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

In the Matter of the Appeal Regarding
CalPERS Membership of:

LISA M. POPE,
Respondent

and

CITY OF MALIBU,
Respondent.

Case No. 2016-0315
OAH No. 2016080637

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on May 16, 2017, in Los Angeles, California.

Preet Kaur, Senior Staff Attorney, represented the California Public Employees’ Retirement System (CalPERS). Lisa M. Pope (respondent Pope) appeared and represented herself. Natalie C. Karpales, Attorney at Law, represented the City of Malibu (the City).

Oral and documentary evidence was received. The record remained open until June 27, 2017, for all parties to file and serve closing briefs, and until July 11, 2017, for all parties to file and serve reply briefs, if any. On June 26, 2017, the City’s closing brief was received, marked as Exhibit I, and lodged. On June 27, 2017, CalPERS’s closing brief was received, marked as Exhibit 27, and lodged. On July 10, 2017, the City’s reply brief was received, marked as Exhibit J, and lodged. On July 12, 2017, CalPERS filed and served a reply brief. Although this document was filed late, the ALJ marked and lodged it as Exhibit 28.

While reviewing the parties’ briefs, ALJ noticed that there appears to be a dispute between the parties as to the contents of the hearing transcript. Consequently, on July 19, 2017, the ALJ, on her own motion, re-opened the record and ordered CalPERS to lodge a copy of the transcript of the May 16, 2017 hearing and serve a notice of lodging to the other parties by August 2, 2017. On July 20, 2017, CalPERS lodged the transcript (marked as Exhibit 29) and filed and served the notice of lodging (marked as Exhibit 30). The record was closed and the matter submitted for decision on July 20, 2017.
FACTUAL FINDINGS

Parties and Jurisdiction

1. On August 2, 2016, Renee Ostrander, Chief of the Employer Account Management Division of CalPERS, filed the Statement of Issues while acting in her official capacity.

2. The City is a local public agency that contracts with CalPERS for retirement benefits for its eligible employees. The provisions of the City’s contracts with CalPERS are contained in the California Public Employees’ Retirement Law (PERL), which is set forth at Government Code section 20000 et seq.

3. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions and by interest and other earnings on those contributions. The amount of a member’s contribution is determined by applying a fixed percentage to the member’s compensation. A local public agency’s contribution is determined by applying a rate to the member’s compensation as reported by the agency. Using certain actuarial assumptions specified by law, the CalPERS Board of Administration (Board) sets the employer contribution rate on an annual basis.

4. A. On October 12, 2011, respondent Pope contacted CalPERS to clarify whether she should have been enrolled in CalPERS membership as an employee of the City during the period of June 5, 1999, to May 3, 2001.

   B. Respondent Pope worked full-time for the City as a Deputy City Clerk from July 12, 1995, until October 8, 1997. During this time period, the City enrolled her in CalPERS membership. Upon her resignation from the City, respondent Pope retained her CalPERS membership because on October 13, 1997, she entered into full-time employment as a Deputy City Clerk with the City of Moorpark (Moorpark), another public agency that contracts with CalPERS for retirement benefits for its eligible employees.

   C. On May 1, 1998, in addition to her full-time work at Moorpark, respondent Pope entered into part-time employment with the City, as a Recording Secretary. In a letter dated October 6, 1998, the City requested a CalPERS review of respondent Pope’s dual employment status. In a letter dated January 2, 1999, CalPERS informed the City of its determination that respondent Pope was an employee, rather than an independent contractor, of the City. Further, CalPERS advised the City that if respondent Pope should separate from

1 All further statutory references are to the Government Code unless otherwise specified.

2 Although some documents in the record refer to the period under dispute as June 4, 1999, to May 4, 2001, the parties agree that it is June 5, 1999, to May 3, 2001.
her employment with Moorpark, the City would be responsible for reporting earnings and contributions for her.

D. On June 4, 1999, respondent Pope left her employment with Moorpark and notified the City of this change in her employment status. She maintained her employment as a Recording Secretary with the City, but it did not enroll respondent Pope in CalPERS membership. On May 4, 2001, respondent Pope was rehired as a full-time City Clerk with the City and was again enrolled in CalPERS membership.

5. After respondent Pope submitted her October 12, 2011 inquiry, CalPERS staff conducted another review of respondent Pope's working relationship with the City. After reviewing available information, CalPERS staff determined that, during the period of June 5, 1999, to May 3, 2001, respondent Pope was not an independent contractor but an employee of the City. CalPERS staff concluded that the City should have enrolled respondent Pope into CalPERS membership during the aforementioned time period and that the City was liable for payment of contributions and costs pursuant to section 20283.

