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BOARD OF ADMINISTRATION
 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding)	CASE NO. 2014-1087
Membership Exclusion of Foundation)	
Employees by:)	OAH NO. 2015030359
SANTA CLARA COUNTY HEALTH)	CalPERS' POST HEARING BRIEF
AUTHORITY,)	
)	
Respondent,)	
)	
and)	
)	
KATHLEEN KING,)	
)	
Respondent.)	
)	

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal presents a situation that CalPERS sees too frequently, one that CalPERS is dedicated to guarding against and rooting out, when necessary. Though this situation is cunningly characterized as *joint employment* by Respondent King, it is really a straightforward case of ineligibility: an employee of a foundation ineligible to participate as a CalPERS employer is being misreported as an employee of a CalPERS-contracting entity for the sole purpose of taking advantage of CalPERS pension benefits.

Respondent King argues that this case demonstrates what happens when an administrative agency attempts to fit a square peg into a round hole; Respondent King

1 concedes that CalPERS acted in compliance with its own internally-developed system
2 for determining these issues, but suggests that system is flawed for focusing on the
3 key question: who is the employer? Based on this argument, it is clear that
4 Respondent King does not understand, or maybe respect, the legal confines in which
5 CalPERS must operate.

6 Respondents argue that in determining employment status, CalPERS is subject
7 to the common law and that the common law recognizes dual/joint employment
8 situations. Based on that assertion, Respondents argue that Respondent King is a
9 common law employee of *both* Santa Clara County Health Authority (Authority) *and*
10 Santa Clara County Family Health Foundation (Foundation), and that because
11 Respondent King, the Foundation's Executive Director, is at least partly employed by
12 Authority, she was correctly reported to CalPERS for membership purposes.

13 However, dual/joint employment is not applicable to CalPERS membership
14 determinations. Even if it was, the facts in this case do not establish, by a
15 preponderance of the evidence, that Respondent King, as the Executive Director of the
16 Foundation, was actually an employee of Authority for purposes of CalPERS
17 membership.

18 Respondents want to have their cake and eat it too. The Foundation was
19 established as a non-profit to raise funds for the Authority. There are definite tax and
20 fundraising advantages the Foundation enjoys as a non-profit organization. There are
21 also advantages that the Authority enjoys as a public entity, one of which is at issue
22 here: the ability to offer its employees membership in CalPERS. It is clear from
23 Respondents' arguments regarding dual employment that they seek to enjoy all of the
24 benefits afforded to non-profit organizations and public agencies, despite the fact that
25 the relevant law does not permit it.

1 **II. ONLY THE COMMON LAW EMPLOYMENT TEST, NOT GENERAL COMMON**
2 **LAW PRINCIPLES, IS APPLICABLE TO CalPERS MEMBERSHIP**
3 **DETERMINATIONS**

4 **A. Binding Precedent Requires this Court to Apply Only the Common**
5 **Law Employment Test**

6 Government Code section 20125 provides: "The board [CalPERS' Board of
7 Administration] shall determine who are employees and is the sole judge of the
8 conditions under which persons may be admitted to and continue to receive benefits
9 under this system."

10 The CalPERS Board of Administration's Precedential Decision 08-01, *In the*
11 *Matter of Application to Contract with CalPERS by Galt Services Authority and City of*
12 *Galt* (Galt) requires this Court to apply one specific test when determining eligibility for
13 CalPERS benefits, the common law employment test.¹ Indeed, this Court would
14 exceed its jurisdiction if it were to issue a proposed decision based on anything other
15 than the common law employment test.

16 Government Code section 11425.60(b) provides, in pertinent part: "An agency
17 may designate as a precedent decision a decision or part of a decision that contains a
18 significant legal or policy determination of general application that is likely to recur."

19 On March 19, 1997, the CalPERS Board of Administration passed a "Resolution
20 on Precedential Decisions." It provides, in pertinent part: "Once an appeal decision has
21 been designated as precedent, it will bind all future appeals to the extent that the
22 disputed law and issues are the same – or until such time as the Board de-publishes
23 the decision, thereby rescinding its designation as binding."²

24 ¹ *Galt Services Authority*, Prec. Dec. No. 08-01, effective October 22, 2008, and *Lee Neidengard*, Prec.
25 Dec. No. 05-01, effective April 22, 2005.

² CalPERS Requests Official Notice - <https://www.calpers.ca.gov/page/about/board/precedential-decisions-appeals-hearings>.

1 In 2008, the CalPERS Board of Administration designated *Galt* as Precedential
2 Decision 08-01, effective as of October 22, 2008.

3 Under CalPERS Regulation 555.4, this Court is authorized to make a "proposed
4 decision" for referral to the Board of Administration. Accordingly, the legal conclusions
5 in the precedential *Galt* decision are binding on this Court.

6 The *Galt* decision provides as follows:

7 "In *Cargill*, the [California Supreme Court] held that the PERL requires
8 contracting public agencies to enroll in CalPERS all common law employees.
9 CalPERS argues that the common law employment test, which the *Cargill* court
10 used to ensure that [a contracting agency's] employees would obtain pension
11 benefits, should be applied in this matter to deny enrollment in CalPERS to [a
12 contracting agency's] claimed employees. CalPERS' argument is persuasive.
13 Although the court in *Cargill* used the common law employment test to provide
14 CalPERS pension benefits to [a contracting agency's] common law employees,
15 CalPERS may use that same test to deny pension benefits to any persons who
16 are not common law employees..."

17 Thus, this Court is required by binding precedent to apply only the common law
18 employment test to determine whether an individual respondent in this case is entitled
19 to CalPERS benefits. Respondents' failure to distinguish the common law employment
20 test from general principles of common law is a deliberate misinterpretation of this
21 precedent. Joint, dual, simultaneous and co-employment concepts are simply not part
22 of the analysis.

23 Respondents claim that the Public Employees' Retirement Law (PERL)
24 incorporates common-law principles into its definition of a contracting agency
25 employee. Respondents further claim that 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

1 who share employment responsibilities. (Resp. KK Brief, 2:20-23)³. However, this
2 interpretation of the narrow rule set forth in *Cargill*⁴, which would require CalPERS to
3 accept simultaneous employment by multiple entities, is far too broad and does not
4 comport with binding precedent.

5 **B. To Preserve Its Status As A Tax-Qualified Plan, CalPERS Must**
6 **Operate For The "Exclusive Benefit" Of The Participating**
7 **Employer's Common Law Employees**

8 CalPERS is qualified under section 401(a) of the Internal Revenue Code (IRC)
9 and, as a result, it is tax-exempt under IRC section 501(a). For a pension plan like
10 CalPERS to be qualified and retain its tax-exempt status it must be operated for the
11 "exclusive benefit" of the employers' employees and their beneficiaries. (See, 26
12 U.S.C. § 401(a); see also 26 C.F.R. § 1.401-1(a)(3), "In order for a trust forming part of
13 a pension...plan to constitute a qualified trust under section 401(a), ... (ii) It must be
14 part of a pension...plan established by an employer for the exclusive benefit of his
15 employees or their beneficiaries..."). Accordingly, CalPERS must ensure that its
16 contracting agencies provide retirement benefits *only* to their employees. Failure to do
17 so jeopardizes the tax-exempt status of the CalPERS plan. As such, CalPERS cannot
18 permit individuals like Respondent who are not employees of a contracting agency
19 under the *Galt* common law employment test, to reap CalPERS benefits.

20 **III. THE COMMON LAW EMPLOYMENT TEST**

21 The common law employment test derives from the law of agency. (*Lee*
22 *Neidengard*, Prec. Dec. No. 05-01; *Galt Services Authority*, citing *Tieberg v. UIAB*
23 (1970) 2 Cal. 3d 943.) Under this standard, "the most important factor is the right to
24 control the manner and means of accomplishing the result desired. If the employer has

25 ³ Citations to Respondent Kathleen King's Opening Brief abbreviated as "Resp. KK Brief".

⁴ *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal. 4th 491.

1 the authority to exercise complete control, whether or not that right is exercised with
2 respect to all details, an employer-employee relationship exists.” (*Tieberg*, at 949.)

3 Thus, it is perfectly clear that under the common law employment test “control” is king.⁵

4 Although recitals in written agreements pertaining to an employment relationship
5 are not necessarily conclusive, in the presence of consistent independent evidence of
6 the actual exercise of control “such agreements are a significant factor for
7 consideration.” (*Id.* at 952.)

8 As we explain below, when the common law employment test is applied to the
9 relevant facts of this case, it is clear that CalPERS reached the correct determination in
10 finding Respondent King was an employee of the Foundation and improperly reported
11 as an employee of the Authority for purposes of CalPERS membership.

12 **A. The Authority And Foundation Are Separate And Distinct Entities**

13 It is important to understand that while the Authority and Foundation shared
14 common goals and worked toward achieving those goals in a collaborative effort, that
15 the two entities are separate and distinct. The most apt and telling evidence
16 demonstrating this is the physical and collaborative split that occurred in 2013.
17 Notwithstanding the 2013 split, however, it is important to examine the prior
18 relationship between the two entities.

19 Respondent King uses a lot of her brief arguing about which bylaws of the
20 Foundation were operative and that CalPERS’ reliance on the bylaws produced during
21 the audit was “if nothing else, a self-contradictory approach to analyzing whether
22

23 ⁵ *Tieberg* also discusses a variety of “secondary elements,” which the Court characterized as “merely
24 evidentiary indicia of the right to control.” Those “secondary elements” arose out of cases where the
25 question was whether certain persons were employees or independent contractors. Since there is no
claim in this case that the individual respondent was an independent contractor, the secondary elements
are mostly inapposite to this case. In other words, CalPERS and Respondents agree that Respondent
King was an “employee” –there is just disagreement as to which entity was the employer.

1 Ms. King was a properly enrolled employee for CalPERS' purposes." (Resp. KK Brief
2 19:15-17.) However, three relevant Foundation bylaws were introduced into evidence
3 and the important clause for purposes of the common law employment test is identical
4 in each.⁶ In Section 7 of each set, under the heading "Board of Directors – General
5 Powers", the following language is contained:

6 "The Board may delegate the management of the day-to-day operation of the
7 business of the corporation to a management company or to any other person
8 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." (CalPERS 10, Resp. 021, Resp. 033.)

9 This delegation of authority resulted in an Administrative Services Agreement
10 (Service Agreement) between the Foundation and Authority. The Service Agreement
11 accounts for almost all of the "controlling" facts relied on by Respondents to establish a
12 *joint* employment relationship between the Authority and Respondent King.

13 Specifically, the agreement states that the Authority "shall" provide the following:

14 Administrative and management services, as necessary, including but not
15 limited to advise and assistance in the management of day to day operations of
16 the foundation, strategic planning, human resource services, record keeping
17 and regulatory reporting. ... Financial services, including but not necessarily
18 limited to, budgeting, accounting, preparing financial reports, payroll, preparing
19 tax forms, auditing, ... arranging coverage under [Authority's] general liability
20 and certain other insurance programs, ... and, providing and/or arranging for
21 employee benefit administration services. ... Computer and Communications
22 Services, including: systems and operations support, hosting services;
infrastructure management; the use of desktops, network, servers, printers,
23 application software, and operating system software; the use of telephone
24 systems; ... Regulatory and compliance services, including legal analyses of
25 applicable laws, compliance monitoring, assistance in contracting, ... The
services of outside counsel, as needed, will be arranged by [Authority]. ... Office
supplies, printing, postage, and other supplies as reasonably needed... The use
of five hundred square feet of office space and utilities in [Authority] leased
premises. ... (CalPERS 11.)

⁶ Respondent King's assertion that CalPERS relied on bylaws that are inaccurate is disingenuous and attempts to confuse the issues.

1 It is undisputed that the Authority provided almost all, if not all, of the services
2 identified above. Respondents argue that Authority was exercising control over the
3 Foundation and its employees by providing those services. Respondent King even
4 testified that the services were provided because they (Foundation employees) were
5 employees of the Authority. (T.R. 197:11-16, 198:22-199:22, 200:22-201:2.) However,
6 Respondent King's testimony became clearly self-serving when she was asked about
7 the relationship between the entities after the split occurred in 2013 and the Service
8 Agreement was terminated. Rather than claiming that the services were performed
9 pursuant to the Service Agreement, she claimed that the Authority provided those
10 services because she and the other Foundation employees were actually Authority
11 employees.

12 In April 2013, the Foundation's Board, not the Authority, exercised its powers
13 and decided unilaterally to terminate the Service Agreement and move into its own
14 offices. (Resp. 228.) This is not an example of "control" by the Authority over the
15 Foundation, it is the exact opposite. In fact, when the Service Agreement was
16 terminated, all of the services described therein and all of the evidence of "control"
17 relied on by Respondents vanished. (T.R. 214:13-215:16.)

18 Two other pieces of evidence clearly demonstrate that these entities are
19 separate and distinct. First, the organizational charts, one for the Authority and one for
20 the Foundation, indicate that the ultimate control rests with the governing board of
21 each entity. (CalPERS 12.) Second, an Independent Auditor's Report prepared by
22 Moss-Adams LLP in 2010, indicates the Authority does not have financial
23 accountability for the Foundation and the two are separate entities. (CalPERS 9.)
24
25

B. Respondent's Own Communications Corroborate That The Foundation Was The Employer.

In a letter dated June 13, 2013, the Authority's Chief Financial Officer, an Executive level position and direct report to the Authority's Chief Executive, admitted that at least from 2009 onward, the Executive Director [of the Foundation – Respondent King] was a direct report of the Foundation Board of Directors. The Authority's CFO then went on to state that "Foundation employees were not reporting, supervised, directed or evaluated by the Health Authority CEO." (CalPERS 4.)

In an email dated January 14, 2013, the Authority's Vice President of Human Resources, a direct report to the Authority's Chief Executive, stated "Kathleen King, Thong Le and Emily Hennessy were hired to provide support exclusively for the Foundation." (CalPERS 15.)

In an email dated November 26, 2007, the Chair of the Board of the Foundation authorized a pay increase for Foundation employee Emily Hennessey. The email was sent to the Authority's Director of Human Resources and states, "The Board of Trustees of the Family Health Foundation on Nov 2, 2007 authorized an increase in salary for Emily Hennessy for the time she will be the Interim Executive Director." (CalPERS 14.)

In an Employment Relationship Questionnaire used by CalPERS to determine the employment relationship for services performed, the Vice President of Human Resources for the Authority, responded to specific questions posed about Emily Hennessey, a direct report to Respondent King. (CalPERS 16.) Most notable are the following:

Q: Describe the services performed by the individual.

A: Finance Director for the Foundation.

1 Q: Does he/she offer the same type of services performed for your agency to
2 the general public or other agencies?

3 A: Ms. Hennessy does not perform services on behalf of the Health Authority.
4 Her services are performed on behalf of the Foundation.

5 Q: Is he/she required to attend agency meetings?

6 A: No.

7 Q: Who determines the hours of work?

8 A: The Foundation's Executive Director, Kathleen King.

9 Q: Does your agency have the right to control how the individual does his/her
10 work?

11 A: No.

12 Q: Is his/her work directed, supervised or reviewed by anyone?

13 A: The Foundation's Executive Director, Kathleen King. (*Id.*)

14 Of course, Respondents argue that these communications are not what they
15 purport to be, that in reality the Authority CEO was pulling the strings and directing
16 traffic. Somehow Respondent King had no idea what the Authority's CFO was referring
17 to when he admitted that Foundation employees were not reporting, supervised,
18 directed or evaluated by the Health Authority CEO. (T.R. 129:23-130:9.)

19 Similarly, Respondent King tried to mitigate the impact of the November 26,
20 2007 email regarding Emily Hennessey's pay increase. Respondent King testified that
21 it was really the Authority's CEO that recommended the change, not the Foundation's
22 Board. (T.R. 211:6-12.) However, Respondent King also testified that the Authority's
23 CEO made the recommendation *while acting* as a Foundation Board member *during* a
24 Foundation Board meeting and, that the Foundation Board unanimously approved the

25

1 change. (134:17-135:1.) The insinuation that the pay increase for Emily Hennessey
2 was pursuant to "control" by the Authority is clearly disingenuous.

