

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Statement of Issues Against:

ROBERT TOERING,

Respondent,

and

CITY OF VERNON,

Respondent.

Case No. 2013-0619

OAH No. 2013110133

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, on December 11, 2013, in Santa Rosa, California.

The California Public Employees' Retirement System was represented by Cynthia A. Rodriguez, Senior Staff Attorney.

Respondent Robert Toering was present and represented himself.

Respondent City of Vernon was not represented at the hearing. The city submitted a pre-hearing statement and memorandum of points and authorities in which it indicated the city concurred with the CalPERS position in the case and asked that its submission, marked as Exhibit R-11 for identification, be considered in lieu of a personal appearance.

The matter was submitted for decision on December 11, 2013. Immediately after the record was closed, with the consent of the parties present at the hearing, Exhibit R-10, which had previously been marked for identification, was received in evidence.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED Jan 2nd 2014
C. Bodily

SUMMARY

From December 2007 until December 2010, Robert Toering was an employee of the City of Vernon. By virtue of that employment, Toering was a member of CalPERS. Prior to that employment, from August 2002 until December 2007 Toering had worked as a consultant for the city under a series of contracts, each of which had identified him as an independent contractor. In October 2009, Toering requested that CalPERS credit him with membership service for the August 2002-December 2007 period during which he had worked as an independent contractor. In October 2010, CalPERS notified Toering that its review of the evidence indicated an employee/employer relationship had existed between Toering and the city for the period beginning April 1, 2004, but not before, and that he qualified for CalPERS membership on April 1, 2004. However, in June 2012, CalPERS “reversed” that determination and essentially denied Toering’s request, finding there was insufficient evidence to find Toering was a city employee for other than a few months of the period in question. Toering appealed.

It is concluded that CalPERS’s initial October 2010 determination was correct: an employee/employer relationship had existed between Toering and the City of Vernon for the period beginning April 1, 2004, but not before, and Toering therefore qualified for CalPERS membership on April 1, 2004. Toering’s appeal is granted in part and denied in part.

FACTUAL FINDINGS

Procedural Background

1. The City of Vernon is a contracting agency with CalPERS and its qualifying employees are members of CalPERS. Excluded from CalPERS membership are “independent contractors who are not employees.” (Gov. Code, § 20300, subd. (b).)
2. Robert Toering began working for Vernon in August 2002 under a “Consulting Services Agreement” that characterized him as an independent contractor. The city did not offer Toering CalPERS membership through this employment. Toering continued to work under a series of consulting services agreements characterizing him as an independent contractor until December 19, 2007, the effective date of an employment agreement appointing him to serve as both the Executive Director of the Redevelopment Agency of the City of Vernon and the city’s Assistant Director of Industrial Development. This employment entitled Toering to CalPERS membership.
3. In October 2009, Toering submitted to CalPERS a “Request for Service Credit Cost Information – Service Prior to Membership, CETA & Fellowship” form and a cover letter seeking CalPERS membership for the August 2002-December 2007 period during which he had worked under consulting services agreements. In support of his request, in

August 2010 Toering submitted, through his attorney, each of the four consulting services agreements, the November 2007 employment agreement, and a letter from the attorney discussing the “common law test for employment.”

4. CalPERS staff conducted a review of the working relationship between Toering and Vernon during the period in question to determine whether Toering was, in fact, a city employee for all or part of the time he worked under consulting services agreements. On December 30, 2010, Retirement Program Specialist II Ron Gow sent a letter to Toering stating, in pertinent part:

The agreements dated August 14, 2002 and August 14, 2003 do not provide conclusive evidence to support a determination under the common law control test. Absent such evidence of control by the City, CalPERS must accept the language of the agreement itself which clearly states that the consultant is an independent contractor.

Although the agreement of April 1, 2004 contains similar language, it also contains extensive language indicating direct control by the City. Such language includes: consultant serves at the direction of the City Administrator, consultant shall provide additional hours as requested by the City Administrator, expenses and/or additional staff must be approved by the City Administrator, and the City may cancel the agreement at any time without cause.

Because the level of control by the City indicates an employee/employer relationship, and because the terms of employment are greater than half-time for three years, this employment qualified for membership on April 1, 2004. CalPERS will be contacting the City for payroll information for this time period to calculate the arrears contributions.

5. Sometime in 2010, prior to the issuance of Gow’s letter to Toering, CalPERS had begun an audit of the City of Vernon. As explained in a June 13, 2011 memo from Gow to his manager, the audit was triggered by “questions raised by public inquiries following recent events in the cities of Bell and Maywood, as well as internal CalPERS concerns about past service credits and safety formulas for certain employees of [Vernon].”

Gow reported in his memo that “preliminary information surfacing in the audit raised questions about the City’s contract employees, and its contracting process in general.” In March 2011, the lead auditor had “expressed concern about inconsistencies between some of the contracts and their supporting financial documents,” and it was agreed that more research was needed on contract employees. As a result, pending receipt of additional information

from the city, Gow had “placed Mr. Toering’s case on hold.” Gow reported to his manager that he had subsequently received information from the city concerning Toering’s compensation that “appear[ed] to contradict previous information supplied by Mr. Toering.” Gow concluded his memo by stating:

My initial determination of December 2010 was that Mr. Toering should be deemed an employee beginning with the contract of April 1, 2004. This is a “soft” decision, as this period of time could arguably still be considered to be an independent contractor, however my analysis was that the changes to the contract effective that date were sufficient to tip the balance more toward an employee/employer relationship. The contract of March 5, 2007, is not soft at all. Mr. Toering is definitely an employee under the terms of that contract, . . .

Although many of the concerns raised by the audit remain, the additional documentation [the lead auditor] received in response to his inquiry does not appear to bear directly on Mr. Toering’s case. [The lead auditor] believes that none of these contracts should be allowed without more information, which the City appears unable to provide. While his concerns are entirely valid regarding the City’s practices in general, many of those concerns are not specific or pertinent to a membership determination, nor are they specific to Mr. Toering. Absent the additional information audits is seeking, the period of April 2004 to March 2007 is borderline at best. A questionnaire will be sent to Mr. Toering and the City to try and elicit further information.

My recommendation is to proceed with a determination of [city-owned] arrears from March 5, 2007 through November [sic] 17, 2007, as there is no doubt that period is as an employee. The time period from 2004 to 2007 needs further review. Although the contract language appears to lean more toward a common law finding of employment, it is not clear just what that employment was. Answers to the questionnaires may provide more information. The time period 2002-2003 requires no further review. He is clearly not an employee for that time.

6. Toering completed the questionnaire in great detail, returning it to CalPERS on August 29, 2011. No evidence was presented concerning any questionnaire the city may have completed.

7. The results of the CalPERS audit of the City of Vernon were released in April 2012. The audit was quite damning. It included findings that the city had hampered the

audit by failing to provide information necessary to determine the accuracy of retirement benefits, reportable compensation, and membership in the retirement system; that the city had improperly combined payrates, amended required hours of work while continuing to pay and report full-time earnings, increased hourly rates paid outside of regular earnings, and assigned concurrent multiple positions while reporting one full-time payrate; that the city had submitted erroneous information to support the enrollment of ineligible individuals into CalPERS membership; that the city had failed to notify CalPERS when its former mayor was convicted of perjury related to his official duties as mayor and was ordered to repay all benefits received during his final term of office; that the city had incorrectly reported city attorneys as safety members entitling them to enhanced retirement benefits; that the city had reported earnings that exceeded the compensation limit established by the Internal Revenue Code; that the city had reported to CalPERS payrates that improperly included compensation that was not reportable; and that the city had improperly reported items of special compensation as part of base payrates.

8. On June 15, 2013, CalPERS notified Toering that it had completed an audit of the City of Vernon and that he was one of the individuals whose records had been sampled during that audit. The letter stated that CalPERS had “reviewed all information available from 2002 through the present in regards to your eligibility for membership in CalPERS . . .” and had made five “formal” determinations: (1) that he may have qualified for CalPERS membership in March 2007, rather than December 2007 as reported by the city; (2) that he was working in an ineligible position for a portion of the period beginning December 2007; (3) that his work hours from December 19, 2007 to December 18, 2010 could not be verified; (4) that he was an independent contractor and not an employee from August 14, 2002 until March 2007; and (5) that his final compensation could not be determined.

As to determination (4), concerning Toering’s status as either an independent contractor or an employee, the letter stated that CalPERS had revised the determination made in December 2010 that he was an employee from April 1, 2004 forward. The letter stated:

Our decision regarding the agreements dated August 14, 2002 and August 14, 2003 remains unchanged. The agreements do not provide conclusive evidence to support a determination under the common law control test. Although the April 1, 2004, contract contains language that appears to meet common law control criteria, the City has been unable to document specific duties or service that would provide evidence of such control. Additionally, the City has provided conflicting information regarding the invoicing of your consulting services that indicate hours being billed for multiple people under your contract.

