

ATTACHMENT B

Staff Argument

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

County of Monterey; Natividad Medical Center (NMC) is a teaching hospital owned and operated by County of Monterey (the County).

Sally Tirado (Respondent) established membership with CalPERS on October 26, 1996 to June 1, 1998, through her employment with the County as a Licensed Clinical Social Worker IV, working at NMC. In 1998, Respondent resigned from her employment with the County. Thereafter, Respondent entered professional agreements with the Natividad Medical Foundation and NMC to perform services as a Family Practice Residency Program Licensed Clinical Social Worker.

On June 2, 2020, Respondent contacted CalPERS to inquire about the cost to purchase Service Prior to Membership. CalPERS reviewed all of the supporting documents and determined Respondent was a common law employee of the County from April 1, 2013 through May 28, 2020, as a Community Medicine Co-Director of NMC's Residency Training Program. This determination was not appealed by the County. Respondent appealed CalPERS' determination and requested she be deemed a common law employee for additional time from May 1, 2002 through March 30, 2013.

CalPERS requested the County report payroll for April 1, 2013 through May 28, 2020. After the County reported Respondent's payroll from 2013-2020, she was awarded 1.123 additional years of service credit. Respondent disagreed with the payroll reported by the County. The County claimed it could not report payroll that could not be verified. CalPERS informed Respondent that CalPERS cannot compel the County to report payroll that the County cannot verify, and that the issue regarding payroll would be included as part of her appeal.

CalPERS set the matter for a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). The two issues presented were whether Respondent was a common law employee of the County from May 1, 2002 through March 30, 2013, and whether the County must report additional payroll for April 1, 2013 through May 28, 2020. Two days of hearing were held on January 19 and June 2, 2023. Respondent and the County were both represented by counsel during the hearing.

Under Government Code section 20069, subdivision (a), "[s]tate service" means "service rendered as an employee or officer" of a contracting agency. An employee is "[a]ny person in the employ of any contracting agency." (Gov. Code § 20028, subd. (b).) The California Supreme Court has held that the Public Employees' Retirement Law provisions concerning employment by a contracting agency incorporate the common law test for employment. (*Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500.) The common law employment test applies to this case.

The common law employment test was articulated by the California Supreme Court in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949. Under that test, “the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists.” (*Id.*) If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*Id.* at pp. 946-947.)

Tieberg noted the following other factors may be taken into account:

(a) whether or not one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee (*Id.* at p. 949.)

The *Tieberg* court noted one of the most important of those secondary factors is “whether the parties believe they are creating the relationship of employer-employee,” especially as specified in a written agreement. (*Id.* at p. 949.)

The burden of establishing an independent contractor relationship is upon the party attacking the determination of employment. (*Southwest Research Institute v. Unemployment Ins. Appeals Bd.* (2000) 81 Cal.App.4th 705, 708.)

Respondent testified that her main job duty was to train resident physicians. Her work was performed under the control and direction of the NMC’s family practice Residency Program Director. The County provided all her work supplies. The Residency Program Director instructed Respondent on how to perform her job duties, including providing direction on how to spend her time on the job. She was required to consult with the Residency Program Director and provide monthly progress reports on her work.

The County provided testimony from several witnesses. The first testified that Respondent worked at NMC as an independent contractor for 19 to 20 years. She submitted and NMC paid invoices for her services. She was paid approximately \$90 per hour for her services, which was about twice the payrate shown on the County’s salary schedules. Respondent was employed pursuant to employment

contracts, which required her to maintain her own liability and workers' compensation insurance and provided for a 30-day notice of termination. The second County witness testified that there is no record that Respondent applied for a job under NMC's application system which dates back to 2012.

The third County witness testified regarding the County's efforts to produce Respondent's payroll information. The County searched its payroll records and verified that the County had no records for Respondent after 1998. While CalPERS provided some documents, including timesheets from 2019 and 2020, the County could not certify that information because it did not know whether the documents provided by CalPERS were accurate. This witness eventually explained that if the County had paid Respondent as an independent contractor, the payroll system would not include record of those payments. The County's "accounts payable" records might contain that information. No one from the County searched the "accounts payable" records to determine whether payments to Respondent were included.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent's appeal. The ALJ found that under the *Tieberg* test, the County had the right to exercise control over the manner and means of how Respondent performed her work. The ALJ noted that the employment agreements between Respondent and the County state that Respondent is to be supervised by the Residency Program Director. The ALJ held that based on the specific facts in this matter, Respondent's claim that she was a common law employee of the County is not barred based on the doctrine of laches or equitable estoppel. Therefore, The ALJ held that Respondent was a common law employee from May 1, 2002 through March 30, 2013. As to the payroll issue, the ALJ ordered the County to conduct a diligent search and produce any such records to CalPERS.

Pursuant to Government Code section 11517, subdivision (c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." To avoid ambiguity, staff recommends correcting "2006 through 2013" to "2002 through 2013" in paragraph 10, under the Factual Findings section, on page 4 of the Proposed Decision.

For all the above reasons, staff does not oppose the Board's adoption of the Proposed Decision, as modified.

September 20, 2023

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