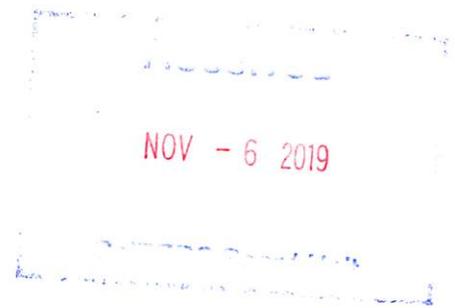


ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)

ATTACHMENT C

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9
 10 **BEFORE THE BOARD OF ADMINISTRATION**
 11 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

12 In the Matter of the Appeal of Membership
 13 Determination of:

14 JAMES J. GREGG,

15 Respondent.

16 and

17 CITY OF BEAUMONT,

18 Respondent.

Case No.: 2018-0109

OAH Case No.: 2018070551

**RESPONDENT'S ARGUMENT IN FAVOR
 OF THE HEARING OFFICER'S DECISION**

Date: November 20, 2019

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IRS Publication: Publication 15-A, Employer’s Supplemental Tax Guide6

1 **I. INTRODUCTION**

2 Respondent James Gregg hereby submits his Respondents' Argument, in which he contends
3 that the decision of the Administrative Law Judge in the above-entitled action should be adopted in
4 full. Respondent also requests that this Board designate the decision as precedential in order to provide
5 proper guidance to CalPERS' staff and its members regarding whether an employee of a contracting
6 agency who is lawfully and properly assigned to a Joint Powers Authority ("JPA") remains an
7 employee of the contracting agency such that the employee does not lose his or her membership in
8 CalPERS, as the contracting agency retains ultimate control over the employee.

9 This dispute ultimately concerns whether Gregg was an employee of Respondent City of
10 Beaumont (hereinafter "Beaumont" or "the City"), or whether Gregg's assignment by Beaumont to
11 the position of General Manager of the Exclusive Risk Management Authority of California
12 ("ERMAC"), a JPA of which Beaumont and four other CalPERS cities were members, compromised
13 Gregg's status as an employee of Beaumont despite Gregg's status as the City's Risk Manager and
14 his performance of numerous duties solely for the City. On this issue—whether Gregg was an
15 employee of Beaumont—the evidence and the ALJ's decision could not be clearer. The relevant
16 factors and tests all support the conclusion that Gregg was an employee of Beaumont because the
17 City had the right to exercise control over Gregg's employment and continued to do so throughout
18 Gregg's assignment to ERMAC. Indeed, as the ALJ recognized, the facts supporting this conclusion
19 are "essentially uncontroverted in the record" (Decision, p. 6, fn. 2), and CalPERS will be unable to
20 identify any factual errors or disputes in the ALJ's decision that would support its rejection.

21 CalPERS has set up a means to flesh out that which is proper and that which is not through its
22 administrative hearing process. In this matter, over the course of two days of testimony before an
23 independent and experienced administrative law judge, Gregg's appeal seeking the retirement that he
24 earned after nearly 40 years of working with or for local governments in California was affirmed.
25 This Board should be reticent to upset such rulings without significant concerns raised specifically
26 from the ruling, as to do so would simply allow staff to continue to harm individuals by imposing
27 significant personal costs on employees who only seek to defend their retirements.

28 Although the ALJ's decision was intensely fact-based, the implications of rejecting this

1 proposed decision would be wide-ranging and could have a disastrous effect on the ability of member
2 agencies to properly staff and operate JPAs of which those agencies are members. It cannot be
3 disputed that Gregg's assignment to ERMAC as the General Manager—a position he undertook in
4 addition to his other duties to the City as its Risk Manager—complied with state law regarding the
5 formation and staffing of JPAs and with ERMAC's own operating documents. If an assignment to a
6 JPA can jeopardize an individual's employment status with a member agency, no employee will
7 accept an assignment to a JPA. Member agencies, who rely on JPAs for a significant number of
8 municipal functions beyond insurance, such as firefighting and communications, may be unable to
9 staff those important and critical agencies.

10 Accordingly, CalPERS should adopt the decision of the ALJ to provide guidance to member
11 agencies on how to properly staff the JPAs to which they belong.

