ATTACHMENT C

RESPONDENT'S ARGUMENT

LAW OFFICES OF
SCOTT N. KIVEL

scottkivel@kivellaw.com

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

October 27, 2021

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

VIA FEDERAL EXPRESS ONLY

Re: In the Matter of the Appeal of Membership Determination of Douglas Breeze, Respondent, and City of Atascadero, Respondent (OAH Case No. 2020100848)

Respondents Douglas Breeze and City of Atascadero's Argument to *Reject* the ALJ Proposed Decision

I. INTRODUCTION

This appeal identifies the key issues demonstrating the fundamental flaws in the Administrative Law Judge's ("ALJ") proposed decision in which the ALJ found that the individual Respondent was a common law employee of the City, rather than of the third-party employer, Regional Government Services. Thus, this decision should be rejected. *The case before this Board involves a third party employer, a public joint powers agency, Regional Government Services ("RGS") which contracted with the Respondent City to provide RGS Advisors for time-limited, high level professional services for time-sensitive and immediate work required by the City.*

II. THE CALPERS BOARD SHOULD REJECT THE PROPOSED DECISION.

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

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

BAR ADMISSIONS:

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

(2) misapplies the well-settled law to the undisputed and consistent testimony by the individual Respondent and the City officials, and the documentary evidence, that the City Respondent and its employees never controlled, supervised, or exercised direction over the manner and means of the work assigned by the City-Regional Government Services contract;

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

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

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

(6) rejects the well-settled judicial obligation to harmonize relevant law, by example, ignoring the well-settled statutory authority given by the Legislature to general law cities to contract for special services as the local jurisdiction deems

---

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

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

necessary to fulfill its service delivery obligations; [3,4]

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

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

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

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

(11) improperly rejected Respondents' repeated attempts to compel CalPERS to identify its "working law" as to third party independent contractor relationships, including but not limited to this Board's adopted administrative law judge decisions that demonstrate contrary factual and legal conclusions which contradict the instant proposed decision. Indeed, CalPERS own training materials instruct

---

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

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

[4] CalPERS conceded that it has failed to adopt any regulation regarding a City hiring outside consultants: Q: "Does CalPERS have any policy of prohibiting a City from hiring a consultant to perform certain finance activities?" A: "No." 3/25/2021, 400:10-13. Q: "Is there any CalPERS prohibition on a City hiring a consultant to do certain financial work?" A: "No." *Id.*, 432:17-19.

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

staff to the exact opposite conclusion as to valid third-party employment, yet another relevant and probative exhibit ruled inadmissible by the ALJ.

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

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

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

In addition to the consistent testimony by all of Respondent's witnesses, and memorialized by the RGS-City contracts and the RGS-individual employment agreements which expressly state that the advisor is an at-will employee of RGS and not subject to the City's authority, it is unambiguous that the Respondent City did not control or have the right to control the manner and means of the RGS advisors' work. See e.g. *Tieberg, supra,* at 947: "[I]f control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established." CalPERS simply has not identified specific evidence showing that the cities controlled or had the right to control the individual Respondents' assigned work.[6]

Moreover, as explicitly provided for in the terms of RGS Advisor employment agreements, the right and expectation of working for *multiple clients, at times concurrently*, also constitutes a basic characteristic of an independent contractor.[7]

---

[6] As demonstrated in the administrative record, Respondent provided overwhelming evidence that the Respondent was an employee of RGS. By way of example, RGS memorialized its RGS Advisor assignments (and compensation) through RGS Personnel Action Forms.

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

IV. FACTS SHOWING RESPONDENT'S STATUS AND ASSIGNMENTS.

ATASCADERO's City Engineer/Public Works Director job description requires that the Public Works Director also be a licensed civil engineer. 695:13-24; Ex. 169, p. 3 ("Special Requirements: Possession of or ability to obtain registration as a professional Civil Engineer from the State of California." BREEZE was not a civil engineer. 655:25-656:2. Despite CalPERS alleging that BREEZE served in this position, he testified that he was not qualified as a city engineer. 661:17-24.

He was not assigned the job description for Public Works Director; rather he was tasked with specific projects such as improving zoo facilities, implementing wastewater engineering recommendations and surveying the street infrastructure for maintenance priorities. 662:19-663:19

The RGS-ATASCADERO contract referenced BREEZE as "RGS Public Works Advisor." (Ex. 161, p. 14) The city manager considered him an "Advisor," never a City employee. 701:2-5.

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

Here the decision fails to meet the standards for establishing precedent:

- The decision does not contain a significant legal or policy determination of general application that is likely to recur; and

- The decision does not include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied.

CalPERS has no statutory authority to dictate how California's public agencies implement their operational mandates. Any attempt to adopt this proposed decision as precedent deserves, indeed requires, ample public notice and an opportunity to respond by any CalPERS member who may be affected by making this decision precedential.

LAW OFFICES OF SCOTT N. KIVEL

Scott N. Kivel