

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Margaret M. Souza (Respondent) established membership with CalPERS in 1975 and worked for various CalPERS covered agencies. Respondent last worked for the City of Patterson as a Finance Director. Respondent service retired effective October 5, 2010.

In 2011, The City of Hughson's (Respondent City) Director of Finance retired at the beginning of the year. At that time, Respondent City was facing a budget deficit and had laid off many employees. The City Manager previously worked with Respondent at the City of Patterson and hired her to work for Respondent City on a part-time basis in January 2011. Respondent entered a "Part-Time Finance Director Employment Agreement" with Respondent City, at the payrate of \$45 an hour. Respondent City's payrate for the Director of Finance position was \$31.24 to \$37.97 per hour.

On September 28, 2012, Regional Government Services (RGS) and Respondent City entered into a contract (RGS Contract) because Respondent City wanted Respondent to continue working as the Director of Finance without violating CalPERS' post-retirement employment laws.

RGS is a Joint Powers Authority (JPA) that does not contract with CalPERS for retirement benefits. RGS was formed to allow CalPERS retirees to perform work for CalPERS covered agencies without jeopardizing retirement benefits from prior employment. Under its service model, RGS classifies the individuals as employees of RGS, and itself as an independent contractor of CalPERS covered agencies.

RGS was retained to assign a Director of Finance to Respondent City. On October 31, 2012, Respondent entered a contract with RGS to perform services for different clients, including Respondent City. Respondent continued to perform the same services she previously performed as the Director of Finance for Respondent City until July 2015.

Respondent was responsible for performing all duties of Respondent City's Director of Finance, as assigned by Respondent City. Respondent was also to perform any other duties assigned by Respondent City. Respondent City's job classification for the Director of Finance states that the Director of Finance is a department head and "receives administrative direction from the City Manager..."

She was paid by the hour, and her salary was above the maximum salary paid pursuant to Respondent City's publicly available pay schedules. Respondent City could terminate the Agreement any time it was dissatisfied with Respondent's performance, which would in turn terminate Respondent. Respondent was classified as an independent contractor by Respondent City, and Respondent was not offered membership in CalPERS through this employment.

In 2018, CalPERS commenced a review of Respondent's working relationship with the Respondent City. On June 28, 2019, CalPERS issued a preliminary determination letter to Respondent and Respondent City. On January 10, 2020, CalPERS issued a determination finding Respondent's employment was in violation of the Public Employees' Pension Reform Act (PEPRA) and other working after retirement laws, including Government Code sections 21200, 21202, 21220, and 21221. CalPERS also determined that Respondent was a common law employee of Respondent City from November 2012 through July 2015. Thereafter, CalPERS filed an Amended Statement of Issues, noting that that Respondent began working for the City in January 2011 and that her employment from January 2011 through July 2015 violated the Public Employees' Retirement Law (PERL) and PEPRA. Respondent's hourly compensation for services provided to Respondent City as its Director of Finance exceeded the maximum pay published for that position at Respondent City during the entire timeframe.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on March 23, 2021 and June 4, 2021. Respondent and Respondent City were both represented by the same attorney at the hearing.

At the hearing, CalPERS' testimony established that under PEPRA, a retiree is generally prohibited from working for a CalPERS covered employer without reinstatement. Thus, when a retiree is performing services for a CalPERS covered employer, CalPERS looks to whether the employment violates the common law test for employment. Under Government Code section 20069 (a), state service means service rendered as an employee or officer of a contracting agency and section 20028 (b), defines an employee as any person in the employ of any contracting agency. The California Supreme Court has held that the PERL provisions concerning employment by a contracting agency incorporate the common law test for employment. (*Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500.) The common law employment test applies to this case.

CalPERS next looks at whether the employment meets the factors of the common law employment test as articulated by the California Supreme Court in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949 (*Tieberg*). According to the Court, "the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists." (*Ibid.*) If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established.

Other factors may be considered:

(a) whether or not 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

Pursuant to case law, the burden of establishing an independent contractor relationship is upon the party attacking the determination of employment. In this case, all parties agreed that Respondent held the burden of proof.

CalPERS' staff testified at hearing that the PERL generally prohibits a retired member from being employed in any capacity by a CalPERS-covered employer without reinstating to active membership, except as expressly authorized by statute. Government Code section 21202 provides that a retired member who obtains employment in violation of the PERL, "shall be reinstated to membership in the category in which, and on the date on which, the unlawful employment occurred." Additionally, Government Code section 21220(b)(1) requires the member to "reimburse the system for any retirement allowance received during the periods of employment that are in violation of law."

At the time of Respondent's employment with Respondent City, the PERL allowed a retired member to temporarily fill an existing position with a contracting agency, without reinstating to active membership, during an emergency or to prevent stoppage of public business. According to Government Code section 21221, the employment is limited to 960 hours for all CalPERS employers in a fiscal year, while compensation for the employment must "not exceed the maximum monthly base salary paid to other employees performing comparable duties . . . divided by 173.333 to equal an hourly rate."

In this case, Respondent met the requirements of the common law employment test because Respondent City contracted with RGS to specifically have Respondent perform the job duties of the Director of Finance. An RGS "advisor" other than Respondent could not perform the services unless the Respondent City provided prior consent. RGS could not reassign Respondent without first consulting Respondent City. Respondent set her schedule with the consent of the Respondent City. Respondent City reimbursed RGS for the costs of the employment, including salary and overhead expenses. Respondent

was a highly skilled professional and needed little supervision to perform the job duties. Respondent was not engaged in a distinct occupation or business but provided general services within a specific department. Respondent performed the type of work that is usually performed by city employees, was paid on an hourly basis, the contract between RGS and Respondent was of an uncertain duration as it could be extended on a month-to-month basis, and Respondent was also provided office supplies and work space by Respondent City. All of these facts are demonstrative of a common law employment relationship.

At the hearing, Respondent testified on her own behalf that she did not consider herself to be an employee of Respondent City but considered herself to be an employee of RGS. She also testified that she did not perform all of the functions of the Director of Finance position.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ held that the relevant inquiry is regarding Respondent's "relationship with the City, not RGS, because the City is a CalPERS employer but RGS is not." The ALJ applied the common law control test and found that "persuasive evidence overwhelmingly established that the City had and exercised that right to control." The ALJ noted that Respondent City could terminate Respondent at any time by terminating the RGS Contract. While Respondent did not perform all of the duties of a Director of Finance, she did not need to because she was only performing the job on a part-time basis.

In the Proposed Decision, the ALJ concluded that Respondent City's "contract with RGS was a subterfuge to hide the fact that Ms. Souza worked as a common law employee of the City of Hughson, without reinstatement..." The ALJ found that Respondent's employment from November 2011 through July 2015 "violated the PERL's and the PEPRAs' post-retirement employment rules..."

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

November 17, 2021

Preet Kaur
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