

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO REMAND THE PROPOSED DECISION

Introduction

In 2003, Respondent James Gregg (Gregg) helped form a new risk management joint powers authority, the Exclusive Risk Management Authority of California (ERMAC). He served as its General Manager from 2003 until 2017. ERMAC has never been a CalPERS participating agency, though all of its member agencies, including Respondent City of Beaumont (City), are. In 2005, Gregg devised a plan to obtain CalPERS benefits by creating a job for himself with the City and having ERMAC reimburse it for his salary and benefits, even though he continued working for ERMAC. This case is about whether Gregg was truly a City employee, thus entitling him to CalPERS benefits, or whether he was really an independent contractor, in which case he would not be entitled to CalPERS benefits. Staff recommends that the Board remand the case for the taking of more evidence on this issue.

Factual Background

Gregg started working at ERMAC in 2003 as its General Manager. He decided he wanted CalPERS benefits in 2005. Shortly thereafter, ERMAC adopted a resolution providing that one of its member agencies, the City of Beaumont, would pay for and administer Gregg's employment as ERMAC's General Manager. The resolution established Gregg's salary and benefits as ERMAC's General Manager and provided that ERMAC would fully reimburse Beaumont for that compensation.

Following ERMAC's adoption of this resolution, Gregg drafted a job description for a new "Risk Manager" job at the City. The description omitted any mention of duties as ERMAC's General Manager. Gregg then applied for this position and was hired in early 2006 without an interview.

Once "hired" by the City, Gregg continued serving simultaneously as ERMAC's General Manager. Gregg also ran his own risk management consulting firm, providing risk management services to various public agencies as an independent contractor. From 2006 until he retired from Beaumont's "employ" in 2015, Gregg spent most of his time working for ERMAC, and ERMAC reimbursed Beaumont for all of Gregg's salary and benefits.

Gregg service retired from the City in 2015 and CalPERS has been sending Gregg a retirement warrant since then. In addition to Gregg's disputed service with the City, Gregg is also a vested CalPERS member from his previous employment with the City of Gardena. Gregg retired from ERMAC in 2017.

Procedural Background

In 2017, CalPERS received an ethics complaint related to Gregg's time at the City of Beaumont. The complaint included a 2015 audit from the City that had been prepared by an independent firm. The audit indicated that: 1) Gregg had not been a full-time

employee of the City; 2) ERMAC had fully reimbursed the City for Gregg's salary (which had risen to \$233,000); 3) there was no indication that the City had ever authorized Gregg's Risk Manager position; and (4) that Gregg had worked at most one or two days a week for the City.

Upon receiving the ethics complaint, CalPERS investigated it and determined that Gregg had never been a true employee of the City, but had instead provided services as an independent contractor. Gregg appealed this determination and exercised his right to an administrative hearing before the Office of Administrative Hearings (OAH.)

A hearing was held on December 7, 2018 and February 15, 2019. Gregg was represented by counsel. The City did not appear. On August 22, 2019, the assigned ALJ issued a Proposed Decision granting Gregg's appeal. However, for the reasons stated below, staff believes further evidence must be adduced before the Board can properly decide the case.

The Board Should Remand This Case for Further Evidence

Under Government Code section 20069, subdivision (a), "[s]tate service" means "service rendered as an employee or officer" of a contracting agency. An employee is "[a]ny person in the employ of any contracting agency." (Gov. Code, § 20028, subd. (b).) The California Supreme Court has held that the PERL's provisions concerning employment by a contracting agency incorporate the common law test for employment. (*Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500.) The common law employment test applies to this case.

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

Tieberg noted the following other factors may be taken into account:

- (a) whether or not 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 (*Id.* at p. 949.)

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

The burden of establishing an independent contractor relationship is upon the party attacking CalPERS’ determination of employment status. (*Southwest Research Institute v. Unemployment Ins. Appeals Bd.* (2000) 81 Cal.App.4th 705, 708.) Here, Gregg is attacking CalPERS’ determination, so he bears the burden to establish that he was the City’s employee and not an independent contractor.

Gregg testified at the hearing. He contended that the City always had the right to control his work. However, he also stated that nobody with the City had any idea how to control the manner and means of performing the work of the Risk Manager position.

Although Gregg said he was under the impression that the City could terminate him at will, the City’s employee handbook establishes civil service rules for employees, including a termination for cause rule that Gregg never claimed applied to him. The ability to discharge a worker at will can be strong evidence of an employer-employee relationship, but treating a worker differently than all other employees is indicative of an independent contractor relationship.

