ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Membership Classification of: STEVEN HUBERT, Respondent, and SAN DIEGO COUNTY WATER AUTHORITY, Respondent.	CalPERS Case No. 2015-0099 OAH No. 2015070529

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on January 21, 2016.

Karli Eisenberg, Deputy Attorney General, Department of Justice, represented petitioner Renee Ostrander, Chief, Employer Account Management Division, California Public Employees' Retirement System, State of California.

Karin L. Backstrom, Attorney at Law, represented respondent Steven Hubert, who seeks classification as a common law employee of the San Diego County Water Authority for the period from May 21, 2001, through June 30, 2004.

Frances E. Rogers, Attorney at Law, represented respondent San Diego County Water Authority, which denies Mr. Hubert was a common law employee during the period at issue and asserts he was an independent contractor.

On January 21, 2006, the record was opened; sworn testimony and documentary evidence was received; official notice was taken; and a briefing schedule was established.

On February 5, 2016, following the submission of closing briefs, the record was closed and the matter was submitted.

ISSUE

Was Steven Hubert a common law employee or an independent contractor of the San Diego County Water Authority (SDCWA) from May 16, 2001, through June 30, 2004?

SUMMARY

California's accepted multi-factor employee/independent contractor test was applied to the facts in this matter to determine whether Mr. Hubert was a common law employee of SDCWA or an independent contractor for the period from May 16, 2001, through June 30, 2004.

Despite language in a written agreement identifying Mr. Hulbert as an "independent contractor," a preponderance of the evidence established there was a common law employer-employer relationship between SDCWA and Mr. Hulbert from May 16, 2001, through June 30, 2004. The most important evidence supporting the employer-employee relationship was SDCWA's retention of the right to discharge Mr. Hulbert at will and without cause, as well as SDCWA's control over the manner and means by which Mr. Hulbert provided graphic design services. The bulk of the less important, secondary factors, also supports this conclusion.

FACTUAL FINDINGS

Preliminary Matters

1. The Public Employees' Retirement Law (PERL) is set forth at Government Code section 20000 et seq. Government Code section 20120 vests management and control of the PERL with the Board of Administration.

Government Code section 20030 defines "employer" as the state, the university, a school employer, and any contracting agency.

Under Government Code section 20022, a "contracting agency" includes "any public agency that has elected to have all or any part of its employees become members of this system and that has contracted with the board for that purpose."

Government Code section 20028 defines "employee" to include any person in the employ of the state and any person in the employ of any contracting agency.

Under Government Code section 20281, a person hired as an employee of the state or a contracting agency "becomes a member [of CalPERS] upon his or her entry into employment."

Government Code section 20300, excludes from CalPERS membership certain persons (including inmates of state or public institutions) and "independent contractors who are not employees."

Government Code section 20125 provides:

> The board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.

Common Law Employees of Contracting Public Employers Must Be CalPERS Members Unless Excluded

2. In *Metropolitan Water District v. Superior Court (Cargill)* (2004) 32 Cal.4th 491, 496, a majority of the California Supreme Court determined the PERL requires contracting public agencies to enroll all common law employees in CalPERS, except for those excluded by a specific statutory or contractual provision.[1]

The San Diego County Water Authority

3. SDCWA is a public agency that delivers a safe and reliable wholesale water supply to approximately two dozen retail water agencies including cities, special districts, and a military base. SDCWA operates under the County Water Authority Act, which is set forth in California's State Water Code. SDCWA's Administrative Code contains regulations that govern SDCWA's property, contracts, business, operations, and other matters.

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[1] *Cargill* involved the Metropolitan Water District's assertion that long-term, full-time persons hired through private labor suppliers were *not* MWD employees but were, instead, "consultants" or "agency temporary employees." The MWD neither enrolled these persons in CalPERS nor provided them with benefits under the MWD's administrative code. The MWD advanced many factual and legal arguments to support its claim these persons were not MWD employees.

The majority of the California Supreme Court disagreed with the MWD's assertion and concluded at p. 509:

> In sum, we conclude the PERL's provision concerning employment by a contracting agency (§ 20028, subd. (b)) incorporates a common law test for employment, and that nothing elsewhere in the PERL, in MWD's administrative code, or in statutes and regulations addressing joint employment in other contexts supports reading into the PERL an exception to mandatory enrollment for employees hired through private labor suppliers. (*Metropolitan Water District v. Superior Court (Cargill)* (2004) 32 Cal.4th 491, 509.)

4. SDCWA was and is a CalPERS "contracting agency." All SDCWA common law employees must become CalPERS members upon their entry into employment unless they are excluded from membership.

Steven Hubert

5. Mr. Hubert graduated from Indiana University of Pennsylvania in 1985 with a bachelor's degree in Journalism. After graduating from college, he was employed by Pode, Inc. from 1986 through 1987.