3
4 **IV. RESPONDENTS' ASSERTIONS THAT CalPERS' DETERMINATIVE
PROCESS IS FLAWED LACKS MERIT**

5 Respondent King makes three separate attacks on the process CalPERS
6 utilizes to make membership eligibility determinations when performing audits. "The
7 premise of CalPERS' process seems to be that a review of documents, resulting
8 largely in speculation about the relationship between the two entities based on the
9 assumption that there is always strict adherence to the contents of those documents,
10 is sufficient to exclude CalPERS participation." (Resp. KK Brief, 18:19-22.) "The
11 approach taken by CalPERS of heavy reliance on documents and little or no inquiry
12 into the operative facts is exactly the approach that is generally rejected by tribunals in
13 assessing a joint employer contention." (Resp. KK Brief, 19:18-20.) And, "CalPERS
14 has demonstrated an unflinching reliance on organizational documents, and made
15 virtually no inquiry into the actual practices of the parties." (Resp. KK Brief, 21:23-24.)

16 These attacks are not based on reality and deserve exposure for what they
17 are—desperate attempts to attack the process because the law and facts do not
18 support Respondents' position. The CalPERS audit process is a collaborative,
19 interactive effort. Auditors work with agencies to gather pertinent information and when
20 potential issues are identified, additional information and explanations are requested.
21 For instance, CalPERS exhibit 16, the Employment Relationship Questionnaire,
22 requests specific relevant information to be provided by the individual in the best
23 position to respond. Also, after a draft audit is performed, the agency is provided a
24 copy and asked to provide a response. In this case, an officer of the Authority

responded to the draft audit and based on those responses, further investigation was performed by CalPERS staff.

The findings contained in the Final Audit and subsequent determinations do not come as surprises to audited agencies. While the agency may disagree with the findings, they are given every opportunity to provide evidence to support their position. The only evidence proffered in this case, however, is self-serving testimony by the individuals that were never eligible to become CalPERS members.

V. CONCLUSION

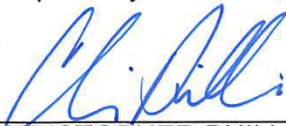
This case is not an academic exercise. There are very real negative consequences for permitting ineligible persons into CalPERS membership. Because the California taxpayers are ultimately on the hook for the benefits CalPERS owes to its members, the standards for determining who is entitled to CalPERS membership must be clear and consistently applied. Without such standards, persons employed by private entities – which have different goals and compensation arrangements than public entities – would creep into membership status, in a way that the Legislature never contemplated or approved. That is why the CalPERS Board of Administration has clearly stated in a precedential decision that the common law employment test applies to membership determination and is the only test uniformly used to determine whether to include or exclude persons from membership. Dual or joint employment between a CalPERS-contracting agency and a non-CalPERS-contracting agency is not a concept that is contained in the common law employment test nor is it recognized by CalPERS as a way for ineligible persons to game the system and become members.

Under a proper application of the common law employment test, it is clear that Respondent King was not an employee of the Authority. While a requirement of her

1 position, as well as other positions of the Foundation, was to work collaboratively with
2 the Authority to achieve common goals, more than collaboration is needed to establish
3 an employment relationship. The glaring reality is that once the Foundation decided to
4 terminate the Service Agreement with Authority, all the alleged "control" Respondents
5 rely on disappeared. The reason it disappeared is that all of the services and functions
6 that had been performed by the Authority were only performed pursuant to the Service
7 Agreement.

8 Accordingly, this Court should issue a proposed decision to the CalPERS Board
9 of Administration that upholds CalPERS' determination that Respondent King is an
10 employee of the Foundation and not an employee of the Authority, and the Authority
11 should not have reported Respondent King to CalPERS for purposes of membership.

12
13
14 Respectfully submitted,

15 

16 Dated: 10/28/2015

17 CHRISTOPHER PHILLIPS,
18 SENIOR STAFF ATTORNEY
19 Attorney for California Public Employees'
20 Retirement System
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PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On October 28, 2015, I served the foregoing document described as:

CalPERS POST HEARING BRIEF- In the Matter of the Appeal Regarding Membership Exclusion of Foundation Employees by SANTA CLARA COUNTY HEALTH AUTHORITY, Respondent, and KATHLEEN KING., Respondent. ; Case No. 2014-1087; OAH No. 2015030359.

on interested parties in this action by placing ___ the original XX a true copy thereof enclosed in sealed envelopes addressed and/or e-filed as follows:

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Executed on October 28, 2015, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Lissa Kunis
NAME


SIGNATURE