

ATTACHMENT C
RESPONDENTS' ARGUMENT



February 5, 2016



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CalPERS Board of Directors
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Re: *In the Matter of the Appeal Regarding Membership Exclusion of Foundation Employees by Santa Clara County Health Authority and Kathleen King*

Dear Board of Directors:

On behalf of Respondent the Santa Clara County Health Authority ("the Authority"), we respectfully urge the Board to reject the proposed decision by Administrative Law Judge Anderson as contrary to the law and the facts and elevating form over substance. At a minimum, the decision should not be given precedential effect.

Fundamentally, this is not a case where a public agency attempted to reduce its financial obligations by transferring its employees to a third party. There is no claim of fraud, malice or bad faith on Respondents' part. The Authority was formed to provide health care to California residents who do not qualify for MediCal coverage. The Authority formed the Foundation to assist in that mission by raising money for the Authority, not as a subterfuge to obtain CalPERS benefits. The goals served by both organizations were purely for the public good. For over a decade, CalPERS never suggested Foundation workers should not be reported.

The Board should find that Respondent King was either a common law employee or a joint employee, as discussed in more detail below.

King Is A Common Law Employee of The Authority

The undisputed facts establish that Kathleen King ("King") was a common law employee of the Authority. Under the common law, an "employee" is hired by a "master" "who controls or has the right to control the physical conduct of the [agent] in the performance of the service." Restatement of the Law (Second) of Agency § 2(1). The employment relationship is defined by *either* the master's "right to control" *or* the *actual* control of the agent's performance—both are not required. *Id.*

The proposed decision ignores the undisputed facts that establish a common law employment relationship here. Indicia of an employment relationship include the act of offering employment, tax treatment of the relationship, assignment of work, directing when and where

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work is performed, discipline (including termination), performance reviews, and mandating training. For instance, a worker was a common law employee because "[t]he structure of his work week is controlled by the company, and he reports to [the company's] personnel department, which must approve any overtime, sick leave, and vacation days he wishes to take." *Int'l Ass'n of Machinists & Aero. Workers, Local Lodge 964 v. BF Goodrich*, 387 F.3d 1046, 1059 (9th Cir. 2004).

Here, King was offered employment "[o]n behalf of the **Santa Clara County Health Authority**" at a stated salary, with the Authority reserving the right to terminate King at-will without cause. (Cal-PERS Ex. 13 [emphasis added].) Such right to terminate **at-will** is "[s]trong evidence of an employment relationship," as noted by the California Supreme Court in a case Cal-PERS relied upon. *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal. 3d 943, 949 (1970). The Authority not only issued all of King's paychecks and W-2 forms, but only the Authority was indicated as King's employer on those documents. (RT 125:1-10, 148:10-15, 151:17-23; King Ex. A, Tab 21 at 120-132)¹ The proposed decision entirely ignores this at-will relationship.

Also ignored by the proposed decision is that King testified it was the Authority's CEO who controlled her compensation. It was the Authority's CEO who denied King's request for a raise. (RT 141:2-16) When King's compensation was increased in June 2010, that raise was approved by the Authority's CEO, without the knowledge or approval of the Foundation. (RT 120:1-11; 136:13-137:2) An across-the-board salary merit increase for all Authority employees was applied to King as well. (RT 132:14-133:10) The Authority's compensation determinations were never reversed. (RT 141:17-20) King also received the same health and insurance benefits as Authority senior staff. (RT 154:13-18, 155:18-156:1, Ex. A, Tab 26 at 156, Tab 28 at 163, Tab 29 at 165-67, Tab 30 at 168-171) All of these facts support a common law employment relationship.

Another indicia of an employment relationship entirely ignored by the proposed decision is the undisputed fact that the Authority exerted significant control over who King could hire and fire. When King wanted to terminate a Foundation staff member, the Authority's HR department prevented that from occurring. (RT 160:18-162:6) The Authority also refused to allow King to convert a temporary employee into a permanent one. (RT 164:5-165:2) The Authority required that King utilize the services of an Authority employee. (RT 165:9-166:9, Ex. A, Tab 34) Conversely, the Authority required King to transfer a Foundation staff member to the Authority, and King was not allowed to replace that individual. (RT 166:24-168:15) The Authority on several occasions prevented King from hiring additional staff. (RT 169:7-20) As King explained, "I didn't even hire a temp without the Health Authority saying it was all right." (RT 203:12-20) All of this evidence—unrebutted—shows an employment relationship.

