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RESPONDENT'S ARGUMENT



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Via Overnight Mail

Cheree Swedensky, Assistant to the Board
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JAN 30 2020

Re: Respondent BART’s Argument to Adopt ALJ’s Decision in Agency Case No. 2018-0432, OAH Case No. 2018120359, *In the Matter of the Appeal of Membership Determination of Mark R. Dana and San Francisco Bay Area Rapid Transit District*

Dear Ms. Swedensky:

Please find attached respondent Bay Area Rapid Transit District’s (“BART”) argument to adopt the administrative law judge’s decision in the above-referenced matter. This matter is set for consideration by the Board of Administration on February 19, 2020. If you have any questions, please do not hesitate to reach out.

Sincerely,

Arthur A. Hartinger

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Memorandum

Date: Jan. 27, 2020

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

From: Attorneys for Respondent Bay Area Rapid Transit District:
Victoria R. Nuetzel, Bay Area Rapid Transit District
Jeana A. Zelan, Bay Area Rapid Transit District
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Re: Respondent BART's Argument to Adopt ALJ's Decision in Agency Case No. 2018-0432, OAH Case No. 2018120359, *In the Matter of the Appeal of Membership Determination of Mark R. Dana and San Francisco Bay Area Rapid Transit District*

I. Summary

The findings and decision of Administrative Law Judge Juliet Cox ("ALJ Cox") in this case (the "*Dana* matter") are correct and well-reasoned. ALJ Cox applied established law to a common industry arrangement between Bay Area Rapid Transit District ("BART") and Mark Dana, a former construction management consultant who worked for a large construction management consulting firm, Earth Tech. ALJ Cox correctly determined, in part based on the frequency of such arrangements and in part upon the express authority granted by the California Legislature to enter into such arrangements, that Mr. Dana was not a common law employee when providing services through Earth Tech.

ALJ Cox correctly found that BART did not exercise control over Mr. Dana the nature and extent of which could convert Mr. Dana from an independent contractor into a common law employee. ALJ Cox's Proposed Decision correctly applies the law to the facts and should be adopted by the Board of Administration.

II. Brief Factual Background

BART is a special transit district created by the California Legislature. Its purpose is to provide transit service in the San Francisco Bay Area. Its expertise is in *running* a railroad—not managing the complex construction required to build new stations and lines. BART's budget and needs for construction vary greatly depending on funding, project timing and other factors.

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The California Legislature explicitly provided that BART “may contract for . . . any professional services required by the district or for the performance of work or services for the district which, in the board of director’s opinion, cannot satisfactorily be performed by the officers or employees of the district.”¹

BART routinely contracts with a third-party consulting companies to provide construction management services on some of its projects. During the relevant time period, BART contracted with Earth Tech whose employees were responsible for overseeing the construction contractor at the construction site, overseeing the contractor’s work and ensuring that the contractor was complying with the terms and conditions of its construction contract with BART. The contracts between BART and Earth Tech provided that Earth Tech was an independent contractor who would retain full control over the employment—including compensation—of its employees.

Mark Dana (“Dana”) began working for Earth Tech in late 1996 or 1997. He initially served solely as a “resident engineer” (“RE”) on BART projects. In that role, he ensured that the construction contractor followed all construction specifications and contract terms. He was eventually promoted within Earth Tech to a “program manager” role, which involved increased supervision of Earth Tech employees and responsibility for Earth Tech’s profits and billing on BART projects.

Numerous indicia support ALJ Cox’s conclusion that Mr. Dana was an employee of Earth Tech—and not BART—including:

- Earth Tech required Mr. Dana to bill a minimum number of hours to client projects each year. In fact, in 2004 when his hours on BART projects were low, he stopped working on BART projects altogether and worked for FEMA in Florida for three months. Working overtime on disaster recovery helped him to “catch up” on billable hours and satisfy his Earth Tech yearly quota.
- Mr. Dana’s Earth Tech manager performed yearly performance reviews. Those reviews encouraged him to seek new business. Mr. Dana regularly “pitched” new business to other transit agencies.
- Earth Tech paid Mr. Dana a set salary without regard to how many hours he billed to clients in a given year.
- Earth Tech was ultimately in charge of Mr. Dana’s employment status. For example, even if BART asked that he be removed from BART projects, Earth Tech could have moved him to other clients’ projects at its discretion.

Mr. Dana eventually applied for a full-time employment position at BART. He was ultimately hired as a BART employee in 2008, albeit to a substantially different role than

¹ Pub. Util. Code § 28769.

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resident engineer. Only in 2014—six years after he was hired—did he request service credit for his time spent with Earth Tech.

III. Summary of ALJ Cox's Findings

ALJ Cox applied established law to the facts above in correctly holding that Mr. Dana was an independent contractor for the purposes of CalPERS credit.

Since at least 2004 and the California Supreme Court's decision in *Metropolitan Water District v. Superior Court*,² CalPERS has applied the common law employment test set forth in *Tieberg v. Unemployment Insurance Appeals Board*³ to determine whether an alleged independent contractor is actually subject to CalPERS enrollment. The case law on common law employment is voluminous, as courts have applied the *Tieberg* common law employment factors for over fifty years to a wide range of work conditions.

Under *Tieberg* and related case law, “[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”⁴ In addition to that principal test, *Tieberg* also laid out a non-exhaustive list of “secondary” factors to consider, including, whether or not the one performing services is engaged in a distinct occupation or business, the skill required in the particular occupation, and whether the parties believed they were entering into an independent contractor relationship at the time.⁵ The ALJ is tasked with balancing all of these factors—and any others the ALJ thinks are appropriate—in light of the facts.

ALJ Cox clearly followed the law. After approximately ten pages of factual findings, she analyzed both the “primary factor”—the level of control BART exercised over Mr. Dana—and the “secondary” factors. *See Proposed Decision at pgs. 10-13.* Ultimately, ALJ Cox held that:

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. (Proposed Decision at pg. 13)

² *See generally Metropolitan Water Dist. v. Sup. Ct.* (2004) 32 Cal. 4th 491.

³ *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal. 3d 943.

⁴ *Tieberg*, 2 Cal. 3d at 946 (citation omitted).

⁵ *Id.*

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As a separate, independent grounds for her Proposed Decision, ALJ Cox—invoking the laches doctrine—found that Mr. Dana impermissibly delayed in seeking service credit. ALJ Cox correctly held that:

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. (Proposed Decision at pgs. 13-14.)

IV. The Board of Administration Should Adopt ALJ Cox's Findings in Full

ALJ Cox made the right findings in the *Dana* matter, and the Board of Administration should adopt the Proposed Decision in full.

When a public agency does not have in-house expertise to perform specialized tasks necessary to carry out its mission, the public agency will often turn to third-party consultant agencies. These arrangements are common throughout California and are essential in enabling public agencies to meet their goals in a timely and cost-effective manner. The California Legislature has authorized many public agencies—including BART—to contract with third parties when the work “cannot satisfactorily be performed by the officers or employees of the district.”⁶ ALJ Cox’s findings simply recognize the necessity of these arrangements. ALJ Cox rightly declined to impose a crushing financial burden on public agencies throughout California by forcing those agencies to treat these specialist consultants as common law employees.

ALJ Cox’s findings on this point are straightforward and make intuitive sense:

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

⁶ Pub. Util. Code § 28769

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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. . . . ***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.*** (Proposed Decision at pg. 11 (emphasis added).)

Furthermore, the CalPERS Board is not in a position to second-guess ALJ Cox's decision. All parties agreed that *Tieberg's* legal standard applied. The only disputes involved the weight and credibility of the evidence. Yet ALJ Cox—not the Board of Administration—actually sat through the testimony and is in the best position to evaluate it. The hearing lasted three full days. ALJ Cox heard testimony from seven witnesses and received voluminous exhibits. Her thorough, well-reasoned Proposed Decision directly grappled with the testimony that she saw first-hand. ALJ Cox was in the best position to determine witness credibility—which witnesses were spinning the facts and which ones were playing it straight. The Board of Administration should trust her judgment on the facts and testimony.

Finally, it should be noted that the facts at issue here are different from recently adopted decisions finding that an alleged independent contract was, in fact, a common law employee. In the *Fuller* matter,⁷ for example, the alleged employee was acting as a public agency's finance manager for eight months. The position was entitled "interim" finance manager, was previously held by a full-time agency employee, was subsequently held by a full-time agency employee, and was obviously required to fulfill the core functions of the public agency. That is a far different scenario than the facts at issue here. The specialized work Mr. Dana provided was outside BART's core mission. BART's needs from Earth Tech employees—including Mr. Dana—and other specialist consultants varied widely based on budgeting and project timing. Adopting the Proposed Decision is therefore entirely consistent with CalPERS' recent actions.

V. Summary

For the reasons stated above and in BART's briefing submitted to ALJ Cox, the Board of Administration should adopt the Proposed Decision in full.

⁷ *In the Matter of the Appeal of Membership Determination of Tracy C. Fuller and Cambria Community Servs. Dist.*, Agency Case No. 2016-1277, OAH Case No. 2017050780 (adopted Oct. 1, 2018).