ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)
September 6, 2017

Via facsimile and U.S. Mail
Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, California 94229-2701

Reference: In the Matter of the Appeal Regarding CalPERS Membership of LISA M. POPE, Respondent, and CITY OF MALIBU, Respondent

Dear Ms. Swedensky:

Enclosed please find City of Malibu's Argument Against the Board's Adoption of the Proposed Decision.

Very truly yours,

Natalie C. Karpeles
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding CalPERS Membership of
LISA M. POPE,
Respondent,

and

THE CITY OF MALIBU,
Respondents.

ARGUMENT AGAINST PROPOSED DECISION

Respondent City of Malibu respectfully submits the following as its Argument against the Proposed Decision in the above-captioned matter.
Malibu was among several cities that contracted with Lisa Pope and her business Minute-by-Minute Transcriptions, but the Proposed Decision singles Malibu out, contrary to the explicit understanding between Malibu and Ms. Pope. The City of Malibu respectfully requests that the Board reject the Proposed Decision, which is wrong for the reasons detailed below.

From October 1997 to May 3, 2001, Ms. Pope was a highly-skilled, sought after provider of minute-taking services. She provided these services either under her own name or through her own business, Minute-by-Minute Transcriptions. From June 5, 1999 to May 3, 2001 (the “Disputed Period”), Ms. Pope was free to (and did) enter into multiple overlapping agreements to perform the same or similar services with at least five cities (Carpentaria, Moorpark, Monterey Park, Ventura and Oxnard) and various other municipal clients, all concurrently. Malibu was one of Ms. Pope’s clients during the Disputed Period.

When Ms. Pope entered into the May 1, 1998 Professional Service Agreement (“PSA”) with Malibu to perform recording secretary services, she had voluntarily left employment with the City of Malibu for over six months; was gainfully employed by the City of Moorpark at the time; and had no intention of being rehired by Malibu. The PSA between Malibu and Ms. Pope intentionally created an independent contractor relationship; the language of which is uncontested and clear.¹ Moreover, the actual arrangement between Ms. Pope and Malibu further demonstrates that the parties had intentionally and voluntarily entered into an independent contractor relationship.² After all, Ms. Pope was moonlighting, being a fulltime employee of the City of Moorpark at the time.

The Proposed Decision erroneously finds that the City retained the right to control the manner and means of Ms. Pope’s services; incorrectly distinguishes the Malibu PSA from Ms.

¹ See Robinson v. City of San Bernardino Police Department (1998) 992 F.Supp. 1198, 1206-7 (court held where “the parties enter into a written agreement which sets forth the details of their relationship and which expressly states the legal nature of the relationship they intend to create, the agreement is a significant factor to consider”); see also Mission Ins. Co. v. Workers’ Comp. App. Bd. (1981) 123 Cal.App.3d 211, 226 (holding that “a lawful agreement between the parties expressly stating that the relationship created is that of independent contractor should not be lightly disregarded when both parties have performed under the contract and relied on its provisions”).

² See S.G.Borello & Sons, Inc. v. Dept. of Industrial Relations (1989) 48 Cal.3d 341, 349 (court found where method of compensation was “results-based,” work was of a temporary nature, and the intent of the written contract was clear the actual arrangement between the parties demonstrated an independent contractor relationship).
Pope’s other municipal contractual arrangements; and mistakenly concludes that the City exercised complete control over Ms. Pope.

1. **The Proposed Decision incorrectly concludes that Malibu retained the right to control the manner and means of Ms. Pope’s services under the PSA.**

The Proposed Decision focuses on the language of Sections 1 and 2 of the PSA to conclude that Malibu exercised “control in defining the nature of [Ms. Pope’s] job” and directed her services. 

Proposed Decision (“PD”), p. 14, ¶¶ 9A-9B.

