

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding
Membership Exclusion of Foundation
Employees by:

Case No. 2014-1087

SANTA CLARA COUNTY HEALTH
AUTHORITY

OAH No. 2015030359

Respondent

and

KATHLEEN KING

Respondent.

PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter on August 26, 2015, in Oakland, California.

Christopher Phillips, Senior Staff Attorney, represented Petitioner Renee Ostrander, Acting Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS).

Alison S. Hightower, Attorney at Law, Littler Mendelson, PC, represented Respondent Santa Clara County Health Authority.

Christopher E. Platten, Attorney at Law, and Mark S. Renner, Attorney at Law, Wylie, McBride, Platten & Renner, represented Respondent Kathleen King, who was present.

At the request of the Parties, the record was left open to receive written closing argument. All briefs were timely received and marked for identification as follows: Respondent Santa Clara County Health Authority's Post-Hearing Brief as Exhibit C; Respondent Kathleen King's Opening Brief as Exhibit D; Petitioner's Post-Hearing Brief as Exhibit 19; Respondent Santa Clara County Health Authority's Post-Hearing Reply Brief as E; and Respondent Kathleen King's Reply Brief as Exhibit F.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 12-15-2015

Sharon D. Noylett

The record closed on November 4, 2015.

ISSUE

Whether Respondent Kathleen King was an employee of the Santa Clara County Health Authority from 2008 until 2013, and thus entitled to CalPERS membership,

FACTUAL FINDINGS

1. Petitioner Renee Ostrander, Acting Chief, Customer Account Services Division, CalPERS, filed the Statement of Issues in her official capacity.
2. Respondent Santa Clara County Health Authority (Authority) is a public entity that contracts with CalPERS for retirement benefits for its eligible employees. The Authority was established in 1995 by an ordinance enacted by the Santa Clara County Board of Supervisors. The purpose was to develop the Local Initiative Plan for the expansion of Medi-Cal Managed Care.
3. In 2000, the Authority established the Santa Clara County Family Health Foundation (Foundation), a non-profit, 501(c)(3) organization. The purpose of the Foundation was to raise funds to support Healthy Kids, a subsidized health coverage plan administered by the Authority. One reason for its creation was that certain donors, including major foundations, could only donate money to a non-profit.
4. In 2008, the Foundation hired Respondent Kathleen King as its Executive Director. She was reported to CalPERS by the Authority as an employee until 2013.

Audit findings – relationship between the Authority and the Foundation

5. In 2013, the CalPERS Office of Audit Services performed a Public Agency Review of the Authority. It determined that Respondent King was improperly reported by the Authority as she was an employee of the Foundation, not the Authority, and was thus not eligible for CalPERS membership. The Authority disagreed with this finding. In a letter dated June 13, 2013, David Cameron, Chief Financial Officer (CFO), wrote:

From the inception of the Foundation until 2008, the Foundation employees reported directly to the CEO of the Health Authority. The CEO directed the work of these employees, evaluated their performance and set Foundation goals and objectives.

6. On July 18, 2013, a conference call was convened between Emily Perez de Flores, Manager, CalPERS Membership Reporting Section, Cameron, and Sharon Valdez,

Authority Vice-President of Human Resources (HR). The Authority provided additional information to CalPERS, and more was requested. On September 6, 2013, the Authority submitted the Foundation's Bylaws and other information.

7. In a letter dated October 15, 2013, de Flores confirmed the initial determination that Foundation employees are not employees of the Authority. She cited portions of two key documents that CalPERS reviewed: the Foundation Bylaws and an Administrative Services Agreement between the Authority and the Foundation.

8. Bylaws section 7 states, in pertinent part:

[T]he business and affairs of the Corporation shall be managed and all corporate powers shall be exercised under the direction of the Board of Directors.

The Board may delegate the management of the day-to-day operation of the business of the corporation to a management company or to any other person provided that the business and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the Board.

[T]he Board shall have the power to: (a) Appoint and remove . . . all corporate officers and the Executive Director of the corporation; prescribe powers and duties for them as are consistent with the law, the Articles of Incorporation, and these Bylaws; fix their compensation; and require from them security for faithful service.

Section 7.17 states:

The Board shall set the compensation of the Executive Director of the corporation. Changes in Executive Director compensation shall be consistent with guidelines established by the Board and shall reflect performance. The Executive Director shall establish the compensation of other Foundation employees, in accordance with guidelines established by the Board, if any.

