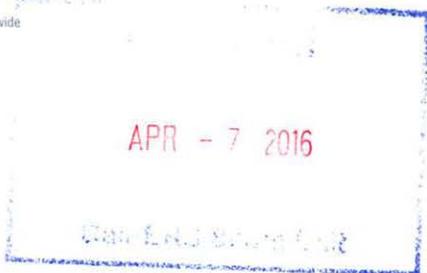


ATTACHMENT B
RESPONDENT AUTHORITY'S ARGUMENT



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April 5, 2016



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Re: *In the Matter of the Appeal Regarding Membership Exclusion of Foundation Employees by Santa Clara County Health Authority and Kathleen King*
Respondent's Argument: April 20, 2016 CalPERS Hearing

Dear CalPERS Board of Directors:

Respondent the Santa Clara County Health Authority ("the Authority") thanks the Board for this opportunity to explain why the Board should reject the proposed decision by Administrative Law Judge Anderson to exclude Respondent Kathleen King from enrollment in CalPERS.

There is no dispute that King was entitled to enroll in CalPERS if she was "in the employ" of the Authority. Cal. Gov't C. §§ 20370(a), 20383. The PERL does not define "employee" but does exclude "independent contractors who are not employees." *Id.* § 20300(b). The PERL includes workers "who would be considered [the public entity's] employees under California common law."¹

Here, King either was (1) a common law employee of the Authority, or (2) jointly employed by the Authority and the Foundation. Under either theory, King was properly enrolled in CalPERS.

The Parties: The Authority is a county health authority established in 1995 that provides health care to Santa Clara County residents who do not qualify for MediCal coverage. There is no dispute that the Authority is a contracting agency whose employees are properly enrolled in CalPERS. The Authority formed the Santa Clara County Health Foundation ("Foundation") as a non-profit organization in 2000 to raise funds for health care administered by the Authority. King was the Executive Director of the Foundation and reported to CalPERS from 2008 to 2013.

No Fraud Or Subterfuge: This is not a case where a public entity attempted to enroll persons in CalPERS as a subterfuge to gain benefits to which the workers were not entitled or to defraud CalPERS in any way. This also is not a situation in which a public entity transferred employees to a separate entity to reduce its financial obligations. All CalPERS contributions for King were made. No fraud, malice or bad faith is alleged. Further, CalPERS' position comes as a complete surprise because for over a decade, CalPERS never suggested King or any Foundation worker should not be reported.

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King Was Properly Enrolled In CalPERS

King was properly enrolled in CalPERS because she was either: (1) a common law employee of the Authority, or (2) jointly employed by both the Authority and the Foundation.

King Was A Common Law Employee

King was a common law employee of the Authority because the Authority controlled significant terms and conditions of her employment. A common law employment relationship exists under two alternative circumstances: *either* the employer has the "right to control" the worker, *or* the employer exerts *actual* control of the worker. The employer does not have to both control the worker *and* have the legal right to control the worker.

Indicia of an employment relationship include an at-will relationship, the manner of compensation, the act of offering employment, tax treatment of the relationship, assignment of work, directing when and where work is performed, discipline (including termination), performance reviews, and mandated training. Here, many indicia of an employment relationship were established:

At-Will Employment And Compensation:

- King was offered employment "[o]n behalf of the *Santa Clara County Health Authority...*"²;
- The Authority reserved the right to terminate King **at will**;³
- The Authority denied King a salary increase;⁴
- The Authority granted King a raise as part of an across-the-board salary merit increase for all **Authority** employees⁵;
- The Authority increased King's compensation in June 2010, based on the approval of the Authority's CEO, without the knowledge or approval of the Foundation;⁶
- Merit salary increases for Foundation workers were approved by the Authority's CEO, *not* the Foundation⁷;
- The Authority's compensation determinations were never reversed;⁸ and
- King received the same health and insurance benefits as comparable Authority senior staff.⁹

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The Authority Identified As King's Employer On Paystubs And W-2

- Only the Authority—*not* the Foundation—was listed as King's employer on her paychecks¹⁰;
- Only the Authority—*not* the Foundation—was listed as King's employer on her W-2¹¹.

The Authority's Control Of Terms And Conditions Of King's Employment

- King was subjected to the Authority's employment policies, procedures, and training¹²;
- The Authority told King whether she could hire or fire her subordinates¹³;
- The Authority's human resources director reviewed and approved King's evaluation forms for her subordinates before they could be presented to any Foundation worker¹⁴
- King needed approval of the Authority's CEO to take vacation for most of her employment¹⁵;
- The Authority told King's direct reports when to show up for work and when they could leave early, without even seeking King's permission;¹⁶ and
- The Authority—not King—determined changes in Foundation employee status with respect to positions, hours, compensation and benefits.¹⁷

The proposed decision ignores most of these facts that support a common law employment relationship. For instance, the right to terminate a worker **at-will**—with or without cause—is “[s]trong evidence of an employment relationship,” as noted by the California Supreme Court in a case CalPERS relied upon.¹⁸ Yet the proposed decision never even mentions this at-will relationship.

Also ignored by the proposed decision is that King testified it was the **Authority's** CEO who controlled her compensation, even though this fact is significant in showing that the Authority exercised actual control over King's employment.

Another indicia of an employment relationship entirely ignored by the proposed decision is the undisputed fact that the Authority exerted significant control over who King could hire and fire. As a senior executive, one would expect that King had autonomy to decide who to hire and who to fire. But when King wanted to terminate a Foundation staff member, the Authority prevented that action.¹⁹ When King wanted to convert a temporary employee into a permanent one the Authority said no.²⁰ When the Authority wanted services from a Foundation staff member, that staff member's duties changed, and the Authority refused to allow King to replace that individual.²¹ The Authority on several other occasions prevented King from hiring

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additional staff.²² As King explained, "I didn't even hire a temp without the Health Authority saying it was all right."²³

Similarly, the proposed decision ignores the fact that King was required to adhere to the same employee policies as Authority employees²⁴, the same confidentiality agreement²⁵, the same community outreach regulatory restrictions²⁶, and to complete the same Form 700.²⁷

Although no contrary evidence was presented, the proposed decision ignores *all* of these undisputed facts that support an employment relationship with the Authority. The Board consequently should reject the proposed decision and find that King was a common law employee of the Authority.

King Was Jointly Employed By Both The Authority And The Foundation

Even if King were not a common law employee of the Authority, CalPERS enrollment was appropriate if she were jointly employed by both the Authority and the Foundation. The Administrative Law Judge agreed "[t]he definition of common law employment includes co-employment," but found that King was not jointly employed by the Authority and the Foundation. The Board should reject this unsupported conclusion.

The concept of joint employment recognizes that a single individual may be employed by two entities at the same time. A joint employer relationship exists when two entities *share* control over terms and conditions of employment, such as the right to hire and fire, to set compensation, and day-to-day supervision of workers. Joint employers may exercise authority over different terms and conditions of employment. For instance, one employer can set a worker's wages and hours while another employer assigns work.

Here, King's undisputed testimony amply establishes that the Authority at a minimum shared control over essential terms and conditions of King's employment. The Authority not only hired King "at will," but issued her paychecks and W-2 tax forms, determined when she obtained salary increases, required she agree to the Authority's employment policies, required certain training and determined when she could take vacation.

In addition, the undisputed evidence established that King and Foundation workers were integrated into the Authority. King's efforts were devoted to raising money for the Authority's programs. As she testified, "we **took all our direction from the Authority**, I mean we raised money for the Authority, we – everything we did was for the Authority." (RT 166:5-7 (emphasis added).) Other indicia of integration include:

- King signed the same confidentiality agreement as Authority employees;
- King was subject to the same employee policies as Authority employees;

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- King had to adhere to the same community outreach regulatory restrictions as the Authority;
- King had to file a Form 700—which was legally required only for an employee or agent of at least a quasi-public agency;
- King received the same health and insurance benefits as Authority senior staff;
- The Authority provided King her office space and equipment at minimal cost;
- At the Authority's direction, King created a strategic plan to detail the anticipated accomplishments of the Authority and Foundation,²⁸ and
- King renegotiated the lease for the Authority's office space.²⁹

These facts demonstrate that King was integrated into the Authority and jointly employed by the Authority and the Foundation. Many of these facts were simply ignored by the ALJ in her proposed decision, which merely states a contrary conclusion without analysis or reference to any evidence.

Indeed, if King was not a common law employee, as the proposed decision concludes, then King had to be jointly employed by both entities because of the numerous indicia of Authority control over her employment. In sum, the proposed decision correctly finds that a worker qualifies for CalPERS enrollment if jointly employed by a public entity, but ignores the salient facts that establish King was a joint employee of the Authority.

Form Does Not Trump Substance

Rather than dispute Respondents' evidence, the proposed decision ignored that evidence in favor of formal written documents that did not reflect the actual conduct of the parties. But the law clearly holds an employment relationship cannot simply be disavowed in writing.

As one court held where an entity in writing disavowed any employment relationship, yet the worker's compensation was set by that entity and was subjected to company policies and procedures, annual performance reviews and required training: "The parties' label is not dispositive and **will be ignored if their actual conduct establishes a different relationship.**"³⁰ In other words, when an entity **actually** exercises control over a worker, the fact that a written contract disavows any employment relationship over that worker does **not** change that reality. If the law were otherwise, entities could draft written documents to evade their legal responsibilities.

The proposed decision wrongly elevates form over substance in relying on the legal documents making the Foundation a separate legal entity that had a legal right to control the terms and conditions of King's employment. The parties' label must be ignored because their conduct

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establishes the Authority exercised sufficient control to create an employment relationship. Further, The proposed decision admits "[t]he two entities were admittedly intertwined, to the extent that the CEO of the Authority seemed at times to ignore the fact that the Foundation was separate and that Respondent King reported to the Foundation's Board." (Decision at 7.) Indeed, King testified that "[the Authority's CEO] could have made it very tough for me" if she did not follow the direction of the Authority's CEO.³¹ King also testified, "I didn't even hire a temp without the Health Authority saying it was all right."³² Given that the Authority controlled the employment policies governing King, who she hired, who she fired, not to mention King's compensation, King reasonably concluded that **the Authority** controlled the terms and conditions of her employment.

Rather than recognize this reality that "**actual conduct** establishe[d] a different relationship," than stated in formal legal documents, the proposed decision instead blames King for not "assert[ing] her rights" based on these legal documents, despite the uncontradicted evidence that King had no such control.³³

In so doing, the proposed decision contravenes controlling legal authority. The Board should reject this decision that is contrary to both the law and the facts, and find that King was a joint employee of the Authority.

Joint Employment Is A Form Of Common Law Employment

We briefly address the contention that no form of joint employment can be recognized by CalPERS. Two entities can be joint employers of the same individuals under the common law.³⁴ CalPERS relies on *Cargill*³⁵ and *City of Galt*, but neither case so limits the Board's authority.³⁶

In *Cargill*, the situation was the opposite of what is presented here. The California Supreme Court rejected the public agency's position that "long-term, full-time workers hired through private labor suppliers" are "employees **only** of the labor supplier."³⁷ The Court found that the fact that the workers were paid by a separate entity did not exclude them from enrollment in CalPERS. The Court found there was no exception in PERL for workers hired through labor suppliers to a contracting agency's duty to enroll employees in CalPERS.³⁸ Thus, the public agency could not **avoid** retirement benefits by treating the workers as employees only of the private labor suppliers. Here, the Authority is **not** avoiding providing benefits to King; all required contributions were made. Nothing in *Cargill* precludes finding King to be "in the 'employ' of a contracting agency" any more than the workers hired by private labor suppliers in *Cargill*.

CalPERS' reliance on *Galt Services Authority and City of Galt* likewise is misplaced. There, the City of Galt transferred some of its employees to work for a separate entity: the Galt Services Agency (GSA). GSA paid these workers and provided their benefits, but in actuality they continued to work for the City of Galt. This structure was adopted for the purpose of facilitating the City's avoidance of social security obligations for these workers. The administrative law

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judge determined that, even though the written agreement appeared to give the GSA the responsibility to control the workers, the actual conduct of the parties trumped the written agreement. The decision did not consider whether an employee of a joint employer is **excluded** from the definition of a common law "employee." The *Galt* decision thus supports Respondents here since it recognizes that the **actual** exercise of control rather than what was stated in a written document controls.

The Decision Should Not Have Precedential Effect

Should the Board nevertheless adopt the proposed decision, that decision should not have precedential effect because it does not contain a significant legal or policy application of general application that is likely to recur. The factual circumstances that gave rise to this appeal are not likely to recur with other public agencies since public agencies generally do not have fundraising affiliates. Nor are other public agencies likely to have enrolled persons employed by an affiliate with the mistaken understanding that those persons are entitled to CalPERS benefits.

In addition, other than recounting the procedural history and quoting from several documents, the proposed decision provides only 4 paragraphs recounting CalPERS' evidence and 3 paragraphs summarizing Respondents' evidence. This discussion omits critical facts. For instance, the proposed decision indicates that employee evaluations "were organized by the Authority's HR department," but omits the important evidence that the Authority reviewed and approved King's completed evaluations of staff before they could be presented to any Foundation worker.³⁹ The proposed decision reports that the Authority completed a questionnaire concerning the employment of another individual besides King, repeating the responses helpful to CalPERS. But the proposed decision omits the Authority's confirmation that the Authority—not the Foundation—could terminate the relationship with this individual at any time (a clear indication of an employment relationship), as well as the Authority's affirmative response to the penultimate question: "In your opinion, is the individual an employee of the agency? **Yes.**"⁴⁰

The sweeping conclusions bereft of evidentiary support in the proposed decision do not provide "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." The proposed decision accordingly does not meet the Board's standards as one entitled to precedential status.

Conclusion

It is undisputed that the Authority did not attempt to transfer employees in order to evade its responsibility to fund their retirement contributions. To the contrary—it funded fully King's benefits. Moreover, the reality of the relationship was that the Authority in fact controlled key terms and conditions of King's employment, which existed solely to serve the Authority's public purpose. King not only received paychecks and W-2 forms showing the Authority as her employer, she was at-will, the Authority determined her compensation, told King who she could

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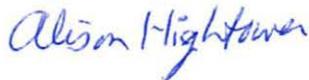
hire and fire and when, and the Authority required that she adhere to the same policies, contracts, training and performance evaluation process as Authority employees. The proposed decision does not dispute these facts. Instead, it incorrectly relies on legal documents describing a formality contradicted by the actual control exercised by the Authority over King's employment. Under the law, the reality of the relationship overrides any legal formalities, yet the proposed decision does the exact opposite.

Finding that King should not have been enrolled in CalPERS is not only legally wrong, but inherently unfair. CalPERS did not question the enrollment until its 2012 audit concluded, and the audit and the ensuing processes have lasted almost three more years. CalPERS now seeks to remove all "employees" of the Foundation from its rolls. King and the Authority had no warning that CalPERS would take this position after-the-fact.

Respondent Santa Clara County Health Authority respectfully asks this Board to reject the proposed decision as contrary to the law and the facts. The Board also should not designate the decision as precedential.

The Board should reject the proposed decision and issue a new decision finding that: (1) the common law employment relationship must be assessed based on whether the entity exerts either actual control or has the right to control the worker and that the parties' legal documents must be ignored if their actual conduct establishes an employment relationship; (2) a joint employer relationship such that an employee of both the Authority and the Foundation under these specific facts is "in the employ of any contracting agency;" and (3) King was properly enrolled in CalPERS as a "common law" and/or joint employee of the Authority under these unusual and specific facts.

Respectfully submitted,



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Santa Clara County Health Authority

ASH/ah
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¹ The Board may not have had the opportunity to review the record from the hearing held before the administrative law judge, let alone the testimony of the witnesses or the briefs submitted. We thus provide citations to that record in the event the Board wishes to review the evidence. "RT" refers to the transcript of the August 26, 2015 hearing, and "Ex. A" refers to the binder of exhibits King submitted, with tab designations referencing exhibit tabs within that binder.

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² CalPERS Ex. 13 (emphasis added)

³ CalPERS Ex. 13.

⁴ RT 141:2-16.

⁵ RT 132:14-133:10.

⁶ RT 120:1-11; 136:13-137:2.

⁷ RT 120:1-11, 132:14-133:10, 136:13-137:2, 137:7-19.

⁸ RT 141:17-20.

⁹ RT 154:13-18, 155:18-156:1, Ex. A, Tab 26 at 156, Tab 28 at 163, Tab 29 at 165-67, Tab 30 at 168-171.

¹⁰ RT 125:1-10, 148:10-15, King Ex. A, Tab 21 at 120-132.

¹¹ RT 151:17-23.

¹² RT 154:19-155:1, 163:11-13.

¹³ RT 160:18-162:6, 164:5-166:9, 166:24-168:15, 169:7-20, 203:12-20; Ex. A, Tab 34.

¹⁴ RT 143:23-144:15.

¹⁵ RT 153:12-154:4.

¹⁶ RT 170:3-8, 175:13-23, Ex. A, Tab 41 at 198)

¹⁷ RT 129:17-22)

¹⁸ *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal. 3d 943, 949 (1970).

¹⁹ RT 160:18-162:6.

²⁰ RT 164:5-165:2.

²¹ RT 166:24-168:15.

²² RT 169:7-20.

²³ RT 203:12-20.

²⁴ RT 154:19-155:1, 163:11-13.

²⁵ RT 172:14-19, 180:5-11, Ex. A, Tab 38.

²⁶ RT 238:11-241:23, Ex. A, Tab 64 at 275, Tab 65 at 281-288.

²⁷ RT 177:14-19; Ex. A, Tab 202.

²⁸ RT 118:10-119:22, Ex. A, Tab 8, 053.

²⁹ RT 186:5-187:9, Ex. A, Tab 49 at 225.

³⁰ *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1, 10-11 (2007) (emphasis added). *Accord*, *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal.3d 341, 358 (1989) (same); *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.*, 235 Cal.App.3d 1363, 1372 (1991) (workers were common law employees despite agreement that stated otherwise).

³¹ RT 166:1-9.

³² RT 203:12-20.

³³ *Estrada*, 154 Cal.App.4th at 10-11.

³⁴ *NLRB v. Browning-Ferris Indus.*, 691 F. 2d 1117, 1124 (3d Cir. 1982); *Browning-Ferris Indus of Calif., Inc.*, 362 NLRB 186 at 12 (Aug. 27, 2015) (the Board's joint employer doctrine always incorporated the common law definition of an employee and the Restatement (Second) of Agency).

³⁵ *Metropolitan Water District of Southern California v. Superior Court (Cargill)*, 32 Cal.4th 491 (2004).

³⁶ PERB Precedential Decision 08-01 (2008)

³⁷ *Cargill*, 32 Cal.4th at 506 (emphasis added).

³⁸ *Id.*, 32 Cal.4th at 506.

³⁹ RT 143:23-144:15.

⁴⁰ CalPERS Ex. 16 at pp. 2-3 (emphasis added).