6. In a letter dated February 13, 2012, CalPERS notified the City of its determination described above and advised them of their right to appeal that determination. (Exhibit 10.) The City requested a third review of this decision, but upon submission of additional information from both parties, CalPERS upheld its prior decisions of January 2, 1999 and February 13, 2012.

7. In a letter dated September 18, 2015, the City timely filed an appeal and requested an administrative hearing.

8. The issue on appeal is whether respondent Pope was an employee or an independent contractor of the City during the period of June 5, 1999, through May 3, 2001.

Respondent’s Employment with the City as a Recording Secretary.

9. A. From July 12, 1995, to October 8, 1997, respondent Pope held a full-time position with the City as a Deputy City Clerk. On May 1, 1998, she began part-time employment with the City as a Recording Secretary. On that date, the parties executed a Professional Services Agreement (PSA), in which it was recited that the City “desires to contract for [a] minutes secretary for public meetings” and that respondent “has demonstrated to [the City] that she has the ability to perform the duties and accomplish the responsibilities under [the PSA].” (Exhibit 22, p. 1.)

B. Section 1 of the PSA provides:

[Respondent Pope] agrees to perform the duties and responsibilities of a Recording Secretary on an as-needed basis for duly noticed meetings of the City Council, including, but not limited to, all regular meetings of the City Council. These
duties include collecting and organizing speaker slips, collecting all documents and evidence submitted to the City Council and made part of the official record, keeping and, when requested[,] reading back all motions, taking roll and rollcall votes, preparing and certifying action minutes and minutes for each meeting and such other duties as requested by the City Clerk.

C. Section 2 of the PSA provides that “[the City] shall be responsible for providing administrative assistance necessary for [respondent Pope] to fulfill the responsibilities. [The City] shall provide adequate direction to [respondent Pope] to allow [respondent Pope] to perform services under this Agreement.”

D. Section 3 of the PSA requires respondent Pope to “perform all services and duties pursuant to this Agreement in a professional and timely manner.”

E. In Section 4 of the PSA, the City agreed to pay respondent Pope $20 per hour upon her submission of invoices for payment each month, but she was not entitled to any additional benefits or compensation.

F. Section 5 of the PSA allows either party to terminate the agreement, with or without cause, by giving the other party 30 days written notice.

G. Section 6 of the PSA specifies that respondent Pope is deemed to be an independent contractor and that the agreement is not intended to create an employer-employee relationship between the parties.

H. Section 7 of the PSA prohibits respondent Pope from assigning her interests in the contract without the City’s express written consent.

10. A. At the hearing, respondent Pope testified regarding her duties and responsibilities as the Recording Clerk for the City. Her credible and uncontroverted testimony established the following:

B. As the Recording Clerk, respondent Pope attended the City Council meetings on the second and fourth Mondays of the month and the City Planning Commission meetings on the first and third Mondays of the month. Both the City Council and the Planning Commission meetings were conducted at City Hall. They began at 6:30 p.m. and lasted approximately three to four hours, although some meetings lasted five hours or more. During the time period that she served as the Recording Secretary for the City, respondent Pope also provided minute preparation services to other entities (described in detail below). However, she always attended the City’s meeting as a first priority in the event of a conflict. There was no evidence that respondent Pope had missed any City Council or City Planning Commission meetings during her tenure as the Recording Secretary, except for a period during which she was excused from her work for a maternity leave.
C. The Deputy City Clerk, Virginia Bloom (Bloom) supervised all of respondent Pope's work. Before each meeting, Bloom mailed to her speaker slips\(^3\) and a floppy disk containing the meeting agenda and the speaker list. Bloom also provided her with a City-issued laptop for her use during the meetings. In preparation for the meetings, Bloom told respondent Pope when to arrive at a meeting, how long a meeting may last, whether an agenda item may be controversial, how many people may attend the meeting, who the speakers might be, and which speakers respondent Pope should introduce to the mayor.

D. At the City Council meetings, Bloom was routinely absent, but she gave respondent Pope directions on “where to sit, how to do the job, [and] what to do with the public inquiries.” (Exhibit 29, p. 67, lines 12-14.) She was expected to follow the rules under the Ralph M. Brown Act\(^4\) (Brown Act) and the City Council’s rules of decorum. Respondent Pope helped to set up the public documents, the agenda packets, speaker slips, and pens for the public to fill out the speaker slips. She worked with the City Council members on the order of the agenda and how the meeting was to be conducted. She assisted the public by informing them of the meeting process, talking to them about previous City Council actions and upcoming actions, and responding to other types of inquiries. In addition to taking notes of the meeting on her laptop that was issued by the City, respondent Pope kept time for the speakers, allowing each to speak for three minutes. If the mayor missed a speaker, or if a speaker submitted his or her slip late, respondent Pope called on him or her to step up to the podium. If the City Council or a member of the public needed copies of a document, she made copies using the City’s copy machines. Occasionally, respondent Pope performed ceremonial functions such as presenting corsages to members of the City Council. She also at times assisted the telecommunications specialist with video equipment. Once the meeting concluded, respondent Pope ensured that the room was cleared and picked up any extra papers.

E. After the City Council meetings, respondent Pope wrote the minutes at her home. Based on a template provided by Bloom, she prepared the minutes not as a verbatim transcript of the proceedings, but in a summary style. Bloom required respondent Pope to submit the drafts within one week of the meeting so that the City may review them in a two-step editing process. First, every draft was sent to Bloom for review. Although Bloom did not make revisions to every draft, approximately once a month, she called respondent Pope and instructed her to make both grammatical and content-based revisions. Content-based revisions to the minutes include requests to change how certain items are worded, to add more details to certain sections, and to clarify comments made by certain speakers. After respondent Pope made these changes, the draft minutes were submitted to the City Manager

\(^3\) Members of the public who wish to speak on a docketed item at a City Council meeting must fill out a speaker slip.

\(^4\) The Ralph M. Brown Act, contained in section 54950 et seq. of the Government Code, governs open meetings for local government bodies. It guarantees the public’s right to attend and participate in meetings of local legislative bodies.
and City Council for further comment. Based on this second review, respondent Pope was directed to make additional content-based revisions to expand the summary or to clarify certain comments. According to respondent Pope, the purpose of the minutes was “[t]o ensure that they accurately reflect what happened at the meeting or are stated in a way that is satisfactorily to the political environment.” (Exhibit 29, p. 80, lines 11-13.) After the minutes have undergone this editing and review process, they are placed on the consent agenda at the following month’s City Council meeting for approval.

F. Respondent Pope performed similar work for the City Planning Commission. The minutes she prepared for these meetings also followed the same editing process as those for the City Council meetings. She submitted the draft minutes to the Planning Commission Secretary rather than to Bloom, but the minutes were subject to further review and revisions by the Planning Director and the City Planning Commission. Based on instructions from the City, respondent Pope also made grammatical and substantive revisions to the City Planning Commission minutes.

G. Respondent Pope submitted monthly invoices to Bloom and was paid on an hourly basis for her services.

H. During cross-examination, respondent Pope admitted that while a portion of the work that she performed as the Recording Secretary were the same as those of a Deputy City Clerk, she did not perform all of functions of a Deputy City Clerk. For example, she was not the official custodian of the city seal, and she did not maintain and update the City’s Book of Ordinances, respond to Public Records Act requests, accept subpoenas on behalf of the City, or attest to the Mayor’s signature upon the signing of a new ordinance.

CalPERS’s 1999 Determination of the Respondent Parties’ Relationship

11. As discussed above in Factual Finding 4B, on October 13, 1997, respondent Pope entered into full-time employment with Moorpark, through which she maintained her CalPERS membership. Thus, at the time that respondent Pope began her part-time employment with the City as a Recording Secretary, she was employed by both Moorpark and the City.

12. In letters dated October 6, 1998 and December 18, 1998, Bloom forwarded a copy of the PSA to CalPERS for an opinion as to a “conflict of interest,” presumably meaning respondent Pope’s dual employment status with both Moorpark and the City. (Exhibits 5 and 6.)

13. By a letter dated January 2, 1999, CalPERS informed the City that respondent Pope should be considered as an employee. The letter provided, in pertinent part:

   The Professional Services Agreement between [the City] and [respondent Pope] has been reviewed. There are factors present in that Agreement which indicate that [respondent Pope] is an
employee rather than in Independent Contractor with the City. However, since [respondent Pope] is currently a full time employee with another CalPERS covered agency, she cannot, at the same time, receive service credit with [the City]. If, in the future, [respondent Pope] should separate from her employment with the City of Moorpark, or should she began working at less than a full time rate, then [the City] would be responsible for reporting earnings and contributions for [respondent Pope].

(Exhibit 7.)

14. In a memorandum dated January 7, 1999, Bloom forwarded this CalPERS letter to Harry Peacock, the City Manager. She wrote in this memorandum, “Please advise if you wish me to forward the same to our personnel department for the necessary PERS forms, or if you wish to further discuss having [respondent Pope] as our Recording Secretary.” (Exhibit 8.) On the same memorandum is a handwritten note written by an author not established by the record. It stated, “Please forward to City Attorney[,] Finance Director Nancy Steiner.” (Ibid.)

