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 and Post-Retirement Employment of:

MARGARET SOUZA and CITY OF HUGHSON, Respondents

Agency Case No. 2020-0565

OAH No. 2020090931

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter by videoconference on March 23 and June 4, 2021, from Sacramento, California.[1]

Kevin Kreutz, Senior Attorney, represented California Public Employees' Retirement System (CalPERS).

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[1] There was a discrepancy in the official exhibit list and the official exhibits concerning Joint Exhibits 281 and 282. The discrepancy was resolved by the parties' stipulation, which is included in the record as Joint Exhibit 332.

Scott N. Kivel of the Law Offices of Scott N. Kivel represented respondents Margaret Souza and the City of Hughson. Ms. Souza was present throughout the hearing.

Evidence was received and the record was held open to allow the parties to submit simultaneous closing and reply briefs.[2] CalPERS's closing and reply briefs are marked as Exhibits 330 and 333, and respondents' closing and reply briefs are marked as Exhibits JJ and KK. The record was closed and the matter submitted for written decision on September 3, 2021.

SUMMARY

Ms. Souza retired for service, after which she worked for the City of Hughson without reinstatement from retirement. The persuasive evidence established that she worked as a common law employee of the City of Hughson. The evidence further established that she was paid an excessive hourly rate. Therefore, Ms. Souza's appeal from CalPERS's determinations that she was a common law employee of the City and violated the post-retirement employment rules should be denied.

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[2] Hearing in this matter was coordinated, but not consolidated, with the hearings in Linda Abid-Cummings (Agency Case No. 2020-0560, OAH No. 2020090772), Douglas Breeze (Agency Case No. 2020-0561, OAH No. 2020100848), David Dowswell (Agency Case No. 2020-0562, OAH No. 2020090934), and Tarlochan Sandhu (Agency Case No. 2020-0564, OAH No. 2020100708) to allow for a running written record producing a single, continuous transcript, continuous exhibit numbers/letters, and consolidated post-hearing briefing. Therefore, there are gaps in the exhibit numbers/letters.

FACTUAL FINDINGS

Jurisdictional Matters

1. Ms. Souza began working for the City of Turlock on March 1, 1975. She became a local miscellaneous member of CalPERS by virtue of that employment. She continued earning CalPERS service credit working for the City of Newman and then the City of Patterson. She retired from the City of Patterson as its finance director, effective October 5, 2010. She has been receiving her retirement allowance since December 1, 2010.

2. During retirement, Ms. Souza served as the City of Hughson's "Interim Finance Director;" initially pursuant to the city manager's appointment, and later as an "advisor" for Regional Government Services (RGS). At all times relevant, the City of Hughson (City) contracted with CalPERS to provide its eligible employees, including the finance director, retirement benefits. The City never provided Ms. Souza retirement benefits, and she never reinstated from retirement.

3. RGS is a joint powers authority created by the Association of Bay Area Governments and the City of San Carlos. It provides public entities access to experienced public sector professionals they may not have the resources to attract and retain as employees. RGS hires employees with prior work experience in the public sector and assigns them as advisors to clients who contract for RGS's services. Some of the professions in which RGS has advisors include finance, human resources, and land use planning.

4. In February 2018, CalPERS began investigating the nature of Ms. Souza's relationship with the City. On January 10, 2020, CalPERS sent Ms. Souza

correspondence explaining that it concluded she worked as a common law employee for the City from November 2012 through July 2015. CalPERS also concluded her employment violated the post-retirement employment rules. CalPERS subsequently discovered that Ms. Souza first began working for the City in January 2011.

5. Ms. Souza timely appealed CalPERS's determinations. On March 22, 2021, Renee Ostrander, Chief of CalPERS's Employer Account Management Division, signed the Amended Statement of Issues solely in her official capacity. The Amended Statement of Issues identifies the following issues on appeal: (1) was Ms. Souza a common law employee of the City; and (2) if so, did her employment violate the post-retirement employment rules set forth in the Public Employees' Retirement Law (Gov. Code, § 20000 et seq.; PERL) and the California Public Employees' Pension Reform Act of 2013 (Gov. Code, § 7522 et seq.; PEPRA)?[3]

Post-Retirement Employment

6. At all times relevant, Bryan Whitemyer was the City's city manager. Sometime during his tenure, it became clear to him that the City's finance director lacked the technical skills needed for the position, and she eventually retired. He did not immediately recruit a new finance director because the City was in "dire financial

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[3] The prayer in the Amended Statement of Issues erroneously identifies the applicable law as the PERL only. Elsewhere in the Amended Statement of Issues, however, it is alleged that the PERL's post-retirement employment rules apply prior to January 1, 2013, and the PEPRA's rules apply on and after that date. It is further alleged that Ms. Souza's employment was subject to both the PERL and the PEPRA. Therefore, respondents received proper notice of the applicable law.

straits," and he was receiving pressure from various employee unions about the amounts the City was paying its executives while other employees were being laid off.

7. In the meantime, City employees without the requisite knowledge and skills were performing the finance director's duties. He "had no confidence in the numbers that were coming out of the Finance Director's office," and "needed to find someone to help with that critical, urgent task" of determining the City's financial status. He asked Ms. Souza to fill in temporarily as the City's "Interim Finance Director" until he could find a permanent replacement, and she agreed.

8. Mr. Whitemyer knew Ms. Souza from their time working as colleagues for the City of Patterson when he was the assistant city manager and she was the finance director. He became her supervisor when he was appointed the City of Patterson's interim city manager. He "had a very high opinion" of her, and believed her to be "a very competent – – more than competent, one of the best Finance Directors I've ever worked with."

9. Mr. Whitemyer formally appointed Ms. Souza as the City's "Interim Finance Director," effective January 4, 2011. The city council approved his appointment six days later. She was paid $45 per hour.[4] Mr. Whitemyer explained that he gave her the title "Interim Finance Director" because he needed the city council to approve her appointment quickly and she did not have staff available to create a new job description. Additionally, he wanted to give her "credibility" when speaking to the city council and the public.

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[4] The Amended Statement of Issues erroneously alleges she was paid $58.57 an hour. That was the hourly rate the City subsequently paid RGS for her services.

10. Ms. Souza helped prepare the City's budget and performed other related duties. Mr. Whitemyer did not supervise her work. She "was pretty independent in doing the budget. [She] didn't need a supervisor, but [she] was more guided." She checked with Mr. Whitemyer to make sure he agreed with what the different City departments were proposing for their individual budgets, just as she did when she prepared budgets for the other public entities she worked for.

11. Eight months into Ms. Souza's appointment, Mr. Whitemyer had not begun recruiting a permanent finance director because the City's finances were still poor. He wanted Ms. Souza to continue as interim finance director, but was aware of recent changes to the PERL's post-retirement employment rules and did not want to violate them. After talking with the city attorney, he decided it would be best for Ms. Souza to become an RGS advisor and for the City to contract with RGS for her services.

12. On September 28, 2012, the City entered into a contract for RGS to "assign an RGS employee . . . to serve as the [City's] Director of Finance." The City agreed to pay RGS $58.57 an hour for the employee's services. The contract specified that the hourly rate was "based upon RGS's costs of providing the services required hereunder, including salaries and benefits of employees."

13. The contract commenced October 16, 2012, and was "anticipated to remain in force through August 31, 2013." After that date, the contract could be "extended by mutual consent of the Parties for up to one-year intervals until terminated." Either party could terminate the contract for any reason "upon 30 days written notice." Additionally, the City could terminate the contract if, in its "sole discretion . . . [it] determines that the services performed by RGS are not satisfactory."

14. The contract prohibited RGS from reassigning the advisor provided the City "without first consulting with the [City]." However, the City could request a different advisor at any time. The contract identified RGS as the City's independent contractor and the advisors as RGS's agent or employees. This language was consistent with Mr. Whitemyer's and Ms. Souza's understanding and intent that she was not a City employee.

15. The contract specified that the City "shall not have the ability to direct how services are to be performed, specify the location where services are to be performed, or establish set hours or days for performance of services, except as set forth in Exhibit A." Additionally, the City had no right "to discharge any employee of RGS from employment." Finally, the contract specified that RGS was responsible for providing all employee benefits to Ms. Souza and paying all applicable employment taxes for her.

16. Ms. Souza entered into an employment agreement with RGS to work as "Consulting Administrative Services Director to a variety of clients, including the City of Hughson" on October 31, 2012. RGS paid her $45 an hour. Her job duties did not change after she began working for the City through its contract with RGS and the extent of her interactions with Mr. Whitemyer remained the same. She recorded the time she worked at the City on a timesheet, and RGS used the timesheet to generate an invoice for her services to the City. The City paid the invoice directly to RGS.

17. The City extended its contract with RGS for an additional year on September 1, 2013. The parties also included an option to continue the contract on a month-to-month basis until cancelled by either party after the one-year extension expired. The parties exercised the option on August 15, 2014, because the City anticipated starting the recruitment process for a permanent finance director "in the

fall." Ms. Souza continued working as the interim finance manager on a month-to-month basis from October 16, 2014, through July 14, 2015.

CalPERS's Analysis of Post-Retirement Employment

BACKGROUND

18. Christina Rollins is the Assistant Division Chief of Membership Services in CalPERS's Employer Account Management Division. She supervises the Membership and Post-Retirement Employment Determinations Team (Team). She has worked with the Team "in various capacities since 2012."

19. The Team makes "complex determinations" about the nature of a member's employment relationship to determine if she is acting as a common law employee or an independent contractor of the CalPERS employer to whom she is providing services. This determination is relevant when a member is providing services to a CalPERS employer, but neither the member nor the employer is making contributions to CalPERS. If it is determined that the member is acting as a common law employee, contributions must be made. If the employee is a retired member, the Team must also determine if her employment violates the post-retirement employment rules. If it does, the retired member is subject to reinstatement from retirement.

20. At the beginning of 2018, Ms. Rollins was "the section manager over the Team . . . ." She supervised and participated in the Team's collection and analysis of information about Ms. Souza's employment relationship with the City. She drafted the "final determination" letter sent to Ms. Souza on January 10, 2020.

ANALYSIS OF EMPLOYMENT RELATIONSHIP

21. The PERL's post-retirement employment rules applied prior to 2013, and the PEPRA's rules apply on and after January 1, 2013. Therefore, both bodies of law apply to Ms. Souza's employment. The relevant portions of the PERL and the PEPRA are the same. Ms. Rollins explained that a retired CalPERS member is generally prohibited from working for a CalPERS employer without reinstatement. Therefore, the first step in her analysis of Ms. Souza's relationship with the City was to determine if she worked as an employee or an independent contractor. She used the common law test for employment in accordance with *Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 491 (*Metropolitan Water District*). Some of the common law factors she considered included the City's right to control how Ms. Souza performed her work, the skills required for performing that type of work and the amount of supervision typically provided someone performing that work, the duration for which the City anticipated needing her services, and whether she was paid based on the amount of time she worked or a per project basis. Ms. Rollins further explained that no one factor was given more weight than the other, but rather it was the "cumulative" weight of all factors that led her to conclude Ms. Souza was a common law employee of the City.

Right to Control

22. The City provided CalPERS portions of the City's municipal code that created the finance director position. Ms. Souza held that position on an interim, part-time-time basis from 2011 until 2015 when the City hired a permanent replacement. She performed the duties of that position related to budget preparation, and no one else performed those duties. She was subject to "control and oversight" by the city manager as specified in the municipal code.

23. The City stated in its response to CalPERS's Employment Relationship Questionnaire that Ms. Souza was required to "be reasonable [*sic*] available to perform the services during the normal work week" and to "meet regularly and [as] often as necessary for the purpose of consulting about the scope of work performed." The City provided a copy of its 2012-2013 organization chart, which identified Ms. Souza as the "Interim Finance Manager." According to city council records, she gave a presentation about a mid-year budget review as the City's "Finance Director" on February 5, 2015.

24. Ms. Rollins explained that the information the City provided demonstrated that it had the right to control how Ms. Souza performed her duties. It did not matter that she was not performing all the duties outlined in the job description for the finance director, because she was working on a part-time basis and it would be unreasonable to expect a part-time employee to perform all the duties of a full-time position. The information also showed Ms. Souza was performing services that were part of the City's regular business.

Skills Required and Degree of Supervision

25. Ms. Souza described herself in response to CalPERS's Employment Relationship Questionnaire as "an experienced public administration professional" who did not "require training to perform [her] assignments." She also explained, "Forty some years with different City Finance Departments had provided me with the skill and experience to do the job." Therefore, it was insignificant that Mr. Whitemyer did not supervise her day-to-day activities. Ms. Rollins explained, "there are many positions that are employees of an agency where . . . their expertise is needed, and they don't receive a lot of oversight or control, but that doesn't mean the employer-employee relationship does not exist."

Duration of Services

26. Ms. Souza began working for the City on November 4, 2011, pursuant to a contract with the City for an unspecified length. The City decided to contract for her services through RGS instead of directly with her after October 30, 2012, and she continued working pursuant to a contract between RGS and the City. The contract had an initial term of one year but allowed the parties to extend it in one-year increments. After the first year, the parties agreed to an extension and included an option to have the contract continue on a month-to-month basis after expiration of the extension. The parties exercised the option, and Ms. Souza worked on a month-to-month basis from October 16, 2014, through July 14, 2015.

Method of Payment

27. Ms. Souza recorded the time she spent working for the City on a timesheet, and RGS paid her an hourly rate for that time. According to Ms. Rollins, "true consultants are paid by the job. That's because they are generally hired to do a specific project. They come in, do that project, and are paid for that project that they do."

Analysis of Post-Retirement Employment Rules

28. Ms. Rollins explained that the PERL and the PEPRA allow a retired member to work for a CalPERS employer without reinstatement under limited circumstances, but the retired member may not receive an hourly rate more than the maximum paid other employees performing similar duties. Therefore, once Ms. Rollins

concluded Ms. Souza was a common law employee of the City and did not reinstate from retirement, Ms. Rollins analyzed Ms. Souza's hourly pay rate.[5]

29. Ms. Souza exclusively performed some of the duties of the City's finance director from November 4, 2011, through July 14, 2015. The City paid her $45 an hour prior to October 31, 2012, and RGS paid her the same amount after that date. The maximum salary authorized for the City's finance director when she began working was $37.97.[6] It increased to $42.60 per hour by the time she began providing services through RGS.

Analysis

MS. SOUZA WORKED FOR THE CITY AS A COMMON LAW EMPLOYEE WITHOUT REINSTATEMENT

30. It was undisputed that Ms. Souza never reinstated from retirement. Mr. Whitemyer admitted at hearing that "under the part-time agreement she was an at-

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[5] Whether an exception to the general rule prohibiting post-retirement employment applied to Ms. Souza was not an issue on appeal; only the nature of her employment relationship and the amount she was paid were issues.

[6] There was no evidence to support the allegation in the Amended Statement of Issues that the maximum compensation was $42.78 per hour. CalPERS's citation to Exhibits 264 and 278 (page 22) in its closing brief did not establish otherwise. Exhibit 264 discussed the approved salary for Fiscal Year 2016/2017, but Ms. Souza stopped working prior to that year. Exhibit 278 discussed the hourly rate the City paid RGS for her services.

will employee, so she could be let go at any time." His testimony was corroborated by the City's Personnel Action Form documenting her appointment as "Interim Finance Director." Ms. Souza's argument to the contrary was disingenuous, and the remaining analysis of her employment relationship is limited to the time on and after October 31, 2012. The relevant inquiry is her relationship with the City, not RGS, because the City is a CalPERS employer but RGS is not. Though RGS's contract with the City identified RGS as the City's independent contractor and Ms. Souza as RGS's employee or agent, such language is not dispositive if the parties' actual conduct indicates otherwise.

31. The most important factor under the common law test is the City's right to control the way Ms. Souza performed her duties, and the persuasive evidence overwhelmingly established that the City had and exercised that right. Notwithstanding language in RGS's contract with the City to the contrary, the City had the right to terminate Ms. Souza's employment with the City by canceling the contract. The City had the express right to cancel the contract if it concluded, in its sole discretion, that her services were "not satisfactory." Alternatively, the City could request a different advisor. Either way, Ms. Souza would have effectively been terminated.

32. The City entered into a contract with RGS for the specific purpose of having Ms. Souza perform some of the duties of a vacant position, and no one else performed those duties. The contract was extended twice because the City had not found Ms. Souza's permanent replacement, and she stopped working once it did. Ms. Rollins persuasively explained the insignificance of Ms. Souza not performing all the finance director's duties. She also persuasively explained why the lack of day-to-day supervision did not negate the City's right to control Ms. Souza.

33. The City's contract with RGS expressly prohibited RGS from reassigning Ms. Souza to another client "without first consulting" the City. The contract required her to "be reasonable [*sic*] available to perform the services during the normal work week" and to "meet regularly and [as] often as necessary for the purpose of consulting about the scope of work performed."

34. The contract specifically stated that the City was not responsible for paying Ms. Souza or providing her employee benefits. But the express language of the contract demonstrated that the City reimbursed RGS for those costs, and RGS was simply a conduit through which the City paid Ms. Souza.

35. Other elements of the common law test for employment also indicated Ms. Souza was a common law employee. It was undisputed that she was highly skilled at preparing budgets for public entities, and the persuasive evidence established that employees with her skills often work with little supervision. She was not engaged in a distinct occupation or business when she worked for the City. The work she performed was usually performed by the City's finance director. RGS paid her on an hourly basis, as opposed to a flat rate.

36. Although the contract was initially for a specific term, it allowed for extensions in one-year increments. The parties agreed to an extension and included an option for future extensions on a month-to-month basis. The parties exercised the option, and Ms. Souza continued working for the City on a month-to-month basis for nine months. Therefore, the contract was for an uncertain duration, an indication of an employment relationship.

37. The combined weight of the common law factors discussed above justifies disregarding the parties' subjective intent to create an independent contractor

relationship. Besides, it is the City's intent that is relevant, not Mr. Whitemyer's. The fact that the City retained Ms. Souza for the express purpose of performing some of the duties of its finance director while the position was vacant was the most compelling evidence of its intent. That intent was affirmed by numerous official documents identifying her as holding that position.

Ms. Souza Received Excessive Pay

38. Ms. Souza did not produce any evidence to contradict CalPERS's persuasive evidence that she was paid an hourly rate greater than the maximum rate authorized for the City's finance director throughout her employment.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. The parties agreed Ms. Souza has the burden of proving she was an independent contractor of the City and she did not violate the PERL's or the PEPRA's post-retirement employment rules. She must meet her burden by a preponderance of the evidence. This evidentiary standard requires Ms. Souza to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, she must prove it is more likely than not that she was an independent contractor and did not violate the post-retirement rules. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

POST-RETIREMENT EMPLOYMENT RULES

2. The PERL generally prohibits a retired CalPERS member from working for a CalPERS employer without reinstatement. (Gov. Code, § 21220, subd. (a).) However, a retired member may "serve without reinstatement from retirement or loss or interruption of benefits provided by this system" in a position with a contracting agency that requires special skills "or during an emergency to prevent stoppage of public business." (Gov. Code, § 21221, subd. (h).) Such employment is limited to no more than 960 hours for all CalPERS employers in a fiscal year. (*Ibid.*) Additionally, "the compensation . . . shall not exceed the maximum monthly base salary paid to other employees performing comparable duties . . . divided by 173.333 to equal an hourly rate." (*Ibid.*)

3. Commencing January 1, 2013, the PEPRA applies to "all state and local public retirement systems and to their participating employers, including the Public Employees' Retirement System." (Gov. Code, § 7522.02, subd. (a).) The PEPRA prohibits a retired CalPERS member from serving, being employed by, or "be[ing] employed through a contract directly by," another CalPERS's employer "without reinstatement from retirement." (Gov. Code, § 7522.56, subd. (b).)

4. An exception to the PEPRA's general prohibition against post-retirement employment applies when the retired member serves or works for a CalPERS employer "either during an emergency to prevent stoppage of public business or because the retired person has skills needed to perform work of limited duration." (Gov. Code, § 7522.56, subd. (c).) Work performed under this exception is limited to no more than 960 hours for all CalPERS employers in a fiscal year. (*Id.*, subd. (d).) Additionally, "the

rate of pay for the employment shall not be less than the minimum, nor exceed the maximum, paid by the employer to other employees performing comparable duties, divided by 173.333 to equal an hourly rate." (*Ibid.*)

COMMON LAW TEST FOR EMPLOYMENT

5. The California Supreme Court articulated the common law test for employment in *Empire Star Mines Limited v. California Employment Commission* (1946) 28 Cal.2d 33. The Court said: "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, overruled on different grounds by *People v. Sims* (1982) 32 Cal.3d 468, 479, fn. 8 [collateral estoppel applies to administrative proceedings that are judicial in nature].) An employer-employee relationship exists if the employer has the complete right to control, regardless of whether the right is actually exercised. (*Empire Star Mines Limited v. California Employment Commission*, *supra*, 28 Cal.2d at p. 43.) The Court identified other factors to consider:

> Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of

> payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

(*Ibid.*)

6. In *Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, the California Supreme Court clarified: "The right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship and the other matters enumerated constitute merely 'secondary elements.'" (*Id.* at p. 950.) "The right to terminate at will, without cause, provides 'strong evidence' of a right to control." (*Bowerman v. Field Asset Services, Inc.* (N.D.Cal. 2017) 242 F.Supp.3d 910, 929.) And the fact that work is performed without supervision does not negate other factors indicating the right to control when such work is generally performed without supervision by both employees and independent contractors. (*Santa Cruz Transportation, Inc. v. Unemployment Insurance Appeals Board* (1991) 235 Cal.App.3d 1363, 1374.) Nor does the freedom to choose whether to work or not because such freedom becomes "illusory" when the worker's income is dependent on whether he works. (*Id.* at p. 1373-1374.)

7. The common law factors are to be analyzed together as a whole rather than separately in isolation, and their cumulative weight is determinative. (*Garcia v. Seacon Logix, Inc.* (2015) 238 Cal.App.4th 1476, 1486.) Being paid on an hourly or monthly basis without regard to initiative, judgment, or abilities is indicative of an employment relationship. (*Gonzalez v. Workers' Compensation Appeals Board* (1996) 46 Cal.App.4th 1584, 1594.) So is providing services that are a regular part of the employer's business. (*Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, 1049.) And

providing services for an indeterminate length of time "is highly indicative of an employment relationship." (*Gonzalez v. Workers' Compensation Appeals Board*, *supra*, 46 Cal.App.4th at p. 1594.) Lastly, the parties' subjective intent to create an independent contractor relationship will be disregarded when their actual conduct indicates otherwise. (*S.G. Borrello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 ["The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced"], superseded by statute on different grounds as stated in *James v. Uber Technologies Inc.* (N.D.Cal. 2021) 338 F.R.D. 123; *Performance Team Freight Services, Inc. v. Aleman* (2015) 241 Cal.App.4th 1233, 1243 [label on the parties' written agreement is not dispositive].)

8. In *Metropolitan Water District*, several of the water district's employees alleged they were misclassified as "consultants" or "agency temporary employees," and therefore improperly denied employee benefits, including CalPERS membership. The water district contracted with CalPERS to provide retirement benefits to its employees. However, the water district did not enroll employees provided pursuant to contracts with several private labor suppliers, instead classifying them as "consultants" or "agency temporary employees." (*Metropolitan Water District*, *supra*, 32 Cal.4th 491, 497-498.)

9. On appeal, the California Supreme Court identified the issue as "what the PERL means by 'employee.'" (*Metropolitan Water District*, *supra*, 32 Cal.4th at p. 500.) The Court concluded that Government Code section 20028, subdivision (b), provides little guidance on the meaning of employee in the context of an agency that contracts with CalPERS to provide its employees retirement benefits ("any person in the employ of any contracting agency" is an employee). (*Metropolitan Water District*, *supra*, 32 Cal.4th at p. 500.) Therefore, "the PERL's provision concerning employment by a

contracting agency [citation] incorporates a common law test for employment." (*Id.* at p. 509.)

10. Though *Metropolitan Water District* analyzed the meaning of "employee" under the PERL rather than the PEPRA, both bodies of law provide similar exceptions to the general prohibition against retired members working for a CalPERS employer without reinstatement. Therefore, its analysis applies equally to the PEPRA.

11. CalPERS's closing argument that the common law employment analysis is irrelevant is premised on an overly myopic reading of the PERL.[7] According to CalPERS, the PERL "prevents retirees from being employed by contracting agencies," whereas the PEPRA "prevents retirees from providing services to contracting agencies." Therefore, CalPERS posits, the PEPRA's post-retirement rules apply "even if the retiree is not considered a common law employee." Though Government Code section 21220, subdivision (a), prohibits a retired member from being "employed" by a CalPERS employer without reinstatement, numerous statutory exceptions allow the member to "serve without reinstatement" in a variety of positions. (Gov. Code, §§ 21221, 21223, 21224, subd. (a), 21225, subd. (a), 21226, subd. (a), 21227, subd. (a), 21229, subd. (a), 21230, subd. (a), & 21231, subd. (a).) Therefore, the PERL uses the terms "employed" and "served" interchangeably, and CalPERS's argument was not persuasive.

12. CalPERS's argument about the applicability of Government Code section 20164 is irrelevant. CalPERS's right to collect any purported overpayments to Ms. Souza is not an issue on appeal.

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[7] It was also disingenuous given that it argued the opposite at hearing and the amount of resources it expended proving Ms. Souza's common law employment.

13. Ms. Souza made several arguments in closing, none of which was persuasive. She argued that concluding she was a common law employee is inconsistent with the City's constitutional and statutory rights to provide public services through employees, independent contractors, or a combination of both. A similar argument was rejected in *Metropolitan Water District*. The water district argued that concluding the workers hired through a third-party were employees, would entitle them to full employee benefits without having to go through its merit selection process, thereby undermining that process. (*Metropolitan Water District*, *supra*, 32 Cal.4th at p. 504.) But the California Supreme Court explained:

> To the extent MWD complains of having to provide long-term project workers the employment security and other benefits provided for in its administrative code, we stress that no such result follows from our plain language reading of the PERL: a determination that long-term project workers are entitled to enrollment in CalPERS would not necessarily make those workers permanent employees for purposes of MWD's administrative code or entitle them to benefits provided by MWD to its permanent employees. For both past and present workers, entitlement to local agency benefits is a wholly distinct question from entitlement to CalPERS enrollment . . . .

(*Id.* at pp. 505-506.)

14. Ms. Souza criticized CalPERS's Board of Administration for not adopting regulations or issuing precedential decisions outlining criteria for distinguishing between employees and independent contractors. But she cited no authority requiring

the Board to do so. Additionally, she admitted that her appeal is "governed by the common law test" and cited a plethora of case law discussing that test. Her conclusion that "[CalPERS's] interpretation of statutory language is entitled to less deference when not adopted as a regulation" is significantly undermined by her citation to several administrative decisions the Board issued, all of which were excluded from evidence. (See, Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2020) ¶ 13:60 [referring to matters excluded from evidence during closing argument is an "extreme form of attorney misconduct"]; citing *Martinez v. State of California Department of Transportation* (2015) 238 Cal.App.4th 559, 561; *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126-127.)

15. Ms. Souza's argument that CalPERS's inconsistent rulings when applying the common law employment test demonstrates that CalPERS has adopted an underground regulation is belied by her admission that "the common law control test is fact-sensitive." And her argument that concluding she was a common law employee because she held a specific position with each public entity ignores Ms. Rollins's persuasive testimony that Ms. Souza's holding a specific position was just one factor.

16. Ms. Souza's argument that the rules of statutory construction lead to the conclusion that she was an independent contractor because there is no statute or regulation defining "employee" ignores Government Code section 20028, which defines that term. Her argument that there is no statutory authority for requiring reinstatement of retired members who violate the PEPRA's post-retirement employment rules is contradicted by the express language of Government Code section 7522.56, subdivision (b), providing otherwise.

17. Lastly, Ms. Souza's argument that RGS's service model is critically important to assisting public agencies is an unsupported opinion.

Conclusion

18. The City's contract with RGS was subterfuge to hide the fact that Ms. Souza worked as a common law employee of the City of Hughson, without reinstatement, as discussed in Factual Findings 30 through 37. Her employment violated the PERL's and the PEPRA's post-retirement employment rules as discussed in Factual Finding 38.

ORDER

Respondent Margaret Souza's appeal from CalPERS's January 10, 2020 determinations that she was a common law employee of the City of Hughson and her employment violated the PERL's and the PEPRA's post-retirement employment rules is DENIED.

DATE: September 17, 2021

Coren D. Wong (Sep 17, 2021 11:47 PDT)

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings