ATTACHMENT C

RESPONDENT(S) ARGUMENT

Attachment C

CYNDY DAY-WILSON, Esq., SBN 135045
City Attorney
CITY OF EUREKA
531 K Street
Eureka, CA 95501
Phone: (707) 441-4147
Fax: (707) 441-4148

Attorney for
CITY OF EUREKA

Received
JUN - 6 2014
CalPERS Board Unit

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Application to Purchase Service Credit for Maternity Leave of Absence and to Receive Service Credit for Part-Time Hourly Employment by: TAWNIE L. HANSEN, Respondent, and CITY OF EUREKA, Respondent.	**CASE NO. 2011-0991** **OAH NO. 2011110365** **CITY OF EUREKA'S REQUEST FOR REMAND** **Trial Date: January 22-23, 2014** **Location: Eureka, CA**

The City of Eureka ("City") respectfully submits the following memorandum of points and authorities in support of its REQUEST FOR REMAND in response to the Proposed Decision of the Administrative Law Judge David Benjamin.

INTRODUCTION

The City of Eureka was involved in litigation with Ms. Hansen for several years. Over the course of the litigation, Ms. Hansen made many allegations against the City, her former employer, regarding employment issues. That litigation was resolved in 2010 with a full release of all claims by Hansen. Ms. Hansen has sought, in a blatant attempt to obtain

another "bite of the apple," to obtain service credit with CalPERS ("CALPERS") for her hourly employment with the City.

The Proposed Decision is in error for two reasons: First, Ms. Hansen's claim is barred by law pursuant to Government Code Section 20305(a)(1) which provides for an exclusion of hourly employees by contract. Second, as ordered by Administrative Law Judge Sarli, the issue of the effect of the full release was not part of the First Amended Statement of Issues dated August 23, 2012 or part of the hearing on January 22-23, 2014. The matter must be remanded for further hearing.

ARGUMENT

A. The City's Contract Precludes Service Credit for Hourly Work.

The facts are largely undisputed and the issue of whether Hansen is entitled to obtain service credit turns on a legal interpretation, namely, the City's contract with CalPERS.

The City and CALPERS originally entered into a contract, effective February 27, 1967, governing the City's participation in the CalPERS system. That contract has been amended numerous times. The Amendment that is controlling during the time period in question states:

> 4. In addition to the classes of employees excluded from membership by said Retirement Law, the following classes of employees shall not become members of said Retirement System:
>
> **a. PERSONS COMPENSATED ON AN HOURLY BASIS;**
>
> **b. PERSONS COMPENSATED ON A DAILY BASIS;**
>
> **c. PERSONS COMPENSATED ON A WEEKLY BASIS; AND**
>
> **d. FIREMEN AND POLICEMEN WHO REMAIN MEMBERS OF THE FIREMEN'S AND POLICEMEN'S RETIREMENT SYSTEM OF THE CITY OF EUREKA AFTER SEPTEMBER 1, 1972.**

On August 13, 1999 CalPERS contacted the City regarding its interpretation of the hourly exclusion (City's Exhibit 27):

> Your agency has an exclusion of "All Hourly Rated or Hourly Basis Employees" in its contract with CalPERS. **This is valid contract exclusion**. [Emphasis added.]

The City responded on September 13, 1999:

> In response to your request for information on how the City of Eureka interprets its PERS membership contract exclusions, here are the answers to your specific questions:
>
> 1. "How does your agency interpret this exclusion?"
>
> Response: We interpret our contract exclusion to include, in addition to the classes or categories of employees excluded from membership by PERS law, all employees employed by the City of Eureka and compensated on:
>
> 1) an hourly basis
> 2) a daily basis
> 3) a weekly basis; and
> 4) those Fireman and Police who remain members of the Firemen's and Policemen's Retirement system of the City after September 1, 1972
>
> The Eureka City Council, during their annual budget process, allocates a specified number of regular full-time and regular part-time positions. These regular positions are salaried and are afforded benefits including membership in PERS. Any person who is employed by the City and is not employed in an allocated position is paid on an hourly, daily or weekly basis, does not receive any benefits and is not eligible for PERS membership.

Thus, based on the hourly exclusion Hansen cannot earn service credit during the time spent as an hourly employee at the City.

B. The Proposed Decision's Interpretation of Government Code Section 20305 Is Incorrect and without Any Legal Support.

Government Code section 20305 provides in pertinent part:

> (a) 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 this system unless:
>
> (1) He or she is a member at the time he or she renders that service **and is not otherwise excluded** pursuant to this article or **by a provision of a contract**. [Emphasis added.]

Ms. Hansen is excluded by this first subsection stated above because of the contract exclusion. If you carefully read the first subsection, there is an "and" that clearly excludes those that are "excluded by a provision of a contract." This is the situation that describes Ms. Hansen. As an hourly employee of the City, she was excluded by the hourly exclusion of the contract between the City and CalPERS.

> 4. In addition to the classes of employees excluded from membership by said Retirement Law, the following classes of employees shall not become members of said Retirement System:

Thus, the law provides that Ms. Hansen's hourly work is excluded and no service credit can be given.

The Proposed Decision, however, ignores the law and years of CalPERS interpretation and instead finds that 20305(a)(3)(B) applies to Ms. Hansen's situation. This interpretation would render subsection (a)(1) meaningless. To interpret the statute otherwise would disregard decades of CALPERS interpretation and application not only in the City of Eureka but, also in other jurisdictions that have an hourly contract exclusion in their contracts with CALPERS. To ignore CalPERS' interpretation of the hourly contract exclusion would result in significant unfunded liabilities statewide as there are numerous hourly exclusions being applied exactly this way.

Further, it has long been established in California that agencies are entitled to great deference with regard to their interpretation and application of the regulations and statutes that they are entrusted to apply.

> The construction of a statute by the officials charged with its administration must be given great weight, for their "substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute." (*White v. Winchester Country Club*, 315 U.S. 32, 41 [62 S.Ct. 425, 86 L.Ed. 619]; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 [51 S.Ct. 144, 75 L.Ed. 397]; *Riley v. Thompson*, 193 Cal. 773, 778 [227 P. 772]; *County of Los Angeles v. Frisbie*, 19 Cal. 2d 634, 643 [122 P.2d 526]; *County of Los Angeles v. Superior Court*, 17 Cal. 2d 707, 712 [112 P.2d 10]; see, *Griswold, A Summary of the Regulations Problem*, 54 Harv.L.Rev. 398, 405; 27

Cal.L.Rev. 578; 23 Cal.Jur. 776.) *Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 756-7.

This is because courts have realized that to disregard an agency's long-standing interpretation could be financially devastating as there has been detrimental reliance by another on the agency's interpretation.

> **When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation.** (*Helvering v. Griffiths*, 318 U.S. 371, 403 [63 S.Ct. 636, 87 L.Ed. 843]; *United States v. Hill*, 120 U.S. 169, 182 [7 S.Ct. 510, 30 L.Ed. 627]; see *County of Los Angeles v. Superior Court*, 17 Cal. 2d 707, 712 [112 P.2d 10]; *Hoyt v. Board of Civil Service Commissioners*, 21 Cal. 2d 399, 402 [132 P.2d 804].) *Whitcomb Hotel, Inc., supra* at 757. [Emphasis added.]

The City has relied on CALPERS and its interpretation and assurances that it is applying its contract containing the hourly exclusion correctly. To reverse course at this stage would mean that the City, specifically the taxpayers of Eureka, would incur a significant unfunded liability.

C. The Proposed Decision Incorrectly Holds That Hansen Did Not Waive Her Claim for CalPERS Service Credit.

On or about July 16, 2012, the City filed a Pre-Trial Brief/Motions in Limine. (Exhibit A.) One of the issues raised by the City was that Ms. Hansen's claim was barred by the execution of a mutual waiver of all claims against the other as part of a Settlement Agreement relating to litigation filed by Ms. Hansen against the City for various employment issues:

> *"Plaintiff and Defendants hereby mutually release each other and waive the provisions of Section 1542 of the Civil Code." (¶5)*

This general release of all known and unknown claims *did not exclude any claim* that Ms. Hansen had against the City of Eureka as of the date of the Settlement Agreement.

Administrative Law Judge Ann Elizabeth Sarli considered the question of "What effect does the settlement agreement that the City entered into with respondent have on respondent's

claims?" On August 8, 2012, ALJ Sarli ordered the following with regard to the issue of the waiver:

> 6. In written argument, respondent asserted that the Statement of Issues should be further amended to reflect respondent's claim that the City should be ordered to pay all costs and arrears in 'reinstating'respondent to CalPERS membership pursuant to Government Code section 20283. CalPERS and the City object to this further amendment; CalPERS on the ground that the issue is premature and not ripe for adjudication, and the City on the grounds that it has entered into a settlement agreement with respondent in which she waives any claims against the City. As the argument of CalPERS has merit and the issue is a jurisdictional issue, **the City's argument is not considered, at this time**. [Emphasis added.] (Exhibit B.)

Thus, the issue of the effect of the general release signed by Ms. Hansen was not part of the First Amended Statement of Issues dated August 23, 2012 as it was not to be considered at the hearing because an initial determination regarding jurisdiction had to be made as ordered by ALJ Sarli. (See Exhibit C.) In other words, the issue of the effect of the general release remains to be determined. The City noted this in its Closing Brief: "While the Court has, in its August 8, 2012 Order on Motions, ruled that the matter of the general release is not at issue at this time, the City wishes to remind the Court that the issue remains to be resolved." The ALJ's inclusion of this issue in the Proposed Decision when it was previously ordered to not be "at issue" at the hearing is in error. The Board's adoption of the Proposed Decision on this issue would be highly prejudicial to the City and reversible error under the law. The issue must be remanded to the ALJ for consideration.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the Proposed Decision not be adopted by the Board and that the matter be remanded for further consideration. At a minimum, the issue of the effect of the general release executed by Ms. Hansen should be remanded for further proceedings as ordered by ALJ Sarli.

//

//

Dated: June 6, 2014

CITY OF EUREKA

Cyndy Day-Wilson

Cyndy Day-Wilson
City Attorney
ATTORNEY FOR CITY OF EUREKA

Exhibit A

CYNDY DAY-WILSON, SBN 135045
CITY ATTORNEY, CITY OF EUREKA
531 K STREET
EUREKA, CA 95501
(707) 441-4147

ADRIENNE M. MORAN, SBN 136414
SHAPIRO, GALVIN, SHAPIRO & MORAN
P.O.BOX 5589
SANTA ROSA, CA 95402
(707) 544-5858

ATTORNEYS FOR CITY OF EUREKA

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

IN THE MATTER OF :)	**Case No. 2011-0991**
TAWNIE L. HANSEN)	**THE CITY OF EUREKA'S PRE-TRIAL BRIEF**
	KAREN J. BRANDT PRESIDING ADMINISTRATIVE LAW JUDGE

The City of Eureka ("City") respectfully submits the following memorandum of points and authorities in response and opposition to Tawnie Hansen's ("Hansen") Pre-Trial Brief seeking: (1) representation in these proceedings by Mr. Jim Niehaus; (2) amendment of the Statement of Issues; and (3) penalties against the City regarding reporting of her work hours to PERS.

I.

INTRODUCTION

The City of Eureka was involved in litigation with Mr. Hansen for several years. Over the course of the litigation, Ms. Hansen made many allegations against the City, her former employer, regarding employment issues. That litigation was resolved in 2010 and Ms. Hansen signed an agreement releasing all claims whether known or unknown against the City. Ms. Hansen now seeks, in a blatant attempt to play the victim again, to obtain "two bites at the apple". Her claim is barred by law and should not be entertained by this tribunal or any other.

II.

ARGUMENT

A. Jim Niehaus cannot represent Hansen in these proceedings.

Ms. Hansen's request to be represented by former CalPERS employee, Jim Niehaus should be denied. It is apparent from Mr. Niehaus' declaration that he really seeks permission to offer his "expert" opinions regarding the supposed proper application of the Public Employees' Retirement Law, based on his personal experience at CalPERS, rather than to truly represent Ms. Hansen at the administrative hearing. Mr. Niehaus' declaration refers to his experience serving as a subject matter expert on statutory construction and legislative intent. Presumably, here, Mr. Niehaus seeks to offer his "expert" interpretation of the law, based on his personal experience at CalPERS.

Yet, the City would have no opportunity to cross-examine Mr. Niehaus on his opinions or the basis for them, unlike a true retained expert. The City would be at an unfair disadvantage if Mr. Niehaus was permitted to insert his "expert" opinions on the issues in this case, given the City's lack of ability to question him as a witness. In the event Ms. Hansen is permitted to be

represented by Mr. Niehaus, the City respectfully requests that he be prohibited from offering any opinions or testify regarding experiences of his own at the hearing.

B. The City's objects to the proposed amendment of the Statement of Issues.

At the eleventh hour, Ms. Hansen seeks permission to amend her Statement of Issues to include consideration of whether or not the City supposedly erred in failing to report Ms. Hansen's part time hours of service to CalPERS from late 1996 to 2006. This request should be denied because it unduly prejudices the City to have to defend a claim dating back more than 15 years! The City's ability to investigate this new claim and to produce witnesses with personal knowledge of the handling of Ms. Hansen's CalPERS eligibility are greatly diminished by the substantial passage of time, changes in personnel over the years and the difficulty in locating records relevant to this proposed new issue. Ms. Hansen has unreasonably delayed for over 15 years in raising this issue about which she must have been aware since the mid 1990's. In the event Ms. Hansen is given permission to raise this old claim, then the City requests that the hearing be delayed for a sufficient period of time to permit it to investigate the new issue and to locate potential witnesses and records which might assist with its defense.

C. Ms. Hansen's claim for penalties against the City is also barred by her previous release of <u>all claims</u> against the City relating to her employment.

Tawnie Hansen sued her former employer, the City of Eureka for hostile work environment and other employment issues in November 2009. The case was resolved at mediation and the parties entered into a written Settlement Agreement dated September 2, 2010. (A true and correct copy of the Settlement Agreement is attached hereto as **Exhibit A**) As a material part of the consideration for the City's settlement, the parties agreed to a mutual waiver of all claims against the other.

"Plaintiff and Defendants hereby mutually release each other and waive the provisions of Section 1542 of the Civil Code." (¶5)

This general release of all known and unknown claims *did not exclude any claim* that Ms. Hansen had against the City of Eureka as of the date of the Settlement Agreement. Yet, in this action, Ms. Hansen now seeks to have a penalty imposed against the City for its supposed error in failing to report her part time hours to PERS in 1996:

> *"If it is determined that the employer erred in not keeping Ms. Hansen in active Cal-PERS membership then pursuant to Government Code §20283 the City will be wholly responsible for the arrears of Ms. Hansen's Cal-PERS retirement contributions in addition to its own employer contributions"*
> (Hansen's Pretrial Brief p.7:20-24).

Significantly, Ms. Hansen was aware of her potential claim against the City of Eureka regarding her belief that the City had failed to enroll her in PERS back in 1996, at the time Ms. Hansen signed the Settlement Agreement. Specifically, according to Ms. Hansen's Exhibit A-2 (her chronology), Ms. Hansen was informed on August 5, 2010 that the City was supposedly required to report her part time hours. Yet, Ms. Hansen made absolutely no effort to, and did not, exclude this known claim from the scope of the general release she signed on September 2, 2010.

"An obligation is extinguished by a release therefrom given to the debtor to the creditor, upon a new consideration, or in writing, with or without new consideration." (Civil Code §1541) The Settlement Agreement included a release of all known and unknown claims and a waiver of Civil Code §1542. A release constitutes a bar to recovery unless it is avoided in some legitimate way (*Drumm v. Hart* (1933) 136 Cal.App. 12). A cause of action is barred by a release executed

by the plaintiff, where she, for a specified amount, releases any claim against the defendant (*Hudgins v. Standard Oil Company* (1935) 5 Cal.App.2d 618).

> *"On the one hand, the policy of the law is to encourage out of court settlements. To further this policy, the parties to a dispute should be encouraged to negotiate settlements and to enter into releases. In the absence of unfair conduct on the part of the releasee, the law should extend its protection to the stability of the transaction by holding the parties to the express terms of the release."* (*Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 504)

Because of Ms. Hansen's full release of any and all claims against the City of Eureka on September 2, 2010, she is now barred from raising her claim of penalties against the City because of its alleged error made in 1996.

D. Sacramento is not the proper venue for the hearing of this matter.

All of the witnesses, including Hansen, are located in the Eureka area. It makes no sense to have everyone travel six hours to another venue. The City thus, requests that the hearing be held in Eureka.

III.

CONCLUSION

Ms. Hansen should not be permitted to be represented by Jim Niehaus because the true intention is not to be a representative for Hansen, but to render expert opinions based on his CalPERS experience. The City would be unduly prejudiced if such opinions were permitted, while the City is denied the opportunity to question this "expert" witness or otherwise attack his offered opinions.

Ms. Hansen's request to amend the Statement of Issues should also be denied. The claim of alleged error by the City in not reporting Ms. Hansen's part time service hours to CalPERS

dates back to 1996. The City's ability to defend this claim and to locate relevant witnesses and documents essential to the City's defense, is greatly compromised by Ms. Hansen's delay in raising this issue (about which she must have been aware since the mid 1990's).

The request to amend the Statement of Issues should also be denied because Ms. Hansen has waived any such claim by her unqualified release of all known and unknown claims against the City entered into on September 2, 2010, despite Ms. Hansen awareness of this claim. She cannot have "two bites at the apple."

Lastly, any hearing should be held in Eureka where all of the witnesses and parties are located.

DATED: July 16, 2012

By: _____
CYNDY DAY-WILSON
Attorneys for City of Eureka

EXHIBIT A

This agreement is entered into this 2d day of September 2010 between TAWNIE HANSEN (herein "Plaintiff"), THE CITY OF EUREKA (herein "the City"), DAVID W. TYSON (herein "Tyson", the City and Tyson jointly referred to as "Defendants") and REDWOOD EMPIRE MUNICIPAL INSURANCE FUND (herein "REMIF").

Wherein, Plaintiff sued Defendants in the Superior Court of ~~Eureka~~ Humboldt County (case no CV 09-0773) and the parties now wish to resolve the matter.

NOW THEREFORE WITNESSETH, the parties agree as follows:

1. This settlement is conditioned on public agency approval.

2. If there is public agency approval, REMIF shall pay plaintiff the sum of $200,000. ~~by ...~~ Payment shall be by check payable to plaintiff and delivered to Defendant's Counsel on October 29, 2010 or this shall the immediately mailed check to Plaintiff's Counsel.

3. No party or counsel may initiate contact with the press at any ~~date~~ time subsequent to this date to discuss this case or this settlement. If the press initiates contact, the response shall be "I cannot discuss this case."

4. There shall be no discussion of this

case or this settlement by a party or counsel with any third party except the husband of Plaintiff or the wife of Plaintiff's counsel or the staff of Defendants' counsel. If any of the excepted third parties discloses this settlement to a non-excepted third party, the party who is not in breach of this agreement may rescind the agreement. The terms of this paragraph shall expire upon the dismissal of the aforementioned law suit. City employees shall be considered third parties for the purpose of this paragraph except to the extent that members of the City Council, the

city manager, and the city attorney are are required to take action pursuant to the Brown Act.

5. Plaintiff and Defendants hereby mutually release each other & waive the provisions of Section 1542 of the Civil Code.

6. Each party shall bear its own costs and fees.

7. Counsel will extend all discovery and discovery motion deadlines now set for September 30, 2013 to November 30, 2013.

8. Should any party be obliged to enforce this agreement, which is enforceable and binding upon the parties pursuant to

Section 664.6 of the California Code of Civil Procedure, shall be admissible in such enforcement proceeding pursuant to Section 1123 of the California Evidence Code and the prevailing party or parties in such litigation shall be entitled to attorney fees

9. Plaintiff and REMIF shall each pay mediator fees Directly the sum of $500.

Approved as to form:

ALAN GOLDBERG
Attorney for Plaintiff

ADRIENNE M. MORAN
Attorney for Defendants

TAWNIE HANSEN

CITY of EUREKA
by DAVID W TYSON, city mgr.

DAVID W TYSON
individually

REDWOOD EMPIRE MUNICIPAL INSURANCE FUND
by JEFFREY DAVIS, general mgr

DECLARATION OF SERVICE

Case Name: Hansen, Tawnie L. **OAH No.: 2011110365**

I, Marian Bogdanyi, declare as follows: I am over 18 years of age and am not a party to this action. I am employed by the City of Eureka. My business address is 531 K Street, Eureka, CA 95501. On July 16, 2012, I served a copy of the following document (s) in the action entitled above:

THE CITY OF EUREKA'S PRE-TRIAL BRIEF

To each of the person(s) named below at the addresses listed after each name by the following method(s):

Carol A. McConnell
Senior Staff Counsel
PERS
Sacramento, CA 94229-2707
Carol_McConnell@calpers.ca.gov

Jim Niehaus, Consultant
1809 S. Street, Ste.101-384
Sacramento, CA 95811
Mypublicpension@gmail.com

Hon. Karen J. Brandt, Presiding
Administrative Law Judge
2349 Gateway Oaks Drive, Ste. 200
Sacramento, CA 95833-4231
sacfiling@dgs.ca.gov

☑ **Email or electronic Transmission.** Based on a court order or the agreement of the parties to accept service by email or electronic transmission, I caused the documents(s) to be sent to the person(s) at the Email address (es) listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed at Eureka, California on July 16, 2012.

Marian Bogdanyi, Declarant

Exhibit B

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of: TAWNIE L. HANSEN, Respondent, and CITY OF EUREKA, Respondent.	Case No. 2011-0991 OAH No. 2011110365 **ORDERS ON MOTIONS**

This matter is pending before Administrative Law Judge Ann Elizabeth Sarli, Office of Administrative Hearings (OAH).

(CalPERS) is represented by Carol A. McConnell, Senior Staff Counsel.

The City of Eureka (City) is represented Cyndy Day-Wilson, City Attorney.

Tawnie L. Hansen (respondent) seeks to be represented by Jim Niehaus, Public Pension Plan Consultant.

****

1. On May 23, 2012, Karen J. Brandt, Presiding Administrative Law Judge, ordered, *inter alia*, that the parties submit written arguments on the following issues raised during a status conference:

A. Should respondent's request to have Mr. Niehaus represent her be granted?

B. Should the Statement of Issues be amended to reflect respondent's claim that she should be awarded service credit for her part-time work with the City?