. . . CalPERS looked to the California common law employment test to determine whether your status at the City was as an employee or independent contractor. [¶] . . . In determining whether one who performs services for another is an employee

or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the desired result. If an 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. Other factors to be taken into consideration are (a) whether or not the 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 job; (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; [and] (g) whether or not the parties believe they are creating the relationship of employer-employee. [Citations omitted.]

[¶]

CalPERS has concluded that absent conclusive evidence of employment in a valid City function or position, service under the agreements prior to March 5, 2007 is as an independent contractor, and not as an employee, and therefore excluded from membership in CalPERS by [Government Code] Section 20300(b).

9. Toering appealed all of these determinations on July 6, 2012. The parties have stipulated, however, that the only determination in issue in this proceeding is whether Toering was an independent contractor or an employee for the period before March 5, 2007. A finding that he was an independent contractor during that period would render Toering's appeal of the remaining determinations moot since he would be left without sufficient CalPERS membership service to qualify for retirement benefits. If a finding is made that Toering was an employee, the parties will meet and confer to determine mutually agreeable hearing dates to try the other four determinations made in the June 15, 2013 denial letter.

Toering's contracts with the City of Vernon

10. From January 1989 until December 1995, Toering was the president of NI Industries, a manufacturing firm that was the second largest employer in the City of Vernon. After he left NI Industries, Toering started his own business-consulting company. Initially operating as a sole proprietorship, Toering converted his business into a limited liability company, Concept Engineering Group, LLC, (CEG) in 2000.

11. In mid-2002, Toering was contacted by Bruce Malkenhorst, at the time the City of Vernon's city administrator, who inquired about Toering's availability to provide consulting services for the city. Toering subsequently met with Malkenhorst and then-city attorney Eduardo Olivo, who informed Toering they were looking for someone to gather information about the business community's view of the city and to give the city's businesses information provided by the city. Toering agreed to provide the services and gave Olivo a copy of CEG's standard consulting contract, which Olivo modified to meet the city's needs.

12. The city and CEG entered into a "Consulting Services Agreement" effective August 14, 2002. The contract was for a six-month term, with the city having the right to unilaterally extend it for an additional six months. The agreement included the following "Description of Services":

Concept Engineering Group, LLC will supply the following strategic consulting services to the CITY with the express purpose of educating the City's business and property owners regarding policies and legislation that have been implemented by CITY.

1. Conduct individual meetings with the Vernon business leaders and educate them on the official CITY position and rationale on issues such as taxation and fees.
2. Educate the business leaders of Vernon [on] the CITY's continuing efforts to promote industry and how such efforts impact their businesses.
3. Accumulate feedback and identify key "issues" in the minds of Vernon business owners/managers and Vernon property owners.
4. Provide city management with feedback and coherent assessment of the CITY's education efforts.
5. Assist CITY in developing a long-term strategy for the further education of its constituency – residents, landowners, and businesses.
6. Meet with ancillary organizations, such as Chamber of Commerce, to further coordinate the improvement of the City's education efforts.

CEG was required to supply the city with a specified list of "Deliverables" – written reports that were to be prepared either weekly or periodically.

The contract provided that, "Because of his prior years of leadership within the Vernon business community, Mr. Robert Toering (the President of Concept Engineering Group, LLC) will personally perform the efforts addressed by this proposal."

A clause entitled "Relationship of Parties," provided:

It is understood by the parties that CONSULTANT is an independent contractor with respect to CITY, and not an employee of CITY. CONSULTANT shall not receive any other compensation from the CITY or participate in or receive benefits under any of the CITY's employee fringe benefit programs or receive any other fringe benefits from the CITY on account of services rendered hereunder (including without limitation health, disability, life insurance, retirement, pension and profit sharing benefits), . . .

13. At the end of the contract's six-month term, the city extended it for another six months. Effective August 14, 2003, the parties entered into a second "Consulting Services Agreement" that was virtually identical to the first. The contract included the same "Description of Services," "Description of Deliverables," specification that Toering was to personally provide the itemized consultation services, and recitation that CEG/Toering was acting as an independent contractor rather than a city employee, as the earlier agreement. The term of this contract was 12 months.

