BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for CalPERS Membership Credit by LEE NEIDENGARD, Respondent, and TRI-COUNTIES ASSOCIATION FOR THE DEVELOPMENTALLY DISABLED, Respondent.	CASE NO. 6099 OAH NO. L-2003100580 PRECEDENTIAL DECISION NO. 05-01 EFFECTIVE: April 22, 2005

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated January 11, 2005, concerning the application of Lee Neidengard; hereby designates its decision as precedential; RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

* * * * *

I hereby certify that on March 16, 2005, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the administrative law judge's Proposed Decision is a true copy of the decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FRED BUENROSTRO, CHIEF EXECUTIVE OFFICER

Dated: March 22, 2005 BY _____
KENNETH W. MARZION
ASSISTANT EXECUTIVE OFFICER

ATTACHMENT C

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues of: LEE NEIDENGARD, Respondent, and TRI-COUNTIES REGIONAL CENTER Respondent.	Case No. 6099 OAH Case No. L2003100580

PROPOSED DECISION

This matter was heard by Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on October 4 and 5, 2004, in Glendale, California.

Cynthia A. Rodriguez, Senior Staff Counsel, represented Kenneth W. Marzion (Petitioner), Chief, Actuarial and Employer Services Division, California Public Employees' Retirement System (CalPERS).

Respondent Lee Neidengard (Respondent Neidengard or Respondent) appeared *in propria persona*.

Michael W. Monk, Attorney at Law, represented Tri-Counties Regional Center (Respondent Tri-Counties, Tri-Counties, or TCRC).

Respondent seeks to purchase service credit for the period of October 15, 1992 through July 2, 2000, a period in which he worked pursuant to professional service agreements with Respondent Tri-Counties. Petitioner maintains that Respondent should be allowed to purchase the service credit because, despite the agreements, Respondent was actually an employee of Respondent Tri-Counties and not an independent contractor. Respondent Tri-Counties argues Respondent was indeed an independent contractor and thus not entitled to CalPERS membership or benefits during the period in question.

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FILED Jan 18 2005
Kathleen Kazanski

Oral and documentary evidence was received at the hearing. The record was left open for the parties to file written closing argument. Petitioner filed briefs on November 24 and December 13, 2004, which have been marked for identification as Complainant Exhibits 10 and 11, respectively. Respondent filed briefs on November 23 and December 7, 2004, which have been marked as Exhibits A and B, respectively. Respondent Tri-Counties filed briefs on November 29 and December 13, 2004, which have been marked as Respondent Exhibits 18 and 19, respectively. The matter was submitted for decision on December 13, 2004.

FACTUAL FINDINGS

1. Petitioner filed the Statement of Issues solely in his official capacity.

2. Respondent Tri-Counties is a non-profit corporation providing services to developmentally disabled individuals in San Luis Obispo, Santa Barbara, and Ventura Counties. It receives funding from the State of California to conduct its mission and employs social workers to provide services, primarily advocacy and coordination, to its clients or consumers. It employs physicians and psychologists to conduct required evaluations and recommend appropriate services and contracts with providers for the services its consumers need.

3. On September 1, 1995, Tri-Counties contracted with CalPERS for the provision of retirement services for its employees.

4. Respondent obtained a medical degree in 1969. His areas of specialization are developmental pediatrics and genetics. In August 1978, he was hired as a staff physician by Tri-Counties.

5. At the time of his hiring by Tri-Counties, Respondent's primary duties were: performing eligibility and other medical evaluations; participating in eligibility and service provision meetings; responding to questions from other staff members regarding eligibility and services for consumers or potential consumers of Tri-Counties; consulting with Tri-Counties staff and service providers regarding service matters; providing training and advocacy assistance to consumers and their families; and, providing information about Tri-Counties, its services, and developmental issues in general at public meetings.

6. In 1992, Tri-Counties faced severe budgetary reductions and made a number of responsive changes in operations and reductions in services and staff. At the time, employees of Tri-Counties, including respondent and other professional staff, were funded through the agency's operations budget. Respondent and the other professional staff employees, primarily physicians and psychologists, were offered the option of continuing to provide their services on a contractual basis, without fringe benefits, such as paid vacation and health insurance.

7. Respondent testified he had no choice but to accept the offered arrangement if he wished to continue to work at Tri-Counties. He told then Tri-Counties Executive Director James Shorter that he wished to remain an employee, but the only choice of continuing employment offered was through a professional services agreement. Respondent understood all other professional staff members retained by Tri-Counties did so pursuant to the same contractual arrangement. Respondent further testified that he understood his duties would remain the same, but that he would be paid from the purchase of services budget, not from the operations budget.

8. On October 15, 1992, Tri-Counties completed an "Employee Separation Report" for Respondent. The reason for separation was listed as "permanent layoff" and the document contained the following explanation: "Transfer to purchase of service – vendor status." The form also indicates the separation was suggested by management and that the employee would not be replaced.

9. a. During the 1992-2000 period, Respondent signed several professional services agreements designating his status as that of an independent contractor. All of these agreements were drafted by Respondent Tri-Counties, albeit after receiving some input from a group of four physicians, including Respondent, for the last two contracts.

b. The initial contract was effective, by its terms, starting October 1, 1992. The contract, which was subject to termination by either party on sixty-days written notice, was entitled "Professional Services Agreement (Independent Contractor)." It described the services to be performed as: "medical consultation to [Tri-Counties] staff with a primary focus on the [Tri-Counties]'s San Luis Obispo and Santa Maria offices" and being "available to provide medical information to [Tri-Counties] Client Program Coordinators and community care facility operators." In consideration of services rendered, Tri-Counties agreed to pay "a reimbursement" of $62 per hour for up to 1,800 hours per year. Respondent was responsible for his own expenses, including "automobile repair and maintenance, gasoline, automobile insurance, worker's compensation insurance, FICA, State Disability Insurance, and medical malpractice insurance." The agreement also stated that Tri-Counties "will not provide any fringe benefits." Contractual duties and responsibilities could be assigned with Tri-Counties' consent. Respondent agreed to indemnify and hold Tri-Counties harmless for any claim arising out of Respondent's service performance. The contract contained the following provision regarding Respondent's status:

> "8. Status of CONTRACTOR: Both parties agree that CONTRACTOR:
>
> "A. performs pursuant to this Agreement as an independent contractor.
>
> "B. will not accrue personnel [benefits] from [Tri-Counties].

"C. will work towards accomplishing the objectives stated above.

"D. will manage his own time as he works toward accomplishing the objective stated above.

"E. is free to take employment from others, as an independent contractor, or in any other status. CONTRACTOR agrees not to permit other employment to interfere with [his] responsibilities as stated in this Agreement."

c. The second contract, effective by its terms from July 1, 1993 to June 30, 1994, continued the basic provisions of the initial one, with some modifications. In pertinent part, the title was changed to "Professional Services Agreement," without the title reference to independent contractor. Services to be provided were detailed to include participation in agency planning meetings; review of case records for eligibility; treatment or assessment; conduct of evaluations pursuant to Welfare and Institutions Code section 6500 and Penal Code section 1001.21; completion of assessments; provision of consultation services to care providers and Tri-Counties staff; and presentation of testimony on behalf of Tri-Counties at administrative hearings. A paragraph was added governing records maintained by Respondent: they must be available for government audits and must otherwise be kept confidential. A provision expressly requiring Respondent to maintain his professional occupational license in good standing was also added. The payment rate remained the same, but the allowed service hours increased to 40 per week, or 2,000 in total. Notice of contract termination was reduced to thirty days. With respect to the paragraph pertaining to status as an independent contractor, the parties agreed that Respondent was not an agent of Tri-Counties and that he "is under the control of [Tri-Counties] as to the result of his services only and not as to the means by which said result is accomplished."

d. The third contract, which was effective from October 1, 1994 to June 30, 1995, continued the material terms of the preceding contract with two pertinent changes. It expressly provided that "CONTRACTOR will be provided with office space and clerical services for the support and convenience of [Tri-Counties]'s consumers." It added an avoidance of conflict paragraph covering private treatment of Tri-Counties clients, but removed an outside employment restriction, permitting Respondent to undertake work "whether or not competitive with the business of [Tri-Counties]."

e. The fourth contract, effective by its terms from July 1, 1995 to June 30, 1996, continued the basic provisions of the prior agreement, adding a mandatory arbitration clause.

f. The fifth contract, for a term of July 1, 1996 to June 30, 1997, retained the material provisions essentially unchanged. It added the following language to the office space and support services paragraph: "Any office supplies, equipment or professional materials requested by the CONTRACTOR, may be considered and approved by the Chief of Consumer Services. CONTRACTOR shall not use [Tri-Counties] fax, computer, other office equipment or business telephone to conduct non-[Tri-Counties] related activities...."

g. On July 1, 1997, the parties extended the previous contract through December 31, 1997.

h. The January 1, 1998 to June 30, 1999 contract deleted the avoidance of conflicts and professional status clauses, but added non-discrimination and insurance requirements. It also provided that the services under the contract could not be assigned. It dropped the reference to "results" and "means" in the "status of contractor" paragraph. Tri-Counties agreed to reimburse certain of Respondent's travel expenses in accordance with agency policy. The agreement contained the most detailed description of tasks to be performed, which were nevertheless consistent with the description set forth in factual finding number 5 and the preceding agreements.[1] The other terms and conditions remained essentially unchanged.

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[1] The Description of services clause, contained in Exhibit A to the agreement provides: "Services to be performed by CONTRACTOR shall be performed in a timely, responsive manner for the San Luis Obispo and Santa Maria County offices, and **shall** include:

1. Review and make recommendations regarding service policies for the provision of clinical and prevention services and consultation to TCRC consumer and families, including medical, nursing, and therapy services (as requested by TCRC Chiefs of Consumer Services or designee).
2. Attend and participate in clinical services/management staff meetings (up to 4 times per fiscal year).
3. Present testimony at fair hearings (as requested by TCRC Chiefs of Consumer Services or designee).
4. When requested, attend and participate at ARCA Physician Group meetings (up to 2 times per fiscal year).
5. Conduct medical assessment/evaluation of regional center applicants/consumers for the purpose of determining regional center eligibility, identification of health issues for follow-up and/or coordination with primary health care provider/family/service provider/TCRC staff (as determined by Chiefs of Consumer Services).
6. Review consumer records for regional center eligibility, health needs/issues, genetic testing/counseling, and special projects (as requested by Chiefs of Consumer Services).
7. Review of the utilization of clinical services provided to consumers in order to assure best practices consistent with TCADD policy/standards as well as TCRC procedures (as requested by Chiefs of Consumer Services).
8. Prepare and conduct training for TCRC staff on consumer health issues (as requested by Chiefs of Consumer Services).
9. Prepare and conduct training for TCRC consumers/family members and service providers on consumer health issues (as requested by Chiefs of Consumer Services).
10. Participate in eligibility staffings, core staffings and consumer planning meetings as related to the determination of eligibility and necessary supports and services (as requested by Chiefs of Consumer Services).
11. Facilitate consumer access to generic health services (as requested by Chiefs of Consumer Services).

i. The next contract had a term of July 1, 1999 to June 30, 2002, and, with the exception of additional language regarding indemnification and insurance, retained the material provisions of the preceding agreement.

10. Respondent entered into the agreements set forth in factual finding number 9 and did not publicly contend during the period he was signatory to the agreements that he was an employee and not an independent contractor.

11. During the period he worked pursuant to professional service agreements, Respondent continued to perform the same duties as outlined in factual finding numbers 5 and 9. He continued to use the same office and examination space as before; he retained family photos and other personal items in his office; and retained a key to enter TCRC facilities. Although Respondent preferred using his own stethoscope and medical bag, Tri-Counties continued to provide supplies and equipment, including a diagnostics kit that included an ophthalmoscope and otoscope. Tri-Counties staff continued to transcribe dictated reports, which reports were maintained in client files at the agency. The number of hours Respondent worked generally fluctuated between 35 and 40 per week.

12. The funding and method of compensation for Respondent's services changed after October 1992. He became a Tri-Counties vendor and received a vendor number. Rather than receiving a salary paid from the operations budget, Respondent submitted a voucher and received a check based on the number of hours worked for the month.

13. Tri-Counties paid other service providers pursuant to the same purchase of service method it used with Respondent after October 1992. With respect to physicians, Respondent was the only individual regularly performing the duties set forth in factual finding number 5 in his primary geographic area. Other physicians were contracted to perform specialty evaluations outside of Respondent's area of expertise and to provide medical services to consumers.

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12. Provide consultation to health care providers and systems to assure appropriate care and enhance quality of service for TCRC consumers and families (as requested by Chiefs of Consumer Services).

13. Provide consultation to TCRC staff and management regarding appropriate consumer specific clinical diagnosis, specific clinical diagnosis, treatment and referral (as requested by Chiefs of Consumer Services).

14. Provide consultation to service providers to enhance health care of TCRC consumers (as requested by Chiefs of Consumer Services).

15. Provide evaluations pursuant to WIC §6500 and Penal Code §1001.2 regarding informed consent.

16. Provide consultation and written recommendations to designated managers regarding placements into Intermediate Care Facilities (Form HS 231).

17. Provide consultation and written recommendations to the TCRC Executive Director or his/her designee regarding consent for treatment under provisions of Welfare and Institutions Code §4655.

14. Another change from the pre-1992 work situation involved Respondent's private practice and attendant scheduling issues. Respondent had engaged in two outside activities prior to October 1992, with Tri-Counties' consent: he worked as an assistant professor at the University of California, Los Angeles (UCLA) one day each month and he provided consulting services to Alphagin, a firm providing genetics services. He continued the professorship until 1993 and the Alphagin work until 2000. In order to supplement his income and make up for lost benefits, Respondent engaged in additional private practice activities. For approximately one year in 1992 and 1993, he provided consultations for San Luis Obispo County Children's Services. He worked for about one year (1993-94) as an attending physician for Casa de Vita, a home for developmentally disabled individuals, until Tri-Counties objected to Respondent privately providing services to Casa de Vita residents who were also TCRC clients. From 1996 until his retirement in 2003, Respondent performed consulting services for a primary care physician group that underwent several name and personnel changes.

15. Respondent and Tri-Counties managers arrived at mutually agreeable scheduling arrangements. Respondent generally reserved Mondays and some Friday afternoons for his private practice clients and the remaining workdays for Tri-Counties. Tri-Counties staff scheduled the agency's days as before (when Respondent was an undisputed employee), to meet its, and its clients', needs. On occasion, if agreeable to both parties, Respondent worked at Tri-Counties on Mondays or Friday afternoons.

16. Respondent did not receive paid health benefits or other fringe benefits during the period of October 15, 1992 to July 2, 2000.

17. He did not receive paid vacations, but did take time off. He scheduled his off periods as before, informing Tri-Counties managers of his desire to take time off approximately one month before he planned to be absent. The vacations during the October 1992 to June 2000 period were shorter, in the nature of two workweeks or less, as Respondent had the additional consideration of maintaining a certain level of monthly service hours.

18. During the October 1992 to June 2000 period, Tri-Counties did not withhold taxes or make any other payroll deductions for respondent. It provided Respondent with an Internal Revenue Form 1099 at the end of each year, indicating sums paid to Respondent during the year.

19. Another change in Respondent's working conditions after October 1992 involved attendance at general staff meetings. He was invited, not required, to attend, but would not be paid for his attendance. He continued to attend clinical staff meetings, for which he was compensated. As set forth above, the services agreements required that he attend certain clinical meetings.

20. Effective July 3, 2000, Respondent returned to formal employee status. He was required to complete a "New Hire Form" and other new employee forms. He selected a "4/10" flexible schedule wherein he worked 10½ hours on Tuesdays through Fridays. He completed Internal Revenue Service Form W-4 for tax withholdings.

21. After July 3, 2000, Respondent again started receiving health and other employee benefits. He was paid a salary check and payroll withholdings were made. He became subject to the collective bargaining agreement between Tri-Counties and Service Employees International Union Local 535 covering professional employees. He reported his hours of work on a time card. Respondent's duties remained the same as set forth in factual finding numbers 5, 9, and 11. He was permitted to continue private practice, consistent with his employment obligations to Tri-Counties, which outside work was facilitated by his flexible work schedule.

22. During his entire employment tenure, Respondent reported to a Tri-Counties manager. During the October 15, 1992 to July 2, 2000, period, more of the interactions pertained to scheduling and payment for services rendered. However, no evidence was presented at the hearing that anyone supervised Respondent's exercise of clinical, medical judgement. Tri-Counties did not have a medical director and those managers that testified did not hold medical degrees. Respondent did participate in interdisciplinary meetings where managers made decisions regarding client service eligibility or service levels based on clinical input received, but the exercise of managerial prerogatives in these circumstances did not involve the exercise of medical judgment.

23. Tri-Counties managers had authority to discipline and terminate respondent's employment during the periods he was an undisputed employee. No evidence was presented at the hearing that Respondent received regular performance evaluations or discipline during any period of employment, contractual or otherwise.

24. Respondent completed a CalPERS enrollment form on July 3, 2000, which was thereafter forwarded to CalPERS.

25. In July 2002, Respondent submitted to CalPERS a Request for Service Credit Cost Information - Service Prior to Membership (Form MSD 370), requesting to purchase service credit for employment with Tri-Counties from August 1978 through June 2002. In processing the request, CalPERS asked Tri-Counties to complete the Member Employment History portion of Form MSD 370. Tri-Counties staff completed the form designating Respondent as a "Physician" from August 1, 1978 to June 1995 and July to December 2000, and as "Contract Physician" from July 1995 to June 2000.[2]

[2] Tri-Counties asserts the designation as a employee physician from October 1992 to June 2000 was a mistake that can be corrected pursuant to Government Code section 20160. Petitioner and Respondent oppose the request for correction as untimely.

26. CalPERS allowed Respondent to purchase service credit, including service during the October 15, 1992 to July 2, 2000 period, as it concluded he was an employee. CalPERS affirmed the initial determination by letter dated June 30, 2003. Respondent Tri-Counties thereafter filed a timely appeal.

27. In August 2003, Respondent retired from employment with Tri-Counties.

LEGAL CONCLUSIONS

1. The Public Employees' Retirement Law (PERL), Government Code[3] section 20000 et seq., allows public agencies to contract with CalPERS for the provision of retirement services to some or all of its employees (Sections 20022 and 20460). Tri-Counties has elected to enter into such contract for its employees, as set forth in finding number 3.

2. Section 20300, subdivision (b), however, excludes from CalPERS membership and benefits "Independent contractors who are not employees."

3. PERL does not define independent contractors. In pertinent part, the statute defines the term "employees" as "Any person in the employ of any contracting agency." (Section 20028, subdivision (b)). Since PERL does not define "independent contractor," or "employees" of a contracting agency with greater particularity, these terms must be defined with reference to California common law. (*Metropolitan Water Dist. v. Superior Court (Cargill)* (2004) 32 Cal.4th 491).

4. In *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949, a decision cited with approval in *Cargill*, the Supreme Court referred to earlier decisions in setting forth the following pertinent test:

> "[I]n *Empire Star Mines* [(1946) 28 Cal.2d 33, 43-44] this court, holding that a mining company was not an employer within the meaning of the Unemployment Insurance Act, said, 'In 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. 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. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations omitted in original.] Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the

[3] All further statutory references are to the Government Code.

> 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. (Rest., Agency, § 220.)" (*Tieberg*, supra at p. 949).

In *Tieberg*, the Supreme Court applied the test and upheld the lower court's determination that freelance writers were employees because the employer exercised considerable control and direction over the work product (written television screen plays called "teleplays") through the process of revision and approval of drafts.

5. In this matter, Tri-Counties exercises considerable if not complete control over the manner and means by which Respondent performed his work. Thus, Respondent's work involves Tri-Counties' consumers or potential consumers. The work is required for consumer eligibility or for service delivery by, or through coordination by, Tri-Counties. Respondent's work is performed at Tri-Counties' office, during Tri-Counties' business hours. The work is performed using Tri-Counties' examination rooms, supplies, and equipment. Tri-Counties staff transcribes Respondent's reports and the client records are maintained in Tri-Counties offices. Tri-Counties staff schedules clients or prospective clients for evaluations, provides records for review, and requires Respondent's participation at meetings that result in eligibility and service needs' determinations by Tri-Counties. Tri-Counties staff solicits Respondent's opinions throughout the eligibility and service provision process. Tri-Counties staff selects the community forums and training sessions at which Respondent will participate. In sum, Respondent's work product is an integral part of the process by which Tri-Counties carries out its mission and Tri-Counties controls the manner and means by which respondent performs his work.

Respondent exercises his medical judgement, but does so in a professional capacity within the strictures and control of Tri-Counties. His situation is different from those cited by Tri-Counties involving physicians or health care professionals involved in patient care. In these cases, particularly the ones involving a physician (*Brown v. Mitchell*, 327 F.Supp2d 615 (E.D.Va 2004)) and a nurse anesthetist (*Garcia v. Reed*, 227 F.Supp.2d 1183 (D.N.M. 2002)), the professionals had their own patients, were left to independently treat the patients, and the results of their efforts (patient well-being) was not the regular business of the employer.

Accordingly, analysis of the most important factor in the common law test leads to the conclusion that Respondent is an employee of Tri-Counties.

6. Review of the secondary factors leads to a similar conclusion. Although Respondent prefers to use his own stethoscope and toy supply, Tri-Counties supplies the tools and instrumentalities, as well as the place of work, required for Respondent to discharge his obligations (*Tieberg* factor (d)). The work is ongoing, performed without time or project limitation (factor (e)) and the method of payment is by time, not by job or other results-oriented measurement (factor (f), which factors are more consistent with the manner employees are hired and compensated. The work is part of the regular business of Tri-Counties (factor (g)). These factors, taken together, particularly if viewed in the context of Tri-Counties delivery of services and its control over such delivery, establish Respondent was an employee of Tri-Counties during the period of October 1992 to July 2, 2000.

The factor pertaining to at-will termination is deemed neutral, as both Respondent and Tri-Counties had the same rights under the professional services agreements. No evidence was presented regarding local practices (factor (b)).

Tri-Counties argues that Respondent's private practice indicates he is an independent contractor. However, Respondent engaged in private practice during periods of undisputed employee status both before and after the 1992-2000 period. He did have some scheduling flexibility from 1992 to 2000, but he also arrived at mutually agreeable arrangements to facilitate his private practice activities before 1992 and, through his collective bargaining representative, after July 2000. The scheduling arrangements are therefore neutral in light of the parties' history and other practices.

Factors (a) (distinct occupation) and (b) (skill) would tend to point to independent contractor status were it not for the facts that the work involves Tri-Counties' mission and clients and that Tri-Counties exercises significant control over the manner and means in which the clients are served.

Analysis of factor (h) (whether or not the parties believed they were creating an employer-employee relationship) is more difficult. The language of the professional services agreement and Respondent's failure to raise contemporaneous objections to the status purportedly created by the agreements would tend to indicate an independent contractor relationship. However, the terminology used in the agreement, although significant, is not conclusive (*Tieberg*, supra at p. 952). Also, the agreements must be examined in light of the circumstances surrounding the entry into the agreement and those surrounding the employment relationship. (See, e.g., *G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 358-359).

In this case, as set forth in this legal conclusion and legal conclusion number 5, Tri-Counties exercised considerable control over the methods and means by which Respondent performed his work. Respondent credibly testified that he understood the change to service contract status would involve a change in method of payment not in the work performed. He in

fact continued performing the same tasks under the same circumstances, but with a different payment source and no fringe benefits. The professional services contractual arrangement was Tri-Counties' idea and primarily benefited Tri-Counties by allowing it to make cuts in the operations budget at a critical time. In these circumstances, the mutual intent to create a true independent contractor relationship did not exist.

Moreover, even if it were concluded that Respondent willingly agreed to become an independent contractor, benefits established for a public reason may not be waived by private agreement. (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 358). The Legislative declaration of purpose contained in section 20001[4] clearly establishes the public reason for PERL benefits and Respondent may not waive the benefits.

Analysis of the secondary common law factors thus leads to the conclusion that Respondent was an employee of Tri-Counties during the October 1992 to July 2, 2000 period.

7. In light of the foregoing factual findings (numbers 2 through 27) and legal conclusions (numbers 1 through 6), it is concluded that Respondent was an employee of Respondent Tri-Counties at all times material and Petitioner's determination to allow Respondent to purchase service credit for the period of October 1992 to July 2, 2000 is upheld.[5]

ORDER

Respondent Tri-Counties appeal is denied and Petitioner's determination to allow Respondent to purchase service credit for the period of October 1992 to July 2, 2000 is upheld.

DATED: 1/11/05

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

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[4] The section states: "The purpose of this part is to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits." (See, also, *State Civil Service*, 22 Ops.Cal.Attny.Gen. 205, 206 (1953), cited in *Cargill*, supra at p.507.)

[5] Because of this conclusion, it is unnecessary to rely, and no reliance has been placed, on Tri-Counties' purported mistake in failing to designate Respondent in CalPERS Form MSD 370 s as a contract physician during the period of October 1992 to June 1995.