

**ATTACHMENT C**

**RESPONDENT(S) ARGUMENT(S)**

June 23, 2021

**BY EMAIL, EXPRESS MAIL, and FACSIMILE****Cheree.Swedensky@calpers.ca.gov**  
**(916) 795-3972**Ms. Cheree Swedensky  
Assistant to the Board  
CalPERS Executive Office  
P.O. Box 942701  
Sacramento, CA 94229**Re: *Respondent City of Palm Springs' Argument in Support of the Proposed Decision In the Matter of the Appeal of Membership Determination of Scott A. Mann and City of Palm Springs, Respondents (Ref. No 2020-0663)***  
**Client-Matter: PA026/044**

Dear Ms. Swedensky:

Respondent City of Palm Springs ("City") hereby requests that the California Public Employees' Retirement System's ("CalPERS") Board of Administration ("Board") adopt the Proposed Decision issued by Administrative Law Judge ("ALJ") Kimberly Belvedere in the above-referenced matter.

**I. INTRODUCTION**

In 2009, the City entered into a contract with consulting firm Keenan & Associates ("Keenan") for consulting services and training seminars in the areas of risk management and loss control. In 2011, Keenan subcontracted this work to Respondent Scott Mann ("Mann"), who performed the contracted work on behalf of Keenan from October 1, 2011, through April 22, 2014. In 2018, Mann filed a "Service Prior to Membership" request with CalPERS asking that CalPERS allow him to purchase additional CalPERS service credit for his work as a subcontractor.

In February 2020, CalPERS issued a determination that Mann was a City employee entitled to service credit for his service with the City. The City appealed. Despite Mann's admission in the application that he worked as an independent contractor, and despite extensive objections from the City, CalPERS granted Mann's application without question. Moreover, the record showed that CalPERS did not do a meaningful analysis, or really any analysis at all, of the common law test factors before issuing its determination that Mann served as a City employee. The ALJ correctly viewed the CalPERS determination for what it was: CalPERS accepting Mann's statements as to his employee status as true without question.

The ALJ found that the record presented overwhelming evidence that Mann was not a City employee at all, but was an independent contractor. Indeed, Mann even admitted during the hearing that he considered himself an independent contractor rather than an employee of the City. The ALJ correctly determined that Mann was not entitled to any service credit for his work as a subcontractor under the City's contract with Keenan.

This is a unique case as there is no possible doubt that the ALJ ruled correctly. The evidence was overwhelming and clearly in favor of the City. For this reason, it would be an abuse of discretion for the CalPERS Board not to adopt the ALJ decision as its own.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. The City Enters Into a Contract For Consulting Services with Keenan & Associates, Who In Turn Subcontract the Work to Mann.**

On July 1, 2009, the City entered into a Consulting Services Agreement with Keenan & Associates, a California corporation, to provide loss control and regulatory compliance services. The contract required the City to pay Keenan a lump sum for these services. (Proposed Decision ("PD") at p. 6, ¶ 11.) At the time the contract was signed, two Keenan employees were designated as the persons performing the contracted services. (PD at p. 7, ¶ 12.) Keenan later designated Mann as the person performing the contracted services, beginning October 1, 2011. After Mann ceased providing services for the City, other independent contractors continued to provide these services until the contract with Keenan expired in 2019. (PD at p. 8, ¶ 16.)

### **B. CalPERS Denies Mann's First Service Prior to Membership Request**

On July 27, 2018, Respondent Mann filed a Request for Service Credit Cost Information – Service Prior to Membership, to determine if he was entitled to CalPERS service credit for the time he performed services for the City. In the application, Mann stated that he was hired as an independent contractor, that he performed services pursuant to a contract, and that he was paid through invoices submitted to Keenan, and was not paid by the City. (PD at p. 4, ¶ 3; pp. 9-10, ¶ 18.) On October 10, 2018, CalPERS determined Mann was ineligible for service credit because his employer, Keenan, was not a CalPERS contracting agency. (PD at p. 4, ¶ 4.)

### **C. Mann Refiles His Service Prior to Membership Request; This Time, CalPERS Grants It Without Question, Despite Receiving Voluminous Contrary Evidence and Objections from the City.**

On October 16, 2018, Respondent Mann refiled the same request along with an Employment Relationship Questionnaire. CalPERS also obtained an Employment Relationship Questionnaire from the City. (PD at p. 4, ¶ 5.) On September 26, 2019, CalPERS advised both Respondents that it had reviewed the documentation provided and determined Mann was a common law employee of the City and was entitled to service credit. (PD at p. 4, ¶ 6.)

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The testimony of CalPERS' analyst Nancy Williams, who was charged with investigating Mann's request, revealed that she took each of Mann's assertions as true without any effort to verify them. (PD at p. 15, ¶ 21.)

On November 21, 2019, the City wrote a detailed response disagreeing with CalPERS' determination and asserting that Mann was an independent contractor. (PD at p. 5, ¶ 7.) Nonetheless, CalPERS adhered to its conclusion and on February 13, 2020, CalPERS notified both Respondents of its final determination that Mann was an employee of the City, was entitled to service credit, and that approximately \$11,651.23 in missing membership contributions were due to CalPERS. (PD at p. 5, ¶ 8.) The City appealed on March 12, 2020. (PD at p. 5, ¶ 9.)

#### **D. Respondent City's Appeal and Hearing Before the OAH**

The City's appeal was heard at a remote hearing before ALJ Kimberly Belvedere from the Office of Administrative Hearings on January 26, 2021. (PD at p. 1.) At the hearing, the City presented testimony from Keenan's Vice President of Loss Control Services Eric Preston and the City's Human Resources Manager Kim Hardcastle, both of whom testified that Mann was an independent contractor and to the facts that supported that characterization. (PD at pp. 10-14.) CalPERS' witness, Analyst Nancy Williams, testified that she took what Mann asserted as true without any effort or investigation to confirm whether his responses were in fact, true. (PD at pp. 14-15.) Mann testified on his own behalf and gave his account of the scope and nature of the services he performed for the City. (PD at pp. 15-18, ¶ 22.) When asked directly whether he believed he was an employee of the City, Mann answered that he did not believe he was an employee. (PD at p. 28, ¶ 23.)

Following one day of hearing and briefing from the Parties, the ALJ issued her Proposed Decision on April 13, 2021, granting the City's appeal. On April 22, 2021, CalPERS submitted an unopposed Motion to Correct a Mistake in the Proposed Decision, and the ALJ issued a revised Proposed Decision on May 17, 2021. The Proposed Decision concluded that Mann was an independent contractor and not an employee, that he is therefore not eligible for service credit, and neither the City nor Mann were responsible for any membership contributions to CalPERS for the period Mann performed services for the City. (PD at pp. 29-30.)

As corrected, the Proposed Decision accurately reflects the evidence presented at the hearing and should be adopted.

### **III. ARGUMENT**

#### **A. Burden and Standard of Proof**

The ALJ correctly determined that the preponderance of the evidence did not establish that Mann was a common law employee of the City; rather, "overwhelming" evidence established that Mann was an independent contractor. (PD at p. 19, ¶ 4; p. 24 ¶ 15.)

**B. The Determinations in the ALJ's Proposed Decision Are Correct.**

The Public Employees' Retirement Law ("PERL") governs the City's participation in CalPERS. And as the California Supreme Court explained in *Metropolitan Water District v. Superior Court (Cargill)* (2004) 32 Cal.4th 491, the PERL incorporates common law principles in its definition of who is – or is not – an employee of a contracting agency. (PD at p. 23, ¶ 13.) The ALJ correctly determined that Mann was an independent contractor for the entire period of time he provided consulting services to the City and that he was therefore not eligible for service credit. (PD at p. 24, ¶ 15.)

Under the common law employment test, the most important factor is whether the principal has the right to control the manner and means by which the worker accomplishes the result desired. (*Empire Star Mines Co. v. California Employment Commission* (1946) 28 Cal.2d 33, 43.) Other relevant factors include whether the person providing the services is engaged in a distinct occupation or business; 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; the amount of skill required to perform the services; which party provides the instrumentalities, tools, and place of work; the length of time for which the services are to be performed; the method of payment, whether by the time or by the job; whether the services provided are normally part of the principal's regular business; and the parties' subjective intent regarding the nature of their relationship. (*Id.* at 43-44; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946-947.)

The ALJ correctly determined that these factors supported the conclusion that Mann was an independent contractor (PD at p. 24, ¶ 15):

- No objective evidence showed that the City directed or controlled Mann's work. Mann himself testified that the City merely gave him assignments to complete with an expected completion date, and that he independently determined how best to produce the expected work product. And no objective evidence showed that Mann was required to do any work outside the scope of the City's contract with Keenan. (PD at pp. 24-25, ¶ 16.) The City also had no direct authority to terminate Mann. (PD at p. 25, ¶ 17.)
- The City did not pay Mann for any services provided. Mann invoiced Keenan on a monthly basis, who paid him for his work. The City had no authority to determine the number of hours Mann worked, the hourly rate he was paid, or the manner and method in which he was paid. The City paid Keenan an annual lump sum that did not affect, and was not affected by, the compensation Keenan paid to Mann or the number of hours he worked. (PD at pp. 25-26, ¶ 18.)

- The City provided Mann with access to its facilities, a communal office, and a generic email address that was also used by other contractors. No evidence was presented to indicate Mann was required to use these facilities or required to work on-site. (PD at p. 26, ¶ 19.)
- Mann performed services only for a limited period of time within the ten-year period that the City contracted with Keenan for services. (PD at p. 27, ¶ 20.)
- Mann's services were not part of the City's regular business, as he did not provide municipal services or assist the City in doing so. Rather, Mann's services in loss control and regulatory compliance consulting were incidental to the City's regular business. (PD at p. 27, ¶ 21.)
- The City did not hire Mann. The City contracted for independent consulting services from Keenan, and had no input in Keenan's decision to select Mann as a subcontractor. (PD at pp. 27-28, ¶ 22.)
- Mann's own statements and conduct demonstrated that he was not a City employee. He identified himself as an independent contractor on the employment relationship questionnaire he submitted to CalPERS. (PD at pp. 27-28, ¶ 22.) He took on full-time employment of another CalPERS member agency during the time he provided services to the City. (PD at p. 28, ¶ 22.) He had previously been a CalPERS member before cashing out his CalPERS account in 2011, yet never questioned why no one was making contributions on his behalf. (PD at p. 28, ¶ 23.) And when directly asked at the hearing whether he believed he was an employee of the City, Mann answered that he did not believe he was an employee. (PD at p. 28, ¶ 23.)

In light of the above, the ALJ correctly determined that Mann was not a City employee and was not entitled to membership service credit. (PD at p. 29, ¶¶ 25-27.) For this reason, the Board should adopt the ALJ's decision as its own.

**C. The Board Should Not Make a Decision on Whether Its Final Decision is Precedential.**

Government Code section 11425.60 confers upon the Board the authority to designate a decision as precedential. In determining whether to designate a decision as precedential, the Board considers whether the decision "contains a significant legal or policy determination of general application that is likely to recur, and also contains a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied." (Mar. 19, 1997 Resolution of the Board Adopting a Policy Designating an Appeal as Precedential.)

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At the time of writing, it is the City's understanding that CalPERS's staff will be recommending that the ALJ's proposed decision be adopted as the decision of the Board. However, CalPERS has not indicated to the City what CalPERS staff's ultimate position will be on whether the Board's final decision should be designated as precedential. Given this uncertainty, the City requests that if the Board were inclined to make its final decision precedential, the parties be given a chance to present short briefing solely on that issue.

The City's current position is that regardless of the direction of the CalPERS Board's final decision, this case is not appropriate for precedential status as it is based primarily on its specific facts. It does not present significant legal or policy questions. However, the Parties should be allowed to brief that issue if it does become relevant.

#### **IV. CONCLUSION**

For the foregoing reasons, the City requests that the Board adopt the Proposed Decision in this matter as the decision of the Board. However, whether or not the Board adopts the Proposed Decision, the City requests that the Board decline to designate the ultimate decision in this matter as precedential, or allow the Parties the opportunity to provide additional briefing on this issue.

Sincerely,

LIEBERT CASSIDY WHITMORE



Steven M. Berliner

Lars T. Reed

SMB:LTR:ls

June 24, 2021

**BY E-MAIL**

[REDACTED]

Ms. Cheree Swedensky  
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P.O. Box 942701  
Sacramento, CA 94229

**Re: Respondent Scott Alan Mann - Opposing the Proposed Decision in the Matter of the Appeal of Membership Determination of Scott A. Mann and the City of Palm Springs, Reference #2020-0663**

Dear Ms. Swedensky,

I hereby request that the California Public Employees' Retirement System's (CalPERS) Board of Administration (Board) reject the Proposed Decision issued by Administrative Law Judge (ALJ) Kimberly Belvedere and uphold the membership determination issued by CalPERS on September 26, 2019.

In CalPERS' membership determination, it was concluded that the City of Palm Springs had common law control over what, how, when, and where to perform services that I provided to the City. The following was determined by CalPERS:

- The position I held as a Risk Consultant was previously performed by a City employee and was an integral part of the City's normal operations.
- The City had the authority to control and review the services I provided.
- I was paid by the hour, not by the job for an on-going period of time.
- I personally performed these services for the City as no subcontracting occurred during this timeframe.
- I reported to the City Manager, City Attorney, Finance Director, and Human Resources Director.
- There was a continuous relationship between me and the City rather than a one-time transaction.
- I was required to attend City meetings; for example, City Council meeting for which my work products relating to the City's Injury and Illness Prevention Program (IIPP) was being considered and was adopted.
- The City furnished me with an office, office supplies, City badge, and a City issued e-mail address need to perform these services.
- I continued to perform this work longer than my contract with the City stated.

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- The City was dependent upon my services as the scope of work continued to grow as a result of my on-going relationship with the City.
- I was an authorized representative for the City in matters specifically related to my scope of work and other matters.
- The service agreement confirmed that oversaw specific City business operations.
- Either the City or I with proper notice could terminate the relationship at any time.

As result of the foregoing, and in consideration of the evidence presented by me and the City of Palm Springs, it was determined that my service as an employee was subject to the membership rules under GC 20305 and, thus, CalPERS approved my membership for service with the City for the period October 11, 2011 to December 3, 2012. Therefore, I request that the Board reject the ALJ's proposed decision and uphold, and approve, my membership as determined by CalPERS on September 26, 2019.

In forwarding this correspondence for the Board's consideration, I do not request that the Board's decision in this matter be precedential.

Sincerely,



Scott A. Mann, MBA, CBO, ARM  
Risk Manager  
City of Sunnyvale



Scott A. Mann



Copy to:

Mr. Charles Glauberman, Counsel for CalPERS

Mr. Steve Berliner, Counsel for Respondent City of Palm Springs