Mr. Hubert moved to San Diego in 1987, where he worked as an office manager for several years. Following that employment, he worked for National Medical Computer Services. He provided some graphic design services when employed by National.

In the mid-1990s, Mr. Hubert became employed by RKM Partners in Trust, a La Jolla insurance broker. He served as RKM's Vice President of Marketing. He was a salaried employee who provided some graphic design services. In 2001, RKM experienced financial difficulties, resulting in Mr. Hubert looking for work elsewhere. He continued to provide part-time services for RKM.

6. Mr. Hubert learned about part-time graphic design work that was going to become available with SDCWA.

7. In 2001 SDCWA issued a request for proposal (RFP) for graphic design services.

The RFP stated that SDCWA's Public Affairs Department produced various publications including fact sheets, brochures, annual reports, on-line employee newsletters, external newsletters, and other printed materials. Each project required graphic design and coordination with printers. All graphic design work had to be formatted for use on SDCWA's website. According to the RFP, it was expected that a single consultant, rather than rotating consultants, would "work the various projects assigned, in order to maintain continuity of style throughout."

The RFP included a section entitled "special considerations" that stated the consultant's work hours would vary from an estimated minimum of 10 hours a week to a maximum of 25 hours per week; SDCWA would provide on-site equipment "at no charge" including computers, printers, and graphic software; a contract would be awarded for one year, but SDCWA retained the authority to extend the contract for two additional one-year periods.

Responses to the RFP were required to be submitted to Alex Newton, a SDCWA employee, by April 25, 2001.

The Written Agreement for Services

8. Mr. Hubert filed a response to the RFP that resulted in a written agreement with SDCWA. SDCWA prepared that agreement. Mr. Hubert testified he signed the agreement as written because he "needed a job."

9. Under the agreement, Mr. Hubert was, among other matters, required to deliver materials to SDCWA to meet specified deadlines; ensure all materials were formatted for use on SDCWA's website; work with SDCWA's Public Affairs staff in the training and use of graphic software; recommend upgrades; and "follow appropriate document indexing functions (i.e., in creating an HTML or PDF page for a fact sheet, there should be a title, date, author and key words attached to the file to be used by the local/internet search engines)."

The agreement provided in part:

> 3. Independent Contractor. Contractor's relationship with the Authority shall be that of an independent contractor. Contractor shall have no authority, express or implied, to act on behalf of the Authority as an agent, or to bind the Authority to any obligation whatsoever, unless specifically authorized in writing by the Authority. Contractor shall be solely responsible for the performance of any of its employees, agents, or subcontractors under this Agreement . . . The Authority shall not make any federal or state tax withholdings on behalf of Contractor. The Authority shall not be required to pay any workers' compensation insurance on behalf of Contractor. Contractor agrees to indemnify the Authority for any tax, retirement contribution, social security, overtime payment, or workers' compensation payment which the Authority may be required to make on behalf of Contractor or any employee of Contractor for work done under the Agreement.

Compensation under the agreement was not to exceed the contract price of $45,000. Compensation was to be paid at the rate of "$35.00 per hour, for an average of 25 hours per week." The "Contractor [was] to invoice the Authority on a bi-weekly basis."

A portion of the agreement provided:

> All work shall be completed in every detail to the satisfaction of the Authority, and any required deliverables shall be furnished to the Authority by established deadlines.

The agreement required Mr. Hubert to maintain a general liability insurance policy for personal and bodily injury with limits in the amount of $500,000 and an automobile liability insurance policy with limits in the amount of $300,000.

While it was not contemplated Mr. Hubert would employ others to provide services under the agreement, the agreement required him to comply with the Civil Rights Act, the California Fair Employment Practices Act, the Americans with Disabilities Act, and ensure equal employment opportunities under SDCWA's emerging business enterprises program.

The agreement authorized SDCWA to terminate "any portion or all of the work" under the Agreement by giving Mr. Hubert ten days' written notice; cause to terminate the agreement was not required. Mr. Hubert had the right to terminate the agreement on 30 days' written notice, but "only in the event of substantial failure by the Authority to perform in accordance with the terms of this agreement through no fault of Contactor."

Mr. Hubert's Daily Interaction with SDCWA

10. Mr. Hubert began providing services on May 16, 2001. He reported to work at an assigned cubicle within SDCWA's offices. He arrived at the worksite at the same time as other SDCWA employees, most often on Mondays, Wednesdays, and Fridays; however, he sometimes worked at the office on Tuesdays or Thursdays. He left SDCWA worksite at the end of the regularly scheduled SDCWA workday. SDCWA did not provide Mr. Hubert with business cards, formal identification, or keys to the office.

Alex Newton and Patty Brock assigned projects and set deadlines. Although Mr. Hubert represented he managed his own priorities in a response to a question set forth in a CalPERS questionnaire, persuasive testimony established Mr. Hubert could be pulled off one project and required to finish another project; he did not have the absolute freedom to work on whatever project he wanted, anytime he wanted.

