs of respondent's and other physicians' services and RPS's administrative costs. RPS had complete control over the funds received by the State and decided what portion of those funds would comprise respondent's compensation. That the State was the ultimate source of the respondent's compensation does not mean the State directly controlled the funds that paid him.

7. Additionally, respondent's contracting with RPS or his work for CDCR does not constitute employment with a contracting agency as required by subdivision (b) of section 20028. A contracting agency is defined in sections 20022 and 20460 as a

public agency that has chosen to participate in CalPERS by contract with the CalPERS governing board and has elected to have some or all of its employees become CalPERS members. It can include county agencies and some other public employers. RPS is not a contracting agency under section 20022 because it is a private company that has not contracted with CalPERS and has not elected to have any of its contracting physicians become CalPERS members.

Respondent's Contentions

8. Respondent asserts he falls within the scope of subdivision (a) of section 20028 because he was a common law state employee providing state services starting in 2005. According to respondent, because his work was under the control of the State, he should have been enrolled as a CalPERS classic member in 2005 and been permitted to purchase additional service credit based on his CalPERS classic member status. Respondent cites *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491 (*MWD*) and several CalPERS administrative decisions in support of his assertion.

9. The *MWD* decision and the other decisions cited by respondent, however, are each distinguishable from the facts presented here and do not support respondent's assertion he falls within subdivision (a) of section 20028. In *MWD*, the California Supreme Court ruled that persons employed through a third party contractor by the water district were common law employees and eligible to become members of CalPERS. In the other decisions cited by respondent, the Board of Administration similarly found that the individuals at issue, even though employed through a contractor, were common law employees of either a city or other public agency.

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10. In each of the cases cited by respondent, the employing party was a contracting agency as defined by the PERL, and the determination of whether the individual therefore was eligible to receive CalPERS benefits was controlled by section 20028, subdivision (b), and not by subdivision (a), which pertains to State employees. As subdivision (b) does not define employee, applying the common law definition of employee is appropriate. (*MWD, supra*, 32 Cal.4th at p. 501.) Thus, the workers employed by MWD, a contracting agency, could be deemed members of CalPERS if they could show they met the test of a common law employee relationship.

11. In this case, however, subdivision (b) of section 20028 is inapplicable because neither RPS nor CDCR is a contracting agency as defined by section 20022. Thus, respondent cannot rely on the common law employee analysis permitted under subdivision (b) to determine his eligibility to receive CalPERS benefits. He therefore must look to subdivision (a) of section 2022 to determine his eligibility. However, as the *MWD* court also makes clear, subdivision (a) does not rely on the common law employee definition to determine eligibility. Instead, that subdivision specifically requires that to qualify as a CalPERS member, individuals must be State employees whose compensation is "paid out of funds directly controlled by the state" regardless of whether they can be considered common law employees of the State. (*MWD, supra*, 32 Cal.4th at p. 502.) Thus, the nature of respondent's duties while working at CDCR before 2022 is not relevant in determining whether he could be considered a CalPERS member at that time. What is decisive is whether he was a State employee and the source of his compensation.

12. Respondent offered no evidence supporting his claim that he was paid by funds directly controlled by the State or CDCR. While CDCR may have suggested his hourly rate, RPS paid his compensation and had exclusive control over the lump sum

funds paid by the State to cover its physician costs and administrative fees. No funds were disbursed or earmarked by the State Treasury to specifically pay respondent as respondent asserts. (Exhibit N, p. B457.) Contrary to respondent's assertion in his brief (Exhibit N, p. B466), RPS Contract Analyst Reinhart disavowed the contents of the February 25, 2022 and April 29, 2022 letters stating the State funds paid to RPL were controlled by the State, and she testified RPS had exclusive control of the funds.

13. Respondent also contends the definition of an employee in section 18526 requiring respondent to be a civil service employee is irrelevant because section 18526 is not part of the PERL, and in any event, respondent was exempt from civil service requirements because of his unique talents and the State's dire need for physicians. None of these arguments are persuasive. Section 18526 sets forth the requirements for being a State employee, regardless of whether such employee is a member of CalPERS. That definition is relevant because subdivision (a) of section 20028 refers to "an employee of the State." As respondent did not take a civil service examination, he cannot be considered an employee of the State. Additionally, there appears to be no exception to the civil service law for highly qualified personnel, as respondent suggests, and respondent offered no evidence showing he was hired because civil servant physicians were unavailable or unable to provide an equivalent level of service.

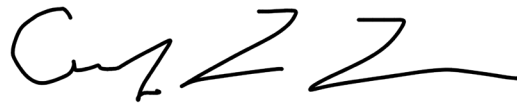
14. In summary, respondent was not a State employee when he worked at CDCR institutions through RPS. RPS was a private firm with the sole control over the funds in its possession. RPS also was the only party responsible for compensating respondent. RPS's funds paid respondent's compensation. Respondent is therefore ineligible to be classified as a CalPERS classic member for his work through RPS and is

ineligible to purchase SPM service credit for the years he worked as a contract physician with RPS.

ORDER

The appeal of respondent Sherif R. Abdou, M.D., is denied.

DATE: **12/01/2023**

A handwritten signature in black ink, appearing to read 'Cindy F. Forman', with a stylized, cursive script.

CINDY F. FORMAN

Administrative Law Judge

Office of Administrative Hearings