

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

David W. Dowswell (Respondent) established membership with CalPERS in 1975 and worked for various CalPERS covered agencies. At the time of his retirement, Respondent worked for the City of Dixon (Respondent City) as the Community Development Director. Respondent service retired effective September 30, 2011.

Although Respondent service retired, he continued to work for Respondent City, performing the duties of a Community Development Director. Respondent initially worked as a retired annuitant on a part-time basis. Subsequently, on October 22, 2013, Regional Government Services (RGS) and Respondent City entered into a contract (RGS Contract) because Respondent City wanted Respondent to continue working as the Community Development Director without violating CalPERS' post-retirement employment laws.

RGS is a Joint Powers Authority (JPA) that does not contract with CalPERS for retirement benefits. RGS was formed to allow CalPERS retirees to perform work for CalPERS covered agencies without jeopardizing retirement benefits from prior employment. Under its service model, RGS classifies the individuals as employees of RGS, and itself as an independent contractor of CalPERS covered agencies.

RGS was retained to assign a Community Development Director to Respondent City. On October 23, 2013, Respondent entered a contract with RGS to perform services for different clients, including Respondent City. Respondent continued to perform the same services he previously performed as the Community Development Director for Respondent City until July 2015.

Respondent was responsible for performing all duties of Respondent City's Community Development Director plus other duties, as assigned by Respondent City. Pursuant to the municipal code, the City Manager supervises the Community Development Director.

Respondent was paid by the hour, and his salary was above the maximum salary paid pursuant to Respondent City's publicly available pay schedules. Respondent City could terminate the agreement any time it was dissatisfied with Respondent's performance, which would in turn terminate Respondent. Respondent was classified as an independent contractor by Respondent City, and Respondent was not offered membership in CalPERS through this employment.

In 2018, CalPERS commenced review of Respondent's working relationship with Respondent City. On June 28, 2019, CalPERS issued a preliminary determination letter to Respondent and Respondent City. On January 10, 2020, CalPERS issued a determination finding Respondent worked as a common law employee from November 1, 2013, through July 1, 2015, and violated Public Employees' Pension Reform Act (PEPRA) and other working after retirement laws from April 28, 2015 through June 30, 2015, because he worked in excess of 960 hours during that period.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on March 30, 2021. Respondent was represented by counsel at the hearing. Respondent City was also represented by counsel at the hearing.

At the hearing, CalPERS testimony established that under PEPRA, a retiree is generally prohibited from working for a CalPERS covered employer without reinstatement. Thus, when a retiree is performing services for a CalPERS covered employer, CalPERS looks to whether the employment violates the common law test for employment. Under Government Code section 20069 (a), state service means service rendered as an employee or officer of a contracting agency, while section 20028 (b), defines an employee as any person in the employ of any contracting agency. The California Supreme Court has held that the Public Employees' Retirement Law's (PERL) 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.

CalPERS next looks at whether the employment meets the factors of the common law employment test as articulated by the California Supreme Court in *Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, 949 (*Tieberg*). According to the Court, "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.*) *Tieberg* further explains, 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.

Other factors may be considered:

(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.

Pursuant to case law, the burden of establishing an independent contractor relationship is upon the party attacking the determination of employment. In this case, all parties agreed that Respondent held the burden of proof.

CalPERS' staff testified at hearing that the PERL generally prohibits a retired member from being employed in any capacity by a CalPERS-covered employer without reinstating to active membership, except as expressly authorized by statute. According to Government Code section 21202, a retired member who obtains employment in violation of the PERL, "shall be reinstated to membership in the category in which, and on the date on which, the unlawful employment occurred." Additionally, Government Code section 21220(b)(1) requires the member to "reimburse the system for any retirement allowance received during the periods of employment that are in violation of law."

At the time of Respondent's employment with Respondent City, the PERL allowed a retired member to temporarily fill an existing position with a contracting agency, without reinstating to active membership, during an emergency or to prevent stoppage of public business. Under Government Code section 21221, the employment is limited to 960 hours for all CalPERS employers in a fiscal year, while compensation for the employment must "not exceed the maximum monthly base salary paid to other employees performing comparable duties . . . divided by 173.333 to equal an hourly rate."

In this case, Respondent met the requirements of the common law employment test because Respondent City contracted with RGS to specifically have Respondent perform the job duties of the Community Development Director. An RGS "advisor" other than Respondent could not perform the services unless the Respondent City provided prior consent. RGS could not reassign Respondent without first consulting Respondent City. Respondent set his schedule with the consent of the Respondent City. Respondent City reimbursed RGS for the costs of the employment, including salary and overhead expenses. Respondent was a highly skilled professional and needed little supervision to perform the job duties. Respondent was not engaged in a distinct occupation or business but provided general services within a specific department. Respondent performed the type of work that is usually performed by city employees, was paid on an hourly basis, the contract between RGS and Respondent was of an uncertain duration as it could be extended on a month-to-month basis, and Respondent was also provided office supplies and work space by Respondent City. All of these facts are demonstrative of a common law employment relationship.

At the hearing, Respondent testified on his own behalf that he did not consider himself to be an employee of Respondent City but considered himself to be an employee of RGS. He also testified that he did not perform all of the functions of the Community Development Director position.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ held that the relevant inquiry is regarding Respondent's "relationship with the City, not RGS, because the City is a CalPERS employer but RGS is not." The ALJ applied the common law control test and found that "persuasive evidence overwhelmingly established that the City had and exercised that right to control." The ALJ noted that Respondent City could terminate Respondent at any time by terminating the RGS Contract. While Respondent did not perform all of the duties of a Community Development Director, he did not need to because he was only performing the job on a part-time basis.

In the Proposed Decision, the ALJ concluded that Respondent City's "contract with RGS was a subterfuge to hide the fact that Mr. Dowswell worked as a common law employee of the City from April 28 through July 1, 2015, without reinstatement..." The ALJ found that Respondent's employment from April 28 through June 30, 2015, "violated the PERL's and the PEPRA's post-retirement employment rules..."

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes in the proposed decision." In order to avoid ambiguity, staff recommends that the quote "without or without cause" be changed to "with or without cause" on page 12, paragraph 31.

For all the above reasons, staff argues that the Proposed Decision be adopted as modified by the Board.

November 17, 2021

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