

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

**In the Matter of the Appeal of Membership Determination
and Post-Retirement Employment of:**

**LINDA D. ABID-CUMMINGS and CITY OF HUGHSON,
Respondents**

Agency Case No. 2020-0560

OAH No. 2020090772

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter by videoconference and telephone on June 3, 2021, from Sacramento, California.

Kevin Kreutz, Senior Attorney, represented California Public Employees' Retirement System (CalPERS).

Scott N. Kivel of the Law Offices of Scott N. Kivel represented respondents Linda D. Abid-Cummings and City of Hughson (City).

Evidence was received and the record was held open to allow the parties to submit simultaneous closing and reply briefs.¹ CalPERS's closing and reply briefs are marked as Exhibits 330 and 333, and respondents' closing and reply briefs are marked as Exhibits JJ and KK. The record was closed and the matter submitted for written decision on September 3, 2021.

SUMMARY

Ms. Abid-Cummings began working for the City before she retired for service, and she continued working for the City after retirement without reinstatement. The persuasive evidence established that she worked as a common law employee and was paid an excessive hourly rate. Therefore, Ms. Abid-Cummings's appeal from CalPERS's

¹ Hearing in this matter was coordinated, but not consolidated, with the hearings in Douglas A. Breeze (Agency Case No. 2020-0561, OAH No. 2020100848), Margaret Souza (Agency Case No. 2020-0565, OAH No. 2020090931), David Dowswell (Agency Case No. 2020-0562, OAH No. 2020090934), and Tarlochan Sandhu (Agency Case No. 2020-0564, OAH No. 2020100708) to allow for a running written record producing a single, continuous transcript, continuous exhibit numbers/letters, and consolidated post-hearing briefing. Therefore, there are gaps in the exhibit numbers/letters. Additionally, page numbering for the transcripts in this matter and the second day of the Souza matter inadvertently began with page 796 and there are duplicate pages 796 through 940 in the written transcript. To the extent the parties cited to the duplicate pages in their post-hearing briefs, they agreed to cite the page number and the date of the transcript or the name of the matter.

determinations that she was the City's common law employee and violated the post-retirement employment rules should be denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. Ms. Abid-Cummings began working for the City of Riverbank on April 29, 1996. She became a local miscellaneous member of CalPERS by virtue of that employment. She retired for service from the City of Riverbank as its administrative services director and city clerk, effective December 31, 2011. She has been receiving her retirement allowance since March 1, 2012.

2. Ms. Abid-Cummings began working as the City's interim director of administrative services prior to the effective date of her retirement. She initially worked as a temporary employee under a contract directly with the City. She later worked as a "consultant" under a contract between the City and Regional Government Services (RGS). RGS is a joint powers authority created by the Association of Bay Area Governments and the City of San Carlos that provides public agencies access to experienced public sector professionals.

3. At all times relevant, the City contracted with CalPERS to provide their eligible employees, including the director of administrative services, retirement benefits. The City never provided Ms. Abid-Cummings retirement benefits and she never reinstated from retirement.

4. On February 2, 2018, CalPERS began investigating the nature of Ms. Abid-Cummings's employment relationship with the City. On January 10, 2020,

CalPERS sent Ms. Abid-Cummings correspondence explaining that it had determined she worked for the City as a common law employee from October 16, 2012, through January 15, 2014. CalPERS also concluded her employment violated the post-retirement employment rules.

5. Ms. Abid-Cummings timely appealed CalPERS's determinations. On March 29, 2021, Renee Ostrander, Chief of CalPERS's Employer Account Management Division, signed the Amended Statement of Issues solely in her official capacity. The Amended Statement of Issues identifies the following issues on appeal: (1) was Ms. Abid-Cummings "a common law employee of the City for the period of October 16, 2012, through January 15, 2014"; and (2) if so, did the amount of her compensation violate the Public Employees' Retirement Law (Gov. Code, § 20000 et seq.; PERL) and the California Public Employees' Pension Reform Act of 2013 (Gov. Code, § 7522 et seq.; PEPRAs)?²

Post-Retirement Employment

6. The Hughson City Council created the director of administrative services job classification on February 28, 2005. The job classification "is the department head level class that oversees all functions and operations of the Administrative Services Department and is responsible for IT, personnel and City Clerk functions for the City

² The Amended Statement of Issues does not reference the PEPRAs, but references Government Code section 7522.56 which is part of the PEPRAs. Additionally, CalPERS's January 10, 2020 correspondence alleged: "This employment with the City is in violation of post-retirement employment laws of the PERL and the Public Employees' Pension Reform Act of 2013." Respondents received proper notice of the applicable law.

and the City's risk management program." The holder of this position "receives administrative direction from the City Manager/Executive Director RDA."

7. Around July 2011, Bryan Whitemyer, the City's city manager, asked Ms. Abid-Cummings to work for him as the City's part-time interim director of administrative services, and she agreed. She originally planned to start after she retired. But as time went on, Mr. Whitemyer's need for help increased and he asked her to start sooner. The City of Riverbank's city manager, Ms. Abid-Cummings's supervisor, authorized her to use one day of executive leave each week to work for the City.

8. The Hughson City Council approved an employment agreement between the City and Ms. Abid-Cummings on February 14, 2012, and she began working as the "part-time interim Administrative Services Director of the City" the following day. Her job duties were "to perform all services appropriate to that position." The City paid her \$45 an hour.

9. Although she understood Mr. Whitemyer hired her as the City's interim director of administrative services, Ms. Abid-Cummings asserted she did not perform "98 percent" of the duties listed in the City's job description for the position. Instead, Mr. Whitemyer asked her to gather the City's records from the prior director of administrative services and the city clerk, organize said records, and convert them into an electronic format. Additionally, she helped create the City's website and prepared a staff report for the city council. On the other hand, she described her duties in her resume as "review the administrative structure of the City and recommend changes for efficiency which will ultimately result in cost savings; revamped the records management system; enhance the agenda processing; 2012 Election."

10. Mr. Whitemyer did not provide any administrative direction on how Ms. Abid-Cummings should perform her duties on the day-to-day basis. She explained, "there was a project that needed to be done, and he just let me do that project to get that project done."

11. In early 2012, the City learned CalPERS had issued new rules regarding post-retirement employment, but it could not receive any clear guidance on how the rules work. Out of an abundance of caution, the City's attorney recommended cancelling Ms. Abid-Cummings's employment agreement, entering into a contract with RGS, and employing her through RGS.

12. On September 28, 2012, the City contracted for RGS to "assign an RGS employee . . . to serve as the [City's] . . . Director of Administrative Services." The City paid RGS \$58.57 an hour for that employee's services. The contract commenced October 16, 2012, and was "anticipated to remain in force through August 31, 2013." After that date, the parties had the option of extending the contract for one-year intervals. Either party could terminate the contract, "with or without cause," by giving the other party 30 days' notice. Additionally, the City could unilaterally terminate the contract if, in its "sole discretion," it "determines that the services performed by RGS are not satisfactory."

13. The contract prohibited anyone other than the RGS employee originally assigned under the contract from serving as the City's director of administrative services without RGS first notifying the City in writing. Additionally, RGS could not reassign that employee "without first consulting with" the City. However, the City could request another employee at any time.

14. The contract identified RGS as the City's independent contractor and RGS's employees as RGS's "agents or employees and not agents or employees of" the City. The contract specified that the City "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 Exhibit A." The City had no "right to discharge an employee of RGS from employment."

15. Finally, the contract specified that RGS was responsible for providing all employee benefits to the assigned employee and paying her salary and all applicable employment taxes. But it also provided that the hourly rate RGS paid the City for that employee was "based upon RGS's costs of providing the services required [under the contract], including salaries and benefits of employees."

16. On October 11, 2012, RGS entered into an employment agreement with Ms. Abid-Cummings and assigned her to work for the City as a "Consulting Administrative Services Director." She began working pursuant to that agreement five days later. RGS paid her \$45 an hour.

17. Ms. Abid-Cummings's job duties remained the same as when she contracted directly with the City, except she also served on the recruitment panel for her permanent replacement. Mr. Whitemyer did not provide any administrative direction, but Ms. Abid-Cummings believed he had the authority to terminate her employment with the City because "the contracts with RGS state they do have the . . . ability to cancel the agreement . . . if I was not performing or if they no longer needed services."

18. Ms. Abid-Cummings recorded the time she worked at the City on a timesheet, and RGS sent the City invoices for her time. The City paid the invoices directly to RGS.

19. The City extended its contract with RGS for one year on September 1, 2013. Ms. Abid-Cummings's last day with the City was January 15, 2014.

CalPERS's Analysis of Post-Retirement Employment

BACKGROUND

20. Christina Rollins is the Assistant Division Chief of Membership Services in CalPERS's Employer Account Management Division. She supervises the Membership and Post-Retirement Employment Determinations Team (Team). She has worked with the Team "in various capacities since 2012."

21. The Team makes "complex determinations" about the nature of a member's employment relationship to determine if she is acting as a common law employee or an independent contractor of the CalPERS employer to whom she is providing services. This determination is relevant when a member is providing services to a CalPERS employer, but neither the member nor the employer is making contributions to CalPERS. If it is determined that the member is acting as a common law employee, contributions must be made. If the employee is a retired member, the Team must also determine if her employment violates the post-retirement employment rules. If it does, the retired member is subject to reinstatement from retirement.

22. At the beginning of 2018, Ms. Rollins was the section manager over the Team. She supervised and participated in the Team's collection and analysis of

information about Ms. Abid-Cummings's employment relationship with the City. She also drafted the "final determination" letter sent to Ms. Abid-Cummings on January 10, 2020.

NATURE OF EMPLOYMENT RELATIONSHIP

23. Ms. Rollins explained that the PERL and the PEPRA generally prohibit a retired member from working for a CalPERS employer without reinstatement. Therefore, she analyzed Ms. Abid-Cummings relationship with the City to determine if she worked as an employee or an independent contractor. Ms. Rollins used the common law test for employment in accordance with *Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 491 (*Metropolitan Water District*). The common law factors she considered included the City's right to control how Ms. Abid-Cummings performed her work, whether the work is part of the City's regular business, the skills required for performing that type of work and the amount of supervision typically provided someone performing that work, the duration for which the City anticipated needing her services, and whether she was paid based on the amount of time she spent working or a per project basis. She did not give any one factor more weight than others, but rather considered the "cumulative" weight of all factors in concluding that Ms. Abid-Cummings was a common law employee of the City.

Right to Control and Type of Work

24. The City provided CalPERS documents that indicated the director of administrative services is a job classification the city council created. Ms. Abid-Cummings held that classification on an interim, part-time-time basis from February 15, 2012, through January 15, 2014, initially pursuant to an employment agreement

with the City and then pursuant to a contract between the City and RGS. She performed some of the duties identified in the City's job description for the classification. She was subject to "administrative direction from the City Manager" as indicated in the city council resolution creating the classification.

25. The City's contract with RGS required Ms. Abid-Cummings to "be reasonably available to perform the services during the normal work week, for approximately 900 hours each per [*sic*] year, as agreed upon." Furthermore, she was required to "meet regularly and as often as necessary for the purpose of consulting about the scope of work performed."

26. Based on her review of the City's documents, Ms. Rollins determined that the City had the right to control how Ms. Abid-Cummings performed her duties. It did not matter that she was not performing all the duties outlined in the job description, because she was working on a part-time basis and it would be unreasonable to expect a part-time employee to perform all the duties of a full-time position. The information also showed Ms. Abid-Cummings was performing services that were part of the City's regular business.

Requisite Skills and Degree of Supervision

27. Ms. Abid-Cummings previously served as the City of Patterson's city clerk and the City of Riverbank's administrative services director and city clerk. Therefore, she had the requisite skills to perform the duties of the City's director of administrative services. Ms. Rollins determined it was insignificant that Mr. Whitemyer did not supervise Ms. Abid-Cummings's day-to-day activities. She explained: "There are many positions that are employees of an agency where . . . their expertise is needed and they

don't receive a lot of oversight or control, but that doesn't mean the employer-employee relationship does not exist."

