

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the Appeal of Membership Determination  
of:**

**MARK R. DANA,**

**Respondent,**

**and**

**SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,**

**Respondent.<sup>1</sup>**

**Agency Case No. 2018-0432**

**OAH No. 2018120359**

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<sup>1</sup> Although this matter arises from an appeal by the San Francisco Bay Area Rapid Transit District (BART), the statement of issues identifies BART as a "respondent."

## **PROPOSED DECISION**

Administrative Law Judge Juliet E. Cox, Office of Administrative Hearings, State of California, heard this matter on July 10, 11, and 30, 2019, in Oakland, California.

Charles H. Glauberman represented complainant Renee Ostrander, Chief of the Employer Account Management Division, California Public Employees' Retirement System (CalPERS).

Respondent Mark R. Dana was present representing himself.

Attorneys Arthur A. Hartinger, Ian T. Long, and Jeana A. Zelan represented respondent BART.

The record was held open to permit the parties to submit written argument. Each party provided timely initial argument, and timely reply to the other parties' arguments. The matter was submitted for decision on November 20, 2019.

## **FACTUAL FINDINGS**

1. BART is a public agency that has contracted with CalPERS to make many of BART's employees CalPERS members. The Public Employees' Retirement Law (PERL) governs the relationship between BART and CalPERS, and establishes criteria for CalPERS membership.

2. Respondent Mark R. Dana currently is a BART employee. Since May 27, 2008, BART has considered Dana an employee who is eligible for CalPERS membership, and has treated him as a CalPERS member.

3. In September 2014, Dana completed a CalPERS form requesting service credit for work he had performed for BART before May 27, 2008. Specifically, Dana seeks CalPERS credit for service he rendered to BART between January 2, 1997, and May 26, 2008. He alleges that during this period, he met all criteria under the PERL to be eligible for CalPERS membership by virtue of his work for BART.

4. By letter dated December 20, 2017, a CalPERS staff member notified both Dana and BART that CalPERS staff members considered Dana "eligible for [CalPERS] membership from July 1, 1997, to May 26, 2008." By letter dated February 14, 2018, BART appealed this determination.

5. Acting in her official capacity as Chief of the Employer Account Management Division, complainant Renee Ostrander prepared and served a statement of issues to both Dana and BART. The statement of issues alleges that Dana qualifies for CalPERS membership between July 1, 1997, and May 26, 2008, because his work for BART during this period met the PERL's criteria for employment conferring CalPERS eligibility. Complainant alleges that BART erred by not enrolling Dana as a CalPERS member beginning July 1, 1997, and that both BART and Dana owe contributions to CalPERS for Dana's work during this period.

### **Dana's Relevant Employment History**

6. Dana's primary professional experience is in construction management and hazardous materials abatement. He has worked for public and private employers in California since 1990 or before.

7. In late 1996 or early 1997, Dana began working for a private engineering consulting firm. Dana continued to work for this firm until May 26, 2008, although its

name and business organization changed through these years. For simplicity, the parties agreed to call Dana's employer at all times material to this matter Earth Tech.

8. Earth Tech organized its business into groups serving different client types. Dana was in Earth Tech's Transportation Group, which served primarily public agencies operating rail transit systems. BART, the San Francisco Municipal Transportation Authority, and the Valley Transportation Authority were three of Earth Tech's major Transportation Group clients in the San Francisco Bay Area between 1997 and 2008.

9. Earth Tech paid Dana an annual salary. Earth Tech also maintained a deferred compensation retirement plan for which Dana was eligible.

10. Each year, Earth Tech and Dana set a target for the number of hours Earth Tech would bill to clients for Dana's work, typically between 80 and 90 percent of Dana's total working hours that year. In addition to services for which Earth Tech billed its clients, Dana also performed work to advance Earth Tech's own interests, such as identifying new business opportunities for Earth Tech and contributing to Earth Tech's efforts to win contracts with new clients and new contracts with ongoing clients.

11. Dana's Earth Tech supervisors evaluated his performance each year. They solicited information for these annual evaluations from representatives of the Earth Tech clients for whom Dana had worked. They also considered whether he had met his billable-hour target for the year, and weighed his contributions to Earth Tech's business development efforts. Earth Tech and Dana used these evaluations to set qualitative and quantitative goals, and to set Dana's salary, for the next year.

12. In 2001, Earth Tech promoted Dana to Program Manager. This promotion increased Dana's responsibility for supervising other Earth Tech employees and Earth

Tech subcontractors. As a Program Manager, Dana also prepared Earth Tech's client invoices, and prepared reports for Earth Tech's executive team about Earth Tech's financial performance on the projects he supervised.

13. During his tenure at Earth Tech, Dana received training from Earth Tech on issues such as ethics and professionalism. He also received an Earth Tech employee handbook.

14. While Dana worked for Earth Tech, he had an Earth Tech telephone number and email address and Earth Tech business cards. Earth Tech provided Dana with a mobile telephone, and with an automobile for business use.

15. At Earth Tech, Dana worked primarily on projects for BART. In many years, BART was the only Earth Tech client Dana served. He sometimes spent 90 percent or more of his work time on tasks for BART, although in other periods he spent 50 percent or less of his time on work for BART (and the rest on work for Earth Tech itself or for Earth Tech's other clients). He recalls that he spent about four months in 2004 on projects for the Federal Emergency Management Authority, and about a week in 2000 on a project for Pacific Gas & Electric Company. Precise time records from Dana's employment at Earth Tech were not in evidence.

16. Dana began seeking a staff position at BART in 2004, because he understood BART's health and retirement benefits to be better for him and his family than the health and retirement benefits he was receiving at Earth Tech. He applied for open positions more than once before BART hired him. The evidence did not establish that Dana ever asked BART to classify him as an employee while he worked for Earth Tech, or that he sought such retroactive reclassification from CalPERS before 2014.

17. Dana resigned his employment at Earth Tech effective May 26, 2008.

18. On May 27, 2008, Dana began employment at BART. He first received and acknowledged BART's Code of Conduct, Conflict of Interest, and Outside Employment policy statements on this date. He also signed an Oath of Allegiance for the first time on this date, promising to "bear true faith and allegiance to the constitution of the United States and the constitution of the State of California."

19. Dana's starting annual salary at BART was about 75 percent of his final annual salary at Earth Tech.

### **Earth Tech's and Dana's Services to BART**

20. Between 1997 and 2008, BART had consulting agreements with several private engineering and construction management firms. In addition to Dana, three people who worked for BART during this period testified about these business relationships: Paul Medved, who continues as a BART Group Manager; Marvin Snow, who oversaw several such agreements but has retired; and John Gee, who worked as a BART engineer but has retired.

21. Medved, Snow, and Gee explained that BART used private consulting firms for construction management chiefly to give BART flexibility in meeting its construction needs. They testified that BART's construction management needs fluctuate considerably from year to year, depending on factors including the availability of state and federal transportation capital improvement funds. If BART maintained an employed engineering staff large enough to meet its needs in peak construction periods, it would either have to lay people off during slow periods or leave its employees idle. Instead, for major construction activities, BART contracts with private consulting firms that can provide people with appropriate experience on a project-by-project basis.

## **WRITTEN AGREEMENTS BETWEEN BART AND EARTH TECH**

22. When Dana began working at Earth Tech, Earth Tech provided services to BART. The first written agreement in evidence between BART and Earth Tech is from April 1998, and resulted from a competitive bidding process in which BART selected Earth Tech as one of several qualified consultant firms. The April 1998 agreement committed BART to using Earth Tech's services for at most five years.

23. BART and Earth Tech made a similar agreement in March 2002, again after a competitive bidding process. This agreement also committed BART to using Earth Tech's services for at most five years. Although Earth Tech continued to serve BART after March 2007, no further agreement between BART and Earth Tech was in evidence.

24. Both the 1998 agreement identified in Finding 22 and the 2002 agreement identified in Finding 23 stated that the services they described "cannot be performed satisfactorily by the officers and employees of BART."

25. The 1998 agreement between BART and Earth Tech called for Earth Tech to "assist and advise [BART] in construction management and procurement activities . . . in accordance with the requirements in the BART Resident Engineering Manual and the Standard Specifications, as provided by BART." Each year, the agreement called for Earth Tech to provide an annual work plan to BART, describing services Earth Tech would perform during that year and confirming the compensation BART would pay to Earth Tech for those services. The 2002 agreement was substantially the same.

26. The 1998 agreement between BART and Earth Tech gave Earth Tech and its employees "no authority to contract or enter into any other agreement in the name of BART." It also reserved to Earth Tech "full control over the employment, direction,

compensation and discharge of all persons employed by [Earth Tech] who are assisting in the performance of services” by Earth Tech to BART. The 2002 agreement was substantially the same.

27. The 1998 and 2002 agreements between BART and Earth Tech listed Dana among Earth Tech’s “key personnel” for Earth Tech’s services to BART.

### **COURSE AND SCOPE OF DANA’S WORK FOR BART**

28. Medved, Snow, Gee, and Dana all testified similarly regarding how BART typically organized construction activities between 1997 and 2008. A BART employee usually acted as Project Manager, supervising several related construction projects at a time. For each project, the BART Project Manager would assign a Resident Engineer to oversee construction, ensuring that both BART and BART’s construction contractor followed all construction specifications and contract terms. BART sometimes used BART employees as Resident Engineers. On many construction projects, however, BART asked consultants including Earth Tech to supply personnel for this role.

29. Between July 1, 1997, and May 26, 2008, BART maintained several successive versions of its Resident Engineer’s Manual. The Resident Engineer’s Manual described in great detail how Resident Engineers working for BART (whether as BART employees or as consultants) should administer construction contracts for BART facilities.

30. A Resident Engineer relies on other people, including construction inspectors, to ensure that construction occurs according to project specifications. When private consultants served as Resident Engineers, those Resident Engineers drew on their firms’ employees or subcontractors for these support services. A Resident Engineer, who interacted with construction personnel at the worksite, also would

coordinate activities with an Office Engineer, who maintained BART's documentation about every aspect of construction and reviewed invoices for construction services. BART sometimes used BART employees as Office Engineers, but sometimes asked private consultants who had provided Resident Engineers to provide Office Engineers as well.

31. Before his promotion (described above in Finding 12), Dana served BART primarily as a Resident Engineer. Dana followed the Resident Engineer's Manual faithfully when he served as a Resident Engineer for BART construction projects. After his promotion, Dana continued to act as a Resident Engineer for BART, but also supervised other Earth Tech Resident Engineers, staff members, and subcontractors. Dana's resignation letter to Earth Tech recommended another Earth Tech employee to replace Dana as Earth Tech's primary contact for BART work.

32. Dana had a workspace at BART's downtown Oakland headquarters. He had a badge that gave him access to secure areas of the building, although the badge noted prominently that he was a "CONSULTANT." He had a BART telephone number and email address, which did not change after May 27, 2008. BART provided a hard hat and safety vest for Dana to wear at BART worksites.

33. Although he spent some of his time at BART construction sites, Dana met regularly at BART's offices with BART employees and other consultants. He attended social events at BART, including annual holiday parties.

34. BART paid Earth Tech for services Dana and other Earth Tech employees and subcontractors rendered to BART, in accordance with payment terms in the written agreements described above in Findings 22 through 27. Earth Tech's invoices to BART for the period between July 1, 1997, and May 26, 2008, were not in evidence.

35. No witness believed that BART could have directed Earth Tech to terminate Dana's employment at Earth Tech. Instead, Medved, Snow, Gee, and Dana all believed between 1997 and 2008 that a BART Project Manager could have asked Earth Tech to replace Dana with someone else on that Project Manager's project. Although no one ever made such a request, Medved, Snow, Gee, and Dana all believed further that if BART had asked Earth Tech to remove Dana not only from a single BART project but from every BART project, Earth Tech would have exercised its own business judgment about whether to continue employing Dana and, if so, how to use his expertise.

36. Between July 1, 1997, and May 26, 2008, Dana knew that neither BART nor Earth Tech considered him a BART employee. Dana testified that "everyone" who worked with him at BART during this period thought he was a BART employee; this testimony is not credible.

## **LEGAL CONCLUSIONS**

1. CalPERS membership is open to persons "in the employ of a contracting agency" (Gov. Code, § 20028, subd. (b)), but not to "independent contractors who are not employees" (*id.*, § 20300, subd. (b)). To distinguish an employee from an independent contractor in this context, the California Supreme Court has held that CalPERS and the courts should use the "common law test for employment." (*Metropolitan Water Dist. of So. Cal. v. Superior Court* (2004) 32 Cal.4th 491, 509.)

2. The common law employment test considers multiple aspects of the business relationship between client or employer and worker. Among these criteria, the "right to control the means by which the work is accomplished is clearly the most

significant test . . . but not the only element in determining whether an employment relationship has been created." (*Tieberg v. Unemployment Ins. Appeals Bd.* (1970) 2 Cal.3d 943, 950.)

3. In this case, the matters stated in Findings 22 through 30 establish that BART engaged Earth Tech as a professional consultant to act as BART's agent with respect to certain construction projects. BART, the principal, directed and controlled its agent's actions, just as many clients direct and control their professional representatives. Public agencies whose employees are CalPERS members engage professional consultants such as real estate agents, engineers, and forensic expert witnesses regularly, in many cases with express authority from the Legislature to do so. (See, e.g., Pub. Util. Code, § 28769 [authorizing BART either to contract with or to employ professionals].) Given this express Legislative authority as well as this common practice, the Legislature cannot have intended that every professional consultant a public agency engages must be a CalPERS member simply because the public agency client holds final decision-making authority in the client-consultant relationship.

4. For the reasons stated in Legal Conclusion 3, other factors in the common law test for employment are critically important in this matter. These factors include:

(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 part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

*(Empire Star Mines Co. v. California Emp. Comm. (1946) 28 Cal.2d 33, 43-44.)* In general, these factors point to an employer-employee relationship "when the work being done is an integral part of the regular business of the employer and the worker does not furnish an independent business or professional service relative to the employer." *(Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd. (1991) 235 Cal.App.3d 1363, 1376.)*

5. The matters stated in Findings 8, 10, 11, and 15 establish that Earth Tech is in a distinct business, that of supporting private organizations and public agencies in carrying out major construction projects. BART's chief business, by contrast, is to operate "an adequate, modern, interurban mass rapid transit system." (Pub. Util. Code, § 28501.) As an Earth Tech employee consulting to BART, Dana engaged in a high-skill occupation: As described in Findings 6 and 30, he was a construction manager, not a clerk or receptionist. Although the agreements described in Findings 22 through 27 were for multiple years, they were time-limited; after each agreement had expired, BART would not have procured further service from Dana or any other Earth Tech employee if Earth Tech had not competed successfully for further work. Finally, the matters stated in Findings 22 through 27, 31, 35, and 36 show that neither BART nor Earth Tech, nor any individuals working for either employer, believed between 1997 and 2008 that Earth Tech's employees who served BART were BART employees.

6. Taken all together, the matters stated in Findings 6 through 36 establish that Dana did not act as BART's common law employee at any time before May 27, 2008. Dana was Earth Tech's employee, and Earth Tech supplied Dana's and other persons' expertise and labor to BART in a consultant-client relationship rather than an employee-employer relationship. Complainant's contrary determination is in error.

## **Laches**

7. The matters stated in Findings 3, 7, and 16 establish that Dana did not seek CalPERS service credit for his consulting work between 1997 and 2008 until more than 17 years after that consulting work began, and more than six years after it ended. Based on this delay, BART contends that the equitable defense of laches also should bar Dana's claims.

8. Laches would bar Dana's claim if his delay were unreasonable, and if it either caused prejudice to BART or reflected his own strategic acquiescence in the circumstances he seeks belatedly to change.

9. As stated in Findings 16 and 34, detailed records showing how Dana spent his work time between 1997 and 2008 were not in evidence. Without further information about why these records were not in evidence, however, their absence does not constitute prejudice to BART.

10. The matters stated in Finding 16 show that Dana understood for many years that employment at BART offered different compensation, including a different mix of immediate and deferred compensation, than did employment at Earth Tech. He acquiesced for at least 17 years in his treatment between 1997 and 2008 as a consultant to BART rather than a BART employee, and delayed unreasonably (as stated in Findings 3 and 16) seeking any change to that treatment. As described in Finding

19, Dana reaped the benefits of private employment by receiving a significantly higher salary from Earth Tech than he would have received from BART; now he seeks service credit at a cost reflecting the lower salary he would have received during those 11 years if he had been a BART employee. Further, Dana bases his request on general, qualitative, and retrospective information about his work at BART, most of which (as described in Findings 10 through 12, 22 through 27, and 36) contradicted the only contemporaneous documentation in evidence about Dana's, Earth Tech's and BART's business relationship. Laches is an additional basis to deny Dana's claim.

## ORDER

The appeal by BART in this matter is granted. Respondent Mark R. Dana was not a BART employee between July 1, 1997, and May 26, 2008. BART did not err by failing to enroll Dana in CalPERS before May 27, 2008.

DATE: December 17, 2019

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*Juliet E. Cox*  
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JULIET E. COX

Administrative Law Judge

Office of Administrative Hearings