

ATTACHMENT B

STAFF'S ARGUMENT

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

Respondent Larry J. Kosmont (Respondent) initially established membership with CalPERS on September 14, 1975, through employment with the City of Santa Monica. He continued his membership through employment with the City of Seal Beach (March 28, 1978 to August 1, 1980), the City of Bell Gardens (August 2, 1980 to September 21, 1983), and the City of Burbank (December 16, 1983 to August 1, 1986). On March 3, 1989, Respondent elected to take a refund of his CalPERS contributions, thus terminating his CalPERS membership.

Respondent City of Montebello (City) is a public agency that first contracted with CalPERS to provide retirement benefits for its eligible employees in 1946. By way of the City's contract with CalPERS, the City agreed to be bound by the terms of the contract and by the Public Employees' Retirement Law (PERL).

On May 12, 2011, the City appointed Respondent as the Interim City Administrator through a Professional Services Agreement (Agreement) entered between the City and Kosmont & Associates, Inc. (K&A). The Agreement indicated K&A would perform the services as an independent contractor. Compensation for Respondent's services was \$25,000/month. Respondent was to perform 16 to 20 hours per week of services for the City, and his assistant David Biggs (Biggs), was to perform 32 to 36 hours per week. The services were to commence on May 12, 2011, and expire on November 11, 2011. The term of the Agreement was amended two times and eventually expired on February 29, 2012. Because the Agreement provided that all K&A employees who provided services for the City (including Biggs and Respondent) were independent contractors and not employees, the City did not report Biggs or Respondent's service to CalPERS at the time it was rendered.

In 2014, CalPERS' Office of Audit Services (OFAS) conducted a Public Agency Review of the City's compliance with the PERL and determined that the City had misclassified Biggs and Respondent as independent contractors. CalPERS determined that Biggs and Respondent should have been classified as employees and their service reported to CalPERS.

The City appealed CalPERS' determination on Bigg's behalf. After the hearing, the CalPERS Board adopted a Proposed Decision at its February 14, 2018 meeting. The Board upheld CalPERS' determination that Biggs was an employee of the City and that his service should have been reported to CalPERS. That Decision is now final.

On February 28, 2019, Respondent contacted CalPERS requesting that he also be granted membership for the time he provided services for the City: May 12, 2011 to February 29, 2012. Respondent indicated that after establishing membership with CalPERS for his time with the City, he intended to redeposit his previously withdrawn member contributions plus interest.

Under the PERL, an employee whose appointment or employment contract does not fix a term of full-time, continuous employment in excess of six months, is excluded from membership unless an exception exists. (Government Code section 20305.) There are three exceptions to that rule:

1. If the employee is a member at the time he or she renders service and is not otherwise excluded pursuant to the PERL or by a provision of a contract;
2. If the employee's position requires regular, part-time service for one year or longer for at least an average of 20 hours per week or requires service that is equivalent to at least an average of 20 hours per week for one year or longer; or
3. The employment is, in the opinion of the Board, on a seasonal, limited-term, on-call, emergency, intermittent, substitute, or other irregular basis that is either:
 - a. full-time employment that continues for longer than six months; or
 - b. the employee completes 1,000 hours of work within a fiscal year.

CalPERS requested information from Respondent and the City to determine whether Respondent's employment qualified for CalPERS membership. Respondent provided CalPERS with the Agreement and invoices. The City filled out a membership form (MEM-1344) informing CalPERS of the number of hours Respondent worked in each pay period.

None of the documents provided to CalPERS by Respondent and the City supported a finding that Respondent qualified for membership. The Agreement clearly states that Respondent was not hired on a full-time basis for more than six months. Respondent did not provide services for one year or longer. Respondent was not a member of CalPERS at the time he performed services. The documents did not establish that Respondent worked more than 1,000 hours in a fiscal year. The Agreement indicated that Respondent worked 16 to 20 hours per week, which equates to 576 to 720 hours in fiscal year 2011-2012. The invoices provided by Respondent did not contain any information regarding the hours he worked. The MEM-1344 submitted by the City provided that Respondent worked, at most, 720 hours in fiscal year 2011-2012.

On March 23, 2020, CalPERS informed Respondent of its determination that he was not eligible for CalPERS membership during the time he worked as the City's Interim City Administrator from May 12, 2011 to February 29, 2012. CalPERS' determination was based on the following facts: (1) Respondent was not hired to work full-time for more than six months; (2) Respondent was not hired to work part-time for at least an average of 20 hours per week for one year or longer; (3) Respondent was not a member at the time he performed services for the City because he had withdrawn all of his member contributions; and (4) there was no credible evidence that Respondent worked 1,000 hours in a fiscal year.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on September 9, 2021. Respondent was represented by counsel at the hearing. The City did not appear at the hearing.

CalPERS presented evidence at the hearing supporting its determination. CalPERS' evidence included the terms of the Agreement which provided Respondent was an independent contractor and was hired to work 16-20 hours per week. In addition, CalPERS presented the City's MEM-1344 showing that Respondent worked between 100-140 hours in fiscal year 2010-2011 and 720 hours in fiscal year 2011-2012. CalPERS' witness testified regarding the efforts taken to obtain information regarding the services Respondent performed, and that none of the information CalPERS received supported a finding that Respondent worked 1,000 hours in a fiscal year. CalPERS' witness also testified that Respondent did not qualify under any of the exceptions to Government Code section 20305 because he was not a CalPERS member when he performed services for the City, he did not work for a year or more for at least 20 hours per week, and he was not hired to work full-time for more than six months.

Respondent testified on his own behalf. Respondent testified that at the time K&A entered into the Agreement, he intended to work part-time and continue performing services for other clients. However, he quickly discovered that the work for the City would be more challenging and time consuming than he originally thought, and he quickly started working full-time for the City. Respondent testified that he did not keep track of the hours he worked because the Agreement was for a lump sum amount and did not require him to report the hours he worked. He estimated that he worked 50 hours per week during the duration of the Agreement.

Respondent called William Quan as a witness. Mr. Quan works for the City and filled out and signed the MEM-1344. He testified that he spoke with the City's payroll staff and Director of Human Resources when he filled out the MEM-1344. He also reviewed the Agreement and the invoices submitted by K&A to receive payment. Mr. Quan testified that it was the City's belief that Respondent worked 20 hours per week, and that is why he put 20 hours as the time worked by Respondent for each pay period.

Respondent also called Susan Perry, William Molinari, and Lillian Guzman as witnesses. Each of these witnesses had first-hand knowledge of the work performed by Respondent for the City in 2011 and 2012. Each witness testified that Respondent worked much more than 20 hours per week, and typically worked at least 40 hours per week. None of these witnesses knew precisely how many hours Respondent worked for the City.

After considering all of the evidence introduced, as well as the arguments by the parties, the ALJ granted Respondent's appeal. The ALJ found that Respondent bore the burden of demonstrating that he qualified for membership, and that he met his burden.

The ALJ found that CalPERS determined in good faith, based on the information available to it at that time, that Respondent was not eligible for membership. However, the ALJ found that the evidence submitted by Respondent at the hearing “augmented the information regarding the number of hours” Respondent worked. The ALJ found that it was reasonable to conclude Respondent worked at least 50 hours per week, and on this basis exceeded 1,000 hours worked in fiscal year 2011-2012. Consequently, the ALJ found that the “preponderance of the evidence established [Respondent] worked more than 1,000 hours for Montebello in fiscal year 2011-2012.”

Based on the evidence and the law, the ALJ ultimately concluded that Respondent’s appeal should be granted, that he satisfied the eligibility requirements found in Government Code section 20305, subdivision (a), and that CalPERS shall determine whether Respondent has satisfied other legal requirements for eligibility.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to “make technical or other minor changes in the proposed decision.” In order to avoid ambiguity, staff recommends that “2021” be changed to “2012” in paragraph 19. On page 7, and “xontractor” be changed to “contractor” in paragraph 23. on page 8.

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

January 18, 2022

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