ATTACHMENT C

RESPONDENT'S ARGUMENTS

Attachment C

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VIA EMAIL & U.S. MAIL
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Ms. Cheree Swedensky
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CalPERS Executive Office
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Re: ***Respondent City of Dixon's Argument***
CalPERS' Ref. No. 2020-0562
Client-Matter: DI050/009

Dear Ms. Swedensky:

The City of Dixon ("City") submits this argument requesting that the California Public Employees' Retirement System ("CalPERS") Board of Administration ("Board") reject the Proposed Decision issued by the Administrative Law Judge ("ALJ") in the above-referenced matter. In the event CalPERS does not reject the Proposed Decision, the City requests that the Board make changes to the Proposed Decision to remove disparaging language that is unsupported by the record, and which does not take into account the complex and fact specific statutory and regulatory scheme under review. Moreover, even if the Proposed Decision is adopted, CalPERS is barred by the applicable statute of limitations from collecting the alleged overpayments.

I. The CalPERS Board Should Reject the Proposed Decision

The City requests that the CalPERS Board reject the Proposed Decision for the reasons stated in the response provided by the Regional Government Services Authority ("RGS"). As discussed below, even if adopted, the Proposed Decision does not allow CalPERS to automatically collect any overpayments and the collection is barred by the statute of limitations.

II. Certain Portions of the Proposed Decision Should be Modified

The City requests that the CalPERS Board modify the Proposed Decision to strike portions of the Proposed Decision that are disparaging and unsupported by the record. Specifically, the City requests that the Proposed Decision delete the final sentence of Paragraph 37 on pages 13-14 and modify the conclusion to remove reference to the contract between the City and RGS being "subterfuge," as the comments are unsupported by the record. As discussed

below, during the time that Mr. Dowswell was appointed as a retired annuitant, Government Code section 21221(h) was amended multiple times and the interpretation of the legislative changes was uncertain.

Under the Administrative Procedure Act, even if the CalPERS Board adopts the Proposed Decision, CalPERS may strike language and make technical or other minor changes. (Gov. Code § 11517(c)(2)(C).)

The Proposed Decision cites testimony that the City received a communication from CalPERS regarding Mr. Dowswell's appointment as a retired annuitant and concerns about the appointment. (Proposed Decision ["PD"], pp. 4-5, ¶ 8.) Although the Proposed Decision does not discuss the issue, the discussions between CalPERS and the City involved legislative changes to the Public Employees' Retirement Law ("PERL") and how those legislative changes would be interpreted with respect to existing appointments. Specifically, Government Code section 21221(h) was amended several times from 2011 to 2013. Until January 1, 2012, there was no limitation on the number of times someone could be appointed under Government Code section 21221(h), hours could be extended by CalPERS, and no recruitment was required. Effective January 1, 2012, the statute was amended to require a recruitment, but eliminated the limited duration language from the statute. Effective June 27, 2012, the statute was amended yet again. Finally, the statute was amended to reflect the current version, which became effective on January 1, 2013. The Legislature also passed comprehensive pension reform legislation on January 1, 2013, known as the Public Employees' Pension Reform Act ("PEPRA"), which had significant impacts on post-retirement employment.

The discussions between the City and CalPERS involved how the amendments to the statute would impact pre-existing retired annuitant appointments. CalPERS did not make any specific finding that the appointment was impermissible. The City attempted to prophylactically comply with CalPERS' informal "concern" regarding the retired annuitant appointment. The legislative changes during this period were numerous and complicated. In fact, the different versions of the statute have tripped up CalPERS' own auditors and confused the ALJ who erroneously, or at least contrary to all CalPERS' published guidance, declares that "the PERL's post-employment retirement rules do not apply after December 31, 2021," apparently assuming they were completely superseded by PEPRA (PD, p. 4, fn. 2.)

The ALJ does not cite statements or evidence from the record that support his conclusion that the parties attempted to evade the law. As discussed above, the legal framework concerning interim appointments underwent a large shift between 2011 and 2013. In addition, the common-law employment test is a malleable, multi-factored test that requires a fact specific analysis regarding the appointment. The City in good faith identified factors and structured its relationship so as to relinquish control of the employment. This included allowing Mr. Dowswell to work for other employers, having Mr. Dowswell only perform some of the more technical portions of community development services, and having the relationship be of relatively short duration. (PD, ¶¶ 11, 25-27, 35.) The Proposed Decision also appears to

conclude that if a contractor performs any functions that are performed in-house, that individual must be hired as an employee, which is not required under the common-law employment test. The Proposed Decision also employs faulty logic in that it concludes that an employee who needs supervision is subject to the employer's control for the purposes of the common-law employment test, but also concludes that an employee who does not need supervision because of the technical nature of the work is also a common-law employee. That rationale would make almost all independent contractors employees.

Employers often try to structure their relationships based on the common-law employment test so that an individual is or is not considered an employee. Such action is consistent with the law, not in conflict with it. Despite its size, CalPERS also employs several consultants that perform services similar to work performed by CalPERS in-house and that makes up a regular part of its business (e.g. hiring attorneys to act as appellate counsel even though CalPERS' in-house attorneys also perform these same functions). It is all but certain that CalPERS structures those relationships so that the consultants are not employees, even though employees are employed in-house to perform the same or similar work. Under the ALJ's framework, not only would anyone who performs some of the duties also performed in-house be a common-law employee, any attempt to structure the relationship would be labelled "subterfuge" or an "end run around" the law. The Proposed Decision's comments are gratuitous and unsupported by the record, and do not take into account the complex legal framework and fact specific common-law employment test.

Finally, there was no evidence that individual City Council members or the governing body believed their conduct was not in compliance with the law. A fact that even the ALJ appears to note in discounting the parties' intent. (PD, ¶ 36.) Thus, to include a finding of intent is inappropriate.

Accordingly, the City requests that, if the CalPERS Board adopts the Proposed Decision, the CalPERS Board modify the Proposed Decision to strike the final sentence of Paragraph 37 on page 13-14, the reference to "subterfuge" in the conclusion in Paragraph 17 on page 21, and the incorrect legal statement in footnote 2.

III. The Statute of Limitations Bars Collection of Any Alleged Overpayments

The City also notes that CalPERS is barred by the three-year statute of limitations from collecting any overpayments from Mr. Dowswell. Specifically, Government Code section 20164(b)(1) provides:

> (b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:

> (1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.

The alleged post-retirement employment occurred from April 28 through July 1, 2015. CalPERS did not even issue the determination letter until January 10, 2020, more than three years after the alleged violation. (PD, pp. 1-2, ¶ 5.) CalPERS is barred from collecting from Mr. Dowswell under the applicable statute of limitations.

The general statute of limitations under Government Code section 20164(b)(1) also is not superseded by, or in conflict with, Government Code section 21220, as Government Code section 21220 and Government Code section 20164(b)(1) can be read in harmony by allowing collection of overpayments back to the first date of unlawful employment, up to the three-year statute of limitations provided under Government Code section 20164(b)(1). Any other reading would cause an implied partial preemption of Government Code section 20164(b)(1). Well-settled principles of statutory construction require that statutes be harmonized whenever possible. In addition, whenever possible, statutes must be read so as to give effect to all of their provisions. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955.) Implied amendment or repeal of statutes is disfavored, and will generally only occur when there is no rational basis for harmonizing the conflicting statutes. (*Id.*; *People v. Galvan* (2008) 168 Cal.App.4th 846, 854.)

In any event, the Proposed Decision is not self-executing with respect to CalPERS' ability to collect any contributions from the Parties. As the Proposed Decision states, "CalPERS' right to collect any purported overpayments to Mr. Dowswell is not an issue on appeal." (PD, p. 19, para. 11.) Accordingly, the collection of overpayments is barred by Government Code section 20164(b)(1) and reinstatement and collection is not directly before the CalPERS Board.

IV. CalPERS Should Decline to Reinstate Mr. Dowswell Under Senate Bill 411

In addition, effective January 1, 2022, SB 411 gives CalPERS discretion regarding whether to reinstate an employee to membership in order to alleviate the harsh penalties that arise when a retiree is involuntarily reinstated. This is especially true in a case like this one, where the violation is relatively di minimis and unintentional. The Legislative Counsel's Digest to SB 411 states that it "would eliminate the [ ] requirement that a person employed without reinstatement in a manner other than authorized by PERL be reinstated, instead providing that reinstatement is permissive. This bill would limit the circumstances pursuant to which retired members and employees are obligated to pay employee and employer contributions, which would have been paid, plus interest, to apply only to specified reinstatements." The appointment here comes within SB 411, which will go into effect in roughly two months.

The alleged violation occurred over a very limited period from April 28 through July 1, 2015, a span of just over two months. Given the short duration of the alleged violation,

combined with the fact that the reinstatement and penalty are not self-executing even if the decision is adopted, the CalPERS Board or staff should not invoke reinstatement in this matter.

V. Conclusion

Based on the above, the City requests that the CalPERS Board reject the Proposed Decision. In the event the Proposed Decision is adopted, the City requests that minor changes be made to the decision to remove unsupported assertions of malicious intent levied against the parties, as they are not supported by the record or relevant to the Proposed Decision's conclusions.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Michael D. Youril

MDY:cgd

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OCT 29 2021
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October 27, 2021

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VIA FEDERAL EXPRESS ONLY

Re: In the Matter of the Appeal of Membership Determination of David Dowswell, Respondent, and City of Dixon, Respondent
OAH Case No. 2020090934

Respondent David Dowswell's Argument to *Reject* the ALJ 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;

(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;

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(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

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[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

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[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

[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.

agreements, the right and expectation of working for *multiple clients, at times concurrently*, also constitutes a basic characteristic of an independent contractor.[7]

IV. FACTS SHOWING RESPONDENT'S STATUS AND ASSIGNMENTS.

DOWSWELL was employed by RGS commencing in 2013. 3/30/2021 485:15-18; Ex. 117. He was hired as "a professional level planner to work with cities..." *Id.* 19-22. Per the RGS-DOWSWELL contract he was an RGS at-will employee. Ex. 111, p. 1, §2. He was hired by RGS to serve as an RGS "community development consultant." Ex. 111, p. 7.

City Manager Lindley negotiated the RGS contract, which was ratified by the city council. 533:22-534:2; Ex. 110. RGS provided him a list of potential RGS consultants. 545:19-546:3; Ex. 114 at p. 1. His intent was to obtain an individual to assist with development related issues where the city did not have available staff. 534:3-8. Exhibit B to the contract (Ex. 110 at p.7) enumerates projects the city negotiated as the scope of work. 535:23-536:17. Per the RGS-DIXON contract there was an independent contractor relationship. Ex.110, p. 3, § 5.1. See e.g. Section 5.3: "Agency 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." And see Section 5.4: "Agency shall not have any right to discharge any employee of RGS from employment."

DOWSWELL had *specific* assignments, including researching, preparing and presenting a discrete housing element update as well as updating the general plan and drafting zoning amendments. 486:15-25; 487:15-25; Ex. 110 at p. 15:

- "Housing Element Update for 2014-2022
- Update of Municipal Services Review
- Process North DIXON Annexation
- Adopt new Agricultural Mitigation Ordinance
- Process Porter Road Properties Rezoning."

Lindley did *not* consider DOWSWELL to be a city employee when he was assigned by RGS: "The agency had an immediate need to complete high priority projects, the agency reached out to RGS to provide the agency with a resource to complete the projects. The individual that was selected by RGS and the individual was responsible for completing the projects while the agency sourced for a Full-Time position..." Ex. 114, p. 9, No. 40. The city manager did not direct him in how to perform the tasks he worked on. 525:4-8. Lindley reviewed (but did not supervise) the "status" and "completion" of DOWSWELL's assignments. Ex. 114,

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

p. 6, No. 18. Dowswell did not have management responsibility. No DIXON staff reported to him. Ex. 114, p. 5, No. 1(e). As an RGS employee, DOWSWELL lacked authority to execute documents on behalf of the city. Ex. 114, p.9, No. 39.

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.

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