

**ATTACHMENT A**

**THE PROPOSED DECISION**

**BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

**In the Matter of the Appeal of Membership Eligibility of:**

**JAMES J. GREGG, Respondent**

**Case No. 2018-0109**

**OAH No. 2018070551**

**PROPOSED DECISION**

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on December 7, 2018, and February 15, 2019, in Riverside, California.

Charles Glauberman, Senior Attorney, represented petitioner Renee Ostrander, Chief, Employer Account Management Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Brian P. Ross, Attorney at Law, Rains Lucia Stern St. Phalle & Silver, PC, represented respondent James J. Gregg.

No appearance was made by or on behalf of respondent City of Beaumont, California.

As directed by the administrative law judge, the parties submitted written closing arguments. The matter was submitted and the record was closed on July 22, 2019.<sup>1</sup>

## **ISSUES**

1. Was respondent James G. Gregg an employee of the City of Beaumont, California from July 1, 2006, through June 30, 2015, (the service period) so that he was eligible for membership in CalPERS during that period?
2. Is CalPERS estopped to deny that James G. Gregg was an employee of the City of Beaumont, California during the service period?

## **PROTECTIVE ORDER SEALING CONFIDENTIAL RECORDS**

Exhibit 42 contains confidential information and is subject to a protective order. Exhibit 42 consists of Mr. Gregg's W-2 forms issued by the City from 2006 to 2015. It is impractical to redact the information from the exhibit. To protect confidential personal information from inappropriate disclosure, Exhibit 42 is ordered sealed. This sealing order governs the release of documents to the public. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517, may review the documents subject to this order,

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<sup>1</sup> Mr. Gregg's opening brief was received as Exhibit A. Mr. Gregg's resume was received as Exhibit B. The closing brief of CalPERS was received as Exhibit C. Mr. Gregg's closing brief was received as Exhibit D.

provided that such documents are protected from release to the public. No court reporter or transcription service shall transcribe the information contained in the exhibit.

## **SUMMARY OF DECISION**

In 2003, James J. Gregg, an individual with many years of experience in municipal risk management, entered into service as the General Manager of the newly-created Exclusive Risk Management Authority of California (ERMAC), a joint powers authority. ERMAC consisted of five California municipalities, including the City of Beaumont (the City). In 2005, Mr. Gregg began to explore other professional options, one of which was to secure a position as an employee of a public entity, so that he could become a member of CalPERS. ERMAC and the City formulated a plan by which Mr. Gregg could realize this goal.

ERMAC was not a CalPERS contracting agency; the City was. The parties thus fashioned an arrangement whereby the City hired Mr. Gregg as an employee, in the position of risk manager, but Mr. Gregg also continued to serve as ERMAC's General Manager. In this way, Mr. Gregg could become a member of CalPERS, which could not have happened had he been hired directly by ERMAC.

Mr. Gregg served as the City's risk manager for ten years, from 2006 to 2015. He continued to serve as ERMAC's General Manager throughout that period. Mr. Gregg spent a substantial majority of his time servicing ERMAC, but he also spent a significant portion of his time serving the City in areas unrelated to his ERMAC responsibilities. The City paid Mr. Gregg's salary, but ERMAC reimbursed the City for

the portion of Mr. Gregg's salary (roughly) intended to correspond to the portion of his time spent on ERMAC business.

The evidence established that Mr. Gregg was an employee of the City during the service period. Most important in this regard, the City retained a substantial right to control his work activities. Among other things, the City Manager met with Mr. Gregg several times per month and gave him direction and assignments. Though Mr. Gregg spent the majority of his time away from the City offices in Beaumont, he was always available on call, and his obligation to the City took precedence over any other commitments he had. He had to get approval to perform outside work activities. He was terminable by the City at will. Other indicia of employee status included his lengthy period of service with the City; that he was paid a salary; that he was engaged in a function (risk management) that was a necessary, core aspect of the City's business; that all of the parties – Mr. Gregg, the City, and ERMAC – believed that Mr. Gregg was an employee of the City; that the source of funding for his position was partly provided by the City; and that a variety of regular incidents of employee status (e.g., he submitted a job application, he underwent Live Scan fingerprinting, he was given an Employee Handbook, the City issued him W-2s, deductions were made for federal and state withholding and CalPERS contributions) were applicable to Mr. Gregg.

In light of the determination that Mr. Gregg was an employee at all times during the service period, it was not necessary to address Mr. Gregg's alternate argument that CalPERS was estopped to deny Mr. Gregg's employee status.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. By letter dated September 21, 2017, CalPERS notified Mr. Gregg of its determination that during the period from July 1, 2006, through June 30, 2015, (the service period) Mr. Gregg had been employed as a General Manager of the Exclusive Risk Management Authority of California (ERMAC) and not as an employee of the City of Beaumont, California (the City). On that basis, CalPERS determined that Mr. Gregg was not eligible for membership in CalPERS during the service period. As a result of this determination, CalPERS instructed the City to reverse the service period from the CalPERS system and to reimburse Mr. Gregg for his contributions applicable to the service period. The letter also provided the following "rough financial estimate" of other impacts on Mr. Gregg's retirement account:

- Return of funds from your Additional Retirement  
Service Credit election: \$131,393.88
- Overpayment of retirement allowance as of October  
2017: \$125,660.68
- Adjusted gross retirement allowance upon  
adjustment: \$4,390.32

2. On November 16, 2017, Mr. Gregg appealed the CalPERS determination. On July 5, 2018, petitioner signed the statement of issues. This hearing ensued.

## **Matters occurring or existing before the service period (before July 2006)**

3. Before 2003, Mr. Gregg had many years of professional experience in municipal risk management. From 1977 to 1994, Mr. Gregg participated as a member of CalPERS as an employee of the City of Gardena.<sup>2</sup>

4. On June 3, 2003, the Exclusive Risk Management Authority of California (ERMAC), a joint powers authority (JPA),<sup>3</sup> was created pursuant to Government Code section 6502.<sup>4</sup> Mr. Gregg assisted in its creation.

The five member entities of ERMAC were the California cities of Beaumont, Hayward, Laguna Hills, Moreno Valley, and Santa Maria. ERMAC was formed "to jointly develop and fund insurance and other related programs as determined by the Agencies wishing to participate in such programs or obtain services." Programs were to include "the creation of joint insurance funds, including excess insurance funds, the

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<sup>2</sup> Except as otherwise indicated, Factual Findings 3 through 41 are based on documents received in evidence and the testimony of Mr. Gregg, Donald White, and Elizabeth Gibbs. These findings are essentially uncontroverted in the record.

<sup>3</sup> The term "JPA" is used in this proposed decision to refer to joint powers agreements in general; the term "Authority" is used interchangeably with the term "ERMAC."

<sup>4</sup> Initially, the Authority was called the California Risk Management Authority. The name was changed to ERMAC because the original name was already in use by another entity.

pooling of self-insured claims and losses, purchase of insurance, including reinsurance, and the provision of necessary administrative and other services," including "risk management consulting, loss prevention and control, centralized loss reporting, actuarial consulting, claims adjusting and legal defense services."

Simply stated, the basic purpose of the ERMAC was to enable member agencies to pool insurance risk and purchase insurance collectively. This was considered a more effective and cost-efficient way to manage risk than for each city to provide for its own risk management. Creating a JPA for the purposes of risk management is a common practice in California, where typically only large cities and counties are self-insured. Such an arrangement is in many cases a cost-effective alternative to hiring a private company to provide such services to the JPA.

ERMAC has the power to enter into contracts; to employ agents and employees; to "acquire, hold, or dispose of property, contributions and donations of property, funds, services and other forms of assistance from persons, firms, corporations and public agencies"; and to "receive and use contributions and advances from members as provided in Government Code section 6504, including contributions or advances of personnel, equipment or property."

ERMAC is governed by a Board of Directors. Each member city appoints one person to serve on the Board. Daniel White, City Manager of Laguna Hills at the time of the hearing, has been the long-time chairman of the ERMAC Board.

5. At the time of its creation in 2003, ERMAC contracted with Mr. Gregg, through Mr. Gregg's company Insurance and Risk Services, Inc. (IRSI), to provide

general management services to the Authority.<sup>5</sup> Mr. Gregg served as ERMAC's General Manager from 2003 to 2006. Mr. Gregg's main areas of service were claims, underwriting, and administration.

6. In 2005, Mr. Gregg started to think about whether to continue in service as ERMAC's General Manager or whether instead to look for another, more lucrative opportunity elsewhere. As one option, Mr. Gregg thought about becoming an employee of ERMAC, so that he could again become an active member of CalPERS and receive the retirement and other benefits incident to such membership.

ERMAC, on its own part, was pleased with Mr. Gregg's services as its General Manager, and it was looking for a way to make Mr. Gregg an offer that would keep him in service in that role.

7. In a General Manager's Report dated September 8, 2005, Mr. Gregg stated the following:<sup>6</sup>

As you will recall, when I assisted in the creation of the JPA at no cost [*sic*]. Following the creation of the Authority, the Board asked how they could compensate me for the efforts made on behalf of the cities. I advised that we should defer any such compensation for a couple of years to make sure the Authority served the needs of its members. It appears that our efforts have been successful.

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<sup>5</sup> Mr. Gregg formed IRSI for the purpose of entering into the ERMAC contract.

<sup>6</sup> What follows was one of several items of business contained in the Report.

I would like to have the Board consider making me an employee. As you all know, I spent 17 years in local government and have 12 years in PERS. I would again like to re-enter the retirement system. My company's current management compensation is 10% of the premiums collected. It is my desire to convert myself to an employee at no additional cost to the Authority. I have contacted PERS and will report back at our next meeting if the Board desires to pursue this course of action. In the event that the Board desires to review this option, I would ask that a member be designated to work with me and present any proposed program. I recommend this to avoid the inherent conflict of recommending my own benefit package.

8. At a September 29, 2005, Board meeting, the President of the Board "directed [Mr. Gregg] to return to the Board with recommendations relative to the possible hiring him [s/c] as a permanent employee either directly with the Authority or as a contract employee of one of the member agencies."

ERMAC ultimately concluded that it would not be cost effective to hire Mr. Gregg as its own employee. ERMAC did not have any employees, and without the benefit of an economy of scale, the administrative costs associated with maintaining an employee workforce of one (i.e., Mr. Gregg) was deemed to be too high.

Instead, Board member and Beaumont City Manager Alan Kapanicas "stepped up" and offered to hire Mr. Gregg as an employee of the City. Mr. Gregg would continue to serve as ERMAC's General Manager, while also serving as the City's risk

manager. ERMAC would reimburse the City for the personnel costs associated with the ERMAC General Manager component of Mr. Gregg's employment.

9. This understanding was articulated in a memorandum to the ERMAC Board dated May 2, 2006, in which Mr. Gregg recommended that the Board authorize the City "to hire Mr. Gregg and administer all employment related services including payroll and benefit administration on behalf of the Authority." Mr. Gregg's contemplated duties and responsibilities as ERMAC General Manager would be the same as those set forth in the existing Management Agreement with IRSI, "without change."

Further:

There would be no additional cost to the Authority to convert [Mr. Gregg] from a contracted General Manager to an in-house General Manager. ERMAC would be responsible for payment of all direct costs associated with [Mr. Gregg's] employment with the City. The City's Finance Director will bill ERMAC for the costs of administering [Mr. Gregg's] employment. These direct costs would include salary, Social Security, Federal and State withholding, retirement benefits, any voluntary program withholding, workers' compensation insurance costs, and any other direct or indirect benefits provide [*sic*] to the General Manager. The City of Beaumont will not charge for its indirect costs associated with administering the program.

The cost to Beaumont to administer one additional employee is negligible. However, the cost to the Authority to set up a payroll and employment system would be considerable. Beaumont's offer to assist in this area produces cost savings for each member of the Authority.

Finally, "indemnification of the City against any claims associated with [Mr. Gregg's] employment with the City when acting within the scope of [his] employment with the Authority" was contemplated.

10. Follow up occurred at a May 11, 2006, Board meeting, where Mr. Gregg provided a comprehensive report and proposed Resolution 2006-03, under which ERMAC:

would contract with the City of Beaumont to provide a General Manager for the Authority. The General Manager currently provides his services on a contract basis. Under this proposal, the City of Beaumont would hire the General Manager and the Authority would reimburse the City for costs associated with his employment as described more thoroughly in Resolution 2006-03.

Following discussion, the Board approved Resolution 2006-03.

11. Resolution 2006-03 stated that ERMAC "desires to employ Mr. Gregg as a public employee to manage ERMAC"; "the costs to ERMAC to hire Mr. Gregg will be equal to the amounts currently paid by ERMAC to" [IRSI]; the costs to create a personnel system complete with benefits and rules, policies, and procedures

outweighs the benefits of hiring staff"; and "the City of Beaumont and ERMAC wish to retain Mr. Gregg based upon terms and conditions approved by ERMAC."

Based on the foregoing considerations, the ERMAC Board authorized "the City of Beaumont to hire Mr. James J. Gregg on behalf of ERMAC to serve as the General Manager of ERMAC on an at-will basis at the discretion of the Board of ERMAC." ERMAC itself appointed Mr. Gregg "as the General Manager to manage [*sic*] of the affairs of the Authority. The General Manager shall be supervised and take direction from the Board of Directors of ERMAC." Mr. Gregg was "authorized and directed to perform" services in the areas of: underwriting; memoranda of coverage; cancellation and nonrenewal; collection of funds; claims; marketing; accounting; statistical; reinsurance; and other services.

The Resolution confirmed ERMAC's agreement "to allow the City of Beaumont to process and administer the employment of Mr. Gregg as the General Manager of ERMAC by providing for" all "administrative and clerical functions, services, and activities required by any Federal, State, or local authorities." These included payroll computation, federal and state income tax withholding, and workers' compensation insurance.

The Resolution provided that the ERMAC treasurer would reimburse the City:

for all direct costs associated with processing the employment of Mr. Gregg including but not limited to all salary, Social Security, Federal and State withholding, retirement benefits, any voluntary program withholding, workers' compensation insurance costs, and any other direct or indirect benefits provide [*sic*] to the General

Manager. Such costs shall not include the indirect costs of processing and administering the salary and benefits provided to Mr. Gregg by the City of Beaumont on behalf of ERMAC.

The Resolution provided further that the ERMAC treasurer "shall maintain an itemized accounting of all costs reimbursed to the City of Beaumont relating to Mr. Gregg's employment and that such reports shall be provided to the" ERMAC Board.

The Resolution provided further:

Mr. Gregg is appointed to the position of General Manager for a period of twelve months from the adoption of this Resolution. Mr. Gregg shall continue in this position thereafter and serve at the pleasure of the Board of Directors of ERMAC and the city of Beaumont. He shall retain no expectation of employment with either ERMAC or the city of Beaumont following the initial twelve month period.

12. At about this time, the City drafted and posted a job announcement for the position of "Risk Manager." The City planned to conduct interviews if anyone (aside from Mr. Gregg) applied. If no one else applied, the City could offer the position to Mr. Gregg. Mr. Gregg did not draft the job description, but he helped edit it. The starting salary was listed as \$9,460 per month. The job was described as follows: "To administer and direct the City of Beaumont's risk management program including general liability, employee safety, and loss prevention." With regard to "supervision received and exercised," direction was to be "provided by the City Manager or his

designee; responsibilities include the direct and indirect supervision of technical and clerical personnel." The described duties included a broad range of functions pertaining to risk management, as follows:

Understand and interpret City, State and Federal regulations and statutes relative to self-insurance and risk management; serve as the City's risk manager for all insurance, liability, retirement and safety programs; review all liability claims filed against the City and determine if claim [*sic*] should be adjusted by City or outside adjusters; coordinate with the City's defense counsel on all general liability matters; administer and/or provide staff input to City Manager or City Manager Staff on contractual agreements as needed, insurance contacts and levels of insurance; counsel employees and others in relation to insurance program activities; establish programs to maintain accident, injury and other statistics and records; develop and monitor City safety programs as needed; perform related duties as assigned.

The job announcement was posted for about 30 days.

13. On June 8, 2006, Mr. Gregg submitted an employment application on a standard City of Beaumont application form. Mr. Gregg did not identify his service as ERMAC General Manager on the application. Since Mr. Gregg was the only applicant, a formal interview was not conducted.

14. Mr. Gregg's asserted employment with the City began in July 2006.<sup>7</sup> ERMAC terminated its contract with Mr. Gregg's company at that time.

15. An important element of Mr. Gregg's attraction to employment with the City was the anticipated opportunity to participate in CalPERS and enjoy the financial benefits of that participation. Another factor was the satisfaction he derived from being a public servant.

Mr. Gregg would not have taken the position with the City had he known that he would not be eligible for membership in CalPERS.<sup>8</sup> He instead would have explored (and in fact was already exploring) other options, such as employment or affiliation with a large private or public entity. The record suggests that an individual with Mr. Gregg's background, experience, and skill would likely have had other employment

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<sup>7</sup> Even before formally joining the City in July 2006, Mr. Gregg performed work for the City as a contractor through IRSI. He organized the City's loss runs. A loss run is an analytical method for determining risk and for making rate determinations.

<sup>8</sup> The transcript of the hearing, volume 1, page 250, states as follows:

Q. All right. If you knew in 2006 that working for the City of Beaumont, or whatever you want to call that arrangement you had, that you would be part of CalPERS, would you have taken that position?

A. No.

It is clear from the context of this interchange that the reporter inadvertently omitted the word "not" between the phrases "you would" and "be part of CalPERS."

opportunities had he declined to work for the City. The record does not establish that Mr. Gregg turned down any specific, concrete offer in order to work for the City, however.

**Matters occurring or existing during the service period (July 2006 to June 2015)**

16. Mr. Gregg began to work for the City effective July 1, 2006. He believed he was a City employee.

17. At the time he started working for the City, Mr. Gregg signed a City waiver of health insurance, since he was covered by his wife's policy. He underwent fingerprinting through the Live Scan process.

18. At the time he started working for the City, Mr. Gregg was given and he signed for an Employee Handbook. The Handbook stated:

This handbook only applies to employees of the City of Beaumont, and not to its independent contractors. An "employee" is defined as an individual whose work is directed and controlled, or is subject to the direction or control, by the City with respect to the final results of the work and the details of when, where and how the work is to be done.

When Mr. Gregg was given a copy of the Handbook, he signed a "Verification of Receipt," which stated:

I have been given a copy of the City of Beaumont Employee Handbook. I understand that it is my responsibility to read

the Handbook. I further understand that the Handbook contains important information governing my terms and conditions of employment with the City of Beaumont. It also includes rules, regulations and obligation that are expected of me as a City employee.

I understand that the original of this Verification of Receipt will be placed in my City personnel file.

The Handbook contained provisions relating to a variety of matters, in such categories as employee obligations and general rules of conduct; equal employment opportunity; employee organizations; hours and overtime; leaves and holidays; classification and pay; benefits; grievance procedure; discipline; and separation.

With regard to "Attendance and Punctuality," the Handbook stated:

Punctuality and regular attendance are essential to insure optimal productivity and serve the citizens of Beaumont. Every employee is expected to be present and ready to work at the beginning of every work shift and to maintain a record of good attendance. It is the employee's responsibility to inform his/her supervisor, at least one (1) hour prior to the scheduled start of his/her shift, if he/she will be absent or late. Likewise, notice is required if an employee anticipates leaving his/her work shift early. Some departments may have special requirements for reporting absences and tardiness.

With regard to outside employment, the Handbook stated:

Employees who wish to work at a second job must obtain prior written approval from their department head and the City Manager. The purpose of this requirement is to ensure that the second job does not create a conflict of interest or impair the efficient performance of the employee's City job.

The Handbook also stated that "[a]ll initial appointments . . . are subject to an eighteen (18) month probationary period, unless an appropriate MOU specifies a different duration for probation."

The Handbook also stated, "Disciplinary action may result from employee misconduct, poor/unsatisfactory performance or unacceptable behavior. Disciplinary action may include . . . termination." The Handbook set forth 28 specific causes for disciplinary action, which were applicable to disciplinary action ranging from suspension without pay to termination "for cause." The Handbook did not contemplate the City's authority to terminate employment at will and without cause.

19. A July 6, 2006, email from Bill Aylward, the City's Finance Director, to Elizabeth Urtega,<sup>9</sup> the City's Resources Director, stated:

As a reminder, Jim started on payroll July 1 and we need the new employee info so we can set him up in the system for his first check to be paid on 7/21/06. Thanks, Bill.

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<sup>9</sup> Ms. Urtega later changed her name as a result of a divorce; she testified at hearing under her maiden name, Elizabeth Gibbs.

20. During his ten years with the City, Mr. Gregg continued to serve as ERMAC's General Manager. His role and duties as General Manager were the same as they had been since 2003.

In addition, Mr. Gregg provided services to the City that were not related to his role as ERMAC General Manager. Mr. Gregg's core duties for the City involved the handling of insurance claims. For each claim the City received, Mr. Gregg created a claim file; he evaluated the claim; he went out into the field to take photographs and examine the scene of the accident; he made a recommendation as to whether the City should pay or reject the claim; he monitored the claim; and he often discussed a claim with the City Attorney. Mr. Gregg handled about 165 to 175 claims during the service period. He handled substantially fewer claims for ERMAC during the service period, perhaps 90 to 100. Mr. Gregg also participated in City staff meetings. He provided advice "on a variety of things that were happening in the city."

In addition to these core duties, Mr. Gregg was involved in a number of discrete projects that took place at different times during the service period. He helped develop a system for the City to bill property claims. He worked with the City's human resources department on workers' compensation claims. He was assigned to submit certain kinds of reports to Medicare. He was assigned to work on the risk management components of a project involving the provision of Beaumont police officers to the City of Desert Hot Springs. He was assigned to evaluate the insurance needs of a new JPA of which the City was a member. He helped develop a Special Liability Insurance Program (SLIP) to address risk management needs in connection with special events. He was assigned to review City policies and documents, some of which were outside the scope of risk management. Mr. Gregg performed these tasks at the direction of Mr. Kapanicas.

21. Mr. Gregg met with Mr. Kapanicas several times per month, and they discussed a variety of City-related matters. Mr. Kapanicas gave Mr. Gregg assignments and direction in connection with the matters they discussed.<sup>10</sup> Neither Mr. Kapanicas nor any other City official or employee directed Mr. Gregg as to how he should carry out or accomplish his assignments or duties. Mr. Gregg was understood to be (and he was) the City's risk management expert. Mr. Kapanicas, who did not have risk management expertise, did not attempt to supervise, direct, or exercise close control over Mr. Gregg with regard to the details of his work assignments.

22. The City provided Mr. Gregg with a City email address. For the most part, however, Mr. Gregg used his personal email address in the performance of his duties.

The City provided Mr. Gregg with a cubicle (i.e., a desk with drawers and a place to store files and other things) at the City offices in Beaumont. He worked at Beaumont on only an irregular basis: at times he worked there once a week; at times twice a week; at times every couple of weeks. He worked primarily at ERMAC's office in Long Beach, where he had maintained his own personal office for many years. Even when he was not working on site in Beaumont, he was always available to the City by telephone and email. He was also available by phone and email to other ERMAC members.

On very rare occasions, a non-City matter would arise on a day when Mr. Gregg planned to be working in Beaumont. On those occasions, Mr. Gregg told Mr. Kapanicas about the conflict and stated that he would go to Beaumont on another

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<sup>10</sup> At times, Mr. Kapanicas delegated to the Beaumont's City attorney (a private law firm) the authority to direct Mr. Gregg.

day. However, if Mr. Kapanicas told Mr. Gregg that he was needed in Beaumont on a particular day, then Mr. Gregg would go to Beaumont on the day in question, because he viewed Mr. Kapanicas as his "boss."

23. Mr. Gregg's service with the City was terminable by the City at will.<sup>11</sup> The record does not reflect that Mr. Gregg was in a probationary status at the outset of his service with the City.

24. The City paid Mr. Gregg a salary. He was not paid per task or per assignment. He was on the City's payroll and he received regular City paystubs. The

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<sup>11</sup> This finding is based on several matters. First, Resolution 2006-03 stated that Mr. Gregg "shall retain no expectation of employment with either ERMAC or the city of Beaumont following the initial twelve month period." Second, CalPERS representative Jamila Ponnley (see below) conceded at hearing, when shown this provision, that "it looks like" the City could terminate Mr. Gregg. Third, Mr. Gregg testified he believed that he was an at-will employee of the City. Fourth, and in contrast, ERMAC General Manager Donald White testified he did not believe ERMAC had the authority to terminate Mr. Gregg as an employee of the City. Instead, his understanding was that ERMAC could inform the City that ERMAC no longer wanted Mr. Gregg to serve as ERMAC's General Manager. If that were to happen, Mr. Gregg would become "Beaumont's problem" and terminating Mr. Gregg's employment "would clearly be up to Beaumont." The only evidence that Mr. Gregg was not terminable at will was the section of the Employee Handbook relating to discharge for cause. The significance of this provision of the Handbook is addressed later in this proposed decision. Ultimately, the evidence that Mr. Gregg was terminable at will by the City outweighs the evidence that he was not.

City deducted federal and state withholding, CalPERS contributions, and Medicare taxes from his pay checks. The City tracked vacation and compensatory time hours. The City issued him an employee ID number and listed his status as full time.

25. The City issued W-2 forms to Mr. Gregg throughout the service period. His compensation as set forth in his W-2s was generally in the \$150,000 to \$180,000 per year range.

26. The major (if not the exclusive) component of Mr. Gregg's salary was calculated based on 10 percent of pooled ERMAC premiums.<sup>12</sup> This amount was funded by ERMAC, which reimbursed the City in connection with Mr. Gregg's work as ERMAC General Manager.

The parties disagreed as to whether there was a second component of Mr. Gregg's salary, one that derived not from funds reimbursed to the City by ERMAC, but derived instead from the City's own funds and that corresponded to Mr. Gregg's duties and activities performed directly for the City and not for ERMAC.

Mr. Gregg testified in this regard, based on his own calculations, that some \$32,000 – or approximately 20% of his salary – was paid by the City from funds not reimbursed by ERMAC.

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<sup>12</sup> The amount Mr. Gregg received did not necessarily reach the 10 percent figure; it often was substantially less (perhaps as low as four or five percent). Exactly how the amount Mr. Gregg received for his service as ERMAC General Manager was calculated was not established at hearing.

The documents submitted at hearing are incomplete (e.g., they do not cover the entire service period); they provide data in some instances on a fiscal year basis and in other instances on a calendar year basis; they are in some respects unclear, ambiguous, and difficult to interpret. The one employee of the City who testified at hearing (Elizabeth Gibbs) knew little about the documents; neither party offered expert testimony to explain or interpret them.

The clearest and strongest evidence on the issue of the source of funds for Mr. Gregg's salary consists of an October 2015 email from Kari Mendoza, City of Beaumont Human Resources Support Services Director, to Sara Fleming, a CalPERS representative. According to Ms. Mendoza, Mr. Gregg's wages "were paid for by the City and then a portion was reimbursed thru ERMAC." Ms. Mendoza's assertion seems consistent with the fact that Mr. Gregg did in fact perform work for the City that was not related to his service as ERMAC General Manager. The email is also nearly contemporaneous with the period of Mr. Gregg's service with the City.

Based on all of the evidence, it is found that a modest but not insignificant portion of Mr. Gregg's salary was paid with City funds not reimbursed by ERMAC. The exact dollar amount or percentage in question cannot be determined based on this record.

27. On December 1, 2009, Mr. Gregg submitted a City of Beaumont "Request for permission to perform outside employment" form. The request was to perform work for "ERMACH/IRSI/Law Office" during the period December 1, 2009, to November 30, 2010. Mr. Kapanicas approved the request on the same day.

On January 4, 2011, Mr. Gregg submitted a similar form, for the period from December 1, 2011, "ongoing." Mr. Kapanicas approved the request the same day.

28. In a memorandum dated June 10, 2014, Mr. Kapanicas wrote to Darci Mulvihill, of the City's Human Resources Department, as follows:

Pursuant to Section 4.4.1 of the City's Personnel Manual, please be advised that I have met with Mr. Gregg annually, since his initial hire date, to discuss his outside employment wherein he engages in certain risk management consulting projects and the practice of law to determine if such activities are compatible with his employment with the City. Each year, following this discussion, I have authorized Mr. Gregg's continued pursuit of these outside employment activities. Furthermore, I authorize such activities for the next fiscal year.

Please place this authorization notification in Mr. Gregg's personnel file.

29. During his tenure with the City, Mr. Gregg performed services for other entities. He performed "some" audit work through IRSI. He performed "some" work for the County of Los Angeles through another contractor. The record does not directly reflect how extensive this outside work was.

30. In a memorandum dated April 14, 2015, to Mr. Kapanicas, Mr. Gregg expressed his "intent to resign from the City effective December of this year. The exact date will be established in the near future following my review of my various retirement options." He added, "I will continue my duties until my retirement date."

Mr. Gregg did not send a similar memorandum to ERMAC.

31. In a memorandum dated June 9, 2015, to Elizabeth Urtiaga, who was Acting City Manager at this time,<sup>13</sup> Mr. Gregg provided his "advice and counsel relating to ongoing risk management functions required following the end of my service with the City effective June 30th of the year."

32. The City did not employ a risk manager before Mr. Gregg took on this role in 2006, and it did not employ one after Mr. Gregg resigned in 2015.

33. The City maintained a personnel file for Mr. Gregg.

34. Mr. Gregg believed he was an employee of the City. City personnel believed he was an employee of the City. Mr. White, ERMAC's Board Chairman, believed he was an employee of the City.

### **Matters occurring or existing after the service period (after June 2015)**

35. At about the time Mr. Gregg resigned from his position with the City, he entered (through IRSI) into a "general administration agreement" with ERMAC to provide administrative services as the Authority's General Manager.<sup>14</sup> The agreement noted that Mr. Gregg "has performed the duties of General Manager for the Authority

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<sup>13</sup> Mr. Kapanicas was then on administrative leave.

<sup>14</sup> The agreement, which is not dated, refers to the termination of Mr. Gregg's term of employment with the City as an event in the future. Mr. White, ERMAC's Chairman, testified that the agreement was executed after Mr. Gregg retired from the City. The precise date is not important and does not affect the determination of this matter.

since the inception of the Authority in July of 2003." The agreement also noted that "Mr. Gregg, since July 1, 2006, has been employed by the City of Beaumont with the Authority reimbursing the City of Beaumont for the employment costs associated with Mr. Gregg's duties as the General Manager of the Authority." The agreement also noted that "the Authority desires that James J. Gregg continue to serve as the General Manager of the Authority due to his intimate knowledge of the ERMAC program and his expertise in insurance and risk related disciplines."

Mr. Gregg's services as General Manager for ERMAC were essentially the same before, during, and after his affiliation with the City.

36. On August 28, 2015, Mr. Gregg filed a service retirement election application with CalPERS.

37. By letter dated October 12, 2015, CalPERS informed Mr. Gregg that it had processed his service retirement application and that his first monthly check was expected to arrive in December 2015.

38. CalPERS sent Mr. Gregg a number of letters over the next six months regarding his service retirement account. None suggested any concern on the part of CalPERS as to Mr. Gregg's status as a retiree member of the System.

39. In around February 2017, CalPERS received an ethics complaint concerning Mr. Gregg's status while he was working with the City. CalPERS opened an investigation. Jamily Ponnley, a CalPERS Associate Government Program Analyst, was involved in the investigation and the eventual determination that Mr. Gregg was never in fact an employee of the City.

40. On March 28, 2017, Van Lant & Fankhanel, LLP, Certified Public Accountants, issued an "Independent Auditor's Report" relating to the City's finances in a wide variety of areas, including "Exclusive Risk Management Authority of California (ERMAC) General Manager employment." Among other things, the report concluded:

The City paid the salary of the General Manager (GM) of ERMAC, including all City paid benefits . . . for risk management services, as if he was an employee of the City of Beaumont . . . . ERMAC reimbursed the City for the amount of salaries paid to the GM. We found no indication that the "Risk Manager" position is an authorized position of the City of Beaumont, established and approved by the City Council. In addition, City staff represented to us that this individual was working onsite at the City approximately 1-2 days a week. In addition, while at the City, the ERMAC GM was not strictly working on activity related to the City of Beaumont. Also, the salary expenditures were listed in the City's general ledger as "Legal Risk Management" instead of "Salaries" like all other employee salary payments.

The report also stated, "City staff were unable [*sic*] provide that this individual was a full-time employee of the City, and would be eligible to receive the City paid benefits, such as CalPERS retirement and health insurance."

The report also stated:

The City may not be in compliance with applicable CalPERS eligibility requirements, and, in addition, the City is subject

to providing retirement benefits for an individual that was not an employee of the City. Also, it appears that the City was paying salaries and benefits to an individual that would typically not meet the definition of a full-time "employee" of the City.

41. In the course of its investigation of the ethics complaint, CalPERS personnel reviewed a number of documents. These documents included Mr. Gregg's September 8, 2005, and May 2, 2006, memoranda to the ERMAC Board; the City's job announcement for the risk manager position that Mr. Gregg ultimately filled; Mr. Gregg's employment application; Mr. Gregg's W-2 forms issued by the City; various City spreadsheets, payroll documents and invoices sent to ERMAC; Mr. Gregg's memoranda to Mr. Kapanicas dated June 10, 2014, and April 14, 2015; the March 2017 independent audit report; and a written response of Mr. Gregg to the preliminary CalPERS determination that he was not an employee of the City.

In its September 21, 2017, letter, CalPERS articulated the basis for its final determination that Mr. Gregg was not an employee of the City as follows:

After review of the documentation provided by you, the City, and other documents, we found that you were employed as a General Manager of the Exclusive Risk Management Authority of California (ERMAC)<sup>15</sup> for the July

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<sup>15</sup> The final determination letter did not explicitly refer to Mr. Gregg as an "employee" of ERMAC, though in context that is probably what was meant. However, CalPERS did not argue at hearing or in its post-hearing brief that Mr. Gregg was an

1, 2006 to June 30, 2015 [*sic*], not as a common law employee for the City. Since ERMAC does not contract with CalPERS for retirement benefits, you were not eligible for membership in CalPERS for the reported above service period.<sup>16</sup>

In addition to what CalPERS stated in the September 12, 2017, letter, CalPERS expressed the view at hearing that ERMAC “farmed out” or “outsourced” the human resources function to the City for purposes of compensating Mr. Gregg as ERMAC’s General Manager.<sup>17</sup>

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employee of ERMAC. And neither party argued that Mr. Gregg was the joint employee of both the City and ERMAC, though Mr. Gregg acknowledged that possibility in his closing brief. Ultimately both CalPERS and Mr. Gregg (correctly) focused more narrowly on whether Mr. Gregg was or was not an employee of the City.

<sup>16</sup> In its preliminary determination letter, dated June 22, 2017, CalPERS articulated two additional grounds in support of its conclusion that Mr. Gregg was not an employee of the City: (1) the City’s Financial Auditor could not verify Mr. Gregg had provided full-time employee service to the City; and (2) the services provided, if any, were in the capacity of a legal professional. By virtue of their omission in the final determination letter, CalPERS is deemed to have abandoned those grounds. Indeed, CalPERS did not raise either of those grounds at hearing or in its post-hearing brief.

<sup>17</sup> This is based on the testimony of Ms. Ponnley, who testified at hearing on behalf of CalPERS.

In reaching its determination that Mr. Gregg was not an employee of the City during the service period, CalPERS did not take into account some of the facts found above in this proposed decision. For example, Ms. Ponnley did not give credence to Mr. Gregg's claims that he performed work for the City in addition to the work he performed as ERMAC's General Manager. Similarly, she did not accept that a portion of Mr. Gregg's salary was paid with City funds that were not reimbursed by ERMAC. In addition, Ms. Ponnley did not believe the City had the right to terminate Mr. Gregg.<sup>18</sup>

## LEGAL CONCLUSIONS

### Burden and Standard of Proof

1. "The moving party — that is, the party asserting the claim or making the charges — generally has the burden of proof" in administrative proceedings. (Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 1997) § 7.50, p. 7-28.) More specifically, and in the absence of a contrary statutory provision, an applicant for retirement benefits has the burden of proof. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.)

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<sup>18</sup> During her testimony, however, after reviewing Resolution 2006-03, Ms. Ponnley conceded, "Yeah, I guess in this case, after looking at this, yeah. It looks like they could have" terminated Mr. Gregg.

Mr. Gregg thus bears the burden of proof, both as to his asserted employee status during the service period and as to his estoppel claim.

2. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.) The preponderance of the evidence standard applies to this proceeding.

3. "Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.] . . . The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

### **The Public Employees' Retirement Law (PERL)**

4. Government Code section 20001 states:

The purpose of this part<sup>19</sup> is to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice,

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<sup>19</sup> The reference is to Part 3 of the Government Code, the "Public Employees' Retirement Law" (PERL), Government Code section 20000 et seq.

be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits.

5. Public employee pension programs serve two objectives: to induce persons to enter and continue in public service, and to provide subsistence for disabled or retired employees and their dependents. (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1304.)

6. With regard to pension legislation, pension provisions shall be liberally construed and all ambiguities must be resolved in favor of the pensioner. This rule of liberal construction is applied for the purpose of effectuating obvious legislative intent and should not blindly be followed so as to eradicate the clear language and purpose of a statute. (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 473.)

7. PERL allows public agencies, including a "contracting agency," to contract with CalPERS for the provision of retirement services to some or all of its employees (Gov. Code, §§ 20022, 20460.)

A "contracting agency" includes "any public agency that has elected to have all or any part of its employees become members of this system and that has contracted with the board for that purpose." (Gov. Code, § 20022.) The City is a "contracting agency" within the meaning of this provision.

8. Government Code section 20028, subdivision (b), defines "employee" as including "any person in the employ of any contracting agency."

9. Government Code section 20125 states, "The board<sup>20</sup> 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."

### **Joint Power Agreements**

10. Government Code section 6504 states:

The parties to the agreement may provide that (a) contributions from the treasuries may be made for the purpose set forth in the agreement, (b) payments of public funds may be made to defray the cost of such purpose, (c) advances of public funds may be made for the purpose set forth in the agreement, such advances to be repaid as provided in said agreement, or (d) personnel, equipment or property of one or more of the parties to the agreement may be used in lieu of other contributions or advances. The funds may be paid to and disbursed by the agency or entity agreed upon, which may include a nonprofit corporation designated by the agreement to administer or execute the agreement for the parties to the agreement.

11. Government Code section 6506 states:

The agency or entity provided by the agreement to administer or execute the agreement may be one or more

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<sup>20</sup> The reference is to the CalPERS Board of Administration.

of the parties to the agreement or a commission or board constituted pursuant to the agreement or a person, firm or corporation, including a nonprofit corporation, designated in the agreement. One or more of the parties may agree to provide all or a portion of the services to the other parties in the manner provided in the agreement. The parties may provide for the mutual exchange of services without payment of any consideration other than such services.

### **Determination of Employee Status**

12. As noted above, PERL defines the term "employee" as "any person in the employ of any contracting agency." (Gov. Code, § 20028, subd. (b).) Since PERL does not define the term "employee" with greater particularity, the term must be defined with reference to California common law. (*Metropolitan Water Dist. v. Superior Court (Cargill)* (2004) 32 Cal.4th 491, 500.)

13. In *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949, a decision cited with approval in *Cargill*, the Supreme Court reiterated and confirmed the following pertinent test for determining employee status:

"[I]n *Empire Star Mines* [(1946) 28 Cal.2d 33, 43-44] this court, holding that a mining company was not an employer within the meaning of the Unemployment Insurance Act, said, 'In determining whether one who performs services for another is an employee or an independent contractor, 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. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations omitted in original.] Other factors to be taken into consideration are (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 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. (Rest., Agency, § 220.)" (*Tieberg*, supra at p. 949).

Further, the secondary factors (i.e., those that supplement the primary, right to control test) cannot generally "be applied mechanically as separate tests; they are intertwined, and their weight depends often on particular combinations. [citation.]" (*S.G. Borello & Sons, Inc. v. Dep't of Ind. Rel.* (1989) 48 Cal.3d 350, 351.)

14. *Galt Services Authority and City of Galt*, CalPERS Precedential Decision 08-01, held that the common law employment test is to be applied not only to determine an individual is a common law employee so as to be eligible to obtain pension benefits employee, but also to determine an individual is not a common law employee so as not to be eligible to obtain CalPERS pension benefits. (See also *Lee Neidengard and Tri-Counties Association for the Developmentally Disabled*, CalPERS Precedential Decision 05-01.)

15. CalPERS Circular Letter No. 200-154-04 states that the "common law rules used by CalPERS for determining employee status can be found" in Internal Revenue Service (IRS) publications 15-A (Employer's Supplemental Tax Guide) and 963 (Federal-State Reference Guide.)

16. IRS publication 15-A states that "Under common-law rules, anyone who performs services for you is generally your employee if you have the right to control what will be done and how it will be done. This is so even when you give the employee freedom of action."

17. IRS publication 963 states that "Many times, when workers perform their tasks satisfactorily, the entity does not appear to exercise much control. The critical question, however, is whether there is a **right to control**. If the entity has the right to do so, it is not necessary that it actually direct and control the manner in which the services are performed." (emphasis in original.) Further:

The nature of the worker's occupation affects the degree of direction and control necessary to determine worker status. Highly-trained professionals such as doctors, accountants, lawyers, engineers, or computer specialists may require very

little, if any, instruction on how to perform their specific services.

Attorneys, doctors, and other professionals can, however, be employees. In such cases, the entity may not train the individuals or tell them how to practice their professions, but may retain other kinds of control, such as requiring work to be done at government offices, controlling scheduling, holidays, vacations, and other conditions of employment.

## **Evaluation**

### **AN UNUSUAL CONFLUENCE OF FACTS**

18. This case involves an unusual if not unique confluence of facts. First, it involves the status of an individual whose (purported) employer is a public entity.<sup>21</sup>

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<sup>21</sup> The relatively few reported cases include: *State of California ex rel. Department of the California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002 (tow truck driver); *Bowman v. Wyatt, Jr.* (2010) 186 Cal.App.4th 286 (dump truck driver); *Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195 (peace officer); *Service Employees International Union, Local 434 v. County of Los Angeles* (1990) 225 Cal.App.3d 761 (home care workers); *In-Home Supportive Services v. Workers' Compensation Appeals Board* (1984) 152 Cal.App.3d 720 (home care worker); and *Smith v. Fall River Joint Union High School District* (1931) 118 Cal.App.673 (student who drove a school bus).

Second, it involves the status of a highly-trained professional.<sup>22</sup> Third, it involves the status of a single individual in a job category to which no other individuals belong.<sup>23</sup> Fourth, it involves a good faith agreement on the part of the asserted employee and employer as to the status of the individual in question.<sup>24</sup>

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<sup>22</sup> The relatively few reported cases include: *Arnold v. Mutual of Omaha Insurance* (2011) 202 Cal.App.4th 580 (insurance agent); *Varisco v. Gateway Science and Engineering, Inc.* (2008) 166 Cal.App.4th 1099 (construction inspector); *Garrison v. California Employment Stabilization Commission* (1944) 64 Cal.App.2d 820 (insurance agent); and *Casselman v. Hartford Accident & Indemnity Co.* (1940) 36 Cal.App.2d 700 (attorney).

Cases involving both a public entity *and* a highly-skilled professional individual are even more unusual. They include: *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446 (municipal pilot); *Greenaway v. Workmen's Compensation Appeals Board* (1969) 269 Cal.App.2d 49 (tax appraiser); and *State Compensation Ins. Fund v. Industrial Acc. Commission* (1954) 124 Cal.App.2d 1 (nurse).

<sup>23</sup> The relatively few reported cases include: *Baugh v. Rogers* (1944) 24 Cal.2d 200 (domestic worker); *Press Pub. Co. et al. v. Industrial Acc. Commission of California et al.* (1922) 190 Cal. 114 (minor who performed tasks as a cream carrier and newspaper deliverer); and *Lara v. Workers' Compensation Appeals Board* (2010) 182 Cal.App.4th 393 (gardener).

<sup>24</sup> In *Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, the parties were in agreement, at the time of the individual's appointment (though not by the time of trial!), that the individual was an independent contractor. The court considered

Even aside from these particularly unusual features, the reported cases as a whole are by their nature highly fact specific. Little benefit is to be derived from attempting to compare the particular combination of facts present in one case with those of another. One is limited to the more modest goal of drawing general principles from the reported cases and attempting to apply them to the facts in the matter to be decided.

### **PRIMARY FACTOR: RIGHT TO CONTROL**

19. It bears emphasizing that the *right* to control does not require the actual *exercise* of control. "It is not necessary that [the entity] actually direct and control the manner in which the services are performed." (IRS publication 15-A.)

Further, "highly trained professionals . . . may require very little, if any, instruction on how to perform their specific services." (*ibid.*)<sup>25</sup> Since Mr. Gregg is a

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the parties' initial agreement as a factor supporting its conclusion that the individual was not an employee.

<sup>25</sup> CalPERS cites *Singh v. 7-Eleven, Inc.*, 2007 U.S. Dist. LEXIS 16677 for the proposition that control over the manner and means of job performance must be "substantial and extensive." *Singh* is a federal district court opinion, not binding here. More important, the cited language must be viewed and understood in the context of the nature of the work performed by the asserted employees, who were unskilled, hourly workers engaged in stocking, cleaning, and related duties. CalPERS similarly cites *McDonald v. Shell Oil Company, Inc.* (1955) 44 Cal.2d 785, which addressed the status of oil rig workers. Neither of these cases involved highly-skilled professionals of the kind contemplated in IRS publication 15-A.

highly-trained professional, a proper evaluation of the right to control issue must take this fact into account.

The evidence established that the City retained substantial control over the work of Mr. Gregg. Mr. Gregg met with City Manager Kapanicas several times per month, and Mr. Kapanicas gave Mr. Gregg direction and assignments at those meetings. Over the years, Mr. Kapanicas gave Mr. Gregg assignments with regard to a number of special projects. On rare occasions, when Mr. Kapanicas needed Mr. Gregg in Beaumont on a day when Mr. Gregg planned to be elsewhere, Mr. Gregg's obligations to the City (and thus Mr. Kapanicas' request) took priority. When Mr. Gregg wanted to engage in non-City work with third parties, he had to get approval from Mr. Kapanicas. Finally, Mr. Gregg's employment was terminable by the City at will. As noted earlier, this is an important factor relative to the right to control of an individual.<sup>26</sup>

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<sup>26</sup> It has even been stated, "The very strongest evidence of an employer's control of his employee is his right to discharge him at will without cause." (*Greenaway v. Workmen's Compensation Appeals Board* (1969) 269 Cal.App.2d 49, 55.) This point should not be overemphasized, however, since it has also been observed that "a terminable at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App. 4th 580, 589.)

It is true that the above observations are based largely on the testimony of Mr. Gregg, which, CalPERS rightly notes, was "self-serving."<sup>27</sup> However, the fact that testimony is "self-serving" does not mean it is inherently suspect. Mr. Gregg's testimony was not internally inconsistent, was not inconsistent with other evidence of record, and was not inherently unreasonable. Further, the record does provide modest confirmation of Mr. Gregg's testimony concerning the right to control. This confirmation includes the statement in the risk manager job description that "direction" was to be "provided by the City Manager"; the documentation regarding Mr. Gregg's requests to engage in outside employment; and the documentation pertaining to the various special projects Mr. Gregg worked on at the direction of Mr. Kapanicas.<sup>28</sup>

### **THE SECONDARY (*TIEBERG*) FACTORS**

20. The secondary (*Tieberg*)<sup>29</sup> factors will be considered in order.

First, Mr. Gregg was engaged to some extent in a distinct occupation or business, in the sense that he provided services to entities apart from the City and

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<sup>27</sup> In fact, one could probably note that nearly all of the testimony a party provides on direct examination is "self-serving," in that it is calculated to support that party's position in the lawsuit.

<sup>28</sup> Confirmation that Mr. Gregg was terminable at will is discussed above.

<sup>29</sup> Though these factors were set forth long before in the Restatement of Agency, section 220, they will for convenience be referred to here as the *Tieberg* factors.

ERMAC during his tenure with the City. He performed "some" audit work through IRSI and "some" work for the County of Los Angeles. The extent to which he engaged in such outside activities is difficult to discern from the record. That it was not particularly extensive can perhaps be inferred from the absence of any documentation reflecting a concern on the City's part about the extent of Mr. Gregg's outside activities.

Second, the record does not reflect whether, "in the locality," the kind of occupation in which Mr. Gregg was engaged (risk management) is usually done under the direction of the principal or by a specialist without supervision.

Third, the skill level required in connection with Mr. Gregg's services to the City and ERMAC was high. Indeed, no other individual affiliated either with the City or with ERMAC was able to provide these services.

Fourth, with regard to instrumentalities, tools, and the place of work, the City provided Mr. Gregg with an email address. However, he generally used his personal email account for work-related communication. The City provided a work space (a cubicle) for Mr. Gregg. However, he spent the majority of his time away from the City offices. The record is silent as to other matters which might bear on this fourth factor (e.g., the use of a computer, the use of a City vehicle or reimbursement for mileage during times of travel on City business, the supply of business cards).

Fifth, Mr. Gregg performed services for the City for ten years, a very substantial period of time. No evidence was presented to suggest the need for periodic renewals of a contractual relationship based on either fixed time intervals or the completion of a particular project.

Sixth, the City paid Mr. Gregg a salary; the City did not pay him by the time, by the job, or by any result-oriented measurement.<sup>30</sup>

Seventh, the reported cases appear to provide very little guidance as to how to determine or define the scope of a municipality's "business." *Societa per Azioni de Navigazione Italia v. City of Los Angeles, supra*, 31 Cal.3d at 460, notes that the pilot whose employee status was at issue:

was performing the business of the City when he undertook to conduct the *Da Verrazano* to its berth within Los Angeles Harbor. The City was engaged in the propriety function of operating a pilotage service.

It would be difficult to derive any general principles from this comment. However, one may at a minimum observe that risk management seems much closer to the core of a city's operations – and is in fact (as CalPERS concedes) a necessary activity "to an agency such as Beaumont" – than is the operation of a pilotage service.

Eighth, all of the parties who were involved during Mr. Gregg's tenure with the City -- Mr. Gregg, the City, and ERMAC – believed that Mr. Gregg was an employee of the City. This factor is the clearest, the strongest, and the most unusual, relative to the typical lawsuit involving an individual's employment status. When viewed in

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<sup>30</sup> Mr. Gregg's salary was determined primarily by reference to pooled ERMAC premiums. But there was no indication in the record that he received any commissions. He was not an insurance agent.

comparison with the other secondary factors discussed above, this one seems particularly significant.

### **ADDITIONAL FACTORS**

21. *Tieberg* does not explicitly limit the factors that may be considered in determining an individual's employment status to those enumerated in that decision. Especially since the application of the *Tieberg* factors in the present case does not on the whole yield the level of clarity for which one might hope, it seems appropriate to evaluate the evidence as a whole in a more flexible way that seeks to derive indicia of employee (or non-employee) status from the entirety of the evidence that presents itself for fruitful consideration.

### **Source of Mr. Gregg's salary**

One such area is the source of funds for Mr. Gregg's salary. Ironically, this is one matter about which the parties are in agreement: they both contend that the source of funds is irrelevant. However, their contentions are based primarily on the point that the source of funds is not itself dispositive. Certainly that is correct. However, that the source of funds is not *dispositive* does not imply that it is not *relevant*. The fact that the City paid *any* portion of Mr. Gregg's salary established that he spent time in service to the City.

### **The Parties' Motivation, Purpose, and Intent**

22. CalPERS has repeatedly emphasized that the nature of Mr. Gregg's service as ERMAC's General Manager was the same before, during, and after the period of his asserted employment with the City. CalPERS also characterized the arrangement between Mr. Gregg, the City, and ERMAC as one in which ERMAC

"outsourced its human resources function so that Gregg could have [CalPERS] benefits." CalPERS also referred to the "illusory nature of Gregg's alleged employment." These assertions suggest an underlying, unstated issue as to whether the motivation, purpose, and intent of Mr. Gregg, the City, and ERMAC in fashioning the arrangement under which Mr. Gregg worked during the service period is relevant to a determination of Mr. Gregg's status during that period.

23. Several observations may be made in this connection.

First, the factual context relevant to this issue is the following: Mr. Gregg's services to ERMAC remained substantially the same before, during, and after his affiliation with the City; Mr. Gregg, ERMAC, and the City all acted with the purpose and intent of making Mr. Gregg an employee of the City; this purpose and intent was motivated by Mr. Gregg's desire for membership in CalPERS; the parties sought to achieve employee status for Mr. Gregg in a manner that would not burden ERMAC with a greater financial commitment to Mr. Gregg than the Authority had taken on between 2003 to 2006; and the parties believed that the arrangement implemented pursuant to Resolution 2006-03 accomplished their purpose and intent.

Second, the evidence does not establish any purpose or intent on the part of Mr. Gregg, the City, or ERMAC to create a sham employment relationship, i.e., to create the false impression that Mr. Gregg was an employee in order to secure for him the benefits of CalPERS membership to which they knew or suspected he was not actually entitled. Instead, the parties sought to create a genuine employer-employee relationship between Mr. Gregg and the City. Whether they succeeded may be – and certainly has been – vigorously contested. But, the intent was to make Mr. Gregg an actual employee, not to avoid making him one. And this intent was carried out via

ERMAC board meetings, Resolution 2006-03, and the requirement that Mr. Gregg complete a City employee application, among other things.

Third, and ultimately, the fact that Mr. Gregg, the City, and ERMAC were all motivated by a desire to secure CalPERS membership for Mr. Gregg sheds no light on whether or not they were successful in doing so. The nature of Mr. Gregg's relationship with the City – not the motivation for creating that relationship – is the issue to be decided.

### **The incidents of Mr. Gregg's employee status and the irregularities relating thereto**

24. In support of its contention that Mr. Gregg was not an employee of the City, CalPERS cites a number of irregularities that CalPERS asserts demonstrates the illusory nature of the alleged employment relationship. These asserted irregularities include the fact that Mr. Gregg authored the risk manager job description, which did not describe his relationship to ERMAC or his duties as ERMAC's General Manager; that Mr. Gregg's actual starting salary was substantially higher than that indicated in the job announcement; that on-site attendance was not required of Mr. Gregg, despite language in the Employee Handbook that attendance was mandatory; and that Mr. Gregg omitted mention of ERMAC, his General Manager duties, and his IRSI affiliation in his job application. CalPERS also contends that the City's financial records (in particular certain spreadsheets) do not reflect deductions for federal and state income tax withholding, Medicare and CalPERS contributions "from the purported Beaumont portion of Gregg's salary."

CalPERS raises legitimate questions in connection with these matters. Irregularities do exist. However, viewed in the context of the record as a whole, they

are not as significant as CalPERS contends. For example, the kinds of attendance requirements prescribed in the Handbook (and the use in the Handbook of such terms as "optimal productivity," "work shift," and "absences and tardiness") seem to assume employment in lower-skilled work typically performed by non-salaried employees. They seem not to contemplate highly-trained professionals such as Mr. Gregg. With regard to the risk manager job description and Mr. Gregg's employment application, the noted discrepancies tend to underscore the undisputed fact that the position was created specifically for Mr. Gregg. That the risk manager position was created for him does not, however, shed light on whether the working conditions of that position made him an employee. It also does not seem surprising or significant that Mr. Gregg's relationship with ERMAC and his duties as ERMAC's General Manager were not mentioned.<sup>31</sup> With regard to the financial spreadsheets, and as noted earlier, these are difficult to interpret, and no one with actual, detailed knowledge as to their preparation and what they meant was called to testify. The significance of the spreadsheets with regard to the precise nature of Mr. Gregg's compensation is thus not clear. As such, no conclusions can be drawn from those documents.

Another irregularity – one that neither party raised – is that Mr. Gregg's status with the City was terminable at will, whereas the City's Employee Handbook appears to assume (because it only addresses) termination for cause.<sup>32</sup> However, the potential

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<sup>31</sup> Potentially, if the record supported a claim that Mr. Gregg's asserted employment with the City was a complete sham, then these omissions might perhaps be more of a concern. The record does not support such a claim, however.

<sup>32</sup> The corollary to this point is that the Handbook provides for a probationary period, whereas Mr. Gregg was not subject to such a provision.

significance of this inconsistency must be balanced against the general principle that termination at will is generally a strong indication of employee status. Mr. Gregg's at will status thus cuts both ways, and it is not a clear factor in one direction or the other.

25. Ultimately, the various irregularities regarding Mr. Gregg's relationship with the City present a modest – but only a modest – concern. Further, these irregularities must be viewed in the context of and weighed against the many regular incidents of employee status that the record also establishes. These include that Mr. Gregg submitted a standard City employment application; that he was fingerprinted at the outset of his employment; that he signed a written waiver of health insurance; that he was given and signed for the Employee Handbook; that the City maintained a personnel file for him; that the City issued checks to him accompanied by regular City pay stubs; that the City deducted federal and state income tax withholding, Medicare and CalPERS contributions; that the City kept track of his vacation and leave; that the City issued W-2 forms to him each year; that he submitted requests for outside employment; and that he submitted a resignation letter.

26. In addition, the evidence established that the City's assignment of Mr. Gregg to ERMAC to act as the Authority's General Manager was consistent with the

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There is an alternative to viewing the Handbook as evidence of an irregularity (or inconsistency) between Mr. Gregg's actual employment conditions and those applicable to other employees. The Handbook could instead be viewed as evidence that Mr. Gregg was in fact *not* terminable at will. As explained earlier, the evidence as a whole does not support this view. But, if the termination for cause provision of the Handbook was found applicable to Mr. Gregg, the very applicability of the Handbook to Mr. Gregg would constitute evidence that he was in fact an employee of the City.

terms of the joint powers agreement; consistent with a typical practice of small JPAs; and consistent with Government Code sections 6504 and 6506.

27. The regular incidents of Mr. Gregg's status as an employee are numerous, varied, and robust. They outweigh the several irregularities that also certainly existed.

### **THE INDEPENDENT AUDIT**

28. A final point to consider is the significance of the independent audit. Certainly this document reflects the findings and opinions of the entity – a C.P.A. firm – that conducted the audit. However, the document is accorded very little weight. First, the audit does not state in detail all the matters on which its conclusions are based. For example, it does not identify the "City staff" who were contacted. It also does not state precisely what these staff members said, but instead provides only summary or conclusory interpretations of whatever statements staff actually made (e.g., "City staff were unable [*sic*] provide evidence that this individual was a full-time employee of the City"). Second, the audit was based on information of doubtful relevance or significance. For example, the audit states, "We found no indication that the 'Risk Manager' position is an authorized position . . . established and approved by the City Council." However, the evidence did not establish that City Council approval was required.<sup>33</sup> Third, the audit apparently did not consider a great deal of the evidence

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<sup>33</sup> On the contrary, according to Kari Mendoza, the City's Human Resources Support Services Director, "The City Manager per City Council – has hiring privileges – therefore I cannot locate any minutes of approval regarding [Mr. Gregg's] employment."

(including most of the evidence considered in this proceeding) that is relevant to a determination of Mr. Gregg's status. It is especially of note that Mr. Gregg was not himself interviewed in connection with the audit. Fourth, the audit does not identify the legal basis on which it concluded that Mr. Gregg was not an employee, and it therefore cannot be determined whether the audit applied (much less applied correctly) the legal principles applicable to this determination.

Ultimately, the undersigned is charged with making a determination in this proceeding, based on the evidence presented in this proceeding, and by reference to the law applicable to the facts as found in this proceeding.

### **Ultimate Legal Conclusion**

29. For the foregoing reasons, in light of the evidence as a whole, the facts found on the basis of the evidence, and the legal principles to which those facts must be applied, it is concluded that Mr. Gregg was an employee of the City at all times during the service period, from July 1, 2006, through June 30, 2015. As such he was eligible for membership in CalPERS during the entire service period.<sup>34</sup>

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<sup>34</sup> In light of this conclusion, it is not necessary to address Mr. Gregg's second contention that CalPERS is estopped to deny his eligibility for membership during the period in question.

## ORDER

1. The appeal by James J. Gregg of the September 21, 2017, final determination that he was not eligible for membership in CalPERS during the service period from July 1, 2006, through June 30, 2015, is granted.
2. CalPERS shall reverse its final determination that Mr. Gregg was not eligible for membership in CalPERS during the service period.
3. CalPERS shall retroactively provide Mr. Gregg with all of the retirement benefits to which he was entitled by virtue of his membership in CalPERS during the service period.
4. CalPERS shall undertake all actions necessary to effectuate this decision.

DATE: August 19, 2019

DocuSigned by:  
*Donald P. Cole*  
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DONALD COLE

Administrative Law Judge  
Office of Administrative Hearings