

**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:**

**SCOTT A. MANN, Respondent**

**and**

**CITY OF PALM SPRINGS, Respondent**

**Agency Case No. 2020-0663**

**OAH No. 2020100684**

**REVISED PROPOSED DECISION<sup>1</sup>**

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter remotely on January 26, 2021, via the Microsoft Teams application, due to the ongoing public health emergency.

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<sup>1</sup> On April 22, 2021, complainant filed a request to correct what it deemed two "mistakes" in the proposed decision. Respondents were given time to respond. No response was received. Although the requested corrections were not "mistakes," they

Charles Glauberman, Staff Attorney, represented Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System, State of California (CalPERS).

Respondent Scott A. Mann represented himself.

Stephen Berliner, Attorney at Law, Liebert, Cassidy, Whitmore, represented respondent City of Palm Springs.

Charles Glauberman, Staff Attorney, represented Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System, State of California (CalPERS).

Oral and documentary evidence was received. The record was held open for the parties to submit closing and reply briefs, which were received and considered. The matter was submitted for decision on March 23, 2021.

## **ISSUES**

Did CalPERS err when it determined that respondent Mann was a common law employee of the City of Palm Springs as opposed to an independent contractor during the time period of October 1, 2011, to April 22, 2014, when respondent Mann provided services to the City of Palm Springs as a subcontractor pursuant to a third-party contract? If CalPERS did not err, and respondent Mann was a common law employee of the City of Palm Springs during that time period, are respondent Mann and the City

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requested changed do not affect the substantive decision and therefore are permitted under applicable law. The changes are reflected in bold.

of Palm Springs responsible to pay any membership contributions that should have been paid to CalPERS on behalf of respondent Mann, or is the City of Palm Springs solely responsible for those payments?

## **FACTUAL FINDINGS**

### **Background and Jurisdiction**

1. Respondent Scott A. Mann (respondent Mann) established CalPERS membership through his employment with Riverside County Schools – Menifee Union School District on April 11, 2007. Respondent Mann “cashed out” his contributions in relation to that employment, and it was unclear from evidence presented whether he somehow purchased service credit back for that employment to re-obtain membership status. At any rate, respondent Mann has been employed with public entities who contract with CalPERS since at least 2012, and he is currently a miscellaneous member of CalPERS.

2. During the time period of October 1, 2011, through April 22, 2014, respondent Mann provided consulting services in the area of risk management to the City of Palm Springs (the City). During that time period, those services were provided pursuant to **a contract between the City of Palm Springs and** Keenan & Associates, the entity that employed respondent Mann **as a subcontractor**. Respondent Mann did not have a private contract with the City of Palm Springs, and he was never designated as an employee by the City of Palm Springs. Because the services were performed pursuant to a contract, and not as a City employee, neither respondent Mann nor the City made contributions to CalPERS on respondent Mann’s behalf.

3. On July 27, 2018, respondent Mann filed a "Request for Service Credit Cost Information – Service Prior to Membership" with CalPERS. The purpose of the request was to determine if he was entitled to CalPERS service credit for the time he performed services for the City of Palm Springs, and what cost it would be for him to purchase that service credit. In the request, respondent Mann identified the services he performed as being pursuant to a contract, and that he was paid by invoices submitted to his employer, Keenan & Associates. He identified the City of Palm Springs as his employer.

4. On October 10, 2018, CalPERS determined respondent Mann was not eligible for service credit for the time he performed services for the City of Palm Springs because respondent Mann's employer, Keenan & Associates, was not a contracted CalPERS business partner. CalPERS notified respondent Mann he could re-file the request if he provided a certification from the City of Palm Springs concerning his payroll information.

5. On October 16, 2018, respondent Mann re-filed his request along with a completed Employment Relationship Questionnaire. CalPERS contacted the City of Palm Springs and obtained an Employment Relationship Questionnaire from the City as well.

6. On September 26, 2019, CalPERS advised the City of Palm Springs and respondent Mann that it had reviewed the documentation provided and determined respondent Mann was a common law employee of the City of Palm Springs during the time he performed services for the City, and as such, he was entitled to service credit for that time period.

7. On November 21, 2019, the City of Palm Springs wrote to CalPERS disagreeing with CalPERS' determination, and instead asserted respondent Mann was an independent contractor. The City of Palm Springs set forth all the reasons for its determination. Despite reviewing the additional information and the City's argument, CalPERS adhered to its conclusion.

8. On February 13, 2020, CalPERS sent the City and respondent Mann a letter dated February 13, 2020, regarding that final determination. CalPERS also determined that, because no membership contributions had been made on respondent Mann's behalf during the time he provided services for the City of Palm Springs, membership contributions would have to be paid to CalPERS. However, as respondent Mann was employed full-time with another CalPERS contracting agency from December 4, 2012, through April 20, 2014, that time period would be considered "non-contributory" for purposes of membership dues as it relates to the City of Palm Springs. Thus, for the time period of October 1, 2011, through December 3, 2012, approximately \$11,651.23 in membership contributions were owed to CalPERS by the City of Palm Springs and/or respondent Mann.

9. On March 12, 2020, the City of Palm Springs appealed both CalPERS' final determination that respondent Mann was a common law employee from October 1, 2011, through April 22, 2014, as well as the determination that arrears membership contributions were owed on respondent Mann's behalf from October 1, 2011, through December 3, 2012.

10. On October 21, 2020, complainant signed a Statement of Issues naming respondent Mann and the City of Palm Springs as respondents. The Statement of Issues seeks a determination of whether respondent Mann was an employee of the City of Palm Springs from October 11, 2011, through April 22, 2014. The Statement of

Issues also seeks a determination of who is responsible for the approximately \$11,651.23 in membership contributions owed to CalPERS in the event respondent Mann is determined to have been a common law employee rather than an independent contractor.

## **The Consulting Services Agreement Between Keenan & Associates and Related Amendments**

11. On July 1, 2009, Keenan & Associates, a California corporation, signed a "Consulting Services Agreement" (agreement) with the City of Palm Springs to provide loss control and regulatory compliance services to the City through June 30, 2012. Compensation for the services to be rendered was to be paid to Keenan & Associates in the lump sum of \$74,050, and not to the independent contractor. The agreement contained the following clause:

**Independent Contractor.** Neither City nor any of its employees shall have any control over the manner, mode, or means by which Consultant, its agents or employees, perform the services required herein, except as otherwise set forth herein. Consultant shall perform all services required herein as an independent contractor of the City and shall not be an employee of the City and shall remain at all times as to the City a wholly independent contractor with only such obligations as are consistent with that role, however, City shall have the right to review Consultant's work product, result, and advice. Consultant shall not at any time or in any manner present that it or any of its agents or

employees are agents or employees of the City. [bold in original]

12. The agreement indicated that a dedicated consultant could be provided, but other consultants may be appointed. At the time the original agreement was signed, two individuals who were employed by Keenan & Associates, John Stephens and Marco Guardi, were designated as the subcontractors who would be providing the independent contracting services to the City of Palm Springs. According to the specifications contained in the attachment to the agreement regarding what type of services to be performed, the City's goal in contracting with Keenan & Associates pursuant to the City's "Rent a Safety Professional" program was to 1) assist the City with state and federal OSHA requirements; 2) raise awareness of regulatory responsibilities; 3) keep abreast of regulatory changes that impact City operations; and 4) reduce the frequency of work-related injuries. The independent contractor would be responsible for conducting a compliance needs assessment, develop various policies and procedures relating to safety, conduct a hazardous materials inventory, and provide employee training. The agreement does not contain any specific language indicating how these services were to be performed.

13. Following the original agreement, several amendments to the agreement were made. The first amendment effective July 11, 2011, authorized the independent contractor provided by Keenan & Associates to provide additional on-site loss control services two days per week, eight hours each day. Keenan & Associates – not the independent contractor - would be paid an additional lump sum not to exceed \$50,450 for the additional loss control services, for the time period of July 1, 2011, through June 30, 2012.



14. The second amendment, effective July 1, 2012, authorized the independent contractor to provide additional on-site loss-control services two days per week, eight hours each day. Keenan & Associates – not the independent contractor - would be paid an additional lump sum not to exceed \$65,000 for the services, for the time period of July 1, 2012, through June 30, 2013.

15. The third amendment, effective July 1, 2013, authorized the independent contractor to provide additional on-site loss-control services two days per week, eight hours each day. Keenan & Associates – not the independent contractor - would be paid an additional lump sum not to exceed \$65,000 for the services, for the time period of July 1, 2013, through June 30, 2014.

16. Although respondent Mann was not the original individual who provided the services under the original consulting agreement, he was later designated as the one who would be providing consulting services to the City pursuant to the original agreement and amendments. Respondent Mann began providing those services on approximately October 1, 2011. Following respondent Mann's cessation of providing services to the City, other independent contractors continued to provide services pursuant to the consulting agreement and amendments in all years up to and including 2019.

### **Invoices from Respondent Mann to Keenan & Associates**

17. During the time period he provided loss control and regulatory compliance services to the City of Palm Springs, respondent Mann provided monthly invoices to Keenan & Associates, and not the City, to get paid. All the invoices broke down the hours of service respondent Mann provided for the designated time periods. The first invoice was for the month of October 2011, and every month thereafter, with

the last invoice for services rendered during the month of April 2014. The hours of service for each month varied between 52 and 94 hours per month. The invoices set forth respondent Mann's personal hourly rate at \$55 per hour (an amount not specified in the consulting services agreement or subsequent amendments).

## **Employment Relationship Questionnaires and Relevant Testimony**

18. After respondent Mann submitted the July 27, 2018, "Request for Service Credit Cost Information – Service Prior to Membership," CalPERS sent respondent (and the City) a document entitled, "Employment Relationship Questionnaire." Respondent specifically stated that he was hired as an "independent contractor" and that he was "appointed" by Eric Preston, the Vice President of Keenan & Associates, and Perry Madison, the Human Resources Director for the City. Respondent Mann wrote that he reported directly to Mr. Madison. He also answered that he did not occupy any other position during his time with the City. In response to the question regarding whether he worked for a third party, respondent Mann answered "no." When asked if he was provided with training, he answered it was "not required for the contract." When asked if he was required to attend meetings, he answered that he was required to attend meetings and conduct trainings. Respondent Mann reported that the City controlled his work and was directly supervised by Mr. Madison. Respondent Mann wrote that the City provided him with paper, an office, office supplies, business cards, and an e-mail address. Respondent Mann reported that he was paid by submitting invoices to Keenan & Associates and that Keenan & Associates "billed the City under the contract." Respondent Mann wrote that he received no benefits and did not need approval for vacation/sick leave. He also reported that he was not subject to a salary classification or schedule. Respondent Mann reported that his position was previously held by an individual that had the title of "Risk and Safety Manager." Finally, when

asked if he was, in his opinion, an “employee of the [City],” respondent Mann answered “no” and described himself as an “independent safety and risk specialist.”

19. Eric Preston is employed by Keenan & Associates. Mr. Preston testified at the hearing as follows: Keenan & Associates is a full-service insurance brokerage that provides claim handling, safety consultation, and similar services. He has worked there for 16 years. Since 2009, he has been the director of loss control, assistant vice president of loss control, and is currently the vice president of loss control services. At present, he is responsible for leading and managing the entire department statewide. These duties include supervision of consultants that Keenan & Associates contracts out to clients.

The City of Palm Springs began contracting with Keenan & Associates in 2009 for consulting services. The agreement included a variety of regulatory compliance consulting services in relation to OSHA compliance, conducting trainings, and chemical inventory services. He referred to the original consulting agreement between Keenan & Associates and described it as a typical agreement Keenan & Associates uses when contracting out services to their clients. If a client wants changes, then amendments must be completed. No subcontractor, like respondent Mann, is expected to do anything outside the scope of the written agreement or amendments. During the life of the original agreement and subsequent amendments, a variety of individuals provided the services needed by the City.

During the relevant time period, the City did not have any authority or control over the decision to assign respondent Mann to the contract; Keenan & Associates picked him. Keenan & Associates never authorized respondent Mann to hold himself out as a city employee. Mr. Preston was respondent Mann’s supervisor at Keenan & Associates. Nobody directed respondent Mann on how to perform his services on a

day to day basis because respondent Mann is an independent contractor hired for his expertise.

Respondent Mann was paid a fixed amount regardless of how long it took him to complete the work.

If there were any issues with the services being provided, the City was required to contact Keenan & Associates. The City did contact Keenan & Associates regarding Mann's performance. Generally, the concerns were about the details of various plans that had been completed. Keenan & Associates received daily communications from the City, and Mr. Preston would then contact the City regarding the concerns and talk to respondent Mann about how to remedy them. Mr. Preston asserted that the City had no ability to terminate respondent Mann's assignment and could not replace him, although it was pointed out during his testimony that the consulting agreement did indicate that the City could terminate any consultant's services. On cross-examination, Mr. Preston clarified that the termination clause was correct, but they could not fire respondent Mann directly; the City would have to go through Keenan & Associates if they wished to terminate the services of any consultant assigned under the agreement.

20. Kim Hardcastle, the Human Resources Manager for the City, was also asked to complete an Employment Relationship Questionnaire like the one completed by respondent Mann. Ms. Hardcastle also testified at the hearing. The following is a summary of her answers on the form and testimony. Kim Hardcastle has been the Human Resources Manager for the City of Palm Springs since 2012, although she has worked for the City for 22 years. She is familiar with the original consulting agreement and amendments. At the time the agreement was entered into in 2009, the City no longer had anyone on staff to provide the services noted in the agreement. Many of the positions that would have provided the type of services noted in the agreement

had been eliminated as early as 2005, up to and including the fiscal year prior to the signing of the agreement.

Regarding the services respondent Mann provided, the City did not have any input regarding who completed the tasks. The City did not choose respondent Mann. Many consultants provided services under the agreement and amendments over the years. The amendments were completed because over the years, certain tasks not encompassed in the original agreement needed to be added. In 2019, the City created an occupational health and safety specialist position and has since terminated the consulting agreement with Keenan & Associates.

Ms. Hardcastle explained that there are many positions within the City. The closest position that the City has to the one respondent Mann wrote he performed on the Employment Relationship Questionnaire (Risk and Safety Manager), is a Risk Management Specialist II. However, that position has many duties that were nothing like those provided under the consulting services agreement. For example, many duties of that position include processing liability claims, processing workers compensation claims, technical support, and handling subrogation claims. The City did not contract with Keenan & Associates to perform the duties of a Risk Management Specialist II. That position was eliminated through the normal budget process in 2005. There was another position known as the Risk and Benefits Specialist II, which similarly did not have the same duties provided by Keenan & Associates under the consulting agreement. That position was eliminated around 2007. Finally, Ms. Hardcastle referred to an old copy of a position known as "Risk Manager," which would be a person who oversaw the day to day responsibilities of risk management. This also was not a position that overlapped with services provided under the consulting agreement, and this position did not exist in 2009 when the agreement was signed.

According to Ms. Hardcastle, respondent Mann provided services like updating various policies and conducting safety training. The City was billed annually for the consulting services pursuant to the consulting agreement. The amount the City paid was fixed pursuant to that agreement and remained fixed regardless of the amount of time respondent Mann worked. The City never paid respondent Mann directly.

The City had no input regarding what consultant was sent to perform services. The City did not ask for respondent Mann. The City did not ask for a subcontractor. The City had no input in Keenan & Associate's selection process of respondent Mann. The City learned of respondent Mann's assignment when the City was notified by Mr. Preston.

Respondent Mann did not have a supervisor at the City. He did not supervise any employees. He did not receive any personnel evaluations. He was not subject to City personnel rules. Respondent Mann had no input in how he was paid. He did not receive any benefits. Nobody at the City directed his work.

Regarding the Employment Relationship Questionnaire, Ms. Hardcastle disagreed with most of respondent Mann's answers. Respondent Mann did not report to Mr. Madison; nobody directed his work. Keenan & Associates controlled his work. He did not supervise operations. The City never had a position at the time that would have encompassed the duties he was performing. Respondent Mann was not required to attend any meetings. He may have attended safety meetings, but those were required under the consulting agreement. Mr. Madison did not determine respondent Mann's work hours. The City did not pay respondent Mann. The City did not reimburse respondent Mann for any expenses. Respondent Mann was never authorized to hold himself out as an employee of the City.

Regarding her answers on the Employment Relationship Questionnaire she filled out, Ms. Hardcastle stated the following: Respondent Mann was given a generic e-mail (as opposed to an official City e-mail with his name) for use while he performed services at the City. It is the same e-mail that was given to anyone performing those services. He was given a visitor badge to gain entrance to relevant City facilities. The City provided respondent Mann with a small office that contained training materials; the space was not much larger than a storage room. It was also not solely for his use. It was designated for anyone performing safety consultant services. The room had a computer that was not assigned solely to respondent Mann. Other City employees had access to the office and the computer. Respondent Mann never had to attend a city council meeting. He was not provided with any business cards from the City. He was not given a uniform. He did not receive anything with the City insignia. He was also not provided with any stationary or letterhead. If Mr. Madison had any problems with respondent Mann or any other consultant, he would contact Keenan & Associates. Ms. Hardcastle was not aware of any provision that gave the City the right to terminate services with respondent Mann.

## **CalPERS Investigation**

21. Nancy Williams is an Associate Governmental Program Analyst for CalPERS who testified at the hearing. Her testimony is summarized as follows: Ms. Williams was charged with investigating a "service purchase request" filed by respondent Mann in connection with the services he provided for the City of Palm Springs. The document respondent Mann provided is used when a person wants to purchase service credit for work they did prior to becoming a CalPERS member. Ms. Williams is familiar with the difference between a common law employee and independent contractor.

Following a review of respondent Mann's request and all relevant documentation, she – in conjunction with other employees – determined respondent Mann was a common law employee of the City and thus a CalPERS member during the time he provided services to the City. They also determined that membership contributions would need to be paid back from October 1, 2011, through December 3, 2012, because respondent Mann obtained other full-time CalPERS covered employment during the time he provided services for the City of Palm Springs, beginning on December 4, 2012. Through her testimony, it appeared that Ms. Williams relied more on the Employment Relationship Questionnaire submitted by respondent Mann and not the questionnaire submitted by the City. On cross-examination, Ms. Williams admitted that she took what respondent Mann reported as true without any effort to confirm whether his responses were true or correct. She also did not interview Perry Madison or Eric Preston. Even with the admission that there was no investigation to determine whether respondent Mann's responses were true and correct, Ms. Williams nonetheless stated that she still was "confident" in the final determination that respondent Mann was a common law employee. When pressed on cross-examination what it means to be "independent." She said it meant that respondent Mann worked "independently." Counsel for the City asked a leading question following that response to get Ms. Williams to admit that she "really [has] no idea about [what it means to be an independent contractor]." She admitted that she does not. Finally, Ms. Williams agreed that more investigation or verification of information provided could have aided in the determination of whether respondent Mann was an employee or independent contractor.



## **Respondent Mann's Testimony**

22. Respondent Mann's testimony is summarized as follows: Respondent Mann had been a CalPERS member prior to 2011 in connection with other employment, but he cashed out his CalPERS account prior to starting to perform services for the City. He began working for a school district during the time he worked for the City that conferred CalPERS membership and worked there until 2017. He presently works for the City of Sunnyvale and is still a CalPERS member. He anticipates retiring soon and that was why he filled out the documentation regarding his time at the City of Palm Springs.

When he filled out the Employment Relationship Questionnaire, he did so to the best of his ability. When asked if anyone at the City told him what steps he needed to take on a particular job he answered, "yes – Eric Preston." But, then, he changed his answer to "I got my direction from Mr. Madison." Respondent Mann then clarified that he would see the work that needed to be done and Mr. Madison would "direct" him what to do based on what respondent Mann recommended he complete. Respondent said Mr. Madison had "substantial control over what I did and the manner and means which it was done." On cross-examination, he admitted he did not believe he was an employee of the City. He also said on cross-examination that Mr. Madison merely gave him his assignments and projects to complete but did not control how he did so. Respondent Mann said he did not know anything about Mr. Madison's background. He considers himself a professional in risk management, so he knows what steps need to be taken to complete a job.

Respondent Mann testified that he was required to attend City meetings. He said during the time he performed services, he attended several executive meetings with the human resources director, city manager, finance director/treasurer, assistant

city manager, and Mr. Preston. The first meeting was to present his findings and to determine the priority of his work. He also attended two additional meetings to update leadership and get direction from how to proceed. He attended three "all department head" meetings (the first one was just to introduce himself) and also attended a city council meeting (that he was not required to attend) but did so because his work was on the consent calendar.

Respondent Mann received "substantial" direction on how to proceed from Mr. Madison and attended many meetings with him. He provided weekly updates to Mr. Madison. He felt Mr. Madison "definitely had control." He said the City was on a 10/80 work schedule and he did his best to have his work hours "approved" by Mr. Madison. He reported to Mr. Madison, took direction from him, and Mr. Madison "corrected things."

Regarding the work he had to perform, there was "no way possible" he could do it remotely; he was "required" to be on site. He had a key to access the office area he was given but knows others had a key as well. He had a desk, computer, and access to the City server and shared drive. He felt he had a city e-mail and that it is irrelevant that it was generic and not personal with his name because it was still a city e-mail. He had a badge to access City facilities but is not sure whether it was a visitor badge or not.

Respondent Mann did sign "a couple documents" during his time there and was told to put some of his communication on City letterhead. He met with some law enforcement officials regarding tort law claims and signed off on service requests. Respondent Mann was "specifically asked and tasked and directed" by Mr. Madison to do a safety and loss control inspection of the parking lot because someone had tripped. He was also asked by Mr. Madison to do a safety assessment downtown at the

village green historical site. These projects expanded into other facilities. Respondent Mann went over other aspects of services he performed, claiming they were beyond the scope of the consulting services agreement and amendments. The City never entered into a contract with him regarding the additional work he claimed was outside the scope of the agreement. Respondent Mann admitted on cross-examination, however, that he never actually saw the original consulting services agreement or amendments. He then said he believed "there was enough of a nexus in the area of safety and loss control for them to be within the original scope" of the agreement.

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. Absent statutory or case law establishing a different standard, the standard of proof is "a preponderance of the evidence." (Evid. Code, § 115.)
2. The parties disagree with respect to who has the burden of proof in this matter. CalPERS asserts that the burden of establishing that respondent Mann was an independent contractor as opposed to a common law employee of the City of Palm Springs is on the party challenging CalPERS' determination, which would be the City of Palm Springs. The City of Palm Springs asserts that the "status quo" since 2011 has been that respondent Mann was an independent contractor and by seeking to change that status quo to declare respondent Mann a common law employee, respondent Mann and CalPERS have the burden of proof under Government Code section 21060, subdivision (b).
3. The party seeking correction of an error or omission pursuant to Government Code section 21060, subdivision (b), has the burden of presenting

documentation or other evidence to the board establishing the right to correction. In this case, CalPERS made an official determination that respondent Mann was a common law employee of the City of Palm Springs from October 1, 2011, to April 22, 2014. Respondent Mann does not disagree with that conclusion. The City of Palm Springs disputes that conclusion and has appealed that conclusion and seeks to have CalPERS correct what the City perceives as a mistake or error in respondent Mann's employment classification. Therefore, it is the City of Palm Springs that has the burden of proof.

4. It is noted that, regardless of who had the burden of proof, for the reasons discussed below, a preponderance of the evidence did not establish that respondent Mann was a common law employee of the City of Palm Springs. To the contrary, a preponderance of the evidence established that respondent Mann was an independent contractor of the City of Palm Springs. Accordingly, irrespective of who had the burden of proof, the outcome would have been the same.

## **Applicable Law**

5. CalPERS provides retirement benefits to public employees in California pursuant to the Public Employees' Retirement Law (Gov. Code, § 20000 et. seq.).

6. Government Code section 20030 provides that an "employer" for purposes of the PERL means the state, the university, a school employer, and any contracting agency employing an employee.

7. Eligibility for CalPERS membership is described as available to "[a]ny person in the employ of a contracting agency." (Gov. Code, §20028, subd. (b).)

8. Government Code section 20028 defines an “employee” for purposes of the Public Employee Retirement Law.

9. Section 20300, subdivision (b), excludes from CalPERS membership independent contractors who are not employees.

10. Government Code section 20125 provides:

The board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.

11. Government Code section 20160 provides:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of

those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

12. Government Code section 20283 provides:

Any employer that fails to enroll an employee into membership when he or she becomes eligible, or within 90 days thereof, when the employer knows or can reasonably

be expected to have known of that eligibility shall be required to pay all arrears costs for member contributions and administrative costs of five hundred dollars (\$500) per member as a reimbursement to [CalPERS's] current year budget.

## **Case Law**

13. In *Metropolitan Water District v. Superior Court (Cargill)* (2004) 32 Cal.4th 491, the California Supreme Court determined the Public Employees' Retirement Law incorporated common law principles into its definition of a contracting agency employee, and that the Public Employees' Retirement Law required contracting public agencies to enroll in CalPERS all common law employees except those excluded by a specific statutory or contractual provision.

14. The California Supreme Court further explained in *Empire Star Mines Co. v. California Employment Commission* (1946) 28 Cal. 2d 33: "In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired." (*Id.* at p. 43.) But the analysis also requires consideration of the following criteria: 1) whether the person providing the services is engaged in a distinct occupation or business; 2) 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; 3) the amount of skill required to perform the services; 4) which party provides the instrumentalities, tools, and place of work; 5) the length of time for which the services are to be performed; 6) the method of payment, whether by the time or by the job; 7) whether the services provided are normally part of the principal's regular business; and 8) the parties' subjective intent regarding the



nature of their relationship. (*Id.* at pp. 43-44; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946-947.)

## **Evaluation**

15. A preponderance of the evidence established respondent Mann was an independent contractor. CalPERS relied, almost exclusively it seemed, on the Employment Relationship Questionnaire submitted by respondent Mann and did not diligently investigate any of the conflicts that arose when it received the Employment Relationship Questionnaire from Ms. Hardcastle. Nobody from CalPERS contacted Mr. Madison, who could have cleared up the conflicts. Instead, once it received an extensive and detailed response from the City that showed most of the responses provided on respondent Mann's Employment Relationship Questionnaire were not correct, CalPERS adhered to its erroneous conclusion. The evidence is overwhelming to support the opposite of the conclusion CalPERS reached: respondent Mann was an independent contractor from October 1, 2011, to April 30, 2014, when he provided consulting services to the City of Palm Springs.

16. No objective evidence showed that Mr. Madison directed or controlled the activities of respondent Mann. Even per the testimony of respondent Mann, Mr. Madison merely gave him his assignments and projects to complete, told him the expected completion date, and asked for recommendations on projects. The City deferred to respondent Mann's professional judgement with respect to which projects he completed. Regardless of what work he did, per respondent Mann, nobody controlled how he did his work. If any issues arose with the work performed by respondent Mann, the City needed to contact Keenan & Associates in order to resolve the situation. In fact, when issues did arise, that's exactly what the City did – called Mr. Preston, respondent Mann's supervisor at Keenan & Associates. While Mr. Mann did

need to provide certain trainings and may have been asked to attend certain meetings to provide updates and information on services he was providing and projects he completed, isolated activities such as these do not transform him into a common law employee. No objective or credible evidence showed that he was required to attend any City meetings on a regular and ongoing basis. To the extent respondent Mann may have been requested to perform services outside the scope of the consulting services agreement, as he claimed, no objective evidence showed that respondent Mann was ever required to, or did, anything other than perform the services specified in the consulting services agreement. Nothing in the evidence showed that at any time, prior to deciding to seek additional service credit in contemplation of retirement 10 years later, respondent Mann ever questioned the services he provided to the City of Palm Springs as outside the scope of the consulting services agreement.

17. The city had no direct authority to terminate respondent man. Although under the consulting services agreement the City could terminate his services at any time, that clause was not specific to respondent Mann. All that clause permitted the City, or Kennan & Associates to do, was terminate whatever independent contractor was serving at the time. Moreover, any change had to go through Keenan & Associates – the City had no discretion to contact respondent Mann and terminate him directly.

18. The City did not pay respondent Mann. Invoices showed that respondent Mann worked a substantially different number of hours each month during the time he provided services to the City. Respondent Mann provided invoices for his services on a monthly basis directly to Keenan & Associates, who paid him for his work. The City had no discretion in the number of hours worked, the hourly rate, or the manner and method in which respondent Mann was paid. The City was not obligated to pay

respondent Mann for any services provided. The City's only obligation with respect to compensation for services rendered was to pay Keenan & Associates one lump sum at the beginning of each year pursuant to the consulting services agreement. The amount paid each year had no bearing on, and was not affected by, who was selected as the independent contractor to perform services and was in no way tied to the hourly rate set by respondent Mann detailed in the invoices he submitted to Keenan & Associates.

19. The City provided respondent Mann with access to its facilities, a small communal office with a computer, and a generic e-mail for respondent Mann to use. The e-mail was the same e-mail all independent contractors were provided. Neither respondent Mann nor any independent contractor was ever authorized to act as a representative of the City. There was no credible evidence to show that respondent Mann was ever provided business cards, as he claimed. To the contrary, Ms. Hardcastle testified he was not provided with business cards and respondent Mann did not provide any copies of business cards to support his claim. The fact that an entity provides an independent contractor with an office and computer, access to facilities, and other supplies to facilitate the services he or she is providing does not transform an independent contractor into a common law employee. Nor does it show control over the work. Respondent Mann was not required to use the office, the computer, or the office supplies provided. There's no evidence he was prohibited from using his own computer or office supplies – or that some of his work could not have been completed at home on his own schedule. His access to City facilities was also limited to a "visitor" badge. Respondent Mann made many self-serving and conclusory statements regarding being "required" to be on-site that simply are unsupported by the evidence.

20. The length of time for which the services respondent Mann performed was also minimal. Although the consulting services agreement between the City and Kennan & Associates lasted from 2009 to 2019, respondent Mann's role only lasted a few years within that time frame. Moreover, he did not have a set schedule; he worked different hours each week.

21. The services respondent Mann performed were not part of the City's regular business. Ms. Hardcastle testified that there was no one position that performed the type of services respondent Mann provided. Most positions that dealt in the same area had been eliminated long before respondent Mann performed any services, and the documentation provided pertaining to those positions covered many more duties than the type of work performed by respondent Mann. Any political subdivision of the state, like a city, is engaged in the normal business of providing public services. Police, fire, parks, recreation, code enforcement, trash collection, and other types of services that are for the safety and benefit of the public. As a public entity, a city may be sued by employees or citizens as a result of injuries or other damages suffered on city property or in connection with city services. A city must maintain a safe workplace. As such, *incidental* to providing public services, a city is in need of safety and loss control and regulatory compliance assistance so that it can provide public services while minimizing any financial damage to the taxpayers (either by way of payouts to litigants or higher premiums to an insurer who would pay settlements to litigants). A city, however, is not in the regular business of providing safety and loss control and regulatory compliance to the public.

22. The overwhelming evidence shows that the relationship was set up as one where the City contracted for independent consulting services from Keenan & Associates and that the subjective intent of the parties was always that the individual

performing the services serve as an independent contractor. The City did not hire respondent Mann. The City had no input regarding who performed the services. The services under the consulting services agreement were performed over a period of 10 years by multiple subcontractors of Keenan & Associates. The consulting services agreement itself specified that the individual providing services was an independent contractor and not an employee. When respondent Mann filled out his employment relationship questionnaire, even he identified himself as an independent contractor. It is also telling that during the time he provided services to the City, he became a full-time employee of another CalPERS member agency that conferred membership on him. That in and of itself shows that his service to the City was not exclusive, that the City did not control what he could and could not do and is yet another very strong indicator showing respondent Mann was an independent contractor.

23. Finally, respondent Mann received no sick leave, no vacation, no dental benefits, and no health benefits from the City. He received no paycheck from the City or summary of CalPERS membership contributions on any kind of pay stub or other document. Respondent Mann, having previously been a CalPERS member before cashing out his CalPERS account immediately prior to employment with Keenan & Associates, would have been more than familiar with the fact that a CalPERS member has monthly contributions made to CalPERS on his or her behalf. Yet, respondent Mann never questioned the fact that nobody was making contributions on his behalf. It seemed apparent that respondent Mann knew he was not a CalPERS member at that time and did not question his status. When asked at hearing whether he believed he was an employee of the City, respondent Mann answered that he did not believe he was an employee.

24. The evidence clearly established that, under all applicable statutory and case law, respondent Mann was an independent contractor from October 1, 2011, through April 22, 2014, when he provided services to the City of Palm Springs as a subcontractor of Keenan & Associates. Accordingly, respondent Mann is not entitled to membership service credit for the services he performed for the City of Palm Springs pursuant to the consulting services agreement between October 1, 2011, and April 22, 2014, and is similarly not entitled to purchase any service credit for that time, as he was not a common law employee of the City. This conclusion also renders moot the issue of whether he or the City owe any arrears membership contributions to CalPERS.

## **Conclusion**

25. Respondent Mann was an independent contractor, and not a common law employee, from October 1, 2011, to April 22, 2014, when he provided services to the City of Palm Springs. CalPERS was therefore not correct in its determination that respondent Mann was a common law employee and entitled to membership status during that time period.

26. Given that respondent Mann was not a common law employee of the City of Palm Springs during the relevant time period, neither CalPERS nor respondent Mann is responsible to pay any membership contributions to CalPERS.

27. These conclusions are based on the Factual Findings and Legal Conclusions as a whole. Evidence and arguments presented by the parties, and not referenced in this decision, have been considered in reaching this decision. All arguments contrary to this decision have been considered and rejected.

## ORDER

1. The appeal of respondent City of Palm Springs seeking to correct CalPERS' determination of respondent Mann's employment status with the City of Palm Springs during that time period is granted. Respondent Mann was an independent contractor who provided services to, and was not a common law employee of, the City of Palm Springs from October 1, 2011, to April 22, 2014.

2. Neither the City of Palm Springs nor respondent Mann are responsible for any membership contributions to CalPERS for any time period while respondent Mann performed services for The City of Palm Springs.

DATE: May 17, 2021

*Kimberly J. Belvedere*

KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings