

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT IN PART AND DECLINE IN PART THE PROPOSED DECISION

Overview

Staff recommends the Board adopt the Proposed Decision, in part, as to the burden of proof, jurisdiction, final compensation, equitable estoppel, laches, and fiduciary duty findings and legal conclusions. Staff recommends this adoption without a Full Board Hearing concerning these issues.

Staff recommends the Board decline to adopt the Proposed Decision, in part, as to Respondent Desi Alvarez's (Respondent Alvarez) employment status after November 9, 2011, in favor of its own decision. Staff recommends this declination so the Board may hold a Full Board Hearing concerning this issue.

Staff's recommendation, that the Board decline to adopt the Proposed Decision, in part, is based upon the following:

- I. The Proposed Decision acknowledges but fails to properly apply the common law employment test to determine whether Respondent Desi Alvarez remained an employee of the Chino Basin Watermaster (Respondent Watermaster) after November 9, 2011; and
- II. The Proposed Decision fails to apply the applicable California Public Employees' Retirement Law (PERL) governing "compensation earnable" and "final settlement pay."

All parties agree that Respondent Alvarez worked for Respondent Watermaster as an employee from May 3, 2011 to November 9, 2011, and was eligible for CalPERS' membership for that service. The parties disagree about whether Respondent Alvarez remained an employee from November 9, 2011 to May 4, 2012.

If Respondent Alvarez continued to remain an employee of Respondent Watermaster, as he contends, then he is eligible for membership and would accrue service credit for the period of November 9, 2011 through May 4, 2012. If Respondent Alvarez was no longer an employee after November 9, 2011, then he is ineligible for membership and accrues no service credit for the period of November 9, 2011 through May 4, 2012 pursuant to Government Code section¹ 20300, subdivision (b). Additionally, if Respondent Alvarez is found to be an employee, a second issue is whether the payments made from November 9, 2011 to May 4, 2012, constitute "compensation earnable" under section 20636 and are reportable to CalPERS.

¹ All further references are to the Government Code unless specified otherwise

Background Facts

Respondent Alvarez entered an Employment Agreement with Respondent Watermaster, effective May 3, 2011, as a Chief Executive Officer (CEO). Pursuant to the Employment Agreement Respondent Alvarez's normal hours of work were generally from "8:00 a.m. Monday through Friday." Respondent Alvarez was only allowed twelve days of administrative leave per year. The Employment Agreement provided a generous severance package, entitling Respondent Alvarez to the full salary and benefits for the first year of the Employment Term "in the event employment is terminated without cause prior to the end of the first year of the Employment Term."

On January 23, 2012, Respondent Alvarez executed a "Confidential Separation Agreement," which terminated his employment as a CEO as of November 9, 2011, ceasing all duties and powers associated with the Employment Agreement. The termination was designated as a "without cause" termination, providing a "transition period" from November 10, 2011 to May 4, 2012, whereby Respondent Alvarez's sole responsibility was to provide advice to the Watermaster Board upon request. Pursuant to the "Confidential Separation Agreement," Respondent Alvarez was provided "Severance Compensation" during this time period. Respondent Alvarez did not assume another employment position with Respondent Watermaster.

Despite separating Respondent Alvarez from employment, Respondent Watermaster continued to report his earnings to CalPERS. Respondent Watermaster reported an annual salary of \$228,000, which calculates to a monthly salary of \$19,000, from May 3, 2011 through May 4 2012.

Staff's Determination

CalPERS determined the "Severance Compensation" provided to Respondent Alvarez from November 9, 2011 to May 4, 2012 constitutes "final settlement pay" under section 20636(f), and therefore is not "compensation earnable." CalPERS also determined that Respondent Alvarez was no longer an employee after November 9, 2011, under the common law employment test and the California Public Employees' Retirement Law (PERL). Therefore, Respondent Watermaster should not have reported any pay for Respondent Alvarez after November 9, 2011.

Proposed Decision

The Proposed Decision finds Respondent Alvarez was an employee of Respondent Watermaster from November 9, 2011 to May 4, 2012. The Proposed Decision held that, under the *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal. 3d 943 common law employment test (also known as the common law control test), CalPERS failed to establish that Respondent Alvarez was no longer an employee after November 9, 2011.

Why the Proposed Decision Should Be Rejected, In Part, As To Respondent Alvarez's Employment Status After November 9, 2011

First, the Proposed Decision acknowledges but fails to correctly apply the common law employment test to determine whether Respondent Alvarez was an employee from November 9, 2011 to May 4, 2012. Next, the Proposed Decision completely fails to apply the applicable provisions of the PERL to determine whether the payments are reportable as "compensation earnable" or must be excluded as "final settlement pay."

I. The Applicable Common Law Control Test Was Incorrectly Applied To Determine Employee Or Independent Contractor Status.

The California Supreme Court in *Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th, 491 (also known as "Cargill") and the Board have determined that the common law "right to control test" is to be utilized when determining whether an individual is an employee of a contracting agency. The most important factor under the common law control test to determine employee status is the right of the employer to control the manner and means of accomplishing the result desired, regardless of whether that right is exercised with respect to all details.

The Proposed Decision acknowledges but fails to correctly apply the common law control test and the factors used in determining a worker's status for purposes of the PERL.

After November 9, 2011, Respondent Alvarez did not report to work, did not supervise any employees, was relieved of all of his duties and powers as a CEO, was no longer responsible for the daily responsibilities of Respondent Watermaster, did not attend Watermaster Board meetings, and had no authority to act on behalf of Respondent Watermaster. In addition, Respondent Alvarez was not required to forgo any other work during the relevant time period. There is no evidence Respondent Watermaster had the right to control the manner or means of accomplishing any services performed, and there is no evidence that control was actually exercised by Respondent Watermaster. Respondent Alvarez merely answered a "handful of inquiries," over the phone, when he was contacted by the Watermaster Board.

There is no evidence demonstrating that Respondent Watermaster furnished any equipment, supplies, or other materials to Respondent Alvarez after November 9, 2011. Respondent Alvarez was to be paid the same amount each month, regardless of whether he performed any work. As a CEO of Respondent Watermaster, Respondent Alvarez's employment had been "at will," as would be the case with an employee. However, the November 9, 2011 "Confidential Separation Agreement," had a specific end date, as would be the case with an independent contractor.

The facts in this case are very similar to that of *In the Matter of the Appeal of Denial of CalPERS Membership of Robert C Wilson*, Case No. 6495, OAH No. 200501220 (Wilson), where respondent was terminated as the executive director but continued being compensated as an "Out-Of-Office Consultant" to provide "consulting services, advice, guidance and training to the New Executive Director." Following a Full Board Hearing, the CalPERS Board issued a Final Decision stating Mr. Wilson was not an employee after the termination of his employment agreement and the payments did not constitute "compensation" because they were not paid for services rendered, and were not reportable, as they were "final settlement pay."

Similarly, a new Board Decision should be issued finding that Respondent Alvarez, under the common law control test, was not an employee of Respondent Watermaster from November 9, 2011 to May 4, 2012.

II. The PERL Statutes Were Not Correctly Applied To Determine Whether The Payments To Respondent Constituted "Compensation Earnable" And Are Reportable To CalPERS.

The Proposed Decision fails to apply or address the PERL's definitions of "compensation earnable."

For employee compensation to be reportable to CalPERS for retirement purposes, it must constitute "compensation earnable" as defined in section 20636. "Compensation earnable" is a combination of a "payrate" and "special compensation." (Gov. Code §20636, subd. (a); Title. 2, Cal.Code Regs., § 570.) Under section 20636, subdivision (b)(1): " 'Payrate' means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment **for services rendered on a full-time basis during normal working hours**, pursuant to publicly available pay schedules." "Special Compensation" of a member includes a "payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions."²

CalPERS' staff believes the payments do not constitute "payrate" or "special compensation" because the pay was not for services rendered since Respondent Alvarez performed no services after November 9, 2011. Furthermore, the payments do not constitute "special compensation" generally, as the payments were not made for services performed for special skills, abilities, work assignment or the like, and were instead paid in anticipation of Respondent Alvarez's separation from employment.

Section 20636, subdivision (f), also provides another basis for excluding the payments made to respondent Alvarez, as the "Severance Compensation" was provided merely to buy out Respondent Alvarez's contract. It is clear, by the unambiguous language of the "Confidential Separation Agreement," that Respondent Watermaster was paying the salary under the "Confidential Separation Agreement" in anticipation of Alvarez's

² Gov. Code, §20636, subd. (b)(1).

separation from employment as of November 9, 2011. Therefore, the payment was made to secure the peaceful separation from all employment relationships of any kind.

Recommendation

Based on the analytical flaws of the Proposed Decision with regard to Respondent Alvarez's work status after November 9, 2011, CalPERS staff urges the Board to reject that part of the Proposed Decision and hold a Full Board Hearing concerning only the employment and "compensation earnable" issues, which arose during the timeframe of November 9, 2011 to May 4, 2012.

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