ATTACHMENT B

STAFF'S ARGUMENT
STAFF’S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Peter J. Wessel (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge’s (ALJ) Proposed Decision dated May 16, 2017, and remand the case for the taking of further evidence. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

CalPERS staff determined that Respondent’s employment with the City of Thousand Oaks was not eligible for membership. The ALJ denied Respondent’s appeal and upheld CalPERS’ determination. Respondent makes three arguments in support of his request to remand the case for the taking of further evidence. The arguments are misleading and meritless.

First, Respondent argues that a key piece of his evidence, a Circular Letter from 1994, was some sort of bait-and-switch because the Circular Letter had been rescinded. The relevant topics of the Circular Letter had been superseded by a 1995 Legal Memorandum authored by Anne Stausboll (Stausboll memo). Respondent claims he received the Circular Letter as part of discovery and that had he known it was rescinded and replaced with the Legal Memorandum, his presentation of evidence and arguments would have been different.

The fact is, Respondent made only one discovery request, which was after the hearing had been conducted. Respondent gathered his evidence for hearing via Public Records Act requests. The Circular Letter that was provided to Respondent by the Office of Stakeholder Relations was responsive to one request. It was not “foreseeable”, as Respondent argues, that he would proffer this irrelevant and improper evidence at the hearing that would ultimately be subject to objection.

Moreover, Respondent did make arguments at the hearing that were in line with the analysis of the Stausboll memo. The memorandum indicates that if a contractual exclusion for hourly compensated employees is used by contracting agencies as pretext for an improper exclusion of temporary and seasonal employees, the exclusion is void. The record in this case is loaded with arguments from Respondent referring to “a wolf in sheep’s clothing.” The “wolf in sheep’s clothing” references directly comport with the analysis of the Stausboll memo. Respondent’s argument that he was not afforded an opportunity to present evidence or argument in relation to the Stausboll memo is disingenuous, at best.

Second, Respondent argues that a factual finding in the Proposed Decision is not supported by any “direct” evidence and that any testimonial evidence relating to the finding should be subject to further review for admissibility. The finding states, “[t]he City employs some regular, part-time employees it compensates on an hourly basis.” Respondent then argues that without this factual finding, the ALJ could not have reached the legal conclusion that the City had not misused the hourly compensation exclusion.
Again, Respondent’s argument is misleading. Respondent submitted documentary evidence that unequivocally demonstrated that CalPERS conducted a review of the City’s hourly compensation exclusion in 1999 and 2000 and determined that the City was properly administering the exclusion as required by the Stausboll memo. Testimony by CalPERS staff corroborated Respondent’s documentary evidence. Moreover, an Associate Human Resources Analyst for the City testified to the number of City employees that are compensated on an hourly basis and the consistency with which the City administered the exclusion.

There was ample evidence admitted at the hearing to support the factual finding and legal conclusion Respondent takes issue with now. Respondent’s disagreement with the finding and conclusion neither changes the fact that he was provided a fair opportunity to present evidence and argument nor invalidates the sound legal analysis of the ALJ.

Third, Respondent argues that a provision contained in the 2015-2017 General Employee’s Memorandum of Understanding (MOU) contradicts the City’s own interpretation and application of the hourly compensation exclusion. However, Respondent does admit that the factual finding in the Proposed Decision relating to the alleged contradiction is still valid. Factual Finding 4(b) states:

In response to the question of how it interpreted the exclusion, the City replied on September 7, 1999: “As per our CalPERS contract we exclude persons compensated on an hourly basis. These are nonrepresented or designated part time employees, who are temporary, seasonal, or hold jobs of less than 30 hours per week.”

Respondent asserts that because the MOU contradicts the factual finding, further discovery is required.

Respondent flatly misrepresents the hearing record in this argument. While Respondent did proffer ten pages of what he purported was the MOU for 2015-1017, it was rejected by the ALJ after a relevance objection. Respondent never worked under the purported MOU, it was an incomplete document, and Respondent did not make an offer of proof that it contradicted other significant evidence that the City properly applied the contractual exclusion at issue. Moreover, the MOU cited by Respondent does not contradict the City’s interpretation and application of the hourly compensation exclusion.
No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the August 16, 2017, meeting was well reasoned and based on the credible evidence presented at hearing.

September 20, 2017

CHRISTOPHER PHILLIPS
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