

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:**

**TARLOCHAN SANDHU; CITY OF CAPITOLA; CITY OF
ALAMEDA; TOWN OF LOS ALTOS HILLS; and CITY OF UNION
CITY, Respondents**

Agency Case No. 2020-0564

OAH No. 2020100708

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter by videoconference on March 9, 24, and 25, 2021, from Sacramento, California.¹

¹ There was a discrepancy in the official exhibit list and the official exhibits concerning Joint Exhibit 35. The discrepancy was resolved by the parties' stipulation, which is included in the record as Joint Exhibit 332.

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

Scott N. Kivel of the Law Offices of Scott N. Kivel represented respondent Tarlochan Sandhu, who was present throughout the hearing.

No one appeared for or on behalf of respondents City of Capitola, City of Alameda, Town of Los Altos Hills, or City of Union City (collectively "the Cities"); their defaults were entered; and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to the Cities only.

Evidence was received and the record was held open to allow the parties to submit simultaneous closing and reply briefs.² CalPERS's closing and reply briefs are marked as Exhibits 330 and 333, and Mr. Sandhu's 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.

² Hearing in this matter was coordinated, but not consolidated, with the hearings in Linda Abid-Cummings (Agency Case No. 2020-0560, OAH No. 2020090772), Douglas Breeze (Agency Case No. 2020-0561, OAH No. 2020100848), David Dowswell (Agency Case No. 2020-0562, OAH No. 2020090934), and Margaret Souza (Agency Case No. 2020-0565, OAH No. 2020090931) 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.

SUMMARY

Mr. Sandhu retired for service, after which he worked for the Cities without reinstatement from retirement. The persuasive evidence established that he worked for the Cities as a common law employee. The evidence further established that he exceeded the maximum number of hours a retired member may work in a fiscal year without reinstatement while working for the City of Union City, and he was paid an excessive hourly rate while working for the Cities of Capitola and Alameda. Therefore, Mr. Sandhu's appeal from CalPERS's determinations that he was a common law employee of the Cities and violated the post-retirement employment rules should be denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. Mr. Sandhu began working for the City of Palo Alto as a finance and accounting professional in 1989. He became a local miscellaneous member of CalPERS by virtue of that employment. Mr. Sandhu continued working as a finance and accounting professional in the public sector until he retired for service from the Santa Clara Valley Transportation Authority as its financial accounting manager, effective September 10, 2011. He has been receiving his retirement allowance since December 1, 2011.

2. During retirement, Mr. Sandhu provided finance and accounting services to the Cities as an "advisor" for Regional Government Services (RGS). RGS is a joint

powers authority created by the Association of Bay Area Governments and the City of San Carlos.

3. RGS provides public entities access to experienced public sector professionals they may not have the resources to attract and retain as employees. RGS hires employees with prior work experience in the public sector and assigns them as advisors to clients who contract for RGS's services. Some of the professions in which RGS has advisors include finance, human resources, and land use planning.

4. In February 2018, CalPERS began investigating the nature of Mr. Sandhu's relationship with the Cities. On January 10, 2020, CalPERS sent Mr. Sandhu correspondence explaining that it concluded he worked as a common law employee for the Cities. CalPERS also concluded his employment with the Cities of Capitola, Alameda, and Union City (from February 1 to June 20, 2016, only) violated the post-retirement employment rules.

5. Mr. Sandhu timely appealed CalPERS's determinations. On February 26, 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 Mr. Sandhu a common law employee of the Cities; and (2) if so, did his employment violate the post-retirement employment rules set forth in the California Public Employees' Pension Reform Act of 2013 (Gov. Code, § 7522 et seq.; PEPRA)?³

³ The prayer in the Amended Statement of Issues erroneously identifies the applicable law as the Public Employees' Retirement Law (Gov. Code, § 20000 et seq.; PERL). Elsewhere in the Amended Statement of Issues, however, it is alleged that the PERL's post-retirement employment rules apply prior to January 1, 2013, and the

Post-Retirement Employment

CITY OF CAPITOLA

6. At all times relevant, Benjamin "Jamie" Goldstein has been the City of Capitola's city manager. At the beginning of the 2015 budget season, the City's finance director gave notice that she was resigning. Mr. Goldstein needed someone to help prepare the budget, and he decided to use RGS's services while the City of Capitola recruited a new finance director. At all times relevant, the City of Capitola contracted with CalPERS to provide its full-time employees, including the finance director, retirement benefits.

7. RGS sent Mr. Goldstein the names and backgrounds of advisors who could fulfill his needs, and he chose Mr. Sandhu. On February 23, 2015, Mr. Sandhu entered into an employment agreement with RGS. The agreement identified the scope of Mr. Sandhu's duties as follows: "Employee will act as Regional Government Services advisor assigned to multiple clients and initially to the City of Capitola to perform interim finance director duties." RGS paid Mr. Sandhu \$75 per hour.

8. The following day, RGS entered into a contract with the City of Capitola for Mr. Sandhu to provide services as a "Finance Advisor." The contract was "anticipated to remain in force through June 30, 2015," but continued after that date "on a month-to-month basis until one party terminate[d] the agreement" by providing

PEPRA's rules apply on and after that date. It is further alleged that Mr. Sandhu's employment "from 2015 through January 2016" violated "PEPRA's Post-Retirement Employment Provisions." (Bold omitted.) Therefore, respondents received proper notice of the applicable law.

30 days' notice. Additionally, the City of Capitola could terminate the contract if it determined, in its sole discretion, Mr. Sandhu's services were unsatisfactory.

9. The City of Capitola paid RGS \$100 an hour for Mr. Sandhu's services. The contract provided that the hourly rate was "based upon RGS's costs of providing the services required hereunder, including salaries and benefits of employees." RGS could not reassign Mr. Sandhu "without first consulting with the [City of Capitola]." However, the City of Capitola could request a different advisor at any time "and RGS shall meet and confer in good faith to consider reassigning such person or persons."

10. The contract identified RGS as the City of Capitola's independent contractor and Mr. Sandhu as RGS's agent or employee and not the City of Capitola's agent or employee. It specified that the City of Capitola "shall not have the ability to direct how services are to be performed, specify the location where services are to be performed, or establish set hours or days for performance of services, except as set forth in the Exhibits." Additionally, the City of Capitola had no right "to discharge any employee of RGS from employment." Finally, the contract specified that RGS was responsible for providing all employee benefits to Mr. Sandhu and paying all applicable employment taxes for him. This language was consistent with Mr. Goldstein's and Mr. Sandhu's understanding and intent that Mr. Sandhu was not a City of Capitola employee.

11. Mr. Sandhu began working at the City of Capitola on February 25, 2015. His main duties were helping prepare the annual operating and capital budget, revenue forecast, and expenditure forecast. The City of Capitola did not provide any training on how to perform those tasks because Mr. Sandhu already had "vast experience" preparing budgets and other financial and accounting documents and

reports based on his more than 20 years of experience as a finance and accounting professional in the public sector.

12. The City of Capitola provided Mr. Sandhu an email address similar to those provided other City of Capitola employees. He was assigned a cubicle with a telephone to use, but performed a majority of his work from home. Mr. Goldstein “was the prime contact person for [Mr. Sandhu] on staff,” and Mr. Sandhu provided him regular updates on his progress with preparing the budget and the revenue and expenditure forecast. Mr. Goldstein did not supervise Mr. Sandhu’s day-to-day work, but “reviewed all the material, and so to the extent there was anything in the budget [he] disagreed with or had questions about, [he] would consult with Mr. Sandhu to resolve those issues.” Mr. Goldstein explained:

So as city manager you rely on the staff to do much of the work, but at the end of the day, I am responsible for that work. So to the extent I rely on consultants or staff to prepare materials, at the end of the day I’m accountable for it. But, yes, I don’t do everything at the city. I don’t think every city manager can do everything for the city.

13. Mr. Sandhu reported the time he worked at the City of Capitola on a timesheet, and RGS used the timesheet to generate an invoice for his services to the City of Capitola. The City of Capitola paid the invoice directly to RGS. Mr. Sandhu’s last day with the City of Capitola was April 30, 2015, because the City of Capitola hired a permanent finance director.

TOWN OF LOS ALTOS HILLS

14. Carl Cahill has been the Town of Los Altos Hills's city manager since 2006. At the beginning of 2015, the Town of Los Altos Hills's administrative services director resigned, and Mr. Cahill promoted the finance manager to administrative services director. He immediately began the recruitment process for a new finance manager. At all times relevant, the Town of Los Altos Hills contracted with CalPERS to provide its full-time employees, including its administrative services director and finance manager, retirement benefits.

15. In the meantime, Mr. Cahill felt a sense of urgency to hire someone to "maintain internal controls for our public finances" because the new administrative services director was the Town of Los Altos Hills's only finance professional. He explained, "It's just not good financial practice, particularly for the public sector to have just one person, one finance professional overseeing the entire finance operation. One person overseeing the public's money."

16. Mr. Cahill decided to use "RGS and its employees to temporarily [and] on an interim basis to safeguard assets and detect financial errors and frauds." On March 6, 2015, the Town of Los Altos Hills entered into a contract with RGS. The contract specified that Mr. Sandhu "shall provide Interim Finance Manager services two (2) days per week; and may perform services on a full [*sic*] time basis as needed."

17. The contract was "anticipated to remain in force through December 31, 2015," but continued on a month-to-month basis after that date until either party provided 30 days' notice. It identified RGS as the Town of Los Altos Hills's independent contractor and Mr. Sandhu as RGS's agent or employee and not the Town of Los Altos Hills's agent or employee. This language was consistent with Mr. Cahill's and Mr.

Sandhu's understanding and intent that Mr. Sandhu was not a Town of Los Altos Hills employee. The terms of the contract were otherwise substantially the same as the contract between RGS and the City of Capitola, except the Town of Los Altos Hills paid RGS \$83 an hour for Mr. Sandhu's services.

18. Mr. Sandhu began working for the Town of Los Altos Hills on April 6, 2015, pursuant to his February 23, 2015 employment agreement with RGS. RGS paid him \$60 an hour. His duties consisted mainly of "helping them and accounting functions, general ledger, updating general ledger, preparing financial reports, [because] there was a new finance director." He explained that most of his duties fell within the Town of Los Altos Hills's job description for its finance manager, "but that doesn't mean I was doing everything that a typical finance manager by themselves would do. I was doing much less special functions."

19. Mr. Sandhu performed most of his work at City Hall in an assigned cubicle. He met with the administrative services director "at least once a week," but she did not supervise his daily work because "compared to my experience in previous agencies, this was a very small outfit. And most of the work assigned to me, I was able to do on my own without any direction." He recorded the hours he worked on a timesheet, which RGS used to generate an invoice for his services to the Town of Los Altos Hills. The Town of Los Altos Hills paid the invoice directly to RGS.

20. Mr. Sandhu's last day at the Town of Los Altos Hills was January 22, 2016. During the 2015/2016 fiscal year, he worked a total of 331 hours.⁴

⁴ As used throughout this decision, a fiscal year begins July 1 and ends June 30 the following calendar year.

CITY OF ALAMEDA

21. In 2015, the City of Alameda's financial services manager position was vacant, and the City of Alameda was recruiting to fill the position. At all times relevant, the City of Alameda contracted with CalPERS to provide its full-time employees, including the financial services manager, retirement benefits.

22. The City of Alameda entered into a contract with RGS on June 26, 2015, for Mr. Sandhu to "provide financial management services 4 days per week" as the "Interim Financial Services Manager." The contract precluded anyone other than Mr. Sandhu from performing those services, "unless prior written consent from the City is obtained." The City of Alameda paid RGS \$100 an hour for Mr. Sandhu's services. The hourly rate was "based upon RGS's costs of providing the services required [under the contract], including salaries and benefits of employees."

23. The term of the contract was July 1 through October 31, 2015. The City of Alameda had the option, "at its sole discretion and without cause," to terminate the contract early by giving seven days' notice. The contract described the nature of the parties' relationship as "that of employer-independent contractor." It further provided: "The manner and means of conducting the work are under the control of [RGS], except to the extent they are limited by statute, rule or regulation and the express terms of this Agreement."

24. Mr. Sandhu worked at the City of Alameda pursuant to his February 23, 2015 employment agreement with RGS. RGS paid him \$75 per hour.⁵ He performed

⁵ There was no evidence that he was paid \$70 per hour as alleged in the Amended Statement of Issues.

some, but not all, the duties listed in the City of Alameda's job description for its financial services manager. His main task was helping City of Alameda staff gather and prepare documentation for an external audit. During the interview process for a permanent financial services manager, he helped the City of Alameda evaluate candidates' responses to the interview panel's questions about the "technical" aspects of the position and provided his opinion about which candidates were qualified.

25. Mr. Sandhu never considered himself a City of Alameda employee. He dictated his own work schedule, was not provided any employee benefits the City of Alameda typically provided its employees, and was provided no day-to-day supervision. He explained, "most of the time [he] did not" need direction on how to do his job. "I know how the process worked, because I'm experienced in other agencies, so I would directly work with the staff, and I was assisting them or asking questions from them, but [a] majority of the time I did not need any direction."

26. Mr. Sandhu continued to work for a short time after the City of Alameda hired a permanent financial services manager "to bring [him] up to speed where we are so he can continue the remaining process." He worked a total of 199 hours between July 15 and September 17, 2015.

CITY OF UNION CITY

27. Antonio Acosta was the City of Union City's city manager from January 2015 through June 2019. When he joined the City of Union City, finance and human resources were under the umbrella of the administrative services department. He did not like that model of government and convinced the city council to reorganize to create a separate finance department and human resources department. This created an opening in the finance director position. At all times relevant, the City of Union City

contracted with CalPERS to provide its full-time employees, including the finance director, retirement benefits.

28. The City of Union City began recruiting a finance director. In the meantime, a financial audit and a confidential financial statement needed to be completed, and Mr. Acosta decided to use RGS's services. RGS sent the names of advisors who could fulfill his needs, and he selected Mr. Sandhu.

29. On October 8, 2015, the City of Union City entered into a contract with RGS for Mr. Sandhu to provide "Interim Finance Director" services. The terms of the contract were substantially the same as the City of Capitola's, except it was anticipated to continue through June 30, 2016. Additionally, the City of Union City paid RGS \$110 an hour for Mr. Sandhu's services.

30. Mr. Acosta never intended Mr. Sandhu to become a City of Union City employee, and did not expect or want Mr. Sandhu to perform all finance director duties. Mr. Sandhu was given the title "Interim Finance Director" as "a term of convenience," and he signed the City of Union City's annual financial report "because the protocol is whoever is serving as finance director would sign off on that report and City Council reports"

31. Mr. Sandhu worked at the City of Union City pursuant to his February 23, 2015 employment agreement with RGS. His first day of work was October 7, 2015. RGS paid him \$85 an hour.

32. Mr. Sandhu performed some, but not all, the essential functions listed in the City of Union City's duty statement for its finance director. His "major goal was to evaluate the operating and capital budget and go through the detail of allusion of revenues and expenditures, advise the city manager whether those I believe are

accurate or not.” He performed most of his work at City Hall in an assigned cubicle. His last day of work was June 20, 2016. He worked a total of 1,064 hours.

CalPERS’s Analysis of Post-Retirement Employment

BACKGROUND

33. 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.”

34. The Team makes “complex determinations” about the nature of a member’s employment relationship to determine if he is acting as a common law employee or an independent contractor of the CalPERS employer to whom he 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 his employment violates the post-retirement employment rules. If it does, the retired member is subject to reinstatement from retirement.

35. 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 Mr. Sandhu’s employment relationship with the Cities. She drafted the “final determination” letter sent to Mr. Sandhu on January 10, 2020.

ANALYSIS OF EMPLOYMENT RELATIONSHIPS

36. Ms. Rollins explained that the PEPRA generally prohibits a retired CalPERS member from working for a CalPERS employer without reinstatement. Therefore, the first step in her analysis of Mr. Sandhu's relationships with the Cities was to determine if he worked for each as an employee or an independent contractor. She 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*).⁶ Some of the common law factors she considered included each City's right to control how Mr. Sandhu performed his work, 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 his services, and whether he was paid based on the amount of time he spent working or a per project basis. She further explained that no one factor was given more weight than the other, but rather it was the "cumulative" weight of all factors that led her to conclude he was a common law employee of each City.

Right to Control

37. The Cities' response to CalPERS's Employment Relationship Questionnaire indicated Mr. Sandhu was hired to perform services of a position established by the entity's municipal code. He performed some of the essential duties listed in the job descriptions for those positions, and he was subject to some, albeit minimal, supervision. For instance, Mr. Goldstein received drafts of the budget documents Mr. Sandhu prepared for the City of Capitola, and the administrative

⁶ Dewayne Cargill was a real party in interest in *Metropolitan Water District*. The parties sometimes referred to the decision as "*Cargill*" or "the *Cargill* decision."

services director reviewed his work on “journal entries in financial reports” for the Town of Los Altos Hills. Mr. Goldstein conceded that as the city manager he was ultimately responsible for Mr. Sandhu’s work. No one else performed Mr. Sandhu’s duties while he was working for each entity. The City of Alameda’s contract with RGS expressly prohibited anyone other than Mr. Sandhu from providing services without the City of Alameda’s “prior written consent.”

38. The City of Capitola responded that Mr. Sandhu was required to “be reasonably available to perform the services during the normal work week; [and] meet regularly and as often as necessary for the purpose of consulting about the scope of work performed.” Similarly, the City of Alameda wrote that he was required to “be reasonably available to perform the services during the normal work week (Monday-Thursday, seven hours a day), as agreed upon.” The Town of Los Altos Hills required him to work a minimum of “two (2) days per week.”

39. The City of Capitola produced city council meeting minutes indicating Mr. Sandhu was introduced as the City of Capitola’s newly hired “Interim Finance Director.” The City of Union City produced various memorandums Mr. Sandhu wrote as the City of Union City’s “Interim Finance Director.” The Town of Los Altos Hills produced emails in which the former administrative services director sought, and received, Mr. Cahill’s permission to extend the Town of Los Altos Hills’s contract for Mr. Sandhu’s services “for purposes of a transition” with a new finance manager.

40. Ms. Rollins explained that the above information demonstrated that the Cities had the right to control how Mr. Sandhu provided his services. It did not matter that he was not performing all the duties outlined in the job descriptions, because he 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. Nor was it relevant that he

did not receive day-to-day supervision, because it is common for highly skilled employees such as him to work with little oversight.

Skills Required and Degree of Supervision

41. It was undisputed that Mr. Sandhu was a highly skilled finance and accounting professional who needed little, if any, day-to-day direction on how to perform his duties with the Cities. Therefore, it was insignificant that he was not provided day-to-day direction. Ms. Rollins explained, “[T]here are many positions that are employees of an agency where 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 Services

42. The Cities’ contracts with RGS anticipated needing Mr. Sandhu’s services for a finite period of nine months or less. Ms. Rollins explained that a short period of employment is generally indicative of an independent contractor relationship. However, each contract, other than the City of Alameda’s, continued after the initial period on a month-to-month basis until a party provided 30 days’ notice. Additionally, Mr. Sandhu was retained by each entity for the specific purpose of performing services of a vacant position while a permanent employee was recruited. Ms. Rollins explained that was more suggestive of an employer-employee relationship, especially because Mr. Sandhu left once a permanent replacement was hired.

Method of Payment

43. Mr. Sandhu recorded the time he spent working for the Cities on a timesheet, and RGS paid him an hourly rate for that time. According to Ms. Rollins,

“true consultants are paid by the job. That’s because they are generally hired to do a specific project. They come in, do that project, and are paid for that project that they do.”

POST-RETIREMENT EMPLOYMENT RULES

44. Ms. Rollins explained that the PEPRA allows a retired member to work for a CalPERS employer without reinstatement under limited circumstances, but such employment may not exceed 960 hours in a fiscal year. Also, he may not receive an hourly rate more than the maximum paid other employees performing similar duties. Therefore, once Ms. Rollins concluded Mr. Sandhu was a common law employee of the Cities and he did not reinstate from retirement, she analyzed the total number of hours worked and his hourly pay rate.⁷

Excessive Hours

45. Mr. Sandhu exclusively performed some of the duties of the Town of Los Altos Hills’s finance manager for a total of 331 hours during Fiscal Year 2015/2016. His employment did not violate the PEPRA, but was included in the total number of hours worked for all CalPERS employers that fiscal year.

46. Mr. Sandhu exclusively performed some of the duties of the City of Alameda’s financial services manager for a total of 199 hours from July 15 through September 17, 2015. Although his hours did not exceed the maximum allowed, they

⁷ Whether an exception to the general rule prohibiting post-retirement employment applied to Mr. Sandhu was not an issue on appeal; only the nature of his employment relationships, the number of hours worked, and the amount he was paid were.

were included in the total number of hours worked for all CalPERS employers that fiscal year.

47. Mr. Sandhu exclusively performed some of the duties of the City of Union City's finance director from October 7, 2015, through June 20, 2016. When he started, he had already worked a total of 530 hours for other CalPERS employers that fiscal year as discussed above. He exceeded the maximum number of hours allowed on February 1, 2016.⁸

Excessive Pay

48. Mr. Sandhu exclusively performed some of the duties of the City of Capitola's director of finance from February 25 through April 30, 2015. The salary authorized for the position at the time was \$10,842 per month (\$62.55 per hour).⁹ RGS paid Mr. Sandhu \$75 per hour.

⁸ The evidence established he exceeded the limit after working six hours on January 28, 2016. However, the Amended Statement of Issues alleges his employment with the City "exceeded the 960-hour limit per fiscal year permitted from February 1, 2016 to June 20, 2016."

⁹ The Amended Statement of Issues alleges that the monthly salary was \$11,237 (\$64.83 per hour). However, the City's salary schedule included within Exhibit 15 was more persuasive evidence of the salary than the job announcement in Exhibit 19. Ultimately, the difference between the amounts is irrelevant because Mr. Sandhu was paid more than both.

49. The top step of the salary range for the City of Alameda's financial services manager while Mr. Sandhu was performing some of the duties of the position was \$10,986.83 per month (\$63.39 per hour). RGS paid him \$75 per hour.

Analysis

MR. SANDHU WORKED AS A COMMON LAW EMPLOYEE WITHOUT REINSTATEMENT

50. The relevant inquiry is Mr. Sandhu's relationship with the Cities, not RGS, because the Cities are CalPERS employers but RGS is not. It was undisputed that he never reinstated from retirement. Though RGS's contracts with the Cities identified Mr. Sandhu as the Cities' independent contractor, such language is not dispositive if the parties' actual conduct indicates otherwise.

51. The most important factor under the common law test is the Cities' right to control the way Mr. Sandhu performed his duties, and the persuasive evidence overwhelmingly established that the Cities had and exercised that right. Notwithstanding language in RGS's contracts with the Cities to the contrary, the Cities had the right to terminate Mr. Sandhu's employment with them by canceling their contracts. The Cities of Capitola and Union City and the Town of Los Altos Hills had the express right to cancel their contracts if they concluded, in their sole discretion, that his services were "unsatisfactory." Alternatively, they could leave the contract in place and request a different "advisor."

52. Each City entered into a contract with RGS for the specific purpose of having Mr. Sandhu perform some of the duties of a vacant position while the entity recruited a permanent employee, and no one else performed those duties. He stopped working for each City shortly after it hired a permanent replacement. The

administrative services director for the Town of Los Altos Hills sought an extension of its contract with RGS for the express purpose of “a transition” with the new finance manager. Ms. Rollins persuasively explained the insignificance of Mr. Sandhu not performing all the duties of the positions. She also persuasively explained why the lack of day-to-day supervision did not negate the Cities’ right to control Mr. Sandhu.

53. Each contract expressly prohibited RGS from reassigning Mr. Sandhu to another client “without first consulting” the entity. The City of Alameda’s contract prohibited anyone other than Mr. Sandhu from providing services without the City’s “prior written consent,” and required him to work “4 days per week.” The Town of Los Altos Hills required him to work a minimum of “two (2) days per week.” The City of Capitola required him to “be reasonably available to perform the services during the normal work week; [and] meet regularly and as often as necessary for the purpose of consulting about the scope of work performed.”

54. Each contract specifically stated that the City was not responsible for paying Mr. Sandhu or providing him employee benefits, and his salary and benefits were RGS’s sole responsibility. But the express language of the contracts demonstrated that the Cities reimbursed RGS for those costs, and RGS was simply a conduit through which the Cities paid Mr. Sandhu for his work.

55. Other elements of the common law test for employment also indicated Mr. Sandhu was a common law employee. It was undisputed that he was a highly skilled finance and accounting professional, and the persuasive evidence established that employees with those skills often work with little supervision. He was not engaged in a distinct occupation or business when he worked for the Cities. The work he performed was usually performed by a City employee. RGS paid Mr. Sandhu on an hourly basis, as opposed to a flat rate for each job.

56. Although the Cities' contracts were initially for a specific term, each continued on a month-to-month basis upon expiration of that term until a party provided 30 days' notice, except for the City of Alameda's. Contracts of an indeterminate length are indicative of an employment relationship. Ms. Rollins persuasively explained why the City of Alameda's short-term contract was not indicative of an independent contractor relationship.

57. 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 Cities' intent that is relevant, not Messrs. Goldstein's, Cahill's, or Acosta's. And the fact that the Cities retained Mr. Sandhu for the express purpose of performing the duties of a specific position was the most compelling evidence of their intent. That intent was affirmed by numerous official documents identifying Mr. Sandhu as holding that position.

MR. SANDHU'S EMPLOYMENT WITH THE CITY OF UNION CITY EXCEEDED THE 960-HOUR LIMIT

58. Mr. Sandhu did not produce any evidence to contradict CalPERS's persuasive evidence that he exceeded the PEPRAs 960-hour limit for post-retirement employment on February 1, 2016, while working for the City of Union City.

MR. SANDHU RECEIVED EXCESSIVE PAY WHILE WORKING FOR THE CITIES OF CAPITOLA AND ALAMEDA

59. Mr. Sandhu did not produce any evidence to contradict CalPERS's persuasive evidence that RGS paid him an hourly rate greater than that which the City of Capitola paid its finance director in Fiscal Year 2014/2015. Nor did he produce

evidence to contradict the evidence that he was paid an hourly rate greater than that which the City of Alameda paid its financial services manager in Fiscal Year 2015/2016.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. The parties agreed Mr. Sandhu has the burden of proving he was an independent contractor of the Cities and he did not violate the PEPRA's post-retirement employment rules. He must meet his burden by a preponderance of the evidence. This evidentiary standard requires Mr. Sandhu 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, he must prove it is more likely than not that he was an independent contractor and did not violate the PEPRA's 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).)

3. Commencing January 1, 2013, the PEPRA 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 PEPRA 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 PEPRA’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).) Work performed under this exception is limited to no more than 960 hours for all CalPERS employers in a fiscal year. (*Id.*, subd. (d).) Additionally, “the rate of pay for the employment shall not be less than the minimum, nor exceed the maximum, paid by the employer to other employees performing comparable duties, divided by 173.333 to equal an hourly rate.” (*Ibid.*)

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 that 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. (*García 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.) And providing services for an indeterminate length of time “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, supra*, 32 Cal.4th 491, several of the water district’s employees alleged they were misclassified as “consultants” or “agency temporary employees,” and therefore improperly denied employee benefits, including

CalPERS membership. The water district contracted with CalPERS to provide retirement benefits to its employees. However, the water district did not enroll employees provided pursuant to contracts with several private labor suppliers, instead classifying them as "consultants" or "agency temporary employees." (*Id.* at pp. 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.¹⁰ 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

¹⁰ It was also disingenuous given that it argued the opposite at hearing and the amount of resources it expended proving Mr. Sandhu's common law employment.

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. (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 was not persuasive.

12. CalPERS’s argument about the applicability of Government Code section 20164 is irrelevant. CalPERS’s right to collect any purported overpayments to Mr. Sandhu is not an issue on appeal.

13. Mr. Sandhu made several arguments in closing, none of which was persuasive. He argued that concluding he was a common law employee is inconsistent with the Cities’ 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. Mr. Sandhu criticized CalPERS's Board of Administration for not adopting regulations or issuing precedential decisions outlining criteria for distinguishing between employees and independent contractors. But he cited no authority requiring the Board to do so. Additionally, he admitted that his appeal is "governed by the common law test" and cited a plethora of case law discussing that test. His conclusion that "[CalPERS's] interpretation of statutory language is entitled to less deference when not adopted as a regulation" is significantly undermined by his 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. Mr. Sandhu'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 his admission that "the common law control test is fact-sensitive." And his argument that concluding he was a common law employee

because he held a specific position with each public entity ignores Ms. Rollins's persuasive testimony that Mr. Sandhu holding a specific position was just one factor.

16. Mr. Sandhu's argument that the rules of statutory construction lead to the conclusion that he was an independent contractor because there is no statute or regulation defining "employee" ignores Government Code section 20028, which defines that term. His 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, Mr. Sandhu's argument that RGS's service model is critically important to assisting public agencies is nothing more than an opinion. Furthermore, it was supported by no legal authority.

Conclusion

18. The Cities' contracts with RGS were subterfuge to hide the fact that Mr. Sandhu worked as a common law employee of the City of Capitola, Town of Los Altos Hills, City of Alameda, and City of Union City, without reinstatement, as discussed in Factual Findings 50 through 57. His employment with the Cities of Capitola, Alameda, and Union City (from September 1 to June 20, 2016, only) violated the PEPRA's post-retirement employment rules as discussed in Factual Findings 58 and 59.

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ORDER

Respondent Tarlochan Sandhu's appeal from CalPERS's January 10, 2020 determinations that he was a common law employee of the City of Capitola, Town of Los Altos Hills, City of Alameda, and City of Union City and his employment with the City of Capitola, City of Alameda, and City of Union City (from February 1 through June 20, 2016, only) violated the PEPRAs post-retirement employment rules is DENIED.

DATE: September 17, 2021


Coren D. Wong (Sep 17 2021 11:45 PDT)

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings