

ATTACHMENT C

RESPONDENTS ARGUMENTS

LAW OFFICES OF
SCOTT N. KIVEL

scottkivel@kivellaw.com

3558 ROUND BARN BOULEVARD, SUITE 200
SANTA ROSA, CALIFORNIA 95403
TELEPHONE: 707.971.5166
FACSIMILE: 800.974.0422
October 27, 2021

RECEIVED

OCT 29 2021

CalPERS Legal Office

CalPERS Board of Administration
Lincoln Plaza North
400 Q Street
Sacramento, CA 95811

VIA FEDERAL EXPRESS ONLY

Re: In the Matter of the Appeal of Membership Determination of Tarlochan Sandhu, City of Capitola, City of Alameda, Town of Los Altos Hills, City of Union City, Respondents (OAH Case No. 2020100708)

Respondent Tarlochan Sandhu's Argument to *Reject* the ALJ Decision

I. INTRODUCTION

This appeal identifies the key issues demonstrating the fundamental flaws in the Administrative Law Judge's ("ALJ") proposed decision in which the ALJ found that the individual Respondent was a common law employee of the City, rather than of the third-party employer, Regional Government Services. Thus, this decision should be rejected, particularly when viewed within the context of this Board's failure (1) to exercise its statutory authority to define lawful third party independent contractors; (2) to define material terms in the CalPERS Employer Relationship Questionnaire; and (3) this Board's continuing failure to define its working law defining "employee" given its 2008 notice of proposed regulation where this Board cancelled the public hearing on the proposed regulation just days before it was scheduled. *The case before this Board involves a third party employer, a public joint powers agency, Regional Government Services ("RGS") which contracted with the Respondent City to provide RGS Advisors for time-limited, high level professional services for time-sensitive and immediate work required by the City.*

II. THE CALPERS BOARD SHOULD REJECT THE PROPOSED DECISION.

The ALJ's decision is fatally flawed in that it:

(1) fails, in light of the factual record, to correctly or even adequately analyze the common law control test indicia. For example, the ALJ opined in these five related cases that the city manager's intent was irrelevant, despite the city manager operating under general law and municipal code authority as the representative of the City;

(2) misapplies the well-settled law to the undisputed and consistent testimony by the individual Respondent and the City officials, and the documentary evidence,

BAR ADMISSIONS:

UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS: DISTRICT OF COLUMBIA, NINTH AND TENTH CIRCUITS • ALL CALIFORNIA FEDERAL AND STATE COURTS

that the City Respondent and its employees never controlled, supervised, or exercised direction over the manner and means of the work assigned by the City-Regional Government Services contract;

(3) imposes, without authority to do so, a new and wholly legally unsupported standard of common law control by concluding that if an individual *performs any service that was part of a City position, even if vacant, then that individual must be reported as a common law employee*;¹

(4) ignores that the assigned work under the RGS-City contract was for time-sensitive, specific assignments that were required by the City, through a services contract whereby the City could terminate the contract, but not the individual RGS advisor;

(5) ignores the testimony and documentary evidence such as the parties' agreement that RGS was the employer and the City had no independent control as explicitly provided for in the terms of RGS employment agreements and as testified to that RGS Advisors such as this individual Respondent were expected to, and often in fact did, work for *multiple RGS client agencies, at times concurrently*, one of the basic characteristics of an independent contractor;²

(6) rejects the well-settled judicial obligation to harmonize relevant law, by example, ignoring the well-settled statutory authority given by the Legislature to general law cities to contract for special services as the local jurisdiction deems necessary to fulfill its service delivery obligations;^{3,4}

¹ Despite the ALJ's lack of authority to establish new law, the ALJ opined that Respondent was hired for the specific purpose of performing *some* of the duties of a vacant position while the entity recruited a permanent employee, and no one else performed those duties. In the ALJ's misguided and untenable view, the above automatically made Respondent a common law employee of the City.

² The ALJ concluded, without adequate evidentiary basis, that evidence established that the City possessed the right and exercised that right to control the way Respondent performed his duties. The ALJ also incorrectly interpreted the undisputed evidence by concluding that notwithstanding language in RGS's contracts with the City to the contrary, the City had the right to terminate Respondent's employment with them by canceling their contracts. The false premise of the ALJ's analysis is shown by the fact that a City may cancel a contract with any independent contractor; that right in no way demonstrates "the right to terminate the worker" which is the hallmark of the common-law control test.

³ The Legislature's grant of statutory authority to cities is indisputable. As just one example, Government Code section 37103 is explicit in conveying powers:

The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal or administrative matters.

⁴ CalPERS conceded that it has failed to adopt any regulation regarding a City hiring outside consultants: Q: "Does CalPERS have any policy of prohibiting a City from hiring a consultant to perform certain

(7) ignores that CalPERS “Employer Relationship Questionnaire” fails to define material terms such as “control,” “supervision,” and “reporting.” CalPERS failure to define these critical terms underscores how it operates on “underground regulations” for which no penalty may be imposed;

(8) attaches credibility to the testimony of CalPERS sole witness despite that her testimony was infected with generalities, contradictory statements and a consistent failure to identify specific evidence supporting the adverse determination by CalPERS;

(9) elevates “form” over substance by giving undue importance to infrequent and erroneous documents describing the individual by a position title;⁵

(10) myopically disregards the overwhelming indicia of employment by Regional Government Services to singularly focus on Respondent City’s indicia of employment; indisputably CalPERS has failed to define lawful third party independent contractor status as there are no defining regulations and the plethora of CalPERS publications are silent; and

(11) improperly rejected Respondents’ repeated attempts to compel CalPERS to identify its “working law” as to third party independent contractor relationships, including but not limited to this Board’s adopted administrative law judge decisions that demonstrate contrary factual and legal conclusions which contradict the instant proposed decision. Indeed, CalPERS own training materials instruct staff to the exact opposite conclusion as to valid third-party employment, yet another relevant and probative exhibit ruled inadmissible by the ALJ.

Given these fundamental errors, the proposed decision lacks all credibility and constitutes an unpersuasive recitation of facts that blindly gives undue deference to CalPERS staff determinations.

III. WITHOUT ANY BASIS IN THE LAW, THE ALJ DISREGARDED RGS’ INDICIA OF CONTROL AS RESPONDENT’S EMPLOYER.

Indisputably “control” is the most critical indicia of common law employment: “In determining whether one who performs services for another is an employee or an independent

finance activities?” A: “No.” 3/25/2021, 400:10-13. Q: “Is there any CalPERS prohibition on a City hiring a consultant to do certain financial work?” A: “No.” *Id.*, 432:17-19.

⁵ Again, without giving due weight to the consistent evidence of intent by Respondent’s witnesses, the ALJ nonetheless reached an incorrect conclusion that the City “retained [Respondent] for the express purpose of performing the duties of a specific position was the most compelling evidence of their intent.” This is nothing more than a conclusory statement by the ALJ and contrary to the administrative evidentiary record.

contractor, the most important factor is the right to control the manner and means of accomplishing the result desired.” *Tieberg v. Unemployment Ins. Appeals Bd.* (1970) 2 Cal.3d 943, 949, quoting *Empire Star Mines Co. v. California Emp. Comm.* (1946) 28 Cal.2d 33, 43. And see *Empire Star Mines Co., supra*, at 43, where the Court observed that “strong evidence in support of an employment relationship is the right to discharge at will, without cause.” Here, there is no evidence showing that the City held the right to discharge; indeed, to the contrary, only RGS possessed this right. City manager testimony consistently stated that if dissatisfied with the Advisor’s performance, the City’s remedy was provided for in the RGS-City contracts, that being either terminating the RGS contract or requesting a substitute advisor.

In addition to the consistent testimony by all of Respondent’s witnesses, and memorialized by the RGS-City contracts and the RGS-individual employment agreements which expressly state that the advisor is an at-will employee of RGS and not subject to the City’s authority, it is unambiguous that the Respondent City did not control or have the right to control the manner and means of the RGS advisors’ work. See e.g. *Tieberg, supra*, at 947: “[I]f 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.” CalPERS simply has not identified specific evidence showing that the cities controlled or had the right to control the individual Respondents’ assigned work.

Moreover, as explicitly provided for in the terms of RGS Advisor employment agreements, the right and expectation of working for *multiple clients, at times concurrently*, also constitutes a basic characteristic of an independent contractor.⁶

IV. FACTS SHOWING RESPONDENT’S STATUS AND ASSIGNMENTS.

Respondent SANDHU was assigned by RGS to the following RGS client agencies where he performed specific financial services for a finite period of time, including (1) *concurrently* at CAPITOLA and ALAMEDA and (2) *concurrently* at UNION CITY and LOS ALTOS.

RGS documented SANDHU’s myriad assignments, including pay rates and job titles, through RGS “Personnel Action Forms.” Ex. 68 (“Home Program: RGS and City of CAPITOLA and other assignments” and “[RGS] Position Title: Advisor”; & “Effective 4/6/15, new assignment with the Town of LOS ALTOS at pay rate of \$60/hr.”); Ex. 71 (“Effective 6/28/15 new assignment with the City of ALAMEDA at pay rate of \$70/hr.”); Ex. 72 (“Effective 10/1/15, new assignment with UNION CITY at pay rate of \$75/hr.”); Ex.76 (“Effective 1/28/16, UNION CITY pay rate of \$85/hr.”); Ex.77 (“Effective 3/16/16: Job Title change to Senior Advisor.”

⁶ CalPERS has previously recognized that a JPA providing consulting services to public agencies does not do violence to the PERL. See e.g. *Chandler and Cooperative Personnel Services* (2011) OAH No. N-2009100248. There the individual was found to be employed by CPS, a joint powers agency and CalPERS employer. CPS provided human resource and management services, including “sophisticated consulting services,” to public entities and non-profit agencies. *Id.*, at ¶ 2. *There is simply no meaningful difference between the Board-adopted Chandler decision and the indicia of RGS control.*

RGS paid SANDHU pursuant to a RGS salary schedule. Ex. 66. RGS provided him with government required training. Ex. 69. RGS documented SANDHU's time by using RGS time and attendance systems. Exs. 15, 70, 74 & 79. RGS provided him with a RGS business card. Ex. 78. SANDHU acknowledged that he was subject to RGS Personnel Rules and Regulations. Ex. 82.

A. CAPITOLA: CAPITOLA's Employment Relationship Questionnaire stated he was an independent contractor. Ex. 16, p. 1; p. 3, Nos. 10-12. He testified that his assignment, working closely with the City manager, was "helping the City to prepare their annual operating and capital budget, the revenue forecast, and expenditure forecast." 03/24/2021, 236:9-17.

He did not perform the duties of finance director found at Ex. 9. He did not plan, supervise or coordinate the City's fiscal and accounting activities; he did not select, train, evaluate and supervise City staff; he did not prepare or supervise preparation of the City's annual financial reports or oversee its annual independent audit; he did not advise the City Treasurer on accounting and financial matters. *Id.*, 214:22-216:2; 217:4-15. City Manager Goldstein disputed the interim finance director job description as being an accurate representation of SANDHU's assignment. *Id.*, 360:4-14 & Ex. 16. Per the RGS-CAPITOLA contract there was an independent contractor relationship. Ex. 13, p. 5, § 5.1. See e.g. § 5.3: "Agency shall not have the ability to direct how services are to be performed, specify the location where services are to be performed, or establish set hours or days for performance of services, except as set forth in the Exhibits." He was *not* viewed as a City employee: "The City of CAPITOLA contracted with Regional Government Services to provide interim finance director *services*. SANDHU was the RGS employee assigned to the City." Ex. 16, p. 6, No. 40. [*Italics added.*]

B. ALAMEDA: SANDHU's assignment was limited to providing accounting services "related to the fiscal year-end close." 03/24/2021, 225:3-7. He did not perform the range of other duties enumerated in the job description. *Id.*, 224:19-227:13. As set forth in the Professional Services Agreement between RGS and ALAMEDA, SANDHU was "...to temporarily perform *functions* of the Interim Financial Services Manager position upon the terms and conditions herein." [*Italics added.*] Ex. 39, p. 1, Recital D. SANDHU was not an ALAMEDA employee: "Our agency did not hire the consultants; our agency retained RGS to provide services. RGS exercised control over all aspects of their employee's employment." *Id.*, p. 8, No. 40. "Under our contract with RGS we did not have the authority to hire, fire, discipline, promote, or make salary adjustments for the individuals assigned by RGS, as they are or were not our employees..." *Id.*, p. 12. "The end result, or work product, was identified by our agency. Although our agency personnel may offer guidance as to the end result, under the contract with RGS we believed that RGS supervised and directed the individual assigned to work with us." *Id.*, p. 5, No. 18. As to whether SANDHU was assigned a position previously held by an ALAMEDA employee, the City responded that "[n]o, the RGS consultant was not assigned to perform the full job scope of the position that had previously been performed by the City employees." *Id.*, p. 7, No. 30. "No comparable positions exist. RGS consultants performed specific work as defined by our contract with RGS and worked limited hours." *Id.*, No. 31.

C. UNION CITY: SANDHU is alleged to have been employed by UNION CITY as both its Administrative Services Director and Interim Finance Director. Ex. 1 at pp. 14-17. Yet the *only*

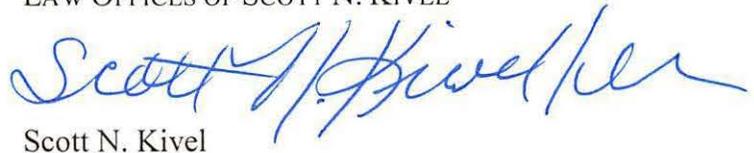
job duty SANDHU performed at UNION CITY was preparing the biannual budget and providing financial advice to City staff. *Id.*, 230:15-231:4; 231:11-232:4. “The major goal [of my assignment] was to evaluate the operating and capital budget and go through the detail of allusion [sic] of revenues and expenditures, advise the City manager whether those I believe are accurate or not.” City manager Acosta entered into a contract with RGS: “I needed a subject matter expert and experienced finance director type of person to fill in temporarily for a vacancy...” *Id.*, 406:24-407:8. Acosta testified that “I worked with him essentially treating him like a consultant.” *Id.*, 407:9-12. “No. I did not expect him or need him to perform all of the duties of a finance director...even the term interim finance director was *a term of convenience*, because we had to call him something, and that is what we called him.” *Id.*, 408:5-12.

D. LOS ALTOS HILLS: CalPERS alleges that Mr. SANDHU was the Interim Finance Manager. Ex. 1 at pp. 9-10. SANDHU worked concurrently at LOS ALTOS and ALAMEDA; he never asked permission from City Manager Cahill because he considered himself a RGS employee. *Id.*, 224:3-18. The Town did not treat SANDHU as its employee. 03/24/2021, 219:7-13. His specific work was limited to providing accounting journals, and ledgers, and financial reports, and monitoring consistency with Town policies; SANDHU did not perform a host of other enumerated job duties. *Id.*, 222:13-223:8. As Cahill testified, “[s]o my objective in hiring RGS and its employees was to ...have somebody fill in and provide—maintain internal controls for our public finances...I would describe it as we hired RGS and its employees to temporarily on an interim basis to safeguard assets and detect financial errors and frauds.” 3/24/2021, 275:274:25-275:11 & Ex. 24. Cahill did not expect SANDHU to perform the finance manager duties. *Id.*, 276:2-10.

V. THIS DECISION FAILS TO MEET THE STANDARDS OF PRECEDENT.

Here the decision fails to meet the standards for establishing precedent: (1) The decision does not contain a significant legal or policy determination of general application that is likely to recur and (2) the decision does not include 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. *CalPERS has no statutory authority to dictate how California’s public agencies implement their operational mandates. Any attempt to adopt this proposed decision as precedent deserves, indeed requires, ample public notice and an opportunity to respond by any CalPERS member who may be affected by making this decision precedential.*

LAW OFFICES OF SCOTT N. KIVEL



Scott N. Kivel