¹ "RT" refers to the transcript of the August 26, 2015 hearing, and "Ex. A" refers to the binder of exhibits King submitted, with tab designations referencing exhibit tabs within the binder.

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Further evidencing the Authority's control—and ignored by the proposed decision—was the fact that King was required to use the same job performance review process as Authority personnel. (RT 135:17-136:5) The Authority not only trained King on how to conduct performance reviews, but required use of the Authority's review forms. (*Id.*, 142:6-13; 142:20-143:10; 146:5-21; Ex. A, Tab 16, 072, Tab 17, 091) The Authority's human resources director reviewed and approved King's evaluation forms before they could be presented to King's direct reports or any other Foundation employee. (RT 143:23-144:15)

The Authority controlled additional conditions of King's employment, utterly ignored by the proposed decision. King was subject to the same employee policies as Authority employees. (RT 154:19-155:1, 163:11-13) King had to sign the same confidentiality agreement as Authority employees. (RT 172:14-19, 180:5-11, Ex. A, Tab 38) The Authority required King to adhere to the same community outreach regulatory restrictions as Authority employees. (RT 238:11-241:23, Ex. A, Tab 64 at 275, Tab 65 at 281-288) For four years King needed approval of the Authority's CEO to take vacation. (RT 153:12-154:4) The Authority—not King—told King's direct reports when they could leave early, without even seeking King's permission. (RT 170:3-8, 175:13-23, Ex. A, Tab 41 at 198) The Authority—not King—determined changes in employee status with respect to positions, hours, compensation and benefits. (RT 129:17-22)

King's efforts were devoted to raising money for the Authority. Moreover, at the specific direction of the Authority's CEO, she created a strategic plan to detail what the Authority and Foundation sought to accomplish. (RT 118:10-119:22; Ex. A, Tab 8, 053) In addition, at the request of Authority CEO, King renegotiated the lease for Authority office space. (RT 186:5-187:9, Ex. A, Tab 49 at 225) The Authority directed King to file a Form 700—a legal requirement only for an employee or agent of at least a quasi-public agency. (RT 177:14-19; Ex. A, Tab 202). Although no contrary evidence was presented, the proposed decision ignores all of these undisputed facts that support an employment relationship.

These undisputed facts support the conclusion that in reality, the relationship between King and the Authority was an employment relationship. CalPERS and the proposed decision focus instead on formal legal documents. But formal legal documents do not override the reality of the situation. Courts find an employment relationship repeatedly *despite* a formal document that clearly disavowed any such relationship when the conduct of the parties contradicts the written document. *E.g., Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1, 10-11 (2007). As that court noted, "[t]he parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship." *Accord, Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.*, 235 Cal.App.3d 1363, 1372 (1991) (workers were common law employees despite contrary written agreement). If the law were otherwise, parties could manipulate their relationship in written documents in order to evade their legal responsibilities.

The proposed decision sweeps these undisputed facts away by opining that "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." (Decision, ¶ 4) But the

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proposed decision cites to no evidence that King *in reality* had such control, and instead ignores the clear and undisputed evidence to the contrary. It is King's *actual relationship* with the Authority—not what might seem preferable to a third party—that controls the determination whether King was an Authority employee.

In short, King was a common law employee of the Authority and the proposed decision should not be adopted because it is contrary to the law and the evidence.

King Alternatively Was Jointly Employed By Both Entities

Alternatively, CalPERS eligibility should be recognized for King under the joint employer standard. The proposed decision agreed with Respondents that the "definition of common law employment includes co-employment." The proposed decision incorrectly concludes this standard was not met, as explained by Respondent King in her separate letter to the Board in more detail.

Respondents clearly established in the alternative that King was jointly employed by the Authority and the Foundation. Joint employers not only may co-determine terms and conditions of employment, they may exercise authority over different terms and conditions of employment. For instance, one employer can set wages and hours while another assigns work. *Browning-Ferris*, 362 NLRB 186 at 15 n. 80. Similarly, a joint employer relationship existed because both entities *shared* the right to hire and fire workers, to set compensation, and day-to-day supervision. *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1124 (3d Cir. 1982).

Here, the undisputed evidence amply established that the Authority at a minimum shared or jointly determined the essential terms and conditions of King's employment. King was hired to raise money for the Authority "[i]n collaboration with the Chief Executive Officer of Santa Clara Family Health Plan." (CalPERS Ex. 13) She received her pay from the Authority, only the Authority was listed as her employer on paychecks and tax documentation, and she was subjected to the Authority's policies, procedures, and training. The Authority could terminate her employment at-will. The Authority exerted significant control over who King could hire and fire and how their work performance was to be evaluated, as well as their pay.

The Authority thus either shared, co-determined or controlled myriad features of King's employment. Indeed, if King was not a common law employee because the Foundation retained the right to control the "manner and means" for her fundraising activities, as the proposed decision concludes, then King had to be jointly employed by both entities because of the numerous other indicia of Authority control over her employment. The proposed decision thus is contrary to the undisputed facts when it concludes that King was not a joint employee of the Authority. The Board should not adopt its flawed conclusion.

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The Decision Should Not Have Precedential Effect

Should the Board nevertheless adopt the proposed decision, that decision should not have precedential effect because it does not contain a significant legal or policy application of general application that is likely to recur. The factual circumstances that gave rise to this appeal are not likely to recur with other public agencies, since it is not common for public agencies to have fundraising affiliates. Nor are other public agencies likely to have enrolled persons employed by an affiliate with the mistaken understanding that those persons are entitled to CalPERS benefits and without any intent to cheat CalPERS or the affected individuals.

In addition, other than recounting the procedural history and quoting from several documents, the proposed decision provides only 4 paragraphs recounting CalPERS' evidence and 3 paragraphs summarizing Respondents' evidence. This discussion does not include many of the facts that Respondents presented. For instance, the proposed decision indicates that employee evaluations "were organized by the Authority's HR department," but omits the important evidence that the Authority reviewed and approved King's completed evaluations of staff before they could be presented to any Foundation worker. (RT 143:23-144:15) The proposed decision reports that the Authority completed a questionnaire concerning the employment of another individual, repeating the responses helpful to CalPERS, but neglects to include the Authority's confirmation that the agency could terminate the relationship with this individual at any time (a clear indication of an employment relationship), as well as the Authority's affirmative response to the penultimate question: "In your opinion, is the individual an employee of the agency? **Yes.**" (CalPERS Ex. 16 at pp. 2-3 [emphasis added])

The sweeping conclusions bereft of evidentiary support in the proposed decision do not provide "clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied." The proposed decision accordingly does not meet the Board's standards as one that should be given precedential status.

Conclusion

This is not a situation where a public agency attempted to deceive CalPERS, evaded financial obligations or acted in bad faith. The Authority and the Foundation were jointly working towards one goal: providing quality health care for county residents. King and the Authority made all of the required contributions to CalPERS. King received paychecks and W-2 forms showing the Authority as her employer, she was at-will, the Authority told King who she could hire and fire and when, and the Authority required that she adhere to the same policies, contracts, training and performance evaluation process as Authority employees. These undisputed facts establish that King was an Authority employee or at the least, jointly employed by both the Authority and the Foundation. Respondent Santa Clara County Health Authority respectfully asks this Board to reject the proposed decision as contrary to the law and the facts.

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Respectfully submitted,

A handwritten signature in black ink that reads "Alison S. Hightower". The signature is written in a cursive style.

Alison S. Hightower
Attorneys for Respondent
Santa Clara County Health Authority

ASH/ah

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February 5, 2016

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**Re: Appeal of SANTA CLARA COUNTY HEALTH AUTHORITY,
Respondent and KATHLEEN KING, Respondent;
Reference No. 2014-1087**

To: The Board of Administration of the California Public Employees' Retirement System

This law firm represents Respondent Kathleen King in the above-entitled matter. We are submitting this letter to the Board as our written argument urging rejection of the Administrative Law Judge's decision issued December 3, 2015.

The Case Before the Administrative Law Judge

This case came about as a result of an audit performed by CalPERS on Respondent Santa Clara County Health Authority. The audit concluded that even though Respondent Kathleen King was duly reported and timely contributions were consistently paid by the Authority to CalPERS, Ms. King (and others) should not have been a participant because she was not employed by the Authority, but instead was employed by the Santa Clara County Health Foundation, an allegedly separate entity.

