

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE REVISED PROPOSED DECISION, AS MODIFIED

Background and Administrative Review

Respondent Scott A. Mann (Respondent Mann) established CalPERS membership through his employment with Riverside County Schools – Meniffee Union School District on April 11, 2007. Respondent Mann “cashed out” his contributions in relation to that employment, and it was unclear from evidence presented whether he somehow purchased service credit back for that employment to re-obtain membership status. At any rate, Respondent Mann has been employed with public entities who contract with CalPERS since at least 2012, and he is currently a miscellaneous member of CalPERS.

During the time period of October 1, 2011, through April 22, 2014, Respondent Mann provided consulting services in the area of risk management to the City of Palm Springs (Respondent City). Those services were provided through Keenan & Associates, a consulting firm that provided risk management services to Respondent City. Because the services were performed through a third-party consultant, neither Respondent Mann nor Respondent City made contributions to CalPERS on Respondent Mann's behalf.

On July 27, 2018, Respondent Mann filed a “Request for Service Credit Cost Information – Service Prior to Membership” with CalPERS to see if he was entitled to service credit for his services provided to the Respondent City. In the request, Respondent Mann identified the services he performed as being pursuant to a contract and that he was paid by invoices submitted to Keenan & Associates. His request identified the City of Palm Springs as his employer.

Later, on October 10, 2018, CalPERS determined Respondent Mann was not eligible for service credit for the time he performed services for the City of Palm Springs because Respondent Mann's employer, Keenan & Associates, was not a contracted CalPERS business partner. CalPERS notified Respondent Mann he could re-file the request if he provided a certification from the City of Palm Springs concerning his payroll information.

Thereafter, on October 16, 2018, Respondent Mann re-filed his request along with a completed Employment Relationship Questionnaire (Questionnaire). CalPERS contacted Respondent City and obtained a Questionnaire from the City as well. The Questionnaires included factual information about Respondent Mann's relationship with Respondent City, such as: who provided the tools and instrumentalities for the job, how long the services were performed, who supervised and/or reviewed the work,

how the individual was compensated, and who controlled or directed the work. Both Questionnaires indicated that the Respondent City's Director of Human Resources supervised Respondent Mann.

CalPERS advised the Respondent City and Respondent Mann on September 26, 2019, that it had reviewed the additional documentation provided and determined Respondent Mann was a common law employee during the time he performed services for Respondent City, and as such, he was entitled to service credit for that time period.

On November 21, 2019, the Respondent City wrote to CalPERS disagreeing with CalPERS' determination and instead asserted Respondent was an independent contractor.

CalPERS sent the Respondent City and Respondent Mann a final determination on February 13, 2020, finding that Respondent Mann was a common law employee during the relevant time period. CalPERS also determined that, because no membership contributions had been made on Respondent Mann's behalf during the time he provided services for the Respondent City, membership contributions would have to be paid to CalPERS.

On March 12, 2020, the Respondent City appealed both CalPERS' final determination that Respondent Mann was a common law employee from October 1, 2011, through April 22, 2014, as well as the determination that arrears membership contributions were owed on Respondent Mann's behalf from October 1, 2011 through December 3, 2012.

Common Law Employment Test

Under Government Code section 20069, subdivision (a), "[s]tate service" means "service rendered as an employee or officer" of a contracting agency. An employee is "[a]ny person in the employ of any contracting agency." (§ 20028, subd. (b).) The California Supreme Court has held that the Public Employees' Retirement Law (PERL) provisions concerning employment by a contracting agency incorporate the common law test for employment. (*Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500.) Accordingly, the common law employment test applies to this case.

The common law employment test was articulated by the California Supreme Court in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949. Under that test, "the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists." (*Ibid.*) If 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. (*Id.* at p. 946-947.)

Tieberg noted the following other factors may be taken into account:

(a) whether or not 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 (*Id.* at p. 949.)

The *Tieberg* court also noted one of the most important of those secondary factors is “whether the parties believe they are creating the relationship of employer-employee,” especially as specified in a written agreement. (*Id.* at p. 949.)

The burden of establishing an independent contractor relationship is upon the party attacking the determination of employment. (*Southwest Research Institute v. Unemployment Ins. Appeals Bd.* (2000) 81 Cal.App.4th 705, 708.)

The Hearing

An appeal hearing in front of the Office of Administrative Hearings was held on January 26, 2021. Respondent Mann appeared and represented himself. Respondent City appeared at the hearing and was represented by counsel. Evidence from the hearing is discussed below.

On July 1, 2009, Keenan & Associates, a California corporation, signed a “Consulting Services Agreement” (Agreement) with Respondent City to provide loss control and regulatory compliance services through June 30, 2012. The Agreement stated that the work was to be performed by an independent contractor, and named two specific individuals, but not Respondent, to perform the services. The Agreement also provided that Keenan & Associates could not alter the personnel providing the services, and that Respondent City had the sole discretion to remove the subject personnel. The Agreement also prohibited Keenan & Associates from contracting with any other individual or entity to perform the services. Between 2009 and 2017, Respondent City entered into numerous addendums to the Agreement; none of which changed the referenced terms.

