# ATTACHMENT B

# STAFF'S ARGUMENT

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## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondents Brett A. Alvarez, Russel S. Bastow, Jason M. Beebout, William J. David, Ryan A. Hammang, Jeffrey D. Harris, Steven V. Jensen, John T. Kelly, Sean M. Kloman, Anthony C. Morganti, Cameron J. Peters, Brian M. Roosen, Tadashi R. Shimada, Jason T. Tighe, Justin N. Topalian, Brian P. Whitaker, and Michael D. Witmer (collectively known as "Respondent Members") are Los Alamitos Joint Forces Training Base Fire Department (JFTB) Firefighters and are state active duty members of CalPERS under Respondent California Military Department.

Respondent California Military Department (Respondent CMD) is a state agency, comprised of state active duty military personnel and civil service employees. Respondent California Department of Human Resources (CalHR) is a state agency vested with "powers, duties, and authorities necessary to operate the state civil service system in accordance with the California Constitution, statutory law, the merit principle, and applicable rules duly adopted by the State Personnel Board." (*Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1146-1147; §19818.16.)

Due to their status as state active duty members, Respondent Members are classified as miscellaneous members of CalPERS. Respondent Members, however, would like to be classified as State Peace Officer/Firefighter (POFF) members of CalPERS. This classification would entitle them to enhanced pension benefits.

Respondent Members requested Respondent CMD review their miscellaneous classification. On July 26, 2016, Respondent CMD replied, stating Respondents are State Active Duty, employed by Respondent CMD, and receive pay and allowances dictated by the California Military and Veterans Code. Based on these facts, Respondent CMD refused to take any action and referred Respondent Members to the Legislature or CalPERS for relief.

On January 6, 2017, Respondent Members requested CalPERS designate them as state POFF members. CalPERS replied that it has no authority to reclassify Respondent Members as state POFF and referred Respondent Members to Respondent CalHR. CalPERS informed Respondent Members that if Respondent CalHR changes their classification, then CalPERS will make the necessary changes.

CalPERS informed Respondent Members that it "does not have authority to determine what positions are eligible for the state POFF retirement category. Respondent CalHR has the statutory authority to determine what positions are eligible for the state POFF retirement category. If a classification is approved by Respondent CalHR, CalPERS will make the necessary changes for the impacted positions."

Respondent Members requested Respondent CalHR reclassify them from the state miscellaneous classification to the state POFF classification. On August 24, 2017, Respondent CalHR replied, stating Respondent Members are State Active Duty, part of the state active militia, and exempt from State Civil Service under California's Constitution. Respondent CalHR noted that "under Government Code section 20398, CalHR is not authorized to make POFF determinations for all categories of persons exempt from civil service as set forth in Article 4 of the California Constitution." Respondent CalHR concluded they have no jurisdiction to reclassify Respondent Members as state POFF.

Respondent Members returned to CalPERS, again requesting to be reclassified as state POFF. Respondent Members argued that they are firefighters, performing the duties of firefighters, therefore they are entitled to be classified as firefighters under Government Code section 20392. CalPERS replied on March 13, 2018, once again stating it lacked authority to designate Respondent Members as state POFF. This response was based on the following facts and analysis.

Government Code section 20391 through 20398 delineate which job classifications carry state POFF benefits and provide a method for designating additional job classifications as state POFF. Section 20391 designates certain investigator classes as state POFF. Sections 20393 and 20394 designate various classes, at certain state departments and California State Universities, as state POFF. Section 20392 identifies more eligible classes as state POFF. Section 20392 "'**State Peace Officer/Firefighter Member'—Various Classes**" provides that "POFF members also includes officers and employees with the following class titles:

| **Class** | **Classification** |
|---|---|
| [¶…¶] | |
| 1077 | Fire Apparatus Engineer |
| 1095 | Fire Captain |
| [¶…¶] | |
| 8979 | Firefighter |
| 1083 | Firefighter I |
| 1082 | Firefighter II…" (Emphasis added.) |

Section 20395 **"'**State Peace Officer/Firefighter Member'—Reclassification from State Miscellaneous**"** defines state POFF as all members who are full-time permanent employees represented by Firefighters Unit No. 8 and are firefighters whose principal duties consist of active firefighting/fire suppression.

Pursuant to section 20398, Respondent CalHR determines which excluded, CEA, and exempt classes or positions meet state POFF retirement criteria specified in Government Code section 20398. Section 20938(a) provides that state POFF also includes a firefighter "whose principal duties consist of active firefighting/fire suppression" who is NOT a civil service employee but one who directly supervises section 20392 state POFF personnel or administers programs of a unit that is primarily

responsible for active firefighting/fire suppression." Section 20398(e) specifically states that "[a]n agency or department shall not designate a classification as a 'state peace officer/firefighter member' classification pursuant to this section without prior approval from the Department of Human Resources."

Thus, to be state POFF, an individual must: 1) hold a classification listed under sections 20391, 20392, or 20393; 2) be a full-time employee represented in Bargaining Unit 8 and have principal duties that consist of firefighting/fire suppression under section 20395; or 3) be in a classification that is approved by Respondent CalHR as state POFF.

Local firefighters are defined under Government Code sections 20433, 20434 and 20435 as an officer or employee of a fire department of a contracting agency or an individual performing training functions for a contracting agency. Based on these statutes, all members of the fire department are firefighters unless their functions "do not clearly fall within the scope of active firefighting…" (*City of Oakland v. Public Employees Retirement System* (2002) 95 Cal.App.4th 29, 58-59 (*City of Oakland*).) In the *City of Oakland*, the court analyzed whether the duties performed by plaintiffs fell within the scope of active firefighting, thus making them "firefighters" under the statute and entitling them to be reclassified as local POFF. (*Id*. at p. 33.)

Respondent Members are not local POFF as they are not employees of a contracting agency. Sections 20433, 20434 and 20435 do not apply to Respondent Members.

Respondent Members appealed CalPERS' 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 March 11 and 12, 2020. All Respondents were represented by counsel at the hearing.

At the hearing Respondent Members argued they should be classified as state POFF because they perform job duties, wear attire, and operate equipment similar to other firefighters classified as POFF members. Respondent Members cited erroneously to the *City of Oakland* case discussed above as an example of CalPERS' authority to reclassify firefighters from miscellaneous to POFF.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent Members' appeal. The ALJ found that while CalPERS has "authority to reclassify members who have been misclassified," Respondent Members "failed to demonstrate that they satisfy any of the statutory conditions for becoming a POFF member." Based on this, the ALJ denied Respondent Members' request.

In the Proposed Decision, the ALJ concludes that Respondent Members do not qualify for reclassification. The ALJ explained as follows:

> "The 'conditions' under which 'other state employees' qualify as POFF members are outlined in Government Code sections 20391 through

> 20397 and include: 1) employment in a specific job classification; 2) employment with a specific agency; 3) employment as a peace officer; 4) representation by a specific bargaining unit; 5) responsibility for direct supervision of POFF members; or 6) a combination of these conditions. The individual respondents failed to demonstrate they satisfy any of the statutory conditions for being a POFF member. Indeed, they agree they do not hold any of the job classifications enumerated in Government Code section 20392."

The ALJ also noted that Respondent Members' reliance on *City of Oakland* is misplaced as the firefighters in the *City of Oakland* were local members, subject to a different statutory standard that takes into account their duties, whereas Respondent Members are state members. The ALJ explained that, "[h]ere, the "conditions" for being a POFF member are defined more narrowly. They do not include the individual respondents' job duties, the attire they wear, or the equipment they use, and such issues are not relevant to their claim for reclassification."

The ALJ correctly concluded that Respondent Members do not qualify for state POFF benefits.

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

September 16, 2020

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Preet Kaur
Senior Attorney