12 **II. THE FACTUAL FINDINGS OF THE ALJ**

13 The decision of the ALJ accurately sets forth the relevant facts of this case, which as the ALJ
14 noted are "essentially uncontroverted." (Decision, p. 6, fn. 2) Those facts primarily relate to the
15 duties performed by Gregg as the Risk Manager of the City of Beaumont and the facts surrounding
16 his hiring by Beaumont and assignment to ERMAC as its General Manager. The 41 factual findings
17 are based on the documentary evidence submitted in the hearing, as well as the testimony of Donald
18 White, the President and Chairman of the Board of ERMAC, Elizabeth Gibbs, the former interim and
19 acting City Manager of Beaumont, and Gregg. With the exception of determining exactly how much
20 money the City contributed to Gregg's salary and whether Gregg was an at-will employee (see
21 Finding #23, p. 21 and Finding #26, p. 22-23), there were no other factual disputes identified by the
22 ALJ, as CalPERS was unable to adduce any testimony or evidence during the hearing that would call
23 into question the central facts supporting the ALJ's decision.

24 **III. THE CLEAR EVIDENCE ESTABLISHED THAT GREGG WAS A COMMON LAW** 25 **EMPLOYEE OF THE CITY OF BEAUMONT**

26 The Supreme Court has held that CalPERS is bound by the common-law employment test, as
27 recognized by the ALJ. (See *Metropolitan Water Dist. of Southern California v. Superior Court*
28 (2004) 32 Cal.4th 491, 500.) Accordingly, CalPERS issued Circular Letter No. 200-154-04, which

1 stated that the "common law rules used by CalPERS for determining employee status" will come
2 from two IRS publications: Publication 15-A, Employer's Supplemental Tax Guide; and Publication
3 963, Federal State Reference Guide. Publication 15-A summarizes the common law requirements for
4 employment, stating: "Under common-law rules, anyone who performs services for you is generally
5 your employee if you have the right to control what will be done and how it will be done. This is so
6 even when you give the employee freedom of action." Publication 963 further stated that the right to
7 control is the "critical question", explaining: "If the entity has the right to do so, it is not necessary
8 that it actually direct and control the manner in which the services are performed."

9 IRS Publication 963 then addressed how the nature of the occupation affects the degree of
10 control, advising:

11 The nature of the worker's occupation affects the degree of direction and control
12 necessary to determine worker status. Highly-trained professionals such as doctors,
13 accountants, lawyers, engineers, or computer specialists may require very little, if any,
14 instruction on how to perform their specific services.

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

20 California courts have also addressed the common law elements of the employment relationship,
21 recognizing that, "[t]he principal test of an employment relationship is whether the person to whom
22 service is rendered has the right to control the manner and means of accomplishing the result
23 desired." (*Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946.) Numerous other
24 secondary factors should also be considered:

25 Strong evidence in support of an employment relationship is the right to discharge at
26 will, without cause. (Citations.) Other factors to be taken into consideration are (a)
27 whether or not the one performing services is engaged in a distinct occupation or
28 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.

1 (*Id.* at 949; see also *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48
2 Cal.3d 341, 350–51.)

3 The ALJ’s decision thoroughly assesses these factors over the course of five pages, ultimately
4 determining that Gregg was an employee of Beaumont because the City had the right to control
5 Gregg’s employment. Indeed, there is no evidence that could contravene the findings and conclusions
6 of the ALJ that the City “retained substantial control over the work of Mr. Gregg” (Decision, p. 40)
7 through meetings with the City Manager and direct assignments to work on tasks and projects
8 specific to the City that did not relate to Gregg’s duties with ERMAC.

9 The ALJ also weighed the secondary *Tieberg* factors, concluding that those factors supported
10 his conclusion regarding Gregg’s employment status. As he noted, the skill level required in
11 connection with Gregg’s work was high, the City provided certain instrumentalities for his position,
12 Gregg filled that position for ten years, Gregg received a salary from the City and he was not paid by
13 the job or by any result-oriented measurement, risk management is a core function of municipal
14 governments, and all involved believed that Gregg was an employee of the City.

15 The ALJ also addressed concerns raised by CalPERS, including the source of Gregg’s salary
16 and certain alleged “irregularities” with Gregg’s employment. Yet as CalPERS itself has recognized
17 in Circular Letter No. 200-154-04, the source of funds for Gregg’s salary is immaterial in
18 determining whether he was an employee for the purposes of membership in CalPERS because of the
19 Supreme Court’s decision in *Metropolitan Water Dist., supra*, 32 Cal.4th 501-02. Moreover, because
20 the evidence established that the City contributed to Gregg’s salary separate from any reimbursement
21 from ERMAC, the consideration of this factor would only support Gregg’s contention that he was an
22 employee of the City. As the ALJ also recognized, any clerical “irregularity” relating to Gregg’s
23 employment with the City, such as the lower salary listed in the job posting for the Risk Manager
24 position prior to Gregg’s actual offer of employment or the apparent contradiction between Gregg’s
25 at-will employment and the provisions in the City’s Manual, must be outweighed by the evidence
26 establishing that the City had the right to control Gregg’s employment. Indeed, these “irregularities”
27 must be contrasted with all of the *regular* incidences of employment, such as the receipt of paystubs,
28 employment application, fingerprinting, waiver of insurance, authorization for outside employment,

1 and the receipt of the Manual itself.

2 Finally, the ALJ's analysis actually understates two central and critical findings that support
3 the conclusion that Gregg was an employee of the City: first, all of the duties that Gregg performed
4 for ERMAC were ultimately at the direction of Beaumont and benefited Beaumont; and second,
5 Gregg's appointment as General Manager was in accordance with ERMAC's own documents and the
6 laws governing the creation and staffing of JPAs generally. Merely because Gregg was assigned by
7 the City to work at ERMAC does not mean that he was no longer an employee of the City. Gregg's
8 assignment to a JPA in which the City was a member was an appropriate, legal, and common method
9 of staffing JPAs. His functions and duties at ERMAC benefited the City, and he should not be denied
10 his retirement benefits because the City assigned him to ERMAC.

11 **IV. ADDITIONAL THEORIES SUPPORT THE ALJ'S PROPOSED DECISION**

12 In addition to the above assessment of the factors and evidence establishing that Gregg was
13 an employee of the City of Beaumont, additional legal theories that were not addressed by the ALJ
14 also support the ultimate conclusion that Gregg's appeal should be granted.

15 First, Gregg's assignment to ERMAC as its General Manager was in complete compliance
16 with state law and ERMAC's governing documents. If CalPERS's position is formalized such that
17 the City is determined not to have had the right to exercise sufficient control over Gregg, no
18 employee of a member agency would ever accept an appointment to a JPA that could threaten that
19 employee's retirement, even if the employee's service with that JPA would also benefit the member
20 agency. JPAs across the State may find themselves unable to staff their agencies, and important
21 governmental functions may be directly threatened. These are not idle concerns; they are the direct
22 result of a decision finding that an employee assigned by a member agency to a JPA is no longer an
23 employee of that agency. Indeed, not just the employee's retirement would be at risk; the tax
24 implications for member agencies, JPAs, and employees assigned to JPAs could be catastrophic.

25 Second, Gregg's performance of duties and tasks should not call into question his
26 employment with the City because, as the Supreme Court held in *Metropolitan Water Dist., supra*, 32
27 Cal.4th at 506, there is no "coemployment exception to a contracting agency's duty to enroll
28 employees in CalPERS."

1 Third, CalPERS should be estopped from denying Gregg his retirement. As the Court of
 2 Appeal held in *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 582-84, estoppel
 3 may be applied against CalPERS because it is in privity with the City. Here, the facts clearly support
 4 estoppel, as one of the main purposes behind Gregg becoming employed by the City was so that
 5 Gregg could be enrolled in CalPERS; the City was apprised of this intent, shared by all parties, for
 6 the City to enroll Gregg in CalPERS; Gregg did not know that he would not be eligible for
 7 enrollment in CalPERS; and Gregg relied on the representations that he would be a member in
 8 CalPERS to his detriment. These facts are all set forth in the ALJ's factual findings, thereby
 9 establishing an additional ground to adopt the ALJ's decision.

10 Finally, CalPERS' investigation in this matter was inadequate and severely prejudiced Gregg.
 11 As the ALJ stated in his final factual finding, CalPERS did not take into account the evidence Gregg
 12 that established that he performed duties specifically for the City that did not benefit ERMAC.
 13 CalPERS' initial decision was based primarily on a draft audit report, yet CalPERS never contacted
 14 anyone with the entity that conducted the audit and drafted the report. The ALJ thereafter correctly
 15 discounted this audit report, identifying four defects in the audit itself that warrant disregarding its
 16 unsupported conclusion. (Decision, p. 49-50.) CalPERS also never spoke with anyone who worked
 17 for or was on the Board of ERMAC or with Gregg himself. CalPERS' investigator, Jamila Ponnley,
 18 could not even recall if she ever spoke with the City Manager or Finance Director with the City, and
 19 there was no evidence that she did so. These deficiencies are substantial and warrant adopting the
 20 ALJ's proposed decision, which established that Gregg was a common law employee of the City.

21 **V. CONCLUSION**

22 For the above reasons, the proposed decision of the ALJ should be adopted and determined to
 23 be precedential to provide guidance to all member agencies regarding the status of employees
 24 assigned to JPAs.

25 Dated: November 6, 2019 RAINS LUCIA STERN ST. PHALLE & SILVER, PC

27 By: /s/ Brian P. Ross
 28 BRIAN P. ROSS, Esq.
 Attorneys for Respondent James J. Gregg