9. De Flores also referenced an independent auditor's report of the Authority performed by Moss Adams, LLP, Certified Public Accountants. The Foundation was not included in the Authority's financial statements. De Flores quotes from Note 5, which states that no more than 49 percent of the Foundation's Board may be management or directors of the Authority and that the Authority does not have financial accountability for the Foundation.

10. The Administrative Services Agreement (Agreement), dated June 1, 2002, between the Authority and the Foundation gives effect to the Bylaw that allows delegation of the Foundation's day-to-day operations. As de Flores reports:

Schedule A to the Agreement specifies the services to be provided by the Authority, and includes both human resources and payroll services, and details how the Authority is reimbursed for these services. The Agreement also addresses the employer/employee relationship. Section 8 of the Agreement states that the Authority and the Foundation are "... separate and independent entities ... " and further, specifically states: "Neither [the Authority] nor the Foundation, nor the employees, servants, agents or representatives of either, shall be considered the employee, servant, agent or representative of the other."

11. De Flores concluded:

The documentation reviewed consistently indicates that the Foundation is separate and independent of the Authority, and that the Foundation Board exercises control and direction over Foundation employees. Although the Administrative Services Agreement appears to delegate certain functions to the Authority, both the Foundation Bylaws, and the Agreement itself clearly indicate that these functions are directed by the Foundation Board, and that the Authority is reimbursed for these services as an independent entity. The Foundation also sets the compensation of the Executive Director, who sets the compensation for other Foundation employees. There is no evidence of common law control by the Authority.

[As] CalPERS has determined the Foundation to be separate and distinct from the Authority, and the Authority does not exercise common law control over Foundation employees, these positions do not constitute Authority employment within the meaning of G. C. Section 20028(b).

12. Respondents timely appealed the CalPERS determination and this hearing followed.

Additional support for the audit's conclusion

13. In the letter first referenced in Finding 5, Cameron also wrote that the Foundation Board changed the reporting structure in 2009. From that time onward, the Executive Director (Respondent King) was a direct report of the Board. In addition,

Foundation employees “were not reporting [to], supervised, directed or evaluated by the Health Authority CEO.”

14. On January 14, 2013, Valdez, the Authority’s HR vice-president, wrote in an email to a CalPERS auditor that Respondent King and two other employers “were hired to provide support exclusively for the Foundation.”

15. On November 26, 2007, the Chair of the Foundation’s Board wrote an email authorizing a pay increase for Foundation employee Emily Hennessey. It was sent to the Authority’s then-HR director, and states that the Board “authorized an increase in salary for Emily Hennessey for the time she will be the Interim Executive Director.” He also thanked the HR director for taking care of the implementation of the new salary amount.

16. At the request of CalPERS auditors, Valdez completed an Employment Relationship Questionnaire concerning the employment of Emily Hennessey. She wrote that Hennessey was the “Finance Director for the Foundation”; that she “does not perform services on behalf of the Health Authority. Her services are performed on behalf of the Foundation”; that her hours of work are determined by Respondent King; that the Authority does not “have the right to control how the individual does his/her work”; and that her work was “directed, supervised or reviewed by . . . The Foundation’s Executive Director” Respondent King.

Respondents’ evidence

17. Respondent King stated in her testimony that Foundation employees were employees of the Authority “in exchange” for raising \$132 million for the Authority. As support for her statement, she provided examples of how the organizations operated. On W-2 forms and paychecks the Authority was identified as the employer. The letter offering King employment was written by the Authority HR director on Authority letterhead. King and Hennessey each received letters regarding a salary change that was written on Authority letterhead, and signed by the Authority’s HR director. (It was also signed by Foundation Board Chair Ron Cohn.) Employee evaluations, including self-reviews, were organized by the Authority’s HR department. Employee orientation and continuing training in subjects such as sexual harassment were provided by the Authority. “All Staff” emails went from CEO Darrow to Authority and Foundation employees. The CEO of the Authority determined the location of Foundation offices within the Authority’s space. All office supplies, except computers, were purchased by the Authority. The Foundation used the Authority’s servers and email address. Although the Foundation paid for the services received, the amount was not commensurate with the actual costs.

18. King also testified that, contrary to the governing documents, the CEO of the Authority decided how much King’s salary would be, that she was not able to hire people without the CEO’s permission, and that Foundation employees “were part of the same organization.” When King desired time off from work, she requested it from the Authority CEO until 2012, when she was told to go through the Foundation Board’s Chair. King also

stated that when she wanted to hire a “temp worker” on a permanent basis, the Authority “said no.”

19. In 2012, the Foundation and the Authority terminated the Agreement and physically separated their operations. The Authority had a new CEO who was looking into different product lines such as Medicare and health care for disabled people. The Foundation engaged in strategic planning, and decided to stay focused on children’s health. The Bylaws were amended, the name changed to Santa Clara Family Health Foundation, and new articles of incorporation filed. In a letter dated April 26, 2013, Respondent King requested that the Authority allow termination of the Agreement within 60 days. It is presumed that this request was granted. The new entity then contracted with other providers for payroll and other services. Space was leased and the operation moved to a new location in June 2013.

LEGAL CONCLUSIONS

1. The burden of proof in this appeal from the denial of CalPERS membership rests with Respondents. The standard of proof is preponderance of the evidence, which was applied in making the Factual Findings.

2. CalPERS provides retirement benefits to public employees in California pursuant to the Public Employees’ Retirement Law (PERL). (Gov. Code, § 20000 et seq.) Persons “in the employ of any contracting agency” are eligible. (Gov. Code, § 20028, subd. (b).) The PERL does not define “employee,” and case law holds that common law principles should be applied to determine whether an individual is an employee for PERL purposes. Pursuant to *Metropolitan Water District v. Superior Court* (2004) 21 Cal.4th 491 (*Cargill*), enrollment of common law employees in CalPERS is mandated. Often, the question is whether a worker is an independent contractor or an employee. Here, the dispute concerns which entity is the employer, but the analysis is similar.

3. The *Cargill* Court pointed to its previous decision in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, which sets out factors for determining whether a worker is an employee. The *Tieberg* Court explained the analysis method by quoting with approval from the decision in *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43-44:

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.] 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 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.

(Emphasis added.)

4. Respondents did not prove that Respondent King's employment situation meets the "control or right to control the manner and means" requirement. First, the relevant documents clearly establish that the Foundation is a separate entity from the Authority; it is an affiliated entity. Respondent King estimated that under her leadership, the Foundation raised about \$132 million for the Authority. It was not established that the Authority directed this effort so as to have controlled "the manner and means" used to accomplish this result. Further, the Authority and the Foundation contracted (via the Agreement) for the provision of services; such would not have been necessary should the Authority have had the right to control the Foundation. When the Agreement terminated, so did the examples Respondents cite to as evidence of control by the Authority. The two entities were admittedly intertwined, to the extent that the CEO of the Authority seemed at times to ignore the fact that the Foundation was separate and that Respondent King reported to the Foundation's Board. For reasons not explained, Respondent King did not assert her rights as the Foundation Executive Director to have the Foundation make decisions such as when she could take leave at a particular time. But this failure does not make her a common law employee of the Authority; the evidence did not establish that the Authority controlled her employment in significant or meaningful ways and it certainly did not have the right to do so.

5. In addition to the "other factors" set out in *Tieberg*, context is very important. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d, 350, 351, states that the secondary factors "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." Taken both individually and as a whole, the listed factors for consideration do not support Respondents' argument that Respondent King was a common law employee of the Authority.

6. Respondents also contend that Respondent King was entitled to CalPERS membership because she was employed by both entities. The definition of common law employment includes co-employment, but no authority was presented that such applies in this context. The entities were not so integrated so that the employees of one were the

employees of the other. Respondents are not persuasive that Respondent King was employed by both entities or that she is entitled to CalPERS membership pursuant to such theory.

7. In addition to manner and means of control, the big picture as well as the more relevant factors clearly point towards the conclusion that Respondent King was an employee of the Foundation, not of the Authority, and that she was not employed by both. She was hired by the Foundation to raise funds for the Authority and did so successfully. Her assertion that she raised funds "in exchange" for employment by the Authority is unsupported and contradicted by other evidence. The Authority provided operational services to the Foundation pursuant to a contract. The evidence presented by Respondents does not establish Respondent King as a common law employee of the Authority. Accordingly, Respondents' appeal will be denied.

ORDER

The appeal of Respondents Santa Clara County Health Authority and Kathleen King is denied.

DATED: December 3, 2015

DocuSigned by:
Mary Margaret Anderson
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MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings