

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
**In the Matter of the Appeal of Membership Determination
of:**

SALLY TIRADO, and

COUNTY OF MONTEREY; NATIVIDAD MEDICAL CENTER,

Respondents.

Case No. 2021-0922

OAH No. 2022020372

PROPOSED DECISION

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on January 19 and June 2, 2023, via videoconference.

Staff Attorney Preet Kaur represented complainant Renee Ostrander, Chief of the Employer Account Management Division of the California Public Employees' Retirement System (CalPERS).

Attorney Vance D. Piggot represented respondent Sally Tirado (Tirado), who was present.

Assistant County Counsel Janet L. Holmes represented respondents County of Monterey (County) and the County's Natividad Medical Center (NMC) (collectively referred to as County).

The record was held open for the parties to submit simultaneous closing briefs. CalPERS, Tirado, and the County submitted such briefs, which were marked for identification as Exhibit 19, Exhibit R81, and Exhibit E, respectively. The record closed and the matter was submitted on July 5, 2023.

ISSUES

The issues presented for determination are 1) whether Tirado qualified for membership in CalPERS from 2002 through March 30, 2013, based upon her performance of services as a common-law employee for the County during her employment at the NMC; and 2) whether the County must report further compensation information to CalPERS for the period of April 1, 2013, through May 28, 2020.

Regarding the first issue, Tirado contends that she was a common-law employee of the County during the disputed period, because the County exercised significant control over the work she performed at the NMC under various independent contractor agreements with the Natividad Medical Foundation (Foundation). The County contends that Tirado was never an employee of the County after 1998 and further that her claim is barred by applicable statutes of limitations and by the doctrines of laches, estoppel, waiver, and unjust enrichment. CalPERS contends that Tirado's claim for membership in CalPERS during the disputed period is barred by the doctrine of laches.

Regarding the second issue, Tirado contends that the County either has compensation records it has not produced or, if not, is obligated to produce its best estimate thereof. The County contends that any records of payments to Tirado would be under the control of the Foundation.

FACTUAL FINDINGS

Background

1. On March 10, 2022, complainant Renee Ostrander filed the statement of issues in her official capacity as Chief of the Employer Account Management Division of CalPERS.

2. Tirado established membership with CalPERS on October 26, 1996, through her previous employment with the County as a Licensed Clinical Social Worker IV, working at the NMC. This employment ended June 1, 1998. By virtue of this County employment, Tirado is a local miscellaneous member of CalPERS.

3. The County is a public agency that contracts with CalPERS to provide retirement benefits for its eligible employees. The provisions of the County's contract with CalPERS are contained in the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq. [all statutory references are to the Government Code unless otherwise stated].)

4. The NMC is a teaching hospital located in Salinas. It is owned and operated by the County.

5. The Foundation is a non-profit corporation that exists to support the NMC philanthropically.

6. On June 2, 2020, respondent Tirado contacted CalPERS to inquire about the cost to purchase service prior to membership.

7. By email of August 3, 2020, CalPERS informed NMC, the County, and the Foundation that it was reviewing Tirado's employment from 2002 to the present and requested submission of supporting documents.

8. CalPERS received several documents from the County, including but not limited to Employment Relationship Questionnaire (Agency); Employment Tax Status Questionnaire; purchase orders; delivery orders; financial accounts payable; employment agreements and contracts; Grant Task; Social Worker IV classification; Monterey Board of Supervisors orders; and an annual review form.

9. On February 25, 2021, CalPERS sent a preliminary determination letter to respondents, informing them that service provided by Tirado at the NMC as a Community Medicine Co-Director and Faculty of Family Medicine Residency Training Program's Community Medicine Rotation, and Expert Educational Consultant Services from April 1, 2013, through May 28, 2020, was that of a common-law full-time County employee. For this reason, CalPERS considered Tirado eligible for CalPERS membership for that period. The letter also offered the County 30 days to provide additional documentation before CalPERS would issue its final determination.

10. By letter dated March 19, 2021, Tirado responded to CalPERS's preliminary determination letter, informing CalPERS that she also had been employed by the County from 2006 through 2013, and asking CalPERS to find her eligible for CalPERS membership during that period of time as well.

11. On May 18, 2021, CalPERS sent a final determination letter to respondents, confirming the preliminary determination summarized in Factual Finding 9.

