ATTACHMENT C

RESPONDENT'S ARGUMENT

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George Carr
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October 26, 2021

Honorable Board of Administration Members
CalPERS
Lincoln Plaza North
400 Q. Street
Sacramento, CA 95811

Re: In the Matter of the Appeal of Membership Determination of Linda D. Abid-Cummings, Respondent, and City of Hughson, Respondent
OAH Case No. 2020090772

In the Matter of the Appeal of Membership Determination of Margaret M. Souza, Respondent, and City of Hughson, Respondent
OAH Case No. 2020090931

Honorable CalPERS Board Members,

On behalf of the City Council of the City of Hughson ("City"), I am writing to you to request that a terrible wrong be averted and that the Administrative Law Judge's ("ALJ") proposed decision in this matter be rejected in its entirety as it would not only create a new CalPERS rule without following the normal rule making procedure, it would retroactively enforce it against unsuspecting cities like Hughson that carefully complied with the then existing rules when entering into its contract for services with Regional Government Services ("RGS") in order to make it through difficult financial times.

CalPERS has established rules so everyone knows what they can and can't do. That process includes allowing CalPERS member agencies to comment on the proposed rules to assist the CalPERS Board in fashioning a well thought out rule after taking those comments into consideration and to avoiding unintended consequences. However, in these cases, CalPERS staff is asking that you completely ignore that process and instead replace it with a fundamentally flawed ALJ's decision that ignores the substantial weight of evidence presented as set forth in the City's formal brief.

From a practical standpoint, here is what is wrong with the ALJ decision and why it is a poor substitute for a proper and transparent rule making procedure:

1. It will be impossible for a city to hire a consultant that employs retired CalPERS members to perform <u>any</u> task that would be performed by a vacant city staff position because the ALJ proposed decision has determined that that is enough to find that the consultant's employee would be a "common law employee" of the city.

2. Even though the City complied with the CalPERS rules in effect 10 years ago, the ALJ proposed decision would apply retroactively back to 2011 in the City's case. How could any agency rely on CalPERS rules as a safe haven knowing that its staff could try to convince an ALJ otherwise as they have in these cases?

3. The ALJ ignored the evidence presented by the City and RGS that clearly showed that RGS's employees were not common law employees of the City. Instead of explaining why, the ALJ's decision simply casts that evidence aside without any analysis. Why? Was this a fair appeal process?

4. There is absolutely no evidence that the City intended to do anything not allowed by CalPERS rules. None! Yet, the ALJ's proposed decision would punish the City, Ms. Abid-Cummings, and Ms. Souza with payment demands going back 10 years when they didn't violate any CalPERS rules?

5. Prior to Ms. Abid-Cummings and Ms. Souza becoming employees of RGS, almost a decade ago Ms. Abid-Cummings and Ms. Souza entered into part time employment contracts with the City. Even though they worked a limited number of hours and were treated as consultants and not as city employees, CalPERS staff decided to add them as claims immediately before the ALJ hearing. Again, with virtually no evidence, the ALJ ignored the City's evidence that they were no common law employees.

It is clear that CalPERS staff do not like that cities like Hughson are able to contract with consultants like RGS even though CalPERS rules do not prohibit it. So, they substitute proper rule making by you with legal shenanigans to achieve their objective. Bad decisions make bad rules. The ALJ proposed decision is both.

Therefore, we respectfully request that the Board reject the proposed decision. If the Board is concerned about these contracts, then adopt a rule to address those concerns so innocent, well intentioned cities and retired CalPERS employees don't find themselves being punished.

Respectfully,

George Carr
Mayor, City of Hughson

ATTACHMENT C

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October 27, 2021

CalPERS Board of Administration
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VIA FEDERAL EXPRESS ONLY

Re: In the Matter of the Appeal of Membership Determination of Linda Abid-Cummings and City of Hughson, Respondents
OAH Case No. 2020090772

Respondents Abid-Cummings and City of Hughson's Argument to *Reject* the Proposed Decision

I. INTRODUCTION

This appeal identifies the key issues demonstrating the fundamental flaws in the Administrative Law Judge's ("ALJ") proposed decision in which the ALJ found that the individual Respondent was a common law employee of the City, rather than of the third-party employer, Regional Government Services. Thus, this decision should be rejected. *The case before this Board involves a third party employer, a public joint powers agency, Regional Government Services ("RGS") which contracted with the Respondent City to provide RGS Advisors for time-limited, high level professional services for time-sensitive and immediate work required by the City.* Here Ms. Abid-Cummings initially worked as a consultant to Hughson, and then continued periodic work to Hughson (and other RGS clients) as an employee of RGS.

