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10 BOARD OF ADMINISTRATION

11 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

12 In the Matter of the Appeal Regarding  
13 Membership Exclusion of Foundation  
14 Employees by

15 SANTA CLARA COUNTY HEALTH  
16 AUTHORITY AND KATHLEEN KING,

17 Respondents.

18 Agency Case No. 2014-1087  
19 OAH Case No. 2015030359

20 ADMINISTRATIVE LAW JUDGE MARY  
21 MARGARET ANDERSON

22 RESPONDENT SANTA CLARA COUNTY  
23 HEALTH AUTHORITY'S POST-  
24 HEARING REPLY BRIEF

25 I. INTRODUCTION

26 While Cal-PERS seeks to deny retirement benefits to Respondent King based on a  
27 myopic focus on by-laws and a few cherry-picked facts, even the cases Cal-PERS relies upon  
28 support Respondents' view that a "common law" employment relationship can and should be based  
upon the actual conduct of the parties. That actual conduct shows King to be a full-time, long-term  
worker; her paychecks and tax documents identified the Authority as King's employer; the Authority  
determined her compensation, provided her benefits, controlled her hours of work, decided which  
subordinates she could hire and fire, and subjected her to the Authority's policies, contracts,  
performance reviews and training. Indeed, the very questionnaire response that Cal-PERS relies  
upon supports the Authority's position that an employment relationship existed since the Authority  
indicated it viewed that worker to be its "employee." Since King was fully integrated into the  
Authority's operation, and the Authority exercised substantial control over her conditions of  
employment, a finding should issue that the Authority properly enrolled King in Cal-PERS.

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

1     **II.     LEGAL ARGUMENT**

2             **A.     A Joint Employer Relationship Does Not Preclude Cal-PERS Enrollment**

3             Cal-PERS first contends that it cannot enroll an employee who was jointly employed  
4 by a public entity and another entity, relying on *Metropolitan Water District of S. Calif. v. Superior*  
5 *Court (Cargill)*, 32 Cal.4th 491, 506 (2004). But that decision does not so hold. In *Cargill*, the  
6 California Supreme Court rejected the public agency's position that "long-term, full-time workers  
7 hired through private labor suppliers" are "employees *only* of the labor supplier." *Id.* (emphasis  
8 added). The Court found that "[t]he only relevant legislative choice to date has been to require  
9 enrollment [in Cal-PERS] of all persons in the 'employ' of a contracting agency." *Id.* Thus, the  
10 public agency could not *avoid* retirement benefits by treating the workers as employees only of the  
11 private labor suppliers.

12             Here, it is Cal-PERS that seeks to avoid the application of its public retirement  
13 benefit program to King despite substantial evidence of common law employment by the Authority.  
14 Nothing in *Cargill* precludes finding King to be "in the 'employ' of a contracting agency" any more  
15 than the workers hired by private labor suppliers in *Cargill*.

16             Cal-PERS' reliance on *Galt Services Authority and City of Galt* likewise is  
17 misplaced. There, the City of Galt transferred some of its employees to work for the Galt Services  
18 Agency (GSA). These workers would be paid by and receive benefits from GSA, but the reality of  
19 the relationship was that those persons continued to work for the City. This structure was adopted  
20 for the purpose of facilitating the avoidance of the City's social security obligations. The  
21 administrative law judge determined that the GSA had little incentive to assume the responsibility of  
22 an employer over the workers, and thus even though the written agreement appeared to give the  
23 GSA that responsibility, the conduct of the parties trumped the written agreement.

24             *Galt* thus supports Respondents here since it recognizes that the *actual* exercise of  
25 control rather than what was stated in a written document determines the employment relationship.  
26 The same is true of the case relied upon in *Galt*, where the court looked at the actual control of the  
27 workers, rather than the purported right to control contained in documents, to determine the  
28 employment relationship. *Professional & Exec. Leasing v. Commissioner*, 862 F. 2d 751, 753 (9th

1 Cir. 1988). The control rights reserved on paper were dismissed as merely “illusory” because they  
2 were never exercised, nor would they likely be. *Id.*

3 The finding that written documents do not conclusively determine the employment  
4 relationship is well established. In addition to *Cargill*, the court in *Tieberg v. Unemployment Ins.*  
5 *Appeals Board*, 2 Cal.3d 943 (1970) – relied upon by Cal-PERS — held that “terminology used in  
6 an agreement is not conclusive....” Indeed, the state Supreme Court more recently held that  
7 “*Tieberg* recognizes the rights spelled out in a contract may not be conclusive if other evidence  
8 demonstrates a practical allocation of rights at odds with the written terms.” *Ayala v. Antelope*  
9 *Valley Newspapers, Inc.*, 59 Cal.4th 522, 535 (2014). This approach is consistent with agency law,  
10 which defines the employment relationship as applying to a “master” who either “controls or has the  
11 right to control” the servant’s performance. Rest. (Second) Agency § 2(1) (emphasis added).

12 The Court in *Tieberg* cited approvingly a United States Supreme Court decision  
13 holding that the entity that exercised the actual control over the workers was the legal “employer,”  
14 despite a written agreement that purported to give *another* entity “complete control of the services  
15 which the employee will render.” *Bartels v. Birmingham*, 332 U.S. 126 (1947). California courts  
16 frequently have disregarded a written document when the actual relationship contradicts the writing.  
17 For example, in *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1, 10-11 (2007),  
18 the court found an employment relationship was established because the worker was integrated into  
19 the entity’s operation, including imposition of company policies and procedures, was subjected to  
20 annual performance reviews and required training, and the entity set compensation and benefits –  
21 despite an agreement that disavowed any employment relationship.. The court held, “[t]he parties’  
22 label is not dispositive and will be ignored if their actual conduct establishes a different  
23 relationship.” Cal-PERS does not mention – let alone distinguish – *Estrada*. *Accord, S.G. Borello*  
24 *& Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal.3d 341, 358 (1989) (same); *Santa Cruz*  
25 *Transportation, Inc. v. Unemployment Ins. Appeals Bd.*, 235 Cal.App.3d 1363, 1372 (1991) (workers  
26 were common law employees despite agreement that stated otherwise).

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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.”<sup>1</sup> (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 <sup>1</sup> 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](mailto:chgoodman@littler.com).

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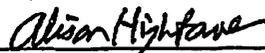
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 4, 2015, at San Francisco, California.



Alison Hightower

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