Duration of Work

28. Ms. Abid-Cummings initially worked directly for the City pursuant to an employment agreement of an indeterminate length. She later worked pursuant to a contract between the City and RGS. Although that contract was initially for one year, it provided an option for one-year extensions which the parties exercised. Ms. Rollins explained: "Well, [Ms. Abid-Cummings] was . . . providing ongoing services for the City. Typically, . . . [the] independent contractor is set to perform a specific project . . . and there is a start and end date of when you would expect that relationship to end. And we did not see that here."

Method of Payment

29. RGS paid Ms. Abid-Cummings an hourly rate. According to Ms. Rollins, "employees are typically paid on an hourly basis. Whereas consultants . . . are usually paid a set amount based on those projects being completed."

POST-RETIREMENT EMPLOYMENT RULES

30. Ms. Rollins explained that the PERL and the PEPRA allow a retired member to work for a CalPERS employer without reinstatement under limited circumstances, but she may not be paid an hourly rate greater than that paid other employees performing similar duties. Therefore, once Ms. Rollins concluded Ms. Abid-

Cummings worked as the City's common law employee without reinstatement, she analyzed her hourly pay rate.³

31. Ms. Abid-Cummings exclusively performed some of the duties of the City's director of administrative services from October 16, 2012, through January 15, 2014. The maximum salary approved for that classification was \$37.97 an hour. She was paid \$45 an hour.

Analysis

MS. ABID-CUMMINGS WORKED AS A COMMON LAW EMPLOYEE WITHOUT REINSTATEMENT

32. The relevant inquiry is the nature of Ms. Abid-Cummings's relationship with the City, not RGS, because the City is a CalPERS employer but RGS is not. It was undisputed that she never reinstated from retirement. Though RGS's contract with the City stated Ms. Abid-Cummings was not a City employee, such language is not dispositive if the parties' actual conduct indicates otherwise.

33. The most important factor under the common law test is the City's right to control the way Ms. Abid-Cummings performed her duties, and the persuasive evidence overwhelmingly established that the City had and exercised that right. Notwithstanding language in RGS's contract with the City to the contrary, the City had the right to terminate Ms. Abid-Cummings's employment with the City by canceling

³ Whether an exception to the general rule prohibiting post-retirement employment applied to Ms. Abid-Cummings was not an issue on appeal; only the nature of her employment relationship and her hourly rate were.

the contract. She understood the City had that right because it could have canceled the contract "with or without cause." The City also had the unilateral right to cancel if it concluded, in its "sole discretion," that Ms. Abid-Cummings's services were "not satisfactory." Alternatively, the City could have left the contract in place and asked RGS to assign someone else.

34. The City entered into the contract with RGS for the specific purpose of having Ms. Abid-Cummings perform some of the duties of a vacant position. Ms. Rollins persuasively explained the insignificance of Ms. Abid-Cummings not performing all the duties of the position. She also persuasively explained why the lack of day-to-day supervision did not negate the City's right to control Ms. Abid-Cummings.

35. The contract prohibited anyone other than Ms. Abid-Cummings from providing services without RGS first providing the City written notice. Additionally, RGS was prohibited from reassigning Ms. Abid-Cummings to another client "without first consulting" the City. She was required to "be reasonably available to perform the services during the normal work week," and to "meet regularly and as often as necessary for the purpose of consulting about the scope of work performed."

36. The contract specifically stated that the City was not responsible for paying Ms. Abid-Cummings's salary or for her employee benefits and that both were RGS's sole responsibility. But the express language of the contract demonstrated that the City reimbursed RGS for those costs, and RGS was simply a conduit through which the City paid Ms. Abid-Cummings.

37. Other elements of the common law test for employment also indicated Ms. Abid-Cummings was a common law employee. It was undisputed that she was

highly skilled at performing the duties of an administrative services director and city clerk, and the persuasive evidence established that employees with those skills often work with little supervision. She was not engaged in a distinct occupation or business while working for the City. The work she performed was usually performed by a City employee. RGS paid Ms. Abid-Cummings on an hourly basis, as opposed to a flat rate for each job.

38. The term of the City's contract was the only secondary factor that potentially indicated Ms. Abid-Cummings was an independent contractor. The contract was for a specific term, and a contract for a specific term is generally indicative of an independent contractor relationship. Contrary to Ms. Rollins's testimony, the proper analysis of the duration element considers how long the parties anticipated services being provided, not the nature of the services.

39. But Ms. Abid-Cummings was hired specifically to fill a vacant position. The contract included the option to extend the contract, and the parties signed an extension on September 1, 2013. This suggested that the parties intended for Ms. Abid-Cummings to work for as long as the City needed her services, and a contract for an indeterminate length is more common in an employment relationship.

40. The combined weight of the common law factors discussed above justifies disregarding the parties' subjective intent to create an independent contractor relationship. Besides, it is the City's intent that is relevant, not Mr. Whitemyer's. And the fact that the City retained Ms. Abid-Cummings to perform the duties of a specific position was the most compelling evidence of its intent.

41. Even if Mr. Whitemyer's intent were relevant, the persuasive evidence established that he intended for Ms. Abid-Cummings to serve as the City's interim

director of administrative services. He initially hired her to work in that capacity, and he later signed the contract for RGS to assign her to continue serving in that capacity. Ms. Abid-Cummings shared a similar intent as reflected by her understanding that Mr. Whitemyer hired her to serve as the City's interim director of administrative services.

Ms. ABID-CUMMINGS RECEIVED EXCESSIVE PAY

42. Ms. Abid-Cummings did not produce any evidence to contradict CalPERS's persuasive evidence that throughout her employment she was paid an hourly rate greater than the maximum rate authorized for the City's director of administrative services.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. The parties agreed Ms. Abid-Cummings has the burden of proving she was the City's independent contractor and she did not violate the PERL's or the PEPRAs post-retirement employment rules. She must meet her burden by a preponderance of the evidence. This evidentiary standard requires Ms. Abid-Cummings to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, she must prove it is more likely than not that she was an independent contractor and did not violate the PERL's or the PEPRAs post-retirement rules. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

POST-RETIREMENT EMPLOYMENT RULES

2. The PERL generally prohibits a retired CalPERS member from working for a CalPERS employer without reinstatement. (Gov. Code, § 21220, subd. (a).) However, a retired member may “serve without reinstatement from retirement or loss or interruption of benefits provided by this system” in a position with a contracting agency that requires special skills “or during an emergency to prevent stoppage of public business.” (Gov. Code, § 21221, subd. (h).) The retired member may not be paid more than “the maximum monthly base salary paid to other employees performing comparable duties . . . divided by 173.333 to equal an hourly rate.” (*Ibid.*)

3. Commencing January 1, 2013, the PEPRRA applies to “all state and local public retirement systems and to their participating employers, including the Public Employees’ Retirement System.” (Gov. Code, § 7522.02, subd. (a).) The PEPRRA prohibits a retired CalPERS member from serving, being employed by, or “be[ing] employed through a contract directly by,” another CalPERS’s employer “without reinstatement from retirement.” (Gov. Code, § 7522.56, subd. (b).)

4. An exception to the PEPRRA’s general prohibition against post-retirement employment applies when the retired member serves or works for a CalPERS employer “either during an emergency to prevent stoppage of public business or because the retired person has skills needed to perform work of limited duration.” (Gov. Code, § 7522.56, subd. (c).) The retired member may not be paid more than “the maximum paid by the employer to other employees performing comparable duties, divided by 173.333 to equal an hourly rate.” (*Id.*, at subd. (d).)

COMMON LAW TEST FOR EMPLOYMENT

5. The California Supreme Court articulated the common law test for employment in *Empire Star Mines Limited v. California Employment Commission* (1946) 28 Cal.2d 33. It said: "In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired." (*Id.* at p. 43, overruled on different grounds by *People v. Sims* (1982) 32 Cal.3d 468, 479, fn. 8 [collateral estoppel applies to administrative proceedings that are judicial in nature].) An employer-employee relationship exists if the employer has the complete right to control, regardless of whether the right is actually exercised. (*Empire Star Mines Limited v. California Employment Commission, supra*, 28 Cal.2d at p. 43.) The Court identified other factors to consider:

Other factors to be taken into consideration are (a) whether or not the 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.

(Ibid.)

6. In *Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, the California Supreme Court clarified: "The right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship and the other matters enumerated constitute merely 'secondary elements.'" (*Id.* at p. 950.) "The right to terminate at will, without cause, provides 'strong evidence' of a right to control." (*Bowerman v. Field Asset Services, Inc.* (N.D.Cal. 2017) 242 F.Supp.3d 910, 929.) And the fact work is performed without supervision does not negate other factors indicating the right to control when such work is generally performed without supervision by both employees and independent contractors. (*Santa Cruz Transportation, Inc. v. Unemployment Insurance Appeals Board* (1991) 235 Cal.App.3d 1363, 1374.) Nor does the freedom to choose whether to work or not because such freedom becomes "illusory" when the worker's income is dependent on whether he works. (*Id.* at p. 1373-1374.)

7. The common law factors are to be analyzed together as a whole rather than separately in isolation, and their cumulative weight is determinative. (*Garcia v. Seacon Logix, Inc.* (2015) 238 Cal.App.4th 1476, 1486.) Being paid on an hourly or monthly basis without regard to initiative, judgment, or abilities is indicative of an employment relationship. (*Gonzalez v. Workers' Compensation Appeals Board* (1996) 46 Cal.App.4th 1584, 1594.) So is providing services that are a regular part of the employer's business. (*Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, 1049.) A "finite time of service" is indicative of an independent contractor relationship, whereas an indeterminate time of service "is highly indicative of an employment relationship."

(*Gonzalez v. Workers' Compensation Appeals Board, supra*, 46 Cal.App.4th at p. 1594.)

Lastly, the parties' subjective intent to create an independent contractor relationship will be disregarded when their actual conduct indicates otherwise. (*S.G. Borrello & 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"], superseded by statute on different grounds as stated in *James v. Uber Technologies Inc.* (N.D.Cal. 2021) 338 F.R.D. 123; *Performance Team Freight Services, Inc. v. Aleman* (2015) 241 Cal.App.4th 1233, 1243 [label on the parties' written agreement is not dispositive].)

8. In *Metropolitan Water District*, the water district contracted with CalPERS to provide retirement benefits to its employees. The water district classified workers provided pursuant to contracts with several private labor suppliers as "consultants" or "agency temporary employees," and did not enroll them in CalPERS. Several of those workers alleged they were misclassified as consultants or agency temporary employees and improperly denied CalPERS membership. (*Metropolitan Water District, supra*, 32 Cal.4th 491, 497-498.)

9. On appeal, the California Supreme Court identified the issue as "what the PERL means by 'employee.'" (*Metropolitan Water District, supra*, 32 Cal.4th at p. 500.) The Court concluded that Government Code section 20028, subdivision (b), provides little guidance on the meaning of employee in the context of an agency that contracts with CalPERS to provide its employees retirement benefits ("any person in the employ of any contracting agency" is an employee). (*Metropolitan Water District, supra*, 32 Cal.4th at p. 500.) Therefore, "the PERL's provision concerning employment by a contracting agency [citation] incorporates a common law test for employment." (*Id.* at p. 509.)

10. Though *Metropolitan Water District* analyzed the meaning of “employee” under the PERL rather than the PEPRA, both bodies of law provide similar exceptions to the general prohibition against retired members working for a CalPERS employer without reinstatement. Therefore, its analysis applies equally to the PEPRA.

11. CalPERS’s closing argument that the common law employment analysis is irrelevant is premised on an overly myopic reading of the PERL. According to CalPERS, the PERL “prevents retirees from being employed by contracting agencies,” whereas the PEPRA “prevents retirees from providing services to contracting agencies.” Therefore, CalPERS posits, the PEPRA’s post-retirement rules apply “even if the retiree is not considered a common law employee.” Though Government Code section 21220, subdivision (a), prohibits a retired member from being “employed” by a CalPERS employer without reinstatement, numerous statutory exceptions allow the member to “serve without reinstatement” in a variety of positions. (See, e.g., Gov. Code, §§ 21221, 21223, 21224, subd. (a), 21225, subd. (a), 21226, subd. (a), 21227, subd. (a), 21229, subd. (a), 21230, subd. (a), & 21231, subd. (a).) Therefore, the PERL uses the terms “employed” and “served” interchangeably, and CalPERS’s argument is not persuasive.

12. CalPERS’s argument about the applicability of Government Code section 20164 is likewise irrelevant. CalPERS’s right to collect any purported overpayments to Ms. Abid-Cummings is not an issue on appeal.

13. Ms. Abid-Cummings made several arguments in closing, none of which is persuasive. She argued that concluding she was a common law employee is inconsistent with the City’s constitutional and statutory rights to provide public services through employees, independent contractors, or a combination of both. A similar argument was rejected in *Metropolitan Water District*. The water district argued that concluding the workers hired through a third-party were employees, would entitle

them to full employee benefits without having to go through its merit selection process, thereby undermining that process. (*Metropolitan Water District, supra*, 32 Cal.4th at p. 504.) But the California Supreme Court explained:

To the extent MWD complains of having to provide long-term project workers the employment security and other benefits provided for in its administrative code, we stress that no such result follows from our plain language reading of the PERL: a determination that long-term project workers are entitled to enrollment in CalPERS would not necessarily make those workers permanent employees for purposes of MWD's administrative code or entitle them to benefits provided by MWD to its permanent employees. For both past and present workers, entitlement to local agency benefits is a wholly distinct question from entitlement to CalPERS enrollment

(*Id.* at pp. 505-506.)

14. Ms. Abid-Cummings criticized CalPERS's Board of Administration for not adopting regulations or issuing precedential decisions outlining criteria for distinguishing between employees and independent contractors. But she cited no authority requiring the Board to do so. Additionally, she admitted that her appeal is "governed by the common law test" and cited a plethora of case law discussing that test. Her conclusion that "[CalPERS's] interpretation of statutory language is entitled to less deference when not adopted as a regulation" is significantly undermined by her citation to several administrative decisions the Board issued, all of which were excluded from evidence. (See, Wegner et al., *Cal. Practice Guide: Civil Trials & Evidence*

(The Rutter Group 2020) ¶ 13:60 [referring to matters excluded from evidence during closing argument is an “extreme form of attorney misconduct”]; citing *Martinez v. State of California Department of Transportation* (2015) 238 Cal.App.4th 559, 561; *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126-127.)

15. Ms. Abid-Cummings’s argument that CalPERS’s inconsistent rulings when applying the common law employment test demonstrates that CalPERS has adopted an underground regulation is belied by her admission that “the common law control test is fact-sensitive.” And her argument that concluding she was a common law employee because she held a specific position with the City ignores Ms. Rollins’s persuasive testimony that Ms. Abid-Cummings holding a specific position was just one factor.

16. Ms. Abid-Cummings’s argument that the rules of statutory construction lead to the conclusion that she was an independent contractor because there is no statute or regulation defining “employee” ignores Government Code section 20028, which defines that term. Her argument that there is no statutory authority for requiring reinstatement of retired members who violate the PEPRA’s post-retirement employment rules is contradicted by the express language of Government Code section 7522.56, subdivision (b), providing otherwise.

17. Lastly, Ms. Abid-Cummings’s argument that RGS’s service model is critically important to assisting public agencies is an unsupported opinion.

Conclusion

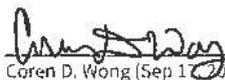
18. The City’s contract with RGS was subterfuge to hide the fact that Ms. Abid-Cummings worked as a common law employee without reinstatement as

discussed in Factual Findings 33 through 42. Her employment violated the PERL's and the PEPRA's post-retirement employment rules as discussed in Factual Finding 43.

ORDER

Respondent Linda D. Abid-Cummings's appeal from CalPERS's January 10, 2020 determinations that she was a common law employee of the City of Hughson from October 16, 2012, through January 15, 2014, and her employment violated the PERL's and the PEPRA's post-retirement employment rules is DENIED.

DATE: September 17, 2021


Coren D. Wong (Sep 17 2021 11:54 PDT)

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings