ATTACHMENT B

STAFF'S ARGUMENT

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STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Tralochan Sandhu (Respondent) established membership with CalPERS in 1989 and worked for various CalPERS-covered agencies. Sandhu last worked for Santa Clara Valley Transportation Authority (VTA) as a Financial Accounting Manager. Respondent service retired effective September 10, 2011.

After retirement, Respondent provided financial services to Respondents City of Capitola, City of Alameda, City of Union City and City of Los Altos Hills (Respondent Cities) as an Advisor for Regional Government Services (RGS).

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.

Respondent Cities individually entered contracts with RGS. Pursuant to the RGS Contracts, RGS was to assign a Finance Director/Finance Manager to Respondent Cities. On February 23, 2015, Respondent entered a contract with RGS to perform services for different clients, including Respondent Cities.

Respondent was responsible for performing all duties of Respondent Cities' Director of Finance/Finance Manager as assigned by Respondent Cities. These duties included performing all functions of a Director of Finance/Finance Manager position plus any other duties, as assigned by Respondent Cities.

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

In 2018, CalPERS commenced review of Respondent's working relationship with Respondent Cities. On June 28, 2019, CalPERS issued a preliminary determination letter to Respondent and Respondent Cities. On January 10, 2020, CalPERS also determined that Respondent was a common law employee of Respondent Cities, and his employment was in violation of the PERL and the Public Employees' Pension Reform Act (PEPRA) from February 1 to June 20, 2016. Respondent's hourly compensation for services provided to Respondent Cities as Director of Finance exceeded the maximum pay published for those positions at Respondent Cities and he worked in excess of the 960-hour limit.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on March 9, 24, and 25, 2021. Respondent did appear at the hearing and was represented by counsel.

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 Insurance Appeals Board* (1970) 2 Cal.3d 943, 949 (*Tieberg*). Under that test, "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.*) *Tieberg* further explains, 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 Cities, 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 also "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 Cities contracted with RGS to specifically have Respondent perform the job duties of the Finance Director/Finance Manager. An RGS "advisor," other than Respondent, could not perform the services unless the Respondent Cities provided prior consent. RGS could not reassign Respondent without first consulting Respondent Cities. Respondent set his schedule with the consent of Respondent Cities. Respondent Cities reimbursed RGS for the costs of the employment, including salary and overhead. 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 Cities. All of these facts are demonstrative of a common law employment relationship.

At the hearing, Respondent testified on his own behalf that he did not consider himself to be an employee of Respondent Cities but considered himself to be an employee of RGS. He also testified that he did not perform all of the functions of the Finance Director/Finance Manager positions.

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 Cities, not RGS, because the Cities are CalPERS employers but RGS is not." The ALJ applied the common law control test and found that "persuasive evidence overwhelmingly established that the Cities had and exercised that right to control." The ALJ noted that Respondent Cities could terminate Respondent at any time by terminating the RGS Contract. While Respondent did not perform all of the duties of a Finance Director/Finance Manager, he did not need to because he was only performing the job on a part-time basis.

In the Proposed Decision, the ALJ concluded that Respondent Cities' "contracts with RGS were subterfuge to hide the fact that Mr. Sandhu worked as a common law employee of the City of Capitola, Town of Los Altos Hills, City of Alameda, and City of Union City, without reinstatement. . ." The ALJ found that Respondent's employment with Capitola (entire time period of employment), Alameda (entire time period of employment) and Union City (from February 1 to June 20, 2016, "violated the PERL's and the PEPRA's post-retirement employment rules…"

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." To avoid ambiguity and ensure the "Conclusion" on page 29 is consistent with paragraph 4 on page 4, paragraph 47 and footnote 8 on page 18, paragraph 58 on page 21, and the "Order" on page 30, staff recommends the fifth line, of paragraph 18, on page 29, of the Proposed Decision, which states "and Union City (from September 1 to June 20, 2016, only) violated the PEPRA's post-. . ." be changed to state "and Union City (from February 1 to June 20, 2016, only) violated the PEPRA's post-. . ."

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

November 17, 2021

Preet Kaur
Senior Attorney