

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Appeal of Membership Eligibility of:

LARRY J. KOSMONT, Respondent, and

CITY OF MONTEBELLO, Respondent.

Agency Case No. 2020-0903

OAH No. 2020110580

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by video conference on September 9, 2021.

Complainant Renee Ostrander was represented by John Shipley, Senior Attorney. Respondent Larry J. Kosmont was present and was represented by Lina Balciunas Cockrell, Attorney at Law. There was no appearance by or for respondent City of Montebello.

Testimony and documentary evidence was received. The record was held open for respondent Kosmont to file his business cards, which were filed September 10,

2021, marked for identification, and received in evidence as Exhibit P. The record closed and the matter was submitted for decision on September 10, 2021.

On September 28, 2021, the ALJ re-opened the record and set a schedule for the parties to brief an issue relating to CalPERS eligibility, indicating the record would close on October 25, 2021. Respondent's brief was filed October 11, 2021, and is marked for identification as Exhibit Q. Complainant's brief was filed October 25, 2021, and is marked for identification as Exhibit 16.

SUMMARY

The issue is whether respondent Larry J. Kosmont (Kosmont) worked at least 1,000 hours as the Interim City Administrator for the City of Montebello (Montebello) in the fiscal year 2011 to 2012. If so, Kosmont would meet a criterion for membership in the California Public Employees' Retirement System (CalPERS). Although the number of his work hours cannot be determined with certainty, the evidence established Kosmont worked at least 1,000 hours.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant Renee Ostrander made and filed the Statement of Issues in her official capacity as Chief of the Employer Account Management Division of CalPERS.

2. As described in more detail below, Kosmont worked for Montebello from May 12, 2011, to February 29, 2012.

3. In May 2014, CalPERS' Office of Audit Services conducted a Public Agency Review (Audit) of Montebello's compliance with the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq. The Audit determined Montebello had misclassified Kosmont as an independent contractor; rather, Kosmont was an employee.

4. Another person who had worked with Kosmont, David Biggs, was determined to be a Montebello city employee and not an independent contractor. This determination was reached in a Decision issued by CalPERS in February 2018 after an administrative hearing. (Exhibit 15.) Kosmont contacted CalPERS in February 2019, wrote that he, too, had been misclassified as an independent contractor, and requested to be processed for membership.

5. CalPERS' Membership Review Team (MRT) gathered information from Kosmont and Montebello. By letter dated March 23, 2020, CalPERS notified Kosmont of its determination he did not qualify for membership. (Exhibit 3.)

6. After CalPERS allowed him extensions of time, Kosmont appealed the determination on June 11, 2020. By his appeal, Kosmont sought a determination that "he is eligible by virtue of his work as the Interim City Administrator for the City of Montebello, to have his CalPERS membership reinstated." (Exhibit 4.)

7. The Statement of Issues is dated October 27, 2020.

8. Complainant served the Statement of Issues and Notice of the Hearing on Kosmont and Montebello. Montebello did not file a Notice of Defense or a request for hearing and did not attend the hearing. The default of Montebello is established, under the authority of Government Code section 11520, subdivision (a). Further statutory citations are to the Government Code unless otherwise noted.

9. All jurisdictional requirements have been met.

Kosmont's Prior Membership in CalPERS

10. On September 14, 1975, Kosmont established CalPERS membership by virtue of his appointment with the City of Santa Monica. When he separated from the City of Santa Monica on March 11, 1978, he left the funds contributed to CalPERS on his behalf on deposit.

11. Kosmont continued CalPERS membership by virtue of appointments with the City of Seal Beach from March 28, 1978, to August 1, 1980, the City of Bell Gardens from August 1, 1980, to September 21, 1983, and the City of Burbank from December 16, 1983, to August 1, 1986.

12. On March 3, 1989, Kosmont elected to receive a refund of his contributions into CalPERS. Kosmont received the refund, thereby terminating his CalPERS membership.

Contract Between Montebello and Kosmont & Associates, Inc.

13. Montebello is a public agency that contracts with CalPERS to provide retirement benefits for its qualifying employees, who are therefore governed by the PERL.

14. On May 12, 2011, Kosmont was appointed by Montebello as the Interim City Administrator (ICA) through Professional Services Agreement No. 2695 (Agreement) between Montebello and Kosmont & Associates Inc. (K&A), doing business as Kosmont Companies (Parties). The Agreement indicated K&A would perform the services as an independent contractor. The Agreement was to terminate on November 11, 2011. The compensation for the services was \$25,000 per month. The Agreement

included work for Montebello by both Kosmont and David Biggs, as Kosmont's assistant.

15. The Agreement, Section 2.a., describes K&A's services by reference to Attachment "A," which states the services were "immediate and comprehensive coverage" to Montebello "by providing the day-to-day services of [ICA]." Attachment "A" also designates the "Minimum time dedicated to perform services: 16 to 20 hours per week by Larry Kosmont" and "32 to 36 hours per week by David Biggs." Separate "primary responsibilities" are listed for Kosmont and Biggs. Kosmont's primary responsibilities are listed as:

- "1. Budget & finance/coordination with First Southwest & City staff
2. Council interface
3. Economic development
4. Media management
5. Serve as Executive Director of the Redevelopment Agency"

(Exhibit 10, pp. 1, 9.)

16. In the Agreement, Section 2.b., Montebello appoints Kosmont to serve as ICA "subject to and in accordance with the duties, responsibilities, procedures and authority of Title 2, Chapter 2.04 of the Montebello Municipal Code." (Exhibit 10, p. 1.)

17. Chapter 2.04.050 of the Montebello Municipal Code refers to the duties of the city manager generally as the administrative and management head of city

government. (Exhibit D.) In 18 subparagraphs, the ordinance refers to a non-exclusive list of specific duties of the city manager. Some of these more specific duties are to supervise and oversee the annual city budget including recommendations, preparing an annual report of financial and administrative activities, advising the City Council and attending City Council meetings, preparing rules and regulations for the conduct of administrative personnel, serving as personnel officer of the city, public relations, managing department heads and employees, approving expenditures, and signing contracts.

18. Section 13 of the Agreement is titled "PERS ELIGIBILITY INDEMNITY." Section 13.a. provides if K&A or its employee is determined to be eligible for enrollment in PERS as an employee of Montebello, K&A will indemnify Montebello for payment of employee and/or employer contributions for CalPERS benefits. Section 13.b. provides:

Notwithstanding any other agency, state or federal policy, rule, regulation, law or ordinance to the contrary, [K&A] and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any claims to, any compensation, benefits, or any incident of employment by CITY, including but not limited to eligibility to enroll in PERS as an employee of CITY and entitlement to any contribution to be paid by CITY for employer contribution and or employee contributions for PERS benefits.

(Exhibit 10, pp. 4-5.)

19. The Parties entered into two amendments to the Agreement, the first extending it to December 31, 2011, and the second extending it to March 31, 2021.

20. K&A submitted monthly invoices to Montebello. (Exhibit 11.) The invoices included the amount due (\$25,000 per month, plus some minor expenses) but did not list specific hours spent or services rendered. The final invoice was for the period from February 12 through March 11, 2012. Montebello paid all invoices.

21. By letter dated February 1, 2012, K&A notified Montebello it would discontinue providing services under the Agreement effective February 29, 2012. (Exhibit H.) In the letter, Kosmont noted during his tenure he was able to assist Montebello to respond to numerous challenges, place it on more stable financial footings, and arrange for a smooth transition to the new City Administrator.

CalPERS Audit and Related Events

22. The May 2014 CalPERS Audit determined Montebello had misclassified Kosmont as an independent contractor; rather, he “worked in the position of City Administrator in an employer/employee relationship during the fiscal year 2011/2012.” The Audit also found Montebello had not maintained records to determine whether Kosmont was eligible for CalPERS membership based on that employment. (Exhibit 14, p. 10.)

23. The Audit determined Montebello should have enrolled David Biggs as an eligible employee for membership in PERS, and his employment was in violation of the PERL. Biggs was notified and he appealed the determination. After an administrative hearing, CalPERS issued a Decision in 2018 that Biggs, who had retired from another contracting agency shortly before working for Montebello, had not complied with a requirement that he be separated for at least 60 days before

commencing other covered employment. The Decision noted Biggs was not an independent contractor; rather, he was an employee of Montebello. The Decision also referred to the Audit determination that Kosmont was an employee of Montebello. (Exhibit 15.) The ALJ hearing the Biggs case did not make a finding whether Kosmont was an independent contractor or employee; the ALJ only referenced the finding from the Audit that Kosmont was an employee.

24. On February 28, 2019, Kosmont requested in writing that CalPERS process his membership for benefits related to the time he worked for Montebello. (Exhibit 7.)

25. In October 2019, CalPERS Membership Review Team (MRT) and Membership and Post-Retirement Employment Determinations Team (MAPD) began to gather information to confirm whether Kosmont was a Montebello employee and other relevant information. By phone and email on October 21, 2019, MRT requested Kosmont send them all information he had about the period he worked for Montebello in 2011 and 2012. (Exhibit 8, p. 20.) There followed a series of emails providing information and attaching documents.

26. On October 31, 2019, MRT received confirmation from MAPD that Kosmont was correctly determined in the Audit to be an employee while working for Montebello, and not an independent contractor. MAPD had requested Montebello to provide hours and earnings information to determine if Kosmont qualified for membership. Montebello did not initially respond.

27. On November 26, 2019, MRT spoke with a Montebello employee by phone and sent a follow-up email requesting completion and return of form MEM-1344 (Request for Payroll Information), and copies of all supporting hiring documents

pertaining to Kosmont. MRT made several further attempts to gather information from Montebello.

28. Montebello sent form MEM-1344 and other relevant documents from to MRT on January 28 and 29, 2020. The form was completed by William Quan, who served in 2011 as Montebello's financial services supervisor and, as of 2018, became the Controller of Montebello. The form indicated Kosmont worked 20 hours from May 12 to May 21, 2011, and 40 hours for each two-week period from May 22, 2011, through March 10, 2012. (Exhibit 12.)

29. On March 23, 2020, CalPERS sent Kosmont a letter, with a copy to Montebello, of its determination he did not qualify for membership. The reasons cited included, in pertinent part: (A) to be considered full-time, an employee must work more than six months, but the term of the Agreement was one day less than six months; (B) Kosmont was not considered full-time because the Agreement stated his time base was 16-20 hours per week; (C) to be considered eligible as part-time, an employee must work for at least one year; and (D) employees who work less than full-time, such as on a limited term, must work at least 1,000 hours in a fiscal year. The letter concluded Kosmont was not eligible for CalPERS membership because he was hired to work only 16-20 hours per week, and he worked only 720 hours in fiscal 2011-2012. (Exhibit 3.)

30. Kosmont had changed address and did not receive CalPERS' March 23, 2020 letter. Emails were exchanged between MRT and Kosmont, and he later received the March 23, 2020 letter. The deadline to appeal the determination was extended due to the delay in Kosmont's receipt of the determination letter and Kosmont's difficulty due to Covid-19 restrictions to access his office to gather relevant information and documents.

31. In his appeal letter dated June 11, 2020, Kosmont indicated he was still gathering information and would show, through documents and testimonial evidence, he worked at least 1,000 hours for Montebello in fiscal year 2011-2012. (Exhibit 4.)

32. In a further exchange of emails, MRT inquired why Kosmont had not already submitted the supporting information. Kosmont replied his office was still closed and he would submit further information when he could gain access.

