

ATTACHMENT B

Staff Argument

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

The City of San Bruno (Respondent City) is a public agency that contracted with CalPERS in 1945 to provide retirement benefits for its eligible employees. In April 1963, Respondent City amended its retirement contract with CalPERS, providing that "persons compensated on an hourly and/or per diem basis hired on or after April 1, 1963" shall not become CalPERS members.

Michael G. Cook (Respondent) began employment as a Per-Diem Dispatcher with Respondent City on October 15, 2018. He worked in this position until April 18, 2020. He did not have a fixed schedule, and the hours he worked varied greatly between weeks. Respondent did not dispute that he was a per diem employee. He was not guaranteed to work a certain number of hours each week and was not offered CalPERS membership due to the retirement contract exclusion for persons compensated on an hourly and/or per diem basis.

From October 2018 to April 2020, Respondent City never deducted contributions from Respondent's pay, nor did Respondent City make contributions to CalPERS on his behalf. Respondent City never indicated to Respondent that he would receive service credit for his work from October 2018 to April 2020.

On March 17, 2021, CalPERS determined that Respondent was eligible for CalPERS membership due to his employment with Respondent City on an hourly/per diem basis from October 15, 2018, to April 18, 2020. Respondent City disputed this determination and cited the 1963 Amendment to its contract with CalPERS. Subsequently, CalPERS completed a review of the City's contract and the 1963 exclusion regarding hourly and/or per diem workers. On June 18, 2021, CalPERS issued an amended determination to Respondent and Respondent City, stating that Respondent was not eligible for CalPERS service credit for the period of October 15, 2018, to April 18, 2020, due to Respondent City's 1963 contract amendment.

Respondent appealed the determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). Two days of hearing were held on August 14, 2024, and January 14, 2025. At the hearing, Respondent City was represented by counsel and Respondent represented himself.

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

At the hearing, CalPERS' staff testified that government employees can be excluded from CalPERS membership in various ways, including based on amendments to contracts between their employers and CalPERS. There are contract amendments between CalPERS and approximately 200 agencies like Respondent City which exclude employees compensated on an hourly basis from CalPERS membership. Respondent City's contract exclusion means that an individual compensated on an hourly basis (as Respondent was) is excluded from membership/receiving service credit. There is no

exception to this exclusion for employees who were already CalPERS members due to prior employment with another contracting agency. Individuals like Respondent remain inactive members of the system during their hourly employment, and they are not enrolled into the system, nor do they receive service credit for time that is excluded by the agency's contract. When a member changes jobs, the first question to be asked is whether the new position is excluded from membership, either by the retirement law or a contract provision of the employer. Because Respondent was in an excluded position, he was not eligible for membership. While CalPERS initially made an erroneous determination that Respondent should get service credit for his time in the per diem position, the 1963 contract amendment was clear that Respondent was excluded.

Respondent City's Assistant City Manager testified regarding Respondent City's employment practices and the circumstances regarding Respondent's employment with Respondent City. The Assistant City Manager confirmed that for the period of October 2018 to April 2020, Respondent was an hourly/per diem employee with no fixed schedule, and Respondent City properly excluded him from membership due to the 1963 contract amendment. The Assistant City Manager also confirmed that Respondent City never told Respondent that he would receive CalPERS' service credit through his employment with Respondent City from October 2018 to April 2020.

Respondent testified that he was working on an hourly/per diem basis for Respondent City, and at the time he worked for Respondent City, he did not believe that he was entitled to service credit through his employment. Nevertheless, he testified that he believes Respondent City misapplied the 1963 contract amendment, and that his time should be counted towards his service credit. Respondent further testified that he does not believe the 1963 contract amendment's provision excluding hourly/per diem employees should apply to him because the exclusion only applies to employees who have never been members of CalPERS prior to their hourly/per diem employment.

After considering all the evidence introduced, the ALJ denied Respondent's appeal. Respondent held the burden of proof, and he did not meet his burden to show that he qualified for CalPERS membership and is entitled to service credit based on his employment as a Per-Diem Dispatcher. The ALJ found that Respondent City's retirement contract with CalPERS specifically excluded Respondent's hourly/per diem employment from October 15, 2018, to April 18, 2020. The ALJ rejected Respondent's argument that the exclusion only applies to those who have never been members. Respondent did not believe he was eligible for service credit while working at Respondent City and the City did not intend to provide retirement benefits to any of its hourly employees, regardless of CalPERS membership by virtue of other employment. Accordingly, the ALJ denied Respondent's appeal.

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

March 19, 2025

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