Respondent Pope’s Other Employment From June 5, 1999, to May 3, 2001

15. On June 4, 1999, respondent Pope left her employment with Moorpark, but she maintained her employment with the City as a Recording Secretary. Although respondent Pope notified the City that she had stopped working for Moorpark, the City did not enroll her in CalPERS membership.

16. On May 4, 2001, the City hired respondent Pope full-time as a City Clerk.

17. In June 1999, respondent Pope established her own business, Minute by Minute Transcription, which provided minute preparation services for other municipalities and corporations. The dates of her employment and the entities for which she worked are listed below:

- October 1998 to June 2001, City of Monterey Park (Monterey Park);
- October 1998 to June 2001, Harbor Area High Gain, Inc. (Harbor Area);
- June 1999 to June 2001, Moorpark;
- August 1999 to June 2001, City of Oxnard (Oxnard);
- May 2000 to June 2001, City of Carpentaria (Carpentaria);
- March 2001 to June 2001, City of Ventura (Ventura).
18. For Monterey Park, Moorpark, Carpentaria, and Harbor Area, respondent Pope did not attend any meetings. She prepared the minutes for these entities based on notes and audio recordings that were provided to her.

19. A. Respondent Pope's contracts with Moorpark, dated June 25, 1999, September 15, 2000, and April 16, 2001, describe the scope of her work as follows:

[Respondent Pope] to prepare completed draft of City Council meeting minutes within seven weekdays after receipt of video tapes and agenda packet of the meeting, if not sooner.

[Respondent Pope] will provide a typed draft of the meeting minutes to the City Clerk via e-mail for the City Clerk to review and revise. Upon receipt of requested corrections from the City Clerk, [respondent Pope] will revise the minutes and submit a final draft to the City Clerk via e-mail within 72 hours of receipt of the requested corrections, if not sooner.

(Exhibits C, D, and H, p. 6.)

B. Additionally, respondent Pope's contracts with Moorpark indicate that "[n]either City nor any of its officers, employees, servants or agents shall have control over the conduct of [respondent Pope], except as herein set forth." (Id. at p. 2.) The contracts require, among other things, for respondent Pope to carry workers' compensation insurance and not to assign her rights under the agreement. However, nothing in the contract directs her on how to perform her work.

20. A. For Oxnard and Ventura, respondent Pope attended meetings, but she performed, "court-reporter type work and didn't participate in the meetings." (Exhibit 29, p. 50, lines 13-15.) Although her contract with Oxnard was not submitted, respondent Pope's contract with Ventura, dated February 1, 2001, describes the scope of her work as follows:

1. Preparing minutes of the Planning Commission meetings in a form agreed upon by Consultant and City staff, utilizing video and /or audio tapes and meetings notes provided by the City.

2. Correcting or changing draft minutes at the request of Planning Commission and City staff.

(Exhibit G., p. 6.)

5 Respondent Pope's contracts with Oxnard, Monterey Park, Carpentaria, and Harbor Area., were not submitted.
B. Furthermore, respondent Pope’s contract with Ventura specifies that “[t]he City and [respondent Pope] agree that [respondent Pope] shall act as an independent contractor and shall have control of all work and the manner in which it is performed.” (Id. at p. 1.)

C. In a 2001 resume, respondent Pope described her work for Ventura and Oxnard as “attend planning Commission bi-monthly meetings, collect and organize speaker slips. . . . prepare and certify action minutes and minutes for each meeting and such other duties as requested by the City.” (Exhibit A2, p.1.) However, given respondent Pope’s credible testimony regarding the nature of her work for these two cities and the contract with Ventura which corroborates that testimony, the descriptions contained in the 2001 resume are given less weight.

21. Respondent Pope testified credibly that the drafts she submitted to these other entities did not undergo the same vigorous editing and review process at the City. At most, she received occasional requests from these entities to correct typographical errors. She did not receive any content-based directions to change her work product from Monterey Park, Moorpark, Oxnard, Ventura, and Carpentaria, and Harbor Area.

CalPERS’s 2012 and 2015 Determinations of the Parties’ Relationship


23. In a letter dated February 13, 2012, CalPERS notified the City’s Assistant City Manager, Reva Feldman (Feldman), of its determination that respondent Pope is an employee of the City and should have been brought into CalPERS membership as of June 5, 1999.

24. The City disagreed with this determination and requested another review. In a letter dated May 10, 2013, CalPERS requested additional information from both respondent Pope and the City in order conduct another review of the parties’ relationship during the period in question.

25. In response to the CalPERS’s request for additional information, both the City and respondent Pope completed a CalPERS form, the Employment Relationship Questionnaire (Questionnaire).

26. A. Of note were the following answers from Feldman to the questions on the Employer portion of the Questionnaire, completed on May 28, 2013.

B. In response to Question 1, which required the City to indicate who had appointed respondent Pope to her position, Feldman identified the City Manager. (Exhibit 11, p. 1.)
C. In response to Question 5, which asked if other individuals performed the same or similar services for the agency, Feldman wrote, “Yes, the Deputy City Clerk and Department Secretaries performed similar services.” (Ibid.)

D. In response to Question 10, which asked whether the worker operated under his/her own name or under the agency’s name, Feldman wrote, “Under her own name.” (Id. at p. 2.)

E. In response to Question 22, which asked if the individual’s work was directed, supervised, reviewed by anyone, Feldman stated that no one directed or supervised respondent’s Pope’s work, but the “[m]inutes were submitted to City Council for approval.” (Ibid.)

F. In response to Question 23, which asked the agency to check all facilities or equipment furnished by the agency which the individual used to perform the services, Feldman checked “None.” (Ibid.)

G. In response to Question 31, which asked if the individual was an employee in the agency’s opinion, Feldman wrote, “No. [Respondent Pope] was hired as an independent contractor to perform Recording Secretary duties only. She was paid pursuant to a written agreement for her services. The city did not and does not have a Recording Secretary position as an authorized employee position. The Recording Secretary was an independent contract position.” (Id. at p. 4.)

27. A. Of note were the following answers from respondent Pope to the questions on the Employee portion of the Questionnaire, completed on June 3, 2013:

B. In response to Question 8, which asked whether the worker operated under his/her own name or under the agency’s name, respondent Pope wrote, “Agency’s.” (Exhibit 13, at p. 2.)

C. In response to Question 21, which asked whether the agency had control over the manner and means of the individual’s work or he/she was responsible only for the end product, respondent Pope wrote, “Yes. Agency controlled manner and means.” (Id. at p. 3.)

D. In response to Question 22, which asked if her work was directed, supervised, reviewed by anyone, respondent Pope stated that Bloom, the City’s Deputy City Clerk and Harry Peacock, the City Clerk,6 directed, supervised, and reviewed her work. (Ibid.)

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6 Although respondent Pope identified Harry Peacock as the City Clerk, Bloom’s January 7, 1999 memorandum established that he was the City Manager. (Exhibit 8.)
E. In response to Question 24, which asked respondent Pope to check all facilities or equipment furnished by the agency which she used to perform her services, respondent Pope checked “Office Supplies,” “Letterhead,” and “Machinery.” *(Ibid.)*

F. In response to Question 31, which asked if, in her opinion, she was an employee, respondent Pope wrote, in part, “CalPERS has determined twice, on January 2, 1999 and again on February 13, 2012, that [the City] was responsible for contributing to CalPERS on my behalf for the period of June 4, 199[sic] through May 4, 2001. I respectfully request that [the City] fulfill its obligation.” *(Exhibit 14, p. 4.)*

28. In a letter dated August 18, 2015, CalPERS upheld its prior decisions and advised the City that respondent Pope should have been enrolled in CalPERS membership because she was an employee of the City from June 5, 1999, to May 3, 2001.

*Testimony of Andrew Harris*

29. At the hearing, Andrew Harris (Harris), CalPERS’s Retirement Program Specialist, testified regarding CalPERS’s position on this case. Harris stated that CalPERS used the common law employment test (discussed in detail below) to determine whether respondent Pope was an employee or an independent contractor. The primary factor in the common law employment test is the extent to which an employer exercised control over the manner and means of how an individual accomplished his or her work. CalPERS determined that the City exerted control over the manner and means of respondent Pope’s work based on the following facts of her employment: she was appointed by the City Manager; she fulfilled detailed duties as requested by the City Clerk; she was required to submit written minutes of the City Council meetings; her work was submitted to the City Council for approval; she operated under the City’s name; she provided services at City Hall, in the Council Chambers, and at home; she was required to attend meetings; the City Clerk determined the work for respondent Pope; and she was required to follow specific procedures.

30. According to Harris, CalPERS also considered the PSA in determining that the relationship between the City and respondent Pope was that of an employer and employee. Specifically, the language of Sections 1 and 2 of the PSA, requiring respondent Pope to perform other duties as directed by the City Clerk as well as requiring the City to provide adequate directions to her, granted the City the authority to control the manner and means of respondent’s Pope’s work. Furthermore, the fact that the PSA did not allow respondent Pope to assign her work to someone else and that the City could terminate her without cause with a 30-day notice also demonstrated the employer’s control over the worker. Although the PSA explicitly stated that respondent Pope was an independent contractor, this characterization of the working relationship between the parties was not necessarily dispositive of CalPERS’s determination. Harris opined during the hearing that respondent Pope should have been classified as an employee. His testimony was reasonably supported, as described above, and was persuasive.