There was a wealth of evidence presented at the hearing on this matter. There were close to five hundred pages of exhibits, and a transcript of the witnesses' testimony was over two hundred and fifty pages. Respondent King's position was that, despite the formal structure of the two entities at issue (Respondent Authority and the Santa Clara County Health Foundation), she was either a common law employee of the Authority or the Authority and the Foundation together were joint employers. King argued that, as an innocent participant, the facts here cry out

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for a finding that these two entities were joint employers, and that on that basis, she should be considered an employee of the Authority for purposes of CalPERS participation.

The facts adduced at the hearing made it clear that for all matters concerning the employment relationship, employees of the Foundation were treated as employees of the Authority. Hiring was done through the Authority, personnel policies were set by the Authority, compensation levels were set by the Authority, Foundation employees received their paychecks from the Authority, employee relations matters were governed by and handled by the Authority, and the Authority provided the office space and equipment to the Foundation employees. That the Foundation employees would also be participants in CalPERS, just like all of the Authority employees, was not a surprising or questionable proposition.

Nevertheless, the CalPERS auditors relied exclusively on the formal documentation indicating that the Foundation was a separate, non-public entity. Based on that, the audit concluded that King was an employee of the Foundation only, and the reality of the actual employment relationship was irrelevant.

The administrative law judge agreed with this approach. She too elevated form over substance, ignoring all factors pointing to joint employment, and relied exclusively on the formal documents to support her conclusion that only the Foundation was King's employer.

The ALJ's decision also apparently assumed that a finding of joint employment would be beyond her purview ("no authority was presented that such [joint employment] applies in this context"; ALJ Decision at p. 7). Respondent King reads this rationale as meaning that she was powerless to adopt the theory of joint employment because the CalPERS Board of Administration has not yet formally adopted a precedential decision incorporating the joint employer concept into the PERL's definition of employer.

Argument

This case cries out for adoption of the concept of joint employment under the PERL. It must be emphasized that Respondent King - and her fellow Foundation employees - were innocent parties in their participation. They were regularly reported to CalPERS, the Authority made the required contributions, they were treated as employees of the Authority for all aspects of the employment relationship, including all employee benefits. Unlike the converse situation of an employer attempting to avoid obligations to CalPERS, their expected participation in CalPERS was completely above board, and did not involve some type of subterfuge in order to gain for employees of a private employer benefits to which they should not be entitled.¹

Unless there is evidence of a contrivance in order to gain coverage to which participants otherwise would not be entitled, Respondent King urges that, under circumstances such as this, the joint employer theory is well within the statutory definition of "employer" under the PERL, and should be adopted. The facts in this case disclose that virtually all aspects of the employment relationship were governed by the Authority, not by the Foundation. Hence, even

¹ This is in contrast to the Board's case of *City of Galt* (2008) CalPERS Precedential Decision 08-01, where a separate entity was created expressly for the purpose of obtaining CalPERS coverage.

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though Respondent King was in a technical sense an employee of the Foundation, because all control of the employment relationship was governed by the Authority, the only accurate way to characterize the relationship between the two entities was one of joint employment. Under those circumstances, the PERL's definition of employer can, and considering all the equities here should, embrace the concept of joint employment. Adoption of the joint employer concept would not in any way dilute the PERL's important prerequisites for participation in CalPERS. If all other requirements are met, and where the public agency controls all significant aspects of the employment relationship, the participant's ostensible employment by a private entity should not stand in the way of participation so long as the joint employment relationship is well-established and bears no earmarks of subterfuge.

Alternatively, even if the Board does not adopt the joint employer theory, Respondent King submits that the ALJ's decision is flawed anyway. Ample evidence was presented that Respondent King was in fact a common law employee of the Authority and therefore should be considered a bona fide participant, as the authority controlled all the significant aspects of the relationship, factors which were not even considered by the ALJ.

