ATTACHMENT B

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

Respondent City of Malibu (Respondent City) and the City of Moorpark are contracting agencies with CalPERS.

Respondent Lisa M. Pope (Respondent) established membership with CalPERS through employment, as a Deputy City Clerk, with Respondent City on July 12, 1995. On October 8, 1997, Respondent separated from employment with Respondent City; however she retained her membership with CalPERS. On October 13, 1997, Respondent Pope entered into full-time employment with the City of Moorpark, as a Deputy City Clerk. The City of Moorpark enrolled Respondent into CalPERS membership.

On May 1, 1998, Respondent entered into part-time employment with Respondent City, as a Recording Secretary, via a Professional Services Agreement (PSA). Pursuant to the PSA, Respondent was responsible for performing the duties of a Recording Secretary. These duties included “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 roll-call votes, preparing and certifying action minutes and minutes for each meeting and such other duties as requested by the City Clerk.” Respondent was paid by the hour and could not assign or transfer her work without the express written consent of Respondent City. Pursuant to the PSA, Respondent City was to provide direction to Respondent on how to perform her work duties. Respondent was classified as an independent contractor by the City, and she was not offered membership of CalPERS through this employment.

By letter dated October 6, 1998, Respondent City requested CalPERS review the PSA and provide a determination as to whether Respondent is considered an employee. CalPERS staff reviewed the PSA and the working relationship between Respondent and Respondent City, and determined that Respondent was an employee of Respondent City rather than an independent contractor. Since Respondent was a full-time employee of the City of Moorpark, another CalPERS covered agency, she could not receive service credit with Respondent City at the same time.

By letter dated January 2, 1999, CalPERS informed Respondent City of its determination and advised Respondent City if Respondent should separate from her employment with the City of Moorpark or should she work at less than a full-time rate with the City of Moorpark, then Respondent City would be responsible for reporting earnings and contributions for Respondent.

On October 12, 2011, CalPERS received an inquiry from Respondent asking for clarification relating to her employment with Respondent City after she separated from the City of Moorpark (1999-2001).
CalPERS' staff re-reviewed the working relationship between Respondent and Respondent City and determined that Respondent was an employee of Respondent City for the period of June 4, 1999, to May 4, 2001. As an employee, Respondent should have been brought into membership in CalPERS when she separated from her employment with the City of Moorpark. CalPERS also determined that Respondent City was liable for payment of contributions and costs pursuant to Government Code section 20283.

Government Code section 20283, subdivision (a) provides that "[a]ny 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."

Respondent City appealed CalPERS' determination and exercised its right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on May 16, 2017. Respondent represented herself at hearing and the Respondent City was represented by counsel.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

Under Government Code section 20069, subdivision (a), "[s]tate service" means "service rendered as an employee or officer" of a contracting agency. An employee is "[a]ny person in the employ of any contracting agency." (§ 20028, subd. (b).) The California Supreme Court has held that the PERL's provisions concerning employment by a contracting agency incorporate the common law test for employment. (Metropolitan Water Dist. of Southern California v. Superior Court (2004) 32 Cal.4th 491, 500.) The common law employment test applies to this case.

The common law employment test was articulated by the California Supreme Court in Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal.3d 943, 949. Under that test, "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." (Ibid.) If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established. (Id. at p. 946-947.)

Tieberg noted the following other factors may be taken into account:
(a) whether or not 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 the 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 a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee (Id. at p. 949.)

The Tieberg court noted one of the most important of those secondary factors is "whether the parties believe they are creating the relationship of employer-employee," especially as specified in a written agreement. (Id. at p. 949.)

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) 81 Cal.App.4th 705, 708.)

Respondent testified on her own behalf that Respondent City provided all the work supplies, including the laptop. Respondent testified that the City Clerk supervised all of her work. The City Clerk instructed Respondent on how to perform her job duties, briefed Respondent on upcoming issues at meetings, instructed Respondent on where to sit during meetings, instructed Respondent on how to draft the minutes, reviewed and revised the draft minutes submitted by Respondent.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent City's appeal. The ALJ found that under the Tieberg test, Respondent City "retained the right to control over the manner and means of respondent's work through the PSA." Respondent was required to perform "such other duties as required by the City Clerk." Pursuant to the PSA, "the City was to provide 'adequate direct' to Respondent for her to render services." The ALJ further held that Respondent City in fact did exercise control over the work performed by Respondent by revising the work she submitted to Respondent City. Therefore, The ALJ felt that Respondent was a (ex) employee from 1999-2001.

The ALJ concludes that Respondent City must pay CalPERS all arrears costs for employer and member contributions from the period of June 5, 1999, to May 3, 2001, and pay CalPERS the administrative cost of $500 as reimbursement to CalPERS' current year budget pursuant to Government Code section 20283.
For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

September 20, 2017

PREET KAUR
Senior Staff Attorney