12. On June 24, 2021, CalPERS granted Tirado an extension to June 28, 2021, to file an appeal.

13. By letter dated June 28, 2021, Tirado timely filed an appeal regarding CalPERS's determination. Tirado contends that she performed services at the NMC as a common-law employee of the County beginning in 2002, well before CalPERS's determination that her County service resumed on April 1, 2013.

14. The County did not timely appeal CalPERS's May 18, 2021, determination.

15. On March 8, 2022, CalPERS requested that the County report Tirado's payroll data for the period of April 1, 2013, through May 28, 2020.

16. On April 8, 2022, CalPERS repeated its request.

17. On May 16, 2022, the County reported payroll data for Tirado for April 1, 2013, through March 21, 2014, and July 1, 2019, through May 28, 2020. This report resulted in 1.123 years of service credit.

18. County representatives informed CalPERS that they could not verify further payroll information regarding Tirado, and that the County could report only the payroll its representatives could verify.

19. On June 2, 2022, Tirado requested information regarding the payroll that had been reported by the County.

20. On July 6, 2022, CalPERS notified Tirado regarding the amount of service credit that had been reported. CalPERS also notified Tirado that it cannot compel the County to report pay information for which the County does not possess records. CalPERS further notified Tirado that this issue would be included as part of the statement of issues pending before the Office of Administrative Hearings.

Tirado's Work at the NMC from 2002 to March 30, 2013

TESTIMONY OF TIRADO

21. Tirado testified at hearing. Her testimony was generally credible and consistent with the documentary evidence.

22. Tirado worked at the NMC from 1996 to 1998 as an intern and then a social worker. She resumed working at the NMC in 2002 as a "clinical instructor." She reports that she was hired by Dr. Marc Tunzi, an employee of the NMC. At some point not long thereafter, her title was changed to "Co-Director" of the Community Medicine program. Later her title was changed to "SBIRT Community Medicine Rotation Co-Director" (SBIRT is an acronym for "screening, brief intervention and referral to treatment"). She performed this work at NMC until she retired in May 2020.

23. Tirado's primary duty was to train resident physicians. The Song-Brown program is a state program to increase the number of family medicine physicians in California. The NMC used funding from this program to train its physicians.

24. Tirado's work from 2002 through 2020 was performed under a series of often overlapping written agreements that identified her as an independent contractor. The earliest agreement in evidence is dated May 1, 2002. Tirado reports that the varying agreements were related to funding sources that paid for her services.

25. Pursuant to the agreements, Tirado's work was supervised by the family practice residency program director at "Natividad Medical Center/Foundation" or the Foundation. A maximum amount of compensation was identified, and Tirado was required to submit a monthly invoice. Tirado was reimbursed for travel approved by the "Residency Program Director." No taxes were deducted from the payments to Tirado.

The earlier documents specified the contracting parties as Tirado and "THE SONG-BROWN program, c/o NATIVIDAD MEDICAL CENTER/FOUNDATION." They stated that Tirado would perform services as an independent contractor, not an employee of the Song-Brown program, and that Tirado would not receive employee benefits.

The later documents identified the parties as Tirado and the Foundation. They also expressly disclaimed any right of Tirado to employee benefits, including retirement benefits, and specified that the parties agreed that nothing that occurred under the agreement would render Tirado an employee of the Foundation or the County.

26. Beginning in approximately 2008, the subsequent documents included a clause stating, "[Foundation] shall not have or exercise any control or direction over the methods by which Contractor shall perform its work and functions." Nevertheless, they also stated that Tirado must strictly abide by "all applicable laws and regulations, Hospital By-laws, rules, regulations, policies and procedures, with the Medical Staff By-laws and Rules and Regulations, NMC rules and regulations, and [the Foundation's] rules and regulations."

27. Some of the copies of the independent contractor agreements submitted by Tirado (including several from 2002 to 2004) are fully executed. Copies of some but not all of the later contracts (e.g., 2008 through 2013) are not executed.

28. Tirado reports that she was initially supervised by Dr. Tunzi and Dr. Gary Gray, who were co-directors of the family medicine residency program. Dr. Gray later served as CEO of the NMC. Dr. Gray was an employee of the County. Tirado was later supervised by directors who succeeded those physicians. All of these supervisors provided formal written evaluations of her performance each year. They provided specific instructions on how she should "spend her time" on the job. She was required to consult with them regarding goals, objectives, and personnel issues. She was required to provide them monthly reports on her work. They oversaw her curriculum. She submitted her timesheets to the director of the family medicine program for approval.