The controlling case for whether an employee may be a proper participant in CalPERS under the common law is *Metropolitan Water District of Southern California v. Superior Court (Cargill)* (2004) 32 Cal. 4th 491. *Cargill* held that the PERL's definition of a contracting agency employee incorporates common law principles. *Id.* at 496. What the ALJ ignored here was that the common law "right of control" test precisely means that the analysis should look not just to who has the right according to the documents, but who **actually** exercises control. The evidence here was that Respondent King was denied a raise by the Authority, that the Authority controlled Ms. King's hours of work and handled approval of her vacation requests, that it controlled who Ms. King could hire and fire, that it controlled how her performance evaluations read, and that it controlled all other significant aspects of her employment relationship. These facts were presented to the ALJ un rebutted.

Nevertheless, the ALJ's decision offers absolutely no analysis at all as to why these facts would not give rise to a common law employment relationship with Ms. King and the Authority. The Decision's blind adherence to the documents was the same error that *Cargill* court cautioned against: that just because the Water District and the private labor supplier had a document that said that the labor supplier was the employer, not the public agency, that should not end the inquiry; instead, the emphasis should be on how the parties actually treat the relationship as between the two entities and the employee. The ALJ's decision ignores that approach, and instead looks only to the documents.

Thus, the Board need not necessarily embrace the joint employer concept, given the factors weighing in favor of common-law employment anyway.

Aside from all of the foregoing, even if the Board should decide to adopt the ALJ's decision, Respondent King urges the Board to refrain from designating it as precedential. The decision itself fails to recognize, assess, and explicitly weigh reams of evidence which were presented at the hearing on the matter. The decision does not explore in any meaningful way what facts and circumstances should or might give rise to *either* a joint employment relationship

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or a common-law employment relationship. Moreover, even though the facts of this case were ripe for a finding of joint employment, the decision offers no explanation as to why the concept of joint employment cannot be squared with the PERL's definition of an "employee of a contracting agency". The decision conclusively states that "Respondents are not persuasive that Respondent King was employed by both entities" but offers no analysis whatsoever as to why that conclusion was reached. As such, the decision does not serve the purpose of designating a decision as precedential—to offer facts and analysis which may be helpful guidance to subsequent parties in interpreting the intricacies of the PERL.

Conclusion

Respondent King devoted her labor to the Foundation for over a five-year period while innocently believing that she was earning a pension in CalPERS. Contributions were duly made by her employer, and additional contributions were duly deducted from her paychecks. To find out years later that CalPERS wants to bar her from receiving the benefit of those contributions, through circumstances completely beyond her control, in the face of a completely logical and legally supportable rationale for why she *should* receive the benefit of those contributions, smacks of inequity. The tens of thousands of hours of labor, for which she thought she was earning a pension, cannot be recouped. More significantly, there is no reasonable prospect of any substitute benefit or replacement plan precisely because the hours have already been worked. The Board must absolutely strictly adhere to the requirements of the PERL and its regulations. Ms. King is not asking for an exception to that principle. She *is* asking why this grave injustice must be done when there is an open avenue to right this wrong which, although rejected by the ALJ, is readily available to this Board.

The irreplaceability of these benefits has also been accentuated by CalPERS extreme delay in processing this whole matter. The underlying audit in the matter was performed in 2012. It is now 2016. Had the process been more efficient, Ms. King might have at least been in a position to begin an alternative plan for her retirement sooner than where we are now four years later.

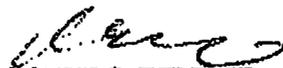
Should the ALJ's decision be upheld, this matter also involves more than simply the permanent loss of retirement benefits for Ms. King. CalPERS staff has already contacted the agency regarding other employees of the Foundation that were in fact subjects of the original audit in this matter. Thus, there are several other Foundation employees whose benefits may be taken away years after the fact. Perhaps most significantly, as far as we are aware, this cancellation of benefits of these innocent participants will even extend to two former Foundation employees who are already retired and one of whom has been drawing benefits for several years.

For all of the above reasons, Respondent King urges that the Board decline to adopt the decision of the ALJ, and remand with directions that (1) the concept of joint employment may be within the PERL's definition of "employee of a contracting agency", (2) that further findings be made regarding the application of joint employment to the facts of this case, and (3) alternatively, that further findings be made regarding application of the common law employment test to the facts of this case. Finally, in any event, Respondent urges that the Board reject any designation of the ALJ's decision as precedential.

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Very truly yours,

WYLIE, McBRIDE,
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