

**ATTACHMENT E**

**FEBRUARY 18, 2016 BOARD AGENDA ITEM**



**California Public Employees' Retirement System**  
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Ref. No. 2014-1087

February 10, 2016

**TO: ALL PARTIES AND THEIR ATTORNEY OF RECORD**

**SUBJECT:** In the Matter of the Appeal Regarding Membership Exclusion of Foundation Employees by SANTA CLARA COUNTY HEALTH AUTHORITY, Respondent, and KATHLEEN KING, Respondent.

Attached is a copy of the agenda item to be presented to the Board of Administration, California Public Employees' Retirement System at its meeting scheduled for February 18, 2016.



**Board of Administration**  
California Public Employees' Retirement System

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**Agenda Item 8m**

February 18, 2016

**ITEM NAME:** Proposed Decision – In the Matter of the Appeal Regarding Membership Exclusion of Foundation Employees by SANTA CLARA COUNTY HEALTH AUTHORITY, Respondent, and KATHLEEN KING, Respondent.

**PROGRAM:** Employer Account Management Division

**ITEM TYPE:** Action

**PARTIES' POSITIONS**

Staff argues that the Board of Administration should adopt the Proposed Decision.

Respondent Santa Clara County Health Authority (Respondent Authority) argues that the Board of Administration should decline to adopt the Proposed Decision.

Respondent Kathleen King (Respondent King) argues that the Board of Administration should decline to adopt the Proposed Decision.

**STRATEGIC PLAN**

This item is not a specific product of either the Strategic or Annual Plans. The determination of administrative appeals is a power reserved to the Board of Administration.

**PROCEDURAL SUMMARY**

After CalPERS audit staff conducted a Public Agency Review of Respondent Authority, CalPERS determined that all employees of an affiliated agency, Santa Clara Family Health Foundation, Inc., who had been reported to CalPERS as employees of Respondent Authority were excluded from CalPERS membership. Respondent Authority and Respondent King appealed the determination regarding membership exclusion. The matter was heard by the Office of Administrative Hearings on August 26, 2015. A Proposed Decision was issued on December 3, 2015, denying the appeal.

**ALTERNATIVES**

- A. For use if the Board decides to adopt the Proposed Decision as its own Decision:

Agenda Item 8m  
Board of Administration  
February 18, 2016  
Page 2 of 3

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own Decision the

Proposed Decision dated December 3, 2015, concerning the appeals of Santa Clara County Health Authority and Kathleen King; RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the Decision.

- B. For use if the Board decides not to adopt the Proposed Decision, and to decide the case upon the record:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated December 3, 2015, concerning the appeals of Santa Clara County Health Authority and Kathleen King, hereby rejects the Proposed Decision and determines to decide the matter itself, based upon the record produced before the Administrative Law Judge and such additional evidence and arguments that are presented by the parties and accepted by the Board; RESOLVED FURTHER that the Board's Decision shall be made after notice is given to all parties.

- C. For use if the Board decides to remand the matter back to the Office of Administrative Hearings for the taking of further evidence:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated December 3, 2015, concerning the appeals of Santa Clara County Health Authority and Kathleen King, hereby rejects the Proposed Decision and refers the matter back to the Administrative Law Judge for the taking of additional evidence as specified by the Board at its meeting.

- D. Precedential Nature of Decision (two alternatives; either may be used):

1. For use if the Board wants further argument on the issue of whether to designate its Decision as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System requests the parties in the matter concerning the appeals of Santa Clara County Health Authority and Kathleen King, as well as interested parties, to submit written argument regarding whether the Board's Decision in this matter should be designated as precedential, and that the Board will consider the issue whether to designate its Decision as precedential at a time to be determined.

Agenda Item 8m  
Board of Administration  
February 18, 2016  
Page 3 of 3

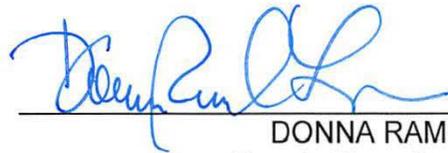
2. For use if the Board decides to designate its Decision as precedential, without further argument from the parties.

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, hereby designates as precedential its Decision concerning the appeal of Santa Clara County Health Authority and Kathleen King.

**BUDGET AND FISCAL IMPACTS:** Not applicable

**ATTACHMENTS**

- Attachment A: Proposed Decision
- Attachment B: Staff's Argument
- Attachment C: Respondent's Argument



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DONNA RAMEL LUM  
Deputy Executive Officer  
Customer Services and Support

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

Case No. 2014-1087

SANTA CLARA COUNTY HEALTH  
AUTHORITY

OAH No. 2015030359

Respondent

and

KATHLEEN KING

Respondent.

**PROPOSED DECISION**

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter on August 26, 2015, in Oakland, California.

Christopher Phillips, Senior Staff Attorney, represented Petitioner Renee Ostrander, Acting Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS).

Alison S. Hightower, Attorney at Law, Littler Mendelson, PC, represented Respondent Santa Clara County Health Authority.

Christopher E. Platten, Attorney at Law, and Mark S. Renner, Attorney at Law, Wylie, McBride, Platten & Renner, represented Respondent Kathleen King, who was present.

At the request of the Parties, the record was left open to receive written closing argument. All briefs were timely received and marked for identification as follows: Respondent Santa Clara County Health Authority's Post-Hearing Brief as Exhibit C; Respondent Kathleen King's Opening Brief as Exhibit D; Petitioner's Post-Hearing Brief as Exhibit 19; Respondent Santa Clara County Health Authority's Post-Hearing Reply Brief as E; and Respondent Kathleen King's Reply Brief as Exhibit F.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM

FILED 12-15-2015

Sharon D. Koyl

The record closed on November 4, 2015.

### ISSUE

Whether Respondent Kathleen King was an employee of the Santa Clara County Health Authority from 2008 until 2013, and thus entitled to CalPERS membership,

### FACTUAL FINDINGS

1. Petitioner Renee Ostrander, Acting Chief, Customer Account Services Division, CalPERS, filed the Statement of Issues in her official capacity.
2. Respondent Santa Clara County Health Authority (Authority) is a public entity that contracts with CalPERS for retirement benefits for its eligible employees. The Authority was established in 1995 by an ordinance enacted by the Santa Clara County Board of Supervisors. The purpose was to develop the Local Initiative Plan for the expansion of Medi-Cal Managed Care.
3. In 2000, the Authority established the Santa Clara County Family Health Foundation (Foundation), a non-profit, 501(c)(3) organization. The purpose of the Foundation was to raise funds to support Healthy Kids, a subsidized health coverage plan administered by the Authority. One reason for its creation was that certain donors, including major foundations, could only donate money to a non-profit.
4. In 2008, the Foundation hired Respondent Kathleen King as its Executive Director. She was reported to CalPERS by the Authority as an employee until 2013.

#### *Audit findings – relationship between the Authority and the Foundation*

5. In 2013, the CalPERS Office of Audit Services performed a Public Agency Review of the Authority. It determined that Respondent King was improperly reported by the Authority as she was an employee of the Foundation, not the Authority, and was thus not eligible for CalPERS membership. The Authority disagreed with this finding. In a letter dated June 13, 2013, David Cameron, Chief Financial Officer (CFO), wrote:

From the inception of the Foundation until 2008, the Foundation employees reported directly to the CEO of the Health Authority. The CEO directed the work of these employees, evaluated their performance and set Foundation goals and objectives.

6. On July 18, 2013, a conference call was convened between Emily Perez de Flores, Manager, CalPERS Membership Reporting Section, Cameron, and Sharon Valdez,

**Authority Vice-President of Human Resources (HR). The Authority provided additional information to CalPERS, and more was requested. On September 6, 2013, the Authority submitted the Foundation's Bylaws and other information.**

**7. In a letter dated October 15, 2013, de Flores confirmed the initial determination that Foundation employees are not employees of the Authority. She cited portions of two key documents that CalPERS reviewed: the Foundation Bylaws and an Administrative Services Agreement between the Authority and the Foundation.**

**8. Bylaws section 7 states, in pertinent part:**

**[T]he business and affairs of the Corporation shall be managed and all corporate powers shall be exercised under the direction of the Board of Directors.**

**The Board may delegate the management of the day-to-day operation of the business of the corporation to a management company or to any other person 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.**

**[T]he Board shall have the power to: (a) Appoint and remove . . . all corporate officers and the Executive Director of the corporation; prescribe powers and duties for them as are consistent with the law, the Articles of Incorporation, and these Bylaws; fix their compensation; and require from them security for faithful service.**

**Section 7.17 states:**

**The Board shall set the compensation of the Executive Director of the corporation. Changes in Executive Director compensation shall be consistent with guidelines established by the Board and shall reflect performance. The Executive Director shall establish the compensation of other Foundation employees, in accordance with guidelines established by the Board, if any.**

**9. De Flores also referenced an independent auditor's report of the Authority performed by Moss Adams, LLP, Certified Public Accountants. The Foundation was not included in the Authority's financial statements. De Flores quotes from Note 5, which states that no more than 49 percent of the Foundation's Board may be management or directors of the Authority and that the Authority does not have financial accountability for the Foundation.**

10. The Administrative Services Agreement (Agreement), dated June 1, 2002, between the Authority and the Foundation gives effect to the Bylaw that allows delegation of the Foundation's day-to-day operations. As de Flores reports:

Schedule A to the Agreement specifies the services to be provided by the Authority, and includes both human resources and payroll services, and details how the Authority is reimbursed for these services. The Agreement also addresses the employer/employee relationship. Section 8 of the Agreement states that the Authority and the Foundation are "... separate and independent entities ..." and further, specifically states: "Neither [the Authority] nor the Foundation, nor the employees, servants, agents or representatives of either, shall be considered the employee, servant, agent or representative of the other."

11. De Flores concluded:

The documentation reviewed consistently indicates that the Foundation is separate and independent of the Authority, and that the Foundation Board exercises control and direction over Foundation employees. Although the Administrative Services Agreement appears to delegate certain functions to the Authority, both the Foundation Bylaws, and the Agreement itself clearly indicate that these functions are directed by the Foundation Board, and that the Authority is reimbursed for these services as an independent entity. The Foundation also sets the compensation of the Executive Director, who sets the compensation for other Foundation employees. There is no evidence of common law control by the Authority.

[As] CalPERS has determined the Foundation to be separate and distinct from the Authority, and the Authority does not exercise common law control over Foundation employees, these positions do not constitute Authority employment within the meaning of G. C. Section 20028(b).

12. Respondents timely appealed the CalPERS determination and this hearing followed.

*Additional support for the audit's conclusion*

13. In the letter first referenced in Finding 5, Cameron also wrote that the Foundation Board changed the reporting structure in 2009. From that time onward, the Executive Director (Respondent King) was a direct report of the Board. In addition,

Foundation employees “were not reporting [to], supervised, directed or evaluated by the Health Authority CEO.”

14. On January 14, 2013, Valdez, the Authority’s HR vice-president, wrote in an email to a CalPERS auditor that Respondent King and two other employers “were hired to provide support exclusively for the Foundation.”

15. On November 26, 2007, the Chair of the Foundation’s Board wrote an email authorizing a pay increase for Foundation employee Emily Hennessey. It was sent to the Authority’s then-HR director, and states that the Board “authorized an increase in salary for Emily Hennessey for the time she will be the Interim Executive Director.” He also thanked the HR director for taking care of the implementation of the new salary amount.

16. At the request of CalPERS auditors, Valdez completed an Employment Relationship Questionnaire concerning the employment of Emily Hennessey. She wrote that Hennessey was the “Finance Director for the Foundation”; that she “does not perform services on behalf of the Health Authority. Her services are performed on behalf of the Foundation”; that her hours of work are determined by Respondent King; that the Authority does not “have the right to control how the individual does his/her work”; and that her work was “directed, supervised or reviewed by . . . The Foundation’s Executive Director” Respondent King.

*Respondents’ evidence*

17. Respondent King stated in her testimony that Foundation employees were employees of the Authority “in exchange” for raising \$132 million for the Authority. As support for her statement, she provided examples of how the organizations operated. On W-2 forms and paychecks the Authority was identified as the employer. The letter offering King employment was written by the Authority HR director on Authority letterhead. King and Hennessey each received letters regarding a salary change that was written on Authority letterhead, and signed by the Authority’s HR director. (It was also signed by Foundation Board Chair Ron Cohn.) Employee evaluations, including self-reviews, were organized by the Authority’s HR department. Employee orientation and continuing training in subjects such as sexual harassment were provided by the Authority. “All Staff” emails went from CEO Darrow to Authority and Foundation employees. The CEO of the Authority determined the location of Foundation offices within the Authority’s space. All office supplies, except computers, were purchased by the Authority. The Foundation used the Authority’s servers and email address. Although the Foundation paid for the services received, the amount was not commensurate with the actual costs.

18. King also testified that, contrary to the governing documents, the CEO of the Authority decided how much King’s salary would be, that she was not able to hire people without the CEO’s permission, and that Foundation employees “were part of the same organization.” When King desired time off from work, she requested it from the Authority CEO until 2012, when she was told to go through the Foundation Board’s Chair. King also

stated that when she wanted to hire a “temp worker” on a permanent basis, the Authority “said no.”

19. In 2012, the Foundation and the Authority terminated the Agreement and physically separated their operations. The Authority had a new CEO who was looking into different product lines such as Medicare and health care for disabled people. The Foundation engaged in strategic planning, and decided to stay focused on children’s health. The Bylaws were amended, the name changed to Santa Clara Family Health Foundation, and new articles of incorporation filed. In a letter dated April 26, 2013, Respondent King requested that the Authority allow termination of the Agreement within 60 days. It is presumed that this request was granted. The new entity then contracted with other providers for payroll and other services. Space was leased and the operation moved to a new location in June 2013.

#### LEGAL CONCLUSIONS

1. The burden of proof in this appeal from the denial of CalPERS membership rests with Respondents. The standard of proof is preponderance of the evidence, which was applied in making the Factual Findings.

2. CalPERS provides retirement benefits to public employees in California pursuant to the Public Employees’ Retirement Law (PERL). (Gov. Code, § 20000 et seq.) Persons “in the employ of any contracting agency” are eligible. (Gov. Code, § 20028, subd. (b).) The PERL does not define “employee,” and case law holds that common law principles should be applied to determine whether an individual is an employee for PERL purposes. Pursuant to *Metropolitan Water District v. Superior Court* (2004) 21 Cal.4th 491 (*Cargill*), enrollment of common law employees in CalPERS is mandated. Often, the question is whether a worker is an independent contractor or an employee. Here, the dispute concerns which entity is the employer, but the analysis is similar.

3. The *Cargill* Court pointed to its previous decision in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, which sets out factors for determining whether a worker is an employee. The *Tieberg* Court explained the analysis method by quoting with approval from the decision in *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43-44:

In determining whether one who performs services for another is an employee or an independent contractor, *the most important factor is the right to control the manner and means of accomplishing the result desired.* If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations.] Other factors to be taken into consideration are (a) whether or not the one performing services

is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

(Emphasis added.)

4. Respondents did not prove that Respondent King's employment situation meets the "control or right to control the manner and means" requirement. First, the relevant documents clearly establish that the Foundation is a separate entity from the Authority; it is an affiliated entity. Respondent King estimated that under her leadership, the Foundation raised about \$132 million for the Authority. It was not established that the Authority directed this effort so as to have controlled "the manner and means" used to accomplish this result. Further, the Authority and the Foundation contracted (via the Agreement) for the provision of services; such would not have been necessary should the Authority have had the right to control the Foundation. When the Agreement terminated, so did the examples Respondents cite to as evidence of control by the Authority. The two entities were admittedly intertwined, to the extent that the CEO of the Authority seemed at times to ignore the fact that the Foundation was separate and that Respondent King reported to the Foundation's Board. For reasons not explained, Respondent King did not assert her rights as the Foundation Executive Director to have the Foundation make decisions such as when she could take leave at a particular time. But this failure does not make her a common law employee of the Authority; the evidence did not establish that the Authority controlled her employment in significant or meaningful ways and it certainly did not have the right to do so.

5. In addition to the "other factors" set out in *Tieberg*, context is very important. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d, 350, 351, states that the secondary factors "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." Taken both individually and as a whole, the listed factors for consideration do not support Respondents' argument that Respondent King was a common law employee of the Authority.

6. Respondents also contend that Respondent King was entitled to CalPERS membership because she was employed by both entities. The definition of common law employment includes co-employment, but no authority was presented that such applies in this context. The entities were not so integrated so that the employees of one were the

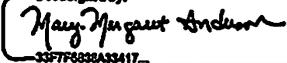
employees of the other. Respondents are not persuasive that Respondent King was employed by both entities or that she is entitled to CalPERS membership pursuant to such theory.

7. In addition to manner and means of control, the big picture as well as the more relevant factors clearly point towards the conclusion that Respondent King was an employee of the Foundation, not of the Authority, and that she was not employed by both. She was hired by the Foundation to raise funds for the Authority and did so successfully. Her assertion that she raised funds "in exchange" for employment by the Authority is unsupported and contradicted by other evidence. The Authority provided operational services to the Foundation pursuant to a contract. The evidence presented by Respondents does not establish Respondent King as a common law employee of the Authority. Accordingly, Respondents' appeal will be denied.

#### ORDER

The appeal of Respondents Santa Clara County Health Authority and Kathleen King is denied.

DATED: December 3, 2015

DocuSigned by:  
  
337F5838A33A17  
MARY-MARGARET ANDERSON  
Administrative Law Judge  
Office of Administrative Hearings

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

### **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Respondent Santa Clara County Health Authority (Authority) is a public entity that contracts with CalPERS for retirement benefits for its eligible employees. The Authority was established in 1995 by an ordinance enacted by the Santa Clara County Board of Supervisors to develop the expansion of Medi-Cal Managed Care.

Respondent Kathleen King (Respondent King) was hired in 2008 by the Santa Clara County Family Health Foundation (Foundation), a non-profit 501(c)(3) organization. The purpose of the Foundation was to raise funds to support Healthy Kids, a subsidized health coverage plan administered by the Authority. The Foundation is not a CalPERS contracting agency.

In 2013, the CalPERS Office of Audit Services performed a Public Agency Review of the Authority. CalPERS determined that Respondent King was an employee of the Foundation and had been improperly reported by the Authority as an employee of the Authority. Since the Foundation is not a CalPERS contracting agency, CalPERS determined that Respondent King was not eligible for CalPERS membership. Respondent King and the Authority timely filed appeals.

The CalPERS determination that the Foundation is an affiliated entity of the Authority and that Foundation employees are not employees of the authority was based on a number of facts. The Foundation bylaws permit the Foundation Board to delegate the management of the day-to-day operation of the business of the corporation. The Foundation and Authority entered into an Administrative Services Agreement (Agreement) in 2002 based on that delegation of power. Pursuant to the Agreement, Authority would provide all of the administrative services for Foundation, including human resources and payroll. The Agreement also expressly states that the Authority and Foundation are "separate and independent entities" and further states "neither [the Authority] nor the Foundation, nor the employees, servants, agents or representatives of either, shall be considered the employee, servant, agent or representative of the other."

In a response letter to the audit by CalPERS, the Chief Financial Officer for the Authority informed CalPERS that from 2009 onward Respondent King was a direct report of the Foundation Board and that Foundation employees "were not reporting [to], supervised, directed or evaluated by the Health Authority CEO." Similarly, the Vice-President of Human Resources for Authority wrote in an email to CalPERS that Respondent King and two other Foundation employees "were hired to provide support exclusively for the Foundation."

At the hearing, Respondents submitted documentary evidence and the testimony of Respondent King and Emily Hennessey, the Finance Director for the Foundation.

Respondents argued that despite what the Foundation bylaws and the Agreement say, Respondent King was a common law employee of the Authority, or of both the Authority and the Foundation, and that CalPERS should recognize this co-employment situation to allow Respondent King membership in the CalPERS system.

Attachment B

In support of their co-employment theory, Respondents provided examples of how the organizations operated. For instance, W-2 forms and paychecks identified Authority as the employer, employee evaluations, including self-reviews, were organized by the Authority's HR department, office space and supplies were provided by the Authority and the Foundation used the Authority's servers and email addresses. Respondent King also testified that it was really the Authority's CEO that directed her employment, including how much her salary would be, who she was able to hire and fire, and approval for time off.

However, in 2012, the Foundation and Authority terminated the Agreement. As soon as the Agreement was terminated, so did the examples Respondents cite to as evidence of control by the Authority. The Foundation moved offices and contracted with other providers for payroll and administrative services.

The Administrative Law Judge (ALJ) looked to *Metropolitan Water District v. Superior Court* (2004) 21 Cal.4<sup>th</sup> 491 (*Cargill*) and *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, to apply the common law employment test and determine whether Respondent King was a common law employee of the Authority. Under that test, the most important factor is the right to control the manner and means of accomplishing the result desired.

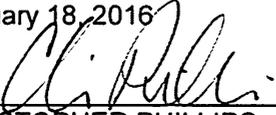
The ALJ found that Respondents did not prove that Respondent King's employment situation meets the "control or right to control the manner and means" requirement. First, the relevant documents clearly established that the Foundation is a separate entity from the Authority. Respondent King estimated that under her leadership, the Foundation raised about \$132 million for the Authority; however, it was not established that the Authority directed those efforts so as to have controlled "the manner and means" to accomplish those results. The ALJ further found that the Agreement would not have been necessary if the Authority had the right to control the Foundation, and that when the Agreement terminated, so did the examples Respondents cited to as evidence of control by the Authority.

The ALJ found that Respondent King was an employee of the Foundation, not of the Authority, and that she was not employed by both.

The ALJ concluded that Respondents' appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

February 18, 2016

  
\_\_\_\_\_  
CHRISTOPHER PHILLIPS  
Senior Staff Attorney

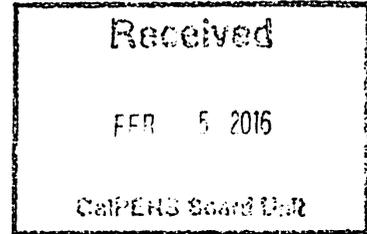
**ATTACHMENT C**  
**RESPONDENTS' ARGUMENT**

Feb-05-2016 02:18 PM LITTLER MENDELSON P.C. 4153998490

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February 5, 2016



To: CalPERS Board of Directors      Fax: 916.795.3972      Phone:  
CalPERS Executive Office

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PERS01600



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February 5, 2016

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**BY FAX [916 795-3972]**

CalPERS Board of Directors  
CalPERS Executive Office  
P.O. Box 942701  
Sacramento, CA 94229-2701

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

Dear Board of Directors:

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

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

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

**King Is A Common Law Employee of The Authority**

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

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

CalPERS Board of Directors  
February 5, 2016  
Page 2

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

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

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

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

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

CalPERS Board of Directors  
February 5, 2016  
Page 3

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

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

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

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

The proposed decision sweeps these undisputed facts away by opining that "Respondent King did not assert her rights as the Foundation Executive Director to have the Foundation make decisions such as when she could take leave at a particular time." (Decision, ¶ 4) But the

CalPERS Board of Directors  
February 5, 2016  
Page 4

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

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

#### **King Alternatively Was Jointly Employed By Both Entities**

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

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

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

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

CalPERS Board of Directors  
February 5, 2016  
Page 5

### **The Decision Should Not Have Precedential Effect**

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

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

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

### **Conclusion**

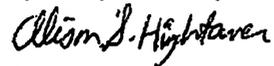
This is not a situation where a public agency attempted to deceive CalPERS, evaded financial obligations or acted in bad faith. The Authority and the Foundation were jointly working towards one goal: providing quality health care for county residents. King and the Authority made all of the required contributions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

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7/7

CalPERS Board of Directors  
February 5, 2016  
Page 6

Respectfully submitted,



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PAGE 01/06



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RE: Appeal of Santa Clara County Health Authority, Respondent and Kathleen King,  
Respondent

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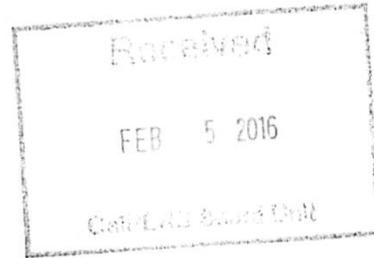
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**Re: Appeal of SANTA CLARA COUNTY HEALTH AUTHORITY,  
Respondent and KATHLEEN KING, Respondent;  
Reference No. 2014-1087**

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

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

The Case Before the Administrative Law Judge

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

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

Letter to Swedensky  
February 5, 2016  
Page 2

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

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

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

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

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

#### Argument

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

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

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

Letter to Swedensky  
February 5, 2016  
Page 3

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

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

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

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

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

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

Letter to Swedensky  
February 5, 2016  
Page 4

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

### Conclusion

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

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

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

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

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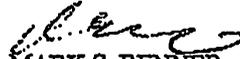
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PAGE 06/06

Letter to Swedensky  
February 5, 2016  
Page 5

Very truly yours,

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