

**ATTACHMENT C**

**RESPONDENTS' ARGUMENTS**

**(Submitted)**

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October 26, 2021

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



Re: In the Matter of the Appeal of Membership Determination of Linda D. Abid-Cummings, Respondent,  
and City of Hughson, Respondent  
OAH Case No. 2020090772

In the Matter of the Appeal of Membership Determination of Margaret M. Souza, Respondent, and  
City of Hughson, Respondent  
OAH Case No. 2020090931

Honorable CalPERS Board Members,

On behalf of the City Council of the City of Hughson ("City"), I am writing to you to request that a terrible wrong be averted and that the Administrative Law Judge's ("ALJ") proposed decision in this matter be rejected in its entirety as it would not only create a new CalPERS rule without following the normal rule making procedure, it would retroactively enforce it against unsuspecting cities like Hughson that carefully complied with the then existing rules when entering into its contract for services with Regional Government Services ("RGS") in order to make it through difficult financial times.

CalPERS has established rules so everyone knows what they can and can't do. That process includes allowing CalPERS member agencies to comment on the proposed rules to assist the CalPERS Board in fashioning a well thought out rule after taking those comments into consideration and to avoiding unintended consequences. However, in these cases, CalPERS staff is asking that you completely ignore that process and instead replace it with a fundamentally flawed ALJ's decision that ignores the substantial weight of evidence presented as set forth in the City's formal brief.

From a practical standpoint, here is what is wrong with the ALJ decision and why it is a poor substitute for a proper and transparent rule making procedure:

1. It will be impossible for a city to hire a consultant that employs retired CalPERS members to perform any task that would be performed by a vacant city staff position because the ALJ proposed decision has determined that that is enough to find that the consultant's employee would be a "common law employee" of the city.

2. Even though the City complied with the CalPERS rules in effect 10 years ago, the ALJ proposed decision would apply retroactively back to 2011 in the City's case. How could any agency rely on CalPERS rules as a safe haven knowing that its staff could try to convince an ALJ otherwise as they have in these cases?
3. The ALJ ignored the evidence presented by the City and RGS that clearly showed that RGS's employees were not common law employees of the City. Instead of explaining why, the ALJ's decision simply casts that evidence aside without any analysis. Why? Was this a fair appeal process?
4. There is absolutely no evidence that the City intended to do anything not allowed by CalPERS rules. None! Yet, the ALJ's proposed decision would punish the City, Ms. Abid-Cummings, and Ms. Souza with payment demands going back 10 years when they didn't violate any CalPERS rules?
5. Prior to Ms. Abid-Cummings and Ms. Souza becoming employees of RGS, almost a decade ago Ms. Abid-Cummings and Ms. Souza entered into part time employment contracts with the City. Even though they worked a limited number of hours and were treated as consultants and not as city employees, CalPERS staff decided to add them as claims immediately before the ALJ hearing. Again, with virtually no evidence, the ALJ ignored the City's evidence that they were no common law employees.

It is clear that CalPERS staff do not like that cities like Hughson are able to contract with consultants like RGS even though CalPERS rules do not prohibit it. So, they substitute proper rule making by you with legal shenanigans to achieve their objective. Bad decisions make bad rules. The ALJ proposed decision is both.

Therefore, we respectfully request that the Board reject the proposed decision. If the Board is concerned about these contracts, then adopt a rule to address those concerns so innocent, well intentioned cities and retired CalPERS employees don't find themselves being punished.

Respectfully,



George Carr  
Mayor, City of Hughson

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OCT 29 2021

CalPERS Legal Office

October 27, 2021

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VIA FEDERAL EXPRESS ONLY

Re: In the Matter of the Appeal of Membership Determination of Margaret Souza,  
and City of Hughson, Respondents (OAH Case No. 2020090931)

**Respondents Margaret Souza and City of Hughson's Argument to Reject the  
ALJ Decision**

## I. INTRODUCTION

This CalPERS Board has a constitutional obligation to "...discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of, providing benefits to participants and their beneficiaries..." Cal. Const. Art. 16, § 17. In flagrant disregard for this duty, adopting this ALJ decision would have disastrous consequences.

The payroll records in this matter show that during the time period that CalPERS staff allege that Ms. Souza was a common law employee of the City of Hughson, she worked for less than one full time year in total. Yet, CalPERS is seeking the complete repayment of all pension payments made to Ms. Souza for November 2012 through July 2015 during which she provided services to Hughson. This result would be disastrous for Ms. Souza. She is now advanced in age and cannot obtain a meaningful comparable position that would provide her with income to pay this debt to CalPERS. The record shows that Ms. Souza is a dedicated public employee who answered an urgent call from the Hughson city manager to temporarily set the bankrupt city's finances in coherent shape. Her reward for providing this invaluable service to the Hughson community is the potential imposition of an insurmountable debt by CalPERS, which would result in CalPERS reaping a windfall. Leaving aside the merits of this case, the above is the reality resulting from the Board's vote today.

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*

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*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. Ms. Souza initially worked as a consultant to the Hughson city manager, and subsequently continued her periodic work as a RGS employee.*

## **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;

(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*.<sup>1</sup>

(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;<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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

(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 necessary to fulfill its service delivery obligations; <sup>3,4</sup>

(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; <sup>5</sup>

(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

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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 any independent contractor; that right in no way demonstrates “the right to terminate the worker” which is the hallmark of the common-law control test.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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.

(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 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>6</sup> 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.

<sup>7</sup> 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

#### IV. FACTS SHOWING RESPONDENT'S STATUS AND ASSIGNMENTS.

SOUZA testified that her initial work at the City of HUGHSON started when "I was approached by my former boss, Bryan Whitemyer, saying that he was shorthanded at the moment and that they needed to have the budget prepared and analyzed because of dire financial straits, and they were in a position of laying off employees and they needed to see what kind of impact laying off 'X' number of employees would have on the City's financial status." 816:11-25. Her motivation was to assist Whitemyer. 849:21-850:1. "...she didn't need this job...I mean, as a public servant, she recognized and read all the things that were going on in HUGHSON and made the decision to help the community of HUGHSON and we're extremely grateful for that." 861:5-12. Whitemyer's motivation "was that we had critical positions that were staffed for at least a couple of years with people who should have never been in those positions. They were not qualified...So I had no confidence in the numbers that were coming out of the Finance Director's office...The audits weren't done. We were behind." 859:2-15. *So I needed to find someone to help with that critical, urgent task in this chaotic, very stressful situation. Time was of the essence.*" 859:24-860:1. *"...I needed specific budgetary help, specific information related to how are our accounts, how are our funds, because I wasn't even confident they were doing things appropriately, keeping things separate in the general fund, sewer fund, water fund. So I needed someone with expertise and also the credibility to speak to the Council..."* 860:2-21.

HUGHSON's Director of Finance job description enumerates various duties. (Ex. 271) The single essential duty SOUZA performed was that of budget preparation. 826:20-827:9. None of the other essential duties did SOUZA ever perform. 827:10-830:5. Contrary to the ALJ's misguided view and disregard for the evidence, Whitemyer testified that the part-time employment agreement was titled "finance director" because of "expediency" and the "chaotic nature and speed at which we had to get something done...the quickest way to get something to the Council was to use what had already been in place, which was the Finance Director job description." 864:23-865:11. He also was concerned that with the staff lay-offs and union friction, "it was important for us to follow the framework that already existed utilizing titles that people were familiar with. I was fearful that consultant or this or that, they would say this is frivolous spending before I could say, hey, this is under the same context of the budget anyway." 865:12-18.

*"But I had no intention of utilizing Miss Souza in the full capacity of a Finance Director."* 865:19-20. Coming in one or two days per week, "she could not possibly do all of the functions of the Finance Director. So I had to take those on and our accounting manager took those on and other account clerks, et cetera, and we got the job done." 865:20-866:1.<sup>8</sup>

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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 the Board-adopted Chandler decision and the indicia of RGS control.*

<sup>8</sup> Whitemyer rejected any accusation that he, the City, or SOUZA were trying to circumvent the retired annuitant rules. "I just remember during that time there was a lack of clarity [regarding post-retirement employment]. We weren't sure what was going on, so we took great care to work with our City Attorney



Whitemyer drew distinctions between the Finance Director position and SOUZA's assigned duty of preparing the budget: "Because the Finance Director is much more than just doing one finite task. It is much more comprehensive, from managing the staff, controlling just the normal day-to-day operations, and Margaret Souza did not conduct any of the day-to-day operations. She did not manage time-off requests. *She didn't manage anything related to the operation of the Finance Department, which includes utility billing, which included just receiving customers at the counter, taking requests, bill protests and those type of things. We just had the finite task of the budget, and the budget process is very significant.*" 871:2-16.

Whitemyer testified to the transition to RGS: "Because I was thinking long-term, I knew Miss Souza couldn't continue to operate like this. She's retired. One reason to go with Regional Government Services was to broaden our pool and have flexibility to possibly work with other professionals on a consultancy basis...if there were other needs that arose, whether it be financing or planning or engineering, other things, having that relationship and establishing that relationship with Regional Government Services may be a useful tool for the City, not just from the financial services aspect, but maybe future services just because they had a larger pool of contacts than I would have." 868:7-19.<sup>9</sup>

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

Here the decision fails to meet the standards for establishing precedent: (1) the decision does not contain a significant legal or policy determination of general application that is likely to recur; and (2) 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



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to do research, and in all of our efforts in our relationship with Miss SOUZA we did everything we could to comply with the CalPERS standard. That was our goal. We had no intention of trying to gain [sic] the system. We had every intention of following the standard, and we thought we were doing that at the time." 867:5-17.

<sup>9</sup> Whitemyer also testified that if SOUZA had been viewed as HUGHSON's Finance Director, she would have first participated in a formal recruitment process and then interviewed by a selection panel. 870:2-23.