ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)
August 30, 2018

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
Lincoln Plaza East
400 Q Street
Sacramento, CA 95811

Re: In the Matter of the Appeal of Membership Determination of Tracy C. Fuller, Respondent, and Cambria Community Services District, Respondent
OAH Case No. 2017050780
Respondent’s Argument to Reject the ALJ Proposed Decision
Submitted by Cambria Community Services District

Dear Ms. Swedensky:

Enclosed please find Respondent Cambria Community Service District’s argument to reject the Administrative Law Judge decision in the above referenced matter. This argument should be included in the CalPERS Board materials for the September 26, 2018 regular meeting. As stated in your July 26, 2018 letter, we expect you will not divulge Cambria’s argument to CalPERS’ attorneys prior to publication of the Board agenda materials.

Thank you.

Law Offices of Scott N. Kivel

Rebecca J. Church
Paralegal

rjw

Enclosure: Respondent’s Argument to Reject the ALJ Proposed Decision

c: Richard Averett, RGS Executive Director
Sky Woodruff, RGS General Counsel
Monique Madrid, Cambria CSD Administrative Services Officer
Timothy J. Carmel, Carmel & Naccasha, LLP
CAMBRIA CSD’S ARGUMENT TO REJECT ALJ PROPOSED DECISION

1. Cambria Community Services District ("Cambria"), a CalPERS contract employer provides water, wastewater, fire services to an unincorporated community of some 6,400 people on the remote Central Coast. A small agency with limited resources, when its finance manager resigned upon 30-day notice it urgently required someone to perform interim finance functions while recruiting. Ms. Fuller, a financial professional employed by Regional Government Services ("RGS") was assigned to perform interim financial functions. RGS, a joint powers public agency and real party in interest, contracted with Cambria and entered into an employment contract with Fuller to provide services to Cambria and other agencies.

CONTROLLING LAW WAS IGNORED BY THE ALJ

2. CalPERS typically relies upon the common law control test for determining employee status. Metropolitan Water Dist. v. Superior Court (Cargill) (2004) 32 Cal.4th 491, Tieberg v. Unemployment Insurance Appeals Board (1970) 2 Cal.3d 943. These factors are whether the person to whom service is rendered has the right (whether exercised or not) to control the manner and means of accomplishing the result desired. Secondary factors include right to discharge at will without cause; whether the worker is engaged in a distinct occupation or business; skill required in the occupation; who pays for equipment and business expenses; length of time services are to be performed; method of payment, whether by hour or job; whether the work is part of the employer’s regular business; whether the parties believe they are creating the employer-employee relationship; worker’s opportunity for entrepreneurial profit or loss depending upon his or her managerial skill; worker’s use of helpers or replacements; and degree of permanence of the working relationship. S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations (1989) 48 Cal.3d 341, 351. These factors “cannot be applied mechanically as separate tests; they are intertwined, and their weight depends often on particular combinations.” Id., at 350-351 [Citation omitted.]

3. CalPERS has failed to adopt any regulation defining an “employee” eligible for pension service credit under the PERL. In 2008 the CalPERS Board proposed a regulation, published it, received public comments through the APA notice and comment required procedure (Govt. Code § 11346.2), and calendared the required public hearing. Without explanation, it was cancelled.  

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1 A lawful agreement expressly stating that the relationship created is that of an independent contractor should not be lightly disregarded when both parties have performed under the contract and relied on its provisions. Mission Ins. Co. v. Workers’ Comp. Appeals Board (1981) 123 Cal.App.3d 211, 226.

2 As CalPERS concedes in Exhibit 56, “[t]hese factors are not ‘weighted,’ nor necessarily presented in order of significance. All factors must be considered in these determinations, and no single factor is determinative in itself; the overall preponderance of evidence for/against control is what matters.” [Emphasis and italics in original.]

3 CalPERS two precedential decisions are inapposite: Neidengard, (2005) Decision No. 05-01, and Galt, (2008), No. 08-01. Neither case is a third party employer. However, in a case cited in CalPERS training manual (Ex. 51, p. 876) the ALJ concluded that respondent was employed by a joint powers agency providing “sophisticated consulting services, as well as human resource and management services,” like RGS. Pp. 12-13, ¶¶ 27-28; 22-23, ¶ 9. “There
4. The ALJ failed to apply CalPERS indicia of control by focusing on the Fuller relationship to the finance manager position pre and post RGS services.