Respondent Mann entered into an agreement as a sub-contractor (2011 Agreement) with Keenan & Associates in 2011 as to provide the risk management services to Respondent City. The 2011 Agreement also listed the scope of services that

Respondent Mann would be providing to Respondent City. Although Respondent's services to Respondent City were only slated to last until June 30, 2012, Respondent continued to work for Respondent City until April 22, 2014 without an additional written agreement.

Respondent Mann testified at hearing that Respondent City had the authority to control the manner and means of his work and that Respondent City's Director of Human Resources (Former Director), who was also the Assistant City Manager, was Respondent Mann's supervisor. Respondent Mann reported directly to the Former Director, and Respondent stated that he received direction from the Former Director in every aspect of his work. Respondent would consult with Former Director about certain projects and Former Director provided Respondent with direction as to how to proceed. Respondent's work schedule was subject to the final approval of the Former Director. Respondent Mann also testified that just like all other agency employees, he was required to work on site, had to attend meetings, and did not work Fridays.

Respondent Mann then explained that he used an office on-site at Respondent City, used a Respondent City's email address, and stored all of his work on Respondent City's computer network. Respondent Mann stated he completed a few assignments outside of the express scope of Respondent City's agreement with Keenan & Associates. On a few occasions, Respondent Mann said he held himself out as a representative of Respondent City when corresponding with third parties and did so on Respondent City's letterhead.

Respondent City's current Director of Human Resources (HR Director) also testified at the hearing. The HR Director disputed that Respondent worked so closely with City's HR Director. The HR Director stated that Respondent Mann was not controlled by Respondent City and that Respondent set his own work schedule. The City's HR Director also testified that Respondent Mann was not required to work on-site.

On cross-examination, the City's HR Director admitted that she did not have any personal knowledge about the relationship between Respondent Mann and the Former Director but that her conclusions were assumptions and speculation. The HR Director also testified that Respondent Mann was the first individual from Keenan & Associates who worked on-site at Respondent City, however, the HR Director's conclusion that Respondent Mann did not have to work on-site was based on speculation.

The HR Director then explained that the last time that Respondent City had a staffed position performing the same duties as performed by Respondent Mann was in 2005. In addition, the testimony confirmed that Respondent City created a risk manager type position in 2015, but that position was not limited to the duties performed by Respondent Mann and has not been filled since 2019. The HR Director then explained that the office used by Respondent Mann was a communal office and the Respondent City email used by Respondent Mann was a generic email address. Nobody but Respondent Mann, though, used the generic email address during the relevant time period.

Respondent Mann's contact (Contact) at Keenan & Associates also testified. The Contact stated that he was Respondent's supervisor at Keenan & Associates and that Respondent City did not control or direct Respondent Mann's work. The Contact admitted, though, that he had no actual knowledge of how much direction or control Respondent Mann received from Respondent City.

CalPERS staff (Staff) also testified at the hearing. Staff testified about its investigation into the relationship between Respondent Mann and Respondent City. Staff also testified about CalPERS' determination process.

The Proposed Decision

After considering all of the evidence, testimony, and argument, the ALJ granted Respondent City's appeal. The ALJ found that Respondent City did not exert control over Respondent Mann, which makes the relationship that of an independent contractor. The ALJ determined that Respondent City directed the results of Respondent's work, but that Respondent had full autonomy over how he performed his job; making Respondent Mann an independent contractor.

Although she had no actual knowledge of the requirements imposed by Former Director on Respondent, the ALJ found HR Director's testimony to be persuasive in that Respondent Mann was not required to be on-site, and Respondent Mann was not required to use the Respondent City's infrastructure. Moreover, the ALJ also found convincing the HR Director's testimony that Former Director could not control the manner and means of Respondent Mann's work.

In addition, Respondent Mann worked at Respondent City from October 2011 through April 2014; which the ALJ determined was indicative of an independent contractor relationship given the contract for services between Respondent City and Keenan and Associates was in place between 2009 and 2019. Also weighing in favor of an independent contractor relationship was the ALJ's finding that the Respondent City is not in the business of providing risk management and loss control services to the public. Instead, those services provided by Respondent Mann were merely incidental to the public services provided by the City.

The ALJ also determined as follows on the issue of how Respondent Mann was paid:

The City did not pay respondent Mann. Respondent Mann provided services on a monthly basis directly to Keenan & Associates, who paid him for his work. The City had no discretion in the number of hours worked, the hourly rate, or the manner and method in which respondent Mann was paid. The City was not obligated to pay respondent Mann for any services. The City's only obligation with respect to compensation for services rendered was to pay Keenan & Associates one lump sum at the beginning of each year pursuant to the consulting services agreement.

was in no way tied to the hourly rate set by respondent Mann detailed in the invoices he submitted to Keenan & Associates.

In granting the appeal, the ALJ concluded that Respondent Mann was an independent contractor for Respondent City from 2011 through 2014. As such, Respondent Mann is not entitled to membership for that period, so no contributions are required from Respondent Mann or Respondent City.

Pursuant to Government Code section 11517 (c)(2)(C) which authorizes the Board to “make technical or other minor changes in the proposed decision” hereby modifies the Revised Proposed Decision by amending page 25, paragraph 17, first sentence by changing the word “man” after the word “respondent” to “Mann” and amending page 29, paragraph 26, first sentence from “neither CalPERS nor respondent” to “neither City of Palm Springs nor respondent.”

For all the above reasons, staff argues that the Revised Proposed Decision be adopted by the Board, as modified.

July 14, 2021

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