PROPOSED DECISION

This matter was heard by Administrative Law Judge Eric Sawyer, Office of Administrative Hearings, State of California, on April 24, 2017, in Los Angeles. The record was closed and the matter submitted for decision upon conclusion of the hearing.

Christopher C. Phillips, Senior Staff Attorney, represented complainant California Public Employees' Retirement System (PERS).

Joseph Paul Ruiz (respondent) was present and represented himself.

James M. Casso, City Attorney, represented respondent City of Industry (City).

Respondent appeals PERS's determination that he is not eligible to be a member. His appeal is denied because it was established by a preponderance of the evidence that he was not an employee of the City, but rather served as an independent contractor; even if he was an employee, respondent failed to establish he was either full-time or had served the requisite number of hours part-time.

FACTUAL FINDINGS

1. On December 6, 2016, a Statement of Issues was filed on behalf of PERS by Renee Ostrander, in her official capacity as Chief of the Employer Account Management Division.¹ (Ex. 1.)

¹ During the hearing, the caption of the Statement of Issues was amended to correct respondent’s first name.
2. The City is a public agency that contracts with PERS for retirement benefits for eligible City employees. The terms of the City's participation in PERS are governed by the California Public Employees' Retirement Law (PERL). (Gov. Code, § 2000 et seq.)

3. As described in more detail below, respondent contracted with the City to provide consulting services. He was therefore classified by the City as a consultant. In 2009 and again in 2015, respondent made written requests to the City to reclassify him as an employee. (Exs. 8 & 11.) The City issued a letter in 2015 denying his request. (Ex. 12.) Respondent also requested PERS to designate him as a member of PERS, contending he should be classified as an employee of the City.

4. By letters dated May 5, 2016, and June 27, 2016, respondent was notified of PERS’ determination that he had not been an employee of the City; he did not provide evidence he worked the requisite number of hours even if he was an employee; and therefore, he was not eligible for PERS membership. (Exs. 3-4.)

5. By letter dated July 5, 2016, respondent timely appealed PERS’ determination and requested the administrative hearing that ensued. (Ex. 5.)

6. Based on the above, this appeal is limited to the issue of whether respondent is eligible to be a member of PERS. (Exs. 1-6, 8, 11, 12.)

Respondent's Relationship with the City

7. In 1983 and 1984, respondent worked for a multi-service contractor to the City, National Engineering. In that capacity, he came into contact with City employees, City officials, and personnel from the Industry Urban-Development Agency (IUDA), which was the City's redevelopment agency. In 1985, respondent became a licensed real estate broker. (Ex. 6, p. 1.) According to a letter written by the City in 2015, respondent has continued to have “an active real estate business serving other clients.” (Ex. 12, p. 3.)

8. In October 1999, respondent was authorized by the City “to develop and coordinate a unique civic/educational/legislative infrastructure where a municipality provides college students in part-time positions to local lawmakers through a university.” (Ex. C, p. 1.) According to an approval letter for that project issued by then Mayor David Winn, respondent was paid $2,500 per month for one year “to liaison this project.” (Ibid.)

9. By a “Contract Proposal from Joseph Ruiz” executed by the parties in December 2000, respondent thereafter agreed to “provide consulting, coordinating and research services to the City of Industry relative to the Firestone Scout Reservation acquisition for the development of a water reservoir with accompanying uses.” (Ex. C, p. 2.) Respondent was paid $4,000 per month; the term of the agreement was one year, which could be extended monthly by consent of the parties. (Ibid.)

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10. A. On October 31, 2002, respondent and the City executed a more detailed “Agreement for Professional Services” (contract), in which it was recited that the City “is presently in need of consulting services consisting of public affairs, professional management and general administration,” and that respondent has been “a general municipal consultant since 1998.” (Ex. 6, p. 1.)

B. In provision 1.A. of the contract, the parties agreed: “As directed by the CITY MANAGER, RUIZ shall analyze, review, assess, evaluate, coordinate, research, as well as, render advice, recommendations and opinions in all subject matters directed by the CITY MANAGER. RUIZ shall perform such services in accordance with the Municipal Code of the CITY OF INDUSTRY, State law, and other applicable administrative policies, regulations, and rules.” (Ex. 6, p. 1; emphasis in original.)

C. In provision 1.B. of the contract, the parties agreed: “RUIZ shall attend appropriate meetings, confer and coordinate with staff members, consultants, and business entities as necessary.” (Ex. 6, p. 1; emphasis in original.)

