

1 Further, the court in *Tieberg* held that “[s]trong evidence in support of an
2 employment relationship is the right to discharge at will, without cause.” *Tieberg*, 2 Cal. 3d at 950.
3 The evidence established that it was the Authority – not the Foundation – that actually determined
4 which employees could be terminated and when. (RT 160:18-162:6). Cal-PERS offered no
5 countervailing evidence.

6 Here, the evidence shows that the Authority exercised actual control over many
7 conditions of employment for King and Foundation workers, including compensation, hiring and
8 firing, and working hours.

9 **B. Cal-PERS’ Other Arguments Are Not Persuasive**

10 Cal-PERS makes several additional arguments in its attempt to deny that King was
11 “in the ‘employ’ of a contracting agency.” None of these arguments have merit.

12 First, Cal-PERS relies on some of the Authority’s responses to a questionnaire related
13 to Emily Hennessy as supposedly proving there was no common law employment relationship with
14 King. (Cal-PERS Ex. 16) But the Authority’s responses are consistent with the fact that Ms.
15 Hennessy was Ms. King’s subordinate, and thus Ms. King in the ordinary course would be giving
16 Ms. Hennessy day-to-day direction. One would expect the same answers to these questions with
17 respect to the administrative assistant to the Authority’s CEO, yet that would not refute that
18 administrative assistant’s public employment status.

19 Moreover, Cal-PERS omits the answers to questions that undercut its argument, such
20 as the Authority noting that: (1) the employment agreement with Ms. Hennessy was with the
21 Authority; (2) the Authority could terminate the relationship with Ms. Hennessy at any time; (3) the
22 Authority provided her office space and equipment, (4) the Authority paid her a flat salary, (5) the
23 Authority did not receive an invoice for Ms. Hennessy’s services; (6) the Authority withheld income
24 tax and provided Ms. Hennessy all employee benefits, and (7) the Authority bore any or all of the
25 cost of any fidelity insurance or any bonds required by law for her position. (*Id.* at 2)

26 Most importantly, Cal-PERS totally ignores the Authority’s affirmative response to
27 the penultimate question: “In your opinion, is the individual *an employee* of the agency? *Yes.*”
28 (Cal-PERS Ex. 16 at p. 3 [emphasis added].) As the Court in *Tieberg* found, based upon the

1 Restatement of Agency, whether the parties believe they are creating the relationship of employer-
2 employee is relevant to determining if the common law employment test is satisfied. *Tieberg*, 2 Cal.
3 3d at 950, Rest., Agency, § 220.

4 Finally, Cal-PERS relies upon a “shared services agreement” as supposedly requiring
5 this tribunal to wholly disregard the compelling evidence of an employment relationship. But this
6 argument is unavailing. Had the Authority merely provided services to the Foundation, then the
7 Authority would have prepared documents indicating that King was employed by the Foundation,
8 not the Authority. For instance, King’s paychecks would have listed the Foundation as the
9 employer, rather than the Authority. (RT 125:1-10, 148:10-15; King Ex. A, Tab 21 at 120-132)
10 King’s W-2 also would have shown the Foundation as the “employer.”¹ (RT 151:17-23) The
11 Foundation, rather than the Authority, would have been noted as the entity on offer letters that had
12 the right to terminate Foundation employees. (Ex. A, Tabs 10-11) King also would have rejected
13 the Authority’s advice at times, such as which employees to hire or fire. (RT 160:18-162:6, 164:5-
14 168:15, 203:12-20) But the only evidence shows the opposite. (*Id.*) The “shared services
15 agreement” consequently does not negate the substantial evidence establishing an employment
16 relationship.

17 **C. The Evidence Establishes A Common Law Employment**
18 **Relationship**

19 The evidence introduced is sufficient to establish a common law employment
20 relationship in any event. *E.g., Int’l Ass’n of Machinists & Aero. Workers, Local Lodge 964 v. BF*
21 *Goodrich*, 387 F.3d 1046, 1059 (9th Cir. 2004) (worker was common law employee because “[t]he
22 structure of his work week is controlled by the company, and he reports to Goodrich’s personnel
23 department, which must approve any overtime, sick leave, and vacation days he wishes to take.”);
24 *Drott v. Park Electrochemical Corp.*, 2012 U.S. Dist. LEXIS 54274, at *15 (D. Ariz. Apr. 18,
25 2012) (plaintiff adequately alleged employment relationship by proof that entity hired Plaintiff,
26 assigned Plaintiff her work projects, provided Plaintiff feedback regarding her work, dictated when

27 ¹ Since the Authority withheld state and federal taxes from King’s paycheck and issued her W-2, finding the Authority
28 to be her legal employer would be consistent with the paperwork, and thus consistent with Cal-PERS status as a pension
plan operated for the benefit of public employees. (Ex. A, Tab 21; RT 151:17-23)


1 and where Plaintiff would work, disciplined Plaintiff when necessary, and ultimately fired Plaintiff);
2 *Krasner v. Episcopal Diocese of Long Island, NY*, 420 F.Supp.2d 321, 324-25 (E.D.N.Y. 2006)
3 (direct or indirect payment of compensation factor in determining whether worker was an
4 employee); *Shah v. Deconess Hosp.*, 355 F. 2d 496, 499 (6th Cir. 2002) (tax treatment of worker's
5 compensation relevant to employment determination under common law); *Doud v. Yellow Cab of*
6 *Reno, Inc.*, 2015 U.S. Dist. LEXIS 40535, at *40-41 (D. Nev. Mar. 30, 2015) (discipline of taxi
7 drivers is indicia of employment relationship).

8 Here, the evidence showed that the Authority denied Ms. King a raise (RT 141:2-16)
9 and merit salary increases were approved by the CEO of the Authority, not the Foundation. (RT
10 120:1-11, 132:14-133:10; 136:13-137:2, 137:7-19) The Authority required that King agree to its
11 employment policies. (RT 154:19-155:1, 163:11-13) The Authority approved changes in employee
12 status with respect to positions, hours, compensation and benefits. (RT 129:17-22) The Authority
13 exercised control over Ms. King's hours of work, requiring her to obtain approval from the
14 Authority's CEO to take vacation. (RT 153:12-154:4) The Authority decided who King could hire
15 and fire. (RT 160:18-162:6, 164:5-166:9, 166:24-168:15, 169:7-20, 203:12-20; Ex. A, Tab 34) The
16 Authority controlled performance evaluations. (RT 135:17-136:5, 142:6-143:10, 143:23-144:15,
17 146:5-21, Ex. A, Tab 16, 072, Tab 17, 091) As in *Cargill*, King employment was for an indefinite
18 period that lasted for multiple years and she was integrated into the Authority's workforce. *Cargill*,
19 32 Cal.4th at 498-99. (RT 118:10-119:22, 186:5-187:9, 238:11-241:23, Ex. A Tab 8, 053, Tab 49 at
20 225) These facts satisfy the common law employment standard.

21 I. CONCLUSION

22 The evidence amply demonstrates that Respondent King was properly enrolled in
23 Cal-PERS as an employee of the Authority. The actual conduct of the parties establishes that Ms.
24 King was an "employee" of the Authority. Cal-PERS erred in determining that Ms. King was
25 erroneously enrolled in Cal-PERS, and its audit finding to the contrary should be reversed.
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1 Dated: November 4, 2015
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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years, and not a party to the within action. My business address is Littler Mendelson, P.C., 650 California Street, 20th Floor, San Francisco, California 94108.2693. On November 4, 2015, I served the foregoing document entitled:

- **RESPONDENT SANTA CLARA COUNTY HEALTH AUTHORITY'S POST-HEARING BRIEF**

on interested parties in this action as follows:

- by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.
- by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick-up box or office designated for overnight delivery, and addressed as set forth below.
- I caused the above-referenced document(s) to be sent to the addressee(s) at the e-mail address(es) below on the date stated thereon. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is chgoodman@littler.com.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 4, 2015, at San Francisco, California.



Alison Hightower

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