

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

The City of Ontario (Respondent City), is a public agency that entered into a contract with CalPERS, effective January 1, 1946, to provide retirement benefits for its eligible employees. The 1962 Amendment to the contract between Respondent City and CalPERS contains an exclusion regarding employees compensated on an hourly basis who are hired October 1, 1962 or thereafter.

Jeffrey D. Crittenden (Respondent Crittenden) began employment with Respondent City in July 1990 as a Police Cadet. From July 2, 1990 through July 4, 1992, Respondent Crittenden held the Police Cadet position, for which he was compensated on an hourly basis. Respondent City excluded Respondent Crittenden from CalPERS membership during this timeframe, pursuant to the hourly exclusion in its Contract with CalPERS. On July 6, 1992, Respondent Crittenden became a member of CalPERS by way of his appointment to a salaried position with Respondent City as a Police Recruit.

James Hall (Respondent Hall) began employment with Respondent City in August 1991 as a Public Service Trainee I. From August 5, 1991 through November 10, 1995, Respondent Hall held the Public Service Trainee I position, for which he was compensated on an hourly basis. Respondent City excluded Respondent Hall from CalPERS membership during this timeframe, pursuant to the hourly exclusion in its Contract with CalPERS. On November 13, 1995, Respondent Hall became a member of CalPERS by way of his appointment to a salaried position with Respondent City as a Solid Waste Collector I.

On June 13, 2017 and October 21, 2019, Respondent Crittenden and Respondent Hall (together Respondents), requested service credit from CalPERS for the time they were employed in positions compensated on an hourly basis.

Initially, CalPERS determined Respondents worked more than 30 hours a week and worked over 1,000 hours in a fiscal year, and thus qualified for CalPERS membership. However, upon further review, CalPERS issued amended determinations denying Respondents' service credit requests. CalPERS concluded that Respondents' employments were properly excluded pursuant to the contract between CalPERS and Respondent City. CalPERS also concluded that the applicable hourly-basis employees' exclusion had been accepted by CalPERS pursuant to its contract with the City; and that the City correctly applied the contractual hourly exclusion to Respondents during their respective timeframes because Respondents were both compensated on an hourly basis.

Government Code section 20502 permits exclusions of groups of employees by amendments to contracts, with respect to future entrants of the group; and provides that

contract exclusions cannot be applied individually, but instead must apply to a specific group of employees.

Respondents appealed their respective determinations and exercised their rights to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). Two days of hearing were completed on August 1 and 31, 2022. Respondents represented themselves at hearing. Respondent City was represented by counsel at hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondents and the need to support their cases with witnesses and documents. CalPERS provided Respondents with copies of the administrative hearing process pamphlet. CalPERS answered Respondents' questions and clarified how to obtain further information on the process.

At hearing, CalPERS staff testified about CalPERS' membership review, determinations made regarding Respondents' service credit requests, and CalPERS' contractual hourly exclusion process and policies.

Respondent City's Human Resources Executive testified at hearing that Respondent City's temporary employees compensated on a *salaried* basis are not excluded from CalPERS membership. Employees compensated on an *hourly* basis are excluded based on the contractual hourly exclusion provision.

Respondent Crittenden testified that his hours were consistent with a "full-time" position, that he met the necessary criteria for membership, and that he was not informed of his exclusion from CalPERS membership.

Respondent Hall testified that he was essentially treated as a full-time employee without benefits during the time he held the hourly compensated position, that he met the necessary criteria for membership, and that CalPERS informed him he could purchase service credit for the time he held his hourly compensated position.

After considering all of the evidence introduced, the ALJ denied Respondents appeals. The ALJ found that the provisions of the PERL that supersede contractual exclusions apply to "seasonal, limited-term, on-call, emergency, intermittent, substitute, or other irregular basis" employees, but those exclusions do not apply to Respondents during the time they worked as hourly employees. The ALJ further found that the number of hours worked did not change Respondents' status from hourly to salaried employees; and that Respondents did not produce any authority showing that Respondent City's failure to notify them they were excluded as hourly employees entitled them to CalPERS membership. The ALJ found "[e]quitable estoppel is extraordinary relief appropriate only for the most extraordinary cases. Here, it would result in an award in excess of statutory authority and inconsistent with [CalPERS'] longstanding practices." The ALJ concluded Respondents were not eligible to purchase service credit for the time they were hourly employees.

Pursuant to Government Code section 11517, subdivision (c)(2)(C), the Board is authorized to “make technical or other minor changes in the Proposed Decision.” To avoid ambiguity, staff recommends correcting “Louis” to “Louie” and “Employees” to “Employees” on page 1; correcting “October 11, 2002” to “October 11, 2022” on page 2; correcting “February 23, 1992” to “August 5, 1991” in paragraph 5, on page 5; correcting “contractual conclusion” to “contractual exclusion” in paragraph 10, on page 6; adding a comma between “... hours a week” and “or requires service ...” in paragraph 14, on page 10; striking “emergency,” after “on-call, emergency,” in paragraph 14, on page 10; and correcting “section 20505” to “section 20305” in paragraph 15, on page 12 of the Proposed Decision; and replacing “CALPERS’s” with “CalPERS” throughout the Proposed Decision.

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

January 17, 2023

Helen L. Louie
Attorney