ATTACHMENT C

RESPONDENT'S ARGUMENT

Attachment C

RESPONDENT TOERING'S ARGUMENT TO ADOPT PROPOSED DECISION

THE ISSUE:

Should Respondent Robert J. Toering be excluded from CalPERS membership for the period from August 14, 2002 to December 18, 2007 or should Respondent be included in CalPERS membership for any portion of that time period.

THE CIRCUMSTANCES:

Respondent Robert J. Toering worked for the City of Vernon from August 14, 2002 until December 18, 2010. Respondent Toering was employed under a total of five contracts (four with City of Vernon and one with Vernon RDA) – Contract A from 8/14/2002 thru 8/13/2003, Contract B from 8/14/2003 thru 3/31/2004, Contract C from 4/1/2004 thru 3/4/2007, Contract D (RDA) from 3/5/2007 thru 12/18/2007, and Contract E from 12/19/2007 thru 12/18/2010. During those 8 years and 4 months, the nature of the work performed by Respondent evolved from an independent contractor relationship to an employee/employer relationship.

The wording of the first two contracts (Contract A and Contract B) was clearly intended to establish an independent contractor relationship and specified actions and deliverables appropriate for an independent contractor. However, during the 19 months actually covered by the first two contracts, Vernon management assigned Respondent more and more tasks that fell outside the written contractual scopes, until essentially none of Respondent's assignments were within the scope of the contract and all were being directly controlled by Vernon management.

In late 2003, the Vernon City Administrator acknowledged that the Respondent's actual work assignments were all outside the scope of the contract (Contract B) and indicated that someone else would need to perform the work covered by the scope because the City wanted to continue to have the Respondent work on other assigned tasks. The Vernon City Attorney created a third contract (Contract C), which was effective 4/1/04, containing wording that indicated direct control by Vernon over Respondent's activities. <u>While the Vernon City Attorney knew, or should have known, that the wording in that new contract clearly established a common law employee/employer relationship, the City of Vernon failed to enroll Respondent under the City's CalPERS agreement and continued to treat Respondent as an independent contractor.</u>

Vernon established a forth contract (Contract D) effective 3/5/07, which likewise contained wording that indicated direct control by Vernon over Respondent's activities, including requiring Respondent's service as the Executive Director of the Vernon Redevelopment Agency. <u>The City of Vernon, however, failed to enroll Respondent under the City's CalPERS agreement and continued to treat Respondent as an independent contractor, although the contract clearly continued the common law employee/employer relationship.</u>

Received
MAR 10 2014
CalPERS Board Unit

Attachment C

Finally, in December of 2007, Vernon established Contract E worded as an Employment Contract rather than a consulting agreement, but containing essentially the same reporting relationships and job duties as contained in Contract D. The City of Vernon did enrolled Respondent Toering under the City's CalPERS agreement, effective December of 2007.

After Respondent Toering requested CalPERS membership for working for Vernon between August 2002 and December 2007, CalPERS staff conducted a review of the working relationship between Respondent and the City of Vernon. On December 30, 2010 CalPERS Retirement Program Specialist II Ron Gow sent a letter to Respondent Toering indicating that CalPERS had determined that Contract C established an employee/employer relationship and that Respondent Toering was qualified for CalPERS membership effective April 1, 2004. Based on that letter from Mr. Gow, which would have given Respondent a total of more than 6 years of CalPERS service credit, Respondent Toering filed for CalPERS retirement February 15, 2011 with an effective date of December 19, 2010 (the day after Respondent's last day of employment at the City of Vernon).

However, during the 2010-11 timeframe, CalPERS was also conducting an audit of the City of Vernon. In March of 2011, apparently because of early audit findings and the difficulties encountered in dealing with the City of Vernon, the lead auditor expressed concerns about the City's contracting practices to Mr. Gow. As a result Mr. Gow placed Respondent Toering's case on hold, pending additional information, and CalPERS Benefit Services Division notified Respondent that he did not have sufficient service credit for vesting.

Despite Respondent Toering providing timely responses to CalPERS requests for additional information in August of 2011 and February of 2012, Respondent's case remained in limbo for an additional 16 months, until June 15, 2013 when CalPERS sent a letter to Respondent Toering reversing the decision embodied in Mr. Gow's letter of December 30, 2010. Respondent Toering filed a timely appeal to the June 15, 2013 decision, leading to the Hearing on December 11, 2013. It appears that Respondent's case was delayed and the initial decision ultimately reversed because the CalPERS audit identified significant issues and problems at the City of Vernon. But apparently the audit did not produce issues that impacted the earlier CalPERS (Mr. Gow) decision regarding Respondent Toering status as an employee – CalPERS Council at the Hearing did not introduce the City of Vernon Audit Report into evidence, and initially objected to Respondent's introduction of the Report into evidence.

By the time of the Appeal Hearing last December, Respondent Toering's planned retirement at age 65 had been delayed over three years – and Respondent was 68 years old. While telephonic discussions between Respondent and various CalPERS employees over the three years seemed to indicate that cases like Respondent's would be handled in months, Respondent's case languished and it seemed as if being connected to the City of Vernon was cause for discriminator treatment.

Attachment C

RESPONDENT TOERING'S ARGUMENT TO ADOPT PROPOSED DECISION

THE PROPOSED DECISION:

After reviewing all of the evidence presented at the Appeal hearing, the Administrative Law Judge (ALJ) correctly concluded that the CalPERS reversal of the December 30, 2010 decision (conveyed by CalPERS letter to Respondent Toering dated June 15, 2013) was driven not by additional evidence but rather by lack of response or evidence from the City of Vernon.

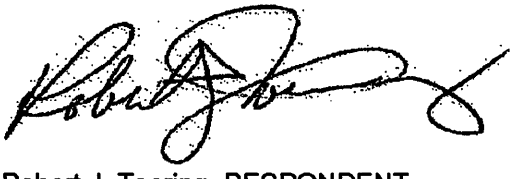
The ALJ also pointed out (¶ 25.) "...the fact that the city was a bad actor in seeking unjustified CalPERS benefits for other employees, hampering the audit by failing to provide requested documents, and failing to provide documents deemed necessary to determine Toering's claim, does not serve as a reason 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."

The ALJ correctly observed (¶26) that "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 ALJ reached a logical, well thought out conclusion based on the evidence and the appropriate application of the common law control test. Respondent Toering respectfully requests that the CalPERS Board adopt the ALJ's Proposed Decision.

The Respondent City of Vernon and CalPERS Legal Council had ample opportunity to present evidence before and at the Hearing. Remanding the case back to the ALJ for the taking of additional evidence would only serve to further delay a process that has already taken too long. Respondent Toering will be 69 years old in two months, and given the other CalPERS still unresolved issue of Respondent Toering's compensation for his final year of employment, he might still not be retired as he approaches 70 years of age.

Respectfully Submitted,



Robert J. Toering, RESPONDENT