5. The ALJ's decision is fatally flawed as silent on due process violations committed by CalPERS auditor as he failed to inquire of RGS or review any RGS personnel documents and indicia of control exercised by RGS. Moreover, the auditor simply ignored Cambria’s responses. II:618-14. (Except, as the ALJ noted, the auditor relied on one newly hired employee's belief that Cambria provided Fuller with business cards. That belief was never corroborated by the auditor and was indeed refuted by Fuller and Cambria’s administrators.) Exhibit 41 is the CalPERS “Employment Relationship Questionnaire:

“Appointed by Regional Government Services; Interim Finance Manager Functions (TR:II:147:1-149:23); Services performed at Cambria or “in her office;” Fuller had her own place of business; Fuller provides the same type of service to other agencies; Cambria does not have first call on her time or services; Fuller determines hours of work; Fuller is not required to do the work personally; Fuller was not trained by an agency employee, correspondence, required attendance at meetings or other methods that provided instruction on the manner or means of accomplishing the desired result; Although “stationary” and “business cards” were inaccurately checked as facilities/equipment furnished to Fuller, the generic stationary did not identify Fuller, and no business cards were provided; Cambria did not have the right to control how Fuller performed her work; Fuller was not directed, supervised or reviewed by any Cambria employee; Invoices “are rendered by her employer: Regional Government Services;” Cambria could terminate the relationship [with RGS] at any time; and Fuller could quit at any time without liability to Cambria...In your opinion, is the individual an employee of the agency? No. She was tasked with providing finance manager services but she alone determined what those services were, produced work based on her own knowledge and abilities and was not supervised or evaluated. She provided guidance to employees but was not a supervisor and could not evaluate, hire, fire or discipline employees. Ibid.”

EVIDENCE DEMONSTRATES RGS' CONTROL OVER FULLER

6. RGS/Cambria CSD Agreement (Ex. 19):

5.1 It is understood that the relationship of RGS to the Agency is that of an independent contractor and all persons working for or under the direction of RGS are its agents or employees and not agents or employees of the Agency...” The Agency and RGS shall, at all times, treat all persons working for or under the direction of RGS as agents and employees of RGS, and not as agents or employees of the Agency. Agency shall have the right to control RGS only insofar as the results of RGS’s services rendered pursuant to this agreement and assignment of personnel...

is no single universally-agreed upon set of ‘tests’ that determine whether an employee is a ‘contractor’ or an ‘employee. Significantly, CalPERS accepts the concept that ‘leased’ workers (analogous here to RGS) may be excluded from membership. Id., at p. 885.
5.3 Agency shall not have the ability to direct how services are to be performed, specify the location where services are to be performed, or establish set hours or days for performance of services, except as set forth in the Exhibits.

5.4 Agency shall not have any right to discharge any employee of RGS from employment. However, Agency shall have the right to terminate this Agreement... Exhibit A provides:

<table>
<thead>
<tr>
<th>NAME</th>
<th>RGS STAFF</th>
<th>POSITION</th>
<th>HOURLY RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tracy Fuller</td>
<td>Interim Finance Manager</td>
<td>$90.00</td>
<td></td>
</tr>
</tbody>
</table>

...Such employee(s) may perform services at the Agency offices available in Cambria or at other locations.” Exhibit B: Scope of Services: RGS shall assign an RGS employee or employees to perform the functions as described below: Perform the functions of Interim Finance Manager as assigned. [Italics added.]

RGS/Fuller Employment Agreement (Ex. 36):

Section 1: Employment. RGS hereby employs ...and the Employee ... accepts employment with RGS on the terms and conditions set forth in this Agreement... Section 2: Term. ...employment is at will and is subject to termination at any time at the sole discretion of the RGS Executive Director... Employee ... rights under any personnel rules which RGS may adopt...” [Italics added.] Section 3. The Employee’s performance and compensation generally are reviewed at least annually by the [RGS] Executive Director... Section 4: Duties. The Employee is engaged to perform services and specific duties as assigned by the [RGS] Executive Director... [Italics added.]

7. The ALJ erred by concluding that Fuller occupied the Finance Manager position, disregarding that she was not assigned all duties and was treated differently than agency managers. “…Fuller’s interim placement in the same position suggests CCSD also had the right to control the manner and means by which Fuller performed her work.” P. 10, ¶ 10. This legal conclusion is contrary to the undisputed facts that Fuller acted and was treated differently than the previous and subsequent incumbent Finance Managers. She was denied unrestricted access to the agency’s computer network contrary to a Finance Manager. 1:28:15-29:17. She was

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4 It was RGS that designated “Title” and “Position,” not Cambria.

5 Section 5.1: “Employment is subject to the rules set forth in the Agency’s [RGS] personnel policies and rules which can be found ... at www.rgs.ca.gov.” Exhibit B: “Employee will act as Regional Government Services Advisor to multiple clients.”

6 Disregarding the testimony by Fuller, [RGS executive director] Averett, Madrid and Gruber, the ALJ relied on “form over substance” in noting that Cambria provided Fuller with an office, phone, access to some computer files, and an email address and occasionally described her in board minutes as a staff member. P. 10, ¶¶ 11-12.
expected to deliver a final product, without supervision by Cambria’s management. II:146:2-25; I:124:11-125:10; 146:23-25.7

“Q. Is there any significance in your mind as to why you used the term ‘interim finance manager’ when you were drafting these [Board] minutes? Madrid: The reason is the minutes are used by staff, counsel, and by the public to refer to the various business transactions that occurred during the board meeting...It would be impractical to say Regional Government Services Consultant Assignee Tracy Fuller.” I:103:22-104:14. General Manager Gruber concurred. I:118:14-119:8. 8,9

8. “...the evidence also revealed that Fuller was an interim occupant of the same position occupied by CCSD employees both before and after her. Fuller’s characterization of her work for CCSD as different in kind from that of her predecessor simply reflected the different financial work CCSD needed at the time due to the emergency water project. Fuller was still operating in the role of a finance manager in performing that work. Thus, the work she was doing was an integral part of the regular business of CCSD.” P. 7, ¶ 22. To the contrary, performing certain “integral” functions does not necessarily compel employee status. 10

9. The ALJ’s decision is further fatally defective as shown by the following uncontroverted testimony: Cambria’s intent was to contract with RGS to have Fuller perform

7 Other admitted exhibits support the conclusion that Fuller was a RGS employee: Ex. 20: Cambria Finance Manager recruitment brochure shows a range of employee benefits never provided to Fuller and the duty statement (pp. 246-250) reflect key managerial responsibilities that Fuller was not assigned to perform, i.e., “plans, supervises and reviews the work of professional” and other lower level staff and “provides training to departmental and operational staff regarding CCSD’s financial reporting policies, procedures, and reporting capabilities.”; Ex. 21: Cambria’s General Manager provided notice to terminate the RGS contract when a finance manager was hired; Ex. 33: RGS payroll sheet listing Fuller’s hours at Cambria; Ex. 34: RGS invoiced Cambria for Fuller’s services. (Note p. 441: “Contract services by Tracy Fuller...” Note p. 453: RGS “Time & Attendance-Time Card Detail”); and Ex. 42: Cambria’s board of directors approved the RGS contract.

8 The ALJ had no evidentiary basis to reject the general manager’s uncontroverted testimony: “Gruber testified the title of Interim Finance Manager for Fuller was a term of convenience, and should have simply been RGS consultant. Gruber also testified he did not supervise Fuller’s day-to-day work because she had a level of expertise and did not need to be told what to do.” [Italics added.] P. 6, ¶ 17.


10 The ALJ’s analysis is further flawed by not finding consistent evidence of independent contractor status: “[Tieberg] secondary factors (a) and (b) tend to support employee status, since operating as an Interim Finance Manager for a public agency is not a distinct occupation or business, and is work usually done under the principal’s direction...factor (d) (instrumentalities, tools, and place of work) tends to support employee status since CCSD provided those items to Fuller, although it also allowed her to perform work from outside the office.” Factor (c) (skill) “tends to support independent contractor status.” “Factor (e) length of time) would tend to support independent contractor status were it not for the month-to-month option to extend the agreement between RGS and CCSD. With that option, this factor is neutral. Factors (f) (method of payment) and (g) regular business of principal) tend to support employee status since Fuller was paid by the hour, not the job, and the work she did was part of the regular business of CCSD...Factor (h) (belief of the parties) tends to support independent contractor status, since CCSD and Fuller apparently believed Fuller was an employee of only RGS...” P. 10, ¶ 13.
some finance functions..." I:25:13-17; Cambria restricted Fuller's computer access, given that she was not a management employee. I:29:3-17; 79:14-24; 80:3-16; Fuller never signed documents on behalf of the agency. I:29:18-30:5; Madrid and Gruber considered Fuller to be a highly skilled specialized finance person who did not require day-to-day direction/control. I:31:17-19, 114:23-115:4,124:15-17; The auditor considered her duties "highly specialized and professional." II:96:10-97:4; Madrid did not instruct Fuller on her finance tasks. I:42:18-25, 43:1-44:19; Any review by Madrid of Fuller's work was secretarial in her role as Clerk, not substantive. I:98:11-99:10; Gruber did not control Fuller's day-to-day work. I:124:15-125:10, II:146:2-25; Madrid, the office administrator, corrected O'Reilly's questionnaire response in that Fuller never had Cambria business cards. I:34:16-18, 48:4-13; It was not unusual for Cambria consultants to make presentations to the agency's board of directors. I:35:13-36:2; No Cambria administrator supervised Fuller. I:47:15-21; Cambria could not terminate Fuller's employment as its only recourse was through RGS. I:48:22-49:7; As a consultant, Fuller's "full-time" simply meant whatever time was required to complete her tasks. I:78:13-24; Fuller provided monthly financial reports and project based financial updates to the Board (tasks that by definition could be accomplished by a consultant or employee). I:81:9-82:1, 84:4-85:9; Indeed, the former finance manager was deemed to be an independent contractor by CalPERS when Cambria brought him back to prepare the finance manager’s report, the revenue and expenditure report, and the annual financial report for several months while Fuller handled emergency crises, yet the ALJ ignored this unambiguous evidence. II:106:9-24; Unlike the agency’s prior and subsequent Finance Managers, Fuller did not supervise or discipline agency staff. I:135:14-21; RGS hired Fuller as one of its financial advisors to be assigned to multiple client agencies. I:155:15-156:9; Fuller participated in RGS financial advisor telephonic meetings. II:9:16-10:13, 11:9-13:9, II:155:20-156:1 ("I was her boss. I was the supervisor. And it was very natural that she would reach out to me."); Consistent testimony and Exhibit 37 demonstrate that RGS controlled Fuller by terminating her assignment subsequent to Cambria. I:160:2-18; RGS Executive Director Averett supervised Fuller when issues needed to be addressed in her Cambria assignment. I:167:20-169:1; the CalPERS auditor incredibly relied on responses from the subsequent finance manager who had only been appointed a few days previously and overlapped with Fuller for only two days and therefore lacked direct knowledge, and further, failed to interview Madrid and Gruber, the agency's administrators. II:66:2-68:2, 73:24-74:10, II:99:3-15; The Auditor's "control" definition was legally untenable to rule out that independent contractors are also directed to perform specified tasks. II:72:18-73:4, 75:13-76:2 ("I need you to do this specific thing, " or "I need you to be here."); The ALJ disregarded the overwhelming and uncontroverted evidence that RGS, not Cambria, had the right to terminate Fuller, which the auditor acknowledged is a key common law control test factor. II:76:10-19; The auditor conceded that "RGS shall assign an RGS employee or employees to perform the functions of interim finance manager as assigned." II:82:7-83:1 ("No, it does not say [that the RGS employee or employees will be the interim finance manager.]"); Fuller was required to attend RGS meetings while Cambria only requested her attendance "as needed." II:142:21-143:21; Fuller temporarily utilized unoccupied offices like any consultant and used a Cambria email "as a courtesy to them so that they would have a record of my interface...[to later] facilitate their ability to track what had occurred and to maintain whatever relationships I had established for the agency." II:150:12-151:10; Fuller was never trained by Cambria. II:153:8-17.11

Additional Evidence demonstrates RGS' control over Fuller: p. 325: Waiver to allow RGS to perform employment references check; p. 327: Authorization and consent for release of information; p. 341: Participation in
10. The APA prohibits a penalty if based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule unless it has been adopted as a regulation. Govt. Code §11425.50(e); Morning Star Co. v. State Bd. of Equalization (2006) 38 Cal.4th 324, 334-335. The ALJ’s decision constitutes an unlawful standard of general application.

11. In Cargill, the court did not decide whether the labor supplier’s leased workers were the agency’s common law employees. Critically, the three dissenting justices recognized the changing nature of employment relationships: “...the majority has uncritically applied an arguably obsolete common law definition of ‘employee’ to a new labor paradigm and conferred an authority on CalPERS—one never accorded by the Legislature—to unilaterally determine the legality of public employers using leased workers.” Id., at 510.12

RGS, Cambria, and Fuller shared intent to contract for skilled, cost effective financial advisor services. CalPERS has no statutory authority to invalidate this operational decision.

LAW OFFICES OF SCOTT N. KIVEL, Attorneys for Respondent Cambria CSD

457 plan; pp. 345-348, 393: Submission by Fuller to RGS of her timecards; p. 351: Approval by RGS of Fuller’s timecard for Cambria work; p. 353: Completion of legally required I-9 form; pp. 357-360: Fuller notice of interest in RGS employment; pp. 364, 374: RGS termination of Fuller from 401 and 457 plans; pp. 380-383: Completion of W-4 form; p. 384: RGS’ COBRA benefits from RGS employment; p. 398: Fuller authorization to release driver record information “to my employer, Regional Government Services”; pp. 400-406: Agreement between “RGS or Employer or Agency” and Tracy Fuller “the Employee;” p. 407: RGS terminated Fuller’s employment; p.411: RGS conducted an investigation of Fuller; p. 412: RGS, as the employer, disciplined Ms. Fuller; p. 417: RGS offered Fuller legally required medical insurance; p. 419: Fuller completed RGS “New Employee Orientation;” pp. 424-426: RGS completed “Personnel Action Forms” for key decisions; p. 428: Fuller acknowledged by her signature that RGS Personnel Rules and Regulations governed her employment; p. 429: A legally required “Privacy Information” notice given by RGS; pp. 434: RGS provided Fuller with vision insurance. Ex. 38: p. 493: Cambria interviewed Fuller through RGS; p. 497: Cambria intended to have Fuller assigned by RGS: “We would like to talk with you about entering into a contract with you [RGS] to secure Tracy Fuller until at least June 30;” p. 509: RGS provided Fuller with “new employee forms;” p. 510: Averett supervised Fuller and provided advice on issues which arose during her Cambria assignent; pp. 574-575: Fuller submitted her timecards to RGS, not to Cambria; pp. 547-549: RGS identified Fuller as a financial advisor on RGS website; pp. 576: Fuller had an assigned RGS phone number; p. 583: Fuller joined RGS meetings to discuss finance advisor roles for she was directed to charge “RGS General Advisors” and not Cambria; pp. 584-585, 587, 596: Fuller was provided with an RGS ID card and RGS business card; p. 669: Fuller was provided a RGS email address.

12 “...the majority... assume[s] the PERL incorporates a static common law definition of employee under which control over performance is the most significant factor... [l]ease workers present a new paradigm, a three-sided labor relationship to which control has been expressly separated from other aspects of employment.” (Id., at 512).

“The role of the court should not be to judge the propriety of a labor relationship otherwise permitted by law, but to effectuate the intent of the parties, particularly one they all knowingly and intentionally accept.” Id., at 515.

“CalPERS’ long failure to provide guidance to its contracting agencies, the majority impose...the potential for new and unexpected financial liabilities, significant in amount, on local government agencies...that already face unprecedented fiscal challenges...the current legislative scheme does not dictate such a result.” Id., at 526.
PROOF OF SERVICE

I, Rebecca J. Church, declare:

I am a resident of the State of California and over the age of 18 years, and not a party to the within action; my business address is 207 Stony Point Road, Suite C, Santa Rosa, CA 95401. On the date set forth below I served the within document(s):

- RESPONDENT CAMBRIA COMMUNITY SERVICES DISTRICT’S ARGUMENT TO REJECT THE ALJ PROPOSED DECISION

on the interested parties in said action, by placing a true copy thereof as indicated below, addressed as follows:

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
Lincoln Plaza East
400 Q Street
Sacramento, CA 95811

( x ) BY FEDERAL EXPRESS: I caused such envelope to be delivered to Federal Express for overnight courier service to the office(s) of the addressee(s), pursuant to CCP §1013.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Santa Rosa, California on August 30, 2018.

Rebecca J. Church