

**ATTACHMENT C**

**RESPONDENT'S ARGUMENT**

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10 SALLY TIRADO

11 **BOARD OF ADMINISTRATION**  
12 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

13 In the Matter of the Appeal of Membership  
14 Determination of:

15 SALLY TIRADO,

16 Respondent,

17 v.

18 COUNTY OF MONTEREY, NATIVIDAD  
19 MEDICAL CENTER,

20 Respondents.

AGENCY CASE NO. 2021-0922

OAH NO. 2022020372

**BRIEF IN SUPPORT OF ADOPTING  
PROPOSED DECISION WITH  
TECHNICAL AND MINOR CHANGES**

**[Govt. Code §11517(c)(2)(C)]**

Board Meeting Date: Sept. 20, 2023

1 **I. RECOMMENDATION BOARD ADOPT PROPOSED DECISION**

2 On August 4, 2023, Office of Administrative Hearings, Administrative Law Judge  
3 Michael C. Starkey issued his Proposed Decision (“Decision”) determining that in addition to  
4 the period from April 1, 2013, through May 28, 2020, Respondent Sally Tirado qualified for  
5 membership in CalPERS between May 1, 2002, and March 30, 2013 “as a result of her  
6 performing services as a common-law employee for respondent County of Monterey.”  
7 (Decision, Ultimate Factual Finding No. 49 (“UFF 49”); Conclusion of Law No. 16 (“COL  
8 16”); and Order No. 1.)<sup>1</sup>

9 The Decision also concluded the “County must promptly perform a diligent search of  
10 all the records in its possession that might plausibly include records of payments to Tirado  
11 from April 1, 2013, through May 28, 2020, and promptly produce any such records to  
12 CalPERS[.]” (COL No. 17.) ALJ Starkey found the County “diligently searched its payroll  
13 system for records of payments” to Tirado, but because she was paid as an independent  
14 contractor “the payroll system is not where the County would store those records” and it “did  
15 not search accounts payable records or any financial records other than its payroll system.”  
16 (UFF No. 50.) Therefore, the Order instructs the County “shall perform a diligent search of  
17 all the records in its possession that might plausibly include records of payments to Tirado  
18 from April 1, 2013, through May 28, 2020, and produce any such records to CalPERS within  
19 30 days of the effective date of this order.” (Order No. 2.)

20 Generally, Tirado agrees and recommends the Board adopt the Proposed Decision.

21 **II. REQUEST THAT BOARD MAKE TWO ADDITIONAL TECHNICAL OR**  
22 **OTHER MINOR CHANGES TO ORDER NO. 2 THAT FALL WITHIN THE**  
23 **SCOPE OF SUBDIVISION (c)(2)(C) OF GOVT. CODE SECTION 11517.**

24 In contested cases and upon the filing and service of the proposed decision, the Board  
25 may “make technical or other minor changes in the proposed decision and adopt it as the

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27 <sup>1</sup> By not appealing CalPERS’ earlier determination that Tirado was an employee from April 1,  
28 2013, through May 28, 2020, the contracting agency County of Monterey conceded this point.

1 decision” so long as such changes are “limited to a clarifying change or a change of a similar  
2 nature that does not affect the factual or legal basis of the proposed decision.” (Govt. Code  
3 §11517, subd. (c)(2)(C).)

4 Order No. 2 provides in its entirety:

5 The County shall perform a diligent search of all the records in its possession that  
6 might plausibly include records of payments to Tirado from April 1, 2013, through May 28,  
7 2020, and produce any such records to CalPERS within 30 days of the effective date of this  
8 order.

9 **A. Order No. 2 should be expanded to cover the *entire* period Tirado was a  
10 common-law employee: from May 1, 2002 through to May 28, 2020.**

11 It is a matter of pragmatism to expand the order to include not just April 1, 2013,  
12 through May 28, 2020, but also May 1, 2002 through to March 13, 2013 (in effect, the entire  
13 period of time). This does not “affect the factual or legal basis of the proposed decision”  
14 because ALJ Starkey already made findings relevant to this issue.

15 ALJ Starkey determined that while the County “diligently searched its payroll system  
16 for records of payments” to Tirado, because she was paid as an independent contractor “the  
17 payroll system is not where the County would store those records” and “did not search  
18 accounts payable records or any financial records other than its payroll system.” (UFF No.  
19 50.) This applied to the period of April 1, 2013, through May 28, 2020.

20 If the County conducts the same limited search (*i.e.*, confined to its payroll system)  
21 for the period of May 1, 2002, through March 30, 2013, the result will be the same because,  
22 as the ALJ already determined, the payroll system is not where those records would be stored  
23 for someone paid as an independent contractor. (UFF No. 50.) This is supported by the  
24 testimony of County payroll manager Patricia Girard. As she explained, “if the County had  
25 paid Tirado as an independent contractor, its payroll system would not include any record of  
26 such payments” and would exist in “accounts payable” or other records “detailing such  
27 payments.” (Decision, Finding of Fact Nos. 46-47.)

28 It is in the interest of administrative economy and efficiency for the Board and parties

1 to amend Order No. 2 in this regard. Although Tirado hopes that given the course of the  
2 proceedings, the County will expand its search beyond employee payroll records for the  
3 period of May 1, 2002, through March 31, 2013 because it now knows it is unlikely to find  
4 the full breadth of such records of payment there as to Tirado, amending the Order will avoid  
5 a chance of recurrence and resulting delay and cost of a subsequent hearing just to come to  
6 the same conclusion and issue the same order.

7 **B. The Board should expand the breadth of the search to require the County**  
8 **to not only such the records in its possession, but to make a good-faith**  
9 **attempt to diligently search or acquire records of the third-party payors,**  
10 **including Natividad Medical Foundation.**

11 Order No. 2 limits the breadth of the search to records in the County’s “possession  
12 that might plausibly include records of payments to Tirado.” Based upon testimony and the  
13 evidence, ALJ Starkey found that “Tirado submitted, and the [Natividad Medical] Foundation  
14 paid, invoices for Tirado’s record.” (Finding of Fact No. 38.) The Foundation issued the  
15 yearly tax records to Tirado (Exs. B 1 through B13) and was a party to the agreements.  
16 (Finding of Fact Nos. 24-25.) The County, Foundation and Natividad Medical Center also  
17 likely, and appear to have, used a third-party accounts payable servicer. The breadth of the  
18 search must include these sources. This is consistent with the factual findings and  
19 contemplated by California Supreme Court case law and CalPERS Circular 200-056-15.

20 In *Metropolitan Water District of Southern California v. Superior Court (Cargill)*  
21 (2004) 32 Cal.4<sup>th</sup> 491 (“*MWD*”), the California Supreme Court held that “PERL’s provisions  
22 concerning employment by a contracting agency incorporates a common law test for  
23 employment, and that nothing elsewhere in the PERL, in [Respondent’s] administrative code,  
24 or in statutes and regulations addressing joint employment in other contexts supports reading  
25 into the PERL an exception to mandatory enrollment for employees hired through private  
26 labor suppliers.” (*Id.* at p. 509) Importantly, it further held “we do not agree that only those  
27 on the [Respondent’s] payroll may be considered [Respondent’s] employees for purposes of  
28 enrollment in CalPERS.” (*Id.* at p. 501.) In doing so, the Court was mindful of the trial

1 court's "'cogent[] observ[ation]' that to hold otherwise 'would allow . . . contracting agencies  
2 to unilaterally avoid their enrollment obligations by setting up a variety of third-party wage  
3 and benefit mechanisms[.]'" (*Id.* at p. 504.) This must be understood to apply with equal  
4 force to a contracting agency avoiding its pay reporting obligations by claiming, as the  
5 County does here, that those records are in the custody of those same "third-party" labor  
6 suppliers and wage payors, and thus unreportable by it.

7 This is further supported by Circular Letter No. 200-056-15. (Nov. 5, 2015) (Tirado  
8 Ex. 70 at B477-479). Letter No. 200-056-15, concerning changes to the employer  
9 certification section of the Service Prior to Membership (SPM) service credit purchase  
10 request form, expands the scope of acceptable documentation to support employer  
11 certification of the SPM period. It contemplates the absence of traditional payroll documents  
12 to support accurate assessment of credits and costs, concluding that "[i]n the event that  
13 specific pay period detail is not available, the employer and/or the member may submit any  
14 substantiating documents for review." (*Id.* at p. 2.)

15 Amending Order No. 2 also appears necessary: the County's most recent submission  
16 (which Tirado understands may have been inadvertently filed with the Office of  
17 Administrative Hearings) indicates a reluctance by the County to be forthcoming in its  
18 overarching obligation to submit more than the bare minimum of "substantiating documents  
19 for review." Given the County's incentive to report as little pay as possible, if the Board does  
20 not order the County to seek records of its third-party labor suppliers or payors (including the  
21 Foundation and perhaps its vendors for payment), it will not do it.

### 22 **III. CONCLUSION**

23 Tirado requests the Board adopt the proposed decision with the recommended  
24 amendments to Order No. 2. Such amendments are supported by the factual findings and  
25 legal conclusions reached by ALJ Starkey in his proposed decision. They are consistent with  
26 the Board's authority under Government Code section 11517(c)(2)(C) to make "technical or  
27 minor changes" to the proposed decision.

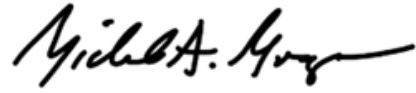
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Dated: August 31, 2023

Respectfully submitted,

**RAINS LUCIA STERN  
ST. PHALLE & SILVER, PC**



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**PROOF OF SERVICE**

I am employed in the City of Pleasant Hill, State of California. I am over 18 years of age and not a party to this action. My business address is Rains Lucia Stern St. Phalle & Silver, PC, 2300 Contra Costa Boulevard, Suite 500, Pleasant Hill, CA 94523.

On the date below I served a true copy of the following document(s):

**BRIEF IN SUPPORT OF ADOPTING PROPOSED DECISION WITH TECHNICAL AND MINOR CHANGES**

on the interested parties to said action by the following means:

- (BY MAIL)** By placing a true copy of the above, enclosed in a sealed envelope with appropriate postage, for collection and mailing following our ordinary business practices. I am readily familiar with this business’s practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- (BY OVERNIGHT DELIVERY)** By placing a true copy of the above, enclosed in a sealed envelope with delivery charges to be billed to Rains Lucia Stern St. Phalle & Silver, P.C., for delivery by an overnight delivery service to the address(es) shown below.
- (BY FACSIMILE TRANSMISSION)** By transmitting a true copy of the above by facsimile transmission from facsimile number (925) 609-1690 to the attorney(s) or party(ies) shown below.
- (BY MESSENGER)** By placing a true copy of the above in a sealed envelope and by giving said envelope to an employee of First Legal for guaranteed, same-day delivery to the address(es) shown below.
- (BY HAND DELIVERY)** By personal delivery of a true copy of the above to the attorneys or parties shown below
- (BY E-MAIL or ELECTRONIC TRANSMISSION)** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable period of time, after the transmission, any electronic message or other indication that the transmission was unsuccessful.

**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct.

Dated: August 31, 2023 Charity Graham  
Charity Graham



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