

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

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 to develop the expansion of Medi-Cal Managed Care.

Respondent Kathleen King (Respondent King) was hired in 2008 by 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. The Foundation is not a CalPERS contracting agency.

In 2013, the CalPERS Office of Audit Services performed a Public Agency Review of the Authority. CalPERS determined that Respondent King was an employee of the Foundation and had been improperly reported by the Authority as an employee of the Authority. Since the Foundation is not a CalPERS contracting agency, CalPERS determined that Respondent King was not eligible for CalPERS membership. Respondent King and the Authority timely filed appeals.

The CalPERS determination that the Foundation is an affiliated entity of the Authority and that Foundation employees are not employees of the authority was based on a number of facts. The Foundation bylaws permit the Foundation Board to delegate the management of the day-to-day operation of the business of the corporation. The Foundation and Authority entered into an Administrative Services Agreement (Agreement) in 2002 based on that delegation of power. Pursuant to the Agreement, Authority would provide all of the administrative services for Foundation, including human resources and payroll. The Agreement also expressly states that the Authority and Foundation are "separate and independent entities" and further 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."

In a response letter to the audit by CalPERS, the Chief Financial Officer for the Authority informed CalPERS that from 2009 onward Respondent King was a direct report of the Foundation Board and that Foundation employees "were not reporting [to], supervised, directed or evaluated by the Health Authority CEO." Similarly, the Vice-President of Human Resources for Authority wrote in an email to CalPERS that Respondent King and two other Foundation employees "were hired to provide support exclusively for the Foundation."

At the hearing, Respondents submitted documentary evidence and the testimony of Respondent King and Emily Hennessey, the Finance Director for the Foundation.

Respondents argued that despite what the Foundation bylaws and the Agreement say, Respondent King was a common law employee of the Authority, or of both the Authority and the Foundation, and that CalPERS should recognize this co-employment situation to allow Respondent King membership in the CalPERS system.

In support of their co-employment theory, Respondents provided examples of how the organizations operated. For instance, W-2 forms and paychecks identified Authority as the employer, employee evaluations, including self-reviews, were organized by the Authority's HR department, office space and supplies were provided by the Authority and the Foundation used the Authority's servers and email addresses. Respondent King also testified that it was really the Authority's CEO that directed her employment, including how much her salary would be, who she was able to hire and fire, and approval for time off.

However, in 2012, the Foundation and Authority terminated the Agreement. As soon as the Agreement was terminated, so did the examples Respondents cite to as evidence of control by the Authority. The Foundation moved offices and contracted with other providers for payroll and administrative services.

The Administrative Law Judge (ALJ) looked to *Metropolitan Water District v. Superior Court* (2004) 21 Cal.4th 491 (*Cargill*) and *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, to apply the common law employment test and determine whether Respondent King was a common law employee of the Authority. Under that test, the most important factor is the right to control the manner and means of accomplishing the result desired.

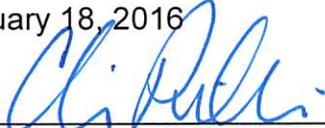
The ALJ found that Respondents did not prove that Respondent King's employment situation meets the "control or right to control the manner and means" requirement. First, the relevant documents clearly established that the Foundation is a separate entity from the Authority. Respondent King estimated that under her leadership, the Foundation raised about \$132 million for the Authority; however, it was not established that the Authority directed those efforts so as to have controlled "the manner and means" to accomplish those results. The ALJ further found that the Agreement would not have been necessary if the Authority had the right to control the Foundation, and that when the Agreement terminated, so did the examples Respondents cited to as evidence of control by the Authority.

The ALJ found that Respondent King was an employee of the Foundation, not of the Authority, and that she was not employed by both.

The ALJ concluded that Respondents' appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

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