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BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

SANTA CLARA COUNTY HEALTH AUTHORITY,

Respondent,

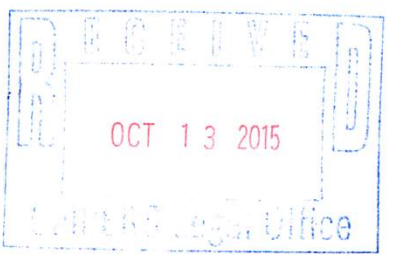
and

KATHLEEN KING,

Respondent.

AGENCY CASE NO. 2014-1087
OAH Case No. 2015030359

RESPONDENT KATHLEEN KING'S OPENING BRIEF



INTRODUCTION

This case is an appeal by Respondent Kathleen King from a determination made by CalPERS that, although her employer/employers faithfully made contributions on her behalf for a 5 year period, the contracting agency that employed her should not have done so. CalPERS determined that the ostensibly separate entity that she worked for, the Santa Clara Family Health Foundation, was an independent entity from the contracting agency, the Santa Clara County Health Authority, and that employees of the Foundation are therefore not eligible to be enrolled in CalPERS. Thus, unlike the typical situation where an employer improperly prevents a group of employees from becoming CalPERS participants, and fails to pay contributions on their behalf, this case involves an employer - the Foundation - which believed that its employees were all properly enrolled in CalPERS and faithfully made the required contributions for a number of years, only to be told after the performance of the CalPERS audit that employees were not properly enrolled, and that they should be barred from participation.

As will be developed below, CalPERS arrived at its conclusion based on an inquiry limited to whether Respondent Kathleen King was an employee solely of the Health Authority, or whether she was solely an employee of the Foundation. In Respondent King's view, this monocular approach does not allow her the full benefit of what the Public Employment Retirement Law ("PERL") [Gov't Code Section 2000 et seq.] offers to its participants.

Under the Authority of *Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 491, the PERL incorporates common-law principles into its definition of a contracting agency employee. (*Id.* at 496). A well-established element of the common law, arising in myriad circumstances, is the concept of the "joint employer" - a relationship where a single employee can simultaneously have two different employers who share employment responsibilities. In that instance, under the common law, the individual is treated as an employee of *both* entities.

Although in a typical case involving dual employers one employer is attempting to disclaim responsibility as an employer, neither the Foundation nor the Authority is attempting to escape responsibility here. Instead, both Respondent King and the Authority submit that the facts developed in this matter are tailor-made for the concept of joint employment. As will be chronicled

below, the conduct and practice of the two entities here present a compelling case that *only* a joint employer finding would accurately describe the relationship. As such, CalPERS' determination in this matter must be overturned.

Statement of the Case

Although underlying this case is a CalPERS audit report which encompasses broader issues, this case is limited to Respondent Kathleen King's challenge to CalPERS' determination as to whether she was properly enrolled in CalPERS.

As the "First Amended Statement of Issues" filed by CalPERS states, Respondent Santa Clara County Health Authority ("The Authority") is a public agency that contracted with CalPERS for retirement benefits The Statement of Issues further declares that CalPERS determined that certain employees were "improperly reported by Authority" and that they were only employees of the Santa Clara County Family Health Foundation ("The Foundation"). Respondent King is one of the individuals identified by the CalPERS audit that was determined by CalPERS to be an employee of the Foundation and not eligible for CalPERS membership.

Respondent King (and the Authority) timely filed a joint appeal of CalPERS' finding.

The issue in this matter, as framed by the (amended) Statement of Issues, is "whether CalPERS correctly determined that Respondent King is an employee of Foundation and that Authority incorrectly reported her as an employee for purposes of CalPERS membership".

CalPERS' Contentions

In 2012 CalPERS performed a "compliance audit" of the Santa Clara County Health Authority (T.R. 21:14-17).[1] Following the field work for that audit, CalPERS produced a "draft audit" (T.R. 22:3-5; CalPERS Exhibit 3). The draft audit was sent to the entity being audited - The Santa Clara County Health Authority ["the Authority'] for its review and comment (CalPERS Exhibit 3; T.R. 23:20-23), but was not sent to the Foundation or Ms. King.

The Authority then sent a letter in response to the audit draft (CalPERS Exhibit 4), which was then further reviewed by CalPERS (T.R. 24:17-23). The letter was submitted on behalf of the

[1] "T.R." refers to the transcript of record in this matter, followed by the page number being referenced. The colon after the page number referenced indicates a citation to the lines being cited within that page.

Authority and was drafted by the Authority's CFO (T.R. 25:25 - 26:4). Following receipt of that letter, CalPERS produced a "final audit" (CalPERS Exhibit 5). That final audit contained no changes from the draft audit (T.R. 26:16-21).

The critical audit finding was that certain employees of the Foundation allegedly were improperly reported to CalPERS by the Authority; that only the Authority was the participating agency, and that the Foundation was a separate entity with its own employees who were not independently eligible for CalPERS participation (CalPERS Exhibit 6, p.2).

At the hearing in this matter, the CalPERS auditor testified as to what he considered important in arriving at his findings. He relied significantly on a CPA financial report that had been prepared for the Authority (unrelated to this case). The auditor considered it "very important" that, according to the Authority's CPA report, the Authority does not have financial accountability for the Foundation (T.R. 30:18-24). As the auditor stated, "when somebody's financial is not part of the other then it's separate and complete" (T.R. 31:3-4). The auditor found that the CPA's report commissioned by the Authority "failed to establish a comingled relationship" (T.R. 31:11-14).

The auditor also believed that because the Authority and the Foundation had two separate executives with two different titles "that really was a smoking gun . . . . ." (T.R. 31:20-24). The auditor also attached significance to the structure of the Foundation, that the Executive Director of the Foundation ostensibly reported to the Foundation's Board and not to the Authority's Board (T.R. 33:5-8). Thus, according to the auditor, because the chain of command ends with the Foundation's Board of Directors, that factor, along with a service agreement between the Authority and the Foundation, showed that the Foundation is "completely separate" that it is " autonomous", and a "stand-alone agency, " that "there wouldn't be any authority of the Foundation over their employees except with . . . basically the bookkeeping function by the Authority" (T.R. 33:17-25 - 34:1-3).

The auditor also relied heavily on the "Administrative Services Agreement" between the Authority and the Foundation. He attached great significance to a clause in that document which states that "the relationship between the Authority and the Foundation is purely contractual and that neither the Authority nor the Foundation or the employees or agents shall be considered the employee, servant, agent or representative of the other" (T.R. 35:19-25 - 36:1-4; CalPERS Exhibit

11). The auditor considered the Administrative Services Agreement the equivalent of "as if you hired a bookkeeper to do your paperwork rather than doing it yourself" (T.R. 38:10-13).

The auditor also attached significance to a statement by the V.P. of Human Resources for the Authority that Respondent here, Kathleen King, was hired to provide support exclusively for the Foundation, as opposed to for the Authority (T.R. 42:23-25 - 43:1-4). Similarly, it was thought to be important that an employee of the Foundation, CFO Emily Hennessy, was supervised by Kathleen King (T.R. 43:14-24).

He also relied on an email from the President of the Foundation Board to the HR Representative of the Authority authorizing a pay increase for the Foundation's CFO Emily Hennessy (CalPERS Ex. 14). [that email was actually sent in 2007, a date outside the period that was "under review" for the audit (CalPERS Exhibit 3, p.2]. The CalPERS auditor explained that he had never spoken to the sender of the email regarding its meaning (T.R. 72:8-13), but his reading of the email was that "based on the structure of the two agencies and the separate entity and the service agreement, they take orders from the Foundation . . . . ." (*Id.*). In fact, the email concerned a period when Hennessy was simultaneously working as the CFO of the Authority, and the increase was proposed by the CEO of the Authority, not the Foundation (T.R. 134:4-25). It was the auditor's belief that when a pay rate was changed for an employee of the Foundation, the HR department of the Authority played a role, but they were "just acting based on orders. The Authority is acting based on instructions from the Foundation Board . . . . " (T.R. 48:1-8).

Significantly, the auditor offered no evidence in support of his assertion about how pay rates for Foundation employees were determined, other than this one-time email from the Foundation's Board president regarding the compensation rate for Ms. Hennessy---a rate that was instigated by the Authority CEO. Other than that single instance, there is no evidence in the record of the Foundation Board ever directing the Authority, issuing any "orders" to the Authority, or giving "instructions" to the Authority's HR department. To the contrary, as will be developed below, the dynamic between the two entities flowed in exactly the opposite direction.

The CalPERS auditor, when asked if the guidelines he used included the "joint employer" test, offered an ambiguous answer which included that "you tried to prove that really is - really an

independent contractor or an employee, so we apply that" (T.R. 49:23-25 - 50:1). He readily admitted that the CalPERS audit process did not include speaking to any employees of the Foundation at all (T.R. 50:23-25 - 51:1-6). In fact, he confirmed that no one from CalPERS had ever spoken to any employees of the Foundation (T.R. 57:4-25). He conceded that a questionnaire that he had the Authority fill out regarding Foundation CFO Emily Hennesy contained answers stating that the Authority could terminate her employment (with the Foundation) at any time (T.R. 52:1-11) and that she was an employee of the Authority, not of the Foundation (T.R. 53:15-22).

The CalPERS auditor also largely conceded that he made assumptions about the level of knowledge and authority possessed by the representative of the Authority that had sent the letter to CalPERS in response to the draft audit. He admitted that he assumed the sender of the letter had authoritative knowledge about the Authority and the Foundation's affairs because of where he appeared on the organization's "org charge" (T.R. 59:8-25 - 60:1-5). Upon further questioning, he admitted that the sender was in fact not the CEO as he had stated, but was the CFO (T.R. 61:7-22).

The CalPERS auditor further admitted that Kathleen King's original offer of employment --- to be the Director of the Foundation --- came from the Authority on Authority letterhead (CalPERS' Exhibit 13 in T.R. 63:1-18). He testified that "the Authority was contracted to do all the hiring", (T.R. 63:20-21), but admitted that no such authority was laid out in the Administrative Services Agreement between the two entities (T.R. 65:6-9). He did not know whether the person who signed the Administrative Services Agreement was simultaneously the President and CEO of the Authority and was also President of the Foundation, nor did he know whether the person signing on behalf of the Authority was also at that time the Treasurer of the Foundation (T.R. 68:12-25).

In concluding his testimony, he opined that the Authority was not empowered to set the terms and conditions for Foundation employees because the Authority was "administering based on instruction from the Foundation" (T.R. 77:19-25) and that compensation for Foundation employees was set by the Board of the Foundation (T.R. 78:1-3). However, he admitted that he had no documentary evidence corroborating that hypothesis because "the Foundation was not the one under audit" (T.R. 78:6-8). Consequently, he did not review any documents regarding the Foundation's setting of compensation for Kathleen King, let alone any other Foundation employee [other than the

single email discussed above]. He also did not review any documents regarding the transfer of employees from one organization to the other, regarding performance evaluations of Foundation employees, or regarding hiring or firing Foundation employees because that was "outside the scope of my audit" (T.R. 78:12-21).

CalPERS' audit also relied on having the audit reviewed by one of its memberships specialists. That specialist was charged with ascertaining more information after the draft audit report was issued. (T.R. 86:17-25 - 87:1-3). At the request of the Authority [after having received the draft report], a conference call took place in which there was discussion regarding "hiring and firing, etc." (T.R. 87:7-14), although no substantive information about who had authority for those duties was actually discussed (T.R. 99:16-100:2).

The specialist eventually concluded that the draft audit report was correct. He testified that he relied in part on the Foundation bylaws (CalPERS Exhibit 10; T.R. 88:11-15). He was not sure from whom he received this copy of the bylaws (T.R. 88:21-24). He testified that he was looking to the bylaws to see who had the Authority to exercise control over the employees, and that the bylaws told him "that the Foundation Board has authority over the Foundation employees" (T.R. 90:2-8). Like the auditor, the specialist determined that the bylaws in and of themselves demonstrated a chain of command within the Foundation that conclusively established that the Foundation Board had sole control over the Foundation's affairs (T.R. 91:16-25 - 92:1:13).

Similar to the auditor, the testimony of the membership specialist from CalPERS reflected that he did not speak to any employees of the Foundation; that doing so "would be well outside my scope" (T.R. 100:24-25 - 101:1-3). He did review what was purportedly the Foundations' bylaws - received from the Authority - but made no further inquiry of any representative of either organization as to the meaning or application of those bylaws (T.R. 102:8-12). His conclusion thus was based entirely on his review of the documents (T.R. 102:13-17). Most significantly, in performing his review, he never considered the legal doctrine of joint employer (T.R. 102:18-22).

Respondent King's Response to CalPERS' Contentions

Respondent Kathleen King's testimony --- supported by extensive documentation that was neither sought nor reviewed by CalPERS during the audit process-- - paints an entirely different picture of the relationship between the Authority and the Foundation.

Ms. King explained that the Health Authority was established in the late 1990's by the enactment of an ordinance by the County (Resp. Exhibits 1-11), and that the Foundation was established in the year 2000 as a nonprofit public benefit corporation (Resp. Exhibits 12-15). She was hired in 2008 as the Executive Director of the Foundation (T.R. 108:7-12). She described the Foundation as "the fundraising arm" for the Authority (T.R. 108:24-25). The sole purpose of the Foundation was to raise money for the Authority, and to pay for itself (T.R. 111:23-25 - 112:1-2). The Authority provided, for the most part, medical coverage for children who had no other coverage available (T.R. 114:7-17). Between the time she was hired in 2008 and up to 2013, the Authority had gradually moved more towards also establishing programs for health coverage for adults (T.R. 114:17-25), and because of that shifting mission, the Authority and the Foundation split in 2013 (T.R. 115:1-2).

Because of the nature of fundraising, private entities would only provide funds directly to the Foundation as a nonprofit organization, as opposed to donating money directly to the Authority, a public agency (T.R. 116:17-25 - 117:1-24). Another key element of fundraising operations is that often the grantor---by way of example, the Packard Foundation---imposed as a condition to grants that it receive reports from the Foundation regarding how the Authority was using the grant money (T.R. 117:11-25 - 118:1-21).

As averred by CalPERS own exhibit, when King was hired as the Executive Director of the Foundation, the offer was extended by the Authority, not the Foundation or its Board (T.R. 121:12-18; CalPERS Exhibit 13). The offer letter described her duties as leading and directing all of the Foundation's fundraising efforts "in collaboration with the Chief Executive Office of the Santa Clara Family Health Plan" [the Authority] (CalPERS Exhibit 13). The offer letter was signed by the Human Resources Director for the Authority (T.R. 123:1-3).

Similarly, when other Foundation employees where hired, the offers of employment and those terms of employment were extended from the HR Director of the Authority (Resp. Exhibits 57-61; T.R. 127:17-25 - 128:1-25); they did not come from the Foundation or its Board, and their terms were all drafted by the Authority (T.R. 129:13-16).

The offices for the Foundation were provided by and located in the same building as the Authority (T.R. 156:13-17). The two organizations shared a postal address (T.R. 156:20-21). The Foundation was usually provided 2 to 3 offices from the Authority, but would get moved quite frequently depending on wherever the Authority decided they would go (T.R. 123:20-23). The amount of the Foundation's office space and its location was determined by the CEO of the Authority (T.R. 123:24-25).

The Foundation used the Authority's email system, with the same domain name in the email addresses as the Authority's (T.R. 124:4-11). Office supplies were provided by the Authority to the Foundation employees (T.R. 124:12-14). Although the Foundation had some of its own desktops, it used the Authority's servers for all their computer systems (T.R. 124:15-25) but the Authority even directed what type of desktop to purchase (*Id.*) Workers' compensation insurance was provided by the Authority for Foundation employees (T.R. 125:11-15).

When Foundation employees underwent a wage change, that was accomplished by executing a "personnel action notice", a form dictated by the Authority (T.R. 130:22-25 - 131:1-6; Resp. Exhibits 62-71). Some of those "personnel action notices" contained a final signature from Elizabeth Darrow, the CEO of the Authority (Resp. Exhibits 68 and 71; T.R. 136:6-10). Employees were also subject to "across the Board" increases which were set by the Authority, not the Foundation (Resp. Exhibit 63; T.R. 132:19-25 - 133:1-10). In fact, on one "personnel action notice" for Respondent King, the across-the Board increase was not even signed by any representative of the Foundation at all nor by a Foundation Board member; instead, it was signed by the HR Director of the Authority and by the CEO of the Authority (Resp. Exhibit 64; T.R. 136:13-25 - 137:1-6).

At one point, the CFO of the Foundation, Emily Hennessy, was working as the CFO for the Foundation and for the Authority simultaneously (T.R. 134:4-16). Because she had those extra

duties, the CEO of the Authority recommended that Hennessy [a Foundation employee] receive a substantial increase for doing that double duty, and the increase was implemented (T.R. 134:7-25).[2]

It was understood that when Foundation employees received increases, it was done pursuant to criteria created by the Authority, not by the Foundation (T.R. 140:1-3). Foundation employee pay increases were set up by the Authority to be dependent on a performance review system (T.R. 145:12-25; Resp. Exhibit 72-85). The employee evaluation system was developed solely by the Authority, not the Foundation, and the Authority provided training as to how to use the system (T.R. 142:14-25 - 143:1-2). This performance review system was uniform throughout the Authority and the Foundation, and was carried out by the HR Director for the Authority (T.R. 144: 16-25 - 145:1-10).

Consequently, when Ms. King sought an increase in pay, she went to the CEO of the Authority. The Authority apparently already had a document it had prepared evaluating Ms. King's position. Using that document as support, the Authority CEO refused to grant her any increase (T.R. 141:2-16). When Ms. King went to bat for Foundation CFO Emily Hennessy to try to get her a pay increase, she was stymied by the Authority and was not successful in getting her the increase that she was recommending to the Authority (T.R. 194:13-196:11). The topic of pay increases was also covered in a chain of emails which dealt with how the Authority would allow salaries to be set for the position of Outreach Manager (Resp. Exhibits 92-96; Resp. Exhibits 101-102) along with a simultaneous chain of emails documenting the constraints the Authority placed on evaluating Ms. Hennessy's job description as it compared to the market (Resp. Exhibits 109-117). In fact, there has never been an instance where a determination by the Authority as to Foundation employee compensation was successfully challenged by the Foundation (T.R. 141:17-20).

Timekeeping for Foundation employees was entered, recorded, and orchestrated by the Authority (T.R. 147:3-25 - 148:1-9). Employees of the Foundation received their paychecks from the Authority, not from the Foundation (Resp. Exhibits 120-132; T.R. 125:1-5). Foundation

[2] That increase was the subject of the email relied upon by the CalPERS auditors in concluding that the Foundation directed the Authority as to pay increases; see discussion above at p. 5.

employees received their W-2 forms indicating that the Authority was their employer, not the Foundation (Resp. Exhibit 133; T.R. 151:6-23).

For the first 4 years that Ms. King was employed, she went directly to the CEO of the Authority to obtain approval for taking time off (T.R. 153:16-25). In 2012, it was changed so that she would go to the Chair of the Foundation Board, but then follow it up by going to the CEO of the Authority, and through the Authority's HR Department (*Id.*). In one instance, Ms. King had to shorten her vacation plans after running them by the CEO of the Authority, and finding out that there were coordination problems, so she had to change her vacation schedule (T.R. 218:4-14).

Foundation employees receive the same benefit package as Authority employees (T.R. 154:13-18), which were all administered by the Authority (Resp. Exhibits 138-167). Life insurance was provided by and through the Authority for Foundation employees (T.R. 157:16-25 - 158:1-8).

When the Foundation had to deal with a particular Foundation employee's performance issues, the Authority's HR Department was consulted, and the Authority brought in its legal counsel to assist the Foundation (T.R. 161:3-19; Resp. Exhibits 172-180). In one instance, even though Ms. King, as director of the Foundation, wanted to immediately discharge an employee, to walk the employee "out the door", the Foundation employee was allowed to work another two weeks at the insistence of the Authority (T.R. 161:22-25). In another instance, the Foundation wished to convert a temporary employee to a permanent employee, but the Authority prevented it from doing so (T.R. 164:5-25). They Foundation had no choice in the matter (T.R. 165:1-2).

Foundation employees were required to sign an employee handbook prepared by the Authority (T.R. 154:23-25 - 155:1). When changes were made to the handbook, they were made solely by the Authority, but Foundation employees were required to acknowledge in writing those changes (T.R. 162:20-25 - 163:1-4; Resp. Exhibits 181-183).

In other words, all HR policies were indistinct as between the Foundation and the Authority (T.R. 163:5-13), and the Foundation was required to adhere to those policies developed by the Authority (*Id.*)

At one point, a person employed by the Authority as a "outreach manager" was transferred to become an employee of the Foundation, against the will of Ms. King (T.R. 165:9-25 - 166:1-9;

Resp. Exhibits 184-187). That employee was to go on performing the same duties that he did for the Authority, but would be switched to becoming an employee of the Foundation because of budget concerns that the CEO of the Authority had at the time (*Id.*) The dynamic between the two organizations was well-illustrated in that one instance. Ask if she had a choice as to accepting the transfer of the employee, Ms. King answered as follows:

> Well because we took all of our direction from the Authority, I mean we raised money for the Authority, we - everything we did was for the Authority. So it would have been tough. She could have made it very tough if I didn't do it. (T.R. 166:5-9).

Ms. King testified that the CEO of the Authority, at the time of this incident, was also on the Board of the Foundation (T.R. 166:10-12). Significantly, the documents carrying out this transfer were all ultimately signed by the Authority CEO (T.R. 166: 19-23; Resp. Exhibit 185).

In another incident dealing with personnel and staffing, the Foundation was outright forbidden by the Authority from hiring into a Foundation position even though the Foundation had the necessary funding for the position (T.R. 169:7-20). The Foundation was specifically prohibited from doing so by the CEO of the Authority (T.R. 169:13-20). There was also an instance where an employee who worked for the Foundation was transferred to the Authority, at the sole direction of the Authority (T.R. 167:2-25 - 168:1-10). Moreover, the Authority did not allow the Foundation to hire a replacement for that employee (T.R. 168:3-5).

Foundation employees were directed to take part in "employee satisfaction surveys" conducted by the Authority (T.R. 170:12-16; Resp. Exhibits 188-190). There were incidents in which the Authority directed "all staff" - including Foundation employees - that they could leave early on a Friday, without any consultation with anyone from the Foundation (T.R. 170:3-8). Holiday lunches and company picnics were set by the Authority for "all employees", which included Foundation employees (T.R. 170:22-25 - 171:1-8). It was a regular practice for emails and memos to come from the Authority and be directed to "all employees" which included employees of the Foundation (Resp. Exhibits 188-197).

Privacy policies were developed and enforced by the Authority and applied to Foundation employees (Resp. Exhibit 194; T.R. 172:20-25 - 173:1-8). The Authority required employees of the

Foundation to execute a "confidentiality agreement" prepared and directed by the Authority (T.R. 180:5-11; Resp. Exhibit 209-215). The Authority also provided training in security and privacy to Foundation employees (T.R. 180:12-16), in sexual harassment prevention (T.R. 181:11-14; Resp. Exhibit 217-218), in HIPAA compliance (T.R. 182:11-14), and training on compliance with the Knox-Keene Act (T.R. 182:19-25 - 183:1-25; Resp. Exhibits 220-221) [which regulates solicitation of health insurance].

Employees of the Foundation were required to be present for meetings of "all employees" called by the Authority (T.R. 173:23-25 - 174:1-5; Respondent Exhibit 196). Employees of the Authority were encouraged to contribute to fundraising efforts engaged in by the Foundation (T.R. 175:24-25 - 176:1-22).

The Authority's web designer was allowed to be used by the Foundation for the Foundation's website at no charge to the Foundation (T.R. 184:1-11). The Foundation used the same legal counsel as the Authority (T.R. 184:15-19). This was true with respect to outside counsel for HR matters (T.R. 184:18-19), as well as other matters where the Authority's in-house counsel would be used by the Foundation (T.R. 185:23-25). In addition, the Foundation was provided legal advice from the office of Santa Clara County Counsel (Resp. Exhibit 223-224; T.R. 187:10-25 - 188:1-12), which, like the Authority, is a public agency.

At one point, the CEO of the Authority suggested that Respondent King attempt to renegotiate the Authority's lease for its office space (T.R. 186:10-25). She was successful in reducing the rent by one half----to the benefit of the Authority, not the Foundation (T.R. 187:1-9).

In the spring of 2012, the then-current CEO of the Authority resigned from the Board of the Foundation (Resp. Exhibit 226-227). Following that, a decision was made by the Foundation that it would move out of its shared quarters, and terminate its Administrative Services Agreement with the Authority (T.R. 189:15-25 - 190:1-5). The Foundation did then in fact terminate the Administrative Services Agreement (Resp. Exhibit 228).

In splitting up the two organizations, a number of issues arose, including access to Foundation documents that were on the Authority's server (T.R. 190:10-12; Resp. Exhibit 229-230).

When the Foundation split away from the Authority, the Authority conducted exit interviews of the employees, and notified them of their COBRA rights (T.R. 197:19-25).

A few months before the two organizations split up, the Foundation developed a new set of bylaws (Resp. Exhibit 231-241; T.R. 191:1-13). The Foundation also modified its Articles of Incorporation at that time (T.R. 198:12-17). Starting anew, the Foundation then had to do its own payroll and find its own insurance (T.R. 200:22-25). The benefit package changed (T.R. 214:18-25), the office location changed, the email addresses changed, and the Foundation had to supply its own office supplies, payroll service, HR services, web design, and all the other services it previously received at the rate of $1,000 per month (*Id.*). Instead, the Foundation then began paying approximately $15,000 to $18,000 a month for those services (T.R. 217:8-10).[3] After the split, compensation levels for Foundation employees were set by the Director, not some other entity (T.R. 217:11-20), as well as decisions on employee benefits, performance evaluations, decisions about when employees can take time off (*Id.*), as well as employee disciplinary matters (T.R. 218:1-3).

Ms. King described the relationship between the Authority and the Foundation [before the 2013 split] as "symbiotic". The Foundation was not merely a conduit through which funds flowed to the Authority. The mechanics of the Foundation supplying funding to the Authority, and the conditions placed on the funding, required a close day-to-day working relationship between the two organizations.

This relationship was explained by Emily Hennessy, the CFO of the Foundation. The Foundation had to work with the Authority to establish what were the responsibilities on the part of the Authority for fulfilling grant requirements, depending on the source of the funds, and then report back to the "funders" (T.R. 225:1-8). The Foundation provided the expertise in "grant management" for the Authority because, as the end -user of the funds, the Authority had to assure the funder that those designated funds were spent on the program for which they were intended (T.R. 226:20-25 - 227:1-3). In addition, when the Authority decided it wanted to implement a certain type of program for health care coverage, it required the assistance of the Foundation in order to put together a

[3] Emily Hennessy, the CFO of the Foundation, estimated that the actual market value of the administrative services agreement was in the neighborhood of $20,000.00 a month (T.R. 245:6-11), i.e., 20 times greater than what the Foundation actually paid.

proposed budget, and to draw in the Foundation's expertise in such matters (T.R. 228:20-25 - 229:1-12).