14. Several months before the expiration of the August 14, 2003 agreement, the parties entered into an entirely new agreement. The new "Consulting Service Agreement," effective April 1, 2004, no longer included a specified list of consulting services to be provided. Instead, the contract included the more expansive provision that, "Consultant will perform Consultant services for the City, as directed by the City Administrator, or his authorized designee." Another clause stated that CEG would provide a minimum of 1,500 hours of "Mr. Robert Toering's time each Contract Year to the City for Consultant services as requested and directed by the City Administrator or his authorized designee." An additional provision of the contract stated that "The Consultant may employ additional personnel in conjunction with the discharge of Consultant's duties to the City, . . . as approved and directed by the City Administrator or his authorized designee, for whatever purpose the City Administrator deems appropriate." A clause entitled "Independent Contractor" provided that "Consultant and the agents and employees of Consultant in the performance of this Agreement shall act in an independent capacity and not as officers or employees or agents of the City." The term of this agreement was three years, from April 1, 2004 to March 31, 2007.

15. Shortly before the April 1, 2004 agreement expired, it was replaced with a new "Consulting Service Agreement" effective March 5, 2007. Rather than between the City of Vernon and CEG, this one was between the city's Redevelopment Agency (RDA) and CEG. It provided that "Consultant shall cause Robert J. Toering to act as the Executive Director of the RDA at the will and pleasure of the Board of Directors of the RDA and will perform Consultant services for the RDA and for the City of Vernon, as directed by the RDA's Legal Counsel, or his authorized designee." The agreement further provided that "Consultant hereby agrees to provide consulting services of Mr. Robert J. Toering as requested and directed by the RDA." Like the preceding agreement, this new contract contained a provision that "The Consultant may employ additional personnel in conjunction with the

discharge of Consultant's duties to the RDA, . . . as approved and directed by the Legal Counsel or his authorized designee, for whatever purpose the Legal Counsel deems appropriate," and included an "Independent Contractor" clause providing that "Consultant and the agents and employees of Consultant in the performance of this Agreement shall act in an independent capacity and not as officers or employees or agents of the RDA." The term of this agreement was one year.

16. Before the March 5, 2007 agreement expired, on November 19, 2007, the city entered into an "Employment Agreement" with Toering, hiring him effective December 19, 2007, as both the Executive Director of the RDA and the city's Assistant Director of Industrial Development. The term of this agreement was three years. After entering into this agreement, Toering dissolved CEG. Toering's city employment was terminated at the end of the contract's three-year term, in December 2010.

Work performed under the consulting services agreements

17. Each of the consulting services agreements required CEG to submit monthly invoices to the city. In support of those invoices, Toering prepared and submitted to the city monthly activity summaries showing the number of hours billed each day and the tasks involved in accruing those hours. Some of the CEG invoices and activity summaries were provided to CalPERS during the time it was investigating Toering's request for retroactive membership service credit. It is unclear how many of these invoices and summaries were provided, and by whom. At the hearing, Toering presented the activity summaries for all but four months of the August 2002 through December 2007 period. The only summaries Toering was unable to locate were those for May through August 2004. The activity summaries show the nature of work Toering provided each day.

18. As the consulting services agreement of August 2002 indicates, the city's purpose in hiring CEG and Toering to perform consulting services was primarily to "educate" the city's business and property owners. In their discussions with Toering, city leaders termed this effort as "outreach" to the business community. He was provided with business cards identifying him as the city's "Outreach" representative. Activity summaries for the first 10 months of Toering's work with the city show that virtually all of his time was spent on "outreach visits" to city businesses. From time to time, the city administrator, Malkenhorst, or the city attorney, Olivo, would assign him other tasks that were not included in the consulting services agreement's "Description of Services."

As time went on, Malkenhorst or Olivo increasingly assigned Toering tasks outside those specified in the August 2002 and August 2003 consulting services agreements. By the summer of 2003, Toering was spending less time on outreach activities and more on other tasks he had been assigned, such as creating the Coalition Against Railroad Acquisition, which was to try and prevent railroads from buying up city land, and working on a city "business incubator." About this time, Malkenhorst designated Eric Fresch as Toering's supervisor. Fresch gave Toering more and more assignments outside the scope of the agreement. The activity summary for September 2003 shows that much of Toering's time

that month was spent working on projects for Fresch and meeting with city staff. Except for the occasional outreach visit, which occurred at business sites, the bulk of Toering's time was spent working in city offices.

19. In October 2003, Malkenhorst and Fresch asked Toering to hire someone else to handle outreach duties so that he would be more available for other assignments. Malkenhorst directed Toering to hire Albert Robles for this purpose. The December 2003 activity summary shows that all outreach activities that month were handled by Robles while Toering worked on various other assignments. Other than for a few hours in March 2004, Toering no longer spent any time on outreach, the original purpose of his hiring. From this point forward, Toering essentially worked on assignment from Malkenhorst and/or Fresch, who became the city attorney in early 2004.

20. It may have been recognition of this change in the nature of Toering's services that led the city to terminate the August 2003 agreement and replace it with the more expansive April 2004 agreement that required Toering to perform consultant services at the request and direction of the city administrator or his designee.

21. By the time of this new agreement, Toering was spending nearly all his time working in city offices and with city employees. As early as 2005, Toering began getting assignments related to the city's Redevelopment Agency. He was surprised in March 2007 when the city, instead of rolling over the prior consulting service agreement, wrote a new contract naming him as executive director of the RDA. Although he got a significant increase in pay and a title, his job duties did not change; he continued doing the same work he had been doing under the prior contract. And the nature of the work he was doing, and the manner in which it was assigned to him, did not change after he received the subsequent employment contract in December 2007.

Discussion

BURDEN AND STANDARD OF PROOF

22. In its June 2013 denial letter, CalPERS concluded there was no "conclusive evidence" to show Toering was an employee rather than an independent contractor. The same language was used in the December 2010 letter in regard to the August 2002 and August 2003 agreements. In letters to CalPERS, Toering's attorney contended that CalPERS had misplaced the burden of proof on Toering. He asserted, "[I]t is well established that a worker providing services is presumed to be the common law employee of the recipient of those services and that the party attempting to overcome this presumption bears the burden of proving [by a preponderance of the evidence] that the worker provided those services as an independent contractor. [Citations omitted.]"

23. While there is a presumption of employment, the fact Toering signed contracts in which he acknowledged he was an independent contractor is enough to overcome the presumption and shift the burden back to him to present sufficient evidence to demonstrate

he was an employee and not an independent contractor. In its letters, CalPERS repeatedly used the phrase “conclusive evidence.” However, there is no “conclusive evidence” standard of proof in California. Absent statutory or case law establishing a different standard, the degree of proof required is “a preponderance of the evidence.” (Evid. Code, § 115.) In this proceeding, therefore, Toering must demonstrate by a preponderance of the evidence that he was an employee, rather than an independent contractor, during the time period in question.

COMMON LAW EMPLOYMENT TEST

24. In its June 15, 2013 denial letter to Toering, CalPERS explained the test it used to determine whether Toering’s status was as an employee or an independent contractor. CalPERS stated:

The common law employment test is used by the courts and the CalPERS Board of Administration to determine “employee” or “independent contractor” status under the [Public Employees’ Retirement Law]. [Citation omitted.] In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the desired result. If an 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.

Although the denial letter also cited a number of other factors that may be taken into consideration in determining employment v. independent contractor status (see Finding 8, above), it is clear that CalPERS relied almost entirely upon the question of control:

- The December 30, 2010 letter that initially informed Toering CalPERS had concluded he had been an employee since April 1, 2004, stated the determination had been made “under the common law control test.” That letter went on to state that “the level of control by the City indicates an employee/employer relationship.”
- In the June 15, 2013 denial letter, CalPERS reversed this determination, stating: “Although the April 1, 2004, contract contains language that appears to meet common law control criteria, the City has been unable to document specific duties or service that would provide evidence of such control. Additionally, the City has provided conflicting information regarding the invoicing of your consulting services that indicate hours being billed for multiple people under your contract.”

Other than this last reference to the city having provided conflicting information because others were being billed under the CEG contract, nowhere does CalPERS indicate it considered factors besides the “common law control test.”¹

APPLICATION OF COMMON LAW EMPLOYMENT TEST

25. As pointed out in Gow’s June 2011 memo to his manager, the lead auditor of the City of Vernon audit had raised valid concerns regarding the city’s practices in general and believed that “none of [Toering’s] contract should be allowed without more information.” But as Gow also pointed out, many of those concerns were not pertinent to a membership determination (which is the issue in this proceeding), nor were they specific to Toering. Although Toering subsequently provided “more information” with his detailed answers to the questionnaire CalPERS sent him, apparently because the city had failed to provide “more information,” Toering’s claim was ultimately denied.

It appears that Toering’s claim is being considered less favorably because he is being tarred with the brush that is Vernon. But the fact that the city was a bad actor in seeking unjustified CalPERS benefits for other employees, hampering the audit by failing to provide requested documents, and failing to provide documents deemed necessary to determine Toering’s claim, does not serve as a reason to deny that claim. Toering cannot be held accountable for Vernon’s actions. His claim must be judged on its own merits, and not colored by the city’s actions or the audit condemning those actions. Toering has presented evidence that in other cases would almost certainly be deemed sufficient. There is no reason why it should not be deemed sufficient in this case.

26. The City of Vernon may have failed to provide documentation to verify the types of duties Toering performed and the sort of control the city administrator and city attorney had over those duties, but Toering has – through the monthly activity summaries he submitted to the city with his invoices, the questionnaire answers he sent to CalPERS in August 2011, and his testimony at the hearing. All of that evidence shows that the determination CalPERS initially made in December 2010 was correct: although the consulting service agreements under which Toering worked from April 1, 2004, until December 19, 2007, identified him as an independent contractor, the circumstances of his employment show that he was actually in an employee/employer relationship with the City of Vernon.

The language of the April 1, 2004 and March 5, 2007 consulting service agreements shows that the city closely controlled the assignments upon which Toering worked. As the agreements provided, Toering provided services “as requested and directed,” first by the city administrator or designee, and later by the RDA’s legal counsel or designee. Toering, as

¹ CalPERS’s reliance upon the control test was entirely appropriate as “[t]he right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship and the other matters enumerated constitute merely ‘secondary elements.’” (*Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, 950.)

president of CEG, was not even free to hire additional personnel in conjunction with his duties. It was first the city administrator and later the RDA legal counsel who “approved and directed” the hiring of additional personnel “for whatever purpose the City Administrator [or Legal Counsel] deemed appropriate.” There is simply no question that from April 1, 2004, forward, Toering worked at the pleasure of city leaders.

From at least April 1, 2004, forward, Toering spent almost all his time working in city offices, using city-owned equipment and supplies. Toering also worked essentially the same schedule as city employees. City employees worked a 4/10 schedule, with Fridays off. The activity summaries from April 2004 forward show that Toering also generally worked a four-day week.

Although the June 2013 denial letter referenced “conflicting information” from the city related to others being billed under the CEG contract, this does not undercut Toering’s claim to employee status. Each of the other “consultants” for whom CEG billed the city could only have been hired at the express direction of the city – not Toering – to do work ancillary to Toering’s. Toering did not control or supervise the other individuals’ work, and they did not do work that he was contracted to perform. The fact that other consultants were billed under the CEG contract did not diminish the work Toering personally did for the city, under the direction, pleasure and control of the city administrator, city attorney, and RDA legal counsel.

27. For the period prior to April 1, 2004, the evidence concerning Toering’s employment relationship is not as clear. The evidence shows that Toering’s duties under the August 2002 and August 2003 consulting services agreements evolved over time, with the amount of control being exercised over him increasing and the nature of his employment relationship morphing from one of an independent contractor to one of an employee. But absent the clear and direct recognition of this change evidenced in the new language of the April 1, 2004 agreement, it is simply impossible to determine an earlier date when Toering’s status crossed over from one of independent contractor to one of city employee. Because the burden in this regard is on Toering, it must be concluded that he has failed to present sufficient evidence to show an employer/employee relationship any time prior to April 1, 2004.

LEGAL CONCLUSIONS

1. The evidence presented established that Robert Toering was in an employer/employee relationship with the City of Vernon from April 1, 2004, until he was terminated by the city in December 2010. During that time period, Toering was not excluded from CalPERS membership under Government Code section 20300, subdivision (b).

2. The evidence presented failed to establish that Robert Toering was in an employer/employee relationship with the City of Vernon from August 14, 2002 until March 31, 2004. During this time period, Toering’s status was as an independent contractor and he

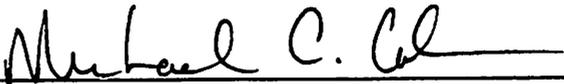
was excluded from CalPERS membership under Government Code section 20300, subdivision (b).

ORDER

The appeal of respondent Robert Toering is granted in part and denied in part. Toering is entitled to CalPERS membership for the period beginning April 1, 2004, but not before.

The parties shall meet and confer to determine mutually agreeable hearing dates to adjudicate the other four determinations (set forth in Finding 8) made in the June 15, 2013 denial letter.

DATED: 12/31/13



MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings