

ATTACHMENT A
THE PROPOSED DECISION

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues
Against:

WILLIAM M. McCORMICK

Respondent,

and

CITY OF VERNON,

Respondent.

Case No. 2013-0899

OAH No. 2013110797

PROPOSED DECISION

This matter came on regularly before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, at Los Angeles, California, on May 22, 2014.

California Public Employees' Retirement System (Petitioner or CalPERS) was represented by Cynthia Rodriguez, Senior Attorney.

William M. McCormick (Respondent) appeared and was represented by Roland G. Simpson, Attorney at Law.

No appearance was made by or on behalf of Respondent, City of Vernon (the City or Vernon) despite its having been properly served with notice of the date, time, and location of the hearing.

Oral and documentary evidence was received. The record was held open to and including June 6, 2014, for the parties to submit written closing argument. The briefs were timely received. "CalPERS' Closing Brief" was marked as Exhibit 18 for identification. The "Closing Brief of Respondent William M. McCormick" was marked as Exhibit U for identification. The record was closed on June 6, 2014, and the matter was submitted for decision.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED June 16 2014

C. Bodily

FACTUAL FINDINGS

1. The following facts are not in dispute:

a. At all relevant times, Respondent was employed by the City of Vernon as a City Councilmember

b. The City of Vernon is a public agency that contracts with CalPERS for retirement benefits for its eligible employees.

c. CalPERS is a defined benefit plan. Members and members' employers contribute to members' benefits. Those contributions are supplemented by interest and other earnings. The amount of the members' contributions is determined by applying a fixed percentage to their compensation. A public agency's contribution is determined by applying a rate to the payroll of the agency. Using certain actuarial assumptions specified by law, the CalPERS Board of Administration annually sets the employer contribution.

2. Article III, Chapter 3.11 of the City of Vernon Code of Ordinances states in part:

The Council may determine the base compensation of Councilmembers by resolution adopted by a majority vote of the members of the Council. . . . The Council shall not increase the base compensation of Councilmembers in excess of cost-of-living adjustments.

In addition to such base compensation, individual Councilmembers may be compensated for serving on City Boards, Commissions, Committees or other City governmental bodies. Such additional compensation shall be set by resolution adopted by a majority vote of the members of the Council. . . . The Council shall not increase such additional compensation of Councilmembers in excess of cost-of-living adjustments.

(Exhibit A.)

3. On April 2, 2007, pursuant to Resolution Number 9284, Vernon's City Council elected to "(i) clarify [the City Councilmembers'] entitlement to appropriate expense reimbursement on expense substantiation as defined in the Internal Revenue Service Code of 1986, as amended; (ii) consolidate the longevity and various allowance benefits into one new salary scale; and (3) [*sic*] increase the base compensation for Councilmembers by approximately six percent (6%) . . ." (Exhibit I.) The Council did so by amending Schedule 2 of the Council's Salary Resolution and setting each Councilmember's monthly salary at \$5,500.

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4. On July 16, 2007, the Vernon City Council adopted Resolution No. 9362 which amended and restated "Salary Resolution" Number 9342, adopted on July 8, 2007.¹ Resolution Number 9362 maintained City Councilmembers' monthly salary at \$5,500. In so doing, the City Council provided: "Longevity and attendance allowances have been incorporated into the City Councilmembers' base compensation." (Exhibit K.) Section 14 of Resolution Number 9362 reads: "All resolutions, or parts of resolutions not consistent with or in conflict with this resolution, including specifically Resolution No. 9342, are hereby repealed." (*Id.*)

5. On June 16, 2008, the Vernon City Council adopted Resolution No. 9639 to fix the compensation, costs and benefits of City employees. Pursuant to that resolution, City Councilmembers' monthly salaries were increased to \$5,671. Section 13 (c) of Resolution No. 9639 contains the following statement: "Longevity and attendance allowances have been incorporated into the City Councilmember's base compensation." (Exhibit L.) Section 14 of Resolution No. 9639 reads: "All resolutions, or parts of resolutions not consistent with or in conflict with this resolution are hereby repealed." (*Id.*)

6. On July 19, 2011, the Vernon City Council adopted Resolution No. 2011-129 to fix the compensation, costs and benefits of the City employees. Pursuant to that resolution, city councilmembers' monthly Step 1 salaries were set at \$4,650 until July 30, 2011, and were increased to \$5,671 effective July 31, 2011. (Exhibit N.) Section 17 of Resolution No. 2011-129 reads: "All resolutions, or parts of resolutions not consistent with or in conflict with this resolution are hereby repealed." (*Id.*)

7. On a date not disclosed by the evidence, Respondent submitted to CalPERS a Retirement Allowance Estimate Request for service retirement benefits. His projected retirement date was July 1, 2011.

8. CalPERS conducted a public agency review for the City of Vernon, the final results of which were published in April 2012. In Finding 7 of that review, CalPERS found:

The City over-reported the compensation earnable of the City [C]ouncil members. Specifically, the City erroneously included additional compensation (attendance pay received by City [C]ouncil members for serving on other boards, commissions, or committees) with the full-time compensation received for services rendered as council members. Compensation for attending meetings of other entities does not meet the definition of compensation earnable.

(Exhibit T.)

¹ Resolution Number 9342 was originally included in Respondent's exhibit packet as Exhibit J. Respondent withdrew Exhibit J at the conclusion of the hearing.

9. CalPERS notified Respondent and the City of the final results of the public agency review on July 9, 2012. CalPERS requested the City to correct the reported monthly payrate from \$5,671 to \$3,072.06 retroactive to the first pay period of December 2007.²

LEGAL CONCLUSIONS

1. CalPERS correctly requested the City of Vernon to correct Respondent McCormick's reported payrate retroactive to the first pay period of December 2007 to conform to the definition of compensation earnable as defined in the California Public Employee' Retirement Law.

2. The matter at issue in this case is governed by Title 2, Division 5, Part 3 of the Government Code³ section 20000 et seq. (Public Employees' Retirement System).

3. Absent a statutory provision to the contrary, the applicant for retirement benefits bears the burden of proving his/her right to the entitlement. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54, 57.)

4. CalPERS is a "prefunded defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198.)

5. CalPERS determines a member's retirement benefit by taking into account years of service, age factor (a percentage based on the member's age on the retirement date), and "final compensation." (Gov. Code, §§ 20037, 21350, 21352, 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)

6. Government Code section 20630 defines "compensation" as the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of holidays, sick leave, industrial disability leave, vacation, compensatory time off, and leave of absence. Compensation is to be reported in accordance with section 20636 and is not to exceed compensation earnable, as that term is defined in section 20636.

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² The public agency review cited to certain other purported errors by the City. However, the parties agree that the sole issue in this case is "whether Cal PERS is correct in requesting that respondent City correct respondent McCormick's reported payrate retroactive to December 2007, to meet the definition of compensation earnable as defined in the California Public Employees' Retirement Law." (Exhibit 1, pp. 7-8.)

³ All statutory references are to the Government Code unless otherwise indicated.

7. Government Code section 20635 states:

When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service. For the purposes of this part, overtime is the aggregate service performed by an employee as a member for all employers and in all categories of employment in excess of the hours of work considered normal for employees on a full-time basis, and for which monetary compensation is paid.

If a member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full time, the position with the highest payrate or base pay shall be reported to this system. This provision shall apply only to service rendered on or after July 1, 1994.

8. Government Code section 20636 defines "compensation earnable" as follows:

(a) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b) (1) "Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. "Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e).

(2) "Payrate" shall include an amount deducted from a member's salary for any of the following:

(A) Participation in a deferred compensation plan.

(B) Payment for participation in a retirement plan that meets the requirements of Section 401(k) of Title 26 of the United States Code.

(C) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of Title 26 of the United States Code.

(D) Participation in a flexible benefits program.

[¶] . . . [¶]

(c) (1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

(2) Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e).

(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.

(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

(5) The monetary value of a service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 and following of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

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(7) Special compensation does not include any of the following:

(A) Final settlement pay.

(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

(C) Other payments the board has not affirmatively determined to be special compensation.

(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.

(e) (1) As used in this part, "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class.

(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

(f) As used in this part, "final settlement pay" means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay. . . .

9. California Code of Regulations, title 2, section 571 states in relevant part:

(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement:

(1) INCENTIVE PAY

[¶] . . . [¶]

Longevity Pay - Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.

The value of EPMC^[4] is calculated on all “compensation earnable” excluding the special compensation of the monetary value of EPMC paid to CalPERS by the employer under Government Code section 20636(c)(4), thus eliminating a perpetual calculation.

[¶] . . . [¶]

(b) The Board has determined that all items of special compensation listed in subsection (a) are:

(1) Contained in a written labor policy or agreement as defined at Government Code section 20049, provided that the document:

(A) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

(B) Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;

(C) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

(D) Indicates an effective date and date of any revisions;

(E) Is retained by the employer and available for public inspection for not less than five years; and

(F) Does not reference another document in lieu of disclosing the item of special compensation;

(2) Available to all members in the group or class;

(3) Part of normally required duties;

(4) Performed during normal hours of employment;

(5) Paid periodically as earned;

⁴ Employer-paid member contributions.

(6) Historically consistent with prior payments for the job classification;

(7) Not paid exclusively in the final compensation period;

(8) Not final settlement pay; and

(9) Not creating an unfunded liability over and above PERS' actuarial assumptions.

(c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).

(d) If an item of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual.

10. Based on the statutory and regulatory definitions and limitations referenced above, the attendance allowance offered to the City councilmembers before the passage of Resolutions 9284 and 9362 was neither payrate nor special compensation, and therefore was not compensation earnable. That fact did not change when the Council eliminated the attendance allowance and made it part of each councilmember's salary. By eliminating the attendance allowance and rolling it into the councilmembers' salaries, the Council affected only the name of the allowance, not its nature or its effect on the calculation of retirement benefits for the City councilmembers.

11. On October 17, 2012, the CalPERS Board of Administration made and adopted a resolution designating as Precedential Decision 12-01 its final decision in *In the Matter of the Appeal Regarding Calculation of Final Compensation of: Craig F. Woods and Tahoe-Truckee Sanitation Agency*, Case No. 8705; Office of Administrative Hearings No. N-2010040719. In that precedential decision, the Board ruled that the General Manager of the Tahoe-Truckee Sanitation Agency was not entitled to include in his payrate an automobile allowance and employer paid deferred compensation for the purpose of determining his retirement benefits because they did not satisfy the definition of compensation earnable, even though they were included in his base compensation. The Board explained:

Case law supports a finding that the benefits at issue here are not a part of compensation earnable for purposes of calculating retirement benefits. "An employee's compensation is not simply the cash remuneration received, but is exactly defined to include or exclude various employment benefits and items of pay." (*Oden v. Board of Administration, supra*, 23 Cal.App.4th at 198.)

12. Respondent argues that only the Vernon City Council is authorized to determine the base salary of its councilmembers, and that CalPERS has over-stepped its authority in its attempt to cull out certain types of income the City Council has chosen to include in its members' base salaries as being outside the definition of "compensation earnable." Respondent is only partially correct. It is true that the City Council has the exclusive right to set its members' salaries. However, it is also true that CalPERS is not obligated to consider the full amount of the salaries set by the City Council as reportable compensation earnable when the Council's determination of members' compensation is at variance with the Public Employees Retirement Law (PERL). (See *Molina v. Board of Administration* (2011) 200 Cal.App.4th 53, 67.) The City Council's incorporation of its members' attendance allowance into their regular compensation, and its repeal all former resolutions indicating otherwise, disguised, but did not legitimize, the true nature of that allowance. Changing its name did not transform an excludable item into compensation earnable.

13. This conclusion is borne out by Article 3, Chapter 3.11 of Vernon's own city charter.⁵ That provision permits the council members to determine their base compensation by resolution. However, it specifies that compensation paid for serving on "City Boards, Commissions, Committees or other City governmental bodies" shall be "in addition to such base compensation." (Exhibit A.) In its public agency review, CalPERS found that "the City erroneously included additional compensation (**attendance pay received by City council members for serving on other boards, commissions, or committees**) with the full-time compensation received for services rendered as council members." (Exhibit T, pages 30-31.) (Emphasis added.) In creating its charter, the City specifically excluded attendance pay from base salary, giving the City Council authority to set both but not combine them. Although the City Council, and only the City Council, has the right to determine the councilmembers' base salaries, it may not eviscerate its own city charter in making that determination.

ORDER

1. The appeal of Respondents, William M. McCormick and City of Vernon, of CalPERS decision to exclude attendance allowances as part of reportable compensation earnable when incorporated into base compensation by resolution, is denied.

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⁵ The city charter is the document referred to in Factual Finding 2 as the City of Vernon Code of Ordinances.

2. Within 30 days of the effective date of this Decision, Respondent, City of Vernon, shall correct Respondent McCormick's reported payrate retroactive to the first pay period of December 2007, to meet the definition of compensation earnable as defined in the California Public Employees' Retirement Law.

Dated: June 13, 2014


H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings