ATTACHMENT B

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

Respondent Tracy Fuller (Respondent) established membership with CalPERS through employment with the City of Rancho Palos Verdes in 1985. Respondent continued to work for other CalPERS covered agencies until 2006. Although Respondent did not work for a CalPERS covered agency from 2006 to 2014, she retained her membership with CalPERS.

From March 17, 2014 through November 21, 2014, Respondent worked for Respondent Cambria Community Services District (Respondent CCSD), as the Interim Finance Manager. Respondent was retained by Respondent CCSD through Regional Government Services (RGS). RGS is a joint powers authority that does not contract with CalPERS for retirement benefits. RGS was formed to “enable CalPERS members and retirees to perform work for CalPERS covered agencies without jeopardizing retirement benefits from prior employment. Under its service model, RGS classifies the individuals as employees of RGS and itself as an independent contractor of CalPERS covered agencies, thereby seeking to avoid the application of CalPERS pension laws to individuals' work assignments.”

In 2014, Respondent CCSD’s long-term Finance Manager retired with short notice and Respondent CCSD needed a Finance Manager immediately to work on an emergency water project. Respondent CCSD contacted RGS and RGS identified Respondent as a potential candidate for the position. Respondent CCSD reviewed Respondent’s resume and interviewed Respondent. Respondent CCSD then entered into an “Agreement for Management and Administrative Services” (Agreement) with RGS, for Respondent to serve as the Interim Finance Manager for Respondent CCSD.

Pursuant to the Agreement, Respondent was responsible for performing all duties of a Finance Manager, as assigned by Respondent CCSD. These duties included performing all functions of a Finance Manager position of Respondent CCSD. Respondent was also to perform any other duties assigned by Respondent CCSD.

Respondent was paid by the hour and Respondent CCSD paid a housing allowance for Respondent. Pursuant to the Agreement, Respondent CCSD could terminate the Agreement any time it was dissatisfied with Respondent’s performance, thereby terminating Respondent. Respondent was classified as an independent contractor by Respondent CCSD, and Respondent was not offered membership in CalPERS through this employment.
In 2014, CalPERS conducted a membership and payroll audit of Respondent CCSD. As part of its audit, CalPERS reviewed the working relationship between Respondent and Respondent CCSD and determined that Respondent was an employee of Respondent CCSD for the period of March 17, 2014 through November 21, 2014. As an employee, Respondent should have been brought into membership when she began working at Respondent CCSD. 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 CCSD 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 March 15 and 16, 2018. Respondent represented herself at hearing and the Respondent CCSD 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 Public Employees’ Retirement Law’s (PERL) 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 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 she did not consider herself to be an employee of CCSD and considered herself to be an employee of RGS.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent CCSD’s appeal. The ALJ held that “[o]verall, the evidence revealed that RGS, CCSD, and Fuller went to great lengths to try to avoid an employer-employee relationship between CCSD and Fuller.” The ALJ noted that characterizations in the Agreement “of Fuller as an agent of RGS, and of RGS as an independent contractor of CCSD, were not reflective of the realities of the position she filled and the work she performed.”

The ALJ found that under the Tieberg test, Respondent CCSD “had the right to control the manner and means by which Fuller accomplished the result desired. . . .” Respondent was selected by Respondent CCSD for the Interim Finance Manager position and Respondent CCSD could terminate Respondent at any time. Respondent worked under the direction of Respondent CCSD’s General Manager and the Board. Respondent CCSD provided Respondent with “an office, a phone, access to some CCSD computers systems, and an email address.” Respondent was also provided housing by Respondent CCSD. Furthermore, the assignments performed by Respondent, of a Finance Manager, were integral to the regular business of Respondent CCSD.

The ALJ also considered the “secondary” factors listed in the Tieberg test. The ALJ analyzed each factor and noted that most of the secondary factors demonstrated the existence of an employment status.
Therefore, The ALJ ruled that Respondent was an employee of Respondent CCSD. The ALJ also concluded that Respondent City must pay CalPERS all arrears costs for employer and member contributions and pay CalPERS the administrative cost of $500 as reimbursement pursuant to Government Code section 20283.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

September 26, 2018

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PREET KAUR  
Senior Attorney