ATTACHMENT G

CALPERS EXHIBITS

ATTORNEY COPY

EXHIBITS

Santa Clara County Health Authority
Agency Case No. 2014-1087
OAH Case No. 2015030359

EXHIBIT		I.D.	EVID.
1	First Amended Statement of Issues dated August 20, 2015		JR
2	Notice of Hearing and Proof of Service dated August 20, 2015		JR
3	Draft Audit and Cover Letter dated May 29, 2013		Admit
4	Agency Response to Draft Audit dated June 13, 2013		
5	Final Audit and Cover Letter dated June 24, 2013		
6	Determination Letter dated October 15, 2013		
7	Appeal Letter from Respondent King dated November 8, 2013		
8	Appeal Letter from Respondent "Authority" dated November 13, 2013		
9	Independent Auditor's Report dated October 28, 2010		
10	Bylaws of Santa Clara Family Health Foundation, Inc.		
11	Administrative Services Agreement		
12	Organizational Charts		
13	Offer Letter to Respondent King dated March 25, 2008		
14	Email Thread between Ronald Cohn and Barbara Elsea dated November 26, 2007		
15	Email from Sharon Valdez to Adeeb Alzanoon dated January 14, 2013		
16	Employment Relationship Questionnaire dated January 14, 2013		
17	CAHILL		
18	GANT		

OFFICE OF ADMINISTRATIVE HEARINGS

State of California

EXHIBIT / WITNESS LIST

OAH 23 (rev. 2/03)

OAH No. 2015030359

ALJ: MM ANDERSON

Agency No. 1014-1087

Agency / Complainant: CalPERS *Attorney / Rep.: Christopher Phillips*	*Case Name / Respondents: Santa Clara County Health Authority & Kathleen King* *Attorneys: Alison S. Hightower & Christopher Patten and Mark S. Renner*

Marked for I.D.	Hearing Dates: August 26, 2015 See attached list for descriptions of Exhibits 1-16	Evidence Admitted Date –AH – Jurisdiction	Marked for I.D.		Evidence Admitted Date –AH – Jurisdiction
1.		J	A.	See attached "Index of Respondent King's Exhibits" list for descriptions of the documents contained within Exhibit A.	X- except pages 045-052, 056, &127 withdrawn
2.		J	B.	Foundation minutes 11.18.08	X
3.		X	C.	Health Authority's closing brief	M
4.		X	D.	King's closing brief	M
5.		X	E.	Health Authority's reply brief	M
6.		X	F.	King's reply brief	M
7.		X	G.		
8.		X	H.		
9.		X	I.		
10.		X	J.		
11.		X	K.		
12.		X	L.		
13.		X	M.		
14.		X	N.		
15.		X	O.		
16.		X	P.		
17.	Copy of Cargill opinion	ON	Q.		
18.	Copy of Galt decision	ON	R.		
19.	C's Closing Brief	M			

COMPLAINANT WITNESSES	RELEASED	RESPONDENT WITNESSES	RELEASED
1. Adeeb Alzanoon	X	1. Kathleen King	X
2. Ronald Gow	X	2. Emily Hennessy	X

Key: X = admitted
J= admitted for jurisdiction only
ON- official notice
M- marked for identification only

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Attorneys for California Public Employees' Retirement System

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding Membership Exclusion of Foundation Employees by: SANTA CLARA COUNTY HEALTH AUTHORITY, Respondent, and KATHLEEN KING, Respondent.	AGENCY CASE NO. 2014-1087 OAH NO. 2015030359 **FIRST AMENDED STATEMENT OF ISSUES** Hearing Date: August 26-27, 2015 Hearing Time: 9:00 am Hearing Location: Oakland

Claimant California Public Employees' Retirement System (CalPERS) states:

I

CalPERS makes and files this Statement of Issues in its official capacity as such and not otherwise.

II

Respondent Santa Clara County Health Authority (Authority), also doing business as Santa Clara Family Health Plan (SCFHP), is a public agency contracted

with CalPERS for retirement benefits for its eligible employees. The provisions of respondent Authority's contract with CalPERS are contained in the California Public Employees' Retirement Law (the PERL).

III

Membership in CalPERS is pursuant to the Public Employees' Retirement Law (PERL). The common law employment test is used by courts and the CalPERS Board of Administration to determine employment status under the PERL. In determining whether one who performs services for another is an employee or an independent contractor, an important factor is the right to control the manner and means of accomplishing the desired result.

IV

On or about 2013, CalPERS Office of Audit Services performed a Public Agency Review of Authority. As a result of this review, CalPERS Membership and Design Unit determined that certain employees were improperly reported by Authority and that these individuals are employees of Santa Clara Family Health Foundation, Inc. (Foundation). CalPERS thoroughly reviewed Foundation's Bylaws, Administrative Services Agreement, an Independent Auditor's Report, and relevant personnel records and determined that employees of the Foundation are not employees of the Authority and should be excluded from CalPERS membership.

V

Respondent Kathleen King (Respondent King) is one of the individuals identified in the CalPERS audit that was reported by Authority as an employee but was

determined by CalPERS to be an employee of Foundation and not eligible for CalPERS membership.

VI

By letters dated October 15, 2013, and October 16, 2013, CalPERS notified Authority and Foundation, respectively, of its determination and were advised of their appeal rights.

VII

By letters dated November 8, 2013, and November 13, 2014, Respondent King and Authority, respectively and through their attorneys, filed a timely joint appeal and have requested an administrative hearing.

VIII

Section 7.1 of Foundation's Bylaws describes the general powers of the Board, as follows:

> Subject to any limitations in the Articles of Incorporation or these Bylaws and to any provision of the California Nonprofit Public Benefit Corporation Code requiring authorization or approval for a particular action, **the business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the Board of Directors.** The Board shall have all rights, powers, duties, immunities and privileges granted to California Nonprofit Public Benefit Corporations either directly or implicitly in the California Nonprofit Public Benefit Corporations Law (Title 1, Division 2, Parts 1 and 2 of the Corporations Code). **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.** (Emphasis added.)

Section 7.2 (a) of Foundation's Bylaws provides the specific powers of the Board, as follows:

> Appoint and remove, at the pleasure of the Board, 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 of Foundation's Bylaws describes the compensation of the Board, as follows:

> Directors as such shall not receive any stated salaries for their services. 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.

Section 8.1 of Foundation's Bylaws defines officers of the Foundation in part, as follows:

> The officers of the corporation shall be: an Executive Director, who shall serve as President and Chief Executive Officer of the corporation; a Chairperson; a Chief Financial Officer, who shall be the treasurer of the corporation; a Secretary; a Chair-Elect; an Immediate Past Chair; and such other officers as may be elected in accordance with the provisions of this Section 8. . . .

IX

Section 8 of the Administrative Services Agreement (Agreement) between Authority and Foundation, effective June 2002, states:

> SCFHP and the Foundation **are separate and independent entities.** The relationship between SCFHP and PN is purely contractual. **Neither SCFHP nor the**

> **Foundation, nor the employees, servants, agents or representatives of either, shall be considered the employee, servant, agent or representative of the other.** SCFHP and the County of Santa Clara are separate legal entities. The County and its officials, employees and agents are not responsible for the obligations of SCFHP. The parties to this Agreement do not intend to, nor do they have the power to, confer on any person or entity any rights or remedies against the County or any officials, employees or agents of the County. (Emphasis added.)

Items 1 and 2 of Schedule A to the Agreement specifies the services to be provided by Authority:

> **Administrative and management services**, as necessary, including but not limited to advise and assistance in the management of **day to day operations of the Foundation, strategic planning, human resource services**, record keeping and regulatory reporting. SCFHP shall also assist in public relations relating to fundraising, to the extent that it can do so without registering as a commercial fundraiser with the Attorney General's office or, if it becomes registered, to the extent agreed to by the parties in an amendment to this Agreement. (Emphasis added.)
>
> **Financial services**, including but not necessarily limited to, budgeting, accounting, preparing financial reports, **payroll, preparing tax forms**, auditing, advising on investments, advising on and overseeing the Foundation's program for fraud prevention and identification, arranging coverage under SCFHP's general liability and certain other insurance programs, as may be from time to time agreed upon by the parties; and providing and/or arranging for employee benefit administration services. (Emphasis added.)

Item 1 of Schedule B to the Agreement provides how Foundation reimburses Authority:

> For administrative, management, financial and compliance services, a pro rata share SCFHP's cost for staff salaries, plus associated general and administrative expenses

incurred, including but not limited to, the Foundation's pro rata share of any insurance policies providing coverage to the Foundation.

X

Note 5 of the Independent Auditors Report dated October 28, 2010, states in part:

> During June 2000, the Health Authority formed the Santa Clara Family Health Foundation (the "Foundation") which is dedicated to the support of medically related community service programs. The bylaws of the Foundation require that **no more than 49%of the Foundation's board of directors, as appointed by Santa Clara County, may be management or directors of the Health Authority**, as defined. Because the **Health Authority does not have financial accountability for the Foundation**, it has not been included in the Health Authority's accompanying combined financial statements. . . . (Emphasis added.)

XI

The following provisions of the Government Code are relevant to this matter and were in effect at all times pertinent to this appeal:

Section 20028 provides in part:

> "Employee" means all of the following: [¶] . . . [¶]
>
> (b) Any person in the employ of any contracting agency. [¶] . . . [¶]

Section 20056 provides:

> "Public agency" means any city, county, district, other local authority or public body of or within this state.

Section 20057 provides in part:

> "Public agency" also includes the following: [¶] . . . [¶]
>
> (e) Any nonprofit corporation whose membership is confined to public agencies as defined in Section 20056. [¶] . . . [¶]

(2) A public or private nonprofit corporation, exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, that operates a rehabilitation facility for the developmentally disabled and provides services under a contract with either (A) a regional center for the developmentally disabled, pursuant to paragraph (3) of subdivision (a) of Section 4648 of the Welfare and Institutions Code, or (B) the Department of Rehabilitation, pursuant to Chapter 4.5 (commencing with Section 19350) of Part 2 of Division 10 of the Welfare and Institutions Code, upon obtaining a written advisory opinion from the United States Department of Labor as described in Section 20057.1.

Section 20125 provides:

> The board [of Administration of CalPERS] shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.

Section 20300, subdivision (b) provides in part:

> The following persons are excluded from membership in this system: [¶] . . . [¶]
>
> (b) Independent contractors who are not employees.
> [¶] . . . [¶]

Section 20370 provides:

> (a) "Member" means an employee who has qualified for membership in this system and on whose behalf an employer has become obligated to pay contributions.
>
> [¶] . . . [¶]
>
> (c) "Local member" includes:
> (1) Local miscellaneous members.
> (2) Local safety members.

Section 20383 provides:

> "Local miscellaneous member" includes all employees of a county office of education, school district, or community college district who are included in a risk pool and all

employees of a contracting agency who have by contract been included within this system, except local safety members.

XII

This appeal is limited to the issue of whether CalPERS correctly determined that Respondent King is an employee of Foundation and that Authority incorrectly reported her as an employee for purposes of CalPERS membership.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Dated: AUG 2 0 2015

BY _____
RENEE OSTRANDER, Chief
Employer Account Management Division

MATTHEW G. JACOBS, GENERAL COUNSEL
CHRISTOPHER PHILLIPS, SENIOR STAFF ATTORNEY, SBN 257758
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Attorneys for California Public Employees' Retirement System

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding Membership Exclusion of Foundation Employees by SANTA CLARA COUNTY HEALTH AUTHORITY, Respondent, and KATHLEEN KING, Respondent.	CASE NO. 2014-1087 OAH NO. 2015030359 NOTICE OF HEARING (Pursuant to Gov. Code, § 11509) ALJ: To Be Assigned Hearing Date: August 26 & 27, 2015 Hearing Location: Oakland, CA Prehearing Conf.: None Scheduled Settlement Conf.: None Scheduled

TO THE RESPONDENTS above named: Santa Clara County Health Authority, by service on its attorney of record; and Kathleen King, by service on her attorney of record.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the hearing of the First Amended Statement of Issues in the above-entitled matter has been set and will be held before an Administrative Law Judge of the Office of Administrative Hearings of the State of California at: **Office of Administrative Hearings, 1515 Clay Street, Suite 206, Oakland, CA 94612, for 2 days on August 26 & 27, 2015, at 9:00 a.m.,**

upon the charges made in the Statement of Issues served upon the respondent. If you object to the place of hearing, you must notify the presiding officer within 10 days after this notice is served on you. Failure to notify the presiding officer within 10 days will deprive you of a change in the place of the hearing. You may contact Cheryl Tompkin, Presiding Administrative Law Judge of the OAH Oakland at (510) 622-2722.

You may be present at the hearing. You have a right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are expected to be ready to proceed with your case at the time of hearing. Failure to appear at the hearing, either through an attorney or personally, if you do not have an attorney, may result in a default. This means that CalPERS' decision will be upheld irrespective of any evidence that may or may not be introduced in your absence.

You have a right to an interpreter if you do not proficiently speak or understand English. If you need an interpreter, you must notify CalPERS immediately so that appropriate arrangements can be made.

You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents, or other things by applying to said agency at: Office of Administrative Hearings, 1515 Clay Street, Suite 206, Oakland, CA 94612.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Dated: 6/20/15

CHRISTOPHER PHILLIPS
SENIOR STAFF ATTORNEY

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 August 20, 2015, I served the foregoing document described as:

FIRST AMENDED STATEMENT OF ISSUES, NOTICE OF HEARING, and Government Code sections 11507.5, 11507.6 and 11507.7 (relating to discovery under the Administrative Procedure Act) – In the Matter of the Appeal Regarding Membership Exclusion of Foundation Employees by SANTA CLARA COUNTY HEALTH AUTHORITY, Respondent, and SANTA CLARA FAMILY HEALTH FOUNDATION, INC., 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:

Kathleen King
c/o Christopher E. Platten
Wylie, McBride, Platten & Renner
2125 Canoas Garden Ave., Ste. 120
San Jose, CA 95125

Office of Administrative Hearings Oakland
Via e-file/e-transmission:
OAH Oakland - oakfilings@dgs.ca.gov**

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

Sharon Valdez
Santa Clara County Health Authority
[redacted]

[X] BY OVERNIGHT DELIVERY: I caused such envelopes to be delivered to the above addresses within 24 hours by overnight delivery service.

[X]** BY ELECTRONIC TRANSMISSION: I caused such documents to be sent to the addressee at the electronic notification address above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.

Executed on August 20, 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.

Kathie Schnetz
NAME

Kathie Schnetz
SIGNATURE

California Public Employees' Retirement System
Office of Audit Services
P.O. Box 942701
Sacramento, CA 94229-2701
TTY: (877) 249-7442
(916) 795-0802 phone, (916) 795-7836 fax
www.calpers.ca.gov

May 29, 2013

Employer Code: 1737
CalPERS ID:
Job Number: P11-007

Santa Clara County Health Authority
David Cameron, Chief Financial Officer
[redacted]

Dear Mr. Cameron:

Enclosed is the draft report on our review of the Santa Clara County Health Authority. The report covers our compliance review in relation to the Santa Clara County Health Authority's contract with the California Public Employees' Retirement System (CalPERS). A confidential list identifying the individuals mentioned in our report is attached as an appendix to the draft report.

Please review the draft report and provide your written response by June 24, 2013. Your response should address whether you agree with the recommendations in the report. The report is to be kept confidential and should not be reproduced. We will review your response and include it as part of the final report.

We appreciate the assistance and cooperation that you and your staff have provided during the review. If you have any questions, please call Adeeb Alzanoon at (916) 795-7821.

Sincerely,

MARGARET JUNKER, Chief
Office of Audit Services

Enclosure

cc: Anthony Suine, Chief, BNSD, CalPERS
Karen DeFrank, Chief, CASD, CalPERS

SANTA CLARA COUNTY HEALTH AUTHORITY

PUBLIC AGENCY REVIEW

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

OFFICE OF AUDIT SERVICES

CALPERS ID:
JOB NUMBER: P11-007

MAY 2013

SANTA CLARA COUNTY HEALTH AUTHORITY

TABLE OF CONTENTS

SANTA CLARA COUNTY HEALTH AUTHORITY

RESULTS IN BRIEF

The California Public Employees' Retirement System (CalPERS) Office of Audit Services (OAS) reviewed the Santa Clara County Health Authority's (Authority) enrolled individuals, member compensation, retirement information and other documentation for individuals included in test samples. A detail of the findings is noted in the Results section beginning on page three of this report. Specifically, the following findings were noted during the review:

- Payrates were not listed on publicly available pay schedules.
- Employees of an affiliated entity were erroneously enrolled into CalPERS membership.
- An employee hired through a temporary employment agency was not enrolled.
- Retired annuitant with excessive rate of pay.

This review did not include a determination as to whether the Authority is a "public agency" (as that term is used in the California Public Employees' Retirement Law), and OAS therefore expresses no opinion or finding with respect to whether the Authority is a public agency or whether its employees are employed by a public agency.

A confidential list identifying the individuals mentioned in this report is attached as an appendix to this draft report.

AUTHORITY BACKGROUND

The Authority (dba Santa Clara Family Health Plan) was established August 1, 1995 by the Santa Clara County Board of Supervisors. The Authority was created for the purpose of developing the Local Initiative Plan for the expansion of Medi-Cal Managed Care. Employment agreements and an employee benefit summary outline Authority employees' salaries and benefits and state the terms of employment agreed upon between the Authority and its employees. The Authority contracted with CalPERS effective April 4, 1999 to provide retirement benefits for local miscellaneous employees.

All contracting public agencies, including the Authority, are responsible for the following:

- Determining CalPERS membership eligibility for its employees.
- Enrolling employees into CalPERS upon meeting membership eligibility criteria.
- Enrolling employees in the appropriate membership category.
- Establishing the payrates for its employees.

- Approving and adopting all compensation through its governing body in accordance with requirements of applicable public meeting laws.
- Publishing all employees' payrates in a publicly available pay schedule.
- Identifying and reporting compensation during the period it was earned.
- Ensuring special compensation is properly identified and reported.
- Reporting payroll accurately.
- Notifying CalPERS when employees meet Internal Revenue Code annual compensation limits.
- Ensuring the employment of a retired annuitant is lawful and reinstating retired annuitants that work more than 960 hours in a fiscal year.

SCOPE

As part of the Board approved plan for fiscal year 2011/2012, the OAS reviewed the Authority's payroll reporting and member enrollment processes as these processes relate to the Authority's retirement contract with CalPERS. The review period was limited to the examination of sampled records and processes from July 1, 2008 through June 30, 2011. The on-site fieldwork for this review was conducted from September 6, 2011 through September 8, 2011. The review objectives and a summary of the procedures performed are listed in Appendix B.

SANTA CLARA COUNTY HEALTH AUTHORITY

OFFICE OF AUDIT SERVICES REVIEW RESULTS

Finding 1: Payrates were not listed on a publicly available pay schedule.

Recommendation:

The Authority should list all employee payrates on a publicly available pay schedule as required in Government Code Section 20636 and California Code of Regulations Section 570.5.

The Authority should work with Customer Account Services Division (CASD) to make the necessary adjustments to active and retired member accounts, if any, pursuant to Government Code Section 20160.

Condition:

The Authority did not have pay schedules that were duly approved and adopted by its governing body. Pursuant to Government Code Section 20636 and California Code of Regulations Section 570.5, the Authority is required to have publicly available pay schedules to specify the payrates reportable to CalPERS. OAS reviewed the reported payrates and pay schedules for sampled employees in the first pay period in June 2011 to determine whether the payrates were listed on a publicly available pay schedule. The Authority did not have publicly available salary schedules during our review period. Instead, the Authority had a final compensation survey that listed positions, grade, and a low and high salary range effective January 1, 2012. The reported payrates must be set forth in a publicly available pay schedule and meet the definition of payrate under the Public Employees' Retirement Law. Additionally, all pay schedules must be properly reviewed, authorized and approved by the Authority's Board in accordance with requirements of applicable public meeting laws. Only compensation earnable as defined under Government Code Section 20636 and corresponding regulations can be reported to CalPERS and considered in calculating retirement benefits.

Criteria:

Government Code: § 20160, § 20636 (b)(1), § 20636 (d)

California Code of Regulations: § 570.5

SANTA CLARA COUNTY HEALTH AUTHORITY

Finding 2: Affiliated entity employees were erroneously enrolled into CalPERS membership.

Recommendation:

The Authority should only enroll eligible employees into CalPERS membership.

The Authority should work with CASD to make the necessary adjustments to active and retired member accounts pursuant to Government Code Section 20160.

Condition:

The Authority erroneously enrolled employees that worked for an affiliated agency into CalPERS membership. OAS found four sampled individuals listed on the Authority's employee roster that had job titles designated as foundation. OAS obtained and reviewed several documents provided by the Authority to determine the relationship between the Authority and an affiliated entity called Santa Clara Family Health Foundation (Foundation).

Based on the documents reviewed, OAS determined the Foundation was an autonomous legal separate entity from the Authority and that the Authority erroneously enrolled individuals that worked for the Foundation into CalPERS membership as Authority employees.

Subsequent to the on-site field review, the Authority acknowledged via email correspondence that three out of the four individuals listed in the employee roster with Foundation titles were Foundation employees that performed services solely for the Foundation.

Criteria:

Government Code: § 20160, § 20502

SANTA CLARA COUNTY HEALTH AUTHORITY

Finding 3: An employee hired through a temporary employment agency was not enrolled into CalPERS membership.

Recommendation:

The Authority should enroll and report eligible CalPERS members when membership requirements are met. In addition, the Authority should implement procedures to review and monitor the number of hours worked in a fiscal year by all temporary part-time employees, including individuals hired through a temporary employment agency, and enroll employees who meet membership eligibility requirements.

The Authority should work with CASD to assess the impact of this membership eligibility issue and make the necessary adjustments to the member's account pursuant to Government Code Section 20160.

Condition:

The Authority did not enroll an employee hired through a temporary employment agency into CalPERS membership when eligibility requirements were met. OAS reviewed the hours worked for fiscal year 2009/2010 and found the employee worked a total of 1,310 hours and was eligible for CalPERS membership on January 10, 2010. The employee should have been enrolled into CalPERS membership not later than the first day of the first pay period in the month following the month in which 1,000 hours of service were completed.

Criteria:

Government Code: § 20044, § 20160, § 20305(a)(3)(B)

SANTA CLARA COUNTY HEALTH AUTHORITY

Finding 4: Retired annuitant's payrate exceeded the pay range that would have been paid to an employee performing comparable duties.

Recommendation:

The Authority should limit the payrate for retired annuitants to the maximum monthly base pay rate paid to other employees performing comparable duties as listed on a publicly available pay schedule.

The Authority should work with Benefit Services Division (BNSD) to assess the impact of the excessive payrate and make the necessary adjustments pursuant to Government Code Section 20160.

Condition:

OAS reviewed the hours worked by the retired annuitant in fiscal year 2010/2011 and found the retired annuitant did not exceed the 960-hour threshold. However, the retired annuitant's payrate during fiscal years 2008/2009 and 2010/2011 was not within the pay range that would have been paid to an employee performing comparable duties. OAS found the retired annuitant's payrates were $100.00 and $75.00 per hour respectively. The hourly payrate paid to the retired annuitant was higher than the $42.47 per hour payrate the Authority reported to CalPERS prior to the member's May 2008 retirement. During the on-site visit, the Authority did not have other employees that performed comparable duties of the retired member.

Criteria:

Government Code § 20160, § 21220, § 21224(a)

SANTA CLARA COUNTY HEALTH AUTHORITY

CONCLUSION

OAS limited this review to the areas specified in the scope section of this report and in the objectives as outlined in Appendix B. OAS limited the test of transactions to employee samples selected from the agency's payroll records. Sample testing procedures provide reasonable, but not absolute, assurance that these transactions complied with the California Government Code except as noted. Since OAS did not review whether the Authority is a "public agency" (as that term is used in the California Public Employees' Retirement Law), this report expresses no opinion or finding with respect to whether the Authority is a public agency or whether its employees are employed by a public agency.

The findings and conclusions outlined in this report are based on information made available or otherwise obtained at the time this report was prepared. This report does not constitute a final determination in regard to the findings noted within the report. The appropriate CalPERS divisions will notify the agency of the final determinations on the report findings and provide appeal rights, if applicable, at that time. All appeals must be made to the appropriate CalPERS division by filing a written appeal with CalPERS, in Sacramento, within 30 days of the date of the mailing of the determination letter, in accordance with Government Code Section 20134 and Sections 555-555.4, Title 2, California Code of Regulations.

Respectfully submitted,

MARGARET JUNKER, CPA, CIA, CIDA
Chief, Office of Audit Services

Date: May 2013
Staff: Cheryl Diez, CPA, Assistant Chief
Michael Dutil, CIA, CRMA, Manager
Alan Feblowitz, CFE, Manager
Jose Martinez
Adeeb Alzanoon

SANTA CLARA COUNTY HEALTH AUTHORITY

APPENDIX A

BACKGROUND

SANTA CLARA COUNTY HEALTH AUTHORITY

BACKGROUND

California Public Employees' Retirement System

The California Public Employees' Retirement System (CalPERS) provides a variety of programs serving members employed by more than 2,500 local public agencies as well as state agencies and state universities. The agencies contract with CalPERS for retirement benefits, with CalPERS providing actuarial services necessary for the agencies to fund their benefit structure. In addition, CalPERS provides services which facilitate the retirement process.

CASD manages contract coverage for public agencies and receives, processes, and posts payroll information. In addition, CASD provides eligibility and enrollment services to the members and employers that participate in the CalPERS Health Benefits Program, including state agencies, public agencies, and school districts. BNSD sets up retirees' accounts, processes applications, calculates retirement allowances, prepares monthly retirement benefit payment rolls, and makes adjustments to retirement benefits.

Retirement allowances are computed using three factors: years of service, age at retirement and final compensation. Final compensation is defined as the highest average annual compensation earnable by a member during the last one or three consecutive years of employment, unless the member elects a different period with a higher average. State and school members use the one-year period. Local public agency members' final compensation period is three years unless the agency contracts with CalPERS for a one-year period.

The employer's knowledge of the laws relating to membership and payroll reporting facilitates the employer in providing CalPERS with appropriate employee information. Appropriately enrolling eligible employees and correctly reporting payroll information is necessary to accurately compute a member's retirement allowance.

SANTA CLARA COUNTY HEALTH AUTHORITY

APPENDIX B

OBJECTIVES

SANTA CLARA COUNTY HEALTH AUTHORITY

OBJECTIVES

The objectives of this review were limited to the determination of:

- Whether the Authority complied with applicable sections of the California Government Code (Sections 20000 et seq.) and Title 2 of the California Code of Regulations.
- Whether prescribed reporting and enrollment procedures as they relate to the Authority's retirement contract with CalPERS were followed.

This review covers the period of July 1, 2008 through June 30, 2011. This review did not include a determination as to whether the Authority is a "public agency", and expresses no opinion or finding with respect to whether the Authority is a public agency or whether its employees are employed by a public agency.

SUMMARY

To accomplish the review objectives, OAS interviewed key staff members to obtain an understanding of the Authority's personnel and payroll procedures, reviewed documents, and performed the following procedures.

- ✓ Reviewed:
  - o Provisions of the Contract and contract amendments between the Authority and CalPERS
  - o Correspondence files maintained at CalPERS
  - o Authority Board minutes
  - o Authority written labor policies and agreements
  - o Authority salary, wage and benefit agreements including applicable resolutions
  - o Authority personnel records and employee hours worked records
  - o Authority payroll information including Summary Reports and CalPERS listings
  - o Other documents used to specify payrate, special compensation, and benefits for all employees
  - o Various other documents as necessary

- ✓ Reviewed Authority payroll records and compared the records to data reported to CalPERS to determine whether the Authority correctly reported compensation.

- ✓ Reviewed payrates reported to CalPERS and reconciled the payrates to Authority public salary records to determine whether base payrates reported were accurate, pursuant to publicly available pay schedules that identify the

position title, payrate and time base for each position, and duly approved by the Authority's governing body in accordance with requirements of applicable public meeting laws.

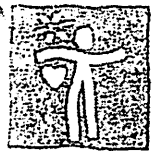
- ✓ Reviewed CalPERS listing reports to determine whether the payroll reporting elements were reported correctly.
- ✓ Reviewed the Authority's enrollment practices for temporary and part-time employees to determine whether individuals met CalPERS membership requirements.
- ✓ Reviewed the Authority's enrollment practices for retired annuitants to determine if retirees were lawfully employed and reinstated when 960 hours were worked in a fiscal year.
- ✓ Reviewed the Authority's independent contractors to determine whether the individuals were either eligible or correctly excluded from CalPERS membership.
- ✓ Reviewed the Authority's affiliated entities to determine if the Authority shared employees with an affiliated entity and if the employees were CalPERS members and whether their earnings were reported by the Authority or by the affiliated entity.
- ✓ Reviewed the Authority's calculation and reporting of unused sick leave balances, if contracted to provide for additional service credits for unused sick leave.

SANTA CLARA COUNTY HEALTH AUTHORITY

APPENDIX C

CONFIDENTIAL LIST

www.scfhp.com



Santa Clara
Family Health Plan

The Spirit of Care

June 13, 2013

Margaret Junker
Chief Office of Audit Services
California Public Employees' Retirement System
Office of Audit Services
P.O. Box 942701
Sacramento, CA 94229-2701

Re: **Employer Code 1737, CalPERS' ID , Job Number P11-007**

Dear Ms. Junker:

The purpose of this communication is to respond to your letter dated May 29, 2013 regarding CalPERS' draft report on its review of Santa Clara County Health Authority.

Finding 1 – Pay rates were not listed on a publicly available pay schedule
The Executive Team has and continues to prepare and submit an annual budget for approval by the Board of Directors which includes Health Authority positions and merit-based and/or COLA increases.

The Health Authority will work with CASD to make necessary adjustments, if any, to active and retired member accounts.

Finding 2 – Affiliated entity employees were erroneously enrolled into CalPERS membership
The Health Authority partially disagrees with this finding.

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 the Foundation goals and objectives. In 2009, a decision was made by the Board of Directors of the Foundation to change the reporting structure. As such, in 2009, the Executive Director became a direct report of the Foundation Board of Directors. Therefore, we believe that the employees of the Foundation were not erroneously enrolled into CalPERS. However, we agree that beginning in 2009, the Foundation employees were not reporting, supervised, directed or evaluated by the Health Authority CEO.

Finding 3 – An employee hired through a temporary employment agency was not enrolled into CalPERS membership
The Health Authority concurs with this finding.

Finding 4 – Retired annuitant's pay rate exceeded the pay range that would have been paid to an employee performing comparable duties
The Health Authority disagrees with this finding.

The individual referenced is responsible for enrolling chronically and severely ill children into California Children's Services to ensure access to the best funding sources for proper care and treatment. This area of responsibility is highly complex and requires someone with specialized clinical skills and judgment.

In addition, the individual referenced is responsible for reviewing claims to determine billing in excess of allowable charges and submitting those claims for recovery. This area of responsibility requires analytical skills specifically related to coding, billing and claims recovery.

Sincerely,

SANTA CLARA COUNTY HEALTH AUTHORITY

David Cameron
Chief Financial Officer

cc: Elizabeth Darrow, Chief Executive Officer
Sharon Valdez, Vice President of Human Resources

California Public Employees' Retirement System
Office of Audit Services
P.O. Box 942715
Sacramento, CA 94229-2715
TTY: (877) 249-7442
(916) 795-0802 phone, (916) 795-7836 fax
www.calpers.ca.gov

June 24, 2013

Employer Code: 1737
CalPERS ID:
Job Number: P11-007

Santa Clara County Health Authority
David Cameron, Chief Financial Officer
[redacted]

Dear Mr. Cameron:

Enclosed is our final report on the results of the public agency review completed for the Santa Clara County Health Authority. Your written response, included as an appendix to the report, indicates agreement with the issues noted in the report except for Finding 2 and Finding 4. Based on the information contained in your agency's response pertaining to Finding 2 and Finding 4, our recommendations remain as stated in the report. In accordance with our resolution policy, we have referred the issues identified in the report to the appropriate divisions at CalPERS. Please work with these divisions to address the recommendations specified in our report.

It was our pleasure to work with your Authority and we appreciate the time and assistance of you and your staff during this review.

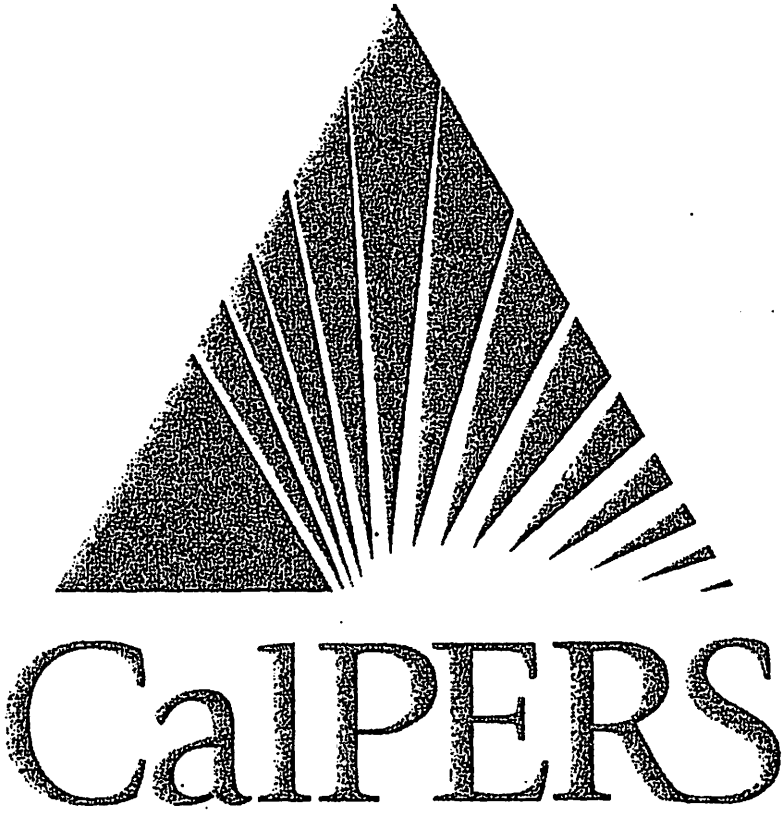
Sincerely,

Original Signed by Margaret Junker
MARGARET JUNKER, Chief
Office of Audit Services

Enclosure

cc: Risk and Audit Committee Members, CalPERS
Peter Mixon, General Counsel, CalPERS
Karen DeFrank, Chief, CASD, CalPERS
Anthony Suine, Chief, BNSD, CalPERS

Office of Audit Services



Public Agency Review

Santa Clara County Health Authority

Employer Code: 1737
CalPERS ID:
Job Number: P11-007

June 2013

SANTA CLARA COUNTY HEALTH AUTHORITY

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SANTA CLARA COUNTY HEALTH AUTHORITY

RESULTS IN BRIEF

The California Public Employees' Retirement System (CalPERS) Office of Audit Services (OAS) reviewed the Santa Clara County Health Authority's (Authority) enrolled individuals, member compensation, retirement information and other documentation for individuals included in test samples. A detail of the findings is noted in the Results section beginning on page three of this report. Specifically, the following findings were noted during the review:

- Payrates were not listed on publicly available pay schedules.
- Employees of an affiliated entity were erroneously enrolled into CalPERS membership.
- An employee hired through a temporary employment agency was not enrolled.
- Retired annuitant with excessive rate of pay.

AUTHORITY BACKGROUND

The Authority (dba Santa Clara Family Health Plan) was established August 1, 1995 by the Santa Clara County Board of Supervisors. The Authority was created for the purpose of developing the Local Initiative Plan for the expansion of Medi-Cal Managed Care. Employment agreements and an employee benefit summary outline Authority employees' salaries and benefits and state the terms of employment agreed upon between the Authority and its employees. The Authority contracted with CalPERS effective April 4, 1999 to provide retirement benefits for local miscellaneous employees.

All contracting public agencies, including the Authority, are responsible for the following:

- Determining CalPERS membership eligibility for its employees.
- Enrolling employees into CalPERS upon meeting membership eligibility criteria.
- Enrolling employees in the appropriate membership category.
- Establishing the payrates for its employees.
- Approving and adopting all compensation through its governing body in accordance with requirements of applicable public meeting laws.
- Publishing all employees' payrates in a publicly available pay schedule.
- Identifying and reporting compensation during the period it was earned.
- Ensuring special compensation is properly identified and reported.
- Reporting payroll accurately.
- Notifying CalPERS when employees meet Internal Revenue Code annual compensation limits.
- Ensuring the employment of a retired annuitant is lawful and reinstating retired annuitants that work more than 960 hours in a fiscal year.

SANTA CLARA COUNTY HEALTH AUTHORITY

SCOPE

As part of the Board approved plan for fiscal year 2011/2012, the OAS reviewed the Authority's payroll reporting and member enrollment processes as these processes relate to the Authority's retirement contract with CalPERS. The review period was limited to the examination of sampled records and processes from July 1, 2008 through June 30, 2011. The on-site fieldwork for this review was conducted from September 6, 2011 through September 8, 2011.

This review did not include a determination as to whether the Authority is a "public agency" (as that term is used in the California Public Employees' Retirement Law), and OAS therefore expresses no opinion or finding with respect to whether the Authority is a public agency or whether its employees are employed by a public agency. The review objectives and a summary of the procedures performed are listed in Appendix B.

SANTA CLARA COUNTY HEALTH AUTHORITY

OFFICE OF AUDIT SERVICES REVIEW RESULTS

Finding 1: Payrates were not listed on a publicly available pay schedule.

Recommendation:

The Authority should list all employee payrates on a publicly available pay schedule as required in Government Code Section 20636 and California Code of Regulations Section 570.5.

The Authority should work with Customer Account Services Division (CASD) to make the necessary adjustments to active and retired member accounts, if any, pursuant to Government Code Section 20160.

Condition:

The Authority did not have pay schedules that were duly approved and adopted by its governing body. Pursuant to Government Code Section 20636 and California Code of Regulations Section 570.5, the Authority is required to have publicly available pay schedules to specify the payrates reportable to CalPERS. OAS reviewed the reported payrates and pay schedules for sampled employees in the first pay period in June 2011 to determine whether the payrates were listed on a publicly available pay schedule. The Authority did not have publicly available salary schedules during our review period. Instead, the Authority had a final compensation survey that listed positions, grade, and a low and high salary range effective January 1, 2012. The reported payrates must be set forth in a publicly available pay schedule and meet the definition of payrate under the Public Employees' Retirement Law. Additionally, all pay schedules must be properly reviewed, authorized and approved by the Authority's Board in accordance with requirements of applicable public meeting laws. Only compensation earnable as defined under Government Code Section 20636 and corresponding regulations can be reported to CalPERS and considered in calculating retirement benefits.

Criteria:

Government Code: § 20160, § 20636 (b)(1), § 20636 (d)

California Code of Regulations: § 570.5

SANTA CLARA COUNTY HEALTH AUTHORITY

Finding 2: Affiliated entity employees were erroneously enrolled into CalPERS membership.

Recommendation:

The Authority should only enroll eligible employees into CalPERS membership.

The Authority should work with CASD to make the necessary adjustments to active and retired member accounts pursuant to Government Code Section 20160.

Condition:

The Authority erroneously enrolled employees that worked for an affiliated agency into CalPERS membership. OAS found four sampled individuals listed on the Authority's employee roster that had job titles designated as foundation. OAS obtained and reviewed several documents provided by the Authority to determine the relationship between the Authority and an affiliated entity called Santa Clara Family Health Foundation (Foundation).

Based on the documents reviewed, OAS determined the Foundation was an autonomous legal separate entity from the Authority and that the Authority erroneously enrolled individuals that worked for the Foundation into CalPERS membership as Authority employees.

Subsequent to the on-site field review, the Authority acknowledged via email correspondence that three out of the four individuals listed in the employee roster with Foundation titles were Foundation employees that performed services solely for the Foundation.

Criteria:

Government Code: § 20160, § 20502

SANTA CLARA COUNTY HEALTH AUTHORITY

Finding 3: An employee hired through a temporary employment agency was not enrolled into CalPERS membership.

Recommendation:

The Authority should enroll and report eligible CalPERS members when membership requirements are met. In addition, the Authority should implement procedures to review and monitor the number of hours worked in a fiscal year by all temporary part-time employees, including individuals hired through a temporary employment agency, and enroll employees who meet membership eligibility requirements.

The Authority should work with CASD to assess the impact of this membership eligibility issue and make the necessary adjustments to the member's account pursuant to Government Code Section 20160.

Condition:

The Authority did not enroll an employee hired through a temporary employment agency into CalPERS membership when eligibility requirements were met. OAS reviewed the hours worked for fiscal year 2009/2010 and found the employee worked a total of 1,310 hours and was eligible for CalPERS membership on January 10, 2010. The employee should have been enrolled into CalPERS membership not later than the first day of the first pay period in the month following the month in which 1,000 hours of service were completed.

Criteria:

Government Code: § 20044, § 20160, § 20305(a)(3)(B)

SANTA CLARA COUNTY HEALTH AUTHORITY

Finding 4: Retired annuitant's payrate exceeded the pay range that would have been paid to an employee performing comparable duties.

Recommendation:

The Authority should limit the payrate for retired annuitants to the maximum monthly base pay rate paid to other employees performing comparable duties as listed on a publicly available pay schedule.

The Authority should work with Benefit Services Division (BNSD) to assess the impact of the excessive payrate and make the necessary adjustments pursuant to Government Code Section 20160.

Condition:

OAS reviewed the hours worked by the retired annuitant in fiscal year 2010/2011 and found the retired annuitant did not exceed the 960-hour threshold. However, the retired annuitant's payrate during fiscal years 2008/2009 and 2010/2011 was not within the pay range that would have been paid to an employee performing comparable duties. OAS found the retired annuitant's payrates were $100.00 and $75.00 per hour respectively. The hourly payrate paid to the retired annuitant was higher than the $42.47 per hour payrate the Authority reported to CalPERS prior to the member's May 2008 retirement. During the on-site visit, the Authority did not have other employees that performed comparable duties of the retired member.

Criteria:

Government Code § 20160, § 21220, § 21224(a)

SANTA CLARA COUNTY HEALTH AUTHORITY

CONCLUSION

OAS limited this review to the areas specified in the scope section of this report and in the objectives as outlined in Appendix B. OAS limited the test of transactions to employee samples selected from the agency's payroll records. Sample testing procedures provide reasonable, but not absolute, assurance that these transactions complied with the California Government Code except as noted. Since OAS did not review whether the Authority is a "public agency" (as that term is used in the California Public Employees' Retirement Law), this report expresses no opinion or finding with respect to whether the Authority is a public agency or whether its employees are employed by a public agency.

The findings and conclusions outlined in this report are based on information made available or otherwise obtained at the time this report was prepared. This report does not constitute a final determination in regard to the findings noted within the report. The appropriate CalPERS divisions will notify the agency of the final determinations on the report findings and provide appeal rights, if applicable, at that time. All appeals must be made to the appropriate CalPERS division by filing a written appeal with CalPERS, in Sacramento, within 30 days of the date of the mailing of the determination letter, in accordance with Government Code Section 20134 and Sections 555-555.4, Title 2, California Code of Regulations.

Respectfully submitted,

Original Signed by Margaret Junker
MARGARET JUNKER, CPA, CIA, CIDA
Chief, Office of Audit Services

Date: June 2013
Staff: Cheryl Dietz, CPA, Assistant Chief
Michael Dutil, CIA, CRMA, Manager
Alan Feblowitz, CFE, Manager
Jose Martinez
Adeeb Alzanoon

SANTA CLARA COUNTY HEALTH AUTHORITY

APPENDIX A

BACKGROUND

SANTA CLARA COUNTY HEALTH AUTHORITY

BACKGROUND

California Public Employees' Retirement System

CalPERS provides a variety of programs serving members employed by more than 2,500 local public agencies as well as state agencies and state universities. The agencies contract with CalPERS for retirement benefits, with CalPERS providing actuarial services necessary for the agencies to fund their benefit structure. In addition, CalPERS provides services which facilitate the retirement process.

CASD manages contract coverage for public agencies and receives, processes, and posts payroll information. In addition, CASD provides eligibility and enrollment services to the members and employers that participate in the CalPERS Health Benefits Program, including state agencies, public agencies, and school districts. BNSD sets up retirees' accounts, processes applications, calculates retirement allowances, prepares monthly retirement benefit payment rolls, and makes adjustments to retirement benefits.

Retirement allowances are computed using three factors: years of service, age at retirement and final compensation. Final compensation is defined as the highest average annual compensation earnable by a member during the last one or three consecutive years of employment, unless the member elects a different period with a higher average. State and school members use the one-year period. Local public agency members' final compensation period is three years unless the agency contracts with CalPERS for a one-year period.

The employer's knowledge of the laws relating to membership and payroll reporting facilitates the employer in providing CalPERS with appropriate employee information. Appropriately enrolling eligible employees and correctly reporting payroll information is necessary to accurately compute a member's retirement allowance.

SANTA CLARA COUNTY HEALTH AUTHORITY

APPENDIX B

OBJECTIVES

SANTA CLARA COUNTY HEALTH AUTHORITY

OBJECTIVES

The objectives of this review were limited to the determination of:

- Whether the Authority complied with applicable sections of the California Government Code (Sections 20000 et seq.) and Title 2 of the California Code of Regulations.
- Whether prescribed reporting and enrollment procedures as they relate to the Authority's retirement contract with CalPERS were followed.

This review covers the period of July 1, 2008 through June 30, 2011. This review did not include a determination as to whether the Authority is a "public agency", and expresses no opinion or finding with respect to whether the Authority is a public agency or whether its employees are employed by a public agency.

SUMMARY

To accomplish the review objectives, OAS interviewed key staff members to obtain an understanding of the Authority's personnel and payroll procedures, reviewed documents, and performed the following procedures.

✓ Reviewed:
- Provisions of the Contract and contract amendments between the Authority and CalPERS
- Correspondence files maintained at CalPERS
- Authority Board minutes
- Authority written labor policies and agreements
- Authority salary, wage and benefit agreements including applicable resolutions
- Authority personnel records and employee hours worked records
- Authority payroll information including Summary Reports and CalPERS listings
- Other documents used to specify payrate, special compensation, and benefits for all employees
- Various other documents as necessary

✓ Reviewed Authority payroll records and compared the records to data reported to CalPERS to determine whether the Authority correctly reported compensation.

✓ Reviewed payrates reported to CalPERS and reconciled the payrates to Authority public salary records to determine whether base payrates reported were accurate, pursuant to publicly available pay schedules that identify the

SANTA CLARA COUNTY HEALTH AUTHORITY

position title, payrate and time base for each position, and duly approved by the Authority's governing body in accordance with requirements of applicable public meeting laws.

- ✓ Reviewed CalPERS listing reports to determine whether the payroll reporting elements were reported correctly.
- ✓ Reviewed the Authority's enrollment practices for temporary and part-time employees to determine whether individuals met CalPERS membership requirements.
- ✓ Reviewed the Authority's enrollment practices for retired annuitants to determine if retirees were lawfully employed and reinstated when 960 hours were worked in a fiscal year.
- ✓ Reviewed the Authority's independent contractors to determine whether the individuals were either eligible or correctly excluded from CalPERS membership.
- ✓ Reviewed the Authority's affiliated entities to determine if the Authority shared employees with an affiliated entity and if the employees were CalPERS members and whether their earnings were reported by the Authority or by the affiliated entity.
- ✓ Reviewed the Authority's calculation and reporting of unused sick leave balances, if contracted to provide for additional service credits for unused sick leave.

SANTA CLARA COUNTY HEALTH AUTHORITY

APPENDIX C

AUTHORITY'S WRITTEN RESPONSE

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Santa Clara
Family Health Plan

The Spirit of Care

June 13, 2013

Margaret Junker
Chief Office of Audit Services
California Public Employees' Retirement System
Office of Audit Services
P.O. Box 942701
Sacramento, CA 94229-2701

Re: **Employer Code 1737, CalPERS' ID** **Job Number P11-007**

Dear Ms. Junker:

The purpose of this communication is to respond to your letter dated May 29, 2013 regarding CalPERS' draft report on its review of Santa Clara County Health Authority.

Finding 1 – Pay rates were not listed on a publicly available pay schedule
The Executive Team has and continues to prepare and submit an annual budget for approval by the Board of Directors which includes Health Authority positions and merit-based and/or COLA increases.

The Health Authority will work with CASD to make necessary adjustments, if any, to active and retired member accounts.

Finding 2 – Affiliated entity employees were erroneously enrolled into CalPERS membership
The Health Authority partially disagrees with this finding.

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 the Foundation goals and objectives. In 2009, a decision was made by the Board of Directors of the Foundation to change the reporting structure. As such, in 2009, the Executive Director became a direct report of the Foundation Board of Directors. Therefore, we believe that the employees of the Foundation were not erroneously enrolled into CaLPERS. However, we agree that beginning in 2009, the Foundation employees were not reporting, supervised, directed or evaluated by the Health Authority CEO.

Finding 3 – An employee hired through a temporary employment agency was not enrolled into CalPERS membership
The Health Authority concurs with this finding.

Finding 4 – Retired annuitant's pay rate exceeded the pay range that would have been paid to an employee performing comparable duties
The Health Authority disagrees with this finding.

The individual referenced is responsible for enrolling chronically and severely ill children into California Children's Services to ensure access to the best funding sources for proper care and treatment. This area of responsibility is highly complex and requires someone with specialized clinical skills and judgment.

In addition, the individual referenced is responsible for reviewing claims to determine billing in excess of allowable charges and submitting those claims for recovery. This area of responsibility requires analytical skills specifically related to coding, billing and claims recovery.

Sincerely,

SANTA CLARA COUNTY HEALTH AUTHORITY

David Cameron
Chief Financial Officer

cc: Elizabeth Darrow, Chief Executive Officer
Sharon Valdez, Vice President of Human Resources

Santa Clara County Health Authority # 5813158737
Job Number P11-007
Confidential List
Review Period: July 1, 2008 to June 30, 2011

Finding 2: Employees of an affiliated entity were erroneously enrolled into CalPERS membership as Authority employees

EMPLOYEE NAME	CalPERS ID	COMMENTS/ DETAILS
		Employee of the Santa Clara Family Health Foundation was erroneously enrolled in CalPERS membership as an Authority employee.
Kathleen King Retiring		Employee of the Santa Clara Family Health Foundation was erroneously enrolled in CalPERS membership as an Authority employee.
		Employee of the Santa Clara Family Health Foundation was erroneously enrolled in CalPERS membership as an Authority employee.

Finding 3: Employee hired through a temp agency worked more than 1,000 hours and was not enrolled

EMPLOYEE NAME	CalPERS ID	COMMENTS/ DETAILS
	N/A	Eligibility was met on January 10, 2010, but the employee was not enrolled into CalPERS membership.

Finding 4: Retired annuitant with excessive rate of pay

EMPLOYEE NAME	CalPERS ID	FISCAL YEAR	COMMENTS/ DETAILS
		2008/2009 and 2010/2011	Retired annuitant rate of pay exceeded the retiree's pay prior to retirement.

California Public Employees' Retirement System
Customer Account Services Division
P.O. Box 942709
Sacramento, CA 94229-2709
TTY for Speech and Hearing Impaired: (916) 795-3240
(888) CalPERS (225-7377) FAX (916) 795-3005

October 15, 2013

Ms. Sharon Valdez
Vice President, Human Resources
Santa Clara County Health Authority
[redacted]

Dear Ms. Valdez;

This letter is regarding the recent Public Agency Review of the Santa Clara County Health Authority (the Authority) by the CalPERS Office of Audit Services (OFAS) for the period of July 1, 2008 to June 30, 2012. Finding #2 of the OFAS review found that the Authority is incorrectly reporting employees of an affiliated entity, Santa Clara Family Health Foundation Inc. (the Foundation), to CalPERS as employees of the Authority.

On July 18, 2013, we held a conference call with David Cameron and Sharon Valdez. The Authority provided background information on the Authority and the Foundation, and CalPERS requested additional information regarding the Foundation. On September 6, 2013, the Authority submitted the Foundation Bylaws and a list of current and former Foundation Board members, and their relationship to the Authority.

CalPERS has reviewed the information, and our determination is that the Foundation is a separate entity, apart from the Authority. Foundation employees are not employees of the Authority, and the Authority should not be reporting employees of the Foundation to CalPERS.

Membership in CalPERS is pursuant to the Public Employees' Retirement Law (PERL). Government Code 20028(b) of the PERL defines an employee: "(b) Any person in the employ of a contracting agency." Government Code Section 20125 provides: "The Board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system."

The common law employment test is used by the courts and the CalPERS Board of Administration to determine "employee" or "independent contractor" status under the Public Employees' Retirement Law (PERL)[1]. 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 desired result.

[1] See *Metropolitan Water Dist. v. Superior Court (Cargill)* (2004) 32 Cal.4th 491 which held the terms "independent contractor" and "employee" of a contracting agency must be defined with reference to California common law.

The Authority responded to OFAS regarding Finding #2 of the review on June 13, 2013. The Authority's response states "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."

CalPERS first reviewed the Foundation Bylaws to determine if the Authority exercised common law control over the Foundation, or its employees. The Foundation Bylaws create for the Foundation, a Board of Directors, and Section 7 of the Bylaws describe the powers of the Board. Section 7.1 states that "...the business and affairs of the Corporation shall be managed and all corporate powers shall be exercised under the direction of the Board of Directors." Section 7.1 further states "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."

Section 7.2(a) of the Bylaws further provides that the Board shall have the power to: "(a) Appoint and remove, at the pleasure of the Board, 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 of the Bylaws further elaborates; "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."

The Bylaws show the Foundation is a separate entity, and not a department or subsidiary under the control of the Authority. This is also supported by Note 5 of an Independent Auditors Report by Moss Adams, which notes that no more than 49% of the Foundation's board of directors may be management or directors of the Authority, and also notes that the Authority does not have financial accountability for the Foundation.

CalPERS also reviewed the Administrative Services Agreement between the Authority and the Foundation. The Agreement shows that the Foundation's Board exercised its authority, granted in Section 7.1 of the Bylaws, to delegate day-to-day operations of the Foundation. 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 SCFHP nor the Foundation, nor the employees, servants, agents or

representatives of either, shall be considered the employee, servant, agent or representative of the other."

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.

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). The Authority should immediately cease reporting Foundation employees to CalPERS as employees of the Authority.

The Foundation may submit a request to see if it would qualify to contract directly with CalPERS for retirement benefits. The Foundation should contact Irene Ho of the CalPERS Contract Unit at (916) 795-0422 to initiate the new agency contract process within two weeks of the date of this letter. Failure to do so will result in immediate steps to reverse service credit, and cancel health benefits for all employees who were discrepantly enrolled into CalPERS.

You have the right to appeal the decision referred to in this letter if you desire to do so, by filing a written appeal with CalPERS, in Sacramento, within **thirty days of the date of the mailing of this letter,** in accordance with Government Code section 20134 and sections 555-555.4, Title 2, California Code of Regulations. An appeal, if filed, should set forth the factual basis and legal authorities for such appeal. A copy of the applicable statute and Code of Regulations sections are included for your reference. If you file an appeal, the Legal Office will contact you and handle all requests for information.

Your appeal will be set for hearing with the Office of Administrative Hearings (OAH). The assigned CalPERS attorney will contact you to coordinate a hearing date. Depending on the current caseload of the OAH and the assigned attorney, the hearing date may be set several months after the case is opened. The OAH will typically offer its earliest available hearing date that meets the schedule of both parties.

If you choose not to be represented by an attorney, the assigned CalPERS lawyer will be in direct communication with you during the appeal process. If you do hire an attorney, please let CalPERS know immediately so our attorney can work directly with him or her.

Enclosed is an informational brochure on the General Procedures for Administrative Hearings.

After the hearing is completed, the Administrative Law Judge will issue a Proposed Decision in approximately 30 days. The CalPERS Board of Administration will then make a determination whether to accept or reject that Proposed Decision. If the Board rejects the Proposed Decision, they will hold a Full Board Hearing in order to review the entire hearing record again before finalizing their decision.

Your appeal should be mailed to the following address:

Karen DeFrank, Assistant Division Chief
Customer Account Services Division
California Public Employees' Retirement System
P.O. Box 942709
Sacramento, CA 94229-2709

CalPERS remains committed to assisting our members in all matters related to their retirement within the statutory authority available to us. Should you have any further questions regarding this matter please do not hesitate to contact Christina Rollins, Manager of the Membership Analysis and Design Unit, at (916) 795-2999.

Sincerely,

EMILY PEREZ de FLORES, Manager
Membership Reporting Section
Customer Account Services Division

WYLIE, MCBRIDE, PLATTEN & RENNER
A Law Corporation

2125 CANOAS GARDEN AVENUE, SUITE 120
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November 8, 2013

Karen DeFrank, Assistant Division Chief
Customer Account Services Division
California Public Employees' Retirement System
P.O. Box 942709
Sacramento, CA 94229-2709

Re: Kathleen King and Santa Clara County Health Authority

Dear Ms. DeFrank,

This letter is written in appeal to a letter dated October 15, 2013 written by your office to Sharon Valdez in which you found employees of the Santa Clara Family Health Foundation (the Foundation) ineligible to be reported to CalPERS as Santa Clara County Health Authority (the Authority) employees. For the following reasons, employees of the Foundation, including, but not limited to, Mr. Craig Walsh, Ms. Emily Hennessy, Ms. Melodie Gellman, Ms. Ann Wade, Mr. Ernesto Villalobos, and Ms. Kathleen M. King, should be eligible to be reported as employees of the Authority to CalPERS. All the above mentioned Foundation employees have existing funds in CalPERS accounts. We request a hearing with the Office of Administrative Hearings on this appeal.

Here is a brief statement of the legal and factual basis for the appeal.

1. <u>Restatement (Second) of Agency § 220 is controlling in determining employee status.</u>

Courts have "previously quoted with approval these provisions of the Restatement and characterized control as 'the principal test' [citation] in defining employment for purposes of the Unemployment Insurance Code." *Metro. Water Dist. of S. California v. Superior Court*, 32 Cal. 4th 491, 512 (2004). Restatement (Second) of Agency § 220 subsection (1) provides:

> *"A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."*

Restatement (Second) of Agency § 220 subsection (2) further sets forth the relevant factors in determining employee status:

> ***"(a) the extent of control which, by the agreement, the master may exercise over the details of the work; [...] (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; [...] (f) the length of time for which the person is employed; [...] (i) whether or not the parties believe they are creating the relation of master and servant."***

The court in *Metro. Water, supra,* reasoned that Restatement (Second) of Agency § 220 is controlling "in defining employment for purposes of the Unemployment Insurance Code." *Metro. Water, supra,* 32 Cal.4th at 512. Even the Legislature conceded that "for purposes of that code, the common law control test governs employee status in *all* cases *except* that of leased workers." *Id.* (emphasis added).

Here, the Authority extended job offer letters to each of the Foundation employees. Each offer letter had General Duties expressly laid out for Foundation employees in a clear "exercise over the details of the work," Restatement (Second) of Agency § 220 subs. (2), subd. (a)., and "done under the direction of the employer." *Id.* at subd. (c). In the years that followed, the Authority had final decision-making powers regarding any matters of hiring, firing, merit changes, work rules, and all other terms and conditions of employment. For example, any employee issues were managed through the Human Resources department of the Authority, employee retirement and health benefits were all through the Authority, and compliance requirements were regularly submitted to the Authority.

All Foundation employees worked under the conditions set forth by the Authority and reported to Authority management. For example, during the entire period of Foundation Executive Director Kathleen King's employment from March 2008 on, contributions to CalPERS were made on Ms. King's account by the Authority and by Ms. King. "[T]he length of time for which [she] is employed", is a significant factor in identifying her employment status. *Id.* at subd. (f). Admirably, the Foundation has raised over $132 million since its inception, all of which was raised on behalf of the Authority and its lines of business. For example, a federal appropriation that the Foundation received similarly was given in full to the Authority.

Lastly, as detailed below, all parties "believe[d] they [were] creating the relation of master and servant." *Id.* at subd. (i). The control the Authority delegated over the Foundation and the mutual understanding of all parties involved created an undoubted employment relationship. In sum; the Foundation's employees' relationship with the Authority clearly designates them as "a [class] employed to perform services in the affairs of [the Authority] and who with respect to the physical conduct in the performance of the

services is subject to the [Authority's] control or right to control." Restatement (Second) of Agency § 220 subs. (1).

2. Intent of the parties is also controlling in determining employee status.

The *Metro. Water* court found that in determining employee status, the intent of the parties can be controlling because of the expressed understanding of all parties. A similar understanding can be found here with all parties agreeing that Foundation employees would become employees of the Authority by way of the offer letters and other subsequent representations by the Authority. In analyzing the "leased" worker relationship where a third-party service provider contracted workers with a public utility, the *Metro. Water* court stated, "the role of the court should not be to judge the propriety of a labor relationship otherwise permitted by law, but to effectuate the intent of the parties, particularly one they all knowingly and intentionally accept." *Metro. Water, supra,* 32 Cal.4th at 515. Despite the lack of third-party involvement here, a similar intent and understanding amongst the parties exists.

For example, Ms. King received a job offer directly from the Authority in a letter dated March 25, 2008. The letter begins, "[o]n behalf of the Santa Clara County Health Authority, dba Santa Clara Family Health Plan, I am pleased to offer you employment in the Santa Clara Family Health Foundation." The letter is on a Santa Clara Family Health Plan letterhead with a disclaimer on the bottom providing, "[t]he Santa Clara County Health Authority is an At Will Employer." Ms. King's signature is visibly present on the Acceptance of Employment portion of the letter. Every other offer letter extended to Foundation employees was similar to that of Ms. King's. As a result, the expressed offer of employment by the Authority and the Foundation employees' subsequent acceptance provide a clear indication of the intent of parties on both sides for Foundation employees to be considered employees of the Authority.

The Authority also represented employees of the Foundation as their own on multiple occasions. For example, Emily Hennessy, amongst others, was a Foundation employee who performed services for the benefit and on behalf of the Authority. Specifically, Ms. Hennessy was employed as a Financial Analyst for the Foundation but was asked by the current Authority CEO, Leona Butler, to perform services for the Authority. All Foundation employees were further designated amongst "All Staff" when receiving emails from the Authority. Lastly, the Authority permitted the Foundation to utilize its resources as the Foundation's own, specifically, the Authority's attorney and web designer.

For all the foregoing reasons, employees of the Foundation including Kathleen M. King, Craig Walsh, Emily Hennessy, Melodie Gellman, Ann Wade, and Ernesto Villalobos should be eligible to be reported as employees of the Authority to CalPERS.

Accordingly, please have the Legal Office at CalPERS contact me immediately to discuss this appeal.

Very truly yours,

CHRISTOPHER E. PLATTEN

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give to Andria

November 13, 2013

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VIA EXPRESS MAIL AND U.S. MAIL

Karen DeFrank, Assistant Division Chief
Customer Account Services Division
California Public Employees' Retirement System
P.O. Box 942709
Sacramento, CA 94229-2709

Re: Appeal from October 15, 2013 Public Agency Review for Period of July 1, 2008 to June 30, 2012

Dear Ms. DeFrank:

On behalf of the Santa Clara County Health Authority ("the Authority"), we hereby appeal from the October 15, 2013 letter from Emily Perez de Flores to Sharon Valdez, Vice President, Human Resources of the Authority, finding that certain employees of the Santa Clara Family Health Foundation were incorrectly reported as employees of the Authority.

The reasons for the Authority's appeal are set forth in the appeal submitted by employees of the Santa Clara Family Health Foundation, by letter dated November 8, 2013 from Christopher Platten of Wylie, McBride, Platten & Renner. The Authority joins in the appeal filed by those persons. For your convenience, a copy of that November 8, 2013 appeal is attached.

The Authority requests a hearing with the Office of Administrative Hearings. Please coordinate the hearing date with me at the above address and telephone number.

Sincerely,

Alison Hightower

Alison S. Hightower

ASH/cg
Enclosure
cc: Ms. Elizabeth Darrow
Christopher Platten, Esq.

Firmwide:124148601.1 057898.1000

MOSS-ADAMS LLP
Certified Public Accountants | Business Consultants

INDEPENDENT AUDITOR'S REPORT

The Board of Directors of
Santa Clara County Health Authority
dba Santa Clara Family Health Plan and
Santa Clara Community Health Authority

We have audited the accompanying combined balance sheets of Santa Clara County Health Authority dba Santa Clara Family Health Plan and Santa Clara Community Health Authority (collectively the "Health Authority"), as of June 30, 2010 and 2009, and the related combined statements of revenues, expenses, changes in net assets, and cash flows for the years then ended. These combined financial statements are the responsibility of the Health Authority's management. Our responsibility is to express an opinion on these combined financial statements based on our audits.

We conducted our audits in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform our audits to obtain reasonable assurance about whether the combined financial statements are free of material misstatement. An audit includes consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the Health Authority's internal control over financial reporting. Accordingly, we express no such opinion. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the combined financial statements, assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall combined financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the above referenced combined financial statements present fairly, in all material respects, the combined financial position of Santa Clara County Health Authority dba Santa Clara Family Health Plan and Santa Clara Community Health Authority as of June 30, 2010 and 2009, and the changes in their net assets and their cash flows for the years then ended in conformity with accounting principles generally accepted in the United States of America.

The accompanying Management's Discussion and Analysis on pages 1 through 4 is not a required part of the basic combined financial statements, but is supplementary information required by the Governmental Accounting Standards Board. This supplementary information is the responsibility of the Health Authority's management. We have applied certain limited procedures, which consisted principally of inquiries of management regarding the methods of measurement and presentation of the supplementary information. However, we did not audit such information, and we do not express an opinion on it.

Moss Adams LLP

San Francisco, California
October 28, 2010

NOTE 1 – ORGANIZATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

History and organization – The Santa Clara County Health Authority (dba Santa Clara Family Health Plan) and Santa Clara Community Health Authority (collectively the "Health Authority"), was established August 1, 1995 by the Santa Clara County Board of Supervisors pursuant to Section 14087.38 of the Welfare and Institutions Code. The Health Authority was created for the purpose of developing the Local Initiative Plan (the "Plan") for the expansion of Medi-Cal Managed Care, as presently regulated by the California State Department of Managed Health Care. The Medi-Cal Managed Care Program offers no-cost health coverage to children, birth through age 18, pregnant women, and other low-income adults. During 1997, the Health Authority obtained licensure under the Knox-Keene Health Care Service Plan Act of 1975.

The Santa Clara Community Health Authority Joint Powers Authority (the "JPA") is a licensed health maintenance organization that operates in the County. The County's Board of Supervisors established the JPA in October 2005 in accordance with State of California Welfare and Institutions Code (the "Code") Section 14087.54. This legislation provides that the JPA is a public entity, separate and apart from the County, and is not considered to be an agency, division, or department of the County. Further, the JPA is not governed by, nor is it subject to, the Charter of the County and is not subject to the County's policies or operational rules. The JPA received its Knox-Keene license on May 11, 2006, and commenced operations on June 1, 2006.

Santa Clara County Health Authority has contracted with the California Department of Health Care Services ("DHCS") to receive funding to provide health care services to the Medi-Cal eligible County residents who are enrolled as members of the Health Authority ("DHCS contract"). The current DHCS contract effective through December 31, 2010 is still under negotiation. Management does not anticipate any significant issues in the renewal of the contract. The DHCS contract specifies capitation rates which may be adjusted annually. DHCS revenue is paid monthly and is based upon contracted rates and actual Medi-Cal enrollment. Santa Clara County Health Authority, in turn, has contracted with hospitals and physicians whereby capitation payments (agreed-upon monthly payments per member) and fee-for-service payments are made in return for contracted health care services for its members. Provider contracts are typically evergreen and contain annual rate change provisions, termination clauses, and risk-sharing provisions.

During fiscal year 2000, the Health Authority contracted with the California Managed Risk Medical Insurance Board's ("MRMIB") Healthy Families Program ("Healthy Families") to provide health care benefits to certain children whose families do not qualify for Medi-Cal and cannot afford to purchase insurance out-of-pocket. The current contract continues through June 30, 2011 and was assigned to the JPA effective June 1, 2006.

During fiscal year 2001, the Health Authority launched its Healthy Kids program to provide medical coverage to children of parents not otherwise eligible for either the Medi-Cal or Healthy Families programs. This program was assigned to the JPA effective June 1, 2006.

In January 2007, the Health Authority began operating a Medicare Special Needs Plan called Healthy Generations. The program ended operations as of December 31, 2009. During its three years of operations, the program was oriented towards a population in Santa Clara County who qualified for both the Medicare and Medi-Cal programs. The program provided coverage to eligible individuals under Part C and Part D of the Medicare program, plus coverage for eligible individuals under the Health Authority's existing contract with DHCS for Medi-Cal. The Health Authority originally received approval to offer the program effective January 1, 2007 under a contract with the Center for Medicare and Medicaid Services ("CMS"). In order to receive CMS approval, the Health Authority provided a certified actuarial report on the underlying revenue and cost assumptions.

In July 2005, DHCS implemented the Quality Improvement Fee ("QIF") program. This program imposed a 5.5% assessment on the Health Authority's revenue. DHCS used such assessments to obtain matching federal funds, of which 50% was returned to plans in the form of a Medi-Cal rate increase. In order to minimize the impact on the Health Authority, the JPA was created. Effective June 1, 2006, all non Medi-Cal programs were assigned to the JPA, thus reducing the resulting assessment levied on the Health Authority. Effective on September 30, 2009, DHCS terminated the QIF program.

In November 2009, DHCS implemented the Assembly Bill No. 1422 ("AB 1422") or Managed Care Organization ("MCO") premium tax. This program imposes an assessment on the Health Authority's revenue. DHCS uses this assessment to obtain matching federal funds, which is used to sustain enrollment in the Healthy Families program. This program was implemented retroactive to January 1, 2009 and continues through December 31, 2010.

NOTE 3 – CAPITAL ASSETS

Capital asset activity for the fiscal year ended June 30, 2010 was as follows:

	Beginning Balance	Increases	Decreases	Ending Balance
Furniture and equipment	$ 5,517,573	$ 66,749	$ -	$ 5,584,322
Leasehold improvements	241,501	16,076	-	257,577
Total capital assets	5,759,074	82,825	-	5,841,899
Less accumulated depreciation and amortization for				
Furniture and equipment	3,196,913	776,520	-	3,973,433
Leasehold improvements	218,324	21,707	-	240,031
Total accumulated depreciation	3,415,237	798,227	-	4,213,464
Capital assets, net	$ 2,343,837	$ (715,402)	$ -	$ 1,628,435

Capital asset activity for the fiscal year ended June 30, 2009 was as follows:

	Beginning Balance	Increases	Decreases	Ending Balance
Furniture and equipment	$ 5,047,182	$ 470,391	$ -	$ 5,517,573
Leasehold improvements	241,501	-	-	241,501
Total capital assets	5,288,683	470,391	-	5,759,074
Less accumulated depreciation and amortization for				
Furniture and equipment	2,380,171	816,742	-	3,196,913
Leasehold improvements	198,910	19,414	-	218,324
Total accumulated depreciation	2,579,081	836,156	-	3,415,237
Capital assets, net	$ 2,709,602	$ (365,765)	$ -	$ 2,343,837

NOTE 4 – RELATED PARTY TRANSACTIONS

The Health Authority has a capitated contractual relationship with Valley Health Plan, a wholly owned health plan of the County of Santa Clara, to provide medical services to certain Health Authority enrollees. Because of continuing retroactive enrollment adjustments and capitation payment adjustments, periodic adjustments are recorded to reflect the outstanding amounts receivable from or payable to Valley Health Plan. The Health Authority accrued capitation payments in the amounts of $909,199 and $1,811,154 for the Valley Health Plan for the years ended June 30, 2010 and 2009, respectively, not including incentive payments.

The Health Authority also has provider incentive and medical case management arrangements with Valley Health Plan. The Health Authority accrued provider incentive and medical case management payments in the amount of $7,949,581 for the Valley Health Plan for the year ended June 30, 2010. No provider incentive and medical case management payments were accrued for the Valley Health Plan as of June 30, 2009.

NOTE 5 – SANTA CLARA FAMILY HEALTH FOUNDATION

During June 2000, the Health Authority formed the Santa Clara Family Health Foundation (the "Foundation") which is dedicated to the support of medically related community service programs. The bylaws of the Foundation require that no more than 49% of the Foundation's board of directors, as appointed by Santa Clara County, may be management or directors of the Health Authority, as defined. Because the Health Authority does not have financial accountability for the Foundation, it has not been included in the Health Authority's accompanying combined financial statements. The Health Authority accrued a receivable due from the Foundation of $470,798 and $26,762 at June 30, 2010 and 2009, respectively for Healthy Kids premiums and certain administrative costs incurred.

NOTE 6 – INCURRED BUT NOT REPORTED CLAIMS ("IBNR") MEDICAL CLAIMS PAYABLE

Activity for IBNR medical claims payable as of June 30 is summarized as follows:

	2010	2009
Beginning balance	$ 21,131,691	$ 14,674,037
Incurred - current year	50,262,033	70,206,907
Paid related to		
Current year	45,933,511	48,302,164
Prior year	14,054,067	15,447,089
Total paid	59,987,578	63,749,253
Ending balance	$ 11,406,146	$ 21,131,691

As a result of changes between actual payments for medical services and estimated amounts accrued in previous years, claims expenses decreased in 2010, reflecting lower-than-anticipated claims expenses for 2009. Management believes the decrease is largely a result of lower-than-anticipated healthcare expenditures related to the announcement of the termination of the Healthy Generations line of business effective December 31, 2009.

NOTE 7 – OPERATING LEASE OBLIGATIONS

The Health Authority leases its facilities under an operating lease that expires in June 2013. The Health Authority also has various equipment leases expiring in various years through April 2014. Monthly rent expenses of $110,770 under these leases are included in the future minimum lease commitments schedule.

Future minimum lease payments as of June 30, 2010 consist of the following:

Years ending June 30,	
2011	$ 1,118,398
2012	978,323
2013	1,003,499
2014	70,578
Total minimum lease payments	$ 3,170,798

NOTE 8 – EMPLOYEE BENEFIT PLANS

The Health Authority has a defined contribution plan and a deferred compensation plan under Sections 401(a) and 457, respectively, of the Internal Revenue Code (the "Code"). Under the 401(a) Plan, participants must contribute 6% of their gross compensation and the Health Authority must contribute 3% of the participants' gross compensation. The Health Authority contributes greater than 3% of gross compensation for senior staff level employees. In return, senior staff level employees contribute less than 6% of their gross compensation. Contributions by the Health Authority totaled $226,420 and $496,520 for the years ended June 30, 2010 and 2009, respectively. Under the 457 Plan, participants may contribute up to the maximum contribution allowed under the Code and the Health Authority makes no matching contributions.

On April 4, 1999, the Health Authority elected not to continue participation in Social Security and began participation in the California Public Employees' Retirement System ("CalPERS"). CalPERS is an agent multiple-employer defined benefit retirement plan that acts as a common investment and administrative agent for various local and state governmental agencies within the state. CalPERS provides retirement, disability, and death benefits based on the employees' years of service, age, and final compensation. Employees vest after 5 years of CalPERS-credited service and they are eligible for service retirement if they are 55 years old or over and have at least 5 years of CalPERS-credited service.

These provisions and all other requirements are established by state statute. CalPERS issues a stand-alone report that is available upon request at the following address: CalPERS Actuarial & Employer Service Division; P.O. Box 942709; Sacramento, California 94229-2709.

Participating employees are required to contribute 7.00% of their monthly salaries to CalPERS. The Health Authority deducts the contributions from employees' wages and remits to CalPERS on their behalf and for their account. The Health Authority is required to contribute an actuarially determined rate. The employer contribution rates were 8.58% and 8.91% of annual covered payroll for the years ended June 30, 2010 and 2009, respectively. The contribution requirements of the plan members and the Health Authority are established and may be amended by CalPERS. With the election to participate in CalPERS, participation in Social Security is discontinued, and contributions to CalPERS are in lieu of contributions to Social Security.

The Health Authority's annual pension cost for CalPERS was equal to the Health Authority's required and actual contributions which were determined as part of the actuarial valuation using the entry age normal actuarial cost method. The actuarial assumptions included: (a) 7.75% investment rate of return (net of administrative expenses); (b) projected salary increases of 3.25% - 14.45% varying by duration of services, age and type of employment, and (c) 3.25% payroll growth. Both (a) and (b) included an inflation component of 3%. These assumptions are expected to change in the subsequent valuation. The Health Authority's annual pension cost was $1,013,423 for the year ended June 30, 2010. This was equal to the annual required contribution.

Historical trend information:

Fiscal Year Ended	Annual Pension Cost (APC)	Percentage of APC Contributed	Net Pension Obligation
June 30, 2008	$ 736,061	100%	$ -
June 30, 2009	$ 795,427	100%	$ -
June 30, 2010	$ 1,013,423	100%	$ -

BYLAWS
OF
SANTA CLARA FAMILY HEALTH FOUNDATION, INC.
A California Nonprofit Public Benefit Corporation

SECTION 1. NAME

The name of this corporation is Santa Clara Family Health Foundation, Inc.

SECTION 2. OFFICES

The principal office of the Corporation in the State of California shall be located in Santa Clara County. The Corporation may have such other offices, either within or without the State of California, as the Board of Directors may determine or as the affairs of the corporation may require from time to time.

SECTION 3. GENERAL AND SPECIFIC PURPOSES

This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for public purposes.

The specific purposes of this corporation are: to promote, coordinate and support quality health care services for the residents of Santa Clara County, with an emphasis on addressing the problems of delivery of publicly assisted medical care in the County; and to demonstrate ways of promoting quality care and medical cost efficiency within the meaning of the Internal Revenue Code section 501(c)(3) (or the corresponding provision of any future United States internal revenue law) and the Revenue and Taxation Code section 23701(d) (or the corresponding provision of any future California revenue and tax law). Despite any other provision in these articles, the corporation shall not, except to an insubstantial degree, engage in any activities or exercise any powers that do not further the purposes of this corporation, and the corporation shall not carry on any other activities not permitted to be carried on by (a) a corporation exempt from federal income tax under Internal Revenue Code section 501(c)(3) (or the corresponding provision of any future United States internal revenue law) and the Revenue and Taxation Code section 23701(d) (or the corresponding provision of any future California revenue and tax law), or (b) a corporation, contributions to which are the deductible under Internal Revenue Code section 170(c)(2) (or the corresponding provision of any future United States internal revenue law).

SECTION 4. CONSTRUCTION AND DEFINITIONS

Unless the context requires otherwise, the general provisions, rules of construction, and definitions in the California Nonprofit Corporation Law shall govern the construction of these bylaws. Without limiting the generality of the preceding sentence, the masculine gender includes the feminine and neuter, the singular includes the plural, the plural includes the singular, and the term "person" includes both a legal entity and a natural person.

SECTION 5. DEDICATION OF ASSETS

This corporation's assets are irrevocably dedicated to public benefit purposes. No part of the net earnings, properties, or assets of the corporation, on dissolution or otherwise, shall inure to the benefit of any private person or individual, or to any director or officer of the corporation. On liquidation or dissolution, all properties and assets remaining after payment, or provision for payment, of all debts and liabilities of the corporation shall be distributed to a nonprofit fund, foundation or corporation that is organized and operated exclusively for charitable purposes and that has established its exempt status under Internal Revenue Code section 501(c)(3) (or corresponding provisions of any future federal internal revenue law) and ... Revenue and Taxation Code section 23701d (or the corresponding section of any future C...fornia revenue and tax law), or to or for the benefit of the Santa Clara County Health Authority, or the County of Santa Clara, for a public purpose.

SECTION 6. CORPORATION WITHOUT MEMBERS

This corporation shall have no voting members within the meaning of the California Nonprofit Public Benefit Corporation Law. The corporation's Board may, in its discretion, admit individuals to one or more classes of nonvoting members; the class or classes shall have such rights and obligations as the Board finds appropriate.

SECTION 7. BOARD OF DIRECTORS

7.1 General Powers. Subject to any limitations in the Articles of Incorporation or these Bylaws and to any provision of the California Nonprofit Public Benefit Corporation Code requiring authorization or approval for a particular action, the business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the Board of Directors. The Board shall have all rights, powers, duties, immunities and privileges granted to California Nonprofit Public Benefit Corporations either directly or implicitly in the California Nonprofit Public Benefit Corporations Law (Title 1, Di ...on 2, Parts 1 and 2 of the Corporations Code). 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.

7.2 Specific Powers. Without prejudice to the general powers set forth above, but subject to the same limitations, the Board shall have the power to:

(a) Appoint and remove, at the pleasure of the Board, 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.

(b) Change the principal office or the principal business office in California from one location to another; cause the corporation to be qualified to conduct its activities in any other state, territory, dependency, or county; conduct its activities in or outside California; and designate a place in or outside California for holding any meetings.

(c) Borrow money and incur indebtedness on the corporation's behalf and cause to be executed and delivered for the corporation's purposes, in the corporate name, promissory notes, bonds, debentures, deeds of trust, mortgages, pledges, hypothecations, and other evidences of debt and securities.

7.3 Number and Tenure. The authorized maximum number of directors shall be seventeen (17), with the initial number of director positions authorized at six (6) as designated by the Incorporator. One director shall be the Chief Executive Officer of the Santa C[illegible] County Health Authority. Additional directors may be appointed by the Board from time to time. The term of office of each elected director shall be three (3) years, unless otherwise provided for at the time of the director's appointment. Open positions on the existing Board shall be filled prior to adding newly created Board positions, in order to continue staggered terms.

7.4 Restriction on Interested Persons. No later than December 31, 2002, no more than 49 percent of the directors serving on the Board may be "interested directors." As set forth in California Corporations Code Section 5233, any director who has a material financial interest in a transaction to which the corporation is or may be a party, other than certain types of transactions set forth as exceptions in such section, is deemed to be an "interested director" for purposes of such section. An interested director shall also be (a) any person compensated for service rendered to it within the previous 12 months, whether as a full-time or part-time employee, independent contractor, or otherwise, excluding any reasonable compensation paid to such person as a director; and (b) any brother, sister, ancestor, descendant, spouse, brother-in-law, sister-in-law, son-in-law, daughter-in-law, mother-in-law, or father-in-law of such person. However, any violation of this Section 7.4 shall not affect the validity or enforcement of transactions entered into by the corporation.

If at any time any Director believes that he or she is or may be an interested director as to any transaction, such Director is directed to immediately disclose such fact to the Board. In addition, the Corporation may, not more often than quarterly, and shall, not less than annually, distribute to each Director a form requesting such reasonable information as the corporation shall determine, as to actual and/or potential conflicts of interest of such Director with the Corporation. Each such Director shall promptly, accurately, and fully complete each such form and return it to the Corporation. No Director may vote as a Director on any matter as

to which he or she is an interested party or which constitutes a conflict of interest between such Director and the Corporation.

7.5 **Regular Meetings.** A regular annual meeting of the Board on a date specified by the Board shall be held without other notice than this Bylaw for the purpose of electing officers and transacting any other business. The Board may provide for other regular meetings from time to time. Such other regular meetings may be held without call or notice if the meeting time and place of the meetings are provided for in the Bylaws or fixed by the Board. Notice of a meeting need not be given to any director who provides: a waiver of notice or consent to holding the meeting; or an approval of the minutes thereof in writing, whether before or after the meeting; or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to that director. These waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

7.6 **Special Meetings.** Special meetings of the Board may be called at any time by the President, any Vice President, the Secretary, or by any two (2) directors.

7.7 **Notice of Special Meetings.** Notice of the time and place of all special meetings of the Board shall be delivered personally or by telephone or electronic means to each d or at least forty-eight (48) hours before the meeting, or sent to each director by first-class mail, postage prepaid, at least four (4) days before the meeting. Such notice need not specify the purpose of the meeting. The articles and bylaws may not dispense with notice of a special meeting.

7.8 **Place of Meetings.** Meetings of the Board may be held at any place within or outside the State of California, which has been designated in the notice, or if not stated in the notice or there is no notice, at the principal executive office of the corporation.

7.9 **Participation by Telephone.** Members of the Board may participate in a meeting through use of conference telephone or similar communications equipment, so long as all members participating in such meeting can hear one another. Participation in a meeting pursuant to this Section 7.9 constitutes presence in person at such meeting.

7.10 **Quorum.** A majority of the directors then in office shall constitute a quorum for the transaction of business except adjournment. Every action taken or decision made by a majority of the directors present at a duly held meeting at which a quorum is present shall be an act of the Board, subject to the more stringent provisions of the California Nonprofit Public Benefit Corporation Law, including, without limitation, those provisions relating to (a)approval of contracts or transactions in which a director has a direct or indirect material financial interest, b) approval of certain transactions between corporations having common directorships, (c) re n of an appointments to committees of the Board, and (d) indemnification of directors. A ee g at which a quorum is initially present may continue to transact business, despite the withdrawal of some directors, if any action taken or decision made is approved by at least a majority of the required quorum for that meeting.

7.11 Action at Meeting. Every act done or decision made by a majority of the directors present at a meeting duly held at which a quorum is present is the act of the Board, subject to the provisions of California Nonprofit Public Benefit Corporation Law. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for such meeting.

7.12 Waiver of Notice. The transactions of any meeting of the Board, however called and noticed or wherever held, are as valid as though had at a meeting duly held after regular call and notice if a quorum is present and if, either before or after the meeting, each of the directors not present signs a written waiver of notice, a consent to holding the meeting, or an approval of the minutes thereof. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meeting. Notice of any meeting of the Board need not be given to any director who attends the meeting without protesting prior thereto or at its commencement the lack of notice to such director.

7.13 Action Without Meeting. Any action that the Board is required or permitted to take may be taken without a meeting if 100% of the Board members consent to the action in writing, which may include, but not limited to, a response by electronic mail; provided, however, that the consent of any director who has a material financial interest in a transaction to which the corporation is a party and who is an "interested director" as defined in California Nonprofit Public Benefit Corporation Law section 5233 shall not be required for approval of that transaction. Such action by written consent shall have the same force and effect as any other validly approved action of the Board. All such consents shall be filed with the minutes of the proceedings of the Board.

7.14 Vacancies. A vacancy or vacancies on the Board shall occur in the event of a (a) the death or resignation of any director, (b) the declaration by resolution of the Board of a vacancy in the office of a director who has been convicted of a felony, declared of unsound mind by a court order, or found by final order or judgment of any court to have breached a duty under California Nonprofit Public Benefit Corporation Law, Chapter 2, Article 3; or (c) the declaration by resolution of the Board of a vacancy in the office of a director due to the director's lack of participation at meetings of the Board and other activities of the Corporation..

7.15 Resignation. Except as provided below, any director may resign by giving written notice to the chairman of the Board, if any, or to the president or the secretary of the Board. The resignation shall be effective upon acceptance by the Board. The Board may elect a successor to take office as of the date when the resignation becomes effective.

7.16 Vacancies Filled by Board. Except for a vacancy created by the removal of a director by the members, vacancies on the Board may be filled by approval of the Board or, the number of directors then in office is less than a quorum, by (1) the unanimous written consent of the directors then in office, (2) the affirmative vote of a majority of the directors then office at a meeting held according to notice or waivers of notice complying with California Nonprofit Public Benefit Corporation Law section 5211, or (3) a sole remaining director.

7.17 **Compensation.** Directors as such shall not receive any stated salaries for their services. 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.

7.18 **No Vacancy on Reduction of Number of Directors.** Any reduction of the authorized number of directors shall not result in any director's being removed before his or her term of office expires.

7.19 **Standing Committees of the Board and Ad Hoc Committees.**

(a) The Board shall establish, by resolution adopted by a majority of the directors present at a meeting at which a quorum was present, Standing Committees of the Board. The Standing Committees shall include but may not be limited to those listed below, which shall provide advice and counsel to the Corporation on matters within the jurisdiction of the Committee. Each Standing Committee shall have a sufficient number of members to provide the necessary expertise and to work effectively as a group. Each Committee shall have a chairperson appointed by the Chairperson of the Governing Body. The Chairperson of the Governing Body may recommend Committee members for Board approval, however the Board shall, by resolution, appoint the Committee members, as required by law.

i. **Governance and Nominating Committee.** The Governance and Nominating Committee shall be composed entirely of directors then in office. The role of the Governance and Nominating Committee shall be to oversee how the Board is functioning and to nominate candidates for Board membership. The Governance Committee shall also perform the duties of a bylaws committee, evaluating the bylaws and proposing revisions as needed. Proposed amendments to the bylaws shall not be submitted to the Board for consideration unless approved by a majority vote of the Governance Committee.

ii. **Finance Committee.** The role of the Finance Committee shall be to oversee the financial affairs of the Foundation. At least one member of the Finance Committee shall be an accountant.

iii. **Audit Committee.** The role of the Audit Committee shall be to oversee the financial reporting and disclosure process. The audit committee may include non-board members. The audit committee may include members of the finance committee, but the chair of the audit committee may not be a member of the finance committee, and the members of the finance committee must constitute less than half of the audit committee. The audit committee may not include any member of the staff, including top management, or any person who has a material financial interest in any entity doing business with the corporation. The Audit Committee must use an independent certified public accountant to perform the audit of the Corporation.

iv. **Compensation Committee.** The role of the Compensation Committee shall be to oversee the compensation program of the Foundation. The Compensation Committee may include one or more members of the Finance Committee. The Board may establish, by resolution adopted by a majority of the directors present at a meeting at which a

quorum was present, such other Ad Hoc Committees as the directors may deem appropriate. An Ad Hoc Committee shall have such authority as is provided in the Board resolution and not prohibited by law.

SECTION 8. OFFICERS

8.1 **Officers.** The officers of the corporation shall be: an Executive Director, who shall serve as President and Chief Executive Officer of the corporation; a Chairperson; a Chief Financial Officer, who shall be the treasurer of the corporation; a Secretary; a Chair-Elect; an Immediate Past Chair; and such other officers as may be elected in accordance with the provisions of this Section 8. The Board may elect or appoint such other officers, including one or more Vice Chairpersons, one or more Assistant Secretaries, and one or more Assistant Treasurers (the number thereof to be determined by the Board), as it shall deem desirable, such officers to have the authority and perform the duties prescribed, from time to time, by the Board. Except as provided in Section 8.9, any two or more offices may be held by the same person.

8.2 **Election and Term of Office.** The officers of the corporation shall be elected annually by the Board at the regular annual meeting of the Board. If the election of officers shall not be held at such meeting, such election shall be held as soon thereafter as conveniently may be. New offices may be created and filled at any meeting of the Board. Each officer shall hold office until his or her successor shall have been duly elected and shall have qualified. The term of office of the chair shall be two years unless the Board votes to extend the term. The term of office of the officers shall be two consecutive two-year terms. The Board may change term limits for officers on the recommendation of the Governance Committee and approval of a majority of the members of the Board then present who constitute a quorum.

8.3 **Removal.** Without prejudice to the rights of any officer under an employment contract, the Board may remove any officer with or without cause. An officer who was not chosen by the Board may be removed by any other officer on whom the Board confers the power of removal.

8.4 **Vacancies.** A vacancy in any office because of death, resignation, removal, disqualification or otherwise, may be filled by the Board for the unexpired portion of the term.

8.5 **Executive Director.** The Executive Director shall be the President and Chief Executive Officer of the corporation. The Executive Director shall be appointed by, report to and serve at the pleasure of the Board of Directors. The Executive Director shall be responsible for the general supervision, direction and control of the business and affairs of the corporation, subject to Board oversight and policies. The Executive Director shall have the general powers and duties of management usually vested in the office of the President and Chief Executive Officer of a corporation. The Executive Director shall have the necessary authority and responsibility to operate the corporation and all of its activities and departments on a day-to-day basis, subject to the direction of the Board or its delegates, any policies issued by the Board or its delegates and subject to applicable law.

8.6 **Chairperson.** The Chairperson shall preside at all meetings of the Board. The Chairperson may sign, with the Secretary or any other proper officer of the corporation authorized by the Board, any deeds, mortgages, bonds, contracts, or other instruments which the Board has authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the Board or by these bylaws or by statute to some other officer or agent of the corporation; and in general the Chairperson shall perform all duties incident to the office of Chairperson and such other duties as may be prescribed by the Board from time to time.

8.7 **Chief Financial Officer.** The Chief Financial Officer ("CFO") may also act as the Treasurer of the corporation. He or she shall keep and maintain, or cause to be kept and maintained, adequate and correct books and accounts of the corporation's properties and transactions. The CFO shall send or cause to be given to the directors such financial statements and reports as are required to be given by law, by these Bylaws, or by the Board. The books of account shall be open to inspection by any director at all reasonable times.

The CFO shall (i) deposit, or cause to be deposited, all money and other valuables in the name and to the credit of the corporation with such depositories as the Board may designate; (ii) disburse the corporation's funds as the Board may order; (iii) render to the Chairperson and/or the Board, when requested, an account of all transactions in his or her capacity as Chief Financial Officer and of the financial condition of the corporation; and (iv) h such other powers and perform such other duties as the Board or the Bylaws may require.

If required by the Board, the CFO shall give the corporation a bond in the amount and with the surety or sureties specified by the Board for faithful performance of the duties of the office and for restoration to the corporation of all of its books, papers, vouchers, money, and other property of every kind in the possession or under the control of the chief financial officer on his or her death, resignation, retirement or removal from office.

8.8 **Secretary.** The Secretary shall keep the minutes of the meetings of the shareholders and of the Board in one or more books provided for that purpose; see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law; be custodian of the corporate records and of the seal of the corporation and see that the seal of the corporation is affixed to all documents, the execution of which on behalf of the corporation under its seal is duly authorized in accordance with the provisions of these Bylaws; and in general perform all duties incident to the office of Secretary and such other duties as from time to time may be assigned to the Secretary by the President or by the Board.

8.9 **Chair-Elect.** The Chair-Elect shall be elected during the second year of he present Chairperson's term. The role of the Chair-Elect shall be to undertake to study the osition of Chair in preparation of assuming this role.

8.10 **Immediate Past Chair.** The Immediate Past Chair shall serve as an iv. to the Chair and the President.

8.11 **Vice Chairperson.** In the absence of the Chairperson, or in the event of s or her inability or refusal to act, the Vice Chairperson, if there is one, or in the event there be

more than one Vice Chairperson, the Vice Chairpersons in the order of their election, shall perform the duties of the Chairperson, and when so acting, shall have all the powers of and be subject to all the restrictions upon the Chairperson. Any Vice Chairperson shall perform such other duties as from time to time may be assigned to him or her by the Chairperson or by the Board.

8.12 **Duplication of Office Holders.** Any number of offices may be held by the same person, except that neither the Secretary nor the CFO may serve concurrently as President.

SECTION 9. SEAL

The seal of the corporation shall consist of the name of the corporation, the state of its incorporation and the year of its incorporation.

SECTION 10. FISCAL YEAR

The fiscal year of the corporation shall begin on the first day of July and end on the last day of June in each year.

SECTION 11. BOOKS AND RECORDS

11.1 **Maintenance.** The corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of the Board and committees having any of the authority of the Board. All books and records of the corporation may be inspected by the directors for any proper purpose at any reasonable time.

11.2 **Annual Report.**

(a) Financial statements shall be prepared not later than 120 days after he close of the fiscal year. The financial statements shall contain, in appropriate detail, a alance sheet as of the end of the fiscal year, an income statement for the fiscal year and a tatement of changes in financial position for the fiscal year.

(b) Any report furnished to directors of the corporation which includes ie financial statements prescribed by paragraph (a) shall be accompanied by any report thereon f independent accountants, or, if there is no such report, the certificate of an authorized officer f the corporation that such statements were prepared without audit from the books and records f th orporation.

(c) A report including the financial statements prescribed by paragraph) shall be furnished annually to all directors of the corporation.

SECTION 12. CONTRACTS, CHECKS, DEPOSITS AND FUNDS

12.1 **Contracts.** The Board of Directors may authorize any officer or officers, agent or agents of the corporation, in addition to the officers so authorized by these Bylaws, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the corporation, and such authority may be general or confined to specific instances.

12.2 **Checks, Drafts, etc.** All checks, drafts or orders for the payment of money, notes or other evidences of indebtedness issued in the name of the corporation, shall be signed by such officer or officers, agent or agents of the corporation and in such manner as shall from time to time be determined by resolution of the Board. In the absence of such determination by the Board, such instruments shall be signed by the CFO. Any check over $10,000 shall also require a second authorized signature.

12.3 **Deposits.** All funds of the corporation shall be deposited from time to time to the credit of the corporation in such banks, trust companies or other depositories as the Board may select.

12.4 **Contracts With Directors and Officers.** No director of this corporation n[illegible]ny other corporation, firm, association, or other entity in which one or more of this corporation's directors have a material financial interest, shall be interested, directly or indirectly, in any contract or transaction, unless (a) the material facts regarding that director's financial interest in such contract or transaction or regarding such common directorship, officership, or financial interest are fully disclosed in good faith and noted in the minutes, or are known to all members of the Board prior to the Board's consideration of such contract or transaction; (b) such contract or transaction is authorized in good faith by a majority of the Board by a vote sufficient for that purpose without counting the votes of the interested directors; (c) before authorizing or approving the transaction, the Board considers and in good faith decides after reasonable investigation that the corporation could not obtain a more advantageous arrangement with reasonable effort under the circumstances; and (d) the corporation for its own benefit enters into the transaction, which is fair and reasonable to the corporation at the time the transaction is entered into.

This Section 12.4 does not apply to a transaction that is part of an educational or charitable program of this corporation if it (a) is approved or authorized by the corporation in good faith and without unjustified favoritism and (b) results in a benefit to one or more directors or their families because they are in the class of persons intended to be benefited by the educational or charitable program of this corporation.

SECTION 13. INDEMNIFICATION

To the fullest extent permitted by law, this corporation shall indemnify its directors, officers, employees, and other persons described in California Nonprofit Public Benefit Corporation Law section 5238(a), including persons formerly occupying any such positions, against all expenses, judgments, fines, settlements, and the amounts actually and reasonably

incurred by them in connection with any "proceeding," as that term is used in that section, and including an action by or in the right of the corporation, by reason of the fact that the person is or was a person described in that section. "Expenses," as used in this bylaw, shall have the same meaning as in that section of the California Nonprofit Public Benefit Corporation Law.

On written request to the Board by any person seeking indemnification under California Nonprofit Public Benefit Corporation Law section 5238(b) or section 5238(c), the Board shall promptly decide under California Nonprofit Public Benefit Corporation Law section 5238(e) whether the applicable standard of conduct set forth in California Nonprofit Public Benefit Corporation Law section 5238(b) or section 5238(c) has been met and, if so, the Board shall authorized indemnification.

To the fullest extent permitted by law and except as otherwise determined by the Board in a specific instance, expenses incurred by a person seeking indemnification under these Bylaws in defending any proceeding covered shall be advanced by the corporation before final disposition of the proceeding, on receipt by the corporation of an undertaking by or on behalf of that person that the advance will be repaid unless it is ultimately found that the person is entitled to be indemnified by the corporation for those expenses.

SECTION 14. INSURANCE

This corporation shall have the right, and shall use its best efforts, to purchase and maintain insurance to the fullest extent permitted by law on behalf of its officers, directors, employees, and other agents, to cover any liability asserted against or incurred by any officer, director, employee, or agent in such capacity or arising from the officer's, director's, employee's, or agent's status as such.

SECTION 15. AMENDMENTS TO BYLAWS

These Bylaws may be altered, amended or repealed and new bylaws may be adopted by a majority of the directors present at any regular meeting or at any special meeting. A copy of the amendment must be distributed to the Board no later than two days before the amendment is adopted.

SECTION 16. LOANS TO DIRECTORS AND OFFICERS

This corporation shall not lend any money or property to or guarantee the obligation of any director or officer without the approval of the California Attorney General; provided, however, that the corporation may advance money to a director or officer of the corporation for expenses reasonably anticipated to be incurred in the performance of his or her duties if that director or officer would be entitled to reimbursement for such expenses by the corporation.

CERTIFICATE OF SECRETARY

I, the undersigned, hereby certify:

1. That I am the duly elected, acting and qualified Secretary of Santa Clara Family Health Foundation, Inc., a California corporation; and

2. That the foregoing bylaws constitute the bylaws of such corporation as duly adopted by action of the Incorporator of the corporation duly taken on the __ day of _____, 20__.

IN WITNESS WHEREOF, I have hereunto subscribed my name this __ day of _____, 20__.

_____

Secretary

ADMINISTRATIVE SERVICES AGREEMENT
BETWEEN
SANTA CLARA FAMILY HEALTH FOUNDATION, INC.
AND
SANTA CLARA COUNTY HEALTH AUTHORITY, dba SANTA CLARA FAMILY HEALTH PLAN

THIS ADMINISTRATIVE SERVICES AGREEMENT, effective the first day of June 2002 (hereinafter referred to as the "Agreement"), by and between Santa Clara Family Health Foundation, Inc. ("the Foundation"), a California corporation and The Santa Clara County Health Authority, dba Santa Clara Family Health Plan ("SCFHP"), a public agency.

RECITALS

WHEREAS, the Foundation and SCFHP desire to entered into an Administrative Services Agreement to memorialize the arrangement that the parties have been working under, in which SCFHP provides specified administrative services ("Administrative Services") to the Foundation;

WHEREAS, applicable law requires contracts between the Foundation and SCFHP to be in writing and to contain certain mandatory provisions;

NOW THEREFORE, in consideration of the covenants and conditions set forth below, and in exchange for other valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

1. SCFHP shall provide the Administrative Services described in Schedule "A" to Foundation in accordance with generally accepted standards of performance.

2. SCFHP shall comply with all applicable laws, regulations, and regulatory agency instructions, in performing Administrative Services under the Agreement on behalf of the Foundation. SCFHP understands, and will ensure that its subcontractors and/or other delegates (any of which are hereinafter referred to as "Delegates"), if any, understand, that the same law that would apply to the Foundation if the Foundation performed the Administrative Services described in Schedule "A" of the Agreement, also applies to SCFHP and its Delegates, if any, when they perform any of those services.

3. In exchange for Administrative Services provided in accordance with the terms of this Agreement, the Foundation will pay SCFHP at the rates and in accordance with the terms set forth in Schedule B hereof.

4. SCFHP shall grant, and require its Delegates to grant, the California Attorney General, the Franchise Tax Board and any other applicable State or Federal Agency, and/or their respective designees, the right to inspect any pertinent information related to the Agreement (including but not limited to all books, records, papers, contracts, documentation, facilities and equipment). The right to inspect extends during the contract term, for at least six years from the final date of the contract period, and, in certain instances described in applicable law or regulations, for periods in excess of six years after termination of the Agreement, as appropriate. SCFHP shall submit, and require its Delegates to submit, to the Foundation any reports or disclosure information

as are reasonably required by the Foundation to comply with the law governing the Foundation and any contracts or grants applicable to the Foundation. A list of the reports and disclosures that SCFHP must routinely submit to the Foundation is included in the listing of Administrative Services at Schedule "A" of the Agreement.

5. On 60 days prior written notice, the Foundation may terminate this Agreement, and/or terminate any delegation of a duty hereunder and/or any delegation of a duty by SCFHP to a Delegate, if services are not performed satisfactorily or if requisite reporting and disclosure requirements are not fully met in a timely manner. Either party may terminate this Agreement without cause on 120 days prior written notice to the other party. Either party may terminate this Agreement with cause on 60 days prior written notice to the other party. Notices may be hand delivered, sent by U.S. Mail or sent by facsimile to the other party at the following address. Notice addresses may be changed by the respective parties by sending written notice of change of address to the other party.

Notice addresses of the parties:

Executive Director
Santa Clara Family Health Foundation, Inc.
[redacted]

President and Chief Executive Officer
Santa Clara Family Health Plan
[redacted]

6. The Foundation is responsible for monitoring and overseeing the performance of SCFHP and any of its Delegates. The Foundation has the authority and responsibility to: implement, maintain and enforce the Foundation policies governing SCFHP's duties under the Agreement or any delegation under it, and/or governing the Foundation's oversight role; conduct audits, inspections and/or investigations in order to oversee SCFHP's performance (and/or that of its Delegates) of the duties described in the Agreement or any delegation amendment hereto, if any; require SCFHP to take corrective action if the Foundation or an applicable federal or state regulator determines that corrective action is needed with regard to any duty under the Agreement; and/or terminate the Agreement or revoke the delegation of any duty, if SCFHP fails to meet the Foundation standards in the performance of that duty. SCFHP and its Delegates (if any) shall cooperate with the Foundation in the Foundation's oversight efforts and shall take corrective action as the Foundation determines necessary to comply with applicable laws, regulations, and/or the Foundation policies governing the duties of SCFHP or the Foundation's oversight of those duties. SCFHP understands that the Attorney General or other regulatory authority may hold the Foundation responsible if services are not performed in accordance with applicable law. Except as otherwise provided in this Agreement, the Foundation shall have a right to indemnification (including but not limited to court costs and reasonable attorneys fees) from SCFHP if the Foundation is sanctioned or otherwise penalized as a result solely of SCFHP's negligent or intentionally wrongful performance or nonperformance of its duties under this Agreement.

7. All subcontracts, delegation agreements or other arrangements entered into by SCFHP, to secure services for the Foundation's plans, must be consistent with this Agreement, applicable law governing the Foundation, and the Foundation policies and procedures.

8. SCFHP and the Foundation are separate and independent entities. The relationship between SCFHP and PN is purely contractual. Neither SCFHP nor the Foundation, nor the employees, servants, agents or representatives of either, shall be considered the employee, servant, agent or representative of the other. SCFHP and the County of Santa Clara are separate legal entities. The County and its officials, employees and agents are not responsible for the obligations of SCFHP. The parties to this Agreement do not intend to, nor do they have the power to, confer on any person or entity any rights or remedies against the County or any officials, employees or agents of the County.

9. To the extent that any provision of the Agreement is inconsistent with applicable law, regulations or regulatory requirements the inconsistent portion of the provision is hereby deleted. Any provision required by law to be in the Agreement shall be binding on the parties as if set forth herein in full; however, the parties shall enter into a written amendment of the Agreement as soon as possible after any such provision is identified, to expressly include the provision. The parties may amend the Agreement by mutual consent to replace any deleted or superseded provision or portion of a provision with a new provision that is consistent with applicable law, requirements and contracts.

10. IF ANY CLAIM, DISPUTE, OR CONTROVERSY (ANY OR ALL OF WHICH SHALL BE HEREINAFTER REFERRED TO AS DISPUTE) SHALL ARISE BETWEEN THE PARTIES HERETO WITH RESPECT TO THE MAKING, CONSTRUCTION, TERMS, OR INTERPRETATION OF THIS AGREEMENT OR ANY BREACH THEREOF, OR THE RIGHTS OR OBLIGATIONS OF ANY PARTY HERETO, THE DISPUTE SHALL, IN LIEU OF COURT ACTION, BE SUBMITTED TO MANDATORY, BINDING ARBITRATION UPON WRITTEN DEMAND BY EITHER PARTY IN ACCORDANCE WITH THE ARBITRATION POLICIES AND PROCEDURES OF SCFHP. EXCEPT AS PROVIDED IN PARAGRAPH O, BELOW, THE ARBITRATOR SHALL HAVE THE POWER TO GRANT ALL LEGAL AND EQUITABLE REMEDIES AND AWARD COMPENSATORY DAMAGES PROVIDED BY STATE LAW, EXCEPT THAT PUNITIVE OR EXEMPLARY DAMAGES MAY NOT BE AWARDED AND NO MULTIPLE OF ACTUAL DAMAGES PURSUANT TO ANY STATUTE OR REGULATION MAY BE AWARDED.

11. Except as otherwise provided herein, the effective date of this Agreement shall be the first day of June 2002.

12. This Agreement constitutes the entire understanding of the parties on this subject matter and supersedes any and all written or oral agreements, representations, or understandings on the same subject matter. The recitals, schedules, exhibits and amendments are integral parts of this Agreement and are incorporated herein by reference. No modifications, discharges, amendments, or alterations shall be effective unless signed by both parties, except as otherwise provided elsewhere in this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date(s) indicated below.

SANTA CLARA FAMILY HEALTH FOUNDATION, INC.:

Leona M. Butler
Leona M. Butler, President

June 6, 2002
Date

SANTA CLARA COUNTY HEALTH AUTHORITY:

Tax ID #

Ron Wojtaszek, Treasurer/CFO

6/6/02
Date

SCHEDULE A
ADMINISTRATIVE SERVICES

During the term of this Agreement, SCFHP shall provide the following administrative, financial and technical services, related supplies and office space (hereinafter referred to individually and collectively as "Administrative Services") to the Foundation in accordance with the terms of this Agreement:

1) Administrative and management services, as necessary, including but not limited to advise and assistance in the management of day to day operations of the Foundation, strategic planning, human resource services, record keeping and regulatory reporting. SCFHP shall also assist in public relations relating to fundraising, to the extent that it can do so without registering as a commercial fundraiser with the Attorney General's office or, if it becomes registered, to the extent agreed to by the parties in an amendment to this Agreement.

2) Financial services, including but not necessarily limited to, budgeting, accounting, preparing financial reports, payroll, preparing tax forms, auditing, advising on investments, advising on and overseeing the Foundation's program for fraud prevention and identification, arranging coverage under SCFHP's general liability and certain other insurance programs, as may be from time to time agreed upon by the parties, and providing and/or arranging for employee benefit administration services.

3) Computer and Communications Services, including: systems and operations support; hosting services; infrastructure management; the use of desktops, network, servers, printers, application software, and operating system software; the use of telephone systems; connectivity comparable to that offered by SCFHP to its own staff performing similar functions; new versions of software, as they are obtained by SCFHP; and help desk and training services. The Foundation understands and agrees that it receives no ownership right, license or title in any of the software, software applications or hardware provided by SCFHP or its third party vendors. All rights, title and interest in such software, software applications and hardware remain with SCFHP or its third party vendors. Unless caused by the gross negligence of SCFHP, SCFHP shall not be responsible for any failure to meet generally accepted standards regarding software, software applications or hardware; nor shall SCFHP be liable for any loss of data in transmission, improper transmission or failure of any transmission of data on behalf of the Foundation. SCFHP makes no warranties, express or implied, and specifically disclaims any implied warranties of fitness and merchantability as to any hardware, software or software applications and/or communications services provided to Foundation under this Agreement.

4) Regulatory and compliance services, including legal analyses of applicable laws, compliance monitoring, assistance in contracting, and assistance in the preparation of regulatory reports, such as Attorney General Annual Registration Report # RRF-1. The services of outside counsel, as needed, will be arranged by SCFHP.

5) Public affairs support, to the extent that the support does not require registration as a commercial fundraiser with the Attorney General's Office.

6) Office supplies, printing, postage and other supplies as reasonably needed by the Foundation.

7) The use of five hundred square feet of office space and utilities in SCFHP's leased premises. The Foundation shall comply with all applicable terms of SCFHP's master lease for the building and any sublease that may be entered into between the parties.

SCHEDULE B
REIMBURSEMENT SCHEDULE

In exchange for Administrative Services provided in accordance with the terms of this Agreement, the Foundation shall pay SCFHP on a monthly basis the following administrative fees, rents and expenses, not to exceed the fair market value of the Administrative Services. Notwithstanding the above, SCFHP may waive or delay payment of any of the following fees, rents and/or expenses during the initial development phase of the Foundation's operations or subsequently. A waiver or postponement of reimbursement by SCFHP, or forbearance by SCFHP to collect any amount owed, in whole or in part during any month, shall not be construed as an agreement to waive or postpone payment, or forbear collection of amounts due, for any subsequent month.

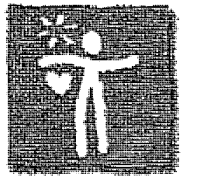
1) For administrative, management, financial and compliance services, a pro rata share SCFHP's cost for staff salaries, plus associated general and administrative expenses incurred, including but not limited to, the Foundation's pro rata share of any insurance policies providing coverage to the Foundation.

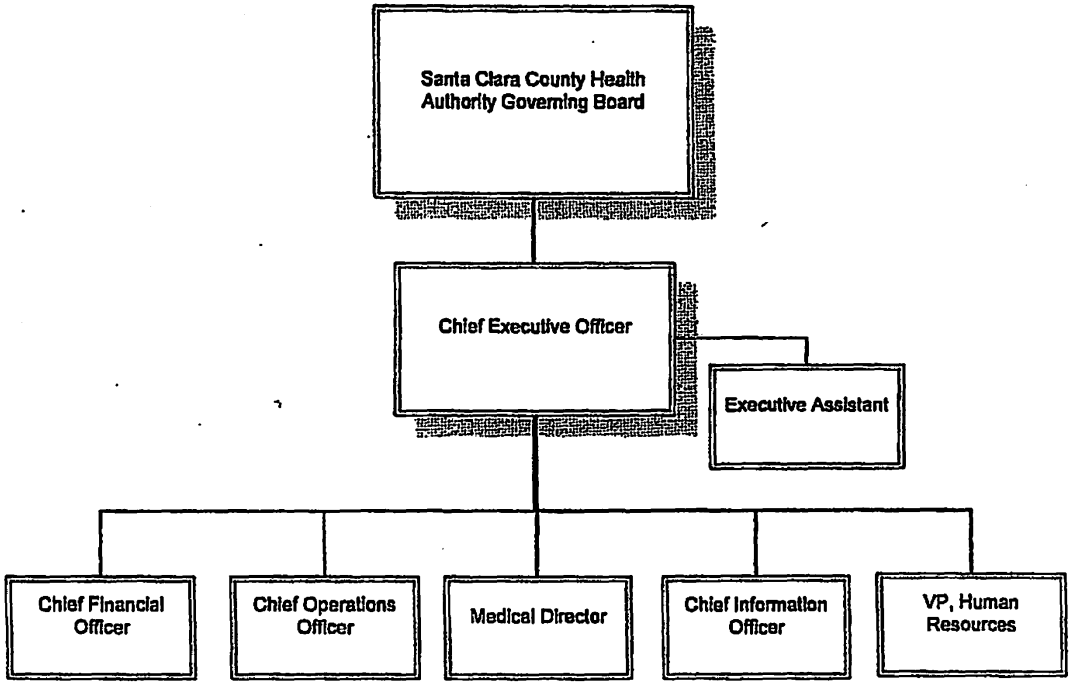
2) For office supplies, printing supplies, postage and other incidental supplies, SCFHP's actual cost.

3) For office space, the Foundation's pro rata share of the rent for the building, plus a pro rata share of any utilities, and any direct and indirect expenses paid by SCFHP under the master lease.

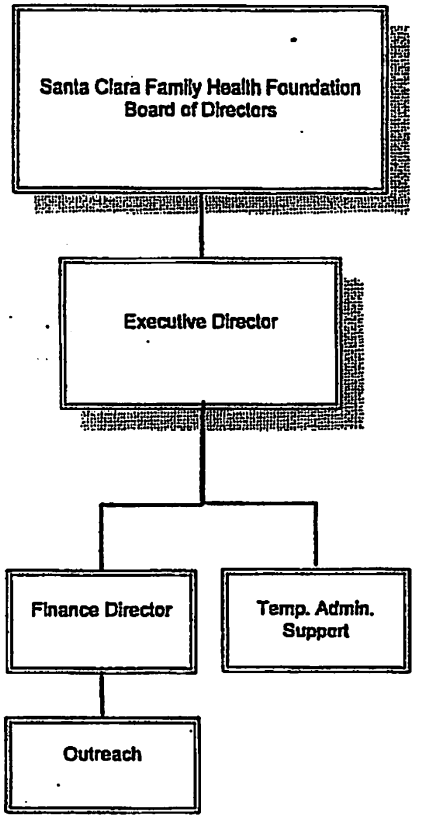
4) For information management and communications services, software, software applications and hardware, the Foundation's pro rata share of SCFHP's actual costs for staff salaries, general and administrative expenses, acquisition of software and hardware, and other associated costs.

SANTA CLARA FAMILY HEALTH PLAN





Santa Clara Family Health Foundation



www.scfhp.com

Santa Clara
Family Health Plan

The Spirit of Care

March 25, 2008

Ms. Kathleen M. King

Dear Kathleen,

On behalf of the Santa Clara County Health Authority, dba Santa Clara Family Health Plan, I am pleased to offer you employment in the Santa Clara Family Health Foundation. This offer is contingent upon the satisfactory completion of a reference check. The details regarding your position are outlined below. If you have any questions about the information that follows, please contact me at (408) 874-1875.

Title:	Foundation Executive Director
Salary:	Starting at $11,333.33 per month, equivalent to $136,000.00 per year. The Board of Directors of the Santa Clara Family Health Foundation established the Introductory Period for this position to be nine (9) months to determine that your performance meets expectations for the position.
Classification:	Exempt
General Duties:	Responsible for all fundraising efforts and the strategic, programmatic and financial management of the organization. In collaboration with the Chief Executive Officer of Santa Clara Family Health Plan, the Executive Director is accountable for leading and directing all of the Foundation's fundraising efforts.
Start Date:	March 31, 2008
Report To:	Board of Directors of the Santa Clara Family Health Foundation
Hours:	Standard Operating Hours are Monday to Friday, 8am – 5pm
Benefits:	Effective on May 01, 2008, which is the first of the month after 30 days of employment. This position is eligible for all benefits afforded members of Senior Staff.

On your first day of work, please bring with you proof of your legal right to live and work in this country. We are required by federal law to examine documentation of your employment eligibility within three business days after you begin work.

Please indicate your acceptance of our offer by signing this letter and returning it to us in the enclosed envelope. Keep a copy for your records and let me know if you have any questions.

We look forward to working with you.

Barbara L. Elsea
Human Resources Director

Acceptance of Employment:

Kathleen M. King

Kathleen M. King

Date

The Santa Clara County Health Authority is an At Will Employer. All offers of employment are made on an At Will basis and do not imply an employment contract.

[redacted]

Barbara Elsea

From: Ronald Cohn [redacted]
Sent: Monday, November 26, 2007 3:45 PM
To: Barbara Elsea
Subject: Re: Reminder that I need written authorization from you to put in the Wage Change we discussed for Emily Hennessy

Barbara,
Sorry I meant to get this off to you over the weekend but forgot.

As we discussed last week, 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. The amount we discussed last week is correct and it will be effective with the pay period which began on Nov. 4. I understand that will require a supplimental payment for the periods completed.

Thank you for taking care of this.

Ronald Cohn
Chair of the Board

Barbara Elsea [redacted]> wrote:

> Ron,
>
> If you can get that off to me today, we'll be on time for the payroll cutoff tomorrow. It's not necessary to provide exact $$$ so your reply by email will be sufficient.
>
> Thanks!
>
> Barbara

Source: Sharon D. Valdez, Vice President, Human Resources, Authority

Purpose: To document the correspondence from the Authority with regard to individuals found to be working for the Foundation.

Conclusion: Authority statement indicates that Emily, Thong le and Kathleen were Foundation employees. Alvarez was on temporary loan.

RE: Response to Audit -1-11-2012 - Message (HTML)

Message | Developer

Ignore | Junk | Delete | Reply | Reply All | Forward | Meeting | IM | More | Absence 2012 | Team E-mail | Reply & Delete | To Manager | Done | Create New | Move | Rules | OneNote | Actions | Mark Unread | Categorize | Follow Up | Translate | Find | Related | Select | Zoom

Delete | Respond | Quick Steps | Move | Tags | Editing | Zoom

From: Sharon Valdez [redacted]
To: Alzaeem, Adeeb
Cc:
Subject: RE: Response to Audit -1-11-2012
Sent: Mon 1/14/2013 2:41 PM
Message | Employment Relationship Questionnaire for Emily Hennessy.zip (101 KB)

Adeeb,

The purpose of this email message is to follow up on our telephone conversation of Thursday, January 10 and to respond to your email messages of January 11.

Mr. Alvarez was employed by the Health Authority for the period of 09/21/98 through 10/14/11. During this period of time, he reported to the following Health Authority employees:

- 09/98 – 06/05 –Maria Avelar, Community Relations Director
- 06/05 – 07/09 – Janis Tyre, Vice President of External Affairs
- 07/09 – 05/10 – Robin Tolle, Sr. Director of Marketing, Outreach, Acquisition and Retention

Mr. Alvarez provided temporary services to the Foundation beginning March 2010 through October 14, 2011 to assist with their outreach activities. However, during this period of time he remained on the Health Authorities' payroll.

Kathleen King, Thong Le and Emily Hennessy were hired to provide support exclusively for the Foundation. The completed Employment Relationship Questionnaire and offer letter to Emily Hennessy are attached per your request. The password will be sent by separate email message.

Thank you.

Sharon D. Valdez
Vice President, Human Resources
Santa Clara Family Health Plan
[redacted]

EMPLOYMENT RELATIONSHIP QUESTIONNAIRE

QUESTIONNAIRE TO DETERMINE THE EMPLOYMENT RELATIONSHIP FOR SERVICES PERFORMED

The term "Agency" refers to: Santa Clara County Health Authority

Name of agency

"Individual" refers to: Emily Hennessy
Name of occupant of position

1. (a) By whom was the individual appointed? Offer letter was prepared and signed by Santa Clara County Health Authority Human Resources Director, Barbara Elsea. See attached offer letter dated April 7, 2005.

   (b) What date did the individual first occupy the position? May 9, 2005.

2. Describe the services performed by the individual. Finance Director for the Foundation.

3. How many other individuals perform the same services for your agency? None. Ms. Hennessy provides services on behalf of the Foundation.

4. Are services performed under written or oral agreement? Written. See attached offer letter dated April 7, 2005.

   (a) If written, please attach a copy of the agreement.
   (b) If oral agreement, attach a statement of terms of the agreement

5. Where are the services performed (individual's office, home, agency premises, etc.)? On the agency's premises part time and at home part time.

6. Does the individual have his/her own place of business? Unknown.

7. For services in question, does the individual operate under his/her own name or agency's name? Ms. Hennessy operates under the name of Santa Clara Family Health Foundation.

8. Does he/she offer the same type of services performed for your agency to the general public or other agencies? Ms. Hennessy does not perform services on behalf of the Health Authority. Her services are performed on behalf of the Foundation.

9. Does the agency have first call on his/her time or services? See #8, above. Ms. Hennessy provides services on behalf of the Foundation.

10. Is he/she required to attend agency meetings? No.

11. Who determines the hours of work? The Foundation's Executive Director, Kathleen King.

12. Is the individual required to do the work personally? Unknown.

13. Does your agency have the right to control how the individual does his/her work? No.

14. Is his/her work directed, supervised or reviewed by anyone? The Foundation's Executive Director, Kathleen King.

    (a) What particulars of the job are supervised? Unknown.

    (b) What is the name and title of supervisor? Kathleen King, Foundation Executive Director.

15. Please check facilities or equipment furnished by your agency the individual uses in performing services for the agency.

X Office	_____ Machinery
X Office Equipment	_____ Tools
_____ Stationery	_____ None
_____ Automobile	_____ Other

16. Does the individual render a statement or invoice for services rendered? N/A

17. Please check basis on which he/she is paid.

X Flat salary _____ Hourly rate _____Lump sum

_____Other, please explain

18. Check the following benefits the individual received:

X withholding for income tax	X Workers Compensation
X Retirement	X Vacation (PTO)

X Other, please explain medical, dental, vision, life, ltd, flex

19. Can the agency terminate the relationship at any time? Yes.

20. Can the individual quit at any time without liability to the agency? Yes.

21. Was this position previously held by an agency employee? What was the title of the position? – No.

22. Does the agency bear any or all the cost of any fidelity insurance or any bonds required by law for the position? Yes.

23. Does the agency bear the cost to defend and indemnify the Contractor/retired annuitant to the extent required by law? Yes.

24. Does the individual have the authority to sign documents on behalf of the Agency? What title does the individual utilize as signatory authority? No.

25. In your opinion, is the individual an employee of the agency? Yes.

If not explain: _____

_____

_____

COMMENTS:

Prepared by Sharon Valdez Title Vice President of Human Resources

Name of Agency Santa Clara County Health Authority Date: January 14, 2013

32 Cal.4th 491
Supreme Court of California

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, Petitioner,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
Dewayne Cargill et al., Real Parties in Interest.
CDI Corporation et al., Petitioners,
v.
The Superior Court of Los Angeles County, Respondent;
Dewayne Cargill et al., Real Parties in Interest.

No. S102371.
Feb. 26, 2004.

Synopsis

Background: Workers who were technically hired by private service providers that contracted with metropolitan water district brought class-action petition for writ of mandate against district and claim of unfair business practices against providers, seeking benefits under California Public Employees Retirement System (CalPERS). CalPERS intervened as plaintiff. The Superior Court, Los Angeles County, No. BC191881, Charles W. McCoy, Jr., J., found on summary adjudication motion that district was required to enroll all common-law employees in CalPERS. District and providers sought writ review. The Court of Appeal denied writ petition. The Supreme Court granted petitions for review brought by district and providers, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Werdegar, J., held that:

[1] provision concerning employment by a contracting agency in Public Employees' Retirement Law (PERL) incorporated common law test for employment, and

[2] nothing supported reading into PERL an exception to mandatory enrollment in CalPERS for employees hired through private labor suppliers.

Judgment of Court of Appeal affirmed.

Brown, J., filed a concurring and dissenting opinion.

Baxter, J., filed a dissenting opinion in which Chin, J., joined.

Opinion, 112 Cal.Rptr.2d 513, superseded.

Attorneys and Law Firms

***858 *495 **967 Jeffrey Kightlinger, Herny Torres, Jr.; Horvitz & Levy, Mitchell C. Tilner, Encino, Jon B. Eisenberg, Oakland; Bergman, Wedner & Dacey, Bergman & Dacey, Gregory M. Bergman, Los Angeles, Daphne M. Anneet and Mark W. Waterman for Petitioner Metropolitan Water District of Southern California.

Katten Muchin Zavis, Stuart M. Richter, Los Angeles, Patricia T. Craigie, Beverly Hills, Justin M. Goldstein, Los Angeles, Donna L. Dutcher, Beverly Hills; Freedman & Stone and Marc D. Freedman for Petitioners CDI Corporation, Comforce Technical Services, Inc., H.L. Yoh Company, ***859 MD Technical Services Company, Peak Technical Services, Superior Technical Resources, Inc., Superior Staffing Services, Inc., Volt Information Sciences, Inc., Volt Management Corp. and Westaff (USA), Inc.

Musick, Peeler & Garrett and Charles E. Slyngstad, Los Angeles, for County Sanitation District No. 2 of Los Angeles County as Amicus Curiae on behalf of Petitioner Metropolitan Water District of Southern California.

McMurchie, Weill, Lenahan, Lee, Slater & Pearse and David W. McMurchie, Sacramento, for California Special Districts Association as Amicus Curiae on behalf of Petitioner Metropolitan Water District of Southern California.

Jones, Day, Reavis & Pogue, Elwood Lui, Philip E. Cook, Los Angeles; Brown, Winfield & Canzoneri, Nowland C. Hong and Scott H. Campbell, Los Angeles, for County of Los Angeles as Amici Curiae on behalf of Petitioner Metropolitan Water District of Southern California.

**968 Myers, Nave, Riback, Silver & Wilson, San Leandro, Arthur A. Hartinger, Mountin View, and Terry Roemer

for 148 California Cities, Counties, Towns and Districts, California Association of Sanitary Agencies, State Water Contractors, California Special Districts Association and Association of California Water Agencies as Amici Curiae on behalf of Petitioner Metropolitan Water District of Southern California.

No appearance for Respondent.

Cochran–Bond Connon & Ben–Zvi, Cochran–Bond Law Offices, Walter Cochran–Bond; Law Offices of William M. Samoska, Los Angeles, Samoska & Friedman, Judy A. Friedman and Richard N. Grey, Encino, for Real Parties in Interest Dewayne Cargill, Anvar Alfi, John Sims, Paul Broussard, Joseph Zadikany, Sun Son, Charlotte Manuel, Steven Minor and Lisa Nelson.

Steptoe & Johnson, Edward Gregory, Sheri T. Cheung, Jason Levin, Los Angeles, and Bennett Cooper for Real Party in Interest California Public Employees' Retirement System.

*496 Rothner, Segall & Greenstone, Anthony R. Segall, Glenn Rothner and Julia Harumi Mass, Pasadena, for American Federation of State, County and Municipal Employees Union, Local 1902, AFL–CIO as Amicus Curiae on behalf of Real Parties in Interest.

Bendich, Stobaugh & Strong, David F. Stobaugh, Stephen K. Strong, Brian J. Waid; Krakow & Kaplan, Rottman• Kaplan, Steven J. Kaplan, Los Angeles; Kalisch, Cotugno & Rust, Lee Cotugno and Mark Kalisch, Beverly Hills, as Amici Curiae on behalf of Real Parties in Interest.

Carol R. Golubock and Patricia C. Howard for Service Employees International Union, AFL–CIO, CLC as Amicus Curiae on behalf of Real Parties in Interest.

Davis, Cowell & Bowe, Richard G. McCracken and Andrew J. Kahn, San Francisco, for Union of American Physicians and Dentists as Amicus Curiae on behalf of Real Parties in Interest.

Tosdal, Levine, Smith, Steiner & Wax and Thomas Tosdal, San Diego, for Center on Policy Initiatives as Amicus Curiae on behalf of Real Parties in Interest.

Opinion

WERDEGAR, J.

Defendant Metropolitan Water District of Southern California (MWD) contracts with the California Public Employees' Retirement System (CalPERS) for the latter to provide retirement benefits to MWD's employees. The single issue of law presented here is whether, under the Public Employees' Retirement Law (PERL) ***860 (Gov.Code, § 20000 et seq.) [1] and MWD's contract with CalPERS, MWD is required to enroll in CalPERS all workers who would be considered MWD's employees under California common law. MWD contends it may exclude from enrollment workers, such as plaintiffs, who are paid through private labor suppliers, even if they would be employees under the common law test. We conclude, as did the lower courts, that the PERL incorporates common law principles into its definition of a contracting agency employee and that the PERL requires contracting public agencies to enroll in CalPERS all common law employees except those excluded under a specific statutory or contractual provision.

We understand, as MWD argues, that public employers must occasionally hire additional workers for projects lasting an extended period of time and that, in some cases, enrolling those workers in CalPERS may involve a *497 needless expense. But while many temporary workers (generally, those employed for no more than six months at a time or 125 days in a fiscal year) are excluded from CalPERS (§ 20305, subd. (a)(3)), the PERL contains no broad exclusion for long-term, full-time workers hired through private labor suppliers. Any change in the PERL to accommodate such long-term temporary hiring must come from the Legislature, not from this court, which cannot remake the law to conform to MWD's hiring practices. Moreover, although the PERL permits participating agencies to seek agreement from CalPERS for exclusion of selected categories of employees (§ 20502), MWD has not negotiated an exception to its CalPERS contract for **969 its long-term project workers. Again, this court is not empowered to remake the parties' agreement even were we of the view that such an amendment would be desirable.

The present writ proceeding, which arises from the trial court's pretrial decision on a single legal issue in this complex litigation, presents only the question of whether the PERL requires enrollment of all common law employees. We therefore do not decide whether plaintiffs are in fact common law employees of MWD, nor do we express any opinion as to whether plaintiffs, in the event they are determined to be MWD's employees as defined in the PERL, are therefore entitled to enrollment in CalPERS as of the dates they were first employed. Still less do we decide whether plaintiffs are MWD's employees for any purpose other than CalPERS

enrollment or whether they are entitled to any benefits as employees under other provisions of law.

FACTUAL AND PROCEDURAL BACKGROUND

MWD, a public agency engaged in procuring, storing, and delivering water, hires and employs many employees under a merit system set forth in its administrative code, which establishes procedures for the selection of employees and provides those employees with various benefits; these recognized employees are also enrolled in CalPERS retirement plans pursuant to the MWD–CalPERS contract. In addition, however, MWD has entered into contracts with several private labor suppliers to provide it with workers. MWD classifies these workers as "consultants" or "agency temporary employees" and neither enrolls them in CalPERS retirement plans nor provides them with benefits specified in the MWD administrative code.

Plaintiffs are named individual workers hired through labor suppliers, and a proposed class of such workers, who allege ***861 MWD misclassified them as consultants and agency temporary employees and for that reason illegally denied them the ordinary benefits of MWD employment, including CalPERS *498 enrollment.[2] Plaintiffs' petition and complaint sought writ relief compelling MWD to provide class members with compensation, benefits, and employment rights in accordance with the agency's administrative code and, in particular, to enroll class members in CalPERS.

Plaintiffs also named as defendants several of MWD's labor suppliers, alleging they had violated the unfair competition law (Bus. & Prof.Code, § 17200 et seq.) by assisting MWD to avoid its statutory obligations to plaintiffs; plaintiffs sought injunctive relief and other equitable remedies on this cause of action. The trial court permitted CalPERS to intervene in the action; its complaint seeks a declaration that the PERL requires enrollment of all MWD's common law employees not specifically excluded by statute or the MWD–CalPERS contract.

In a case management order, the trial court identified the following question, labeled Issue A, for pretrial resolution: "Whether MWD is mandated by the [PERL] to enroll all common law employees in CalPERS." After extensive briefing and argument on MWD's motion for summary adjudication and CalPERS's motion for decision, both concerning Issue A, the court ruled that MWD is mandated by the PERL to enroll all common law employees in CalPERS.

MWD and the labor suppliers sought review in the Court of Appeal by petition for writ of mandate. The Court of Appeal, after issuing an order to show cause, denied the petition by opinion, holding the trial court had resolved Issue A correctly. We granted MWD's and the labor suppliers' petitions for review.

The issue upon which we granted review is a purely legal one that can be decided without exploring the details of plaintiffs' relationship with MWD and the labor suppliers. Suffice it to say that plaintiffs alleged, and have produced some evidence to show, that **970 they worked at MWD for indefinite periods, in some cases several years; that MWD managers interviewed and selected them for employment; that they were integrated into the MWD workforce and performed, at MWD offices or worksites, duties that are part of MWD's regular business; that MWD supervisors directly oversaw and evaluated their work, determined their hourly rates of pay, raises, and work schedules, approved their timesheets, and had the power to discipline and *499 terminate them; and in general that MWD had the full right to control the manner and means by which they worked, while the labor suppliers merely provided MWD with "payroll services." Such facts, if proven, might support an argument that plaintiffs are MWD's employees under the established common law test (see *Tieberg v. Unemployment Ins.App. Bd.* (1970) 2 Cal.3d 943, 88 Cal.Rptr. 175, 471 P.2d 975; Rest.2d Agency, § 220), which is used by CalPERS administrators to distinguish employees from independent contractors.[3] ***862 But these allegations, which MWD has denied for lack of knowledge or information, have not yet been tried.

DISCUSSION

Under the PERL, the CalPERS system covers not only state employees but also employees of "contracting agencies," that is, public entities, such as MWD, that have chosen to participate in CalPERS by contract with the CalPERS governing board. (§§ 20022, 20460.)

A CalPERS "member"—the status to which plaintiffs claim they are entitled—is an "employee who has qualified for membership in this system and on whose behalf an employer has become obligated to pay contributions." (§ 20370, subd. (a).) More specifically, "local miscellaneous members"

include "all employees of a contracting agency who have by contract been included within this system, except local safety members." (§ 20383.).[4] Under section 20281, a person hired as an employee of the state or a contracting agency "becomes a member upon his or her entry into employment." As these provisions indicate, only an agency's *employees*—not those performing services for the agency on other terms—may be enrolled in CalPERS. The PERL makes this rule explicit in section 20300, subdivision (b), which excludes from CalPERS membership "[i]ndependent contractors who are not employees."

The contract between a participating agency and CalPERS may exclude some of the agency's employees, but "[t]he exclusions of employees ... shall be based on groups of employees such as departments or duties, and not on *500 individual employees." (§ 20502.) Furthermore, the CalPERS board may disapprove a contract amendment proposing an exclusion "if in its opinion the exclusion adversely affects the interest of this system." (*Ibid.*) Finally, employees of contracting agencies may not decline membership for which they qualify: "Membership in this system is compulsory for all employees included under a contract." (*Ibid.*) The MWD–CalPERS contract follows the above provisions of section 20502; it states that all "[e]mployees other than local safety members" shall become members of CalPERS unless excluded by law or by the agreement, and excludes only a single group, "safety employees."

[1] The above establishes that both under the provisions of the PERL, to which MWD became subject when it entered into its contract with CalPERS (§ 20506), and under the contract itself, MWD is obliged to enroll in CalPERS all its employees other than safety employees and those, such as certain part- **971 time and temporary employees (§ 20305), excluded by the PERL. Our question, then, is what the PERL means by "employee."

[2] As to contracting agencies, the PERL gives the term no special meaning, stating simply that "employee" means "[a]ny person in the employ of any contracting agency." (§ 20028, subd. (b).) In this circumstance—a statute referring to ***863 employees without defining the term—courts have generally applied the common law test of employment. " '[W]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' [Citations.] *In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.*" (*Community for Creative Non–Violence v. Reid* (1989) 490 U.S. 730, 739–740, 109 S.Ct. 2166, 104 L.Ed.2d 811, italics added; accord, *People v. Palma* (1995) 40 Cal.App.4th 1559, 1565–1566, 48 Cal.Rptr.2d 334 ["as a general rule, when 'employee' is used in a statute without a definition, the Legislature intended to adopt the common law definition and to exclude independent contractors"].) California courts have applied this interpretive rule to various statutes dealing with public and private employment.[5] *501 The federal courts have applied it specifically to the question of qualification for retirement benefits.[6] Unless given reason to conclude the Legislature must have intended the term to have a different meaning in section 20028, subdivision (b), we also can only adhere to the common law test. We proceed to consider MWD's and the labor suppliers' arguments for a contrary reading of the PERL.

[3] [4] Observing that the PERL should be read as a whole, MWD points to several provisions of the law that, it contends, show the legislative intent that a contracting agency's worker is to be covered *only if the funds from which the worker is paid are controlled by the agency,* a criterion it asserts plaintiffs do not meet because their paychecks were issued by the labor suppliers, not MWD. We agree the provisions of the PERL should be read in the context of the entire law. (*City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468, 14 Cal.Rptr.2d 514, 841 P.2d 1034.) For the reasons stated below, however, we do not agree that only those on the MWD payroll may be considered MWD employees for purposes of enrollment in CalPERS.

While subdivision (b) of section 20028, concerning employees of *contracting* agencies, contains no control-of-funds limitation, subdivision (a) of the same statute, concerning employees of *state* agencies, does; subdivision (a) defines "employee," in relevant part, as "[a]ny person in the employ of the state ... whose compensation ... is *paid out of funds directly controlled by the state* ... excluding all other political subdivisions, municipal, public and ***864 quasi-public corporations." (Italics added.)[7]

**972 [5] MWD contends subdivision (b) of section 20028 should be read as containing the same control-of-funds limitation as section 20028, subdivision (a) because, prior to the PERL's 1945 codification, the provisions of the *502 two present subdivisions were part of a single paragraph;

no reason exists for the Legislature to have required direct agency control in one case (state agencies) but not in the other (contracting agencies); and to make such a distinction would violate the constitutional equal protection rights of any state agency workers excluded from CalPERS because they are paid from funds not directly controlled by the state.

[6] We find these arguments unpersuasive. As the Court of Appeal explained, "[w]here the Legislature makes express statutory distinctions, we must presume it did so deliberately, giving effect to the distinctions, unless the whole scheme reveals the distinction is unintended." Here, every indication is that the distinction was purposeful. Though the precodification version of the law contained provisions regarding state agencies and contracting cities in the same paragraph, indeed the same sentence, that text, like the two subdivisions today, nonetheless clearly distinguished between the two categories of employees and imposed a direct-control-of-funds limitation only as to employees of state agencies.[8] The legislative intent to make this distinction, shown by the plain language of section 20028 and its predecessors, is confirmed by other parts of the PERL permitting state employees who are reassigned to positions in which their compensation does *not* come from a source directly controlled by the state nevertheless to continue to participate in CalPERS. (§§ 20284, 20772; cf. § 21020, subd. (d).) These provisions, like the limitation on employment in section 20028, apply only to employment by the state, not by a contracting agency, strongly suggesting the distinction in section 20028 was not accidental.

A rational legislative basis for the distinction is, moreover, readily apparent. The direct-control-of-funds limitation in subdivision (a) of section 20028 prevents local government employees working in programs indirectly funded by the state from claiming state employment. (See, e.g., *Adcock v. Board of Administration* (1979) 93 Cal.App.3d 399, 402–403, 155 Cal.Rptr. 596 [under predecessor to § 20028, subd. (a), inheritance tax referee paid from state tax revenues controlled by county treasurer is not eligible for CalPERS state service credit].) Contracting agencies, unlike the state, are not typically engaged in indirect funding of other government entities' ***865 programs, and a contracting agency, also unlike a state agency, may seek exclusion, under section 20502, of categories of employees not paid out of funds directly controlled by the agency. MWD's claim that the distinction in section 20028 between state and contracting agency employees must have been a drafting error resulting from the creation of two subdivisions from a single statutory *503 paragraph is therefore without merit, as is its claim that the distinction violates equal protection principles because it lacks a rational basis.

MWD also argues that failing to read a control-of-funds limitation into section 20028, subdivision (b) will have the absurd and burdensome consequence of enrolling thousands of contracting agency workers in CalPERS with no prospect those employees will ever receive retirement benefits. This claim rests on the PERL provisions arguably basing the amount of retirement benefits upon compensation paid from funds controlled by the employing agency. (See §§ 21354 [benefits for local miscellaneous members determined in part from member's "final compensation"], 20069, subd. (a) ["state service" is service "for compensation"], 20630 ["compensation" **973 is "remuneration paid out of funds controlled by the employer"].)

As CalPERS points out, however, other provisions of the PERL may permit retirement benefits to be calculated on a basis not formally dependent on state or contracting agency employer control of funds. (See §§ 20024 [service credit available for "service in employment while not a member but after persons employed in the status of the member were eligible for membership" as well as for "state service"], 20037 ["final compensation" dependent on member's "compensation earnable"], 20636 ["compensation earnable" dependent on member's "payrate" and "special compensation," both defined without reference to employer control of funds].) We agree with the Court of Appeal that "MWD has not established that the sections it cites constitute the only tests for determining benefit levels."

More to the point, the PERL's enrollment mandate is separate from the right to collect retirement benefits. A contracting agency must enroll all employees who are not excluded from the system by law or contract. (§ 20502; see also § 20281 [new contracting agency employee "becomes a member upon his or her entry into employment"].) The right of any member to receive benefits, on the other hand, is in the first instance for CalPERS itself to decide, after hearing if necessary, when such benefits are sought. (§§ 20123, 20125, 20134.) Even if, as MWD claims, service credit and final compensation are dependent on whether the contracting public agency controlled the funds from which the employee was paid, CalPERS correctly claims the authority to determine, subject to judicial review, "the existence, level and effect of such control following evidentiary hearings" on entitlement to benefits. In a given case, CalPERS may well determine that

an employee whose paycheck was issued by a private labor supplier, but whose rate of pay and hours of work were set by the employing contracting agency, whose timesheets were subject to approval by that agency's supervisors, and for whose work the labor supplier was paid an amount calculated from the agency-dictated pay rate (all of which, the record suggests, were true of at *504 least some plaintiffs here), was compensated from funds controlled, within the meaning of section 20630, by the contracting public agency. (See *People v. Groat* (1993) 19 Cal.App.4th 1228, 1232–1234, 24 Cal.Rptr.2d 15 [local government manager who approved her own timesheets thereby controlled disbursement ***866 of public funds within meaning of criminal misappropriation statute]; *People v. Qui Mei Lee* (1975) 48 Cal.App.3d 516, 519, 523, 122 Cal.Rptr. 43 [same, as to county medical director with authority to approve invoices from private hospitals, which were actually paid by county auditor].)[9]

No absurd or obviously unintended result is necessarily created, therefore, by reading section 20028, subdivision (b) according to its plain language, as not containing the direct-control-of-funds limitation found in section 20028, subdivision (a). To the contrary, it is MWD's interpretation of the statute, under which a public agency employee paid through a third party would automatically be disqualified from CalPERS membership, that would undermine the legislative purpose of the PERL. As the trial court cogently observed in its Issue A ruling, MWD's construction "would allow ... contracting agencies to unilaterally avoid their enrollment obligations by setting up a variety of third-party wage and benefit mechanisms, or by bypassing **974 internal merit hiring systems, both of which appear inconsistent with the legislative requirement in section 20502 that contracting agencies must enroll all employees absent a statutory exclusion or a contractually agreed upon exclusion expressly approved by the CalPERS Board."

MWD also makes two related public policy arguments for construing the PERL to exclude workers hired through labor suppliers: first, MWD observes that if such workers are hired without going through the agency's normal merit selection procedures (in MWD's case, set out in its administrative code), but can obtain full employee benefits, merit selection programs will be undermined; and second, MWD argues that public agencies often need temporary workers solely for individual public works projects, which may take years to complete, and that giving such employees full civil service *505 rights, including restrictions on discharge, will result in unnecessarily increased public staffing costs.

MWD tethers neither argument to provisions of the PERL, and we are aware of nothing in the PERL to support an exclusion based on either rationale. Participation in the CalPERS retirement system does not depend on whether an agency chooses to classify an employee as eligible for benefits under civil service or local merit selection rules. Such an interpretation could lead, contrary to the letter and spirit of the law, to a patchwork of standards set by local agencies rather than a uniform definition set and applied by the CalPERS administering board. (See §§ 20125 [CalPERS board has sole authority to "determine who are employees"], 20502 [board may disapprove agency proposal ***867 to exclude a group of employees]; *City of Los Altos v. Board of Administration* (1978) 80 Cal.App.3d 1049, 1051–1052, 144 Cal.Rptr. 351 [legislative intent was for a single system-wide standard of eligibility, not various standards set by individual participating agencies]; see also Com. on Pensions of State Employees, Rep. to Leg. (Dec.1928) p. 10 [proposed state pension law "has been drawn on the assumption that all state employees shall participate in the system, without regard to whether or not they have civil service status"].) Nor, given the express exclusion of "seasonal, limited-term ... or other irregular" workers who are employed for fewer than six months at a time or 125 days (or 1,000 hours) in a fiscal year (§ 20305, subd. (a)(3)), can we infer an intent to exclude, more broadly, all workers hired for a long-term public works project.

Though we cannot rewrite the PERL to relieve MWD of the consequences it foresees from application of the law to its employment practices, MWD itself seemingly has the power to avoid at least some of them. As CalPERS observes, "[i]t was MWD who chose to hire [plaintiffs] through the providers instead of through its own merit selection system." If, as it claims, MWD fears "favoritism, cronyism and political patronage" will result from giving workers hired outside the merit selection system employee status, the agency retains the option of applying its merit selection system more broadly to avoid these evils.

To the extent MWD complains of having to provide long-term project workers the employment security and other benefits provided for in its administrative code, we stress that no such result follows from our plain language reading of the PERL: a determination that long-term project workers are entitled to enrollment in CalPERS would not necessarily make those workers permanent employees for purposes of MWD's administrative code or entitle them to benefits provided by

MWD to its permanent employees. [10] For both past and present workers, entitlement to local agency benefits is a *506 wholly distinct question from entitlement to CalPERS enrollment and, as to MWD's future hires, of course, nothing in the PERL prevents it from amending its own code.

The private labor suppliers, citing several statutes and regulations that permit dual employers of the same worker (joint employers or coemployers) to share or allocate between them certain responsibilities of employment, argue the PERL, too, should be construed to **975 recognize coemployment. They maintain that under a theory of coemployment the labor suppliers, rather than their clients such as MWD, should be deemed the employers for purposes of the PERL, thus excluding workers they supply from the public retirement system. No legitimate basis exists, however, for finding a coemployment exception to the PERL.

The cited laws may be fairly read as showing a recognition of leased workers as a special case in certain contexts. [11] But ***868 none purports to abrogate the common law test for employment, and none suggests that workers hired through labor suppliers are, for purposes other than those treated by the cited statutes, deemed employees only of the labor supplier. Nor, of course, has the Legislature provided in the PERL for any coemployment exception to a contracting agency's duty to enroll employees in CalPERS. The only relevant legislative choice to date has been to require enrollment of all persons in the "employ" of a contracting agency. (§ 20028, subd. (b).) Where the Legislature has expressly provided for separation of certain payments and benefits (workers' compensation and unemployment insurance) from employment as defined at common law, but has not done so for public retirement benefits, the court may not write such an omitted exception into the PERL statutes. As the Court of Appeal explained, "such revision is a legislative, not a judicial, responsibility."

[7] *507 No more persuasive is the labor suppliers' claim that a worker hired through a supplier *waives* his or her right to CalPERS membership by agreeing to be hired in this manner. Contrary to the suppliers' assertion that "[n]othing in PERL indicates participation is mandatory," the PERL states in so many words that "[m]embership in this system is compulsory for all employees" not excluded by other provisions of the PERL or by the local agency's contract with CalPERS. (§ 20502; see also § 20281 [employee of state or contracting agency becomes a member upon entry into employment].) That rule protects the system itself, for, as the commission that initially recommended establishment of a state pension system explained, without mandatory membership some employees may prefer to take their full salary and, absent the prospect of a pension, will be reluctant to retire even when they are no longer productive: "The state can secure full value for the money it contributes only through compulsory membership of all employees. One employee should have no more right than another to continue at full salary far beyond the period of full working efficiency." (Com. on Pensions of State Employees, Rep. to Leg., *supra*, p. 10; accord, *State Civil Service*, 22 Ops.Cal.Atty.Gen. 205, 206 (1953) [benefits under the PERL are established for a public reason and may not be waived by private agreement].) [12]

**976 None of the federal decisions cited by the labor suppliers and the concurring and ***869 dissenting opinion (*Roth v. American Hospital Supply Corp.* (10th Cir.1992) 965 F.2d 862; *Hockett v. Sun Company, Inc.* (10th Cir.1997) 109 F.3d 1515; *Capital Cities/ABC, Inc. v. Ratcliff* (10th Cir.1998) 141 F.3d 1405) is to the contrary. The *Roth* court relied expressly on authority holding, under ERISA, that participation in a pension plan may be knowingly and voluntarily waived (*Roth v. American Hospital Supply Corp., supra*, at p. 867); under the PERL, as stated, membership is compulsory for eligible employees of contracting agencies. Roth, moreover, was not an ordinary leased worker but a chief executive officer who, in negotiations over sale of his company, *insisted* that he continue to be employed by the former parent company. The court limited its waiver holding to those facts, noting that "[e]mployers should not take either our reasoning or result to mean that they may coerce their employees to waive some or all of their benefits." *508 (*Id.* at p. 868.) The *Hockett* court applied the common law test for employment; to the extent it gave particular emphasis to the parties' understanding of their relationship, one of the established factors, it relied on its earlier decision in *Roth*. (*Hockett v. Sun Company, Inc., supra*, at p. 1527.) Finally, in *Capital Cities/ABC, Inc. v. Ratcliff*, the same court held simply that the employees had, by express contract, waived their rights to pension benefits. (*Capital Cities/ABC, Inc. v. Ratcliff, supra*, at p. 1410.) As already explained, such contractual waivers are not recognized under the PERL.

The concurring and dissenting opinion argues "it should be for the Legislature, not this court," to decide "whether a public agency should be permitted to use leased workers to meet its labor needs." (Conc. & dis. opn. of Brown, J., *post*, 9 Cal.Rptr.3d at p. 877, 84 P.3d at p. 983.) We absolutely agree. Nothing we say here precludes the Legislature, if

it so chooses, from amending the PERL to declare leased workers to be the employees of the labor suppliers, as the Legislature in fact has done for certain (but, notably, not all) labor suppliers in the unemployment insurance context. (Unemp.Ins.Code, § 606.5.) But for this court to anticipate legislative action and create an unprecedented exemption from the PERL by replacing the established common law test of employment with a rule of complete deference to the parties' characterization of their relationship (conc. & dis. opn. of Brown, J., *post,* 9 Cal.Rptr.3d at pp. 873–874, 875–876, 84 P.3d at pp. 979–980, 981) would be, we believe, improper, especially as the issue here is one of *statutory interpretation,* not of common law development. Convinced the common law test must be rewritten so as to serve the "labor consumer's" purpose of "separat [ing] control from other terms of employment," the concurring and dissenting justice excoriates the court for failing to reach out to embrace this "new labor paradigm." (*Id.*, 9 Cal.Rptr.3d at pp. 873, 877, 84 P.3d at pp. 979, 982.)[13] But we believe the court exercises restraint consistent with the "[p]roper exercise of our role" and fully discharges its "fundamental obligation" (***870 *Id.*, 9 Cal.Rptr.3d at pp. 870–871, 879, 84 P.3d at pp. 977, 984) by deciding the single *statutory* question presented under the procedural posture of this case, Issue A of the case management order, without exploring common law issues neither decided by the lower courts nor briefed by the parties.

*509 CONCLUSION

In sum, we conclude the PERL's provision concerning employment by a contracting agency (§ 20028, subd. (b)) incorporates a common law test for employment, and that nothing elsewhere in the PERL, in MWD's **977 administrative code, or in statutes and regulations addressing joint employment in other contexts supports reading into the PERL an exception to mandatory enrollment for employees hired through private labor suppliers.

Justice Baxter claims our decision will impose a "crushing burden" on MWD and other contracting agencies by requiring them to make up previously unpaid CalPERS contributions for leased workers. (Dis. opn. of Baxter, J., *post,* 9 Cal.Rptr.3d at p. 880, 84 P.3d at p. 860.) As previously stated (see *ante,* 9 Cal.Rptr.3d at p. 880, 84 P.3d at p. 860), however, we do not hold that plaintiffs or any other particular leased workers must be enrolled in CalPERS; nor do we hold that plaintiffs, if found to be MWD employees, must be enrolled as of their dates of initial employment. Moreover, as Justice Baxter himself recognizes (dis. opn. of Baxter, J., *post,* 9 Cal.Rptr.3d at pp. 881–882, 84 P.3d at pp. 986–987), employees with fewer than five years in qualifying service—presumably including most employees hired as temporary workers through labor suppliers—are ineligible for CalPERS retirement benefits, and a contracting agency's contribution obligations are determined actuarially, taking into account the employer's eligibility experience. (See §§ 20815, subd. (a), 21060.) Contributions attributable to temporary leased employees should thus be substantially reduced. Finally, pursuant to section 20812, the CalPERS board may adopt a funding period of 30 years for amortization of unfunded contributions from contracting agencies and "shall approve new amortization periods based upon requests from contracting agencies ... that can demonstrate a financial necessity," making the imposition of ruinous lump-sum liability even more unlikely. In short, Justice Baxter greatly overstates the effect of the court's decision.

DISPOSITION

The judgment of the Court of Appeal is affirmed.

WE CONCUR: GEORGE, C.J., KENNARD and MORENO, JJ.

Concurring and Dissenting Opinion by BROWN, J.

This is a case of the tail wagging the dog—with a vengeance. The majority purports to decide only whether real parties in interest[1]—workers leased by the Metropolitan Water *510 District (MWD) from independent labor suppliers—must be enrolled as members of the California Public Employees' Retirement System (CalPERS). In reality, the majority has uncritically applied an arguably obsolete common law definition of "employee" to a new labor paradigm and conferred an authority ***871 on CalPERS—one never accorded by the Legislature—to unilaterally determine the legality of public employers using leased workers. Proper exercise of our role in defining the common law and according deference to the legislative and executive branches should compel the court to decline plaintiffs' invitation to remake the civil service in the image of the pension system. I respectfully dissent.

I.

In its extensive case management order, the trial court considered threshold issue A: "Whether [MWD] is mandated by the [Public Employees' Retirement Law] to enroll all common law employees in CalPERS." Plaintiffs reason that, under California's common law definition of "employee," they are unquestionably MWD employees. Therefore, if the Public Employees' Retirement Law (PERL) incorporates the common law test into its own definition of employee, plaintiffs are entitled to CalPERS enrollment.

The trial court permitted CalPERS to file a complaint in intervention. Consistent with plaintiffs' interpretation, CalPERS sought declaratory relief that would (1) interpret the term employee in the PERL in accordance with the common law definition of that term, and (2) affirm CalPERS's role as the first arbiter of whether an individual is an employee of a public agency for purposes of applying the PERL.

**978 The majority purports only to resolve the threshold issue; but, of course, the answer is not so simple. While enrollment in CalPERS does not directly resolve whether plaintiffs are MWD's employees for nonretirement purposes, or even expressly determine their entitlement to CalPERS benefits, it inevitably gives considerable momentum to their broader claims.

Thus, despite its disclaimers, the majority's ostensibly narrow interpretation of the PERL is effectively dispositive of the more significant underlying question of plaintiffs' employment status. To say that a covered employee is any employee CalPERS says is a covered employee is a tautological response that not only rewrites the statute, it alters the whole purpose of the pension law.

II.

The majority's approach has several shortcomings. First, it conflicts with and undermines the purpose and intent of the PERL. Second, it rewrites the *511 contractual relationship between MWD and CalPERS, between MWD and the labor suppliers, and between the leased workers and the labor suppliers while foisting on MWD an employment relationship it specifically contracted to avoid. Third, it presupposes, without analytical support, that the current common law test of "employee" is appropriate for determining the status of leased workers in this, or any other, context. Finally, and in conflict with the separation of powers doctrine, it preempts the Legislature from determining whether and in what manner to treat leased workers differently in the public employment context.

A. PURPOSE AND INTENT OF THE PERL

"[O]ur first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387, 241 Cal.Rptr. 67, 743 P.2d 1323). "The Legislature enacted the Public Employees' Retirement Law (Gov.Code § 20000 et seq.), 'to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated ***872 may, without hardship or prejudice, be replaced by more capable employees....' " (*Pearl v. Workers' Comp. Appeals Bd.* (2001) 26 Cal.4th 189, 193, 109 Cal.Rptr.2d 308, 26 P.3d 1044.) Courts also deem civil service pensions to serve as an inducement to competent persons to enter and remain in public service. (*Packer v. Board of Retirement* (1950) 35 Cal.2d 212, 217, 217 P.2d 660.)

Neither the explicit nor the implicit purpose of the PERL is served by a determination that leased employees must be enrolled in CalPERS. These employees have chosen to work for private employers, without additional pension inducement and subject to termination at will when their services are no longer needed. The rule of liberal construction applicable to the PERL serves to effectuate the legislative intent of securing and retaining competent individuals for public sector employment in the first instance. It does not support a construction contrary to the statutory purpose, endorsing eligibility for workers clearly outside the PERL's intent. (See *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 473, 1 Cal.Rptr.3d 790.) In such circumstances, the court should approach its interpretive task with utmost circumspection rather than with the blithe assumption that a superficial construction suffices.

Indeed, while arguing that the purpose of the PERL should be liberally construed, plaintiffs, seconded by CalPERS, invoke a canon of construction intended to limit the scope of legislative enactments: that, as a general rule, statutes will not be interpreted to alter common law rules absent a clear statement to that effect. " ' "A statute will be construed in light of common law decisions, unless its language ' "clearly

and unequivocally discloses an *512 intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter...." [Citations.]' [Citation.]" ' " (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297, 65 Cal.Rptr.2d 872, 940 P.2d 323.) Even assuming the legal and analytical validity of this court-formulated precept in ordinary circumstances where it occasions no **979 great harm (see Corrigan & Thomas, "*Dice Loading" Rules of Statutory Interpretation* (2003) 59 N.Y.U. Ann. Surv. Am. L. 231), plaintiffs here ask the court to rely on it to undermine a clearly expressed legislative purpose, contrary to the court's primary statutory construction directive.

B. LEASED WORKERS AND THE COMMON LAW TEST OF "EMPLOYEE"

With respect to the common law, plaintiffs' and CalPERS's argument contains a second fundamental analytical flaw —the uncritical assumption that "employee" as defined under the *current* common law test applies without further consideration to leased workers.

Plaintiffs, and by its language the majority (see maj. opn., *ante,* 9 Cal.Rptr.3d at pp. 861, 865, 866–867, 84 P.3d at pp. 969, 973, 974), assume the PERL incorporates a static common law definition of employee under which control over performance of the work is the most significant factor. This assumption erroneously ignores, or disregards, the essence of the common law: the evolution of court-crafted jurisprudence to address new circumstances and legal questions. Leased workers present a new paradigm, a three-sided labor relationship in which control has been expressly separated from other aspects of employment.

In support of their position, plaintiffs rely heavily on the Restatement Second of Agency (1958) (Restatement), section 220, and its apparent focus on the factor of control. Section 220, subdivision (1), defines ***873 a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Section 220, subdivision (2)(a) lists 10 factors relevant to distinguishing employees from independent contractors, the first factor being "the extent of control which, by the agreement, the master may exercise over the details of the work."

This court has previously quoted with approval these provisions of the Restatement and characterized control as "the principal test" (*Tieberg v. Unemployment Ins.App. Bd.* (1970) 2 Cal.3d 943, 946, 88 Cal.Rptr. 175, 471 P.2d 975 (*Tieberg*)) in defining employment for purposes of the Unemployment Insurance Code. (See also *McFarland v. Voorheis–Trindle Co.* (1959) 52 Cal.2d 698, 704–706, 343 P.2d 923; *513 *Industrial Ind. Exch. v. Ind. Acc. Com.* 1945) 26 Cal.2d 130, 135, 156 P.2d 926 [same in workers' compensation context].) At the same time, we recognized that control is not dispositive and that several other " 'secondary elements' " (*Tieberg,* at p. 950, 88 Cal.Rptr. 175, 471 P.2d 975) may be relevant in assessing employment status. (*Id.* at pp. 949–950, 88 Cal.Rptr. 175, 471 P.2d 975; see also *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 352, 256 Cal.Rptr. 543, 769 P.2d 399; *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777–778, fn. 7, 100 Cal.Rptr. 377, 494 P.2d 1.) Moreover, the court has never considered how these various elements would affect the status of leased workers. It is far from clear the same factors would predominate.

Indeed, the Legislature has taken the lead in suggesting that a distinct rule should apply to leased workers. Section 606.5, subdivision (b), of the Unemployment Insurance Code provides that, for purposes of that code, the common law control test governs employee status in all cases *except* that of leased workers, expressly recognizing they present a separate case. In other contexts as well, the Legislature has made independent provision for worker leasing. (See Lab.Code, § 3602, subd. (d) [addressing workers' compensation coverage for leased workers]; see also Cal.Code Regs., tit. 2, § 7286.5, subd. (b)(5) [defining employment for purposes of workplace discrimination against an employee of a "temporary service agency"]; cf. 29 C.F.R. § 825.106(b)-(c) (2003) [designating the leasing employer as the employer for purposes of family leave].) Even CalPERS's own handling of the issue indicates —contrary to the position it takes in this litigation—that it has heretofore recognized worker leasing as a distinct phenomenon calling for development of a new "system-wide approach"; and the State Administrators' Handbook, from which CalPERS obtained its working summary of the common law control test, elsewhere indicates special considerations apply in these circumstances.

**980 Undue emphasis on control assumes an overly reductionist approach to the common law. However close a link between control over the way the work is performed and employment in other contexts, in the case of worker leasing,

control is relatively insignificant because the purpose of the labor relationship is to separate control from other terms of employment. Moreover, the worker enters into and accepts, generally expressly, this three-sided labor relationship fully aware of its purpose. As the Restatement recognizes, a relevant determinative of an employer-employee relationship is "whether or not the parties believe they are creating the relation of master and servant." (Rest., § 220, subd. (2)(i); see also ***874 *Tieberg, supra,* 2 Cal.3d at p. 949, 88 Cal.Rptr. 175, 471 P.2d 975.) Since the parties' intent dominates the relationship among worker, labor supplier, and labor hirer, this element logically should weigh more heavily than control of work performance in determining employment status.

*514 The Restatement is at best a snapshot of the common law as it existed in 1957. Because it *follows* the law —summarizing consensus and organizing relevant legal principles—it cannot serve as a definitive guide to assessing a new labor structure, one which reflects unprecedented economic, technological, and demographic transformations in our society. This does not render the PERL, with respect to the common law definition of employment, a moving target. The fundamental common law conception of employment has not changed. Rather, to the extent their significance varies from the original norm, the relevant factors must be reweighed in this new context, consistent with the intent of the parties.

The Restatement was formulated at a time when employee leasing in its purest form did not even exist. Thus, it differentiates only between employees and independent contractors, not employees and leased workers. Nor does the Restatement or our cases dealing with employee lending discuss the paradigm of labor supply and consumption. (See, e.g., *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174, 151 Cal.Rptr. 671, 588 P.2d 811.) For example, the labor relationship at issue here differs distinctly from that of one employer lending another employer one of its skilled employees for an occasional task. (See, e.g., Rest., § 227, com. c, illus.3, p. 502.) Contrariwise, a labor supplier *is in the business* of providing workers to consumers temporarily in need of certain services. The latter situation represents an entirely new labor relationship in which control of the work is exclusively within the purview of the labor consumer; and, as all parties contractually agree, every other aspect of employment is exclusively within the purview of the labor supplier. Common law rules that evolved to address the traditional two-sided labor paradigm are simply inapposite in this context.

Moreover, the Restatement developed its definition of employment specifically in the context of assigning tort liability to employers under the doctrine of respondeat superior. Here, the predominant consideration is the statutory purpose of the PERL, which "is to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees" (Gov.Code, § 20001) and to attract the best employees to public service. (*Packer v. Board of Retirement, supra,* 35 Cal.2d at p. 215, 217 P.2d 660.) These statutory purposes are very different from the question of assigning tort liability, a question plainly more closely aligned with the common law control test than with pension entitlement. (Cf. *Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 239 Cal.Rptr. 578 [labor consumer is employer of leased worker for purposes of workers' compensation law].) There is no logical reason control should determine employment status in the latter circumstance even if it does in the former, particularly when the parties have expressly separated control from every other aspect of employment.

*515 In sum, ultimately the courts, not the Restatement, delineate the evolution of the common law definition of employee and identify the factors that should assume primary significance in any particular worker context.

***875 **981 Uncritical application of the Restatement's control test fails to recognize that the leased worker of today is unlike the lent employee of 1958. In *Vizcaino v. United States Dist. Ct. for the Western Dist. of Wash.* (9th Cir.1999) 173 F.3d 713 (*Vizcaino*), the Ninth Circuit Court of Appeals considered whether leased workers (temporary agency employees) who provided services to Microsoft were employees for purposes of participation in Microsoft's employee stock purchase plan. The court conceded "that the assessment of the triangular relationship between worker, temporary employment agency and client is not wholly congruent with the two-party relationship involving independent contractors." (*Id.* at p. 723.) Nevertheless, the court applied the Restatement—with its dispositive emphasis on control—as a fixed body of law, failing to recognize the common law as an organic element of the law intended to adapt itself to new circumstances. (See also *Wolf v. Coca-Cola Company* (11th Cir.2000) 200 F.3d 1337, 1340–1341 [leased worker may be employee of labor consumer for purposes of Employee Retirement Income Security Act];

Burrey v. Pacific Gas & Electric Company (9th Cir.1998) 159 F.3d 388, 391–392.)

In my view, the better rule is expressed in *Roth v. American Hospital Supply Corp.* (10th Cir.1992) 965 F.2d 862 (*Roth*), in which the court considered the claim of a leased worker that, for purposes of the Employee Retirement Income Security Act (ERISA; 29 U.S.C. § 1001 et seq.), he was an employee of the business that leased his services. The court found that ERISA incorporated the common law definition of employee and specifically section 220 of the Restatement. (*Roth,* at p. 866.) However, in applying the common law definition in the context of worker leasing, the court noted that "[t]he issue ... is one not squarely addressed by the common law test...." (*Id.* at pp. 866–867.) "Many of the common law factors are, unsurprisingly, inapplicable to this inquiry." (*Id.* at p. 867.) Under the circumstances, the court concluded that control over the work of the leased worker was less significant than the clear intent of the parties. (See also *Capital Cities/ ABC, Inc. v. Ratcliff* (10th Cir.) 141 F.3d 1405.)

Accordingly, the role of the court should not be to judge the propriety of a labor relationship otherwise permitted by law, but to effectuate the intent of the parties, particularly one they all knowingly and intentionally accept. Here, since MWD intended to avoid entering into an employer-employee relationship with plaintiffs, and they, in turn, willingly accepted their jobs on the terms offered, the courts should recognize their mutual intent as the principal consideration in determining plaintiffs' employee status. Assuming MWD did ***516** not actively mislead plaintiffs, they should not be allowed after the fact to redefine the agreed-upon terms of the labor relationship. As the court in *Roth* explained, where parties knowingly and intentionally separate control over work performance, a court should not override that intent. (*Roth, supra,* 965 F.2d at p. 868.) This does not "remake the law to conform to MWD's hiring practices" (maj. opn., *ante,* 9 Cal.Rptr.3d at p. 860, 84 P.3d at p. 968), but discharges the court's responsibility to reexamine and develop the common law in new circumstances. (See Llewellyn, The Common Law Tradition (1960) pp. 293–294.)

Contrary to the fundamental precepts of the common law, the majority here views the question presented in statutory isolation, focusing on the PERL and refusing to assess the unique position of leased workers. Like the lower courts, the majority erroneously views worker leasing as bilateral. But by definition this is a three-party labor relationship, the very purpose *****876** of which is to separate control over work performance from every other aspect of employment and thus realign the parties' relationship whereby labor consumers are not employers. The majority's failure to recognize the legal significance of this distinct labor structure arbitrarily adjudicates the obligations of the parties contrary to their original expectations.

C. CONTRACTUAL IMPAIRMENT

In this regard, the majority also fails to consider the impact of its holding on contractual rights and expectations. While it disclaims the power "to remake the parties' agreement" (maj. opn., *ante,* 9 Cal.Rptr.3d at p. 860, 84 P.3d at p. 969), its analysis accomplishes ****982** exactly that. Given the contractual relationship between MWD and CalPERS, their respective conduct over the course of nearly 60 years is highly relevant to determining their understood intent. (See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 689, pp. 622–623.)

For purposes of PERS entitlement, CalPERS has heretofore only used the common law control test to distinguish independent contractors. Its long-term dealings with MWD give no indication that CalPERS regularly or consistently applied any version of that test to leased workers or that it had ever developed a formal, system-wide policy with respect to leased workers. Similarly, nothing in the record indicates CalPERS had, prior to this litigation, definitively interpreted the PERL as including leased workers within its definition of employee. Nor did MWD understand the PERL in that way.

Thus, even if MWD's leased workers are employees for purposes of the PERL, that holding cannot apply retroactively if the parties' conduct indicates they never interpreted their contract in that way. The majority's contrary implication imposes on MWD a potentially huge liability it had no basis for anticipating. (See dis. opn. of Baxter, J., *post,* 9 Cal.Rptr.3d at p. 880, 84 P.3d at p. 985.) If the historic ***517** understanding of the parties with respect to the PERL is at odds with the court's present construction of that law, then the contract involves a mutual mistake of law and is, to that extent, subject to rescission. (1 Witkin, Summary of Cal. Law, *supra,* Contracts, §§ 377, 378, pp. 344–345.) Any other conclusion would bind MWD to a contractual term that no party bargained for or understood to exist. Nevertheless, the majority completely ignores the legal significance of this contractual history.

D. PREEMPTION OF THE LEGISLATURE

Noting that the PERL contains "no broad exclusion for long-term, full-time workers" (maj. opn., *ante*, 9 Cal.Rptr.3d at p. 880, 84 P.3d at p. 985), the majority declares that "[a]ny change in the PERL to accommodate such long-term temporary hiring must come from the Legislature, not from this court, which cannot remake the law to conform to MWD's hiring practices." (*Ibid.*) With due respect, this completely inverts the statutory analysis. Given the historical perspective of leased workers, there is no basis for finding the PERL would have contemplated leased workers in the first instance; thus, there would be no reason for the Legislature to refer to them, either by inclusion or exclusion. In other words, contrary to the majority's unsupported assumption, their absence from the statutory scheme has no legal significance. By investing this purported omission of any reference to leased workers with legal substance, the majority itself rewrites the statute—inferring that public employers are prohibited from using leased workers outside the purview of the PERL.

***877 The specific question raised in this case is whether a public agency that has purchased labor from a labor supplier in lieu of hiring its own employees must enroll these workers in CalPERS. Under this new three-sided model, the labor consumer is no longer the employer of the worker. Instead, the employment contract lies between the worker and a third party—a labor supplier—that separately contracts with labor consumers to satisfy their labor needs. In the abstract, this new labor paradigm appears to be simply a matter of personal choice and private agreement. Disputes, however, arise when workers who have willingly entered into employment contracts with labor *suppliers* then seek the rights and benefits of employment with the labor *consumers*. In essence, these workers ask the courts to redraw the boundaries of the three-sided relationship.

That task is clearly one the court should defer to the Legislature, which can better assess the policy implications and balance the respective interests of the public and individual workers. Indeed, the Legislature has already taken action where it has thus far deemed it appropriate. (See Lab.Code, § 3602, subd. (d); Unemp. Ins.Code, § 606.5, subd. (b); see also Cal.Code Regs., tit. 2, § 7286.5, subd. (b)(5).) In effectively subverting the parties' deliberate *518 effort to separate control from employment, the majority ignores this express validation of employee leasing as an acceptable, and presumably **983 desirable, economic innovation. Contrary to the implication of the majority's analysis, the Legislature has already determined that control over work may be legally separable from employment. The majority asserts no basis, other than a legislative vacuum, for finding that the two are inseparable in the context of the PERL, particularly given the PERL's vague definition of employee.

The PERL does not mention the common law control test. This test becomes part of the statutory scheme only by virtue of judicial interpretation. Thus, while plaintiffs argue the PERL incorporates the same common law rule that applies outside the context of the PERL—they ignore the fact that nothing in the common law rule prohibits a labor consumer from leasing workers—and having control over their work—without thereby becoming an employer. Any other interpretation of the common law would bring it into conflict with the Legislature's express approval of employee leasing.

Moreover, given the policy considerations, it should be for the Legislature, not this court, to address the narrower question of whether a public agency should be permitted to use leased workers to meet its labor needs. Unlike the broader proposition of using leased workers generally, that narrower question raises distinct concerns because these workers can provide a public agency with a means to avoid certain costs and burdens that apply exclusively in the public employment context, such as merit selection requirements and the possibility of suits under 42 United States Code section 1983. For that reason, the Legislature might reasonably place restrictions on public agencies as regards their use of leased workers. But, that is a legislative, not judicial prerogative. Whatever reservations we may harbor in this regard, the legislative process should be allowed to work. If limitations are appropriate, we must assume that the Legislature will act accordingly. Until that time, the court's function is to develop the common law to meet the changing circumstances of the workplace.

Contrary to the majority's implication, recognizing a special rule for employee leasing does not carve out an exception to ***878 the PERL's definition of employee without any basis for such an exception in the statutory language. (Cf. Gov.Code, §§ 20300 [excluding independent contractors], 20502 [allowing for contractual exclusion of specified groups by contracting agencies].) Rather, in identifying a special rule applicable to leased workers, this court would be construing the common law, not the PERL, which incorporates the common law.

This case is not a referendum on the legality, morality, or any other aspect of public agencies' utilizing leased workers to supplement their workforce. *519 That question is completely separate from the one the majority purports to answer, one that implicates policy concerns principally within the legislative purview and one the Legislature has yet to directly address in this context. Given the legislative vacuum, this court should be wary of arrogating to itself or CalPERS the authority to determine whether this new class of workers is entitled to CalPERS membership.

III.

In sum, I do not think the Legislature intended to strike a fatal blow to worker leasing when, in 1943, it first enacted the PERL's rather vague definition of public agency employee. More likely, it did not even consider the issue at that time. When it did consider the issue 43 years later in defining the employer-employee relationship in another statutory context, the Legislature gave its imprimatur to employee leasing by making express provision for it. This latter point, more than any other, should settle the issue before us. The common law definition of employee cannot work to foreclose an innovative labor relationship that the Legislature has explicitly recognized. Rather, in deference to and consistent with that legislative approval, we should interpret the common law to accommodate worker leasing by adjusting the relevant test to reflect the singularity of this new labor relationship, one in which the control factor assumes less, and the intent of the parties greater, significance.

**984 I agree with the majority's rejection of MWD's argument that subdivision (b) of Government Code section 20028 "should be read as containing the same control-of-fund limitation as section 20028, subdivision (a)." Such an interpretation is unsupported by the statutory language (see maj. opn., *ante,* 9 Cal.Rptr.3d at p. 863–864, 84 P.3d at p. 971–972) and would improperly require this court to act in a legislative capacity. (*Id.* at p. 860, 84 P.3d at p. 968.) Nevertheless, the "foundational" principle cited by MWD and its amici curiae—that CalPERS enrollment and CalPERS benefits should not be available to workers unless they have received "compensation" from a CalPERS employer —remains logically compelling and is the only position consistent with the express purpose of the pension scheme. Therefore, even if the majority's determination that the PERL's definition of employee incorporates California's common law is correct, I would also conclude that the common law factors that are relevant to determining the existence of an employer-employee relationship do not have the same weight in every context, and that in the context of worker leasing, control over the manner in which the work is performed is not determinative of an employment relationship and does not override the express intent of the parties.[2] *520 Thus, ***879 while I agree MWD is mandated by the PERL to enroll all common law employees in CalPERS, I also conclude, contrary to the majority's analysis, that a leased worker is not a common law employee and that the superficial answer to issue A is correct but incomplete. A proper analysis of the underlying question is critical to the resolution of this litigation. For this reason, I would disclaim what will surely be the ultimate effect of the majority's analysis. Rather, I would address the question directly and discharge this court's fundamental obligation to develop the common law in light of changing circumstances.

Dissenting Opinion by BAXTER, J.

I respectfully dissent. In the case of a local public agency, such as defendant Metropolitan Water District of Southern California (MWD), that has voluntarily contracted with the California Public Employees' Retirement System (CalPERS) to include its eligible "employees" in CalPERS, the Public Employees' Retirement Law (PERL; Gov.Code, § 20000 et seq.)[1] grants service credit, upon which all pension rights are based, only for work *compensated from funds controlled by the contracting agency itself.* The agency's obligation to make pension contributions on a worker's behalf—the sine qua non of the worker's membership in CalPERS—also depends entirely on service *compensated by agency-controlled funds.* Plaintiffs here are workers employed by private labor suppliers. Though plaintiffs were assigned to perform services for MWD, their pay came entirely from the private employers, which used their own funds for that purpose. Hence, these services neither qualified for CalPERS pension benefits, nor gave rise to an obligation of MWD to pay contributions to CalPERS. Accordingly, plaintiffs neither were nor are eligible "employees" of MWD who must be enrolled as CalPERS members.

The majority's contrary conclusion, wrong on the law, also has potentially unfair, even calamitous, consequences for the agencies that have volunteered to provide their true

employees with CalPERS benefits. CalPERS, which has primary responsibility for **985 determining who are "employees" covered by the *521 system (§ 21025), has long known that public agencies were making increased use of leased workers. Indeed, CalPERS's staff internally noted the "escalat[ing]" implications of this practice for CalPERS pension purposes.

Yet, though it now supports plaintiffs' belated claims for membership, CalPERS never alerted contracting agencies that leased workers are the agencies' own "employees" in this regard. It never required these workers' enrollment in the system, and it never assessed ongoing employer and employee contributions toward their CalPERS pensions. On the contrary, internal memoranda indicate that CalPERS avoided the issue except in scattered individual cases. CalPERS deferred pertinent ***880 regulations and guidelines, decided only to "research[ ] further [its] position," and placed the problem on the "back burner," meanwhile conducting "a fact-driven review of each request for membership." In 1996, a knowledgeable CalPERS official stated internally that leased workers were "justifiably excluded" under current conditions.

The result of CalPERS's misleading procrastination is that MWD and many other local contracting agencies, which have budgeted on the assumption that leased workers were not their "employees" for pension purposes, may now have to enroll significant numbers of such workers, nunc pro tunc, as CalPERS members. Aside from future contributions to the system on the workers' behalf, these agencies may also now have to make up previously unpaid contributions that are actuarially necessary to finance full pension rights of those leased workers who have already worked long enough to "vest" in the system. I cannot join the majority's decision to expose financially strapped local agencies to this crushing burden.

In reaching their result, the majority essentially reason as follows: Unless the worker is expressly excluded by contract or statute (see, e.g., §§ 20300 et seq., 20502), the PERL requires every "employee" of an agency, such as MWD, which has agreed with CalPERS to participate in the CalPERS pension scheme (hereafter, a local contracting agency), to be a member of CalPERS as of the inception of the agency's CalPERS contract, or the employee's entry into employment, whichever is later. (§§ 20281, 20283.) The statute broadly describes an "employee" for this purpose as "[a]ny person in the employ of any contracting agency." (§ 20028, subd. (b).) Because section 20028, subdivision (b) does not further define or limit "employ" or "employee" in this context, we must assume the statute intends the multifactor common law test of employment. Hence, since MWD's contract with CalPERS did not expressly exclude workers furnished and paid by private labor suppliers, MWD must enroll all such workers, not statutorily ineligible for membership, who were MWD's common law employees.

*522 I believe this analysis is flawed. The majority reject the argument of MWD and its amici curiae that workers are a local contracting agency's "employee[s]," for purposes of CalPERS enrollment, only if their work is *compensated from funds controlled by the agency itself.* Focusing exclusively on section 20028, which defines "[e]mployee," the majority note that while subdivision (a) expressly limits the employees of the state, a state university, or a county school superintendent to those workers compensated from funds "directly controlled" by such entities or officials, separate subdivision (b), applicable to the employees of "[local] contracting agenc [ies]," contains no similar express limitation.

The majority dismiss the contention that by virtue of other provisions of the PERL, a control-of-funds rule is *implied* in subdivision (b) of section 20028, and restricts the class of eligible "[e]mployee[s]" who must be enrolled in CalPERS. However, I find that interpretation persuasive.

We must construe specific statutory provisions in the context of the overall scheme of which they are a part (e.g., *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903, 135 Cal.Rptr.2d 30, 69 P.3d 951; *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 280, 87 Cal.Rptr.2d 222, 980 P.2d 927; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299), avoiding, if possible, anomalous or absurd results that contravene **986 the Legislature's presumed intent (see, e.g., ***881 *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047, 80 Cal.Rptr.2d 828, 968 P.2d 539). The PERL's purpose is, of course, to establish a public employee pension system administered by CalPERS and funded by employer and employee contributions, and to determine eligibility for the system's benefits. As MWD and its amici curiae point out, the PERL makes clear that one who claims CalPERS pension benefits through a local contracting agency *may only obtain such benefits for service compensated from funds controlled by the agency itself.*

Because CalPERS membership simply reflects the member's potential eligibility for CalPERS benefits, it seems apparent that one cannot be a local agency's eligible "[e]mployee," and thus a compulsory member of CalPERS, if his or her only service fails, *ab initio*, to qualify for such benefits by reason of the control-of-funds rule.

Moreover, the PERL states explicitly that a CalPERS "[m]ember" is "an employee who has qualified for membership in this system *and on whose behalf an employer has become obligated to pay contributions.*" (§ 20370, subd. (a), italics added.) As I will explain, a contracting local agency's obligation to make pension contributions on behalf of a worker, like the worker's eligibility for benefits, is based solely on service compensated by agency-controlled funds.

*523 The path to these conclusions is clear. We necessarily begin with the PERL's definition of "[s]tate service"—the basis upon which all CalPERS eligibility, benefits, and contributions are calculated. Under section 20069, subdivision (a), " '[s]tate service' means service rendered as an employee ... of ... a contracting agency, ... *and only while he or she is receiving compensation from that employer therefor* ...." (Italics added.) Section 20630 provides, in turn, that "[a]s used in this part, 'compensation' means the remuneration *paid out of funds controlled by the employer* in payment for the member's services...." (Italics added.)[2]

A member may retire "for service" only "if he or she has attained age 50 and is credited with *five years* of *state service.*" (§ 21060, italics added.) Upon such "retirement for service" (§ 21350), the "service retirement allowance" (*ibid.*) of a "local miscellaneous member" is calculated on three variables—the member's age at retirement, his or her years of "service," and his or her "final *compensation.*" (§ 21354, italics added.) Under the statutory definitions set forth above, the applicable years of "service" are only those years of work compensated from funds controlled by the local contracting agency, and the worker's final "compensation" must itself have been paid from such funds. To put it simply, no CalPERS service retirement allowance can be obtained or calculated except upon the basis of work so compensated. (But cf. fn. 4, *post.*) Accordingly, one is not eligible to receive a CalPERS service retirement allowance for work on behalf of a local contracting agency if the work was compensated entirely from funds outside the agency's control.[3]

***882 As noted, the CalPERS pension system is funded by contributions from both CalPERS members and the public agencies that employ **987 them. The normal rate of the employee contribution for local miscellaneous members is "7 percent of the *compensation* paid that member for *service* rendered on and *524 after June 21, 1971." (§ 20677, subd. (a)(2), italics added.) Hence, the employees' contribution is based solely on work compensated by funds controlled by the public agency.

The employer's contribution is an amount calculated to produce, when combined with its employees' contributions, service retirement allowances for eligible employees in the amounts specified by the PERL. (See §§ 21350, 21354.) This contribution, actuarially determined on an annual basis, is not a uniform rate, but must be assessed, as to each employer, on the basis of that employer's "own experience" with respect to its employees' eligibility for retirement benefits. (§ 20815, subd. (a); see also § 20814, subd. (b).)

Thus, the employer's duty to contribute is limited to the amount actuarially necessary, when combined with employee contributions, to pay pensions for its *eligible* workers *on the terms and conditions set by the PERL.* As explained above, that pension eligibility is based upon *state service*—service compensated from funds controlled by the employer—and calculated on the basis of the employees' *final compensation*—compensation paid from funds controlled by the employer. It follows that a CalPERS employer has no obligation to contribute on behalf of workers who have not rendered service, or received compensation, from funds controlled by the employer, and are thus not eligible to receive CalPERS retirement benefits. And persons for whom the employer is not obligated to contribute need not be enrolled as CalPERS "[m]embers." (§ 20370, subd. (a).) That is the status occupied by the plaintiffs in this case.[4]

The majority suggest the issue whether plaintiffs must be *enrolled* as CalPERS *members*—all the majority purport to decide here—is separate from their eligibility, ***883 if any, for CalPERS retirement benefits. I disagree. As indicated above, the statutory scheme, read as a whole, restricts and limits compulsory CalPERS membership to those workers who can qualify for *525 CalPERS retirement benefits. Under the control-of-funds rule that underlies all eligibility for such benefits, plaintiffs, whose work was entirely compensated by private labor suppliers, are unable to do so. Indeed, as MWD and its amici curiae stress, the Legislature cannot have intended to compel the meaningless act of CalPERS enrollment for persons who, from the outset, are unable to qualify for CalPERS benefits.[5]

****988** The majority, like plaintiffs and their amici curiae, insinuate that to exclude leased workers from CalPERS under a control-of-funds requirement is to encourage and reward an easy subterfuge, by which public agencies may bypass their merit hiring systems, and may deny the full benefits of public employment to large numbers of persons who essentially function as employees. But plaintiffs have raised no challenge to the legality of MWD's use of leased workers. They simply seek to "have their cake and eat it too." They agreed to be employed, not by MWD, but by private entities that leased their services to MWD. This choice spared them the rigors of a competitive merit selection system in obtaining their positions. It may well have enhanced their take-home pay, as well as increasing their flexibility and mobility. They have made no contributions to CalPERS, and, as MWD and its amici curiae point out, they may already be covered under pension plans provided by their private employers. Yet, without assuming the burdens of competitive merit employment by a public agency, they now seek the very benefits they decided to forgo.

Moreover, though the majority suggest otherwise, it is entirely rational for the Legislature to determine, by means of a control-of-funds requirement, that workers employed and paid by others, like independent contractors (§ 20300, subd.(b)), should be excluded from CalPERS. In one case, the agency ***526** contracts with an individual for his or her independent services; in the other, it contracts with an independent entity for the services of persons the entity employs. The evidence indicates that public agencies tend to use independent contractors and leased workers *****884** in similar ways—to obtain flexible temporary assistance, or focused technical or consulting skills, that are needed only on a special or intermittent basis, without resort to the civil service system and its implications of tenured employment. It is hardly remarkable that the Legislature would consider both categories of workers to be appropriately excluded from the PERL's provisions for lifetime public pension benefits.

By concluding otherwise, after CalPERS's long failure to provide guidance to its contracting agencies, the majority impose, at this late hour, the potential for new and unexpected financial liabilities, significant in amount, on local government agencies throughout this state that already face unprecedented fiscal challenges. As I have explained, the current legislative scheme does not dictate such a result. Given the very substantial implications, it might now be well for the Legislature to confront and consider directly the issue how the growing phenomenon of leased workers is to be treated for public pension purposes.

In the meantime, I cannot join the majority's reasoning, or their result. I would reverse the judgment of the Court of Appeal.

I CONCUR: CHIN, J.

All Citations

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Footnotes

1 Hereafter all statutory references are to the Government Code unless otherwise indicated.

2 Plaintiffs also include some individuals who allegedly were hired directly by MWD but misclassified as "district *temporary* employees" and, for that reason, have been denied the ordinary benefits of MWD employment. The complaint does not make clear whether these plaintiffs have also been denied CalPERS enrollment. The parties' contentions on the single issue before us, entitlement to CalPERS enrollment, have focused solely on those plaintiffs hired through labor suppliers; our discussion will therefore do the same.

3 MWD argues that CalPERS has not historically applied the common law test to leased workers, and one of the minority opinions accuses CalPERS of "misleading procrastination" in this respect. (Dis. opn. of Baxter, J., *post*, 9 Cal.Rptr.3d at p. 880, 84 P.3d at p. 985.) But CalPERS insists it has done so consistently from as early as 1944, when MWD first sought to join the system, and cites three occasions on which it determined that leased workers were in fact employees under the common law test. Unlike the dissent, we decline to express an opinion on CalPERS's conduct, a matter that *is simply not before us.* Resolution of the sole question presented—whether MWD is obliged to enroll all its common law employees—does not depend on CalPERS practices.

4 According to the complaint, none of the plaintiffs are safety employees, who are excluded under the MWD–CalPERS contract.

5 See, e.g., *Tieberg v. Unemployment Ins.App. Bd., supra,* 2 Cal.3d at pages 946–950, 88 Cal.Rptr. 175, 471 P.2d 975 (unemployment insurance law); *McFarland v. Voorheis–Trindle Co.* (1959) 52 Cal.2d 698, 702–706, 343 P.2d 923 (workers' compensation exclusivity); *Service Employees Internat. Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 769–770, 275 Cal.Rptr. 508 (public employment collective bargaining law).

6 *Nationwide Mutual Insurance Company v. Darden* (1992) 503 U.S. 318, 322–323, 112 S.Ct. 1344, 117 L.Ed.2d 581 ("employee," as used in Employee Retirement Income Security Act (ERISA), is defined by the common law test); see *Wolf v. Coca–Cola Company* (11th Cir.2000) 200 F.3d 1337, 1340–1342 (leased worker may be employee, under common law test, for purposes of ERISA, but is not entitled to benefits because specifically excluded by terms of employer's plan); *Vizcaino v. United States District Court for the Western District of Washington* (9th Cir.1999) 173 F.3d 713, 723–724 (Restatement test applied to determine whether temporary agency employees were employees of Microsoft for purposes of participation in Microsoft's employee stock purchase plan).

7 Section 20028, subdivisions (a) and (b) provide in full: " 'Employee' means all of the following: [¶] (a) Any person in the employ of the state, a county superintendent of schools, or the university whose compensation, or at least that portion of his or her compensation that is provided by the state, a county superintendent of schools, or the university, is paid out of funds directly controlled by the state, a county superintendent of schools, or the university, excluding all other political subdivisions, municipal, public and quasi-public corporations. 'Funds directly controlled by the state' includes funds deposited in and disbursed from the State Treasury in payment of compensation, regardless of their source. [¶] (b) Any person in the employ of any contracting agency."

8 See Statutes 1939, chapter 927, section 3, pages 2605–2606, defining an employee as "any person in the employ of the State of California whose compensation ... is paid out of funds directly controlled by the State ... and, for the purposes of this act, any person in the employ of any contracting city who is included by contract under the retirement system."

9 Justice Baxter argues this court should decide as a matter of law that plaintiffs are ineligible for CalPERS membership because that the labor suppliers issued their paychecks is undisputed. (Dis. opn. of Baxter, J., *post,* 9 Cal.Rptr.3d at p. 883, fn. 5, 84 P.3d at p. 987–988, fn. 5.) This analysis assumes that the entity issuing a paycheck necessarily has sole control (within the meaning of the PERL) of the funds from which the worker is paid. But as experience and the decisions cited above indicate, control over disbursement of funds may be exercised by persons other than those who actually write the checks. MWD's asserted control over whether, how long, and at what wages its leased employees work might well be sufficient to constitute control over the funds from which they are paid, funds that MWD supplies through its payments to the labor suppliers. Because the degree and nature of the control exercised by MWD is a matter of disputed fact (see *ante,* 9 Cal.Rptr.3d at pp. 861–862, 84 P.3d at pp. 969–970), so far unresolved either by trial or by CalPERS hearing, the legal question of how much control is enough is not ripe for decision.

10 We say nothing here, of course, regarding plaintiffs' entitlement, or lack thereof, to the MWD administrative code benefits sought in their petition and complaint. Only the issue of the PERL's interpretation is before us.

11 See, e.g., Labor Code section 3602, subdivision (d) (where a worker has multiple employers, one employer may contract with another for the payment of workers' compensation premiums and may thereby satisfy its statutory duty to secure compensation); Unemployment Insurance Code section 606.5 (if labor supplier meets definition of "leasing employer"—a supplier who also determines the workers' assignments and rates of pay and has the right to hire and fire the workers—supplier is the employer for purposes of securing unemployment insurance; otherwise, the "client or customer" remains the employer for unemployment insurance purposes); California Code of Regulations, title 2, section 7286.5 (for purposes of Fair Employment and Housing Act, worker supplied through temporary services agency is employee of temporary services agency "with regard to such terms, conditions and privileges of employment under the control of the temporary service agency," but is employee of client employer as to "such terms, conditions and privileges of employment under the control of that employer").

12 In a variation on the waiver theory, Justice Baxter argues that because plaintiffs "decided" to be employed through labor suppliers, they should have no right to benefits ordinarily available to MWD employees. (Dis. opn. of Baxter, J., *post,* 9 Cal.Rptr.3d at p. 883–884, 84 P.3d at p. 988.) But the record suggests plaintiffs were given no choice in the matter. The named plaintiffs' declarations generally indicate they were interviewed and selected by MWD supervisors and *told* their employment would be through a labor supplier. The dissent cites no evidence plaintiffs freely chose to avoid "the rigors of a competitive merit selection system." (*Ibid.*) All that plaintiffs "decided" was to accept employment on the terms offered. In contrast, MWD, exercising apparently unfettered freedom of choice, decided to hire plaintiffs without using the procedures set forth in its administrative code. If any unfairness to other employees results from that decision, it should not be attributed to plaintiffs.

13 Even if we could properly reach the question of a "new labor paradigm" in this case—despite the lack of even a hint of this idea in the statute at issue—we would not necessarily be convinced this case calls for a fundamentally new understanding of the employment relationship. MWD, a large public employer, is already well organized to assume the risks and burdens of the employment relationship for its scores or hundreds of employees. If the allegations in plaintiffs' complaint are true, MWD may have hired plaintiffs through labor suppliers not to reduce the burden on its human resources department, but to avoid providing them retirement and other employment benefits.

1 In the action below, real parties in interest were the plaintiffs and respondent Metropolitan Water District was the defendant. For clarity, I will refer to the parties by these terms.

2 On this basis, I would disagree with CalPERS's long-standing conclusion that the PERL incorporates the 20–factor federal test into its definition of employee. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8, 78 Cal.Rptr.2d 1, 960 P.2d 1031 ["[T]he binding power of an agency's *interpretation* of a statute ... is contextual.... [¶] ... [I]t may be helpful, enlightening, even convincing. It may sometimes be of little worth. [Citation.]"].) First, nothing in the PERL indicates the applicability of federal law in this context; and our decisions discussing the common law definition of the employer-employee relationship nowhere indicate approval of the 20–factor federal test. More importantly, the federal test focuses exclusively on control, and for the reasons stated above, I see no indication that the Legislature intended control to be determinative of employment in the case of a leased worker, thereby prohibiting for purposes of the PERL what the Legislature expressly approved in the Unemployment Insurance Code.

1 All subsequent unlabeled statutory references are to the Government Code.

2 Section 20284 provides that when "an employee *of the state,*" as defined by section 20028, subdivision (a), is assigned to work for which, "pursuant to statute or duly authorized contract entered into by *the state* or the *state agency* by which the person is employed," he or she is compensated from "funds not directly controlled by the state," the person continues, while in that status, as an " 'employee *of the state,*' " and the person's work during such assignment "shall be 'state service' notwithstanding [s]ections 20028 and 20069." (Italics added.) No similar expansion of the definition of "state service" applies to *local* contracting agencies and workers who provide services to such agencies.

3 Similar principles apply to eligibility of a local miscellaneous member for a *disability* retirement pension, and to the calculation of the final amount of such pension. Thus, a local miscellaneous member is eligible for a CalPERS disability retirement allowance only "if ... credited with five years of *state service.*" (§ 21150, italics added.) As indicated above, "state service" is service compensated from funds controlled by the CalPERS employer. Moreover, the final amount of a disability pension is based on the employee's "final compensation" and credited "years of service" (see §§ 21423, subds. (a), (b), 21427)—both of which require payment for service from funds controlled by the CalPERS employer.

4 The majority point to several sections of the PERL, cited by CalPERS, which, they assert, suggest that a CalPERS pension need not always be calculated exclusively upon the basis of work compensated from funds controlled by the CalPERS employer. For example, section 20024 defines "current service"—one component upon which the final amount of a pension is calculated (see e.g., § 21350, subd. (b))—to include not only "state service," but also "service in employment while not a member but after persons employed in the status of the member were eligible for membership." Whatever the technical meaning of this provision, it does not undermine the requirement of minimum "state service"—i.e., service compensated from funds controlled by the employer—as a prerequisite to the eligibility of a local miscellaneous member for *any* retirement pension, whether "service" or "disability." (§§ 21060, 21150.) Similarly, to the extent a pension is calculated on such bases as the worker's "final compensation," "special compensation," "compensation earnable," and "payrate" (§§ 20037, 20636) none of these technical terms is defined to suggest that the "compensation" referred to in these phrases is other than "compensation" as defined generally for all PERL purposes, which "compensation" must be paid from funds controlled by the employer. (§ 20630.)

5 The majority suggest that membership enrollment is necessarily separate from determinations of pension eligibility because CalPERS itself has the authority to decide in the first instance, subject to judicial review, each individual member's eligibility for a CalPERS pension. (See § 21025.) I find these principles irrelevant to the situation presented by this case. Certainly, CalPERS, as the expert agency charged with administering the PERL, should take positions on issues of coverage affecting CalPERS employers and members (see text discussion, *ante*), and it may determine eligibility in individual cases by *applying* the legal principles set forth in the PERL to decide disputed facts, or mixed questions of fact and law. But courts may always decide pure questions of law on undisputed facts. Here it is undisputed that plaintiffs' paychecks were issued by private labor suppliers, not by MWD. The *suppliers* charged MWD fees for the workers' labor, which fees were based on the workers' agreed pay rate plus a "markup" for the services of the companies that employed and supplied the workers. Though the majority suggest otherwise, I believe this arrangement takes plaintiffs

out of eligibility for CalPERS membership or pension benefits, as a matter of law, by virtue of the PERL's control-of-funds rule.

Though CalPERS now supports plaintiffs' position, the majority are not so bold as to invoke the principle of deference to CalPERS's expert agency interpretation. Their restraint on this point is wise. As indicated above, CalPERS dithered and delayed on the matter and never promulgated a formal construction of the PERL in line with its apparent current stance.

End of Document

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application to Contract with CalPERS by GALT SERVICES AUTHORITY, Respondent, and CITY OF GALT, Respondent.	CASE NO. 8287 OAH NO. N-2007080553 PRECEDENTIAL DECISION 08-01 EFFFECTIVE: October 22, 2008

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code Section 11425.60, concerning the application of Galt Services Authority and City of Galt; hereby designates its final decision in the GALT SERVICES AUTHORITY and CITY OF GALT matter, as adopted by the Board on May 15, 2008, as a PRECEDENTIAL DECISION of the Board.

I hereby certify that on October 22, 2008, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the Board's final decision is a true copy thereof as adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
KENNETH W. MARZION, INTERIM CHIEF
EXECUTIVE OFFICER

Dated: NOV 1 9 2008 BY _____
PETER H. MIXON
GENERAL COUNSEL

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application to Contract with CalPERS by GALT SERVICES AUTHORITY, Respondent, and CITY OF GALT, [1] Respondent.	)	CASE NO. 8287 OAH NO. N-2007080553 DECISION

This matter was heard before the Board of Administration of the California Public Employees' Retirement System at its regular meeting on May 15, 2008, pursuant to the Board's determination at its meeting of March 19, 2008, to hear this matter as a Full Board Hearing.

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated January 29, 2008, concerning the application of Galt Services Authority; RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

*****

I hereby certify that on May 15, 2008, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the administrative law judge's Proposed

/////

[1] Corrected caption.

Decision is a true copy of the decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Dated: May 20, 2008. BY _____
KENNETH W. MARZION
INTERIM CHIEF EXECUTIVE OFFICER

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: GALT SERVICES AUTHORITY, Respondent, and CITY OF GALT, Respondent.	Case No. 8287 OAH No. 2007080553

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 5, 2007, in Sacramento, California.

S. Kingsley Macomber, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Roger K. Crawford, Attorney at Law, represented the City of Galt (City) and the Galt Services Authority (GSA). (The City and GSA are collectively referred to as "respondents.")

Evidence was received on December 5, 2007. The record remained open for the parties to file post-hearing briefs to address questions asked by the Administrative Law Judge and to respond to issues raised by the parties during the hearing. On January 8, 2008, CalPERS filed its post-hearing brief, which was marked for identification as Exhibit 27, and respondents filed their post-hearing brief, which was marked for identification as Exhibit B. The record was closed and the matter was submitted for decision on January 8, 2008.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED January 31, 20 08

ISSUES

The following issues are before the Board of Administration for determination:

1. Upon transfer to the GSA under the terms of the Joint Powers Agreement, described in Finding 5 below, and the Revised Operating Agreement, described in Finding 12 below, do the officers of the City who hold positions created or defined by statute or municipal code (City Manager, City Clerk and Finance Director) become employees of the GSA such that the GSA may contract with CalPERS to make these officers members of CalPERS?

2. Upon transfer to the GSA under the Joint Powers Agreement and Revised Operating Agreement, do City employees become GSA employees such that the GSA may contract with CalPERS to make these employees members of CalPERS?[1]

FACTUAL FINDINGS

1. The GSA is a public agency, established pursuant to the Joint Powers Agreement for the stated purpose of providing administrative, management, special and general services to the City. The City seeks to transfer employees to the GSA in order to provide the transferred employees with enhanced retirement benefits while, at the same time, avoiding the City's irrevocable prior participation in the federal Social Security Program. The GSA, as a public agency, has sought to contract with CalPERS to have its transferred employees become members of the system. CalPERS declined to contract with the GSA, contending that, under the common law employment test, the transferred employees will not become employees of the GSA but, instead, will remain employees of the City. The City and GSA appealed CalPERS's decision.

Stipulated Facts

The parties stipulated to the following facts:

2. The City is a general law city located in California and a "public agency" as defined by Government Code section 20056.

3. The Redevelopment Agency of the City of Galt (RDA) is a public government organization created by the City.

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[1] The Statement of Issues also included two additional issues (Nos. 3 and 4 in Section XVI) relating to the Chief of Police and City Police Officers. As set forth in Finding 18, the parties stipulated that the City would not be transferring these positions to the GSA, so Issue Nos. 3 and 4 were no longer relevant and should be deleted. Pursuant to the stipulation of the parties, the Statement of Issues is amended to delete Issue Nos. 3 and 4 in Section XVI.

4. The current contract between the City and CalPERS, as amended effective January 1, 2006, provides retirement benefits under the "2% at 55" formula for miscellaneous members.

5. A Joint Powers Agreement creating the GSA was adopted by the City and the RDA on September 5, 2006. The purpose, powers, organization and other provisions governing the terms, organization and authority of the GSA are set forth in the Joint Powers Agreement.

6. The California Secretary of State acknowledged the filing of the GSA Joint Powers Agreement on September 26, 2006. The GSA was issued an Employer Identification Number by the IRS on October 2, 2006.

7. An Operating Agreement between the City and the GSA was adopted on October 17, 2006, wherein, among other things, the GSA agreed to provide certain administrative, management, special and general services to the City. Further, the GSA agreed to employ any and all individuals that were employed by the City and engaged to perform those services at the time those services were "transferred" to the GSA. Further details of the proposed relationship between the City and the GSA are set forth in the Operating Agreement.

8. Prior to entering into the Operating Agreement, the City met and conferred with the employee association representing its employees regarding the decision and effects of the Operating Agreement. The City also met with its unrepresented employees. This process resulted in a Memorandum of Understanding (MOU) with the represented employees that required the City, among other things, to ensure that the GSA would hire current bargaining unit employees to perform the services under the Operating Agreement without any loss or reduction of rights, benefits or seniority. The City entered into a similar agreement with its unrepresented employees. The terms affecting the transfer of employees to the GSA are set forth in the MOU and the City Agreement with Unrepresented Employees.

9. Implementation of the Operating Agreement was placed on hold pending CalPERS's approval of the GSA's request to enter into a contract for retirement benefits covering its employees.

10. The GSA initiated the process of contracting with CalPERS in October 2006. The scope of this request, as well as the nature of the benefits and the requested benefit formula, are set forth in Sections V and VI of the Statement of Issues.

11. On February 23, 2007, CalPERS notified the City (and the GSA) that it had determined that individuals to be employed by the GSA to perform the services under the Operating Agreement would remain subject to the control and direction of the City and, accordingly, under the applicable common law rules of employment, would remain City

employees and would not become GSA employees. CalPERS further concluded that, absent further supporting documentation, those individuals would remain subject to the contract already entered into between the City and CalPERS.

12. On March 12, 2007, the GSA and the City subsequently submitted a Revised Operating Agreement to CalPERS in an attempt to address the concerns CalPERS raised in its February 23, 2007 letter. The Revised Operating Agreement sets forth the proposed relationship between the City and the GSA and, for purposes of this matter, governs their contractual obligations to each other.

13. Under the Revised Operating Agreement, the GSA must hire City employees with no change in their wages, hours or terms of employment other than those recognized in the City's bargaining agreements, recognize existing City employee associations and assume the City's obligations under the City's existing bargaining agreements, and adopt and implement the City's existing personnel and employer-employee regulations and policies.

14. Under the Revised Operating Agreement, the City will continue in existence and carry out its municipal functions and duties as before. The following City employees will be transferred to the GSA under the Revised Operating Agreement: City Manager, City Clerk, City Finance Director, and all other permanent employees of the City except the City Treasurer, Chief of Police and all Police Officers who report to the Chief of Police. The Revised Operating Agreement neither prohibits nor obligates the GSA to change the personnel who will be provided to the City for carrying out its functions and duties.

15. The Revised Operating Agreement neither prohibits nor obligates the GSA to hire employees to manage and handle, among other things, its own internal operations. Further, the GSA is neither prohibited nor obligated to enter into a separate agreement to provide personnel and services to the RDA (or even a third agency).

16. All funds for GSA salaries, benefits and employee taxes will be provided by the City.

17. On April 25, 2007, CalPERS rejected the GSA's request to enter into a contract for retirement benefits. The GSA and the City filed a timely appeal on June 6, 2007.

18. Because the Chief of Police and Police Officers who report to the Chief of Police are not being transferred to the GSA and will remain employees of the City, the parties agreed that Issue Nos. 3 and 4 as set forth in Section XVI of the Statement of Issues do not need to be decided and are therefore moot. The parties stipulate that the Statement of Issues may be amended to delete Issue Nos. 3 and 4.

Additional Facts

The following additional facts were established through evidence presented at the hearing:

19. The contract that the GSA seeks to enter into with CalPERS would provide retirement benefits under a "2.7% at 55" formula for miscellaneous members.

20. The Joint Powers Agreement between the City and the RDA provides for the creation of the GSA as a joint powers authority under the Joint Exercise of Powers Act, Government Code section 6500 et seq. The agreement recites that the City and the RDA determined, among other things, that: (1) it was more efficient and cost-effective to provide certain management, administrative, special or general personnel services to the City and the RDA through a joint powers authority than by directly employing certain staff; (2) state law allows for a joint powers authority to provide such services; and (3) state law allows for certain functions of the City and the RDA to be provided by contract with the GSA. The agreement states that its purpose is to "jointly exercise" the common powers of the City and the RDA in the manner set forth in the agreement. Article III of the agreement provides:

> **TRANSFER OF SERVICES**
> **ASSUMPTION OF RESPONSIBILITIES**
>
> On or after the Effective date, City or [RDA] may contract with GSA for personnel services. City or [RDA] may transfer to GSA employees of City or [RDA] and GSA shall become their employer under such terms and conditions as determined by GSA. All applicable employment rules, regulations, MOU's or collective bargaining agreement[s], ordinances, and resolutions may be adopted and ratified by the Board for such employees. Any and all employment records shall become the property of GSA.

21. At its regular meeting on September 5, 2006, the Galt City Council adopted Resolution No. 2006-116 establishing the GSA. The August 25, 2006 Agenda Item for that resolution explained that the creation of the GSA was "the first step in the process to withdraw from Social Security, which would enable the City to offer enhanced benefits to its employees." The Agenda Item stated that, once the GSA had been established and staff had filed for recognition with state and federal authorities, the City "would then be in a position to complete the process of assigning employees to the [GSA] and withdrawing from Social Security." The Agenda Item described the GSA as "an alternate employer for the City of Galt as a means of withdrawing from Social Security."

22. The MOU that the City entered into in October 2006 with the City's represented employees provides that the parties had "fully met and conferred over the decision as well as the effects of a potential contracting out of all bargaining unit work, with the accompanying 'transfer' of bargaining unit employees" to the GSA. The parties agreed that "all bargaining unit employees are transferred to and become employees of the GSA without any loss of rights. benefits or seniority" except as provided in the MOU. Among other things, the MOU provided that employees "transferred to the GSA will agree not to participate in the Social Security retirement program. (This removes the current 6.2% employee contribution and the employees will retain 6.2% in their salary.) Instead, they will be entitled to the Level 4 1959 Survivor Benefits through CalPERS, with employees responsible for the employee cost. (Currently, this cost is estimated at $2.00 per month.)"

23. The City's unrepresented employees entered into a similar agreement with the City, entitled "Agreement with the City of Galt and the Unrepresented Employees, October 17, 2006, Establishment of an Alternate Employer." This agreement states, in relevant part, that it was "expressly understood that the unrepresented employees will support the effort to establish an alternate employer and to withdraw from participation in Social Security."

24. In addition to the provisions described in Findings 12-16 above, the Revised Operating Agreement also provides that the GSA agreed to "employ any and all individuals currently employed by City and engaged to perform services as set forth in 2(A)(i) above without any loss or reduction of rights, benefits or seniority or change in wages, hours and terms and conditions of employment, except as expressly set forth in any agreements or memorandum of understanding between City and the affected employees or their respective employee associations or as permitted by existing law or City rule, regulations, practice, procedure or policy." In addition, the agreement provides that the GSA will: (1) maintain the personnel records for these employees; (2) recognize all existing City bargaining units and assume all meet and confer obligations; (3) adopt all existing City rules, regulations, policies, practices and procedures covering personnel matters and employee-employer relations; (4) provide workers' compensation coverage for these employees; (5) arrange for its employees to participate in deferred compensation plans; (6) provide health and welfare benefit plans to its employees; (7) arrange for its employees to participate in a Flexible Benefit Plan; (8) prepare rules and regulations for its personnel administration; (9) provide all hiring, disciplinary, and general personnel administration for its employees; and (10) be responsible for the costs of all taxes; health and welfare benefits; vacation, sick, administrative and other types of leave; and other payments relating to its employees.

The Revised Operating Agreement provides that the City will: (1) set up and maintain all the bank accounts, petty cash, daily reports, budgeting, investment and auditing set out in the Joint Powers Agreement creating the GSA; (2) prepare payroll checks for GSA employees until the GSA had made arrangements for the preparation and processing of its payroll; (3) provide the GSA with office space, and all equipment and supplies, at the City's expense; and (4) transfer to the GSA an amount necessary to reimburse the GSA for the salaries and benefits of the employees.

25. Audrey Daniels is the Human Resources Director of Foster City and an independent consultant in human resources. He was engaged by the City as an advisor to present, develop and initially draft the Joint Powers Agreement, the Operating Agreement, and the Revised Operating Agreement. As Mr. Daniels explained, while the City will transfer to the GSA certain personnel with specific job descriptions, under the Joint Powers Agreement and Revised Operating Agreement, the GSA is not required to maintain those personnel or job descriptions once those employees are employed by the GSA. Instead, like any other employer, the GSA may, in the future, make changes in its personnel and job classifications as it deems appropriate. In addition, while the GSA will initially assume the City's obligations to represented employees under the collective bargaining agreements in effect at the time of the transfer, the GSA, in the future, may bargain with the unions and make those changes in the collective bargaining agreements to which the parties agree. After the transfer, the GSA will maintain its own personnel records and may develop its own personnel policies. The GSA will provide the management, administrative, special and general personnel services to the City as described in the Revised Operating Agreement and the City has the right to insist that the end results of those services be correct. According to Mr. Daniels, the GSA will determine how the services for the City will be performed and which GSA employees will perform those services.

26. Under the Joint Powers Agreement and the Revised Operating Agreement, the City will transfer to the GSA employees currently occupying the positions of City Manager, City Clerk, Finance Director, and other City positions, and the GSA will provide services to the City utilizing these transferred employees. There was no evidence to indicate that the City would transfer any vested statutory or ordinance-defined positions to the GSA. Nor was there any evidence to show that the City Council would cede to the GSA any of the City Council's discretion over its municipal authority.

27. While the evidence did not establish that the City intended to transfer any of its positions or cede any of its municipal authority to the GSA, from the documents described in Finding 21, it appears that the sole purpose of the City Council in establishing the GSA was to create an "alternate employer" for the City's employees in order to avoid the City's irrevocable prior participation in the federal Social Security Program and increase the retirement benefits the transferred employees will receive through CalPERS. Although the Joint Powers Agreement and the Revised Operating Agreement state that the GSA may provide additional services to entities other than the City in the future, there was no indication in the City Council documents that the GSA is, in reality, expected to perform any services for agencies other than the City.

LEGAL CONCLUSIONS

1. The law governing CalPERS is set forth in the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq. Government Code section 20022 defines a "contracting agency" to mean "any public agency that has elected to have all or part of its employees become members of this system and that has contracted with the board for that purpose." Government Code section 20028, subdivision (b), defines an "employee" to

mean "[a]ny person in the employ of any contracting agency." Under Government Code section 20460, a "public agency may participate in and make all or part of its employees members of [CalPERS] by contract entered into between" the public agency's governing body and the Board pursuant to the PERL. Under Government Code section 20461, the Board may "refuse to contract with ... any public agency for any benefit provisions that are not specifically authorized by [the PERL] and that the [Board] determines would adversely affect the administration of" CalPERS.

2. Pursuant to Government Code section 20125,[2] the Board determines who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under CalPERS. As the California Supreme Court held in *Metropolitan Water District v. Superior Court* (2004) 32 Cal.4th 491, 509 (*Cargill*), when determining whether individuals are employees of a public agency, CalPERS must apply the common law test for employment.

In *Cargill*, the Metropolitan Water District (MWD) contracted with several private labor suppliers to provide MWD with workers, classified as "consultants" or "agency temporary employees." MWD did not enroll these workers in CalPERS's retirement plans or provide them with benefits specified in the MWD Administrative Code. The workers alleged that MWD had the full right of control over the manner and means by which they provided services, and the labor suppliers merely provided MWD with payroll services. The court found that, if these allegations were proven, the workers would be MWD employees under the common law employment test and MWD would be required to enroll them in CalPERS.

3. In *Cargill*, the court held that the PERL requires contracting public agencies to enroll in CalPERS all common law employees.[3] CalPERS argues that the common law employment test, which the *Cargill* court used to ensure that MWD's employees would obtain pension benefits, should be applied in this matter to deny enrollment in CalPERS to GSA's claimed employees. CalPERS's argument is persuasive. Although the court in *Cargill* used the common law employment test to *provide* CalPERS pension benefits to MWD's common law employees, CalPERS may use that same test to *deny* pension benefits to any persons who are not common law employees of the GSA.

4. In *Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, 949 (quoting from *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43-44), the California Supreme Court explained the common law test for employment as follows:

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[2] Government Code section 20125 provides:

> The board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.

[3] Contracting public agencies may exclude employees under specific statutory or contractual provisions not relevant to this matter.

> 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. (Rest., Agency, § 220; Cal.Ann., § 220.)

The court also recognized two additional factors: the extent of control, and whether the principal is or is not in business. (*Id.* at p. 950.)

5. In arguing that the City, and not the GSA, will remain the common law employer of the transferred employees, CalPERS cites to cases decided by federal courts under section 401, subdivision (a) of the Internal Revenue Code (IRC § 401(a)) involving professional employment organizations (PEO's), which "lease" management personnel, consultants and licensed professionals (such as attorneys, accountant, dentists and engineers) to businesses (recipients). For a pension plan to qualify under IRC § 401(a) and retain its tax-exempt status, an employer's retirement plan must be for the "exclusive benefit" of the employer's employees and their beneficiaries. In order to preserve its tax-qualified status under IRS § 401(a), CalPERS must ensure that its contracts with public agencies provide retirement benefits only to the agencies' common law employees.

6. In *Professional & Executive Leasing, Inc. v. Commissioner Internal Revenue Service* (9th Cir. 1988) 862 F.2d 751, Professional & Executive Leasing, Inc. (PEL), a PEO, filed a petition for declaratory relief seeking a determination that its retirement plans met the requirements of IRC § 401(a). PEL entered into employment contracts with the workers covered under PEL's retirement plans. PEL also entered into leases with the recipients to which PEL leased the workers. PEL prepared the workers' paychecks, withheld Federal and state income taxes, and paid Social Security and Federal unemployment taxes for each worker. PEL also paid worker's compensation premiums and state unemployment insurance premiums for the workers.

The court in *Professional & Executive Leasing, Inc.* determined that PEL's retirement plan did not qualify under IRC § 401(a) because it included non-employees and, therefore, was not exclusively for the benefit of employees. In reaching its decision, the court applied a employment test very similar to the common law employment test enunciated in *Tieberg*. The court found that PEL's control over the workers was not sufficient to establish an employment relationship even under the lower standard applicable to professionals. In addition, that court found that, although the contracts PEL entered into appeared to give PEL control over its workers, PEL's right to control was, at best, "illusory."

The court relied upon the following factors in reaching its conclusion: Almost all workers had a prior equity or ownership interest in the recipient to which they were assigned. PEL had the right to reassign workers to a different recipient, but it never exercised that right. PEL had no reason to reassign or fire a worker unless a recipient complained, an unlikely scenario because most workers had some control over the recipient to which they were leased. Similarly, PEL's control over the workers' salaries was illusory, because any change required approval by either the recipient or the worker. PEL did not conduct any screening of the workers except to verify their licenses to practice. The recipients: (1) provided the equipment, tools and office space for the workers; (2) furnished the workers with malpractice insurance; and (3) along with the workers, controlled the details of how and when the work was to be performed. (See also *United States v. Garami* (1995) 184 B.R. 834.)

7. CalPERS argues that, while these PEO cases involved private entities and professional employees, their reasoning is applicable to the public agency officers and employees in this case. CalPERS's argument is persuasive.

Under the terms of the Joint Powers Agreement and Revised Operating Agreement, the GSA must accept all the identified City officers and employees. The GSA is initially bound by the City's labor agreements and personnel rules and policies. While respondents asserted that the GSA could meet and confer with the union to change these agreements, rules and policies in the future, there appears to be little reason to do so because the City is the GSA's only client. Although the Joint Powers Agreement and the Revised Operating Agreement state that the GSA may provide additional services to entities other than the City in the future, there was no indication in the City Council documents that the GSA is, in reality, expected to perform any services for agencies other than the City.

The City will set up and maintain all the bank accounts, petty cash, daily reports, budgeting, investment and auditing for the GSA; prepare payroll checks for GSA employees until the GSA makes arrangements for the preparation and processing of its payroll; and provide the GSA with office space, equipment and supplies at the City's expense. While respondents emphasized that the GSA will just be providing services to the City, the Revised Operating Agreement provides that City will reimburse the GSA for the salaries and benefits of the employees, instead of paying for the value of the services it receives.

Even though the Revised Operating Agreement may allow the GSA to determine the duties and responsibilities of its personnel, all of its actions are subject to City approval. While the Joint Powers Agreement and Revised Operating Agreement ostensibly grant the GSA the authority to change personnel policies, take over the payroll function, and discipline the transferred personnel, the GSA has little incentive to assume these employer responsibilities once it has achieved what appears to be its sole purpose for existing: acting as the City's "alternate employer" so that the City may avoid its Social Security obligations and increase CalPERS retirement benefits for its transferred employees. (Findings 21 and 27.)

In sum, although the Joint Powers Agreement and Revised Operating Agreement appear to give the GSA control over the transferred officers and employees, the GSA's right of control is, at best, illusory.

8. CalPERS refused to contract with the GSA based upon its determination that, under the common law employment test, the transferred officers and employees would not, in reality, become the officers and employees of the GSA but, instead, would remain the officers and employees of the City. In making this determination, CalPERS properly exercised the authority granted under Government Code section 20125 and applied the test set forth in *Cargill*. Respondents failed to meet their burden of proving, by a preponderance of the evidence, that CalPERS's determination was incorrect.[4]

ORDER

CalPERS's refusal to contract with the Galt Services Authority is AFFIRMED. Respondents' appeal is DENIED.

DATED: January 29, 2008

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings

[4] Given this conclusion, there is no need to address CalPERS's additional arguments regarding whether the City may contract out for the positions of City Manager, City Clerk or Finance Director; whether, under the Joint Powers Agreement and the Revised Operating Agreement, the City would be delegating any non-delegable authority to the GSA; or whether the City's efforts to withdraw from Social Security were prudent.