II. THE CALPERS BOARD SHOULD REJECT THE PROPOSED DECISION.

The ALJ's decision is fatally flawed in that it:

(1) fails, in light of the factual record, to correctly or even adequately analyze the common law control test indicia. For example, the ALJ opined in these five related cases that the city manager's intent was irrelevant, despite the city manager operating under general law and municipal code authority as the representative of the City;

(2) misapplies the well-settled law to the undisputed and consistent testimony by the individual Respondent and the City officials, and the documentary evidence, that the City Respondent and its employees never controlled, supervised, or exercised direction over the manner and means of the work assigned by the City-Regional Government Services contract;

(3) imposes, without authority to do so, a new and wholly legally unsupported standard of common law control by concluding that if an individual *performs any service that was part of a City position, even if vacant, then that individual must be reported as a common law employee;*[1]

(4) ignores that the assigned work under the RGS-City contract was for time-sensitive, specific assignments that were required by the City, through a services contract whereby the City could terminate the contract, but not the individual RGS advisor;

(5) ignores the testimony and documentary evidence such as the parties' agreement that RGS was the employer and the City had no independent control as explicitly provided for in the terms of RGS employment agreements and as testified to that RGS Advisors such as this individual Respondent were expected to, and often in fact did, work for *multiple RGS client agencies, at times concurrently*, one of the basic characteristics of an independent contractor;[2]

(6) rejects the well-settled judicial obligation to harmonize relevant law, by example, ignoring the well-settled statutory authority given by the Legislature to general law cities to contract for special services as the local jurisdiction deems

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[1] Despite the ALJ's lack of authority to establish new law, the ALJ opined that Respondent was hired for the specific purpose of performing *some* of the duties of a vacant position while the entity recruited a permanent employee, and no one else performed those duties. In the ALJ's misguided and untenable view, the above automatically made Respondent a common law employee of the City.

[2] The ALJ concluded, without adequate evidentiary basis, that evidence established that the City possessed the right and exercised that right to control the way Respondent performed his duties. The ALJ also incorrectly interpreted the undisputed evidence by concluding that notwithstanding language in RGS's contracts with the City to the contrary, the City had the right to terminate Respondent's employment with them by canceling their contracts. The false premise of the ALJ's analysis is shown by the fact that a City may cancel a contract with <u>any</u> independent contractor; that right in no way demonstrates "the right to terminate the worker" which is the hallmark of the common-law control test.

necessary to fulfill its service delivery obligations; [3,4]

(7) ignores that CalPERS "Employer Relationship Questionnaire" fails to define material terms such as "control," "supervision," and "reporting." CalPERS failure to define these critical terms underscores how it operates on "underground regulations" for which no penalty may be imposed;

(8) attaches credibility to the testimony of CalPERS sole witness despite that her testimony was infected with generalities, contradictory statements and a consistent failure to identify specific evidence supporting the adverse determination by CalPERS;

(9) elevates "form" over substance by giving undue importance to infrequent and erroneous documents describing the individual by a position title;[5]

(10) myopically disregards the overwhelming indicia of employment by Regional Government Services to singularly focus on Respondent City's indicia of employment; indisputably CalPERS has failed to define lawful third party independent contractor status as there are no defining regulations and the plethora of CalPERS publications are silent; and

(11) improperly rejected Respondents' repeated attempts to compel CalPERS to identify its "working law" as to third party independent contractor relationships, including but not limited to this Board's adopted administrative law judge decisions that demonstrate contrary factual and legal conclusions which contradict the instant proposed decision. Indeed, CalPERS own training materials instruct

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[3] The Legislature's grant of statutory authority to cities is indisputable. As just one example, Government Code section 37103 is explicit in conveying powers:

> The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal or administrative matters.

[4] CalPERS conceded that it has failed to adopt any regulation regarding a City hiring outside consultants: Q: "Does CalPERS have any policy of prohibiting a City from hiring a consultant to perform certain finance activities?" A: "No." 3/25/2021, 400:10-13. Q: "Is there any CalPERS prohibition on a City hiring a consultant to do certain financial work?" A: "No." *Id.*, 432:17-19.

[5] Again, without giving due weight to the consistent evidence of intent by Respondent's witnesses, the ALJ nonetheless reached an incorrect conclusion that the City "retained [Respondent] for the express purpose of performing the duties of a specific position was the most compelling evidence of their intent." This is nothing more than a conclusory statement by the ALJ and contrary to the administrative evidentiary record.

staff to the exact opposite conclusion as to valid third-party employment, yet another relevant and probative exhibit ruled inadmissible by the ALJ.

Given these fundamental errors, the proposed decision lacks all credibility and constitutes an unpersuasive recitation of facts that blindly gives undue deference to CalPERS staff determinations.

III. WITHOUT ANY BASIS IN THE LAW, THE ALJ DISREGARDED RGS' INDICIA OF CONTROL AS RESPONDENT'S EMPLOYER.

Indisputably "control" is the most critical indicia of common law employment: "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." *Tieberg v. Unemployment Ins. Appeals Bd.* (1970) 2 Cal.3d 943, 949, quoting *Empire Star Mines Co. v. California Emp. Comm.* (1946) 28 Cal.2d 33, 43. And see *Empire Star Mines Co., supra,* at 43, where the Court observed that "strong evidence in support of an employment relationship is the right to discharge at will, without cause." Here, there is no evidence showing that the City held the right to discharge; indeed, to the contrary, only RGS possessed this right. City manager testimony consistently stated that if dissatisfied with the Advisor's performance, the City's remedy was provided for in the RGS-City contracts, that being either terminating the RGS contract or requesting a substitute advisor. An underlying premise of Respondent City contracting with RGS was the explicit understanding that the City was purchasing a service from RGS for high level professional assistance and if, for whatever reason, the advisor(s) was unable to perform the services it was RGS' obligation to find advisor(s) to competently and professionally continue to provide the contracted service with RGS having final authority over which advisor was assigned to the project.

In addition to the consistent testimony by all of Respondent's witnesses, and memorialized by the RGS-City contracts and the RGS-individual employment agreements which expressly state that the advisor is an at-will employee of RGS and not subject to the City's authority, it is unambiguous that the Respondent City did not control or have the right to control the manner and means of the RGS advisors' work. See e.g. *Tieberg, supra,* at 947: "[I]f 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." CalPERS simply has not identified specific evidence showing that the cities controlled or had the right to control the individual Respondents' assigned work.[6]

[6] As demonstrated in the administrative record, Respondent provided overwhelming evidence that the Respondent was an employee of RGS. By way of example, RGS memorialized its RGS Advisor assignments (and compensation) through RGS Personnel Action Forms.

Moreover, as explicitly provided for in the terms of RGS Advisor employment agreements, the right and expectation of working for *multiple clients, at times concurrently*, also constitutes a basic characteristic of an independent contractor.[7]

IV. FACTS SHOWING RESPONDENT'S STATUS AND ASSIGNMENTS.

HUGHSON City Manager Whitemyer asked ABID-CUMMINGS to assist him in his new position as HUGHSON City Manager, while she was still employed by the City of Riverbank as Administrative Services Director and City Clerk. 811:23-25; 812:14-813:11. She obtained permission from Riverbank to take executive leave one day per week to assist Whitemyer. *Ibid.* Her assistance was to recreate the city records and files which she found to be in disarray or missing. 817:7-8; 818:5-10. Compiling the city records was a continuous project for her at HUGHSON. 824:17-825:19. ("I was recreating [the city's management record] system.")

ABID-CUMMINGS work "was always intended to be temporary. *It was just temporary to get us through the challenges I was dealing with.*" 867:4-8. Whitemyer testified that "when I hired [ABID-CUMMINGS] I had no expectation of her performing the duties of the administrative services director. My intent was I had to present something in the sense that we needed someone with certain expertise to handle our records management system and that was incorporated with the administrative services director positon. There were literally only five people left at City Hall, so we didn't have time or resources to create new job descriptions. We weren't able to really have time to be creative. And as the authority of the Municipal Code said, I needed to get the work done as efficiently as possible, so we moved forward with this goal to have Ms. Abid-Cummings *work on the special projects*, primarily the records management system." 865:5-21. ABID-CUMMINGS did not have responsibility for nor did she perform any of the "essential functions" enumerated in the job description. Exhibit 251. 818:18-820:7.

References to ABID-CUMMINGS on the HUGHSON organization chart were meaningless: "...this was such a transitional period for the small City of HUGHSON, that we had so many things to do with so few people that sometimes we would just put people's name on documents because we are dealing with old documents that used to be someone there. *So in some ways we had to demonstrate to the community that you still have a city government.* We just eliminated half of your city staff, but, hey, we got this. We have the ability to provide the service. We were in a transitional period stabilizing the city government, and it's something I am extremely proud of. The work that Linda provided to the residents of the City of HUGHSON was instrumental in the recovery of that city. I'm proud to say that with her assistance and the

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[7] CalPERS has previously recognized that a JPA providing consulting services to public agencies does not do violence to the PERL. See e.g. *Chandler and Cooperative Personnel Services* (2011) OAH No. N-2009100248. There the individual was found to be employed by CPS, a joint powers agency and CalPERS employer. CPS provided human resource and management services, including "sophisticated consulting services," to public entities and non-profit agencies. *Id.*, at ¶ 2. *There is simply no meaningful difference between the Board-adopted Chandler decision and the indicia of RGS control throughout the evidentiary record that are undisputed by CalPERS witnesses in any meaningful way.*

assistance of other hard working individuals, we were able to bring them out of the financial discord, the records management disaster into a well-run, well-managed city that continues to provide the ability to pay PERS the payments it needs to pay. *So I would be very shocked without their help and assistance that we would be in a position that we are today.*" 875:3-876:7.

Whitemyer testified that when he hired ABID-CUMMINGS "I knew I wasn't hiring the administrative services director, but I knew—and one of the reasons why I had her fill out the application was so that we can document we were hiring someone to do many sorts of things, that we were hiring a person that deserved that type of pay…I new [sic] she would not be doing a fraction of the duties of the administrative services director position [because she was only working one day per week]." 878:13-879:8

Whitemyer viewed ABID-CUMMINGS as being in a consultant role: "I viewed her as a consultant. I mean, I think it's important to look at it that this was a temporary situation. I had no need to supervise her. I had no need to discipline her. It was a very temporary arrangement. I either got the service I needed related to the records management system, or we would just end that relationship." 869:4-12. Responding on cross-examination to Exhibit 210, pp. 18-19, where it states that the city fills the finance director and administrative services director positions on a part-time, temporary basis by utilizing retired individuals, Whitemyer explained that the operational reality was starkly different: "…I'm telling you they did not fill those positions from the service standpoint. They had their own schedule, projects, and hours, and that was it. All the other things were done by other folks. And I carried most of the list, just to be honest with you." 885:17-15.

At no point did Whitemyer instruct her day-to-day records management work, either when she worked directly for HUGHSON or later when she was employed by RGS. 871:23-872:3. He never mandated a specific task to her. 872:4-8. He was more interested in the results of her work, not in her manner and means. 872:9-12. Whitemyer repeatedly stated that ABID-CUMMINGS did not perform the functions of HUGHSON's Administrative Services Director or as its City Clerk. 874:22-875:2.

V. THIS DECISION FAILS TO MEET THE STANDARDS OF PRECEDENT.

Here the decision fails to meet the standards for establishing precedent: (1) the decision does not contain a significant legal or policy determination of general application that is likely to recur; and (2) the decision does not include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied. *CalPERS has no statutory authority to dictate how California's public agencies implement their operational mandates. Any attempt to adopt this proposed decision as precedent deserves, indeed requires, ample public notice and an opportunity to respond by any CalPERS member who may be affected by making this decision precedential.*

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