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:

DAVID W. DOWSWELL and CITY OF DIXON,

Agency Case No. 2020-0562

OAH No. 2020090934

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter by videoconference on March 30, 2021, from Sacramento, California.

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

Scott N. Kivel of the Law Offices of Scott N. Kivel represented respondent David W. Dowswell, who was present throughout the hearing.

Michael D. Youril of the law firm Liebert Cassidy Whitmore represented respondent City of Dixon (City).

Evidence was received and the record was held open to allow the parties to submit simultaneous closing and reply briefs.[1] CalPERS's closing and reply briefs are marked as Exhibits 330 and 333, and Mr. Dowswell's closing and reply briefs are marked as Exhibits JJ and KK. The City did not file closing or reply briefs. The record was closed and the matter submitted for written decision on September 3, 2021.

SUMMARY

Mr. Dowswell retired for service from the City as the community development director. He continued performing the duties of that position during retirement without reinstatement. The persuasive evidence established that he did so as a common law employee of the City from April 28 through July 1, 2015, and he exceeded the number of hours he could work without reinstatement. Therefore, Mr. Dowswell's appeal from CalPERS's determinations that he was a common law employee of the City and worked excessive hours should be denied.

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[1] 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), Margaret Souza (Agency Case No. 2020-0565, OAH No. 2020090931), 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. Mr. Dowswell began working for the City of San Pablo as a planning aide on November 3, 1975. He became a local miscellaneous member of CalPERS by virtue of that employment.

2. Mr. Dowswell continued earning CalPERS service credit while working for the City of Vallejo as an assistant planner, the Town of Corte Madera as an associate planner, the Cities of Pinole and Albany as the planning manager, and the City as the community development director. He retired for service from the City on September 30, 2011, and has been receiving his retirement allowance since November 1, 2011.

3. Mr. Dowswell continued performing the duties of the City's community development director after retirement, initially as a retired annuitant, but later as a "consultant" for Regional Government Services (RGS). RGS is a joint powers authority created by the Association of Bay Area Governments and the City of San Carlos that provides public agencies access to experienced public sector professionals.

4. At all times relevant, the City contracted with CalPERS to provide its eligible employees, including the community development director, retirement benefits. The City did not provide Mr. Dowswell retirement benefits when he worked after retirement, and he did not reinstate from retirement.

5. On February 2, 2018, CalPERS began investigating the nature of Mr. Dowswell's relationship with the City. On January 10, 2020, CalPERS notified Mr. Dowswell it had determined he worked for the City as a common law employee from

November 1, 2013, through July 1, 2015, and his employment violated the post-retirement employment rules from April 28 through July 1, 2015.

6. Mr. Dowswell timely appealed CalPERS's determinations. On March 25, 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 Mr. Dowswell a common law employee of the City from April 28 through July 1, 2015; and (2) if so, did his employment violate the post-retirement employment rules set forth in the California Public Employees' Pension Reform Act 2013 (Gov. Code, § 7522 et seq.; PEPRA)?[2]

Post-Retirement Employment

RETIRED ANNUITANT

7. Prior to Mr. Dowswell's retirement, the Dixon City Council authorized his post-retirement employment as a retired annuitant because he had "important knowledge, skills and abilities that enable[d] him to serve as the City's interim Community Development Director," and the City needed him to finish projects that were pending when he retired. He returned to his former position on an interim basis on October 10, 2011. The City paid him $55.22 per hour.

8. After Mr. Dowswell had been working as a retired annuitant for about two years, the City "received a communication from CalPERS stating . . . their

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[2] The Amended Statement of Issues also cites the Public Employees' Retirement Law (Gov. Code, § 20000; PERL). However, the PERL's post-employment retirement rules do not apply after December 31, 2012.

perspective on retired annuitants." Mr. Lindley, the City's city manager, discussed CalPERS's "perspective" with the city attorney and decided to stop employing Mr. Dowswell as a retired annuitant. But he wanted Mr. Dowswell to continue working for the City, so he explored having Mr. Dowswell work as a "consultant."

RGS CONTRACT

9. On October 22, 2013, the City contracted with RGS to assign Mr. Dowswell to the City to work as the "Community Development Director." The City paid RGS $68.26 an hour for Mr. Dowswell's services.

10. The contract commenced November 1, 2013, and was "anticipated to remain in force through June 30, 2015. After that date, "services [could have] continue[d] on a month-to-month basis until one party terminate[d]" the contract. Either party could have terminated the contract "with or without cause, upon 30 days written notice." Additionally, the City could have terminated the contract if, in its "sole discretion," it "determine[d] that the services performed by [Mr. Dowswell were] not satisfactory."

11. The contract prohibited RGS from reassigning Mr. Dowswell to another client "without first consulting with the [City]." However, the City could have requested a different consultant at any time. The contract identified RGS as the City's independent contractor and Mr. Dowswell as RGS's agent or employee and not the City's agent or employee. This language was consistent with Mr. Lindley's and Mr. Dowswell's understanding and intent that Mr. Dowswell was not a City employee.

12. Finally, the contract specified that RGS was responsible for providing all employee benefits to Mr. Dowswell and paying all applicable employment taxes for him. However, the contract also provided that the hourly rate the City paid for his

services was "based upon RGS's costs of providing the services required [under the contract], including salaries and benefits of employees." Furthermore, the City's human resources director's staff report recommending approval of the contract to the city council explained: "RGS would charge the City of Dixon for Mr. Dowswell . . . the cost of [the] position's salary, required benefits (Medicare and a qualified retirement contribution), insurance and an overhead rate of $7.80 per hour."

EMPLOYMENT AGREEMENT

13. The day after the City and RGS entered into their contract, Mr. Dowswell entered into an employment agreement with RGS to work "as a Community Development Consultant for Regional Government Services assigned to various clients." RGS paid him $50.32 an hour. Mr. Dowswell recorded the time he worked on timesheets from which RGS invoiced the City. The City paid the invoices directly to RGS.

14. Mr. Dowswell continued working for the City through July 1, 2015. He performed some, but not all, the duties usually performed by the community development director. In particular, he worked on updating the City's general plan.

15. The City's municipal code states that the community development director is subject to the city manager's general supervision. Mr. Lindley became the city manager shortly before Mr. Dowswell retired. Mr. Lindley had no prior experience in planning and "relied on [Mr. Dowswell] heavily to know what to do and inform [Mr. Lindley] of what he needed to know as it related to . . . [Mr. Dowswell's] responsibilities." Both before and after his retirement, Mr. Dowswell had the same amount of interaction with Mr. Lindley. They had "regular contact," but Mr. Dowswell "was not supervised at all on [his] day-to-day work."

CalPERS's Analysis of Post-Retirement Employment

BACKGROUND

16. 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."

17. The Team makes "complex determinations" about the nature of a member's employment relationship to determine if he is acting as a common law employee or an independent contractor of the CalPERS employer to whom he 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 annuitant, the Team must also determine if his employment violates the post-retirement employment rules. If it does, the retired annuitant is subject to reinstatement from retirement.

18. 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 Mr. Dowswell's employment relationship with the City. She drafted the "final determination" letter sent to Mr. Dowswell on January 10, 2020.

NATURE OF EMPLOYMENT RELATIONSHIP

19. Ms. Rollins explained that the PEPRA generally prohibits a retired annuitant from working for a CalPERS employer without reinstatement. Therefore, she first analyzed Mr. Dowswell's relationship with the City to determine if he 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*).[3] Some of the common law factors she considered included the City's right to control how Mr. Dowswell performed his 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 his services, whether he was paid based on the amount of time he spent working or a per project basis, and the parties' intent. She did not give any factors more weight than others, but rather considered the "cumulative" weight of all factors when she concluded Mr. Dowswell was a common law employee of the City.

Right to Control

20. Mr. Dowswell worked as the City's community development director prior to retirement. He returned to that position on an interim basis as a retired annuitant, and he continued performing some of the duties of that position under the contract between the City and RGS. Ms. Rollins observed, "so the employment-employee relationship while working for Dixon didn't seem to change." She explained that this indicated that the City had the right to control how Mr. Dowswell provided his services. It did not matter that he was not performing all the duties outlined in the City's job description for the position, because he 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.

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[3] Dewayne Cargill was a real party in interest in *Metropolitan Water District*. The parties sometimes referred to the decision as "*Cargill*."

Requisite Skills and Degree of Supervision

21. The City's municipal code specifies that the city manager has general oversight over the community development director. Mr. Lindley explained Mr. Dowswell was "a highly skilled professional that had been doing that job for a number of years." He opined Mr. Dowswell "did not require much direction" from him. Ms. Rollins explained that a lack of close supervision of highly skilled workers was common because "when you get to these higher level positions . . . they become specialized and you need specialized skills a lot of times to do these jobs. So you don't really require a lot of direction or a lot of oversight itself of the day-to-day work of that individual."

Duration of Services

22. Mr. Dowswell performed some of the duties of the City's community development director pursuant to the contract between the City and RGS for 19 months. Ms. Rollins explained, "when we're looking at independent contractor relationships, . . . the person that you're hiring is coming in most of the time to fill a specific project or a specific need of the agency. [¶] . . . [¶] They are not performing ongoing duties that are part of the position that's established at the City."

Method of Payment

23. Mr. Dowswell was paid an hourly rate. 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."

The City's Regular Business

24. The community development director position is established with the City. Mr. Dowswell held that position prior to retirement, after which he held the

position on an interim basis as a retired annuitant. He continued performing some of the duties of the position pursuant to the City's contract with RGS. He performed duties that were part of the City's regular business.

Parties' Intent

25. Mr. Lindley's intent when he signed the contract with RGS on behalf of the City was for Mr. Dowswell "to help [the City] with completing [its] general plan update and some other development related issues that [it] didn't have the staff to complete at the time." He did not want Mr. Dowswell to serve as the community development director because the City was "recruiting for that position when I entered into [the] contract." Mr. Dowswell confirmed Mr. Lindley never asked him to serve as the community development director after he stopped working as a retired annuitant.

26. But Mr. Lindley also explained he stopped employing Mr. Dowswell as a retired annuitant after learning CalPERS's "perspective" about such employment, and he recommended entering into the contract with RGS to the city council because he wanted to continue the relationship with Mr. Dowswell. He believed that hiring Mr. Dowswell through RGS would satisfy CalPERS's concerns.

27. Mr. Dowswell explained that he stopped working for the City as a retired annuitant because Mr. Lindley told him CalPERS had contacted the City and expressed concern with Mr. Dowswell's employment. Mr. Lindley also told Mr. Dowswell he "needed to look more like a consultant and less like an employee," and one way of doing that was to work for other public entities besides the City. Therefore, Mr. Dowswell entered the employment agreement with RGS "so [he] could work for multiple cities, conceivably exceed 960 hours, and not get in trouble with CalPERS."

POST-RETIREMENT EMPLOYMENT RULES

28. Ms. Rollins explained that the PEPRA allows a retired annuitant to work for a CalPERS employer without reinstatement under limited circumstances, but not for more than 960 hours in a fiscal year.[4] Therefore, once Ms. Rollins concluded Mr. Dowswell worked for the City as a common law employee without reinstatement, she analyzed the total number of hours worked.[5]

29. Mr. Dowswell exclusively performed some of the duties of the City's community development director from November 1, 2013, through July 1, 2015. Between July 1, 2014, and June 30, 2015, he worked a total of 1,168 hours.[6] The hours he worked from April 28 through June 30, 2015, were in excess of 960 for the fiscal year.

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[4] As used in this Proposed Decision, a fiscal year begins July 1 and ends June 30 the following calendar year.

[5] Whether an exception to the general rule prohibiting post-retirement employment applied to Mr. Dowswell was not an issue on appeal; only the nature of his employment relationship and the number of hours worked were.

[6] Although his employment continued through July 1, 2015, a new fiscal year began that day and he was eligible to work an additional 960 hours.

Analysis

Mr. Dowswell Worked as the City's Common Law Employee Without Reinstatement

30. The relevant inquiry is Mr. Dowswell's relationship with the City, not RGS, because the City is a CalPERS employer but RGS is not. It was undisputed that he never reinstated from retirement. Though RGS's contracts with the City identified Mr. Dowswell as the City's independent contractor, 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 Mr. Dowswell performed his 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 Mr. Dowswell's employment with the City by canceling the contract. The City could have terminated the contract "without or without cause." Additionally, the City could have cancelled the contract if it concluded, in its "sole discretion," that his services were "not satisfactory." Alternatively, it could have left the contract in place and requested a different "consultant."

32. The City entered into the contract with RGS for the specific purpose of having Mr. Dowswell perform some of the duties of a vacant position, and no one else performed those duties. RGS was expressly prohibited from reassigning him to another client "without first consulting" the City. Ms. Rollins persuasively explained the insignificance of his not performing all the duties of the position. She also persuasively explained why Mr. Lindley's lack of day-to-day supervision did not negate the City's right to control Mr. Dowswell.

33. The contract specifically stated the City was not responsible for paying Mr. Dowswell or providing him employee benefits, and paying his salary and benefits was RGS's sole responsibility. But the express language of the contract demonstrated the City reimbursed RGS for those costs, and RGS was simply a conduit through which the City paid Mr. Dowswell.

34. Other elements of the common law test also indicated Mr. Dowswell was a common law employee. It was undisputed he was a highly skilled land use planning professional, and the persuasive evidence established that employees with those skills often work with little supervision. He was not engaged in a distinct occupation or business when he worked for the City. The work he performed was usually performed by a City employee. RGS paid him by the hour, as opposed to by the job.

35. The term of the City's contract was the only secondary factor that potentially indicated Mr. Dowswell was the City's independent contractor. The contract was for a finite period, and there were no extensions. Ms. Rollins's testimony to the contrary was not persuasive.

36. 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. Lindley's. And the fact that the City retained Mr. Dowswell for the express purpose of performing the duties of a specific position was the most compelling evidence of its intent.

37. But even if Mr. Lindley's intent is relevant, the persuasive evidence established that he would have continued employing Mr. Dowswell as a retired annuitant had CalPERS never expressed concern about such employment. And once CalPERS expressed concern, Mr. Lindley attempted an end run around the PEPRA's

rules regarding post-retirement employment by attempting to hire Mr. Dowswell as a "consultant" through RGS.

38. Mr. Dowswell shared a similar intent as reflected by his sole motivation for becoming a "consultant" with RGS: "So that's the reason that I went and signed up with RGS, so I could work for multiple cities, conceivably exceed 960 hours, and not get in trouble with CalPERS."

MR. DOWSWELL WORKED MORE THAN 960 HOURS

39. Mr. Dowswell did not produce any evidence to contradict CalPERS's persuasive evidence that he exceeded the PEPRA's 960-hour limit for post-retirement employment for Fiscal Year 2014/2015 on April 28, 2015.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Mr. Dowswell has the burden of proving he was an independent contractor of the City and he did not violate the PEPRA's post-retirement employment rules. He must meet his burden by a preponderance of the evidence. This evidentiary standard requires Mr. Dowswell 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, he must prove it is more likely than not that he was an independent contractor and did not violate the PEPRA's post-retirement rules. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

POST-RETIREMENT EMPLOYMENT RULES

2. 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 annuitant 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).)

3. An exception to the PEPRA's general prohibition against post-retirement employment applies when the retired annuitant 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).)

COMMON LAW TEST FOR EMPLOYMENT

4. 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.*)

5. 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.)

6. 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].)

7. In *Metropolitan Water District*, the water district contracted with CalPERS to provide retirement benefits to its employees. The water district classified workers provided pursuant to contracts with several private labor suppliers as "consultants" or

"agency temporary employees," and did not enroll them in CalPERS. Several of those workers alleged they were misclassified as consultants or agency temporary employees, and therefore improperly denied CalPERS membership. (*Metropolitan Water District, supra*, 32 Cal.4th 491, 497-498.)

8. 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.)

9. 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.

10. 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

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

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 is not persuasive.

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

12. Mr. Dowswell made several arguments in closing, none of which is persuasive. He argued that concluding he was a common law employee is inconsistent with the Cities' 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.)

13. Mr. Dowswell criticized CalPERS's Board of Administration for not adopting regulations or issuing precedential decisions outlining criteria for distinguishing between employees and independent contractors. But he cited no authority requiring the Board to do so. Additionally, he admitted his appeal is "governed by the common law test" and cited a plethora of case law discussing that test. His conclusion that "[CalPERS's] interpretation of statutory language is entitled to less deference when not adopted as a regulation" is significantly undermined by his 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.)

14. Mr. Dowswell'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 his admission that "the common law control test is fact-sensitive." And his argument that concluding he was a common law

employee because he held a specific position with the City ignores Ms. Rollins's persuasive testimony that Mr. Dowswell holding a specific position was just one factor.

15. Mr. Dowswell's argument that the rules of statutory construction lead to the conclusion that he was an independent contractor because there is no statute or regulation defining "employee" ignores Government Code section 20028, which defines that term. His 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.

16. Lastly, Mr. Dowswell's argument that RGS's service model is critically important to assisting public agencies is an unsupported opinion.

Conclusion

17. The City's contract with RGS was subterfuge to hide the fact that Mr. Dowswell worked as a common law employee of the City from April 28 through July 1, 2015, without reinstatement, as discussed in Factual Findings 30 through 38. His employment from April 28 through June 30, 2015, violated the PEPRA's post-retirement employment rules as discussed in Factual Finding 39.

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ORDER

Respondent David W. Dowswell's appeal from CalPERS's January 10, 2020 determinations that he was a common law employee of the City of Dixon from April 28 through July 1, 2015, and his employment violated the PEPRA's post-retirement employment rules is DENIED.

DATE: September 17, 2021

Coren D. Wong (Sep 17, 2021 11:49 PDT)

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings