ATTACHMENT B

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

Respondent Mark E. Bills was employed by respondent City of Davis (respondent City) as a Firefighter II. By virtue of his employment, respondent Bills is a local safety member of CalPERS.

Respondent Judi L. Cutaia was employed by respondent City as a Fire Captain. By virtue of her employment, respondent Cutaia is a local safety member of CalPERS.

On October 7, 2013, respondent Bills signed an application for service retirement with CalPERS. Respondent Bills retired for service effective February 11, 2014, with 29.522 years of service credit and has been receiving his retirement allowance from that date.

On October 10, 2012, respondent Cutaia signed an application for service retirement with CalPERS with a service retirement date of December 21, 2012. Respondent Cutaia retired for service effective December 21, 2012, with 29.406 years of service credit and has been receiving her retirement allowance from that date.

In 2009, respondent City and the Davis Professional Firefighters’ Association negotiated a Memorandum of Understanding (MOU) for the period of December 16, 2009 through June 30, 2012. The MOU included a provision that allowed members with at least 25 years of service to convert 80 percent of their unused “cafeteria cash out” to “longevity pay.” Respondents Bills and Cutaia each opted to convert their cafeteria cash out amounts to longevity pay once they accumulated 25 years of service.

In October of 2016, CalPERS Office of Audit Services conducted a public agency review of respondent City to determine its compliance with applicable sections of the Public Employees’ Retirement Law. The review period was July 1, 2011 through June 30, 2014.

On October 20, 2016, CalPERS issued its final audit report. CalPERS determined that payments reported as “longevity pay” did not meet the statutory criteria for special compensation and should not have been reported to CalPERS.

Respondent City agreed to make payroll adjustments reversing the cafeteria cash outs as reportable income. Respondent City provided CalPERS with a list of affected employees, including respondents Bills and Cutaia.

CalPERS notified respondents Bills and Cutaia by letters in May 2017 of its determinations regarding the cafeteria cash outs. CalPERS also notified respondents of the overpayments and adjustments to respondents’ retirement allowances due to the determination.
Respondents Bills and Cutaia appealed the determinations and exercised their right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on July 19, 2018. Respondents were represented by counsel at the hearing. Respondent City did not appear at the hearing.

Respondents testified on their own behalf regarding their job histories and their retirements. CalPERS presented the testimony of Leianne Generosa regarding the 2016 audit and CalPERS’ determination regarding longevity pay.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondents’ appeals. The ALJ found that respondent City erroneously labeled cafeteria cash out as longevity pay on behalf of respondents Bills and Cutaia. The ALJ found that the payments did not meet the definition of longevity pay under California Code of Regulations, title 2, section 571.

The ALJ also considered Respondents’ affirmative defenses of laches and equitable estoppel with respect to CalPERS’ right to collect overpayments. The ALJ concluded that the respondents failed to meet their burden of proof in establishing these defenses.

In the Proposed Decision, the ALJ concludes that the cafeteria cash outs, reported by respondent City on behalf of respondents Bills and Cutaia, do not qualify as longevity pay or any other authorized type of special compensation. The ALJ further concludes that CalPERS is entitled to recoup the overpayments to respondents Bills and Cutaia subject to the three-year statutory limitation.

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

December 19, 2018

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AUSTA WAKILY
Senior Attorney