

**ATTACHMENT C**  
**RESPONDENT ARGUMENT**

BEFORE THE BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEE'S RETIREMENT SYSTEM  
STATE OF CALIFORNIA

In the Matter of the Membership  
Classification of

) CalPERS Case No.: 2015-0099  
OAH No. 2015070529

STEVEN HUBERT,

) RESPONDENT'S ARGUMENT  
SUBMITTED BY STEVEN HUBERT

Respondent,

and

SAN DIEGO COUNTY WATER  
AUTHORITY,

Respondent



Respondent Steven Hubert hereby submits this written argument respectfully requesting that Board adopt Administrative Law Judge James Ahler's Proposed Decision in the above referenced matter. Respondent is convinced that Judge Ahler accurately weighed the evidence presented at the hearing on January 21, 2016 and properly applied the law to the facts of this matter. Specifically, Mr. Hubert was a common law employee of the San Diego County Water Authority ("SDCWA") from May 16, 2001 to June 30, 2004. Thus, Mr. Hubert is entitled to service credit from May 16, 2001 to June 30, 2004.

**I. THE PROPOSED DECISION SHOULD BE ADOPTED**

The Proposed Decision contains 20 pages summarizing the evidence presented at the hearing and explaining Judge Ahler's careful application of the common law employee test to the facts presented. Respondent contends that the Proposed Decision accurately summarizes the evidence. The Proposed Decision summarizes the testimony

of Mr. Hubert, Alex Newton (a retired Public Affairs Representative from SDCWA) and Gina Molise (another retired Public Affairs Representative from SDCWA) as well as Gretchen Spaniol (Human Resources Manager for SDCWA) and Dennis Cushman (Assistant General Manager of SDCWA). Judge Ahler heard a full day of testimony and was able to succinctly summarize it in the Proposed Decision.

Similarly, Judge Ahler applied the common law employer-employee test accurately within the Proposed Decision. The Proposed Decision relies upon California Supreme Court precedent to utilize the common law employee test when determining whether an individual is an employee for purposes of participation in CalPERS. (*Metropolitan Water District v. Superior Court (Cargill)* (2004) 32 Cal.4<sup>th</sup> 491, 509.)

Furthermore, the Proposed Decision contains an excellent analysis of the application of the common law employee test to the facts presented on January 21, 2016. For example, the Court found that SDCWA maintained control over the means and method of accomplishing the desired results based on the following facts:

- The written agreement between Mr. Hubert and SDCWA required Mr. Hubert to complete all work to SDCWA's satisfaction in every detail and furnish work to SDCWA by established deadlines.
- SDCWA provided Mr. Hubert with a cubicle and a computer where he was required to complete the work.
- SDCWA assigned projects to Mr. Hubert with deadlines for completion, reviewed his graphic designs, and required him to modify those designs when other SDCWA employees deemed that necessary.<sup>1</sup>

In addition, SDCWA retained the right to terminate Mr. Hubert at will and without cause. This is strong evidence of an employment relationship as opposed to an independent contractor relationship. (*Arzate v. Bridge Terminal Transport, Inc.* (2011) 192 Cal. App. 4<sup>th</sup> 419, 426.)

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<sup>1</sup> See Proposed Decision at page 18, Paragraph 10.

The Proposed Decision balances the significant finding that SDCWA exercised control over the means and method of performing the work with several secondary factors. The secondary factors also point to an employment relationship. Significantly, Mr. Hubert was paid hourly instead of by the project or the job, suggesting a common law employee relationship. Also, Mr. Hubert furnished the same kind of graphic design services his predecessor furnished as an employee of SDCWA. These services were essential in meeting the routine, daily needs of the SDCWA and were integrated into SDCWA's operations. In addition, Mr. Hubert worked a regular schedule of set hours.<sup>2</sup>

The Proposed Decision properly points out that despite language in the written agreement identifying Mr. Hubert as an "independent contractor," a preponderance of the evidence established SDCWA controlled the manner and means by which Mr. Hubert provided graphic design services. "SDCWA treated Mr. Hubert as an employee, and his circumstances did not change after the written agreement and amendments expired and he was hired as a Public Affairs Representative II."<sup>3</sup>

**II. MR. HUBERT SHOULD BE REIMBURSED HIS ATTORNEY'S FEES BECAUSE HE HAD TO LITIGATE TO ENFORCE HIS RIGHTS AS AN EMPLOYEE**

Because CalPERS denied Mr. Hubert the opportunity to purchase service credit from May 16, 2001 to June 30, 2004, Mr. Hubert respectfully requests reimbursement of his attorney's fees and costs incurred in seeking to enforce his rights as a common law employee of SDCWA pursuant to Section 1021.5 of the California Code of Civil Procedure.<sup>4</sup> Here, Mr. Hubert sought a significant benefit to all public employees who

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<sup>2</sup> See Proposed Decision at page 19, Paragraph 13.

<sup>3</sup> Proposed Decision at page 20, Paragraph 17.

<sup>4</sup> C.C.P. § 1021.5 provides in pertinent part, "a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an

have been misclassified as “independent contractors” and denied the benefits of public employment including the opportunity to participate in CalPERS.

**III. MR. HUBERT RESPECTFULLY REQUESTS THAT THE  
DECISION BE PUBLISHED AS A PRECEDENTIAL DECISION**

Mr. Hubert respectfully requests that the Board designate the Proposed Decision as a precedential decision. Judge Ahler provides a detailed analysis of the primary and secondary factors of the common law employee test. Judge Ahler takes the time to explain how the law applies to the specific facts of this case. Mr. Hubert believes that the Proposed Decision can serve as a guide for other employees seeking to determine their proper status.

Dated: April 7, 2016

Respectfully submitted,



Karin L. Backstrom

Attorney for Respondent Steven Hubert

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important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.