Additional Relevant Evidence

TESTIMONY OF WILLIAM QUAN

33. Quan testified credibly. He spoke with Montebello's payroll staff and Director of Human Resources for information on completing the MEM-1344 form. (Exhibit 12.) He reviewed Montebello's salary resolution (Exhibit E, indicating the salary of the City Administrator is \$195,000 annually), the Agreement, and the K&A invoices. He checked the box "Part-time (at least half-time)." To fill in the columns on the form titled "Pay Rate (per Hour, Day or Month)" and "Time Worked (in Hours)," Quan used the highest number of hours for Kosmont included in the Agreement, 20 hours per week, and the salary resolution to determine an hourly salary by dividing the annual salary by the standard number of work hours in a year. Quan did this conversion because the form requested that information, even though K&A was not paid by the hour. Above Quan's signature is a certification the information on the form was true and correct.

34. Quan had the completed MEM-1344 form reviewed by payroll staff before it was submitted to CalPERS. He does not recall if there were any further inquiries from CalPERS. Quan does not believe he communicated with Kosmont before completing the form.

TESTIMONY OF CHRISTINA ROLLINS

35. Christina Rollins testified credibly. She has worked for CalPERS as a Staff Services Manager (I and II) for nine and a half years and in April 2021 became the Assistant Division Chief/Staff Services Manager III in the Employer Account Management Division. She reviewed the process used by the MRT and concluded Kosmont did not qualify for CalPERS membership. The factors Rollins considered were Kosmont was a part-time employee of Montebello, he did not work for more than six months, and he did not work 1,000 hours. Rollins noted the fiscal year for Montebello ends on June 30. The MEM-1344 form established Kosmont worked between 100 and 140 hours in fiscal year 2010 to 2011, and 720 hours in fiscal year 2011 to 2012.

36. Rollins confirmed the efforts of MRT to gather information and documents. Although she expected the city manager position would be full-time, she noted the Agreement included duties for both Kosmont and Biggs, and more hours for Biggs than for Kosmont. Rollins was also aware Montebello had submitted a MEM-1344 form for Biggs indicating he worked full-time, 30 to 40 hours per week.

TESTIMONY OF LARRY KOSMONT

37. Kosmont has held administrative positions in numerous municipalities and gained experience in city management and governance. In Santa Monica he was the Administrative Assistant to the City Manager; in Seal Beach, he was the Assistant City Manager; in Bell Gardens, he was the City Manager and Executive Director of the Redevelopment Agency; and in Burbank, he was the Director of Community Development. Each position was full-time. In none of these positions did Kosmont track his hours worked. He withdrew his CalPERS contributions after he left Burbank in 1986. Kosmont understands and agrees if he is determined to be eligible for CalPERS

benefits based on his service for Montebello, he will be required to restore those contributions.

38. Kosmont testified credibly about the Agreement negotiation process, his work for Montebello under the Agreement, and his efforts to gather information to send to CalPERS. K&A had previously performed services for Montebello. The city manager had terminated services unexpectedly at a time Montebello was facing several challenges. Kosmont described the city as "dysfunctional." The Agreement was on a form customarily used by Montebello. The Agreement and its Exhibit "A" were drafted by the City Attorney. The process was expedited so Kosmont could start as soon as possible. Kosmont used the city manager's monthly salary and added the value of employment benefits to reach the cost of \$25,000 per month for K&A's services. The hours for Kosmont and Biggs were listed as minimums. According to Kosmont, Montebello personnel indicated they wanted his attention and expertise under the difficult financial circumstances faced by the city, and he intended to put in "as many hours as needed to right the ship." Montebello had over 500 employees at the time and a budget of over \$45 million.

39. Biggs continued to work with Kosmont during the first amendment of the Agreement and then left for another job. Another K&A employee sometimes assisted Kosmont thereafter. At some point, Montebello hired an Assistant City Manager who worked with Kosmont.

40. Kosmont performed the duties listed in the Agreement and in Chapter 2.04.050 of the Montebello Municipal Code. Kosmont worked primarily in the city manager's office in city hall, and also attended City Council meetings and other outside activities on behalf of Montebello. He used a city car and had a city-issued cell phone, business cards, and email address. He described the conference room in city

hall as his "war room." He was on call at all hours and brought work home. Kosmont described numerous events that increased the number and types of tasks in which he was required to engage. For example, on Kosmont's first day the State Controller's Office was in city hall, unannounced, to review documents.

41. In a presentation to the City Council covering events from May 2011 to February 2012, Kosmont listed various issues facing Montebello, various audits by outside agencies, corrective actions, and future planning. (Exhibit I.) In December 2011, the State of California directed all redevelopment agencies to be phased out and their funds transferred to the state budget. This was a further complication for Montebello, which had ongoing plans for use of those funds. Many of the audits were unexpected, and it was often necessary for Kosmont to work with Montebello employees to gather information, coordinate with the City Council, and respond to the auditing agencies.

42. Kosmont estimated he spent a "conservative" average of 50 hours during each week working for Montebello, with added hours for evening Council Meetings twice per month and other activities. Kosmont also attended three or four public meetings in January and February 2012 relating to the city budget. He took work home over weekends and answered phone calls after regular work hours. Under the Agreement, Kosmont was not required to document the hours he worked, and there was no record kept of those hours. Most of the municipalities contracted with K&A paid on a transactional basis, unrelated to the number of hours worked.

43. At the outset, Kosmont hoped to be able to do work for other K&A clients while working for Montebello but quickly discovered that this work needed to be reassigned to others. He focused almost exclusively on work for Montebello. Although Attachment "A" to the Agreement indicated Biggs would potentially work more hours than Kosmont, Kosmont testified Biggs never worked more hours than he

did. As described by Kosmont, Montebello got the benefit of two people filling in for the City Manager for the price of a single salaried manager. Kosmont felt this was fair, anticipated the arrangement would last for six months, and set his goal as placing Montebello on better footing financially and organizationally going forward.

44. Kosmont had no input in the preparation or contents of the form MEM-1334. He does not recall when he first saw form MEM-1344 listing his hours and compensation. When he did see it, he did not realize the number of hours he worked was an issue being examined by CalPERS.

TESTIMONY OF OTHER WITNESSES

45. Susan Perry testified credibly. She has worked with Kosmont for 31 years. She is currently Senior Vice President and in-house legal counsel of K&A. She described Kosmont Companies' activities as consulting primarily in the public sector on economic and real estate matters. She reviewed the Agreement before it was signed. She was not aware of any requirement for Kosmont to document his hours. Shortly after he started working for Montebello, Kosmont and Perry re-assigned his other projects to other K&A employees so Kosmont could concentrate on Montebello. Perry described the city as "in crisis." Kosmont usually worked in the company office in Los Angeles but, during the span of the Agreement, he was "virtually never there." If Perry needed to contact Kosmont she would call Montebello city hall.

46. William Molinari testified credibly. He served on the Montebello City Council from April 1982 to November 2018, with a two-year hiatus between 1987 and 1989. He was aware of the process to interview and hire K&A and knew of Kosmont's services to public agencies. The council members worked closely with Kosmont. Molinari was at city hall often, as the times were "turbulent." He observed Kosmont

there, more often than he observed Biggs. Molinari was aware of seven audits by state and local agencies during Kosmont's tenure. There were serious budget issues to address. He estimated Kosmont worked "considerably more" than a standard 40-hour workweek. When he was shown the form MEM-1344, Molinari testified the inclusion of 40 hours per each two-week period was not correct. It underestimated Kosmont's hours.

47. Molinari recalled an incident where a truck crash and fire threatened access to and the continuing operation of a large regional shopping mall during December 2011, requiring Kosmont to coordinate with Caltrans and the shopping center to have repairs made quickly. The shopping center was the source of substantial tax revenue for Montebello.

48. According to Molinari, Kosmont was the full-time City Manager, who worked weekdays and weekends, "more than a normal workweek," to help stabilize the city. Near the end of the Agreement and the amendments, Montebello was recruiting for a permanent City Manager.

49. Lillian Guzman testified credibly. She worked for Montebello for over 22 years, starting as a clerk typist and rising through other positions to Deputy City Clerk. Guzman retired in December 2020. During Kosmont's tenure, she was the office manager and assistant to the City Manager, with her workstation by the City Manager's office. In addition to regular work hours 7:30 a.m. to 5:30 p.m., Monday to Friday, Guzman also worked with Kosmont at City Council meetings and other special meetings. According to Guzman Kosmont often worked in the office after 5:30 p.m. She did not agree that his hours were 40 hours every two weeks. Kosmont "definitely" worked more hours; she said he was "super busy" and worked at least 40 hours per week.

DOCUMENTARY EVIDENCE

50. Kosmont submitted several letters, a Power Point presentation, and several news articles relating to his work for Montebello. (Exhibits G and I-N.) The letters addressed different aspects of his work for the city. The Power Point presentation included the status of his management and financial turnaround efforts and a mid-year financial review. The articles addressed various issues faced by Montebello at the time, including the sudden resignation of the prior City Administrator and the city's dire financial circumstances, federal review of the use of housing funds, stabilization of city finances and its credit rating, and the effects of the tanker truck crash in mid-December 2011.

LEGAL CONCLUSIONS

1. Under the PERL, a "contracting agency" means any public agency that has elected to have any of its employees become CalPERS members and has contracted with the CalPERS Board of Administration (Board) for that purpose. (Code, §§ 20022, 20021.) Montebello is a contracting agency. (Factual Finding 13.)

2. A person properly characterized as an employee of a contracting agency on the effective date of its contract with the Board becomes a CalPERS member immediately. (Code, §§ 20028, 20281.)

3. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions, and by interest and other earnings on those contributions. The amount of a member's service retirement allowance is calculated by applying a percentage figure, based upon the member's age on the date of retirement, to the member's years of service, and the member's final compensation.

4. In this matter, Kosmont seeks treatment as an employee of a contracting agency to be eligible for a service retirement allowance or other CalPERS benefits. When reviewing the denial of an application for benefits, the burden of proof is on the applicant. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; *Greator v. Board of Administration* (1979) 91 Cal.App.3d 54, 57 [retirement benefits]; *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044.) The standard of proof is by a preponderance of the evidence (Evid. Code, § 115), which means evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567; see also Code, § 20160, subd. (d).)

5. The PERL determines membership in CalPERS. The common law employment test is part of the criteria used by CalPERS and the courts to determine "employee" or "independent contractor" status under the PERL. (*Metropolitan Water District v. Superior Court (Cargill)* (2004) 32 Cal.4th 491) [the terms "independent contractor" and "employee" of a contracting agency must be defined with reference to California common law]). Courts use the common law test of employment when a statutory scheme refers to the term "employee" without defining it. (*Cargill, supra*, 32 Cal.4th at 500-501). Factors to determine whether one performing services is an employee or independent contractor are found in *Empire Star Mines Co. v. California Employment Commission* (1946) 28 Cal. 2d 33, 43-44, revd. on other grounds (1982) 32 Cal.3d 468.)

6. The Agreement stated K&A employees would function as independent contractors. Under all the circumstances, Kosmont functioned as an employee of Montebello. The CalPERS determination Kosmont was misclassified by Montebello as

an independent contractor is supported by the law and the facts. (Factual Findings 13-50.)

7. The Agreement, paragraph 13b, stated K&A employees waived all claims to be treated as eligible employees for purposes of enrollment in CalPERS for entitlement to benefits. However, eligibility for CalPERS enrollment is created by statute, the PERL, and does not depend on the classification or characterization of an employee by the contracting agency. (*Cargill, supra*, 32 Cal.4th at 503-505.) The statutory definitions established by the Legislature cannot be qualified by bargaining agreements between the parties. (*Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578.) As noted in Code section 20125, the "board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system."

8. It is noteworthy both parties, in their briefs filed after the hearing, contend the waiver in the Agreement is not enforceable. (Exhibit 16 and Exhibit Q.) Under all the circumstances, paragraph 13b of the Agreement is not enforceable.

9. As noted below and elsewhere in the PERL, there are several requirements to be met for an employee of a contracting agency to be eligible for benefits from CalPERS. In this matter, in emails, letters, and at the administrative hearing, the parties concentrated on the number of hours Kosmont worked in fiscal year 2011-2012. Kosmont contends he worked more than 1,000 hours. CalPERS contends he did not and had not submitted sufficient evidence to conclude otherwise.

10. Code section 20305, subdivision (a), provides an employee with a contract of less than six months is excluded from membership in CalPERS unless certain conditions occur. It states, in pertinent part:

(a) An employee whose appointment or employment contract does not fix a term of full-time, continuous employment in excess of six months is excluded from this system unless: [P] . . . [P]

(3) His or her employment is, in the opinion of the board, on a seasonal, limited-term, on-call, emergency, intermittent, substitute, or other irregular basis, and is compensated and meets one of the following conditions:

(A) The appointment or employment contract does not fix a term of full-time, continuous employment in excess of six months, but full-time employment continues for longer than six months, in which case membership shall be effective not later than the first day of the first pay period of the seventh month of employment.

(B) The person completes . . . 1,000 hours within the fiscal year, in which case, membership shall be effective not later than the first day of the first month following the month in which . . . 1,000 of service work completed. . . .

Under subdivision (b), Code section 20305 supersedes any contract provision excluding persons in any temporary or seasonal employment.

11. CalPERS determined Kosmont was not a full-time employee because it determined the contract, here the Agreement, was for one day less than six months in duration, and Kosmont was not full-time because the reference to Kosmont's time base in the Agreement was 16 to 20 hours per week. Further, if Kosmont was

considered less than full-time, he was excluded from membership unless he worked 1,000 hours in a fiscal year. According to form MEM-1344, Kosmont's time base was part-time (at least half-time) and he had worked 720 hours in fiscal year 2011-2012. Therefore, CalPERS determined in good faith based on the available information Kosmont was not eligible.

12. The evidence submitted at the administrative hearing augmented the information regarding the number of Kosmont's work hours. The fiscal year 2011-2012, as applied to Kosmont, was comprised of the period from July 1, 2011, to February 29, 2012, approximately 36 weeks. The uncontested testimony is that he worked, conservatively, 50 hours per week, plus work for additional meetings and responsibilities. This computes to a minimum of 1,800 hours. The 50-hour per week figure is also a reasonable basis for use in determining when Kosmont exceeded 1,000 hours. At 50 hours per week, Kosmont would have accumulated 1,000 work hours as of completing his 20th week of work for Montebello in fiscal year 2011-2012.

//

//

//

//

//

//

//

//

13. Although Kosmont could not provide an absolute number of his work hours, what is required under the PERL is that he worked more than 1,000 hours to establish eligibility. Form MEM-1344 was compiled without reference to Kosmont's actual hours worked and is based on assumptions that were not supported by the evidence; that is, the assumption the minimum hours stated in the Agreement were the actual number of hours worked by Kosmont. The preponderance of the evidence established Kosmont worked more than 1,000 hours for Montebello in fiscal year 2011-2012.

ORDER

1. The appeal of respondent Larry Kosmont is granted.
2. Respondent has satisfied the eligibility criteria of Government Code section 20305, subdivision (a).
3. CalPERS shall determine whether respondent has satisfied other legal requirements for eligibility.

DATE: 11/24/2021

David Rosenman

DAVID B. ROSENMAN

Administrative Law Judge

Office of Administrative Hearings