29. Tirado was assigned a specific resident to train, and was required to show up at particular locations and times to perform her duties. She trained and evaluated 20 to 30 NMC resident physicians per year. She served on, and attended weekly meetings for, NMC faculty and hospital committees. She describes her role as a "faculty member and professor at" the NMC.

30. Tirado reports that she was provided office space at the NMC, with a telephone and an NMC computer. She mostly worked onsite at the NMC, but sometimes trained residents offsite at an addiction clinic. She was issued a NMC identification badge. She was provided with a County email account and then later a NMC email account. She was provided secretarial support by NMC employees. She was provided with office supplies, business cards, and a printer. She attended trainings

such as sexual harassment prevention, which she understood were for NMC employees.

31. The payments Tirado received did not have taxes withheld. She submitted two 1099-MISC federal tax forms, for the years 2006 and 2019, respectively. These forms identify the Foundation as the payer. They reflect payments from the Foundation to Tirado of \$41,800.04 and \$125,167, respectively. Tirado testified that she is not sure if she ever received a 1099 form from the County.

32. Tirado was not a member of the Service Employees' International Union after 2000.

33. Tirado reports that, if given the option, she would have enrolled into CalPERS and paid retirement contributions. She reports that she asked about becoming eligible for CalPERS membership, and her co-director was granted CalPERS membership, but her request was denied. She reports that she started making these requests as far back as 2002 and made them to different supervisors, without success.

34. Tirado reports that there is not an official County position equivalent to the work she performed from 2002 through 2020, and that this work was different from the typical social worker duties she performed for the County before 2000. She believes she first contacted CalPERS regarding her membership in 2019 or 2020.

TESTIMONY OF JENNIFER WILLIAMS

35. Jennifer Williams testified at hearing. Williams has been the president and CEO of the Foundation since May 2018. Prior to that role, she served as the Foundation's director of development for approximately 16 years. Williams provided the following testimony.

36. The Foundation is a tax-exempt corporation that exists to provide philanthropic support to the NMC. The Foundation is a separate entity from the County and the NMC. All state agency grants for the NMC's benefit, including all Song-Brown grants, "go through the Foundation." A press release describing two state grants directly to the NMC is incorrect in that regard. The Foundation does not own or operate the NMC. It is not able to dictate what occurs there. It does employ some physicians who treat patients there.

37. The Foundation's offices are on the campus of the NMC. It employs 10 to 20 employees. Those employees are not enrolled in CalPERS. The Foundation has separate retirement "arrangements" for its employees. The Foundation obtains 30 to 40 grants per year, which it uses to, among other things, fund its workers.

38. Williams knows Tirado. Williams reports that Tirado worked for the Foundation for 19 to 20 years, as an independent contractor. Williams does not regard Tirado as ever having been an employee of the Foundation or of the NMC. Tirado performed most of her work for the Foundation on the NMC campus, but not in the Foundation's office suite. Williams reports that Tirado submitted, and the Foundation paid, invoices for Tirado's work. Williams believes that Tirado was paid approximately \$90 per hour at the time she stopped working for the Foundation. Tirado was required to maintain her own liability and workers' compensation insurance, pursuant to the terms of her contracts. The contracts also provided for a 30-day notice of termination, whereas Foundation employees are at will.

39. Williams is not aware that Tirado ever asked the Foundation whether she was entitled to CalPERS benefits or inquired whether she was an employee of the County. Williams reports that she does not know if the NMC exercised control over how Tirado performed her work.

TESTIMONY OF CHARLES WANG

40. Charles Wang testified at hearing. Wang has been a senior personnel analyst for the NMC and the County since 2013.

41. Wang reports that there is no record of Tirado's applying for a job with the County in the current application system, which dates back to 2012. Wang reports that as of 2021, the highest pay rate for a County social worker was \$42.69 per hour, less than half of Tirado's final hourly rate. Wang appeared unaware that Tirado's work from 2002 to 2020 involved teaching new physicians. He testified that he does not know whether County social workers perform that task or co-direct activities of the family medicine residency program.

42. Wang reports that the County used to pay the entire contribution for its employees' CalPERS funding. At some point, perhaps in 2010, County employees were required to start paying part of the contribution, but Wang is not sure precisely when that change happened.

The County's Efforts to Produce Tirado's "Payroll" Information

43. A document submitted by CalPERS purports to be a "listing of documents in the County of Monterey Advantage Financial System for" Tirado. It is titled "Vendor Transaction History" and appears to show many tens of thousands of dollars paid to Tirado between April 9, 2013, and April 10, 2014. The document appears incomplete, and the original source was not authenticated, but it suggests that Tirado was paid some amounts by the County during that period. A spreadsheet submitted by CalPERS shows numerous payments from 2013 through 2019 to Tirado, totaling \$834,003, attributed to the County, the Foundation, "San Francisco General Hospital," or "JBS." Payments totaling \$52,500 for the years 2013 and 2014 are

attributed to the County. This original source of this document was also not established, but it again suggests some payments by the County to Tirado in the relevant period.

44. Patricia Girard testified at hearing. Girard has been the payroll manager for the County for more than 15 years. Her purview includes County employees who work at the NMC, but not individuals who work for the Foundation. Girard credibly reports that her employees searched the County's payroll records and verified that the County has no such records for Tirado after 1998.

45. Girard reports that CalPERS provided documents, including timesheets from Tirado for 2019 and 2020, and asked the County to use those documents, position titles, and salary schedules, to determine the hours Tirado worked and her rate of pay for April 1, 2013, through May 28, 2020. Girard reports that the County could not certify that information because it did not know whether the documents provided by CalPERS were accurate.

46. Girard eventually explained that if the County had paid Tirado as an independent contractor, its payroll system would not include any record of such payments. Rather, such records would exist in the County's "accounts payable" records, along with records of payments to the County's other non-employee vendors. Girard reports that she has no access to those records and no knowledge of how long the County retains them. To her knowledge, no one from the County checked those records to ascertain whether the County had records of payments to Tirado for her work at the NMC. Girard did not check with any other department of the County, or with the Foundation, to attempt to find records of payments made to Tirado.

47. Girard was not asked to, and did not, reconcile the documents that appear to show payments from the County to Tirado from 2012 to 2014 with her testimony. The County may possess records detailing such payments, even though they are not identified as "payroll" records. In addition, it was not established in this proceeding whether the Foundation possesses records of payments to Tirado, or what efforts were made to discover such records.

Ultimate Factual Findings

48. Significantly more evidence was presented at hearing than was available to CalPERS when it issued its May 18, 2021, determination that Tirado had not shown she was a common-law employee of the County prior to April 1, 2013.

49. Tirado's work from May 1, 2002, through March 30, 2013, was a core part of the NMC's mission as a teaching hospital. Her nominal employer is a separate but highly related entity dedicated to support the County's NMC; she performed her work under the supervision of County employees, and pursuant to NMC rules; she largely performed her work at a County facility, using the office, secretarial staff, supplies, email account, and other instrumentalities provided by the County; and she served on, and attended weekly meetings for, NMC faculty and hospital committees. Tirado's work was not significantly different in this disputed period from her work during the April 2013 through May 2020 period that CalPERS already has determined constituted common-law employment for the County.

50. The County diligently searched its payroll system for records of payments to Tirado. However, because she was apparently paid as an independent contractor, the payroll system is not where the County would store those records. The County did not search accounts payable records or any financial records other than its payroll

system. Some evidence shows that the County made payments to Tirado between April 1, 2013, and May 28, 2020, and the County may possess further records of those payments that it has not produced to CalPERS or Tirado.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In opening argument at hearing, CalPERS and Tirado agreed that it is CalPERS's burden to show that Tirado was not qualified for membership between 2002 and 2013 as a result of her work as a common-law employee for the County. In CalPERS's closing brief, however, it cites *Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476, and contends opaquely that "The person against whom a Statement of Issues is filed generally bears the burden of proof at the hearing regarding the issues raised." CalPERS then quotes Evidence Code section 500, stating "Except as otherwise provided by law, a party has the burden of proof as to each fact." Tirado also argues that the County bears the burden to show that it does not have records of payments to Tirado that it has not already produced.

2. These arguments are unpersuasive. Tirado seeks to change the status quo, and bears the burden of proving her contentions. She bears the burden of proving that she was a common-law County employee, and of showing that relevant County records relating to that employment may exist. The standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; Evid. Code, § 115.)

First Issue: Tirado Was Qualified for Membership in CalPERS from May 1, 2002, through March 30, 2013, as a Common-Law County Employee

TIRADO'S CLAIM THAT SHE WAS QUALIFIED FOR MEMBERSHIP IN CALPERS FOR THE RELEVANT PERIOD IS NOT BARRED BY A STATUTE OF LIMITATIONS, OR BY THE DOCTRINES OF LACHES, ESTOPPEL, WAIVER, OR UNJUST ENRICHMENT

3. The County argues that Tirado's claim is barred by the statute of limitations set forth in section 911.2, which requires certain claims against government entities to be presented within one year of accrual of the claim. The County argues that Tirado's claim for CalPERS benefits "amounts to a claim against the County," and points to the fact that Tirado has not filed a tort claim in a court of law. This contention is rejected, because Tirado's claim is not a claim against the County under section 911.2. She timely and properly presented her claim to CalPERS less than a month after she retired. (Factual Findings 6, 7, and 11.)

4. Similarly, the County's citation to *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 462-463, and assertion that an "employee may only recover for deficient payments made in the four years preceding the filing of the cause of action" is rejected as inapposite. Tirado promptly filed her claim with CalPERS; and her claim is not a claim against the County, despite the fact that it might impact the County financially. The County's argument that contributions might be more expensive now than if the County had made them at the time Tirado performed her work does not render Tirado's claim untimely.

5. Laches is an equitable limitation on a party's right to bring suit. (*Kling v. Hallmark Cards Inc.* (9th Cir. 2000) 225 F.3d 1030, 1036) In some cases of delay, equity may bar an administrative proceeding, and "the courts will apply notions of laches borrowed from the civil law." (*Brown v. State Personnel Bd.* (1985) 166 Cal.App.3d 1151, 1158-1159.) Under California law, "(t)he defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.) CalPERS joins the County in arguing that Tirado's claim is barred by laches.

6. As to the issue of whether Tirado was a common-law employee of the County, the delay has not significantly prejudiced the County or CalPERS. The evidence (including the testimony of Foundation CEO Williams) established that Tirado's work did not significantly change from 2002 through 2020 when she retired and presented her claim to CalPERS. There is no significant factual dispute on this issue. Further, the County failed to diligently search for records related to Tirado's work at the NMC and cannot, with unclean hands, invoke this equitable defense.

7. The County and CalPERS also argue that Tirado acquiesced to her characterization as an independent contractor of the Foundation, and chose to remain in that status instead of applying for a County position. They both argue that Tirado benefited from this arrangement because she received approximately double the hourly rate of pay of a County social worker. This argument ignores the overwhelming evidence that Tirado was not performing social worker duties, nor was that her job title. Instead she was co-director of the NMC's family medicine residency program, a position that one would expect to pay much more than that of a social worker. The evidence does not show that an equivalent position for the County would have paid

less. It appears that Tirado's primary alternative would have been to quit her position and seek a significantly different type of work. Under these circumstances, her actions do not constitute sufficient acquiescence in the act about which she complains to bar her claim for a determination that she was a common-law employee of the County from May 1, 2002, through March 30, 2013, under the doctrine of laches.¹

8. The County argues that Tirado is estopped from claiming she was a common-law employee of the County because she earned a higher rate of pay as an independent contractor; left her CalPERS-eligible position with the County to accept the independent contractor position; and induced the County in good faith to rely on her resignation to its injury. However, four years elapsed between the end of Tirado's tenure as a County social worker and the beginning of the period in question. In addition, the work was not the same, and the evidence did not show that a truly equivalent position for the County would have paid less.

9. The County cites *Gutierrez v. Board of Retirement* (1998) 62 Cal.App.4th 745, an opinion about benefits election, and argues that Tirado waived her right to a determination that she was a common-law employee of the County by "resigning her County employment and accepting work with the Foundation at a significantly higher hourly rate of pay." The County also argues that finding Tirado a common-law employee of the County is barred by the doctrine of unjust enrichment, again premised on the notion that Tirado was paid more as an independent contractor than

¹ However, this analysis is limited to this issue. Tirado's delay in challenging her classification poses a much greater likelihood of prejudice to CalPERS and the County with respect to the determination of her service credit.

she would have been paid as an employee. *Gutierrez* is inapposite, because the evidence did not show that an equivalent position for the County would have paid less.

10. Tirado's assertion that she was qualified for membership in CalPERS for the relevant period is not barred by a statute of limitations, or by the doctrines of laches, estoppel, waiver, or unjust enrichment.

TIRADO WAS A COMMON-LAW EMPLOYEE OF THE COUNTY FROM MAY 1, 2002, THROUGH MARCH 30, 2013

11. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions, and by interest and other earnings on those contributions. The amount of a member's service retirement allowance is calculated by applying a percentage figure, based upon the member's age on the date of retirement, to the member's years of service and the member's "final compensation." CalPERS staff reviews service credit report by member's employer(s) to ensure the member receives the proper amount of service credit, and that all reportable years of service are used to calculate the member's final compensation for purposes of calculating the retirement allowance.

12. Membership in CalPERS is determined by the PERL. The common-law employment test is part of the criteria used by CalPERS and the courts to determine whether an individual should be classified in "employee" or "independent contractor" status under the PERL. (*Metropolitan Water District v. Superior Court (Cargill)* (2004) 32 Cal.4th 491; the terms "independent contractor" and "employee" of a contracting agency must be defined with reference to California common law). Courts use the

common-law test of employment when, as here, a statutory scheme refers to the term “employee” without defining it. (*Cargill, supra*, 32 Cal.4th at 500-501.)

13. The California Supreme Court explained in *Empire Star Mines Co. v. California Employment Commission* (1946) 28 Cal. 2d 33 the following regarding the distinction between an employee and an independent contractor, “[i]n determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired.” (*Id.*, at p. 43; overruled on different grounds by *People v. Sims* (1982) 32 Cal.3d 468, 479, fn. 8.) The Court set forth the following criteria: (1) whether the person providing the services is engaged in a distinct occupation or business; (2) whether the services provided are generally performed under someone else’s supervision; (3) the amount of skill required to perform the services; (4) which party provides the instrumentalities, tools, and place of work; (5) the duration for which the services are to be provided; (6) whether compensation is based on the amount of time spent or by the job; (7) whether the services provided are normally part of the principal’s regular business; and (8) the parties’ subjective intent regarding the nature of their relationship. (*Id.*, at pp. 43-44.)

14. Under the joint employer doctrine, a worker can be the common-law employee of more than one employer, based on the same work performed. (See, e.g., *Turman v. Superior Court of Orange County* (2017) 17 Cal.App.5th 969, 986; *Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1017–1018.)

15. The written contracts, the tax treatment of payments to Tirado, and the fact that Tirado nominally worked for a separate entity all weigh against a finding that she was a common-law employee of the County. However, her work was a core part of the NMC’s mission as a teaching hospital; her nominal employer is a separate but

highly related entity dedicated to support the County's NMC; she performed her work under the supervision of County employees, and pursuant to NMC rules; she largely performed her work at a County facility, using the office, secretarial staff, supplies, email account, and other instrumentalities provided by the County; and she served on, and attended weekly meetings for, NMC faculty and hospital committees. (Factual Finding 49.) Her work was not significantly different in this disputed period from her work in the 2013 to 2020 period that CalPERS already has determined constituted common law employment for the County. (*Ibid.*) The County exercised primary control over the manner and means of Tirado's work at the NMC. She was a common-law employee of the County from May 1, 2002, through March 30, 2013.

TIRADO WAS QUALIFIED FOR MEMBERSHIP IN CALPERS FROM MAY 1, 2002, THROUGH MARCH 30, 2013, BASED UPON HER PERFORMANCE OF SERVICES AS A COMMON-LAW EMPLOYEE FOR THE COUNTY

16. The County is a public agency that contracts with CalPERS to provide retirement benefits for its eligible employees. (Factual Finding 3.) Tirado was a common-law employee of the County. (Legal Conclusion 15.) Both CalPERS and the County tacitly admit that if Tirado is found to be a common law employee of the County for the period in dispute, then she is qualified for membership in CalPERS for that period, just as CalPERS determined for the period April 1, 2013, through May 28, 2020. Tirado is qualified for membership in CalPERS from May 1, 2002, through March 30, 2013.

Second Issue: The County Must Report Further Compensation Information to CalPERS for the Period of April 1, 2013, Through May 28, 2020.

17. The County diligently searched its payroll system for records of payments to Tirado, but did not search the accounts receivable records, the place most likely to contain records of payments to her. (Factual Finding 50.) The County must promptly perform a diligent search of all the records in its possession that might plausibly include records of payments to Tirado from April 1, 2013, through May 28, 2020, and promptly produce any such records to CalPERS.

ORDER

1. Respondent Sally Tirado qualified for membership in CalPERS between May 1, 2002, and March 30, 2013, as a result of her performing services as a common-law employee for respondent County of Monterey.

2. The County shall perform a diligent search of all the records in its possession that might plausibly include records of payments to Tirado from April 1, 2013, through May 28, 2020, and produce any such records to CalPERS within 30 days of the effective date of this order.

DATE: 08/04/2023



MICHAEL C. STARKEY

Administrative Law Judge

Office of Administrative Hearings