The SDCWA provided Mr. Hubert with all materials, supplies, computers, software, printers, and other equipment and machines necessary to complete the projects he was assigned. He was not required to supply any tools, equipment, machines, or supplies. Mr. Hubert did not perform SDCWA work at home; indeed, Mr. Newton and Ms. Brock told him he was not permitted to do so. They said, "Be in the office three days a week, so that's what I did."

The SDCWA reimbursed Mr. Hubert for mileage and miscellaneous expenses when he was required to meet with others away from SDCWA's offices or transport materials to and from printers and other vendors.

Mr. Newton and Ms. Brock told Mr. Hubert when he was to complete assigned projects. SDCWA employees reviewed and edited Mr. Hubert's graphic work product. According to Mr. Hubert, these persons "had the last say" concerning the final appearance and content of his graphic work product. There was no credible evidence to the contrary.

The SDCWA paid Mr. Hubert on an hourly basis, and not by the project. His "invoices" were timesheets documenting the time he spent each day completing the projects and other routine office tasks he was assigned.

Mr. Newton and Ms. Brock directed Mr. Hubert to attend SDCWA staff meetings, even if a meeting was held on a Tuesday or Thursday. For example, Mr. Hubert attended sexual harassment and driver education training. He was not paid to attend meetings or trainings.

While Mr. Hubert continued working part-time for RKM on a limited basis and was compensated for that work, the bulk of his income was derived from the services provided under the arrangement with SDCWA. He was paid every two weeks.

From May 16, 2001, through June 30, 2004, SDCWA did not provide Mr. Hubert with a paid vacation or sick leave. SDCWA did not withhold taxes or other contributions from his paycheck. SDCWA did not provide Mr. Hubert with health insurance or retirement benefits.

11. Mr. Newton, who retired from SDCWA in February 2007, was a Public Affairs representative in 2001 who worked at SDCWA office where Mr. Hubert was assigned. He recommended to SDCWA that Mr. Hubert be hired to replace Sue King, a retiring SDCWA employee.

Mr. Newton recalled Mr. Hubert having a cubicle in the SDCWA office and working regular hours three days a week. Mr. Hubert was treated in the same manner as others working in the office and was considered part of SDCWA's team.

Mr. Newton believed Mr. Hubert was an independent contractor, as opposed to a regular employee, because Mr. Hubert worked at the office three days a week instead of five days a week. Mr. Newton did not recall directing Mr. Hubert to attend SDCWA trainings or meetings. When Mr. Hubert asked Mr. Newton for permission to substitute a regularly scheduled Monday, Wednesday or Friday workday for a Tuesday or Thursday workday, Mr. Newton approved. According to Mr. Newton, "We were reasonable about that."

12. Gina Molise, who retired from SDCWA in June 2015, was a Public Affairs representative. According to Ms. Molise, Ms. King was a SDCWA employee who provided resident graphic design services before her retirement and before Mr. Hubert became the next SDCWA resident graphic designer.

In his role as resident graphic designer, Mr. Hubert provided graphic design services for smaller projects. Ms. Molise prepared text and provided Mr. Hubert with text, photographs, and other materials to support the text. Mr. Hubert reviewed what he was given and made design suggestions. He enjoyed creative freedom, but the design and production of SDCWA publications was a collaborative process. Mr. Hubert designed and prepared a draft of a proposed publication for Ms. Molise's review. Ms. Molise discussed Mr. Hubert's work

product and directed him to make changes to a design layout when she deemed that necessary. Ms. Molise believed Mr. Hubert was a hardworking, highly skilled graphic designer. She believed he was a member of SDCWA's team.

13. SDCWA very much appreciated the valuable service Mr. Hubert provided under the original written agreement, which resulted in the signing of a First Amendment to Agreement dated May 20, 2002. Mr. Hubert's circumstances did not change when the written agreement was extended. The amended agreement provided in part:

> Paragraph 4, Compensation, is amended to increase the amount of the compensation as follows: "The maximum contract is hereby increased from $45,000 to $49,200."
>
> Paragraph 11, Duration of the Agreement, is amended to extend the termination date as follows: "The term of this agreement, as amended, is hereby extended to and shall terminate on June 30, 2002."

14. Mr. Hubert continued to provide SDCWA with excellent service, which resulted in the signing of a Second Amendment to Agreement dated July 30, 2002, that provided in part:

> Paragraph 4, Compensation, is amended to increase the amount of compensation as follows: "Contractor's compensation for all work performed in accordance with the agreement shall not exceed the total contract price of $94,200."
>
> Paragraph 11, Duration of Agreement, is amended to extend the termination date as follows: "This contract is used for one year from the date of award." This agreement shall commence on the date of the execution and shall terminate on June 30, 2003."

15. Mr. Hubert's responsibilities, work situation, and performance did not change over the course of the next year. The parties entered into a Third Amended Agreement dated July 23, 2003, that provided in part:

> Paragraph 4, Compensation, is amended to increase the amount of compensation as follows: "Contractor's compensation for all work performed in accordance with the agreement shall not exceed the total contract price of $139,200."
>
> Paragraph 11, Duration of Agreement, is amended to extend the termination date as follows: "This contract is used for one year from the date of award." This agreement shall commence on the date of the execution and shall terminate on June 30, 2004."

16. A review of the "invoices" Mr. Hubert submitted to SDCWA demonstrates some of the routine non-graphic design tasks he was paid to perform: "organize office"; "set up email"; "installed Photoshop"; "on telephone with HP to get color printer to work"; "met with Kelly on MAC issues and software"; "various emails to respond to and including printer issues"; "researched color printers on the internet"; "Office administration and filing"; and "hard disk organization." These tasks were unrelated to specific graphic design projects, and their completion did not involve or require advanced knowledge of graphic design.

17. Mr. Hubert presented documentation and testimony suggesting others "thought" he was a SDCWA employee; he obtained bids for services from printers and other vendors on SDCWA's behalf; and he selected vendors who were the lowest bidders for particular services. This evidence was not particularly helpful in determining whether SDCWA retained the right to control the manner and means Mr. Hubert used to accomplish the projects he was assigned.

Mr. Hubert's Formal Employment with SDCWA

18. On July 8, 2004, SDCWA hired Mr. Hubert as a Public Affairs Representative II. He was placed on a period of probation and directed to report to work five days a week. He was given business cards, identification, and keys to the office. He no longer had to prepare and submit an invoice to obtain compensation. He became a full-time, salaried employee. SDCWA provided Mr. Hubert with a paid vacation and sick leave. SDCWA withheld taxes and other contributions from his paycheck. SDCWA provided Mr. Hubert with health insurance and retirement benefits.

18. After he was hired as a Public Affairs Representative II, Mr. Hubert reported to work at the same cubicle at the same SDCWA office where he provided the same services that he had provided before he was hired. His work circumstances did not change except he reported to work five days a week.

SDCWA exercised the same control over Mr. Hubert's vocational activities and work product as it had before July 8, 2004, when Mr. Hubert provided service under the series of written agreements. Mr. Hubert provided resident graphic design services on smaller projects assigned by SDCWA employees, who gave him the text, photographs and other materials to use in preparing SDCWA publications. Mr. Hubert continued to exercise a certain amount of creative freedom, but the design and production of SDCWA publications remained a collaborative process. Mr. Hubert's initial graphic designs were critiqued by SDCWA employees, who continued to have the final say concerning a particular graphic design layout.

19. Mr. Hubert has remained a loyal and valued SDCWA employee for the past dozen years.

Mr. Hubert's Application for CalPERS Service Credit

20. In 2011 Mr. Hubert learned about another SDCWA employee who received CalPERS service credit for worked performed before formal employment commenced under circumstances similar to Mr. Hubert's.

On June 27, 2011, Mr. Hubert submitted a Request for Service Credit Cost Information - Service Prior to Membership form to CalPERS. In that application, he requested the opportunity to purchase CalPERS service credit as a result of his employment with SDCWA from May 16, 2001, through June 30, 2004.

21. CalPERS reviewed documents and materials provided by Mr. Hubert and SDCWA. No one at CalPERS spoke with Mr. Hulbert. By letter dated August 15, 2014, CalPERS advised Mr. Hubert:

> CalPERS has determined that after applying the common law control factors, your service provided to San Diego County Water Authority (SDCWA) does not meet these factors.

The letter explained:

> SDCWA contracted for your services for the timeframe stated above. The signed Contract (Agreement) was between yourself and SDCWA. Because of superior service, low costs, or lack of alternative providers, a long term relationship existed as the contract was renewed regularly. The Agreement for Services between San Diego County Water Authority and Steve A. Hubert shows service was provided and followed the agreement outlined under heading: **"PROJECT: Graphic Services".** Multiple tasks were to be completed within the **"PROJECT: Graphic Services".** These descriptions reflect delivery of services to SDCWA.
>
> The information reviewed does not reflect common law control. The needs, requirements, short term/long term goals are not known of SDCWA at the time services were provided.

The letter advised Mr. Hubert of his right to appeal CalPERS's determination.

22. Mr. Hubert appealed, and this hearing followed.

SDCWA's Position and Other Evidence

23. Gretchen Spaniol, Human Resources Manager, testified about SDCWA's emerging business enterprises program (now known as the small business program), job

classifications, and administrative code. Her testimony was not particularly helpful in determining Mr. Hubert's daily work activities between May 16, 2001, and June 30, 2004, and whether SDCWA had retained the right to control the manner and means Mr. Hubert used to accomplish the projects he was assigned during that period of time.

24. Dennis Cushman has been employed by SDCWA since July 1997 and has served as its Assistant General Manager since August 2002.

Mr. Cushman testified Ms. King, the SDCWA employee who retired, had been responsible for providing graphic design for SDCWA before her retirement. In his opinion, her graphic design work was "more rudimentary" than that provided by Mr. Hubert, and she did not possess the same technical skills or talent as Mr. Hubert.

Besides Mr. Hubert, SDCWA contracted with others, including Katz & Associates, for graphic design services. Katz & Associates and other entities who provided graphic design services were not resident graphic designers responsible for the completion smaller day-to-day projects, but were, instead, engaged to complete larger, more complicated projects.

While Mr. Cushman did not directly supervise Mr. Hubert, he believed Mr. Hubert exercised "creative freedom" in the completion of graphic design projects. Mr. Cushman did not know Mr. Hubert was prohibited from working at home since that had not been included in the written agreement. He believed Mr. Hubert reported to work at SDCWA office during the normal work hours simply because that was "convenient" to Mr. Hubert and SDCWA. He was unaware Mr. Hubert was given permission to substitute work on Tuesdays and Thursdays for work on Mondays, Wednesdays, and Fridays. He believed Mr. Hubert could show up to work any time he wanted.

On the issue of whether Mr. Hubert was an employee or an independent contractor, Mr. Cushman believed the "written contract is the core of the matter." The written agreement did not mention assigned work hours, require performance evaluations, or provide fringe benefits. The agreement, according to Mr. Cushman, compensated Mr. Hubert at an hourly rate consistent with a "professional wage." Mr. Cushman testified Mr. Hubert was not required to follow workplace rules and regulations that were incumbent on SDCWA employees under the agreement. Nor was Mr. Hubert required to attend special events under the agreement. Finally, Mr. Hubert lacked the authority to approve payment of SDCWA's bills.

Mr. Cushman's testimony emphasized Mr. Hubert's technical skills and creativity as a graphic designer, but downplayed SDCWA's retention of control over Mr. Hubert's vocational activities and its right to discharge Mr. Hubert without cause under the written agreement and amendments thereto.

Discussion

25. As a part of its regular business, SDCWA provides printed materials to clients and the public, as well as in-house materials, that require the services of a graphic designer. The graphic design services Mr. Hubert provided were not particularly unique; those services were previously delivered by a full time SDCWA employee who retired shortly before Mr. Hubert began providing similar services under the written agreement.

The SDCWA issued an RFP for graphic design services. It was expected that a single consultant, rather than rotating consultants, would "work the various projects assigned, in order to maintain continuity of style throughout." Mr. Hubert responded to the RFP, and he began providing services on May 16, 2001, under the agreement arising out of that RFP.

Mr. Hulbert provided part-time services at an assigned cubicle in SDCWA's offices. He worked three days a week and was paid on an hourly basis; compensation was not dependent upon his completion of an assigned project. He completed projects in the order assigned by SDCWA employees, using materials and equipment supplied by SDCWA. He was prohibited from working on SDCWA projects at home. While he was an experienced and talented graphic designer who enjoyed a certain amount of creative freedom in completing his work, SDCWA employees reviewed his work and directed him to make changes to his work product when they deemed it necessary.

On July 8, 2004, SDCWA hired Mr. Hubert as a Public Affairs Representative II. He became a full time, salaried employee . He was placed on a period of probation, directed to report to work five days a week, and given business cards, identification, and keys to the office. SDCWA provided him with paid vacation and sick leave. SDCWA withheld taxes and other contributions from his paycheck. SDCWA provided him with health insurance and retirement benefits.

There was no significant change in Mr. Hubert's duties or responsibilities after he reported to work on July 8, 2004. Nor was there a change in the manner in which his work was reviewed and approved by others. Mr. Hubert has remained a full time SDCWA employee for the past dozen years.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proof by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. In this matter the burden of proof was on Mr. Hubert to establish by a preponderance of the evidence that he was a common law employee of SDCWA from May 16, 2001, through June 30, 2004.

3. "Preponderance of the evidence" is usually defined in terms of "probability of truth," for example as evidence that, "when weighed with that opposed to it, has more convincing force and the greater probability of truth." (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482-483.) A preponderance of the evidence means the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed. In other words, the term refers to evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Employees and Independent Contractors

4. A review of the many California cases in which the issue involved was whether an individual was an employee or an independent contractor demonstrates some of the many the difficulties in making that determination.

As noted by Julien M. Mundele in a recent note appearing in the Suffolk Journal of Trial and Appellate Advocacy entitled "Not Everything That Glitters Is Gold, Misclassification of Employees: The Blurred Line Between Independent Contractors and Employees Under the Major Classification Tests":

> Today's workplace has become increasingly regulated and complex. In distinguishing employees from independent contractors, employers face challenges due to a lack of statutory authority, and often make lasting, even detrimental, business decisions as a result. Currently, the federal government has not established a substantive statutory scheme to clarify this issue. However, many states have decided to address the problem by providing guidance through a series of common law classification tests. The three major classification tests are: the control test, the economic reality test, and the relative nature of the work test. Although mostly similar, the factors of these three major classification tests vary from jurisdiction to jurisdiction. Other states have decided to resolve the problems by enacting legislation to clarify the issues in some specified industries. (20 Suffolk J. Trial & App. Advoc. (2015) 253, 253-254.)

5. In California, PERL's provision concerning an individual's employment status incorporates the common law test for employment. (*Metropolitan Water District v. Superior Court (Cargill)* (2004) 32 Cal.4th 491, 509.) It is irrelevant that Mr. Hulbert was not given

the same due process rights as other SDCWA employees and other public employees when he was working under the written agreement and amendments thereto. The common law test of employment applies.

California's Common Law Employment Test

6. California Civil Jury Instruction (BAJI) 13.20 provides a legal framework within which it may be determined whether Mr. Hubert was an independent contractor or a common law employee from May 16, 2001, through June 30, 2004.[2]

BAJI 13.20 provides in part:

> While both an agent and an independent contractor work for another person, there is an important distinction between them.
>
> One is the agent of another person, called the principal, if he or she is authorized to act for or in place of the principal and is subject to the right of the principal to control his or her actions.
>
> An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents employer only as to the results of his or her work, and not as to the means whereby it is to be accomplished.
>
> The most important, but not the only, factor in determining whether one is an agent or independent contractor is whether the principal has the right to control the manner and means of

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[2] Mr. Hubert's closing argument did not contest the validity or application of BAJI 13.20, but suggested a California Civil Jury Instruction (CACI 3704) also applied and supported Mr. Hubert's status as a common law employee.

Bowman v. Wyatt (2010)186 Cal.App.4th 286, 303-304, concluded that persuasive legal authority consistently endorsed a multi-factor test to determine the existence of a common law employee-employer relationship that considered not only the right of control, but secondary factors such as whether the worker was engaged in a distinct occupation or business, the skill required in the particular occupation, whether the employer or the worker supplied the tools and the place of work, the length of time for which the services were to be performed, whether the worker was paid by time or by the job, whether the work was a part of the regular business of the employer, and the kind of relationship the parties believed they were creating. *Bowman* held CACI 3740 was misleading and an incorrect statement of the law to the extent it suggested the right of control, by itself, was determinative of the employee-employer relationship.

CACI 3740 was not used in reaching the conclusions set forth herein.

accomplishing the result desired. Strong evidence in support of a principal-agent relationship is the right to discharge at will, without cause.

Other factors which should be taken into consideration in determining whether a person is an agent or independent contractor are:

(a) Whether the one performing services is engaged in a distinct occupation or business;

(b) Whether, in the locality, the kind of occupation or business is one in which the work is usually done under the direction of a principal or by a specialist without supervision;

(c) The skill required in the particular occupation or business;

(d) Whether the principal or the worker supplies the instrumentalities, tools and the place of work for the person doing the work, or helpers;

(e) The length of time for which the services are to be performed;

(f) The method of payment, whether based on time or by the job;

(g) Whether the work is part of the regular business of the alleged principal;

(h) Whether the parties believe they are creating a relationship of agency or independent contractor; and

(i) Whether the alleged employee's opportunity for profit or loss depends on his or her or her managerial skill.[3]

An independent contractor is at liberty to consider and follow any suggestions that his or her employer may make, and his or

[3] In its closing brief, SDCWA observed that factor (i) - whether the alleged employee's opportunity for profit or loss depends on his or her or her managerial skill - was not mentioned in *Tieberg v. Unemployment Insurance Appeal Board* (1970) 2 Cal.3d 943 or any other legal authority that support BAJI 13.20. SDCWA argued factor (i) was not relevant in this matter. That factor was not considered in reaching the findings and conclusions in this matter.

her employer may make any suggestions or requests prompted by his or her own wishes, but these things do not change the independent contractor into an agent so long as he or she retains the right of control over the methods to be used to accomplish the end result.

One who employs an independent contractor ordinarily is not liable to others for the acts or omissions of the independent contractor.

7. In its closing brief, CalPERS relied heavily on the analysis set forth in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522 to support its argument that Mr. Hubert was not a common law employee.

In *Ayala*, newspaper home delivery carriers brought a class action lawsuit against a newspaper, alleging the newspaper improperly classified the carriers as independent contractors rather than employees, thereby violating California labor laws. The superior court denied the carriers' motion for class certification, and the carriers appealed. The court of appeal affirmed in part and reversed in part, and the newspaper petitioned for review. The California Supreme Court granted review and issued an opinion that held that the proper question at the certification stage was whether newspaper's right of control was sufficiently uniform to permit classwide assessment. *Ayala*'s reasoning should be understood within this context.

According to *Ayala*, under the common law, the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. In other words, what matters most is whether the hirer retains all necessary control over its operations. The fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control. Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because the power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities. While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, legal precedents also recognize a range of secondary indicia that may in a given case evince an employment relationship. Courts may consider: (a) whether 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 worker 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. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. 4th 522, 531-532.)

Significantly, what matters under the common law test is not how much control a hirer exercises, but how much control the hirer retains the right to exercise. Whether a right of control exists may be measured by asking whether or not, if instructions were given, they would have to be obeyed on pain of at-will discharge for disobedience. (*Ibid.*, at p. 533.) Where there is a written contract, to answer that question without full examination of the contract is virtually impossible. Evidence of variations in how work is done may indicate a hirer has not exercised control over those aspects of a task, but they cannot alone differentiate between cases where the omission arises because the hirer concludes control is unnecessary and those where the omission is due to the hirer's lack of the retained right. That a hirer chooses not to wield power does not prove it lacks power. This is not to say the parties' course of conduct is irrelevant. While any written contract is a necessary starting point, the rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms. (*Ibid.*, at pp. 535-536.)

When the issue of common law employment is involved, that weighing must be conducted with an eye to the reality that the considerations in the multi-factor test are not of uniform significance. Some, such as the hirer's right to fire at will and the basic level of skill called for by the job, are often of inordinate importance. Others, such as the ownership of the instrumentalities and tools of the job, may be of only evidential value, relevant to support an inference that the hiree is, or is not, subject to the hirer's direction and control. Moreover, the significance of any one factor and its role in the overall calculus may vary from case to case depending on the nature of the work and the evidence. (*Ibid.*, at p. 539.)

8. While the right to control work details is the most important or most significant consideration, the authorities also endorse consideration of several secondary indicia related to the nature of a service relationship. The individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations. It is the balance of the secondary factors that support or refute whether an individual is an employee. (*Garcia v. Seacon Logix, Inc.* (2015) 38 Cal.App.4th 1476, 1486.)

9. The common law test of employment has been used to determine whether an individual is an employee or an independent contractor in a variety of factual contexts, such as the obligation to pay unemployment benefits (*Southwest Research Institute v. Unemployment Insurance Appeals Board (Yingst)* (2000) 81 Cal.App.4th 705), the right to bring a wrongful termination claim (*Ali v. L.A. Focus Publication* (2003) 112 Cal.App.4th 1477), and right of the Labor Commissioner to bring an action against an individual for the retaliatory termination of an alleged employee. (*Lujan v. Minagar* (2004) 120 Cal.App.4th 1040).

In these kinds of matters, the courts first look to the hirer's right to control the manner and means of accomplishing the desired results. After that, secondary considerations include whether the work was occasional and sporadic, whether the worker was paid by the job, the parties' belief, whether the person to whom services were provided withheld taxes, whether the person receiving services provided the equipment and support services necessary to complete the job, whether an individual was engaged in a distinct occupation or profession, whether there was a right to discharge at will, and whether the work was part of the employer's regular business.

10. An agreement characterizing the relationship as one of "client-independent contractor" will be ignored if the parties, by their actual conduct, act like "employer-employee." (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 877.)[4]

The written agreement in this matter identified Mr. Hubert as an independent contractor, yet the written agreement also required Mr. Hulbert to complete all work to SDCWA's satisfaction in every detail and furnish work to SDCWA by established deadlines. In reality SDCWA provided Mr. Hubert with a cubicle where he was required to work, assigned projects for competition by specified deadlines, reviewed his graphic designs, and required him to modify those designs when SDCWA employees deemed that necessary. SDCWA provided Mr. Hubert with the equipment and supplies necessary to accomplish his assigned projects. Despite his not having the formal due process protections afforded public employees. SDCWA treated Mr. Hubert as if he were an employee.

SDCWA did not change manner in which it exercised the right to control Mr. Hubert in his preparation of graphic designs after he became a full-time employee. His day-to-day activities and circumstances remained exactly the same.

11. SDCWA always had the at-will right to discharge Mr. Hubert under the agreement and its amendments, with or without cause. SDCWA's right to discharge Mr. Hubert at will, without cause, is strong evidence that supports an employment relationship rather than an independent contractor relationship. (*Arzate v. Bridge Terminal Transport, Inc.* (2011) 192 Cal. App. 4th 419, 426.)

12. Mr. Hubert was paid on the basis of the number of hours he actually worked. He was paid an hourly rate. The payment of hourly wages to Mr. Hubert, rather than payment by the job or project, strongly suggests an employment relationship rather than an

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[4] An independent contractor agreement can properly include an at-will clause giving the parties the right to terminate the agreement. Such a clause does not, in and of itself, change the independent contractor relationship into an employee-employer relationship. If it did, independent contractor arrangements could only be established through agreements which limited the right of a party, or perhaps both parties, to terminate the agreement. This would be absurd, and it is not the law. (*Varisco v. Gateway Science & Engineering, Inc.* (2008) 166 Cal.App.4th 1099, 1107.)

independent contractor relationship. (*Garcia v. Seacon Logix, Inc.* (2015) 238 Cal. App. 4th 1476, 1488.)

13. Mr. Hubert furnished graphic design services, the same kind of services his predecessor furnished when she was employed by SDCWA. The services Mr. Hubert and Ms. King furnished were essential in meeting the routine, daily needs of SDCWA's public affairs department in its effort to maintain contact with clients and the public, and ensure effective internal communication. While Mr. Hubert certainly possessed training and experience as a graphic designer, he was not engaged in a distinct occupation or business when he worked under the written agreement. The work he performed was integrated into SDCWA's operations. Mr. Hulbert looked like an SDCWA employee and acted like a SDCWA employee. He provided the kinds of resident graphic design service Ms. King provided before she retired. Mr. Cushman's belief Mr. Hubert provided superior services did not establish that Mr. Hubert was an independent contractor or negate an employer-employee relationship.

14. Mr. Hubert's initial contract was for one year; it could be extended for two more years at SDCWA's discretion. SDCWA contemplated hiring a single individual to ensure continuity of style throughout ongoing projects. SDCWA's right to extend the contract for two additional one-year terms, coupled with its right to discharge at will, disclosed the agency's desire to retain the regular services of a competent graphic designer such as Mr. Hubert. And, in fact, Mr. Hubert ended up working under the agreement and its amendments on a continuous part-time basis from May 21, 2001, through June 30, 2004. The duration of his service supports his status as an employee.

With few exceptions, Mr. Hubert worked a set schedule. He had regular contact with SDCWA employees. Regular schedules are consistent with employee status and reflect employer control. (*Air Couriers International v. Employment Development Department* (2007) 150 Cal.App.4th 923, 937.)

15. Mr. Hubert and SDCWA believed they created an independent contractor relationship when they entered into the agreement. This belief continued throughout the duration of the agreement and for many years thereafter. Their belief provides some evidence to support Mr. Hubert's status as an independent contractor and not an employee.

When parties have entered into a written agreement that states the legal relationship they intended to create, the agreement is a significant factor. The very strength and propriety of compensation statutes rest in the fact that where a business is charged with the care of injured employees, the hirers in that business of men and women whose daily tasks place them in jeopardy may insure against the liability imposed by the law. A lawful agreement between the parties expressly stating that the relationship created is that of independent contractor should not be lightly disregarded when both parties have performed under the contract and relied on its provisions, for example by not insuring against risks assumed by the other party. (*Missions Ins. Co. v. Workers' Comp. Appeals Board* (1981) 123 Cal.App.3d 211, 226.)

16. Even when one or two of the secondary factors suggest an employment relationship, all factors must be weighed and considered as a whole. The principle issue for determination remains control. (*Varisco v. Gateway* ***Science & Engineering, Inc.*** **(2008) 166 Cal.App.4th 1099, 1106.)**

A Preponderance of the Evidence Supports a Factual Finding and the Legal Conclusion that Mr. Hulbert Was a Common Law Employee

17. A preponderance of the evidence established Mr. Hulbert was a common law employee of SDCWA from May 16, 2001, through June 30, 2004. Despite language contained in a written agreement identifying Mr. Hulbert as an "independent contractor," a preponderance of the evidence established SDCWA controlled the manner and means by which Mr. Hulbert provided graphic design services and had the right to discharge Mr. Hulbert at will and without cause. SDCWA treated Mr. Hulbert as an employee, and his circumstances did not change after the written agreement and amendments expired and he was hired as a Public Affairs Representative II. The majority of the secondary factors suggest an employment relationship, and not one of the secondary factors that suggests an independent contractor relationship overcomes the predominant finding and conclusion that SDCWA controlled the manner and means by which Mr. Hulbert provided graphic design services from May 21, 2001, through June 30, 2004.

18. The factual and legal conclusions set forth herein do not address various matters not at issue including the payment of arrears, indemnification, or other rights and duties of the parties that may exist under the written agreement and the PERL. The only issue presented for resolution in this proceeding was whether Steven Hubert was a common law employee or an independent contractor of the SDCWA from May 16, 2001, through June 30, 2004.

ORDER

CalPERS's determination that Steven Hubert was an independent contractor and not a common law employee is reversed. CalPERS shall process the Request for Service Credit Cost Information - Service Prior to Membership and shall permit Steven Hulbert to purchase CalPERS service credit as a result of his common law employment with the San Diego County Water Authority from May 16, 2001, through June 30, 2004, as authorized by the Public Employees' Retirement Law.

Dated: February 19, 2016

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings