

**ATTACHMENT B**

**STAFF'S ARGUMENT**

**STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Douglas A. Breeze (Respondent) established membership with CalPERS in 1987 and worked for various CalPERS-covered agencies. Respondent last worked for the City of Ojai as the Public Works Director. Respondent service retired and has been receiving his retirement allowance since August 1, 2007.

In 2013, Respondent City of Atascadero's (Respondent City) City Engineer/Public Works Director retired. Respondent City was unable to fill the position and hired an engineering firm to perform engineering work. Effective July 27, 2014, Respondent City retained Respondent through Regional Government Services (RGS) to lead the Public Works Department at the payrate of \$70.00 per hour, with a housing allowance of up to \$1,500 per month. Respondent City's payrate for the Public Works Director position was \$62.04 per hour.

RGS is a Joint Powers Authority (JPA) that does not contract with CalPERS for retirement benefits. RGS was formed to allow CalPERS members and 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 Public Works Advisor to Respondent City. On July 23, 2014, Respondent entered a contract with RGS to perform services for different clients, including Respondent City. Respondent performed services as a Public Works Director for Respondent City until November 6, 2014.

Respondent City's job classification for the Public Works Director states that the Public Works Director "receives administrative direction from the City Manager." He was paid by the hour, and his 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 review of Respondent's working relationship with 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 July 28 through November 6, 2014. This employment violated the PERL and PEPRA because Respondent's hourly compensation for services provided to Respondent City

as its Public Works Director exceeded the maximum pay published for that position with Respondent City during the entire timeframe.

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 April 13, 2021. Respondent was represented by counsel at the hearing. Respondent City 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 Public Employees' Retirement Law's (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 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 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 City contracted with RGS to specifically have Respondent perform the job duties of the Public Works Director. An RGS "advisor," other than Respondent, could not perform the services unless Respondent City provided prior consent. RGS could not reassign Respondent without first consulting Respondent City. Respondent set his schedule with the consent of Respondent City. Respondent City reimbursed RGS for the costs of the employment, including the salary and other 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 his own behalf that he did not consider himself to be an employee of Respondent City but considered himself to be an employee of RGS. He also testified that he did not perform all of the functions of the City Engineer/Community Development Director 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 have terminated Respondent at any time by terminating the RGS Contract. While Respondent did not perform all of the duties of a Community Development Director, 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 City's "contract with RGS was a subterfuge to hide the fact that Mr. Breeze worked as a common law employee without reinstatement..." The ALJ found that Respondent's employment from July 28 through November 6, 2014, "violated the PERL's and the PEPRA's post-retirement employment rules..."

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

November 17, 2021

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