Although Gregg testified to the various projects he worked on as the City’s Risk Manager, he admitted that he rarely worked onsite at the City, working regularly instead from ERMAC’s main office in Long Beach. In addition, Gregg used his personal email for business related to the City, and when a conflict arose between his personal consulting work and his work for the City, Gregg prioritized his firm’s work.

To contest CalPERS’ assertion that ERMAC had fully reimbursed the City for Gregg’s salary, Gregg claimed that the City had paid for some of it. In support of his contention, he introduced a salary schedule that he had not produced in discovery. He also relied on an Excel spreadsheet purportedly created by the City’s finance manager to show that ERMAC had never reimbursed the City for a specified portion of his salary. Gregg claimed that about \$32,000 of each year’s pay was never reimbursed by ERMAC, but was paid solely by the City for his duties and were coded as “Admin Services.” But this finance manager had been convicted of fraud related to his duties for the City, and did not appear at the hearing to authenticate these records. Based on that evidence, it was unclear whether the City had, in fact, paid *any* of Gregg’s salary without being reimbursed by ERMAC.

The ERMAC Board President testified that he thought that Gregg was employed by the City. A City employee also testified, but had little to no knowledge of the City’s actual authority to control Gregg’s work.

Following the hearing and testimony from witnesses, the Administrative Law Judge (ALJ) issued his Proposed Decision (PD) granting Gregg’s appeal. In his PD, the ALJ relies largely on Gregg’s self-serving testimony that the City had the authority to control his work. The ALJ reasoned that the record confirms the control, as Gregg was given “permission” to engage in outside employment, was terminable at-will, and worked on several projects for the City. The ALJ also leaned heavily on the parties’ testimony

about their relationship, though the case law does not support such reliance on the parties' label. (See *S.G. Borello and Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349; "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.")

The Specific Evidence to be Adduced on Remand

The PD indicates that there was a significant dispute as to whether ERMAC reimbursed the City for *all* of Gregg's salary or whether a small portion was paid without ERMAC's reimbursement. This is an important factual issue. The salary schedule Gregg relied on was never produced in pre-hearing discovery, and CalPERS first learned of it on the second day of hearing. Gregg also relied on a spreadsheet, provided just before the second day of hearing, that had purportedly been created by the City's finance manager who had been convicted of fraud related to his official duties. CalPERS had no opportunity to investigate the veracity and authenticity of these documents, and therefore further documentary and testimonial evidence concerning them is necessary to determine the actual source of Gregg's compensation. In short, determining the actual source of the funds is an important factor in determining whether Gregg was, in fact, a sham employee of the City.

Under the common law control test, the ability of the employer to control the worker is the most important factor. Courts often state that the ability to discharge someone without cause is strong evidence showing control. The PD finds that the City could have terminated Gregg at any time without cause. However, the PD also finds that the City's employee handbook provided that employees could generally only be terminated for cause. So, Gregg's alleged at-will status was markedly different from the City's actual employees, who could only be terminated for cause after being afforded due process rights. Further evidence pertaining to the termination terms applicable to Gregg is necessary to determine whether the City could, in fact, terminate Gregg without cause, and, if so, how this fact impacts the analysis.

In addition, Government Code section 87200 requires certain government employees to file Form 700 Statement of Economic Interests to disclose potential conflicts of interest. There was no evidence that Gregg had filed such a form. Remand would afford an opportunity to determine this fact and how it too would impact the analysis.

The PD also discusses various "irregularities" regarding Gregg's relationship with the City. (Proposed Decision, Page 46, paragraph 24.) These irregularities include 1) Gregg authored the City's Risk Manager job description, which does not reference his work for ERMAC; 2) on his application for the job, Gregg did not describe his relationship to ERMAC or his duties as ERMAC's General Manager, and did not include his ERMAC work or the existence of his consulting firm; 3) Gregg's actual starting salary was \$11,650 each month versus the \$9,640 on the job listing, while the salary schedule for Gregg's purportedly reimbursed "admin services" shows a monthly salary of \$2,725.05; 4) on-site attendance was not required of Gregg, despite language in the Employee Handbook that on-site attendance was mandatory; 5) the City's financial records do not reflect deductions for federal and state income tax withholding, Medicare, or CalPERS deductions. Remand is necessary to flesh out these, and other, irregularities.

For all the reasons stated above, Staff contends that the Board should remand the case for the taking of further evidence on: 1) the referenced pay schedule; the spreadsheet purportedly authored by the City's finance manager; and the extent to which and the source of any compensation the City paid Gregg; 2) whether or not Gregg could be terminated without cause; 3) whether Gregg filed a Form 700 during his time with the City; and 4) the irregularities highlighted in the PD regarding Gregg's relationship with the City. On remand, the ALJ should also analyze the significance of this evidence in the analysis of whether Gregg was truly a City employee.

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