

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

From December 2007 until December 2010, Robert Toering (Respondent) was an employee of the City of Vernon (City). By virtue of this employment, Respondent was a miscellaneous member of CalPERS. Prior to that employment, from August 2002 until December 2007, Respondent had worked as a consultant for the City under a series of contracts, each of which had identified him as an independent contractor. In March 2011, Respondent applied for service retirement. In reviewing his application, CalPERS determined that Respondent did not have the minimum number of five years of service credit needed in order to qualify for a retirement benefit. In arriving at this conclusion, CalPERS reviewed Respondent's employment history and determined that from 2002 - 2007 he was an independent contractor and not an employee. Thus, his only qualified CalPERS service credit was three years, from 2007- 2010. Respondent filed a timely appeal of this determination.

The related issues of pay rate and final compensation which arose in this appeal were bifurcated from the membership issue to allow the parties and the Administrative Law Judge (ALJ) to determine whether Respondent had sufficient service credit time to vest in CalPERS. If Respondent did not win the appeal on the nature of his service to the City, there would be no need to proceed further with pay rate and final compensation determinations. Those matters will be heard separately on appeal.

A hearing was held on December 11, 2013 on the issue of the nature of Respondent's employment relationship to the City during the various time periods in question. The ALJ was asked to decide whether he was an employee, (which would give him service credit), or an independent contractor, (which would not) during those years. Witnesses were heard and documentary evidence was presented. The ALJ issued a Proposed Decision on December 31, 2013, approving the decision by CalPERS in part and approving the appeal by the Respondent in part.

The ALJ concluded that Respondent was not a CalPERS eligible employee from 2002 to March 2004. The Proposed Decision also found that Respondent was a CalPERS eligible employee from 2004 through 2007. The ALJ applied the common law employment test in making his decisions. This is the test that CalPERS also uses in determining whether someone is eligible for membership in the system. Under the common law employment test, as articulated in *Tieberg v. Unemployment Insurance Board* (1970) 2 Cal.3d 943, the most significant test of the employment relationship is determining who controls the means by which the work is accomplished. The ALJ found that the City clearly controlled the means by which the work was accomplished between 2004 and 2007. Due to this finding, Respondent will have the necessary minimum amount of five years of service credit to vest in a retirement benefit. As a result, a further hearing will be held to determine the appropriate pay rate and final compensation amount to be used in calculating his benefit.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board regarding the status of his employment from 2002 to March 2004.

March 19, 2014

*for* Marquinta D. Seaborn  
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