Section 1 of the PSA specifically enumerates those duties and services that Ms. Pope agreed to perform. CalPERS Ex. 22. Contrary to the interpretation of the Proposed Decision, the phrase “and such other duties as requested by the City Clerk” does not translate to mean “any task the City deemed to be appropriate.” PD, p. 14 ¶ 9A (emphasis added). Such an interpretation is neither reasonable nor commonsense. Malibu did not require Ms. Pope to complete “any task” – Ms. Pope was a highly-skilled, sought after recording secretary – she entered into an agreement with Malibu specifically to attend meetings and prepare minutes. CalPERS Ex. 22. Using the basic tenets of contract interpretation, the phrase “and such other duties as requested by the City Clerk” follows the enumerated list of duties and responsibilities expected of a recording secretary, and therefore applies only to those duties of the same general nature as those enumerated. Moreover, there is zero evidence that Malibu ever requested Ms. Pope to perform any assignment other than what would be expected of a recording secretary. The Proposed Decision over-reads the phrase and unfairly assigns a meaning to it that neither party intended or implemented.

Next, the Proposed Decision focuses on Section 2 of the PSA, specifically finding that the mere phrase “adequate direction” demonstrates that Malibu retained control over Ms. Pope’s

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3 See Code of Civil Procedure Sections 1638 (“The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve and absurdity”) and 1641 (“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other”); see also Renee J. v. Superior Court (2001) 26 Cal.4th 735, 744 (holding that the courts must give a reasonable and commonsense interpretation of a contract consistent with the parties’ apparent intent).

4 See City Ex. C: “City has the need for professional services related to the office of the City Clerk, specifically preparation of minutes, training of new staff, and related Deputy City Clerk duties…” (emphasis added); see City Exs. F & H: “City has the need for professional services related to the office of the City Clerk, specifically preparation of minutes, indexing and coding of files, and related Deputy City Clerk duties…” (emphasis added).
services. PD, p. 14 ¶ 9B. The language of Section 2 mutually benefits both parties: in exchange for
Ms. Pope’s services under the PSA, Malibu agrees to provide “administrative assistance” and
“adequate direction to allow” Ms. Pope to perform her contracted-for services. This is a standard
“cooperation clause.” When read in context, this provision provides that Malibu will be responsible
for supporting and assisting Ms. Pope in the performance of her duties under the PSA; it does not
evidence “employer” control.

2. The language of the PSA is generally comparable to the concurrent agreements that Ms.
Pope entered into with her other city clients.

The cities of Moorpark and Malibu both limited the scope of Ms. Pope’s services; where
Malibu sought a “recording secretary,” Moorpark retained Ms. Pope to perform “Deputy City Clerk
duties” (which, for Moorpark, included preparing minutes, training new staff, and indexing/coding
of files). Both Moorpark and Malibu required Ms. Pope to provide minutes in a timely manner –
within one week’s time. (Furthermore, Moorpark required Ms. Pope to submit a final draft of any
revised minutes to the City Clerk within 72 hours “of receipt of the requested corrections.”) Lastly,
her contracts with cities proposed an hourly rate payable as a lump sum to compensate Ms. Pope for
her services; provided for termination “without cause;” and specified that the relationship created
was that of an independent contractor. Ms. Pope’s contracts with the cities of Moorpark, Malibu
and Ventura are similar and reinforce Malibu’s position that Ms. Pope was engaged in her own
distinct occupation and was free to contract with other clients to perform similar services.

3. The services agreed to under the PSA are comparable to the concurrent agreements that
Ms. Pope entered into with her other municipal clients.

For the cities of Malibu, Oxnard and Ventura, Ms. Pope (1) attended the city councils’ and
planning commissions’ bi-monthly meetings; (2) collected and organized speaker slips; (3) received
documents and evidence submitted to the city councils/planning commissions; (4) recorded motions
and votes; and (5) performed “such other duties as requested by the” city/city clerk. City Ex. A-2.
Ms. Pope also prepared and certified action minutes for various city-appointed bodies – these cities

5 See CalPERS Ex. 22, Section 1; see also page 1 of City Exs. C, F & H.
6 See CalPERS Exs. 18 & 22, Section 3; see also page 6 of City Exs. C, F & H.
7 See page 6 of City Exs. C, F & H.
8 See CalPERS Ex. 22, Sections 4, 5 & 7 (respectively); see also p. 6, Section II, and Section IV(B) & (I) of
City Exs. C, F & H; and see Exhibit B and Sections 12 & 5 of City Ex. H.

In essence, the contemporaneous resume that Ms. Pope drafted in or about 2001 evidences that Ms. Pope performed the same services for Malibu that she performed for her other municipal clients during the Disputed Period. City Ex. A-2. This document should be afforded greater weight than Ms. Pope’s self-serving testimony – provided 18 years after-the-fact and influenced by advantage.

4. Malibu did not exercise control over Ms. Pope’s services because of the Brown Act, City Clerk Bloom, the city council/planning commission, or otherwise.

The Proposed Decision makes too much of the services provided by Ms. Pope relative to her attendance at city council meetings. The fact that city council meetings began at a predetermined time; were conducted in council chambers (and in accordance with the Brown Act); and were conducted using city equipment present at city hall does not evidence that Malibu exerted control over Ms. Pope. Tr. 32:11-12; 41:14-22; 51:22-24; 66:15-21; 83:14-15; 93:23-25; 94:1-9. Ms. Pope was the Deputy City Clerk for Malibu for over two years before the Disputed Period – she did not require City Clerk Bloom to tell her what to do at these meetings and where to sit. Tr. 55:18-20.

Furthermore, Ms. Bloom’s suggestions related to controversial items and speaker introductions are not evidence of control. Ms. Pope (as an independent contractor unaware of items controversial to Malibu) would have to be alerted to which items Malibu considered to be “controversial” so that she would be able to provide sufficient detail in order to prepare accurate and useful minutes as she was required to do under the PSA. Moreover, meeting attendance only accounted for less than half of the time that Ms. Pope devoted to Malibu in performance of her services under the PSA. Tr. 92:16-25. Malibu neither instructed nor directed Ms. Pope in the performance of her duties with regard to attending city meetings. It was just like her other city clients.

The changes that were requested by Malibu with regard to the minutes prepared by Ms. Pope did not require “substantive revisions.” PD, p. 15 ¶ 10A. The substance of city council meeting minutes consists of the items on the agenda which were discussed, a summary of the discussion on those items by the public and/or city council, and the action taken by the council relative to each item. At most, Malibu infrequently requested that Ms. Pope provide more detailed information as to
the summary of the discussion related to a particular item (Tr. 38:21-25; 39:1-24); this “additional
detail” had no bearing on the item itself, the course of the discussion, or the action taken by the
Council and therefore is neither “substantive” nor “content-based.” PD, p. 15-16 ¶¶ 10B-F.

Malibu’s requested revisions were seldom and only required as to “controversial” items; Ms. Pope
was free to refuse inaccurate changes and provided the changes in her own words. Tr. 36:15-20;

Minutes are routinely prepared by a minute secretary and accepted as accurate by the body.
That is standard procedure; it is also for this reason that each of Ms. Pope’s multiple municipal
agreements contained provisions affording the public body with the ability to review and revise Ms.
Pope’s work in this regard.9

5. The Secondary Factors Outlined in Tieberg do not establish that Ms. Pope was an
Employee of Malibu during the Disputed Period.

Malibu was involved solely to the effect the results of Ms. Pope’s services and not the means
by which they were accomplished; in other words, analysis of the secondary factors leads to the
conclusion that no employee-relationship existed between Malibu and Ms. Pope.

During the Disputed Period, Ms. Pope was engaged in a distinct occupation – providing
minute-taking services.10 These services require a specialized skill and are not interchangeable with
the services performed by a City Clerk. As Ms. Pope herself has aptly explained, the functions of a
recording secretary are only part of the myriad duties and responsibilities entrusted to the City
Clerk.11 At the time that Ms. Pope entered into the PSA with Malibu, Malibu was seeking someone
who would be able to meet overflow demands on an as-needed basis related to the position of City
Clerk – in fact, each of Ms. Pope’s municipal clients were in need of the same services and retained

9 See Exhibit A of City Ex. G (Ms. Pope responsible for “[c]orrecting or changing draft minutes at the request
of Planning Commission and City staff.”); see also page 6 of City Exs. C, F & H (“Lisa Pope will provide...
meeting minutes to the City Clerk… for the City Clerk to review and revise. Upon receipt of requested
corrections from the City Clerk, Lisa Pope will revise the minutes and submit a final draft to the City Clerk…
within 72 hours of receipt…”)

10 From the time that Ms. Pope left her employment with Malibu in 1997, she “had been assisting cities with
11 See CalPERS Ex. 25 (enumerating responsibilities/duties of City Clerk) compared with Ms. Pope’s
Ms. Pope to perform them. The fact that Ms. Pope performed her contract services for Malibu under the terms of an “evergreen” independent contract does not evidence control; neither does her method of compensation under the PSA. As with her other municipal clients, Ms. Pope’s compensation with Malibu was not automatic – it was determined by a “results-oriented” measurement whereby Ms. Pope would complete the minutes and provide an invoice for the time it took her to complete them – Ms. Pope was paid by the number of hours required to transcribe the minutes at a fixed rate per hour. Tr. 92:16-25; 93:1-4; 151: 6-13.

Malibu appreciates CalPERS’ concern that some public entities enter into sham independent contractor agreements to try and avoid their responsibilities under the Government Code; however, this concern aimed at Malibu is misplaced. It is clear that Ms. Pope provided her contract services without supervision and that she was not furnished with limited work instruments from Malibu. PD, p. 17 ¶ 12. When Ms. Pope entered into the Malibu PSA she had voluntarily left her employment with Malibu for over six months; was employed by Moorpark at the time; and had no intention of being rehired by Malibu. Tr. 28:12-13; 29:22-23; 74:24-25; 75:1. The PSA between Malibu and Ms. Pope intentionally created an independent contractor relationship; a status which Ms. Pope does not dispute. When these factors are intertwined and considered in connection with one another, it is clear that Ms. Pope was an independent contractor for Malibu during the Disputed Period.

Based upon the foregoing, the City of Malibu respectfully requests that the Board reject the Proposed Decision and grant Malibu’s appeal in this matter.

DATED: September 6, 2017

Respectfully submitted,

NATALIE C. KARPELES
JENKINS & HOGIN, LLP
Attorneys for Respondent CITY OF MALIBU

12 City Exs. A-2; C (page 1); F (page 1); G (Exhibit A, thereto); and H (page 1).
PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1230 Rosecrans Avenue, Suite 110, Manhattan Beach, CA 90266.

On September 6, 2017, I served the foregoing documents described as:

RESPONDENT'S ARGUMENT AGAINST THE BOARD'S ADOPTION OF THE PROPOSED DECISION

on the interested party or parties in this action by placing the original thereof enclosed in sealed envelopes with fully prepaid postage thereon and addressed as follows:

SEE ATTACHED SERVICE LIST

☐ VIA EMAIL. I caused such document as described above, to be transmitted via E-Mail to the offices of the addressee(s).

☒ VIA FACSIMILE. I caused such document to be transmitted via facsimile to the offices of the addressee(s).

☐ VIA OVERNIGHT DELIVERY. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address(es) stated above. I placed the envelope or package for collection and overnight delivery at a regularly utilized drop box of the overnight delivery carrier.

☒ VIA U.S.MAIL. I enclosed the above described documents in a sealed envelope or package addressed to the person(s) listed above or on the attached; caused such envelope with postage thereon fully prepared to be placed in the United States mail at Los Angeles, California.

I am readily familiar with the Jenkins & Hogin, LLP's practice of collection and processing correspondence for outgoing mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon prepaid at Manhattan Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ STATE. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 6th day of September, 2017, at Manhattan Beach, California.

[Signature]

WENDY HOFFMAN
## SERVICE LIST

*In the Matter of the Appeal Regarding CalPERS Membership of LISA M. POPE*

*Agency Case No. 2016-0315*

*OAH NO. 2016080637*

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