ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Background

This case involves a dispute concerning whether Respondent Mark Dana (Respondent Dana) served as an independent contractor or a common law employee for Respondent San Francisco Bay Area Rapid Transit District (BART) from 1997 to 2008. During those years, BART had entered into consulting agreements with several private engineering and consulting management firms. After a competitive bidding process, BART contracted with a company called Earth Tech in 1998 for its engineering consulting services, for a term not to exceed five years. The 1998 Agreement called for Earth Tech to "assist and advise [BART] in construction management and procurement activities…in accordance with the requirements in the BART Resident Engineering Manual and the Standard Specifications, as provided by BART." Each year, the 1998 agreement called for Earth Tech to provide an annual work plan to BART, describing services that Earth Tech would perform during that year and confirming the compensation BART would pay to Earth Tech for those services. BART and Earth Tech entered into a similar agreement in 2002 for a term not to exceed five years These two agreements listed Respondent Dana among Earth Tech's "key personnel" for servicing the contracts.

For each construction project, BART would assign a Resident Engineer to supervise construction. BART sometimes used BART employees as Resident Engineers, and other times used consultants to supply personnel to fill this role. Between 1998 and 2001, Respondent Dana served BART primarily as a Resident Engineer. As a Resident Engineer, Respondent Dana managed BART's construction contracts. After 2001, Respondent Dana was promoted by Earth Tech to "Program Manager." This promotion increased Respondent Dana's responsibilities for supervising other Earth Tech employees and Earth Tech subcontractors.

In 2008, BART directly hired Respondent Dana as an employee with the title "Senior Engineer." At that time, Respondent Dana resigned from Earth Tech. Respondent Dana has been employed by BART as a Senior Engineer since then.

In 2015, Respondent Dana requested service prior to membership from CalPERS. In his request, Respondent Dana requested service credit for the 1997 through 2008 period during which he performed duties as a consultant.

CalPERS reviewed Respondent Dana's request to determine if Respondent Dana was entitled to service credit for his time as a consultant for BART. CalPERS conducted an investigation and obtained and reviewed documents as part of its review. Following its review, CalPERS determined that Respondent Dana was entitled to service credit for the 1997 through 2008 period because Respondent Dana had been BART's common law employee during those years. If found a common law employee, he would be

entitled to service credit for those years. BART appealed CalPERS' determination and exercised its right to an administrative hearing before an Administrative Law Judge (ALJ) for the Office of Administrative Hearings (OAH).

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

Three days of hearing were held on July 10, July 11, and July 30, 2019. Respondent Dana was not represented by an attorney at the hearing. BART was represented by its attorneys.

On December 17, 2019, the ALJ issued her Proposed Decision granting BART's appeal and held that Respondent Dana was not a common law employee of BART between 1997 and 2008.

<u>The Law and the Facts Applied at the Hearing</u>

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." (Gov. Code § 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 which may be taken into account in this analysis:

> (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.) It was BART's burden in this case to show that Respondent Dana was an independent contractor and not an employee.

Respondent Dana's Witnesses

Respondent Dana testified on his own behalf in support of his contention that BART controlled the manner and means of accomplishing his duties as a Resident Engineer. After starting as a Resident Engineer in 1997, BART provided Respondent Dana with the Resident Engineer's Manual (RE Manual), which outlined the manner and means by which Respondent Dana was to accomplish his various duties for BART. BART required Respondent Dana to follow the RE Manual. And, for almost every contingency Respondent Dana could encounter, the RE Manual provided Respondent Dana with what to do, and how to do it.

The 60-page RE Manual detailed specific processes and procedures for the Resident Engineer's completion of change orders, change notices, inspections, and materials and workmanship. The RE Manual also had an appendix with 39 required procedures and additional forms for the Resident Engineer job. Respondent Dana was required to use his experience and training to fulfill his duties, but the RE Manual specified how Respondent Dana was to fulfill those duties should issues or problems arise. Moreover, Respondent Dana's discretion was always subject to BART's supervisory oversight.

During his entire time as a Resident Engineer, BART employees exerted supervision over all of Dana's work. Respondent Dana was always required to follow the direction of his BART supervisors, and BART required Respondent Dana obtain BART approval for all of his work plans. Although Earth Tech provided Dana with yearly evaluations, much of the information for the evaluations came directly from Respondent Dana's BART supervisors. In addition, BART conducted its own independent review of Respondent Dana's performance.

Respondent Dana had an office at BART, was given a phone, a phone number, a BART e-mail account, office supplies, a hard hat, and a vest, and used BART facilities and controlled computer systems. Respondent Dana signed letters to third parties as a BART Resident Engineer. Respondent Dana was issued a paycheck by Earth Tech, but BART directly reimbursed Earth Tech for all of Respondent Dana's hours.

With the exception of a three-month period in 2004, Respondent Dana worked full-time as a Resident Engineer for BART from 1997 through 2008.

Respondent Dana was hired directly as a BART Senior Engineer in 2008. One of Respondent Dana's duties as a Senior Engineer is to occasionally work as a Resident Engineer. The Resident Engineer duties remained the same for a direct BART employee as they were for an Earth Tech consultant. In fact, at least eight BART employees worked as BART Resident Engineers between 1997 and 2008.

Respondent Dana called a long-time co-worker (Co-worker) as a witness. Similar to Respondent Dana, the Co-worker served BART as an Earth Tech consultant but was later hired directly by BART. The Co-worker confirmed Respondent Dana's testimony about the RE Manual as the required manner and means for performing the Resident Engineer job.

The Co-worker also worked as a consultant for other public transit agencies and was familiar with how those agencies use their consultants. Unlike BART, the Co-worker testified that the other public transit agencies he worked for did not author their own RE Manual and did not exert control over its consultants as BART does.

BART's Witnesses

BART called two of Respondent Dana's BART supervisors as witnesses. Both supervisors confirmed that BART supervised Respondent Dana as a Resident Engineer and required him to follow the RE Manual. In spite of the mandatory oversight of BART supervisors and adherence to the RE Manual, BART's witnesses asserted that Dana was a skilled worker and was afforded complete discretion over his Resident Engineer duties.

BART also called Respondent Dana's supervisor from Earth Tech. The Earth Tech supervisor explained that Respondent Dana was required to fulfill certain business development duties for Earth Tech that were unrelated to BART. The Earth Tech supervisor, though, had no authority to control or supervise Respondent Dana's Resident Engineer duties for BART.

CalPERS' Witnesses

CalPERS staff testified in support of its determination. Staff explained that after Respondent Dana applied for service prior to membership, CalPERS investigated the matter to see if an employment relationship existed between BART and Respondent Dana from 1997 through 2008. Staff reviewed all of the documents provided by BART and Respondent Dana and analyzed all of the evidence under the common law employment test. Following its review, CalPERS determined that Respondent Dana was a common law employee from 1997 through 2008, because the weight of the evidence supported a conclusion that BART possessed the right to control the manner and means of accomplishing the tasks assigned to Respondent Dana. Two of the strongest indicators of this control were the mandatory use of the RE Manual and the oversight by BART supervisors. Provisions in the 1998 and 2002 Agreements also supported the conclusion that BART possessed the requisite control over Respondent Dana's activities.

CalPERS also called one of Respondent Dana's former BART supervisors to testify. The former supervisor was familiar with Respondent Dana's time with BART from 1997 through 2008. The former supervisor explained that BART exerted extensive control over Respondent Dana through the RE Manual.

Documentary Evidence

In addition to the RE Manual, two engineering services contracts (Contracts) between BART and Earth Tech were introduced into evidence. Both Contracts stated that Earth Tech "has full control over the employment" of its employees, i.e. Respondent Dana. Despite that language, the Contracts specified that all of Dana's Resident Engineer work was "subject to the Project Direction of" BART. The Contracts also made clear that BART maintained the full authority to control, edit and restrict many of Dana's duties.

The Proposed Decision

After reviewing the evidence and legal argument presented by all parties, the ALJ found Respondent Dana to be an independent contractor during the years 1997 to 2008 and granted BART's appeal. While the ALJ made a specific finding that BART "directed and controlled" Respondent's actions, just as many clients direct and control their professional representatives, she relied upon an analysis of the secondary factors in arriving at her decision. Because she found that the facts of the case favored a finding against common law employment with regard to four of the eight secondary factors, she held that Respondent Dana was not an employee of BART during the years in question.

The ALJ held that the following factors supported an independent contractor relationship: 1) Earth Tech was in a distinct business of construction management, whereas BART's chief business is operating a transit system; 2) Respondent Dana engaged in a high-skill occupation; 3) the Contracts between BART and Earth Tech were for a fixed term and after each agreement had expired, BART would not have procured further service from Dana or any other Earth Tech employee if Earth Tech had not competed successfully for further work; and 4) that neither BART nor Earth Tech, nor any individuals working for either employer, believed between 1997 and 2008 that Earth Tech's employees who served BART were BART employees. The ALJ issued little comment on the other four secondary factors. The ALJ concluded that taken all together, the evidence established that Respondent Dana did not act as BART's common law employee at any time before May 27, 2008. Further, that Respondent Dana was Earth Tech's employee, and Earth Tech supplied Respondent Dana's and other persons' expertise and labor to BART in a consultant-client relationship rather than an employee-employer relationship.

The ALJ also ruled that the equitable doctrine of laches barred Respondent Dana's membership from 1997 through 2008. Laches can bar a claim if the delay in making the claim is unreasonable, and if it either: 1) causes prejudice; or 2) the party acquiesced in the delay. Here, the ALJ found that Respondent Dana acquiesced in the delay, as he suspected for many years that he was being treated like an employee. Respondent Dana knowingly received different, and possibly better, compensation from Earth Tech than he would have received as an employee of BART. The ALJ found that Respondent Dana acquiesced for at least 17 years in his treatment between 1997 and 2008 as a

consultant to BART rather than a BART employee, and delayed unreasonably seeking any change to that treatment. So, even if the ALJ had found that Respondent Dana was an employee under the common law employment test, laches would preclude Respondent Dana's request for CalPERS membership from 1997 through 2008.

Based on all the facts and circumstances of the case, Staff does not oppose adoption of the Proposed Decision.

February 19, 2020

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