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:

DOUGLAS A. BREEZE and CITY OF ATASCADERO,

Respondents

Agency Case No. 2020-0561

OAH No. 2020100848

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter by videoconference on April 13, 2021, from Sacramento, California.

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

Scott N. Kivel of the Law Offices of Scott N. Kivel represented respondents Douglas A. Breeze and City of Atascadero (City).

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

SUMMARY

Mr. Breeze retired for service, after which he worked for the City without reinstatement from retirement. The persuasive evidence established that he worked as a common law employee and was paid an excessive hourly rate. Therefore, Mr. Breeze's appeal from CalPERS's determinations that he was the City's common law employee and violated the post-retirement employment rules should be denied.

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[1] Hearing in this matter was coordinated, but not consolidated, with the hearings in Linda Abid-Cummings (Agency Case No. 2020-0560, OAH No. 2020090772), Margaret Souza (Agency Case No. 2020-0565, OAH No. 2020090931), David Dowswell (Agency Case No. 2020-0562, OAH No. 2020090934), and Tarlochan Sandhu (Agency Case No. 2020-0564, OAH No. 2020100708) to allow for a running written record producing a single, continuous transcript, continuous exhibit numbers/letters, and consolidated post-hearing briefing. Therefore, there are gaps in the exhibit numbers/letters.

FACTUAL FINDINGS

Jurisdictional Matters

1. Mr. Breeze began working for Inland Empire Utilities Agency on May 11, 1987. He became a local miscellaneous member of CalPERS by virtue of that employment.

2. Mr. Breeze continued earning CalPERS service credit through his employment with the Cities of Riverside, Port Hueneme, and Ojai. He was the public works director for the last two cities. He retired for service from the City of Ojai and has been receiving his retirement allowance since August 1, 2007.

3. After retiring, Mr. Breeze worked as an "advisor" for Regional Government Services (RGS) and was assigned to the City as a "Public Works Advisor" to perform "Public Works executive duties." RGS is a joint powers authority created by the Association of Bay Area Governments and the City of San Carlos. RGS provides public agencies access to experienced public sector professionals they may not have the resources to attract and retain as employees. RGS hires people 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. At all times relevant, the City contracted with CalPERS to provide its eligible employees, including the city engineer/public works director, retirement benefits. The City did not provide Mr. Breeze retirement benefits and he did not reinstate from retirement with CalPERS.

5. On February 2, 2018, CalPERS sent correspondence to the City requesting information about the nature of its employment relationship with Mr. Breeze. On January 10, 2020, CalPERS sent Mr. Breeze correspondence explaining that it had determined he worked for the City from July 28 through November 6, 2014, as a common law employee. CalPERS also concluded his employment violated the post-retirement employment rules.

6. Mr. Breeze timely appealed CalPERS's determinations. On April 5, 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. Breeze "a common law employee of the City for the period of July 28, 2014, through November 6, 2014;" and (2) if so, did his "post-retirement employment violate [] the terms and conditions of the [California Public Employees' Pension Reform Act of 2013 (Gov. Code, § 7522 et seq.; PEPRA)]?"[2]

Post-Retirement Employment

7. The administrative head of the City's public works department is the city engineer/public works director. The City's job description for the position describes the purpose of the city engineer/public works director as:

[2] The prayer in the Amended Statement of Issues alleges the Public Employees' Retirement Law (Gov. Code, § 20000 et seq.; PERL). Elsewhere in the Amended Statement of Issues it is alleged that the PERL's post-retirement employment rules apply prior to January 1, 2013, and the PEPRA's rules apply on and after that date. Respondents received proper notice of the applicable law.

> [T]o plan, organize, supervise, and review the activities of the divisions comprising the Public Works Department, to provide highly responsible and professional staff assistance to the City Manager, City Council, and commissions; serve as City Engineer; assuming additional responsibilities as assigned; perform related duties as required.

The city engineer/public works director "receives administrative direction from the City Manager."

8. Rachelle Rickard has been the City's city manager since June 2013. In June 2014, the city engineer/public works director retired, and Ms. Rickard immediately began recruiting his replacement. In the meantime, she considered hiring an interim city engineer/public works director but had trouble finding qualified candidates. She decided to hire an engineering firm to serve as the interim city engineer and to use an RGS advisor to provide an interim public works director.

9. On July 23, 2014, Mr. Breeze entered into an employment agreement with RGS to act as RGS's advisor "initially assigned to the City of Atascadero to perform Public Works executive duties." RGS paid him $70 an hour.

10. Four days later, RGS entered into a contract with the City for Mr. Breeze to serve as a "Public Works Advisor." The City paid RGS $750 a day for his services. The contract commenced immediately and was "anticipated to remain in force through December 31, 2014." After that date, the parties had the option of continuing the contract "on a month-to-month basis until one party terminate[d] the agreement." Either party could terminate the contract, "with or without cause," by giving 30 days'

notice. Additionally, the City could terminate the contract if, in its "sole discretion," it "determines that the services performed by [Mr. Breeze] are not satisfactory."

11. The contract prohibited anyone other than Mr. Breeze from serving as the City's public works advisor without RGS providing prior notice to the City. Additionally, RGS could not reassign Mr. Breeze to another client "without first consulting with" the City.

12. The contract identified RGS as the City's independent contractor and RGS's advisors as "its agents or employees and not agents or employees of" the City. It provided that the City "shall not have the ability to direct how services are to be performed, specify the location where services are to be performed, or establish set hours or days for performance of services, except as set forth in the Exhibits." Additionally, the City had no "right to discharge any employee of RGS from employment." This language was consistent with Ms. Rickard's and Mr. Breeze's understanding and intent that he was not a City employee.

13. Finally, the contract specified that RGS was responsible for paying Mr. Breeze's salary, his benefits, and the applicable employment taxes. But it also provided that the daily rate the City paid for his services was "based upon RGS's costs of providing the services required [under the contract], including salaries and benefits of employees."

14. Mr. Breeze recorded the time he worked on a timesheet, and RGS sent the City invoices for his time. The City paid the invoices directly to RGS.

15. The Atascadero City Council authorized an extension of the contract beyond December 31, 2014, because the recruitment for a permanent city engineer/public works director took longer than expected. Ultimately, however, the

City hired a permanent city engineer/public works director, and Mr. Breeze never worked under the extension. His last day with the City was November 6, 2014.

CalPERS's Analysis of Post-Retirement Employment

BACKGROUND

16. 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."

17. 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.

18. 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. Breeze's employment relationship with the City. She drafted the "final determination" letter sent to Mr. Breeze on January 10, 2020.

NATURE OF EMPLOYMENT RELATIONSHIP

19. 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. Breeze's relationship with the City was to determine if he worked 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*). Some of the common law factors she considered included the City's right to control how Mr. Breeze performed his work, whether the work was normally done by a City employee, 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, rather it was the "cumulative" weight of all factors that led her to conclude he was a common law employee of the City.

Right to Control and Type of Work

20. The City provided documents to CalPERS that showed the City has a formal job description for the position of "city engineer/public works director." Mr. Breeze held that position on an interim, part-time-time basis from July 28 through November 6, 2014, while the City recruited a permanent city engineer/public works director. He did not perform all the duties of the position, but no one else performed the duties he did. He was subject to general oversight by Ms. Rickard.

21. The City also provided documents that showed Mr. Breeze appeared at Atascadero City Council meetings, prepared staff reports, and made presentations as

the City's "Interim Public Works Director." Ms. Rickard's July 23, 2014 email announcing his hiring identified his work schedule as Monday through Thursday of the second and fourth weeks of the month and Tuesday through Thursday of the first and third weeks.

22. Mr. Breeze testified that Ms. Rickard asked him "to keep the Public Works Department operating while they did a recruitment" when he first started. He was never asked to be the city engineer, and he was not qualified for that position because he is not a civil engineer. Ms. Rickard initially did not identify any projects for him to work on, but after a few weeks "she asked [him] to do a project here and there." He "managed the public works operations and . . . determined work procedures and made schedules of work for the public works employees." He also approved vacation requests from public works employees. He described his typical day at work as follows:

> As a Public Works Director, you do mental gymnastics from the minute you arrive at work until you leave. You never know what's going to pop up. You know what you have planned in the various areas of your responsibility [*sic*] and you do your best to get those plans accomplished, while at the same time addressing all the issues that pop up in the meantime, including personnel issues, financial issues, scheduling issues. I can go on, and on, and on.

23. The City provided Mr. Breeze a computer, telephone number, email address, and an office to work out of. The signature line for his emails identified him as "Interim Director of Public Works" because "that's what the City labeled [him]." He performed most of his work "on Atascadero property or within the city limits." He set

his own work schedule, which was "to be there when the public works employees reported for work and to be there until they went off work."

24. Ms. Rickard testified that the City's need for Mr. Breeze's services began when the previous city engineer/public works director retired and ended when his permanent replacement was hired. She never expected Mr. Breeze to perform all the duties of the position. She provided the following explanation for why she gave him the title of interim public works director:

> Because for efficiency and for people to understand . . . he's going to be taking over and be doing some of the . . . stuff vacated by . . . our previous Public Works Director. It's . . . so that people know who's going to be doing those functions type of thing. It doesn't mean he's the Public Works Director. It means I've hired somebody to fulfill some of the . . . work that I need to have done.

25. Ms. Rollins explained that the above information demonstrated that the City had the right to control how Mr. Breeze provided his services. It did not matter that he was not performing all the duties outlined in the City's job description, 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. The information also established that Mr. Breeze was performing services that were part of the City's regular business.

Requisite Skills and Degree of Supervision

26. Mr. Breeze explained that he has a master's degree in public administration and "almost 27 years of experience in the public sector dealing with

maintenance and construction within the public works arena." Therefore, he is a highly skilled public works professional and did not require day-to-day supervision.

27. Ms. Rickard said she did not supervise Mr. Breeze even though she was ultimately responsible for his work product. She explained:

> I didn't have the ability to tell him step [*sic*] by [*sic*] step how to do it, but I certainly had the ability to ask for, hey, this is what I need to have done. These are the considerations that we need to do while doing it and go through that. But, you know, do I say, okay, need to work these hours, in this place, and this is what I expect. I didn't have those types of conversations with him.

28. Ms. Rollins determined it was insignificant that Ms. Rickard did not supervise his day-to-day activities. She explained: "There are many positions that are employees of an agency where . . . their expertise is needed and they don't receive a lot of oversight or control, but that doesn't mean the employer-employee relationship does not exist."

Duration of Services

29. The City's contract with RGS anticipated needing Mr. Breeze's services for five months. Ms. Rollins explained that a short period of employment in and of itself is not indicative of the type of relationship because "retired annuitants . . . are usually hired to work on a limited duration basis." But when the short-term employment is considered with the fact that Mr. Breeze performed some of the duties of the City's public works director during a recruitment for a permanent replacement; the

information was more suggestive of an employment relationship, especially because he left his position once a permanent city engineer/public works director was hired.

Method of Payment

30. RGS paid Mr. Breeze an hourly rate. Ms. Rollins explained:

> Typically, when we review independent contractors and consultants, they're usually tasked with a specific project to complete. And we find that . . . the person is paid per project that they're working on. Hourly . . . signifies to us that there could possibly be an employee/employer relationship, because . . . it's more in align [*sic*] with how staff are being paid and not being paid for a specific project.

POST-RETIREMENT EMPLOYMENT RULES

31. Ms. Rollins explained that the PEPRA allows a retired member to work for a CalPERS employer without reinstatement under limited circumstances, but he may not be paid an hourly rate greater than that paid other employees performing similar duties. Therefore, once Ms. Rollins concluded Mr. Breeze worked as the City's common law employee without reinstatement, she analyzed his hourly pay rate.[3]

[3] Whether an exception to the general rule prohibiting post-retirement employment applied to Mr. Breeze was not an issue on appeal; only the nature of his employment relationship and his hourly rate were.

32. Mr. Breeze exclusively performed some of the City's public works director's duties from July 28 through November 6, 2014. The maximum salary approved for that position was $62.04 an hour. He was paid $70 an hour.[4]

Analysis

MR. BREEZE WORKED AS A COMMON LAW EMPLOYEE WITHOUT REINSTATEMENT

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

34. The most important factor under the common law test is the City's right to control the way Mr. Breeze performed his duties, and the persuasive evidence overwhelmingly established that the City had and exercised that right. Notwithstanding language in RGS's contract with the City to the contrary, the City had the right to terminate Mr. Breeze's employment with the City by canceling the contract. The City had the right to cancel the contract "with or without cause." It also had the right to cancel if it concluded, in its "sole discretion," that Mr. Breeze's services were "not satisfactory." Alternatively, it could have left the contract in place and requested a different "advisor."

[4] There was no evidence to support the allegation in the Amended Statement of Issues that the maximum compensation was $60.51.

35. The City entered into the contract with RGS for the specific purpose of having Mr. Breeze perform some of the duties of a vacant position while the City recruited a permanent employee, and no one else performed those duties. He stopped working for the City after it hired a permanent replacement. Ms. Rollins persuasively explained the insignificance of Mr. Breeze not performing all the duties of the position. She also persuasively explained why the lack of day-to-day supervision did not negate the City's right to control Mr. Breeze.

36. The contract prohibited anyone other than Mr. Breeze from providing services without the City's "prior written consent." Additionally, RGS was prohibited from reassigning Mr. Breeze to another client "without first consulting" the City. Mr. Breeze set his work schedule "to be there when the public works employees reported for work and to be there until they were off work," and the persuasive evidence established that he participated in the daily operations of the public works department.

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

38. Other elements of the common law test for employment also indicated Mr. Breeze was a common law employee. It was undisputed that he was a highly skilled public works 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 while working for the City. The work he performed was

usually performed by a City employee. RGS paid Mr. Breeze on an hourly basis, as opposed to a flat rate for each job.

39. The term of the City's contract was the only secondary factor that potentially indicated Mr. Breeze was an independent contractor. The contract was for a specific term. Contrary to Ms. Rollins's testimony, a contract for a specific term is generally indicative of an independent contractor relationship.

40. But Mr. Breeze was hired specifically to fill a vacant position while the City searched for a permanent replacement. The parties had the ability to extend the contract on a month-to-month basis if the City did not hire someone during the initial term, and the contract was extended for that reason. This suggested that the parties intended to enter into a contract for an indeterminate period, and such contracts are more common in employment relationships.

41. The combined weight of the common law factors discussed above justifies disregarding the parties' subjective intent to create an independent contractor relationship. Besides, it is the City's intent that is relevant, not Ms. Rickard's. And the fact that the City retained Mr. Breeze to perform the duties of a specific position was the most compelling evidence of its intent. That intent was affirmed by numerous official documents identifying Mr. Breeze as holding that position.

42. But even if Ms. Rickard's intent were relevant, the persuasive evidence established that she intended for Mr. Breeze to serve as the City's interim public works director until a permanent replacement was hired. She told him "to keep the Public Works Department operating" during the recruitment process when he started. She gave him the title of interim public works director so others would know who was

performing those duties. Mr. Breeze shared a similar intent as reflected by his work schedule and his involvement in the daily operations of the public works department.

MR. BREEZE RECEIVED EXCESSIVE PAY

43. Mr. Breeze did not produce any evidence to contradict CalPERS's persuasive evidence that throughout his employment he was paid an hourly rate greater than the maximum rate authorized for the City's public works director.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. The parties agreed Mr. Breeze has the burden of proving he was the City's independent contractor 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. Breeze 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. 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).)

3. 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).) "The rate of pay for the employment shall not . . . exceed the maximum paid by the employer to other employees performing comparable duties, divided by 173.333 to equal an hourly rate." (*Id.*, at subd. (d).)

COMMON LAW TEST FOR EMPLOYMENT

4. 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.*)

5. 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.)

6. The common law factors are to be analyzed together as a whole rather than separately in isolation, and their cumulative weight is determinative. (*Garcia v. Seacon Logix, Inc.* (2015) 238 Cal.App.4th 1476, 1486.) Being paid on an hourly or monthly basis without regard to initiative, judgment, or abilities is indicative of an employment relationship. (*Gonzalez v. Workers' Compensation Appeals Board* (1996) 46 Cal.App.4th 1584, 1594.) So is providing services that are a regular part of the employer's business. (*Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, 1049.) A "finite time of service" is indicative of an independent contractor relationship, whereas an indeterminate time of service "is highly indicative of an employment relationship." (*Gonzalez v. Workers' Compensation Appeals Board*, *supra*, 46 Cal.App.4th at p. 1594.) Lastly, the parties' subjective intent to create an independent contractor relationship will be disregarded when their actual conduct indicates otherwise. (*S.G. Borrello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 ["The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced"], superseded by statute on different grounds as stated in James v. Uber Technologies Inc. (N.D.Cal. 2021) 338 F.R.D. 123; *Performance Team Freight Services, Inc. v. Aleman* (2015) 241 Cal.App.4th 1233, 1243 [label on the parties' written agreement is not dispositive].)

7. In *Metropolitan Water District*, the water district contracted with CalPERS to provide retirement benefits to its employees. The water district classified workers provided pursuant to contracts with several private labor suppliers as "consultants" or "agency temporary employees," and did not enroll them in CalPERS. Several of those

workers alleged they were misclassified as consultants or agency temporary employees and improperly denied CalPERS membership. (*Metropolitan Water District*, *supra*, 32 Cal.4th 491, 497-498.)

8. 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.)

9. 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.

10. CalPERS's closing argument that the common law employment analysis is irrelevant is premised on an overly myopic reading of the PERL. According to CalPERS, the PERL "prevents retirees from being employed by contracting agencies," whereas the PEPRA "prevents retirees from providing services to contracting agencies." Therefore, CalPERS posits, the PEPRA's post-retirement rules apply "even if the retiree is not considered a common law employee." Though Government Code section 21220, subdivision (a), prohibits a retired member from being "employed" by a CalPERS employer without reinstatement, numerous statutory exceptions allow the member to "serve without reinstatement" in a variety of positions. (See, e.g., Gov. Code, §§ 21221,

21223, 21224, subd. (a), 21225, subd. (a), 21226, subd. (a), 21227, subd. (a), 21229, subd. (a), 21230, subd. (a), & 21231, subd. (a).) Therefore, the PERL uses the terms "employed" and "served" interchangeably, and CalPERS's argument is not persuasive.

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

12. Mr. Breeze made several arguments in closing, none of which is persuasive. He argued that concluding he was a common law employee is inconsistent with the City's constitutional and statutory rights to provide public services through employees, independent contractors, or a combination of both. A similar argument was rejected in *Metropolitan Water District*. The water district argued that concluding the workers hired through a third-party were employees, would entitle them to full employee benefits without having to go through its merit selection process, thereby undermining that process. (*Metropolitan Water District*, *supra*, 32 Cal.4th at p. 504.) But the California Supreme Court explained:

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

> benefits is a wholly distinct question from entitlement to CalPERS enrollment . . . .

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

13. Mr. Breeze 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.)

14. Mr. Breeze'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 the City ignores Ms. Rollins's persuasive testimony that Mr. Breeze holding a specific position was just one factor.

15. Mr. Breeze'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.

16. Lastly, Mr. Breeze's argument that RGS's service model is critically important to assisting public agencies is an unsupported opinion.

Conclusion

17. The City's contract with RGS was subterfuge to hide the fact that Mr. Breeze worked as a common law employee without reinstatement as discussed in Factual Findings 33 through 42. His employment violated the PEPRA's post-retirement employment rules as discussed in Factual Finding 43.

ORDER

Respondent Douglas A. Breeze's appeal from CalPERS's January 10, 2020 determinations that he was a common law employee of the City of Atascadero from July 28 through November 6, 2014, and his employment violated the PEPRA's post-retirement employment rules is DENIED.

DATE: September 17, 2021

Coren D. Wong (Sep 17, 2021 11:52 PDT)

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings