

**ATTACHMENT C**  
**RESPONDENT'S ARGUMENT**

ATTACHMENT C

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**RANCHO CALIFORNIA WATER DISTRICT**

7  
 8 **BEFORE THE**  
**BOARD OF ADMINISTRATION**  
 9 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**  
**STATE OF CALIFORNIA**

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 11 In the Matter of the Appeal Regarding  
 Membership Eligibility of  
 12 **SHAWN BENNETT,**  
 13 Respondent,  
 14 and  
 15 **RANCHO CALIFORNIA WATER**  
 16 **DISTRICT,**  
 17 Respondent.

) CalPERS Ref. No. 2013-0686  
 )  
 ) CASE NO. 2013-0686  
 ) OAH No. 2014080163  
 )  
 ) **RESPONDENT'S ARGUMENT OF**  
 ) **RANCHO CALIFORNIA WATER**  
 ) **DISTRICT**  
 )  
 ) ALJ: Susan J. Boyle  
 ) Board Meeting Date: August 19, 2015  
 ) Time:  
 ) Location: Lincoln Plaza North  
 ) 400 P Street  
 ) Sacramento, CA 95811

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1 Respondent Rancho California Water District (the "District") submits the following  
 2 argument for consideration against the adoption of the Proposed Decision of ALJ Susan J. Boyle,  
 3 dated July 6, 2015, in the above-referenced matter. The Proposed Decision fails entirely to  
 4 address and analyze the unique nature of computer consulting services, such as those that were  
 5 being performed by Respondent Shawn Bennett. The Proposed Decision also fails to recognize  
 6 or consider Bennett's serious credibility problems based upon his admissions of lying and  
 7 attempting to destroy evidence. The District requests that the Board consider all of the evidence  
 8 and briefing and issue a decision finding Bennett to be an independent contractor of the District,  
 9 or alternatively, to review in detail all evidence presented that the District's belief that Bennett  
 10 was an employee was eminently reasonable, particularly given the nature of his work and the  
 11 existence of his separate ongoing business, such that the District is not required to pay member  
 12 contributions in arrears and the administrative fee under Government Code section 20283.

13 **The District Met Its Burden of Proof**

14 The Public Employees' Retirement Law describes an "employee" as "[a]ny person in the  
 15 employ of any contracting agency," Gov. Code § 20028(b), and without further definition of the  
 16 terms "employ" or "employee", the multifactor common law test of employment applies. *Metro.*  
 17 *Water Dist. of S. California v. Superior Court* (2004) 32 Cal.4th 491, 500. The right to control  
 18 the manner and means by which the work is accomplished is the most significant element of  
 19 multifactor common law test. Freedom from that control, conversely, tends to establish an  
 20 independent contractor relationship. "The distinction is one of degree, and the decision in a  
 21 particular case usually requires the weighing of conflicting factors." 3 Witkin, Summary 10th  
 22 (2005) Agency, § 21, p. 60; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949-51.

23 Under this test, general supervisory control is quite different from control over the details  
 24 of the work. "The [principal] may retain a broad general power of supervision and control as to  
 25 the results of the work so as to insure satisfactory performance of the independent contract-  
 26 including the right to inspect, the right to stop the work, the right to make suggestions or  
 27 recommendations as to details of the work, the right to prescribe alterations or deviations in the  
 28 work-without changing the relationship from that of owner and independent contractor or the

1 duties arising from that relationship.” *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790  
2 (internal citations omitted); *see also* 3 Witkin, Summary 10th (2005) Agency, § 23, p. 62.

3 Other relevant factors for consideration are:

- 4 1. Whether or not the person performing the services is engaged in a distinct  
5 occupation or business;
- 6 2. Whether or not the kind of work performed is usually performed by a specialist  
7 without supervision;
- 8 3. The skill required;
- 9 4. Who supplied the tools, instrumentality and place of work;
- 10 5. The length of time the services are performed;
- 11 6. The method of payment (by time or job);
- 12 7. If the work is part of the regular business of the principal; and
- 13 8. Whether the parties believe they are creating an employer-employee relationship.

14 *Tieberg*, 2 Cal.3d at 949; *see also Futrell v. Payday Cal., Inc.* (2011) 190 Cal.App.4th 1419,  
15 1434. In applying these factors, it is essential that the unique nature of computer consulting be  
16 considered, which is an issue that the Proposed Decision fails entirely to address despite the  
17 detailed analysis set forth in the District’s closing brief. The concept of the job of computer  
18 consulting requiring a different approach under the common law analysis is not something  
19 conceived of by the District. The Employment Development Department (“EDD”) has already  
20 recognized the unique nature of computer consulting services and developed specific regulations  
21 that apply to the analysis of computer consultants to determine whether any particular consultant  
22 is properly classified as an independent contractor or employee. *See* 22 CCR § 4-4304.<sup>1</sup>

23 For example, the EDD regulations acknowledge that while the requirement that a person  
24 work on premises during certain hours would normally weigh in favor of employee status, for a  
25 computer consultant that is not necessarily true: “Computer consultants may maintain working  
26 hours similar to employees because of the need for direct client contact. If the need for client  
27 contact is the sole reason for maintaining normal working hours, that factor will not be  
28 considered as an indication of employment.” 22 CCR § 4-4304 (i)(1). The EDD regulations  
also recognize that special circumstances apply to having a computer consultant come to a  
business’s premises to perform services:

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<sup>1</sup> Under these regulations, computer consultants include “individual[s] who perform[] various computer-related services, including but not limited to” “advice in computer-related services”; software maintenance; and “[t]raining of staff in computerized systems and other computer application”. *Id.*, § 4-4304 (b).

1 When the computer consultant performs on large computer systems belonging to  
2 the principal, it is generally impossible for the work to be performed off-site.  
3 Thus, in the computer services industry, performing services on the  
4 principal's premises is usually evidence of neither independence nor of an  
5 employment relationship. ... [¶] When the computer services can only be  
6 performed on the premises of the principal, using the equipment of the principal,  
7 the computer consultant must usually comply with standards and procedures of  
8 the principal regarding use of the computer system. Such standards and  
9 procedures may include providing a computer account and password for access to  
10 the computer system, requiring the use of designated terminal or terminals, and  
11 requiring compliance with procedures built into the system and schedules for use  
12 of equipment that can change because of the principal's workload and the  
13 availability of the facilities. Such requirements by the principal relating to access  
14 or use of the computer systems or relating to security requirements of the  
15 principal are not evidence of employment or independence.

16 *Id.*, § 4-4304 (B)(3) (emphasis added). Accordingly, work location and the use of the principal's  
17 computers are not evidence of employment for computer consultants, although the Proposed  
18 Decision incorrectly indicates that these elements are supportive of employee status in this case.

19 Likewise, the Proposed Decision incorrectly relies upon the hourly nature of Strange  
20 PC's contract as evidence of employee status when the EDD regulations recognize that an hourly  
21 rate is regularly used for computer consultants because "the computer consultant must integrate  
22 his or her services into the environment of the principal, adjusting to all of the interruptions and  
23 unexpected exigencies of the environment ...." *Id.*; see also *id.*, § 4-4304(i)(2)(B)(5) ("[I]n the  
24 computer industry, payment computed on an hourly rate is not evidence of employment or  
25 independence."). Another unique feature of computer consulting agreements is that termination  
26 and renewal at the "end of a fiscal year of the principal" is not evidence of an employment  
27 relationship, *id.*, § 4-4304(i)(2)(B)(4), although the Proposed Decision states otherwise. Finally,  
28 while paying for training is normally evidence of employment, in the computer services industry  
it is recognized that "additional training specific to a particular contract may be required to  
complete the contract" and is not necessarily evidence of employment. *Id.*, § 4-4304(i)(2)(B)(6).  
Again, without any analysis, the Proposed Decision disagrees. The District asks that the Board  
consider all of the evidence and the nature of the services being provided because when all of  
these factors are taken into consideration, the evidence presented at the hearing meets the  
District's burden to show that Bennett was an independent contractor.