D. In provision 2 of the contract, the agreement “shall remain in effect unless terminated by either party with written notice at least thirty (30) days prior to the date of termination to the other party.” (Ex. 6, p. 1.)

E. In provision 3 of the contract, the City agreed to pay respondent $3,500 monthly and to reimburse all costs as agreed upon. (Ex. 6, p. 1.) In provision 4, however, the City agreed to indemnify, defend, and hold harmless respondent from any and all claims in connection with his performance of the contract. (Ibid.)

11. The contract was subsequently amended several times by the parties. The first amendment was executed in June 2005, when respondent’s monthly pay was increased to $5,000. (Ex. 6, p. 3.) In April 2007, another amendment was executed, when respondent’s monthly pay was increased to $8,000. (Id. at p. 4.) In October 2010, another amendment added to respondent’s duties “promotional strategies and duties as directed by the City Manager to support the embodiment of the municipality,” and increased his monthly pay to $11,000. (Id. at p. 6.) In July 2012, another amendment clarified that respondent would “also review and report on all pending and approved State legislation that may affect the interests of the City,” but that his monthly pay would be $4,000. (Id. at p. 8.)

12. A. In April 2009, then Mayor David Perez advised respondent in writing that his pay would be reduced to $4,000 per month (a 50 percent reduction), effective July 1, 2009, because the City was experiencing an economic crisis. (Ex. 6, p. 5.)

B. By a letter dated June 11, 2009, respondent protested his pay reduction, and advised then City Manager Kevin Radecki that he (respondent) may have been “misclassified as an independent contractor.” (Ex 8.) Respondent also made thinly veiled threats of civil litigation in which he would seek retroactive benefits, penalties, and damages.
C. Respondent testified the City did not act on his request to reclassify him. Instead, he testified the City agreed to withdraw the proposed pay reduction.

13. Respondent did not follow up with the City or any other governmental agency on his request to be reclassified as a City employee until April 2015, at which time he sent another letter to Mr. Radecki reiterating his request made in 2009. (Ex. 11.) Respondent did not explain in that letter why he was reiterating the same request made six years earlier, although his letter did intimate turbulence in City politics and a change in City officials.

14. During a meeting with City Manager Paul J. Philips on August 19, 2015, respondent was advised his contract was terminated, effective that date. (Ex. I.) No reason was given for the termination. Respondent was paid for his work through August 2015, but it appears the City did not give him 30 days’ notice, as specified in the contract, which was not thereafter modified by subsequent amendment. (Ibid.) Respondent continued to send the City monthly invoices for his fees, which were ignored. The City advised respondent in December 2015 that his August 2015 payment was his last. (Ibid.) Respondent testified he chose not to litigate his entitlement to any remaining fees due to him.

15. Before his contract was terminated, respondent submitted invoices each month for payment and the City paid him by check each month. The few City checks submitted at hearing note the payments were for "CONSULTING SVC." (Ex. J.) The City did not withhold taxes from respondent’s pay and he was not provided with any benefits, such as bonuses, healthcare, etc. At the end of each year, the City issued respondent 1099 MISC forms, which reflect he was paid the following amounts each calendar year: $14,814.44 in 1999; $36,750 in 2000; $78,090 in 2001; $69,542.69 in 2002; $42,000 in 2003; $48,000 in 2004; $52,500 in 2005; $60,000 in 2006; $84,000 in 2007; $96,000 in 2008; $96,000 in 2009; $105,000 in 2010; $133,000 in 2011; $97,000 in 2012; $48,000 in 2013; $48,000 in 2014; and $32,000 in 2015. (Ex. 9.)

16. 1099 MISC forms were also submitted showing respondent was paid by IUDA $10,500 in 2002, $42,000 in 2004, and $6,000 in 2007. (Ex. 9.) IUDA was a separate legal entity from the City, but operated by City staff and officials. No contracts between respondent and IUDA for these time periods were presented and no explanation was made during the hearing concerning these payments. However, in a letter respondent sent PERS appealing its initial decision denying his request for reclassification, respondent wrote that he “worked for both the City of Industry & its redevelopment agency, the Industry Urban-Development Agency...” (Ex. 5, p. 14.)

PERS Audits the City

17. For reasons not established, in 2010 PERS began an audit of payroll reporting, compensation, and member enrollment processes as they related to its contract with the City. (Ex. 13.) The review period was limited to October 1, 2007, through September 30, 2010. (Ex. 1, p. 4.)
18. On April 13, 2012, PERS' Office of Audit Services completed its audit of the City. PERS concluded, in part, that respondent was not an employee of the City. (Ex. 13.)

19. As part of its audit, PERS requested then City Manager Kevin Radecki to complete an Employment Relationship Questionnaire (questionnaire) concerning respondent's services for the City. On or about July 17, 2011, Mr. Radecki submitted his answers to PERS. (Ex. 7.) Below are the questions and Mr. Radecki's responses relevant to this appeal, as well as additional information provided during this appeal, including from respondent and PERS employee Ronald Gow. Mr. Gow reviews membership issues such as that presented in this case and is looked upon by PERS as an expert in that area.

20. Question 1 asked, "By whom was the individual appointed" and the date he first occupied the position. Mr. Radecki answered respondent was appointed by "Contract with City Manager" (Mr. Radecki) that began on October 31, 2002. (Ex. 7, p. 1.) Respondent contends this answer was false because he had been compensated for services performed for the City from 1998 through 2001, as discussed above. However, it appears that in responding to this question, Mr. Radecki was referring to the contract discussed above, which had been executed in October 2002, and was the basis of the subsequent amendments. Respondent argues the fact he had a longstanding relationship with the City for so many years tends to show employee status. Mr. Gow did not discuss that issue.

21. Question 2 asked, "Describe the services performed by the individual." Mr. Radecki answered, "Consulting on public affairs and governmental affairs, including the monitoring and interface with local and regional city and county agencies, general professional management." (Ex. 7, p. 1.)

22. Question 3 asked, "How many other individuals performed the same services for your agency?" Mr. Radecki answered, "None." (Ex. 7, p. 1.) Mr. Gow testified the fact other people render the same service in question tends to demonstrate employee status.

23. A. Question 5 asked, "Where are the services performed (individual's office, home, agency premises, etc.)?" Mr. Radecki answered, "Services from home office. Local and regional city and county facilities - city premises for requested meetings with city staff." (Ex. 7, p. 2.)

   B. Respondent testified he was allowed to work in city leased office space for many years. Although respondent testified he routinely performed his services in this office space, he did not state he was required to do so or that he could only perform his services there. Respondent also admitted he did not have personal possessions in the office he used.

   C. Respondent also produced a City telephone list issued in 2009 which shows he had been assigned a telephone number and office. However, on cross-examination respondent admitted the three other individuals listed as sharing the same suite worked for the mayor, a state senator, and an engineering firm, respectively. Respondent also admitted he did not know if those three other people were City employees.
Question 6 asked whether respondent had his own place of business. Mr. Radecki answered "No." (Ex. 7, p. 2.) Respondent testified he did not maintain his own office or place of business. Mr. Gow opined that someone having their own place of business tends to show contractor status.

Question 7 asked, "For the services in question, does the individual operate under his/her own name or agency's name?" Mr. Radecki answered, "Provides services under his own name." (Ex. 7, p. 2.) Mr. Gow testified this information is neutral to this employment determination.

Question 11 asked, "Who determines the hours of work?" Mr. Radecki answered, "The City and/or contract with Joseph Ruiz does not sets (sic) hours or a schedule. Services are provided as needed." (Ex. 7, p. 2.) Respondent provided no additional information, other than that he received his assignments from the mayor or city manager. It was therefore established that respondent set his own hours. Moreover, respondent never quantified how many hours he worked in a given day, week, month, or year. Mr. Gow opined that the setting of hours is a strong sign of employer control; the absence of such control tends to show contractor status.

Question 14 asked, "Was the function formerly performed by an employee?" Mr. Radecki answered, "No." (Ex. 7, p. 2.) Mr. Gow testified that if the services in question were described in an employer's duty statement and previously performed by an employee, such is a sign of employee status. However, no evidence was presented indicating the services performed by respondent were described in a duty statement or had been previously performed by a City employee. A 2009 organization chart for the City did not identify respondent or show his position. (Ex. 10.)

A. Question 16 asked, "Does your agency have the right to control how the individual does his/her work?" Mr. Radecki answered, "No." (Ex. 7, p. 3.) Mr. Gow testified this question is crucial to the determination of employment. The lack of control over how an individual does his/her work is indicative of contractor status.

B. Respondent testified that then Mayor David Perez had "death grip" control over the City during much of the time respondent performed his services. However, the control in question relates to whether the individual has autonomy over how they actually perform their services. In this case, respondent presented no evidence indicating the City exercised any control over his performance.

C. Respondent also testified Mayor Perez's attempt in 2009 to unilaterally cut his pay in half shows requisite control. Respondent argues the same is demonstrated by his termination in 2015 by City Manager Philips without the requisite 30-days' notice. However, it must be remembered that Mayor Perez's attempt was not successful, as it was withdrawn after respondent protested; and that respondent failed to exercise his legal rights in response to his termination in 2015. Moreover, those are matters of contractual compensation unrelated to the exercise of control over how respondent performed services.
29. Question 17 asked, “Is his/her work directed, supervised or reviewed by anyone?” Mr. Radecki answered, “No. Assignments are at the request of City Manager.” (Ex. 7, p. 3.) As indicated above, respondent testified he received assignments from both the mayor and city manager. No evidence indicates respondent ever received supervision, review or oversight of his work by anyone. Mr. Gow testified that supervision and oversight by someone else tends to show employee status.

30. Question 18 asked, “Please check facilities or equipment furnished by your agency the individual uses in performing services for the agency.” A number of items were listed. Mr. Radecki answered, “None.” (Ex. 7, p. 3.) In addition to being provided office space as described above, respondent testified he was allowed to use a telephone and computer in that location. It is not clear from his testimony whether those items were shared with other individuals working in that office. Respondent also was provided with a business card by the City. (Ex. E.) However, respondent’s title on the card was “Consultant.” Mr. Gow opined the furnishing of equipment tends to show employee status. However, Mr. Gow testified he did not believe the City furnished the type of equipment to respondent indicative of employee status.

31. Question 20 asked, “Please check basis on which he/she is paid.” Mr. Radecki answered, “Monthly retainer.” (Ex. 7, p. 3.) Respondent testified he did not consider the monthly payments to be a “retainer,” because such is received in advance whether or not services are performed. In his case, respondent performed services, sent an invoice to the City, and was thereafter paid. In this sense, respondent is correct. Respondent characterized the monthly payments as “salary.” Mr. Gow testified that monthly payments tend to show contractor status, though many employees (including state employees) are also paid monthly. Mr. Gow also testified that in reviewing City records in this case, he saw “a few hundred” invoices submitted to the City from respondent.

32. Question 21 asked, “Check the following benefits the individual received.” Mr. Radecki answered, “None.” (Ex. 7, p. 4.) Mr. Gow testified that the receipt of benefits strongly indicates employee status.

33. Question 22 asked, “Can the agency terminate the relationship at any time?” Mr. Radecki answered, “Yes, per the contract with 30 days notice.” (Ex. 7, p. 4.) Mr. Gow opined that a contract with a termination clause favoring the individual performing services tends to show contractor status. In this case, Mr. Gow opined respondent’s contract had such a provision, as the City was obligated to provide him with 30-days’ notice. Respondent testified, as discussed above, that City Manager Philips’ unilateral termination of his contract in August 2015, without providing him 30-days’ notice, shows the opposite. However, the fact that respondent failed to exercise his legal rights in response to his termination does not allow him to ignore the presence of a favorable term in his contract.

34. Question 23 asked, “Can the individual quit at any time without liability to the agency?” Mr. Radecki answered, “Yes.” (Ex. 7, p. 4.) It was not demonstrated that respondent would have any liability to the City for quitting at any time.
35. A. Question 24 asked, "In your opinion, is the individual an employee of the agency?" Mr. Radecki answered, "No." When asked to explain his answer, Mr. Radecki wrote, "Joseph Ruiz is a governmental affairs consultants (sic) who performs services on an as needed basis under a contract as a fully independent contractor. The City does not direct or control the manner or means by which Mr. Ruiz performs the services. Mr. Ruiz provides the services on a part-time basis in accordance with his own schedule. Mr. Ruiz is not required to use the City's office and administrative facilities." (Ex. 7, p. 4.)

B. Respondent disagrees with Mr. Radecki. In addition to the information discussed above, respondent points out that providing services to the City had been his primary business for 11 years; he never incorporated; and his contract contained an indemnity provision in his favor. (Ex. 5.) Respondent argues those facts tend to show he was treated by the City as an employee. Respondent also points out that regulatory audits revealed the City did not maintain timesheets and did not provide documentation of performing annual employee reviews. (Ex. H, p. 5; ex. G.) Respondent argues this explains why no personnel reviews of his work exist and the lack of payroll information for him.

C. Mr. Gow simply testified the City’s answer demonstrated it did not view respondent as an employee, which tends to show contractor status. He also testified that the presence of an indemnity provision does not necessarily show employee status, because he has seen various contracts with that provision going in "all directions."

**Respondent Contests his Contractor Status**

36. As explained above, by a letter dated April 29, 2015, which respondent sent to Mr. Radecki, he again questioned whether he should be reclassified by the City as an employee. (Ex. 11.) He reiterated the arguments made in his 2009 letter, the last time the subject was broached. This time he made specific settlement demands.

37. In response, Mr. Radecki sent to respondent a letter dated June 9, 2015, which concluded respondent was properly classified as an independent contractor and did not qualify as a common law employee of the City. (Ex. 12.) The letter provides the following support for that conclusion:

a. "Over the years, you have provided the City with consulting services on public and governmental affairs, including the monitoring and interface with local and regional city and county agencies, and have provided general professional management services. In exchange, the City paid you a monthly retainer, ranging from $3,500/month to $8,000/month depending upon the City's anticipated needs for your services...." (Ex. 12, p. 1.)

b. "Consistent with the Independent contractor relationship, you retain the right to determine the manner and means by which you perform your services. In recent years, those services have been primarily limited to informing the City Manager about legislation and municipal governance issues that you believe are of interest to the City....
The City Manager does not assign you any specific tasks, or dictate when and how you provide the City with your professional strategic advice and input. Rather, you have complete control over the specific subject matter of your advice and the timing of your updates." (Ex. 12, p. 2.)

c. "As is typical for an independent contractor, you are not required to work full-time for the City. At no time have you ever provided services to the City on a full-time basis. In stark contrast to a City employee, you do not submit any account of hours actually worked, are not required to work during the City's regular business hours, and do not have to schedule time off with the City." (Ex 12, p. 2.)

d. "[Y]our specialized consulting services are not a key aspect of the regular business of the City. Your business card clearly identifies you as a 'consultant,' and further demonstrates that neither you nor the City hold you out to the public as an employee of the City." (Ex. 12, p. 2.)

e. The facts recited in the letter are persuasive. Respondent did not refute any of them in subsequent letters he wrote or his testimony at hearing.

38. On a date in 2015 not established, respondent contacted PERS staff and disputed the audit finding that he was not an employee of the City. In response, PERS staff reviewed the original information from the 2012 audit. (Ex. A.) PERS staff also tried to have City staff complete a questionnaire similar to the one previously completed by Mr. Radecki. (Ibid.) However, Mr. Radecki was no longer employed with the City and no other City employees knew what services respondent had performed. (Ibid.) PERS staff found it probative the City’s Human Resources Director and Mr. Radecki’s executive assistant (who were still employed there) had worked for the City several years while respondent performed his services and did not know what services respondent performed. (Ibid.) PERS staff found it probative the City’s Human Resources Director and Mr. Radecki’s executive assistant (who were still employed there) had worked for the City several years while respondent performed his services and did not know what services respondent performed. (Ibid.) The information obtained by staff was forwarded to Mr. Gow, who reviewed it and concluded, pursuant to applicable law, respondent had been properly classified by the City as an independent contractor. (Ibid.) Specifically, Mr. Gow failed to see any information showing "common law control" by the City over respondent, and that his "compensation and services are very loosely defined and accounted for, so making any kind of 'membership' determination would be largely guesswork." (Ex. 14, p. 2.) Mr. Gow opined during the hearing that respondent was properly classified as an independent contractor. His testimony was reasonably supported, as described above, and was persuasive.

Respondent’s Additional Arguments

39. Respondent contends Mr. Radecki made false representations in his answers to PERS’s questionnaire in 2011, and cites to Government Code section 20085 as supporting a penalty against someone for doing so. While respondent presented some evidence conflicting with some of Mr. Radecki’s responses, it was not established that any of Mr. Radecki’s responses were false. Also, penalties or issues related to section 20085 are not at issue in this case and therefore not relevant.
40. Respondent complains about PERS's process of investigating his claims and handling his appeal. He argues such is demonstrated by several facts, including that he was not interviewed by PERS staff, and Public Record Act requests were not submitted to the City by PERS. However, PERS did not need to submit such requests to the City because it was already contractually obligated to receive such information from the City as part of the PERS participation contract. Respondent did not submit any evidence during the hearing that he had not already submitted to PERS during its investigation and his appeal. Moreover, the issue in this case is the correctness of PERS's ultimate determination, not the process its staff used. (Governing Board v. Superior Court (1985) 167 Cal.App.3d 1158.)

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. A. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (Coffin v. Department of Alcoholic Beverage Control (2006) 139 Cal.App.4th 471, 476.) In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332.) Based on this law, PERS argues respondent bears the burden of establishing he was an employee of the City.

B. On the other hand, a statute applicable to workers' compensation cases states, "[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." (Lab. Code, § 3357.) In addition, in unemployment insurance appeals, the burden of establishing an independent contractor relationship is upon the party attacking the determination of employment. (Southwest Research Institute v. Unemployment Ins. Appeals Bd. (2000) 81 Cal.App.4th 705, 708 [Southwest Research].) Respondent argues this law places on PERS the burden of establishing that respondent was not an employee of the City.

C. A determination of which party bears the burden of proof on the issue of employment is unnecessary, as the case law discussed below, and the factual findings above, make it clear respondent was not an employee of the City, but rather an independent contractor.

2. In McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051 and footnote 5, the court found "the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence." In this case, the standard of proof is the preponderance of the evidence. As explained in more detail below, it was established by a preponderance of the evidence that respondent was not an employee of the City.
Provisions of PERL Regarding Member Eligibility

3. As discussed above, PERS is governed by the PERL. Section 20125 provides that the PERS "board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system." Thus, section 20125 requires that a person must have been an employee of a contracting entity to be eligible for PERS membership.

4. Section 20028, subdivision (b), defines "employee" to mean "[a]ny person in the employ of any contracting agency." Section 20300 provides a list of persons who are excluded from PERS membership, including "[i]ndependent contractors who are not employees." (§ 20300, subd. (b).) In this case, the City was a PERS contracting agency. Therefore, in order for respondent to be eligible for PERS membership, he must have been an employee of the City.

The Common Law Employment Test

5. The California Supreme Court has held that the PERL's aforementioned provisions incorporate the common law test for employment. (Metropolitan Water Dist. of Southern California v. Superior Court (2004) 32 Cal.4th 491, 500.)

6. The common law employment test was articulated by the California Supreme Court in Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal.3d 943, 949. Under that test, "the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists." (Ibid.) 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. (Ib. at p. 946–947.)

7. Tieberg noted the following other factors may be taken into account, which it characterized as secondary to the primary test articulated above:

(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

2 Undesignated statutory citations are to the Government Code.
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. (Id. at p. 949.)

8. The *Tieberg* court noted one of the most important of those secondary factors is "whether the parties believe they are creating the relationship of employer-employee," especially as specified in a written agreement. (Id. at p. 949.)

9. A. Analyzing this case under the primary test of employment described in *Tieberg* demonstrates that the City exercised control only as to the result of respondent's work but not the means by which it was accomplished, meaning an independent contractor relationship existed.

B. The information derived from the questionnaire Mr. Radecki completed in 2011, as well as the related information submitted by other people, clearly show the City did not have the right to control the manner and means of respondent's duties. For example, respondent determined his hours of work, the place where he conducted his work, and how he performed his services. Nobody at the City supervised or oversaw his work. In fact, because respondent only interfac ed with two high-ranking City officials, other City employees had no idea what services he actually performed. Respondent could quit at any time without repercussion and the City could terminate his services upon 30 days' notice. No evidence indicates the City limited or restricted respondent's ability to work for others and, in fact, it appears respondent continued to work as a licensed real estate broker. Mr. Gow persuasively explained how many of the other factors from the questionnaire tended to show independent contractor status and/or were inconsistent with employment status. Finally, the City provided a persuasive recitation of facts in its June 2015 letter to respondent demonstrating respondent was an independent contractor and not an employee.

C. Because the weight of the evidence so heavily showed the City lacked the authority to exercise complete control over the services performed by respondent, it was established by a preponderance of the evidence that respondent was not a City employee.

10. A. Though not necessary, application of the secondary factors articulated in *Tieberg* also support a finding that respondent was not an employee of the City.

B. As *Tieberg* emphasized, the most important of these secondary factors is whether the parties believed they created an employment relationship, especially as specified in a written agreement. In this case, respondent always performed his services under a written contract specifically defining his work as "consulting services;" no mention was ever made in any of the contract amendments referring to respondent as an employee. It is also clear from the record that the City has at all times viewed respondent as an independent contractor and never as an employee.

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C. Though respondent now contends he was an employee, there is a lack of convincing evidence indicating he believed he was an employee during the events in question. He first broached the subject in 2009 after the mayor unilaterally threatened to reduce his compensation. He was satisfied when the mayor backed off that threat, but he did not thereafter ask to be reclassified as an employee or contend he was one until many years later when his services to the City appeared to be in jeopardy again. In sum, it appears from the record respondent only claimed to be an employee when using that argument as leverage for some other purpose; it is not clear he actually believed he was an employee at the time.

D. In addition, a number of the less important secondary factors also indicate an independent contractor relationship existed. For example, as a consultant in the areas of public affairs and professional management, respondent was engaged in a distinct occupation using a particular skill; he was not an unskilled worker. Those are facts indicative of an independent contractor relationship. (Southwest Research, supra, 81 Cal.App.4th at p. 710.) He worked without any supervision, also indicative of independent contractor status. (Ibid.) While respondent was provided with access to office space and a telephone, so were other non-employees working in the same space. More importantly, there is no showing that the telephone or office space provided were necessary for respondent to fulfill his services to the City, and therefore are not indicia of employment. (Ibid.) Respondent’s work was not part of the regular business of the City, as demonstrated by the terms of his contract, as well as the City’s description of his services in both Mr. Radecki’s answers to the questionnaire and the City’s June 2016 letter. Moreover, the services respondent performed were not described in a City duty statement and his position did not appear on a City organization chart. Finally, it must be noted that at no time did respondent receive benefits and trappings normally associated with employment for a public agency, such as contributions to PERS, healthcare benefits, vacation or sick leave, civil service protections, etc.

E. The few remaining secondary factors have only neutral application. For example, respondent performed services for the City for 16 years, which is more consistent with employment than contractor status. However, the length of time for which his services were to be performed is unclear from the record, as his contract and its amendments indicate his projects changed over time and respondent presented no evidence showing how long it took him to perform those projects. While respondent was paid monthly, it appears he was paid regardless of the number of hours he worked or the tasks he performed in any given month. Thus, it is not possible to conclude whether he was paid by the time or by the job.

Eligibility as a Part-Time Public Agency Employee

11. Employment status alone is not enough to qualify for PERS membership. Pursuant to section 20305, subdivision (a)(2), a part-time employee of a public agency is excluded from membership unless his position requires regular, part-time service for one year or longer for at least an average of 20 hours a week, or requires service that is equivalent of at least an average of 20 hours a week for one year or longer, unless he elects membership pursuant to section 20325 (pertaining to part-time school employees).
12. Thus, assuming arguendo respondent was an employee of the City, he still must show either he was a full-time employee or a part-time employee who worked the requisite hours. Unlike the situation above regarding who has the burden of establishing employment, the general burden for an applicant of a benefit should apply where the issue is not employment but whether respondent worked the requisite hours of service to qualify for membership.

13. In this case, respondent failed to establish he worked either full-time or the requisite hours of part-time service. In fact, respondent presented no evidence of how many hours of service he actually provided to the City. To be fair, the evidence indicates the City had a woeful history of making or keeping such documentation during some of the time in question. On the other hand, respondent failed to present any records of his own, nor did he quantify in his testimony how many hours he worked in a typical day, week or month. As he was the person who had the burden of persuasion on this issue, the lack of evidence presented means respondent failed to meet his burden.

**Respondent is Not Eligible to be a PERS Member**

14. Based on the above, it was established by a preponderance of the evidence that respondent was not an employee of the City, but rather an independent contractor. Even if respondent was deemed to be a City employee, he failed to meet his burden of establishing that he was either a full-time City employee or a qualifying part-time employee. Under these circumstances, respondent is not eligible to be a member of PERS. (Factual Findings 1-40; Legal Conclusions 1-13.)

**ORDER**

The appeal of respondent Joseph Paul Ruiz is denied. The determination of PERS is affirmed.

DATED: May 24, 2017

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings