

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Matthew Foskett (Respondent Foskett) served as the Rates and Resources Manager for Respondent City of Lodi (Respondent City). By virtue of his employment, Respondent Foskett was a local miscellaneous member of CalPERS, subject to the terms and conditions of membership set forth in the California Public Employees' Retirement Law (PERL, Cal. Gov. Code 20000 *et seq.*)

Respondent Foskett retired from public service with Respondent City effective August 21, 2011. Immediately thereafter, Respondent Foskett continued as a part-time Rates and Resources Manager for Respondent City. On June 6, 2012, Respondent City entered into a consulting agreement with Respondent Foskett's limited liability company. Several months after it entered into the contract with Respondent Foskett, Respondent City contacted CalPERS to confirm that Respondent Foskett's post-retirement consulting work did not violate any CalPERS' statutes (PERL) or regulations. CalPERS reviewed the consulting relationship, and determined that Respondent Foskett and Respondent City had entered into an employee-employer relationship after Respondent Foskett had retired for service, and were therefore subject to the working-after-retirement provisions of the PERL, enforced by CalPERS.

Respondent City appealed, exercising its right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. A one-day hearing was held on December 15, 2016 in Sacramento, California. Counsel appeared on behalf of Respondent City; Respondent Foskett did not personally appear. Therefore, the hearing proceeded as default under Government Code section 11520 as to him only.

Prior to the hearing, CalPERS explained the hearing process to Respondent Foskett and the need to support his case with witnesses and documents. CalPERS provided Respondent Foskett with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Foskett's questions and clarified how to obtain further information on the process.

The PERL places restrictions on work that members can perform for the State or CalPERS' contracting agencies after a member has retired. These restrictions, known as the working-after-retirement rules, apply to any member who has entered into an employment relationship with the State or a contracting agency. Thus a membership/employment determination must be made by CalPERS before subjecting any contracting agency or member to these provisions. (Gov. Code §20028.)

For persons working for contracting agencies, CalPERS applies the common law employment test to determine whether an employment relationship exists. (*Metropolitan Water District v. Superior Court* (2004) 32 Cal.4th 491; *In the Matter of Application to Contract with CalPERS by Galt Services Authority and City of Galt*, Board of Administration's Precedential Decision 08-01; *In the Matter of the Application for CalPERS Membership Credit by Lee Neidengard*, Board of Administration's Precedential Decision 05-01.)

Under the common law employment test, “the most important factor is the right to control the manner and means of accomplishing the result desired.” (*Tieberg v. UIAB* (1970) 2 Cal.3d 943, 949.) “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.” (*Id.* at 946.) An employment status does not exist simply because the party engaging the services has “the general supervisory right to control the work so as to insure its satisfactory completion in accordance with the terms of the contract” with the worker. (*Robinson v. City of San Bernardino Police Dep’t* (1998) 992 F.Supp. 1198, 1206 (citing *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 788).)

Here, the following evidence was submitted by Respondent City and CalPERS at hearing relative to the question of whether an employment relationship existed:

- The Rates and Resources Manager (RRM) was the subject matter expert on power acquisition and cost for Respondent City.
- Respondent Foscett retired from the RRM position and returned to the City as a “retired annuitant” RRM on a part-time basis.
- City Utility Director Elizabeth Kirkley testified she was concerned about losing Respondent Foscett’s expertise due to the sudden nature of his retirement. After asking her other energy industry contacts, she determined there were no suitable replacements for Respondent Foscett and asked if he would agree to work after retirement.
- Respondent City’s human resources department advised Ms. Kirkley about the maximum hours Respondent Foscett could work as a retired annuitant.
- Toward the end of fiscal year 2011-2012, Ms. Kirkley became aware that Respondent Foscett was reaching the maximum hours for a retired annuitant. Concerned that she would not have the expertise provided by Respondent Foscett, Ms. Kirkley approached Respondent Foscett about him continuing to work for the City as a consultant until she filled the RRM position. Respondent Foscett agreed.
- Respondent Foscett formed Matt Foscett Consulting LLC, a California Limited Liability Company, on May 7, 2012. He was the sole member.
- On June 6, 2012, Respondent City passed a Resolution authorizing the City Manager to enter into a consulting agreement with Matt Foscett Consulting LLC.
- The consulting contract’s scope of work was identical to language contained in the duty statement for the City’s RRM position.
- The contract called for a maximum amount of \$120,000, the same amount as top-range salary for the RRM position that Respondent Foscett held.
- The contract gave the City the right to terminate the agreement without cause by giving 24-hour written notice.
- Matt Foscett Consulting LLC was paid by the hour and submitted monthly invoices tracking the hours worked against the hour-limit for retired annuitants, even though they had entered into a “consulting agreement”.
- Respondent City’s recruitment posting for the RRM position used the same language contained in the contract with Matt Foscett Consulting LLC.

- When no qualified applicants were found, Respondent City extended its contract with Matt Foskett Consulting LLC.
- Once Respondent City identified a suitable RRM candidate the City extended its contract with Matt Foskett Consulting LLC to provide transition training to the new employee.
- Respondent Foskett continued to use a City office while serving as a consultant, and his duties remained substantially the same compared to those he fulfilled before retiring. Some of the differences included that he did not represent the City at power acquisition meetings, did not manage other employees, and did not participate in the budget process. Otherwise, his duties remained substantially the same with respect to power acquisition and pricing.
- Both as an employee and as a consultant, Ms. Kirkley did not exercise significant actual oversight over Respondent Foskett's daily activities, even though she was his supervisor.

After considering all evidence, including the writings and testimony summarized above, the ALJ determined that “the City had the right to control the manner and means in which Respondent Foskett performed his services under the consulting agreement.” The ALJ noted that the description in the scope of services was nearly identical to the definition of the RRM position in City records, that the evidence established that his duties remained virtually the same both before and after the agreement, and that the maximum amount payable under the contract was identical to the salary schedule for the job.

The ALJ also considered testimony from CalPERS’ analyst, who explained at hearing that the fact that a person performs the same duties before and after retirement is strong evidence of a continuation of the employment relationship. Though the ALJ recognized there was some evidence of a change in the nature of Respondent Foskett’s duties before and after retirement, the underlying purpose of his work, which was to provide subject matter expertise regarding public power supply acquisition and price, was the same both while as an employee and as a consultant. The consistency of the purpose of Respondent Foskett’s work, the ALJ reasoned, was strong evidence of an ongoing employment relationship with Respondent City.

The ALJ concluded that Respondent City’s appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. Respondent City may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

Respondent Foskett may file a motion with the Board under Government Code section 11520(c), requesting that, for good cause shown, the decision be vacated and a new hearing be granted.

April 19, 2017



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