C. What effect does the settlement agreement that the City entered into with respondent have on respondent's claims?

D. Should the venue for the hearing be changed from Sacramento to Eureka?

2. The parties timely submitted written arguments on these issues.

3. *Respondent's Representation*: CalPERS does not object to Mr. Niehaus serving as respondent's representative. The City objects to Mr. Niehaus serving as respondent's representative because the City believes Mr. Niehaus intends to testify as an expert witness and intends in argument to cite his training and experience as a former CalPERS employee. The City's objection has merit. **Mr. Niehaus may represent respondent as a "lay representative" in these proceedings, but may not testify and may not cite his training and experience as a former CalPERS employee in argument.**

4. *Amendment of Statement of Issues:* The City objects that respondent's request that the Statement of Issues be amended is untimely and prejudicial. These objections lack merit. CalPERS denied respondent's claim for additional service credit on March 3, 2011. Respondent timely appealed the denial. Although the time period in which respondent alleges she should have accrued service credit is 1996 through 2006 (see below), this appeal is from the 2011 CalPERS determination. The City expressed concern that it may have some difficulty obtaining records and witnesses relating to the earlier part of this time period. The City may request additional time to prepare for hearing or ask for other accommodations as needed throughout the pendency of this proceeding.

5. CalPERS does not object to amendment of the Statement of Issues to include respondent's claim that she should be awarded service credit for her hourly work between 1996 and 2006. CalPERS objects to the manner in which respondent characterized the claim (whether respondent was improperly removed from CalPERS membership). The City objects as well to respondent's characterization of the claim. These objections are well founded. **CalPERS shall amend the Statement of Issues to allege that respondent claims she should be eligible to earn service credit for her hourly work performed for the City between 1996 and 2006. The Amendment shall be made before August 16, 2012, and service of the Amended Statement of Issues shall be made before August 21, 2012.**

6. In written argument, respondent asserted that the Statement of Issues should be further amended to reflect respondent's claim that the City should be ordered to pay all costs and arrears in "reinstating" respondent to CalPERS membership pursuant to Government Code section 20283. CalPERS and the City object to this further amendment; CalPERS on the ground that the issue is premature and not ripe for adjudication, and the City on the grounds that it has entered into a settlement agreement with respondent in which she waives any claims against the City. As the argument of CalPERS has merit and the issue is a jurisdictional issue, the City's argument is not considered, at this time.

7. *Change of Venue:* The parties are in agreement that the parties and most of the known and potential witnesses reside in the Eureka area. Accordingly, cause exists for change of venue to the Eureka area.

8. *Selection of Hearing Dates and Notice of Hearing:* **CalPERS shall coordinate proposed hearing dates with the City and respondent and shall contact OAH calendaring to schedule the hearing. CalPERS shall serve an amended notice of hearing on the parties.**

DATED: August 8, 2012

/s/
ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings

Exhibit C

PETER H. MIXON, GENERAL COUNSEL
CAROL A. McCONNELL, SENIOR STAFF COUNSEL, SBN 125388
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811
P.O. Box 942707, Sacramento, CA 94229-2707
Telephone: (916) 795-3675
Facsimile: (916) 795-3659

Attorneys for Petitioner,
California Public Employees' Retirement System

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application to Purchase Service Credit for Maternity Leave of Absence and to Receive Service Credit for Part-Time Hourly Employment by: TAWNIE L. HANSEN, Respondent, and CITY OF EUREKA, Respondent.	CASE NO. 2011-0991 OAH NO. 2011110365 FIRST AMENDED STATEMENT OF ISSUES Hearing Date: May 23, 2013 Hearing Location: Eureka, CA

Petitioner, California Public Employees' Retirement System (CalPERS), states:

I

Petitioner makes and files this Statement of Issues in its official capacity as such and not otherwise.

II

Respondent, Tawnie L. Hansen (Hansen), was employed by Respondent, City of Eureka (City), as a Police Communications Supervisor.

///

///

III

Hansen began her employment with the City in June of 1990. Hansen had a full-time salaried position when the City granted her an approved Maternity Leave of Absence from approximately July 11, 1996 to September 11, 1996. Hansen returned to her full-time position following this leave, but resigned from it effective September 21, 1996.

IV

From approximately September 22, 1996 to January 15, 2006, Hansen worked in a part-time position as an hourly paid employee for the City.

V

On approximately January 16, 2006, Hansen was re-appointed to a full-time salaried position and worked in that position through August 26, 2009, when she separated all employment with the City. At the time Hansen separated from employment, she was credited with 9.800 years of service, and met the five-year disability retirement vesting requirement.

VI

On approximately May 27, 2009, Hansen filed an application for disability retirement with CalPERS, stating she was unable to return to work for the Eureka Police Department because a hostile work environment made it impossible for her to do her job there.

VII

CalPERS determined that Hansen was permanently disabled or incapacitated from performance of her duties as a Communications Supervisor for the Eureka Police Department, and retired her for disability retroactively effective August 27, 2009.

///

VIII

Hansen learned that a miscellaneous member credited with at least ten years of service receives an enhanced disability retirement allowance (33.333% of final compensation). She contacted CalPERS to see if she could increase her service credit to ten years by purchasing her Maternity Leave of Absence (July 11, 1996 to September 11, 1996).

IX

The following Government Code sections are relevant to purchase of leave of absence service credit:

Section 21002 provides in part:

> A member who returns to active service following an employer-approved uncompensated leave of absence because of his or her serious illness may purchase service credit for that period of absence upon the payment of contributions as specified in Sections 21050 and 21052. . . .

Section 21013 provides:

> "Leave of absence" also means any time, up to one year, during which a member is granted an approved maternity or paternity leave and returns to employment at the end of the approved leave for a period of time at least equal to that leave. Any member electing to receive service credit for that leave of absence shall make the contributions as specified in Sections 21050 and 21052. This section applies to both past and future maternity or paternity leaves of absences by members of the system. (Emphasis added.)

X

City contracted with the CalPERS Board of Administration to participate as a public agency member of CalPERS pursuant to Government Code section 20460 et seq. The provisions for local public agencies contracting with CalPERS are set forth in the Public Employees' Retirement Law (Government Code section 20000 et seq., the "PERL").

///

XI

Section 20500 provides in part:

> The contract may include any provision consistent with this part and necessary in the administration of this system as it affects the public agency and its employees.
>
> . . . . . .

Section 20506 provides in part:

> Any contract . . . entered into shall subject the contracting agency and its employees to all provisions of this part and all amendments thereto applicable to members, [including] local miscellaneous members . . . .

The contract between CalPERS and the City incorporates the definitions of words and terms as set forth in the PERL. The contract also states that the City and its employees shall be subject to all provisions of the PERL, including amendments thereto.

XII

The following Government Code sections are relevant to enrollment and exclusion of employees as members under a contract between a public agency and CalPERS:

Section 20502 provides in part:

> The contract shall include in this system . . . employees of the contracting agency, except as exclusions in addition to the exclusions applicable to state employees may be agreed to by the agency and the board. . . .

Section 20305(a)(1) provides in part:

> 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 this system unless:
>
> (1) He or she is a member at the time he or she renders that service and is not otherwise excluded pursuant to this article or by a provision of a contract. (Emphasis added.)

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XIII

The City's contract with CalPERS at all times relevant to this appeal regarding employees compensated in an hourly basis stated in pertinent part:

> 4. In addition to the classes of employees excluded from membership by [the Public Employees' Retirement Law], the following classes of employees shall not become members of said Retirement System:
>
> a. PERSONS COMPENSATED ON AN HOURLY BASIS;
>
> b. PERSONS COMPENSATED ON A DAILY BASIS;
>
> c. PERSONS COMPENSATED ON A WEEKLY BASIS; (Emphasis added.)

XIV

Government Code section 20160 pertains to the correction of errors and omissions:

> (a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:
>
> (1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.
>
> (2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.
>
> (3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.
>
> Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.
>
> (b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

XV

CalPERS determined that Hansen was not eligible to purchase service credit for her Maternity Leave of Absence because she did not return to employment at the end of her approved leave of absence, for a period of time at least equal to her maternity leave of absence. Hansen was informed of CalPERS' determination by letter dated August 19, 2010.

XVI

Hansen contacted CalPERS to inquire whether she should have received service credit for the period during which she worked in her part-time hourly paid employment.

XVII

CalPERS determined that Hansen was not eligible to receive service credit for the period during which she worked in her part-time hourly paid employment, denied her request to purchase it, and by letter dated March 3, 2011, informed her of her right to appeal its decision.

XVIII

By letters dated March 31, 2011 and May 2, 2011, Hansen appealed CalPERS' determination that she was not eligible to purchase service credit for her Maternity Leave of Absence, stating that she should be allowed to purchase it because Government Code section 20160 provides for correction of mistakes and she believes the following mistakes were made and must be corrected: (1) CalPERS is mistaken in not recognizing that the period of time that she worked full-time after her maternity leave meets the requirement of Government Code section 21013; (2) the City of Eureka made a mistake in not informing her, following her maternity leave, that working part-time would result in her not earning service credit and/or that she was required to return to employment immediately after the end of the approved leave for a period of time at least equal to that leave.

XIX

By letter dated September 29, 2011, CalPERS informed Hansen that even if she were successful in her appeal and were allowed to purchase service credit for her maternity leave of absence, she would still not have the ten years of service required in order to receive an enhanced disability retirement allowance of 33.333% of her final compensation. CalPERS asked Hansen to confirm whether or not she wanted to pursue her appeal.

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XX

By letter dated October 19, 2011, Hansen informed CalPERS that she is pursuing her appeal to purchase service credit for her Maternity Leave of Absence.

XXI

In various communications, Hansen informed CalPERS that she is pursuing an appeal to receive service credit for the period during which she worked in her part-time hourly paid employment.

XXII

This appeal is limited to the following two issues: (1) whether Hansen is allowed to purchase service credit for her Maternity Leave of Absence. If Hansen is successful in her appeal of this issue, she will be eligible to purchase 0.195 years of service credit for her Maternity Leave of Absence; and (2) whether Hansen is allowed to receive service credit for the time she worked in a part-time position as an hourly paid employee for the City.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Dated: AUG 23 2012 BY Karen DeFrank
KAREN DeFRANK, Chief
Customer Account Services Division

DECLARATION OF SERVICE

Case: In re Tawnie L. Hansen OAH No.: 2011110365

I, Ann Maxcy, declare as follows: I am over 18 years of age and not party to this action. I am employed by the City of Eureka, 531 K Street, Eureka, California. On January 6, 2014, I served a copy of the following document(s) in the above-entitled action:

CITY OF EUREKA'S REQUEST FOR REMAND

__X__ **BY UNITED STATES MAIL**: I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above, and placed the envelope or package for collection and mailing, in accordance with our ordinary business practices in Eureka, California. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope or package with postage fully prepaid.

__X__ **BY FAX TRANSMISSION**: Based upon agreement of the parties to accept service by fax transmission, I personally transmitted the above-described document(s) to the person(s) at the fax number(s) listed above from fax machine number 707-441-4148, pursuant to Government Code section 11440.20 and California Code of Regulations, title 1, section 1008, subdivision (d). The fax transmission was reported as complete and without error. A copy of the transmission report showing the date and time of transmission, properly issued by the transmitting machine, is attached to this proof of service.

_____ **EMAIL OR ELECTRONIC TRANSMISSION**: Based on a court order or the agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent to the person(s) at the email address(es) listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Eureka, California.

Dated: June 6, 2014

_____
Ann Maxcy

CITY OF EUREKA City Attorney
531 K Street Eureka, California 95501-1165
(707) 441-4147 • FAX (707) 441-4148

FACSIMILE TRANSMITTAL SHEET

TO: Cheree Swedensky, Assistant to the Board	FROM: Cyndy Day-Wilson, Esq.
COMPANY: CalPERS Executive Office	DATE: 6/6/2014
FAX NUMBER: 916-795-3972	TOTAL PAGES (INCLUDING COVER): 2
PHONE NUMBER: [phone]	SENDER'S REFERENCE: Case No. 2011-0991 OAH No. 2011110365
RE: In the Matter of Tawnie L. Hansen	YOUR REFERENCE NUMBER: [reference number]

☐ *Urgent* ☐ *For Review* ☐ *Please Comment* ☐ *Please Reply* ☐ *Please Recycle*

NOTES/COMMENTS

Dear Ms. Swedensky,

Attached is a corrected Declaration of Service for service of the City of Eureka's Request for Remand.

Sincerely,

Ann Maxcy
Legal Secretary

Please note: The information contained in this facsimile message may be privileged and confidential, and is intended only for the use of the individual(s) or entity named above who has been specifically authorized to receive it. If the reader is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return all pages to the address shown above. Thank you.

DECLARATION OF SERVICE

Case: In re Tawnie L. Hansen OAH No.: 2011110365

I, Ann Maxcy, declare as follows: I am over 18 years of age and not party to this action. I am employed by the City of Eureka, 531 K Street, Eureka, California. On January 6, 2014, I served a copy of the following document(s) in the above-entitled action:

CITY OF EUREKA'S REQUEST FOR REMAND

Cheree Swedensky, Asst. to the Board
CalPERS Executive Office
PO Box 942701
Sacramento, CA 94229-2701
FAX 916-795-3972

__X__ **BY UNITED STATES MAIL**: I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above, and placed the envelope or package for collection and mailing, in accordance with our ordinary business practices in Eureka, California. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope or package with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Eureka, California.

Dated: January 6, 2014

Ann Maxcy

CITY OF EUREKA City Attorney
531 K Street Eureka, California 95501-1165
(707) 441-4147 • FAX (707) 441-4148

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☐ *Urgent* ☐ *For Review* ☐ *Please Comment* ☐ *Please Reply* ☐ *Please Recycle*

NOTES/COMMENTS

Dear Ms. Swedensky,

Attached is a Request for Remand that the City of Eureka is submitting in the above-referenced case. Please contact me if you have any questions.

Sincerely,

Ann Maxcy
Legal Secretary

Please note: The information contained in this facsimile message may be privileged and confidential, and is intended only for the use of the individual(s) or entity named above who has been specifically authorized to receive it. If the reader is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return all pages to the address shown above. Thank you.