The District is not overreaching, nor was it unreasonable for the District to come to the

1 conclusion that Bennett was an independent contractor. Bennett has admitted all along that  
 2 Strange PC had other customers. The District, and specifically Bennett's supervisors, knew that  
 3 Strange PC was conducting other business while working for the District. Also, the EDD looked  
 4 at the same issue, and took testimony and evidence before an ALJ in 2013, and found that  
 5 Bennett was properly classified as an independent contractor applying the same common law  
 6 multifactor test. In coming to the determination that weight of the evidence supported  
 7 independent contractor status, the EDD noted that Bennett initiated the independent contractor  
 8 relationship, that "the relationship of the parties was defined by a renewable annual contract  
 9 which required notice to the other side if either party wished to terminated their agreement," that  
 10 Strange PC was a separate LLC that had other customers, and it could have hired other  
 11 employees to perform its contract. Ex. 41. And even if a different conclusion is reached by the  
 12 Board here, given that two branches of the same state government, using the same legal test,  
 13 came to opposite conclusions demonstrates that it would be inequitable for CalPERS to find that  
 14 the District should have known that Bennett was misclassified so as to apply Government Code  
 15 section 20283 and require it to pay member contributions in arrears and the administrative fee.

16 **The Proposed Decision Inexplicably Relies Upon Bennett's Self-Serving Testimony Despite**  
 17 **His Admissions of Lying and His Shifting Testimony**

18 The Proposed Decision relies upon Bennett's own, uncorroborated, account of the  
 19 amount of business that Strange PC did apart from work for the District despite admitted, serious  
 20 credibility problems on his part. Without addressing Bennett's untruths and admissions, the  
 21 Proposed Decision gave short shrift to the all of the other evidence presented that Strange PC  
 22 worked for numerous other clients while Bennett was working for the District. In fact, Bennett's  
 23 testimony showed that his word is not trustworthy.

24 For example, Bennett's admitted that he had repeatedly lied on his Linked In page:

25 Q Is everything on your Linked In page true?

A No.

26 [...]

27 Q Prior to working for Umetech, is it accurate when it says on here you did help  
 desk support for Sony?

28 A Not entirely. I worked a gig for a week, and I was asked to come to work at  
 Sony as a temp. Long story short, I was there one day because I had some

1 personal issues, and it didn't work out for me.  
2 Q So this portion of your Linked In also is not true when you wrote it? You  
3 knew that?

4 A There's several statements on here that aren't. BCP/DR Planning, GIS  
5 services, those are all other things that people at the District could provide if  
6 they wanted to do side jobs. I have no knowledge of those skills.

7 Q So on page 1 [of Ex. 31] when it says "Specialties" and there's a list, you say  
8 you really don't have any ability - or didn't have any ability to do BCP/DR  
9 planning; is that right?

10 A Correct.

11 Q The other one was GIS services?

12 A Correct.

13 1 RT 145:3-147:3 (emphasis added); compare Ex. 31 and 32. Bennett's story changed several  
14 times on several issues. Bennett first claimed on his Linked In page to have numerous regular  
15 clients, then he changed that to just a few (he could not remember how many), then he changed  
16 that to even less because some were family members, some of whom did not pay. And the same  
17 Linked In page included information regarding his credentials that was false. This was in an  
18 apparent attempt to pump up his credentials to attract business to Strange PC—something he now  
19 denies he ever really tried to do because he wants to be deemed an employee. 1 RT 90:14-22.

20 Notably, even though Bennet claimed he made little to no effort to get more clients for  
21 Strange PC and discounted his numerous clients, he admitted to creating the Strange PC website  
22 in 2008. 1 RT 90:14-22; 151:10-13. Then, at the hearing, under oath, to try to distance himself  
23 from the website as a marketing tool, Bennett testified that he put it up and never edited it. Later,  
24 he changed that testimony when he felt cornered:

25 Q From 2009 when you went full time, did you continue to maintain the Strange  
26 PC website?

27 A I just left it alone.

28 Q Didn't change it?

A No.

Q Didn't add to it?

A No.

1 RT 92:5-11.

Q This is the website you created in 2008, correct?

A Yes.

Q You'll note at the top it says under about us, "Strange PC is licensed and  
insured." Do you see that language?

A Yes.

Q So at the time you created this website, you had already obtained the license  
and insurance for Strange PC?

A I don't recall. I edited at the beginning. I may have thrown it up and added it.

Q You mentioned earlier that you really didn't touch the website very much after



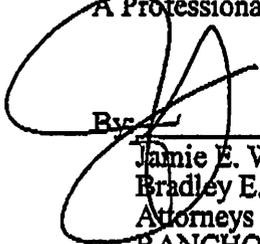
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**The District Requests That The Proposed Decision Not Be Designated As Precedent**

Because the Proposed Decision does not recognize the unique nature of computer consulting services, or even address why the nature of the services should not be considered by CalPERS when applying the common law test, the District asserts that the Proposed Decision should not be designated as precedent. Without an analysis of this core issue, the Proposed Decision does not provide adequate guidance on this issue for future consideration.

Dated: August 7, 2015

GRESHAM SAVAGE NOLAN & TILDEN,  
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By \_\_\_\_\_  
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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF RIVERSIDE**

Re: *In the Matter of the Appeal Regarding Membership Eligibility of  
Shawn Bennett v California Water District*  
Case No. 2013-0686; OAH No. 2014080163

I am employed in the County of Riverside, State of California. I am over the age of 18 years and not a party to the within action; my business address is: 3750 University Avenue, Suite 250, Riverside, CA 92501-3335. On August 7, 2015, I served copies of the within documents described as **RESPONDENT'S ARGUMENT** on the interested parties in this action in a sealed envelope addressed as follows:

**See attached Service List**

- BY MAIL** - I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service on the same day in the ordinary course of business, with postage thereon fully prepaid at Riverside, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- BY CM/ECF SYSTEM** - I hereby certify that I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants listed on the attached Service List.
- BY PERSONAL SERVICE** - I caused such envelope to be delivered by hand to the offices of the addressee pursuant to C.C.P. § 1011.
- BY EXPRESS MAIL/OVERNIGHT DELIVERY** - I caused such envelope to be delivered by hand to the office of the addressee via overnight delivery pursuant to C.C.P. § 1013(c), with delivery fees fully prepaid or provided for.
- BY FACSIMILE** - I caused such document to be delivered to the office of the addressee via facsimile machine pursuant to C.C.P. § 1013(e). Said document was transmitted to the facsimile number of the office of the addressee from the office of Gresham Savage Nolan & Tilden, in Riverside, California, on the date set forth above. The facsimile machine I used complied with California Rules of Court, Rule 2003(3) and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2009(i), I caused the machine to print a record of the transmittal, a copy of which is attached to this declaration.
- BY ELECTRONIC/EMAIL** - I caused such document to be delivered to the office of the addressee via electronic e-mail pursuant to C.C.P. §1013(a). Said document was transmitted to the email address of that office which is listed on the above Service List. Said document was served electronically and the transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 7, 2015, at Riverside, California.

  
\_\_\_\_\_  
Madison Kirkemo

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**SERVICE LIST**

Re: *In the Matter of the Appeal Regarding Membership Eligibility of  
Shawn Bennett v California Water District*  
Case No. 2013-0686; OAH No. 2014080163

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