



## Board of Administration

# Agenda Item 9b1

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**February 21, 2019**

**Item Name:** Precedential Decision – In the Matter of the Appeal of Membership Determination of TRACY C. FULLER, Respondent, and CAMBRIA COMMUNITY SERVICES DISTRICT, Respondent.

**Program:** Employer Account Management Division

**Item Type:** Action

### **Recommendation**

Staff argues that the Board of Administration designate its Decision in this matter, as adopted on September 26, 2018, as a Precedential Decision of the Board.

### **Strategic Plan**

This item is not a specified product of either the Strategic Plan or Annual Plans. The designation of a Decision of the Board as a Precedential Decision is a power reserved to the Board of Administration.

### **Executive Summary**

Pursuant to section 11425.60 of the California Administrative Procedure Act, an agency is authorized to designate all or part of a quasi-judicial administrative Decision as precedential, if the Decision contains a significant legal or policy determination of general application that is likely to recur. An agency's designation of a Decision or part of a Decision, or failure to designate a Decision or part of a Decision, as a precedential Decision is not subject to judicial review. The Board's established policy regarding the designation of precedential Decisions calls for consideration of the following two questions:

- A. Does the Decision contain a significant legal or policy determination of general application that is likely to recur?
- B. Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made and how the law was applied?

From the staff's perspective, the answer to both these questions is "Yes."

## Background

On September 26, 2018, the Board adopted the Proposed Decision in this matter. The Board's Decision became final and effective on October 31, 2018. All appeal timelines have expired. The Proposed Decision determined that, based on the common law employment test, Respondent Fuller (Respondent) was an employee of Respondent Cambria Community Services District (CCSD) for the period of March 17, 2014 through November 21, 2014, and as an employee, she should have been brought into membership when she began working for Respondent CCSD.

From March 17, 2014 through November 21, 2014, Respondent worked for Respondent Cambria Community Services District (Respondent CCSD), as the Interim Finance Manager. Respondent was retained by Respondent CCSD through Regional Government Services (RGS). RGS is a joint powers authority that does not contract with CalPERS for retirement benefits. RGS was formed to "enable CalPERS members and retirees to perform work for CalPERS covered agencies without jeopardizing retirement benefits from prior employment. Under its service model, RGS classifies the individuals as employees of RGS and itself as an independent contractor of CalPERS covered agencies, thereby seeking to avoid the application of CalPERS pension laws to individuals' work assignments." (Proposed Decision, pg.5, adopted as the Board's Decision on September 26, 2018.)

Under Government Code section 20069, subdivision (a), "[s]tate service" means "service rendered as an employee or officer" of a contracting agency. An employee is "[a]ny person in the employ of any contracting agency." (§ 20028, subd. (b).) The California Supreme Court has held that the Public Employees' Retirement Law's (PERL) provisions concerning employment by a contracting agency incorporate the common law test for employment. (*Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500.)

The common law employment test was articulated by the California Supreme Court in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949. Under that test, "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." (*Ibid.*) If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*Id.* at p. 946-947.) *Tieberg* also noted other secondary factors that may be taken into account.

Respondent and Respondent CCSD took the position that Respondent was an employee of RGS, not Respondent CCSD. Respondent CCSD also argued that the common law employment test does not apply because the CalPERS Board failed to exercise its authority under section 20125 to define "employee." Respondent CCSD further argued that CalPERS' determination was based on an underground regulation because the decision itself was an unlawful standard of general application. Respondent CCSD also claimed that RGS's service model represents important public policy by providing local agencies with delivery of cost-effective and efficient services.

The Board Decision finds that CalPERS correctly applied the common law employment test when determining whether an individual is a member of CalPERS and the application of the common law employment test was not akin to an underground regulation. The Board Decision also holds the fact that Respondent was hired through a labor supplier, such as RGS, did not

change Respondent's employment status with Respondent CCSD because there is no co-employment exception in the PERL.

The simple inquiry is whether the individual is in the "employ" of the contracting agency, and that question is answered by applying the common law employment test. The Board Decision provides that the RGS service model does not represent an important public policy. Rather, RGS was merely used by Respondent and Respondent CCSD in an attempt to avoid application of the PERL.

Currently, there is no precedential decision of the Board that comprehensively addresses all the issues related to the common law employment test, hiring of the individual through labor suppliers, and co-employment.

## Analysis

In general, the effect of making a Board Decision precedential is to give it "precedential effect," which in this context means:

- The decision may be officially cited in other administrative hearings and also in other court proceedings.
- The decision is considered "case-made" law, comparable to agency rule-making in its legal effect and may be applied broadly to other cases and the parties involved in other cases. The decision-maker in another administrative matter may expressly rely on the Precedential Decision to decide the matter, that is, give the law or policy in the Decision binding effect in a case involving the same issue as it affects other parties, unless the other case can be factually or legally distinguished.<sup>1</sup>

A Precedential Decision of the Board is not binding on the courts, which remain the final arbiters of the law; but a Board Precedential Decision, as the decision of the agency most knowledgeable and responsible for administering and making policy with respect to the PERL is normally accorded great weight or given deference by the courts.<sup>2</sup> If a Board Decision is not designated as precedential, its effect is more limited. It may be referenced in other administrative matters or to a reviewing court to inform the judge regarding the Board's administration or interpretation of the PERL, but it has no precedential effect.<sup>3</sup>

The Board's established policy regarding the designation of Precedential Decisions calls for consideration of the following two questions:

- A. Does the Decision contain a significant legal or policy determination of general application that is likely to recur?

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<sup>1</sup> See: Cal. Code. Regs., tit 12, §1290 (Office of Administrative Hearings regulation); official *Calif. Law Revision Comments* regarding APA section 11425.60, where it is stated that the statute "...recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking", and "...is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision." Also, see: *Pac. Legal Foundation v. Unemployment Insur. App. Board* (1991) 29 Cal.3d 101, 109; 21 *Jour. Nat. Ass'n Admin. Law Judges* 247 (2001), at pp. 265-267.

<sup>2</sup> *City of Oakland v. Pub. Employees' Ret System* (2002) 98 Cal.App.4th 29, 39; *Hudson v. Board of Administration of the Calif. Pub. Ret. Sys.* (1997) 59 Cal.App.4th 1310, 1324-1325.

<sup>3</sup> *City of Oakland, supra*, at p. 57.

- B. Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied?

A. “Significant Legal or Policy Determination of General Application That is Likely to Recur”

The significant legal and policy determination presented in the *Fuller* Decision is the explanation and application of the common law employment test, when determining whether an individual is in the “employ” of a contracting agency. The *Fuller* Decision details the applicable legal analysis to be used under the common law employment test and quotes the most relevant portions of the cases. More importantly, the *Fuller* Decision provides analysis on labor suppliers, such as RGS, and co-employment issues.

CalPERS staff repeatedly make determinations applying the common law employment test. Those determinations often involve labor suppliers, including RGS, which supply individuals to CalPERS contracting agencies, which classify those individuals as independent contractors or employees of the labor supplier, to avoid application of the PERL. Despite exerting control over the individual, contracting agencies attempt to claim the individual is not an employee and is not entitled to CalPERS membership. As a result, CalPERS repeatedly litigates the issues presented in these types of cases.

Currently, there is no Precedential Decision relating to these issues to provide full guidance to CalPERS staff, members, and employers. As a result, many of these determinations are challenged, and CalPERS is required to repeatedly litigate these questions, thereby expending staff resources on issues that should by now have been well settled. Therefore, a Precedential Decision analyzing the application of the common law employment test will provide members and employers guidance and reduce the amount of future litigation.

B. “Clear and Complete Analysis Sufficient for an Understanding of Why the Finding of Facts Were Made and How the Law Was Applied”

The factual findings in the *Fuller* Decision are straightforward and easy to understand. The Decision describes the facts and circumstances of Respondent’s relationship with Respondent CCSD and the labor supplier, RGS. Then it applies the common law employment test in *Tieberg* to these facts. The Decision sets forth a logical analysis to explain why Respondent is in the “employ” of Respondent CCSD under the common law employment test.

The *Fuller* Decision finds that the common law control test applies, and Respondent was an employee of Respondent CCSD because Respondent CCSD had the right to control the manner and means by which Respondent accomplished the result desired. It found that a theory of co-employment is inapplicable or irrelevant, as the test is whether a person is in the “employ” of the contracting agency. It also finds that a contracting agency cannot avoid application of the PERL by claiming the individual is an employee of the labor supplier.

As described, the *Fuller* Decision is therefore constructed logically and properly interprets the common law employment test as explained in *Tieberg*.

Staff therefore believes that the findings and legal conclusions of the *Fuller* Decision, if the Decision is made precedential, will provide useful, specific rules for staff, members, and employers. Accordingly, staff recommends the *Fuller* Decision be adopted as a Precedential Decision.

### **Benefits/Risks**

The benefits to making the *Fuller* Decision precedential have been described in detail in the above Analysis section. In summary, there are no other Precedential Decisions of the Board addressing all the issues related to the common law employment test, hiring of the individual through labor suppliers, and co-employment, which are addressed in the Board Decision. Since these issues recur repeatedly in litigation before the Office of Administrative Hearings, a Precedential Decision regarding these matters would assist CalPERS staff in analyzing membership disputes. There is very little risk in adopting the Decision as precedential, as an agency's designation of a Decision as precedential is not subject to judicial review. If, in the future, the Precedential Decision becomes outdated by future developments in the law, there is a procedure by which the Board could remove the precedential designation.

### **Alternatives**

- A. For use if the Board decides to designate its Decision, as adopted on September 26, 2018, as precedential, without further argument:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, hereby designates its Decision concerning the Membership Determination of Tracy C. Fuller as a Precedential Decision of the Board, effective immediately.

- B. For use if the Board decides not to designate its Decision, as adopted on September 26, 2018, as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, hereby determines not to adopt its Decision concerning the Membership Determination of Tracy C. Fuller as a Precedential Decision of the Board.

- C. For use if the Board decides to designate certain parts of its Decision, as adopted on September 26, 2018 as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, hereby determines to designate the following parts of its Decision concerning the Membership Determination of Tracy C. Fuller as precedential, effective immediately: [Board to insert here a description of the parts to be designated as precedential].

- D. For use if the Board wants further argument on the issue of whether to designate its Decision, or parts of its Decision, as adopted on September 26, 2018, as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, requests the parties in this matter concerning the Membership Determination of Tracy C. Fuller, as well as interested parties, to submit written comments regarding whether the Board's

Decision in this matter, or parts of its Decision, should be designated as precedential, and that the Board will consider the issue whether to designate its Decision as precedential at a time to be determined.

**Budget and Fiscal Impacts:** Not applicable

**Attachments**

Attachment A: Decision of the Board

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