The Foundation was also required to work in conjunction with the Authority to monitor and provide information to Santa Clara County regarding funds that they would release to the Authority. The Foundation actually prepared invoices on behalf of the Authority to send to the County, who would then send payment directly to the Authority (T.R. 230:3-23). Ms. Hennessy was asked to do this task by the Authority, not the Foundation (*Id.*). In addition, for the Authority's main health coverage program, "Healthy Kids", the Foundation would regularly prepare an invoice on behalf of the Authority for the Authority to send back to the Foundation (T.R. 222:7-12; Resp. Exhibits 246-254). When the Foundation needed to remit certain monies back to schools for a particular health plan program, the Director of the Authority, not the Foundation, controlled how and when those checks were remitted (T.R. 242:6-24; Resp. Exhibits 289).

The same type of interrelation of operations existed with respect to a grant received from the Federal Government. Ms. Hennessy, on behalf of the Authority, worked with the Authority to come up with figures to give an account as to how those funds were being expended (T.R. 234:5-11; Resp. Exhibits 257-258). On another occasion, the Foundation had to work closely with the Authority to look at proposed grant terms to see whether the Authority could carry out the proposal (T.R. 235:9-24; Resp. Exhibits 260-261). And as an ongoing matter, the Foundation and the Authority had to work closely together to determine how much funds should be drawn out of an existing grant program, depending on what were the projected financial needs of that program within the Authority (T.R. 237:8-25 - 238:1-3; Resp. Exhibits 291-294).

Similarly, although normally a charitable organization would never be governed by the State's regulations concerning solicitation of health plans, the Authority always insisted that the Foundation be treated as covered by those prohibitions on soliciting memberships in health plans, i.e., treated the same way as the Authority itself would be treated by the State regulators. This meant that when the Foundation engaged in various "outreach" events, it had to have flyers and communications approved by the California Department of Health Services, at the insistence of the

Authority, in the same way that the Authority would have done (T.R. 239:9-241:23; Resp. Exhibits 291-294).

That was not the only manner in which the Foundation and its operations were treated as an arm of a public agency. Kathleen King herself was directed by the Authority to file a Form 700, an act that could only be required of someone who was an employee or agent of at least a quasi-public agency (T.R. 177:14-19; Resp. Exhibit 202).

As stated above, the Statement of Issues limits this matter to Kathleen King's participation in CalPERS. Importantly, however, there are also two former employees of the Foundation who are currently drawing CalPERS benefits (T.R. 248:8-20).

Applying the Law to The Facts of This Case

CalPERS agrees with Ms. King that in deciding who is properly an "employee of a public agency" within the meaning of the PERL, CalPERS is bound to apply the common law. The Authority for that proposition is the case of *Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 491. In summarizing its holding at the outset, the *Metropolitan Water District* court stated as follows:

> We conclude . . . that the PERL incorporates common law principles into its definition of a contracting agency employee and that the PERL requires contracting public agency to enroll in CalPERS all common law employees except those excluded under a statutory or contractual provision.

Metropolitan Water District of Southern California v. Superior Court (2004) 32 Cal.4th 491, 496.

In *Metropolitan Water District,* the contracting agency controlled employment conditions of employees who were paid by private labor suppliers. Arguing that those paid by the private labor suppliers were not employees of the public agency, the private labor suppliers urged, amongst other things, that an interpretation of the PERL's definition of "employee" should draw from other statutes outside of the PERL that expressly allowed employers to allocate employment responsibilities between two entities. *Id.* at 506. The court distinguished those laws specifically allowing for joint employment where only one entity, if structured according to the statute, would have legal responsibility (specifically, statutes dealing with workers' compensation coverage and unemployment insurance; *id. At fn.* 11) from the PERL. In assessing this argument that these other

statutes allowed for a disclaiming of responsibility by one entity, the court pointed out that "[n]or, of course, has the Legislature provided in the PERL for any co-employment exception to a contracting agency's duty to enroll employees in CalPERS". *Id.* Consequently, the court concluded that when the PERL defines "employee" as "any person in the employ of a contracting agency" (citing Government Code Section 20028(b)), the court should adhere "to the common law test". *Id.* at 501.

There can be no question that the concept of "joint employer" is woven within the fabric of the common law. The principle of joint employment has been adopted in cases interpreting the Fair Labor and Standards Act (*See, Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 928), in cases interpreting the National Labor Relations Act (*Browning-Ferris Industries and Sanitary Truck Drivers and Helpers Local 350, IBT* (August 27, 2015) 362 NLRB 186), as well as under the Fair Employment and Housing Act (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 124-125).

The question of whether two entities may be considered joint employers has been described as whether "it can be shown they share or co-determine those matters governing essential terms and conditions of employment". *NLRB v. Browning-Ferris Industries* 691 F.2d 1117, 1124 (3rd Cir. 1982). Further, the two entities may have some allocation of responsibility over terms and conditions. *Browning Ferris Industries of California* 362 NLRB 186 fn. 80. This is best illustrated by the Third Circuit's decision in *NRLB v. Browning Ferris Industries* 691 F.2d. 1117 (3rd Cir. 1982), where the two entities shared the right to hire and fire employees, co-determine their work hours, and shared responsibility for determining pay rates and promulgation of work roles. *Id.* at 1124-1125.

All of the facts chronicled above amply demonstrate that, *at the very least,* the Authority and the Foundation co-determine the terms and conditions of employment for Foundation employees. All of the traditional employment responsibilities, including granting compensation increases, granting time off, providing compensation and employee benefits and insurance, controlling the hiring and firing of employees, conducting employee performance reviews, and setting employment policies, were controlled by the Authority, not the Foundation. The record amply demonstrates that in dealing with employment matters, the Authority's control over Foundation employees vastly

predominates over the Foundation's exercise of any such control. That is all that is necessary to show a joint employer relationship.

But the Authority's predominating over employment matters was not the only role that it took on in the relationship. The Authority controlled the office space, the email system, the computer system, and treated all employees in the building as one staff---hence the emails to "all employees", the all-staff office events, the all-staff training. And presumably in the view of the IRS, the Authority did much more than provide "payroll services" to the Foundation---the Authority clearly held itself out on Foundation employee W-2's as the employer.

It is apparent from the audit report that CalPERS issued, as well as from the testimony of its witnesses, that CalPERS made its determination in this matter based purely on a pre-determined either-or inquiry: is Ms. King an employee of the Authority, or is she an employee of another independent entity. In Respondent's view, although that approach may be relevant in another case, it is simply beside the point here. As long as the Foundation and the Authority at least had significant *sharing* of employer responsibilities, the principle of a joint employer can obtain.

Having never spoken to any Foundation employees at all, and having confused the identity of the CFO of the Authority with the CEO, along with an unambitious pursuit of relevant documents, combined with limiting the scope of CalPERS' inquiry to that of an employee/independent contractor analysis, it is not surprising that CalPERS made the determination that Ms. King was not an employee of the contracting agency. Indeed, the premise of CalPERS' process seems to be that a review of documents, resulting largely in speculation about the relationship between the two entities based on the assumption that there is always strict adherence to the contents of those documents, is sufficient to exclude CalPERS participation.

The most fundamental flaw in this approach is that if one is going to place almost exclusive reliance on an organization's documents, and make no inquiry about how the entities treated their respective authority over employment matters, the basis for that approach certainly must be grounded upon evidence that the parties' formalities were in fact real - that the documents were executed, were intended to be effective, and for what period. Here, however, even though CalPERS relied heavily on various provisions in what purports to be the Foundation's bylaws, neither

CalPERS nor Ms. King were actually able to locate a signed and dated copy of the Foundations bylaws that would purport to govern the audit period. CalPERS offered into evidence a set of bylaws which were unsigned and not only did not contain a signature date, but contained no date reference in the document at all (CalPERS Exhibit 10). Ms. King offered an unsigned set of bylaws which at least had as a footer a notation "SCFHF Original Bylaws", and did at least contain the year "2000" on its signature page, although no month and date, let alone an actual signature (Resp. Exhibits 20-31). Ms. King also offered another set of bylaws which contained no signature, but did have a footer stating "approved by Board of Directors May 6, 2011" (Resp. Exhibits 32-42).[4]

Ms. King did testify that she *believed* that the first set of bylaws offered were the Foundation's original bylaws, but she pointed out that when the Foundation split off from the Authority, "we didn't get all our documents from the Authority" (T.R. 112:19-23). Consequently, although it might be reasonable to assume that these various bylaws were in fact applicable to the Foundation, in light of CalPERS' extreme reliance on documentation, rather than the actual practice and conduct of the two entities, the absence of hard evidence indicating that these are *authoritative* bylaws which were definitively effective at the relevant time period is, if nothing else, a self-contradictory approach to analyzing whether Ms. King was a properly enrolled employee for CalPERS' purposes.

Moreover, the approach taken by CalPERS of heavy reliance on documents and little or no inquiry into the operative facts is exactly the approach that is generally rejected by tribunals in assessing a joint employer contention. For example, the NLRB in *United Mercanitle* (1968) 171 NLRB 830 criticized over-reliance on a disclaimer contained in the two entities' agreement indicating that one entity would have no control over the other's labor policies, finding instead that all aspects of the relationship must be taken into account. Similarly, in *Teamsters Local 68(Fair Mercantile Co.)* (1974) 211 NLRB 496, the Board rejected recitals in a contract purporting to establish an independent contractor relationship and instead looked to the underlying facts showing the two entities co-determined the essential terms and conditions of employment.

[4] Ms. King also offered a set of bylaws for the Foundation that were actually signed (Resp. Exhibits 231-241), but their apparent effective date was beyond the audit, and therefore not relevant.

CalPERS' also exhibited its over-reliance on documents in its treatment of the "Administrative Services Agreement" executed by the two entities back in the year 2000. Unlike the Foundation bylaws, that document *does* contain the relevant signatures. However, the CalPERS auditor, seeing a signature on behalf of the Foundation, assumed that the signator executed it as an un-conflicted agent of the Foundation. He did not know whether the signator had a simultaneously held role with the Authority (T.R. 68:12-25). In fact, the person signing on behalf of the Foundation at that time was both the President of the Foundation and the President of the Authority (T.R. 193:10-24). The auditor similarly was not aware of whether the person who signed on behalf of the Authority was the treasurer of the Foundation (T.R. 68:16-22); in fact, the signator for the Authority was both Treasurer of the Foundation and CFO of the Authority at that time (T.R. 194:1-12). Ironically, despite his heavy reliance on the contents of the agreement, the auditor explained his ignorance regarding each signators' capacity to sign the agreement and their 100% conflicted roles in doing so by pointing out that it was signed in 2002, "so it's beyond the scope of the audit" (T.R. 69:1:5).

Thus, the document was not negotiated and executed at arms-length. It contained no price at all for performance of these services. It turned out that the price that was paid---apparently with no increases over a 12-year period—was $1,000 per month, a price not measured by anything remotely resembling the market, but instead resembling a pro-forma fulfillment of the requirement that an enforceable contract cannot be a gratuitous promise, a la the $1.00 per year lease agreement.

CalPERS' fundamental misunderstanding of the relationship between the two entities was further illustrated by the rather extraordinary inference that its auditor made regarding figures he saw in the Authority's CPA report. The auditor relied in part in a notation on that report of a receivable of $475,000 from the Foundation to the Authority, owed for "healthy kids premium and certain administrative costs incurred" (T.R. 78:21-79:19). In fact, that receivable had nothing to do with the Authority performing administrative services for the Foundation. That figure appeared in that fashion, Ms. King explained, because whenever the Authority enrolled more participants in a health plan than it could pay for, whatever was the outstanding balance would be "billed" to the Foundation, on the assumption that the money would be raised by the Foundation, and it thus

appeared as a "receivable" on the books of the Authority (T.R. 191:23-192:17). The cost of the administrative services under the Agreement was $1,000.00 a month, nothing more, and nothing less (T.R. 192:22-23).

Thus, not only was the auditor's view of the application of the Administrative Services Agreement completely unsupported, it also overlooked another important factor in the relationship between the two entities: that the Authority provided services under this agreement, but it was anything but an arms-length transaction. Instead, as the testimony showed, the Foundation's cost for these services was in the neighborhood of five cents on the dollar compared to its actual market value. Thus, the Foundation obtained a drastic discount for a wide range of administrative services, a factor that in part explains the interrelation between the two entities, and places a different perspective on the Authority's exercises of close to one hundred percent control over labor and employment matters for Foundation employees.

CONCLUSION

This case illustrates what happens when an administrative agency attempts to fit a square peg in a round hole. CalPERS' auditors may have acted in compliance with their own internally-developed system for determining these issues, but if so, those guidelines apparently ask only one question: who is the employer? The Metropolitan Water District case tells us that CalPERS is required to incorporate the common law when determining who is an employee of a contracting agency. In this case, however, CalPERS limited its query to which entity was "*the* employer", not whether under the common law both could be the employer. That approach arbitrarily excluded any possibility of concluding that Respondent King was, under the somewhat unique circumstances here, jointly employed.

CalPERS has demonstrated an unflinching reliance on organizational documents, and made virtually no inquiry into the actual practices of the parties. Such an inquiry would have revealed that the documents neither reflected the reality, nor the power dynamic between the Authority and the Foundation. Moreover, there is no evidence at all that one of the two documents upon which CalPERS rested its conclusions---the Foundation bylaws---- was in fact ever in effect. And the second document upon which CalPERS relied---the Administrative Services Agreement---was

executed by individuals who simultaneously held office in both organizations, so that the agreement was exclusively signed by individuals who were on both sides of the transaction. The "agreement" itself was thus not an arms-length arrangement between two distinct entities, but yet another instance of co-mingling the roles of the two organizations.

The facts in this case very strongly lend themselves to a finding of joint employment. If your offer letter comes from the Authority, if your paycheck and W-2 come from the Authority, if the office you are provided comes from the Authority, if your benefits come from the Authority, if your pay raise is controlled by the Authority, if your time off is regulated by the Authority, if your employee evaluations are conducted by the Authority, if your employee handbook was drafted by the Authority; if your exit interview is conducted by the Authority, if decisions about employee discipline or discharge are made by the Authority, if all employee training is conducted by the Authority, if a transfer to or from the Authority is unilaterally directed by the Authority, if you use the Authority's computer system and emails, if you use the Authority's office supplies, if you are required to attend "all employee" meetings and are party to all its "all employee" emails, if your legal counsel was the Authority's—commissioned at the direction of the Authority---and if your organization's sole mission is raising funds for the Authority, what would that employee believe about who was the employer?

The employee's intuitive answer would clearly be that the Authority is the actual employer. But Ms. King need not even prove that to demonstrate that she was properly enrolled in CalPERS. Instead, application of the common law compels the conclusion that, at the very least, she was jointly employed by the Authority and the Foundation. As such, she was properly included as an employee of the contracting agency.

Dated: October 7, 2015

WYLIE, McBRIDE, PLATTEN,
& RENNER

MARK S. RENNER
CHRISTOPHER E. PLATTEN
Attorneys for Respondent
Kathleen King

PROOF OF SERVICE

I declare:

That I am now and at all times herein mentioned a citizen of the United States and a resident of Santa Clara County, California. I am over the age of eighteen years and not a party to the within action. My business address is 2125 Canoas Garden Avenue Suite 120, San Jose, CA 95125. On this date I served the following:

RESPONDENT KATHLEEN KING'S OPENING BRIEF

X By Mail: by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail at San Jose, Santa Clara County, California, addressed as set forth below. I am readily familiar with my firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

X By e-mail: I personally sent to the addressee's e-mail address a true copy of the above-described document(s). I verified transmission.

Christopher Phillips
CalPERS
P.O. Box 942707
Sacramento, CA 94229-2707

Alison S. Hightower
Littler Mendelson, PC
650 California Street, 20th Floor
San Francisco, CA 94108-2693

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 7, 2015, at San Jose, California.

EVANGELINA M. TRUJEQUE