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Testimony of Feldman

31. Feldman, City Manager for the City since 2016, testified at the hearing regarding the City’s position. Prior to becoming the City Manager, she served as the Assistant City Manager from 2011 to 2016.

32. Feldman described the duties of the City Clerk, which included administering city elections, overseeing City Council meetings, preparing accurate minutes, receiving subpoenas on behalf of the city, and ensuring compliance with the Public Records Act, the Brown Act, and any other relevant laws and regulations. The Deputy City Clerk performs similar functions and fulfills these duties in the absence of the City Clerk. Feldman emphasized that the City currently does not have a Recording Secretary position.

33. Feldman opined that respondent Pope was not an employee under the PSA because the agreement did not provide any additional benefits to her beyond her hourly wages and it specifically designated her as an independent contractor. Further, she opined that respondent Pope is not an employee under the Personnel Rules set forth by the City. All part-time and full-time employees of the City are paid through its payroll system. However, respondent Pope was paid through the accounts payable system, which pays outside vendors.

34. During cross-examination, Feldman acknowledged that the City is required to hold both City Council and Planning Commission meetings and that minutes must be taken during these meetings. Additionally, Feldman admitted that she did not work for the City during the period in question, and did not have knowledge of respondent Pope’s job duties at that time. Consequently, she completed the Employer’s Portion of the Questionnaire based on her interpretation of the PSA. Given this lack of personal knowledge, Feldman’s responses on the Employer’s Portion of the Questionnaire are given little weight.

35. No evidence of financial hardship was presented by the City.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) In this matter, neither party disputes that the standard of proof is the preponderance of the evidence.

2. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (Coffin v. Department of Alcoholic Beverage Control (2006) 139 Cal.App.4th 471, 476.) “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Evid. Code, §
Based on this law, CalPERS contends that the City bears the burden of establishing that respondent Pope was an independent contractor of the City. 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) (Southwest Research Institute) 81 Cal.App.4th 705, 708.) Neither the City nor respondent Pope asserted a position as to which party bears of the burden of proof.

3. Thus, based on the above, the City has the burden of establishing by a preponderance of the evidence that respondent Pope’s relationship to the City was that of independent contractor, rather than an employee. As set forth in Factual Findings 1 through 35, and Legal Conclusions 1 through 16, that burden has not been met.

CalPERS Membership Eligibility Under the PERL

4. CalPERS is governed by the PERL. Pursuant to section 20125, the Board determines who are employees under the PERL, and “is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.” (§ 20125.) Section 20028, subdivision (b), defines an “employee” to mean “[a]ny person in the employ of any contracting agency.” Section 20300 provides a list of persons who are excluded from CalPERS membership, including “[i]ndependent contractors who are not employees.” (§ 20300, subd. (b).)

5. Thus, under the PERL, only employees of contracting agencies are eligible for CalPERS membership. Here, the City is a contracting agency of CalPERS, and in order for respondent Pope to qualify as a CalPERS member, she must be determined to be an employee rather than an independent contractor of the City.

The Common Law Employment Test

6. The California Supreme Court held in Metropolitan Water Dist. of Southern California v. Superior Court (2004) 32 Cal.4th 491, 509, that CalPERS must apply the common law test for employment when determining whether individuals are employees of a public agency.

7. In Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal.3d 943, the California Supreme Court applied the common law employment test to find that a group of freelance writers were employees because the employer retained the right to exercise, and, in fact, did exercise, control and direction over writers’ services. The Court explained the common law test for employment as follows:

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. 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. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations.] Other factors to be taken into consideration are (a) whether or not the 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 a 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 part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. [Citation.]

(Id. at p. 949.)

The Primary Test of Employment

8. Applying the primary test of employment described in Tieberg, the City in this case retained and exercised control over the manner and means of how respondent Pope performed her work. Thus, an employer-employee relationship existed.

9. A. To begin with, the City retained the right to control the manner and means of respondent’s work through the PSA. Section 1 of the PSA listed several duties which respondent Pope was required to perform, such as collecting and organizing speaker slips, collecting evidence submitted to the City Council, and taking roll and rollcall votes. However, respondent Pope’s job duties were not limited to these enumerated tasks. The PSA also required respondent Pope to perform “such other duties as requested by the City Clerk.” (Factual Finding 9B.) The broad scope of respondent Pope’s work, which could encompass any task the City deemed to be appropriate, demonstrates the City’s control in defining the nature of job.

B. Furthermore, pursuant to Section 2 of the PSA, the City was to provide “adequate direction” to respondent Pope for her to render her services. (Factual Finding 9C.) The lack of ambiguity in this language demonstrates that the City had the right to control and direct respondent Pope’s services.

C. When the PSA is compared to the contracts that respondent Pope entered into with Moorpark and Ventura, it becomes even more evident that the City reserved the right to direct respondent Pope to perform additional duties as it saw fit and how to perform those duties. (Factual Findings 19 and 20.) Unlike the PSA, respondent Pope’s contracts with Moorpark and Ventura limited the scope of her work to a discrete set of tasks. No allowances were made for the agencies to request respondent Pope to perform any undefined
duties as determined by the City Clerk. Furthermore, the contracts with Moorpark and Ventura limited the agencies' ability to control respondent Pope's work to revising the draft minutes she submitted. The contracts also specified that the agencies had no control over the manner in which respondent Pope rendered her services. Thus, Moorpark and Ventura, unlike the City, only had the right to control the result of respondent Pope's work but not the means by which it is accomplished.

10. A. The evidence shows that the City, in fact, exercised considerable, if not complete, control over the manner and means by which respondent Pope performed her work. (Factual Findings 10 and 27.) Before the City Council meetings, Bloom provided her with supplies and equipment, including speaker slips, agenda packets, and a laptop. She also gave directions to respondent Pope on how to conduct herself, including which controversial items that may require her attention and which speakers should be introduced to the Mayor. Respondent Pope attended the City Council Meetings at City Hall and used the City's equipment. At the meetings, she performed the work of a Deputy City Clerk. She worked under the City's direction by assisting the Mayor with speakers, working with members of the City Council on how the meeting was to be conducted, and responding to public inquiries, presumably as a representative of the City rather than of her own business. After the meetings, respondent Pope submitted her draft minutes first to Bloom, and then to the City Manager and the City Council for review. During this review process, she made substantive revisions to her draft minutes, changing how certain sections are worded and expanding other sections, as instructed by the City. Thus, much like the freelance writers in Tieberg, although respondent Pope prepared the minutes on her own schedule and at the location of her choosing, the City nevertheless exercised considerable control and direction over the manner and means of her services through the process of revision and approval of drafts. (Tieberg, supra, 2 Cal.3d at p. 952-953.)

B. The City cited to Southwest Research Institute, in its contention that the revision and review process is not evidence of control and direction. It argued that, as a public agency, the City Council's minutes are required to be approved by the City Council under the Brown Act and that compliance with governmental regulations does not constitute employer control. In Southwest Research Institute, the Court of Appeal held that an independent contractor relationship existed where an employer gave the worker instructions, required under governmental regulations, on how to collect gasoline samples from retail stations. (Southwest Research Institute, supra, 81 Cal.App.4th at p. 708.) The Court found that when the method of performing a task is dictated by regulations imposed by the government, the principal is not exercising the manner and means of control as an employer. (Id. at p. 709.)

C. Alternatively, the City contended that the City's requests to revise the draft minutes is not an exertion of control, but an attempt at quality control, citing to Missions Ins. Co. v. Workers' Comp. Appeals Bd. (1981) 123 Cal.App.3d 211. In Mission Insurance Company, a worker who installed and serviced security alarms on behalf of his employer was found not to be an employee. The worker was subject to occasional inspections when a customer made a specific complaint but otherwise had complete discretion and control over
his work within the standards prescribed by the employer. (Id. at p. 223.) The Court of Appeal stated, “On the contrary, an employer who controls the manner in which work is done has little need of establishing quality standards for completed work; such standards are indicative that [the employer’s] primary interest was quality of the result rather than the manner in which the work was done and constitutes evidence that the applicant was an independent contractor.” (Id. at p. 224.)

D. However, neither Southwest Research Institute nor Mission Insurance Company is applicable in this case. Here, while it is true that the City is required to approve the minutes in accordance with the Brown Act, the instructions Bloom, the City Manager, and the City Council gave to respondent Pope to revise the minutes reflected concerns beyond compliance with the Brown Act. Indeed, respondent Pope’s undisputed testimony is that the City gave her content-based directions to change how certain sections of the minutes are worded. The intent of these changes was not merely to ensure that the minutes accurately documented the proceedings of the meeting, but that they were stated in a manner that is “satisfactorily to the political environment,” which can be reasonably inferred to mean in a manner that is satisfactory to the City. (Factual Finding 10E.)

E. Given the foregoing, the City’s contention that revisions are meant to establish quality standards is also unpersuasive. In contrast with the City, the other entities for which respondent Pope provided minute preparation services requested only typographical corrections, but not content-based modifications. While requests to revise grammatical and typographical errors may suggest the need to establish quality standards, requests to make substantive, content-based revisions, as in Tieberg, indicate control over the manner of work. (Tieberg, supra, 2 Cal.3d at p. 948.) Additionally, unlike the facts of Mission Insurance Company, where the worker was subject to occasional inspections, all of respondent Pope’s draft minutes were reviewed by the City.

F. The City further asserted that respondent Pope’s simultaneous and overlapping commitments with other entities was evidence of the City’s lack of control over the manner and means of respondent Pope’s services. However, while other employment may suggest the existence of an independent contractor relationship, it is merely one of the evidentiary indicia of control and is not by itself determinative. (Id. at p. 949). The nature of respondent Pope’s other employment is readily distinguishable from that of her employment with the City, in that the City exerted actual control over the manner and means of the services she provided, before, during, and after the City Council and City Planning Commission meetings, as discussed above.

The Secondary Factors of the Employment Test

11. The secondary factors outlined in Tieberg are also consistent with CalPERS’s determination that respondent Pope was an employee and not an independent contractor during the period of June 5, 1999, to May 3, 2001. Respondent’s work was on-going, performed without limitation as to time or job assignment (factor (e)). The method of
payment was measured by the hour (factor (f)). The work performed by respondent Pope was part of the City’s regular business (factor (g)).

12. Some of the factors are deemed as neutral. No evidence was presented regarding whether, in the locality, respondent Pope’s work was usually done under the direction of the principal without supervision (factor (b)). Although respondent Pope used the City’s place of work and equipment during the meetings, she worked at home using her own instrument to prepare the minutes (factor (d)). As the Court in Tieberg stated, “the factor of ownership of tools is of little importance where the service to be performed is an intellectual endeavor.” (Id. at p. 954.) In their briefs, the parties presented arguments regarding at-will termination, which is also deemed as neutral, as both respondent Pope and the City had the same rights under the PSA.

13. Other factors, if considered in isolation, would point to independent contractor status. Specifically, factors (a) (distinct occupation) and (c) (skill). In particular, factor (h) (whether or not the parties believed they were creating an employer-employee relationship) does not weigh in respondent Pope’s favor because of the language of the PSA and her failure to raise any contemporaneous objections to the status created by the agreement. Nevertheless, the language of the PSA, though significant, is not dispositive. (Tieberg, supra, 2 Cal.3d at p. 952; In the Matter of the Application for CalPERS Membership Credit by Lee Neidengard, Board Precedential Decision 05-01 at p. 11.) Additionally, “the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.” (S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 351.) The factors taken as a whole are consistent with the conclusion that respondent Pope was an employee during the time period in question.

Arrears and Administrative Costs Payable to CalPERS

14. Given the foregoing conclusion, the City should have enrolled respondent Pope in CalPERS membership immediately beginning June 5, 1999. (§§ 20281 & 20305, subd. (a)(1).)

15. Section 20283, subdivision (a), provides:

Any employer that fails to enroll an employee into membership when he or she becomes eligible, or within 90 days thereof, when the employer knows or can reasonably be expected to have known of that eligibility shall be required to pay all arrears costs for member contributions and administrative costs of five hundred dollars ($500) per member as a reimbursement to this system’s current year budget.

16. In its January 2, 1999 letter, CalPERS advised the City that respondent Pope was an employee and that if she should separate from her employment with Moorpark, the City must enroll her in CalPERS membership. The City was aware of this determination, as
evidenced by Bloom's January 7, 1999 memorandum to the City Manager. After respondent Pope left her employment with Moorpark on June 4, 1999, she notified the City of this change in her employment status. Thus, the City knew or should have known that respondent Pope was eligible for CalPERS membership at that time. Notwithstanding this knowledge, the City failed to enroll her in CalPERS membership. Furthermore, the City did not present any evidence of financial hardship. Under these circumstances, the City must pay its employer contributions, all arrears costs for respondent Pope's contributions, and the administrative costs of $500 to CalPERS as a reimbursement to its current year budget.

ORDER

1. The City of Malibu's appeal is denied. CalPERS's determination that respondent Lisa M. Pope was an employee of the City for the period of June 5, 1999, to May 3, 2001, is upheld.


4. The City shall pay to CalPERS the administrative cost of $500 as a reimbursement to CalPERS's current year budget.

DATED: August 11, 2017

Ji-Lan Zang
Administrative Law Judge
Office of Administrative Hearings