

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Calculation of Final
Compensation of:

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 January 12, 2015, 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.

No appearance was made by or on behalf of respondent City of Vernon. Upon proof of compliance with Government Code sections 11504 and 11509, the matter proceeded as a default as to the city pursuant to Government Code section 11520.

The matter was submitted for decision on January 12, 2015. However, on February 9, 2015, the administrative law judge reopened the record and requested that the parties submit additional evidence and argument. Mr. Toering's additional argument was received on February 17, 2015, and was marked as Exhibit H for identification only. CalPERS's additional argument was received on February 23, 2015, and was marked as Exhibit 15 for identification only, except for the table of positions and payrates shown on page 4 of that document, which is considered as evidence. On February 26 and March 25, 2015, CalPERS

**CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM**

FILED April 28, 2015

submitted the original exhibits from the earlier December 11, 2013 hearing between the same parties. Those exhibits were marked collectively as Court Exhibit 101 and were received in evidence. The matter was thereupon deemed resubmitted on March 25, 2015.

SUMMARY

Robert Toering was an employee of the City of Vernon. Before being hired into a permanent position, he had worked for the city as a consultant under a series of independent contractor agreements. Toering sought to be credited with CalPERS membership for his service under those agreements. In June 2012, CalPERS denied Toering's request and he appealed. Although CalPERS had made a number of other determinations in the June 2012 denial letter, the parties agreed that the only issue to be litigated at the hearing on the appeal was Toering's employment status, with the other issues deferred until that was decided.

In a decision issued in March 2014, the CalPERS Board of Administration determined that a portion of Toering's work under the independent contractor agreements actually constituted employment and that he therefore qualified for CalPERS membership for that period. All of the remaining issues raised in the June 2012 denial letter have since been resolved save one: computation of Toering's final compensation.

Toering asserts his "final compensation," the amount used to compute his retirement allowance, should be based upon the \$20,000 monthly salary the City of Vernon reported to CalPERS. CalPERS asserts Toering's final compensation is calculated using a monthly salary of \$10,929.25, the average of the payrates for other employees in the city having job titles and duties similar to Toering's.

It is concluded that under the Public Employees' Retirement Law Toering's \$20,000 monthly salary cannot serve as the basis for calculation of his final compensation, and that CalPERS's use instead of a monthly figure of \$10,929.25 for computation of that final compensation was reasonable and appropriate.

FACTUAL FINDINGS

Procedural Background

1. The City of Vernon is a contracting agency with CalPERS and its qualifying employees are members of CalPERS.
2. Robert Toering began working for Vernon in August 2002 under a consulting services agreement that characterized him as an independent contractor. Toering continued to work under a series of similar consulting services agreements 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 that he be credited for CalPERS membership for the August 2002-December 2007 period during which he had worked under consulting services agreements.

4. In 2010, CalPERS staff conducted a review of Toering's request. At about the same time, CalPERS began an audit of the City of Vernon that had been triggered, in part, by "internal CalPERS concerns about past service credits for certain employees of [the city]."

5. The results of the CalPERS audit of the City of Vernon were released in April 2012. The audit was highly critical of the city. Among the audit's findings were 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, assigned concurrent multiple positions while reporting one full-time payrate, reported to CalPERS payrates that improperly included compensation that was not reportable, and improperly reported items of special compensation as part of base payrates.

6. On June 15, 2012, CalPERS notified Toering that he was one of the individuals whose records had been sampled during the audit of the City of Vernon. Toering was advised that CalPERS had made a number of determinations related to his October 2009 request to be credited with additional CalPERS membership. Among those determinations were that Toering was an independent contractor and not an employee from August 14, 2002, until March 2007, and that his final compensation could not be determined.

7. Toering appealed all of the determinations. A hearing was subsequently scheduled. The parties stipulated, however, that the proceeding would be bifurcated: the only determination that would be tried at the initial hearing was whether Toering was an independent contractor or an employee for the period before March 2007. The remaining determinations would be deferred to a second hearing, if necessary.

8. Following a hearing in December 2013, a decision of the CalPERS Board of Administration held that Toering was a city employee, and therefore entitled to be considered a CalPERS member, beginning April 1, 2004. All of the remaining issues raised in the June 2012 denial letter have been resolved save one: determination of Toering's final compensation.

9. On August 29, 2014, CalPERS notified Toering that the monthly payrate of \$20,000 that he had requested be used as his final compensation – the amount the city had reported to CalPERS for the position of Assistant Director of Industrial Development – could not be used in the calculation of his retirement allowance. CalPERS instead determined that Toering's final compensation should be based upon a monthly payrate of \$10,929.25, the average of the payrates for other employees in what CalPERS characterized as the city's "Assistant/Deputy Director Group."

10. The sole issue in this proceeding, therefore, is whether Toering's final compensation within the meaning of the Public Employees' Retirement Law is based upon a monthly payrate of \$20,000, or \$10,929.25, or some intermediate figure.

11. Some of the findings made in this decision reflect findings made by the Board of Administration in its earlier decision holding that Toering became eligible as a CalPERS member on April 1, 2004.

Statutes and Regulations/Definitions/Terms

12. An explanation of the manner in which a CalPERS member's retirement allowance is calculated, definitions of some of the terms of art used in that calculus, and a review of some of the statutes and regulations cited by the parties will help place the matters set forth in Findings 21 through 36, below, in context.

13. A member's service retirement allowance is calculated by applying a formula based upon the member's age and years of service to his "final compensation." In the case of a local member like Toering, final compensation means the highest annual compensation during any one-year period of employment. (Gov. Code, § 20042.)¹

14. Section 20635 provides, "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." The section also provides that overtime pay, which is defined as payment for "service performed by an employee . . . in excess of the hours of work considered normal for employees on a full-time basis" is excluded from the computation of a member's compensation.

15. The amount reported by a contracting agency to CalPERS as a member's compensation cannot exceed his "compensation earnable" as defined in section 20636. (§ 20630, subd. (b).) Compensation earnable consists of the member's "payrate" plus any "special compensation." (§ 20636, subd. (a).) In this case, special compensation is not an issue.

16. As set forth in section 20636, subdivision (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

¹ Unless otherwise stated, all statutory references are to the Government Code.

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).

17. Subdivision (e)(1) of section 20636 states, “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.”

18. Subdivision (e)(2) of section 20636 states, “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 employee, . . . 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” “Membership classification” is defined in section 20371, which provides CalPERS members fall within one of two membership classifications – miscellaneous member or safety member. Toering is a miscellaneous member.

19. Effective August 10, 2011, CalPERS enacted California Code of Regulations, title 2, section 570.5, in order “to clarify existing law and make specific the requirements for publicly available pay schedule[s] as that phrase is used in the definition of ‘payrate.’” (CalPERS Circular Letter, August 19, 2011.) As stated in that letter, the purpose of this regulation was to “ensure consistency between CalPERS employers and enhance the disclosure and transparency of public employee compensation” Section 570.5 provides:

(a) For purposes of determining the amount of “compensation earnable” pursuant to Government Code Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

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

(2) Identifies the position title for every employee position;

(3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

(4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;

(5) 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;

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

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

(8) Does not reference another document in lieu of disclosing the payrate.

(b) Whenever an employer fails to meet the requirements of subdivision (a), above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant . . .

20. Under section 20160, subdivision (b), CalPERS is mandated to correct errors made by any of its contracting agencies.

Toering's employment history with the City of Vernon

21. From January 1989 until December 1995, Toering was the president of a manufacturing firm that was the second largest employer in the City of Vernon. After he left that firm, 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.

22. In August 2002, the city and CEG entered into a consulting agreement under which Toering was to provide consulting services to the city relating to educating the city's business and property owners about business issues in the city. Two subsequent agreements extended the original agreement through March 31, 2007. However, shortly before the third agreement expired, in early March 2007, it was replaced with a new agreement that, rather than between the City of Vernon and CEG, 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"

23. Six months later, on November 19, 2007, the Vernon city council passed Resolution No. 9470 creating the Industrial Development Department and appointing Jeff Harrison as the new department's director and Toering as its assistant director.

On the same day, the city entered into an employment agreement with Toering appointing him to serve as both the Assistant Director of Industrial Development and the

Executive Director of the Redevelopment Agency effective December 19, 2007. The employment agreement provided, "Toering shall provide 160 hours of services a month as Assistant Director of Industrial Development and Executive Director of the Redevelopment Agency of the City of Vernon. Toering's base salary shall be \$20,000 per month." It further provided that, "for additional hours of service as reasonably required to perform his duties as Assistant Director of Industrial Development [he] shall be paid at the rate of \$175 per hour for each hour . . . that he works in a month in excess of 160 hours."

And also on the same day, the city council passed Resolution No. 9480, this one entitled "A Resolution . . . Approving and Authorizing the Execution of An Employment Agreement by and between the City of Vernon and Robert J. Toering." This resolution provided:

WHEREAS, the City of Vernon and Toering desire to enter into an Employment Agreement setting forth the terms and conditions governing their relationship for the performance of services in such capacities as designated by the City Council and/or the Redevelopment Agency of the City of Vernon (the "Agency"), including but not limited to, Executive Director of the Agency and Assistant Director of Industrial Development for the City; and

WHEREAS, the City and Toering desire Toering to provide services to the City for a base salary of \$20,000 per month for 160 hours of service and \$175 per hour for services rendered in excess of 160 hours per month; . . .

24. Toering served in both positions until March 1, 2010, when the Board of Directors of the Redevelopment Agency passed Resolution No. RA-383, which removed Toering from his position as the agency's executive director and appointed Rory Burnett in his place. From this point until his employment contract's three-year term expired and he was terminated from city employment in December 2010, Toering continued to serve only as Assistant Director of Industrial Development at a monthly salary of \$20,000.

CalPERS's Reasoning in Finding Toering's "Payrate" to be \$10,929.25

25. Over time, CalPERS has provided several reasons for not accepting \$20,000 as Toering's payrate for purposes of computing his retirement allowance. But CalPERS currently puts forth two basic reasons why the salary reported by the city cannot be used: 1) The city pay scales do not fully comply with the requirements for a publicly available pay schedule under section 20636, subdivision (b)(1), and California Code of Regulations, title 2, section 570.5, in part because they have several positions with no salary shown, or a salary of \$0 shown; and 2) Toering was serving in two full time positions and his salary must be considered to be divided between those two.

26. The audit of the City of Vernon completed in 2012 showed that the city had a historical practice of merging payrates of full-time positions and reporting to CalPERS as if that “inflated payrate” was for a single position. Looking at Toering’s employment situation, CalPERS believed the same had been done for him. Therefore, using its authority under section 20160 to correct errors in compensation reported by a contracting agency, CalPERS looked to extrinsic evidence to determine the correct monthly payrate to be used in calculating Toering’s final compensation. Michelle Balzouman, section manager of CalPERS’s compensation employer review unit, testified that CalPERS frequently uses extrinsic evidence in cases where reported payrates – even those shown on fully-compliant publicly available pay schedules – are ambiguous or appear to be “out of the ordinary.”

27. The evidence CalPERS considered included the following: (1) The city reported to CalPERS a payrate of \$20,000 per month for the position of Assistant Director of Industrial Development but did not report a payrate for the position of Executive Director of the Redevelopment Agency; (2) The city’s pay schedule showed the Assistant Director of Industrial Development position to be a full-time position, and a review of the duties of the Executive Director of the Redevelopment Agency led CalPERS to conclude that it was also a full-time position; and (3) Toering’s reported monthly salary of \$20,000 was nearly double the average salary of “similarly situated members of the same group or class of employment” – i.e., other city employees having job titles and duties CalPERS considered similar to those of Toering’s. As a result, CalPERS concluded that the monthly pay shown on the Assistant Director salary schedule actually constituted compensation for both of Toering’s positions.

28. Therefore, on August 29, 2014, CalPERS notified Toering that the reported monthly payrate of \$20,000 could not be used in the calculation of his retirement allowance. CalPERS instead determined that the payrate used to compute Toering’s final compensation should be \$10,929.25, the average of the payrates for other employees in what CalPERS called the city’s “Assistant/Deputy Director Group.” The City of Vernon does not have such a classification for its employees – it is a group CalPERS created for the purpose of determining Toering’s final compensation.

The salaries used to compute the average of \$10,929.25 were:

Deputy Director of Community Services	\$11,619
Assistant Finance Director	\$10,417
Chief Deputy Director of Health and Environmental Control	\$11,334
Assistant to the City Administrator	\$10,347

Toering’s Contentions

29. Toering asserts, first, that the requirements of California Code of Regulations, title 2, section 570.5, do not apply here because that regulation did not become effective until nearly eight months after he left city employment.

Toering raises a good point, but one that is essentially irrelevant. At all times during his city employment, Toering was subject to the statutory requirement of section 20636, subdivision (b)(1), that in order to be used as a basis for final compensation, a payrate had to be listed on a publicly available pay schedule. According to the CalPERS Circular Letter of August 19, 2011, and the testimony of Michelle Balzouman, section 570.5 merely codified practices CalPERS had already been following in determining whether a reported payrate met the statutory requirement. But beyond that, CalPERS has a responsibility to insure that payrates are accurately reported and has the authority to look behind even payrates shown on fully-compliant publicly available pay schedules when circumstances warrant. Therefore, whether or not the city's pay schedules did or did not comply with the requirements of either section 20636 or California Code of Regulations, title 2, section 570.5, is immaterial – CalPERS has the responsibility and authority to ignore pay schedules that inaccurately report employee compensation for purposes of computing retirement allowances.

30. Toering next asserts that the City of Vernon had not placed his position within a group or class of other employees, and that determination of his payrate must therefore be governed by the second sentence of section 20636, subdivision (b)(1): “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 . . .” CalPERS was not justified, therefore, in creating a class that did not exist within the city – the “Assistant/Deputy Director Group” – and coming up with an average salary for those within this artificially-created group.

But in making this argument, Toering overlooks the true meaning of “group or class” as that phrase is used in section 20636, subdivision (b)(1). “Group or class” is not limited to an employment classification used by an employer as Toering implies. Rather, as made clear in subdivision (e)(1) of section 20636, it refers to “a number of employees considered together because they share similarities in job duties, . . . or other logical work-related grouping.” Under the circumstances, CalPERS was justified in creating an “Assistant/Deputy Director Group” in order to more accurately determine Toering’s payrate within the meaning of the Public Employees’ Retirement Law.

31. Toering contends that in his last years at Vernon he had two positions, one of which paid \$20,000 monthly and the other of which (Executive Director of the RDA) paid zero, and that under section 20635 – “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” – it was the \$20,000 salary for the Assistant Director of Industrial Development that CalPERS should have accepted.

The problems with this argument are twofold: First, the assertion that the Executive Director of the RDA was not a compensated position is not supported by the evidence. While it is true that the resolution that removed Toering from that position and appointed Rory Burnett as his successor provided that the new director was appointed “at no compensation,” that has no impact on how Toering had been compensated. Under the consulting agreements, he was clearly compensated as the Executive Director of the RDA,

and he continued to be compensated for that position under the subsequent employment agreement. Contrary to Toering's assertions, the November 19, 2007 employment agreement and city council resolutions did not provide Toering was to receive \$20,000 monthly solely as Assistant Director of Industrial Development. Rather, that amount was clearly designated as Toering's "base salary" to "provide 160 hours of services a month as Assistant Director of Industrial Development and Executive Director of the Redevelopment Agency of the City of Vernon." Thus, Toering did not hold one compensated and one uncompensated position – both positions he held were compensated.

Second, since the resolution approving Toering's employment agreement is clear – \$20,000 was his base salary for BOTH jobs – whether those jobs are both considered full time jobs or whether one was full time and one was part time is really immaterial. Under the PERL, for purposes of determining the payrate to be used to compute Toering's final compensation, the salary from only one of those jobs may be considered. (Section 20635.)

32. Finally, Toering contends that between March 2010, when he was removed from the position of Executive Director of the Redevelopment Agency, until the termination of his city employment in December 2010, he served only in a single position – Assistant Director of Industrial Development – that was compensated at \$20,000 per month, and that this single position should be used to calculate his final compensation.

The problem with this argument is, again, that until March 2010 Toering was being paid \$20,000 per month to work two jobs and for purposes of the PERL his salary had to be considered to be divided between those two jobs. It would not have been unreasonable to conclude the two jobs were equally compensated. When one job was taken from him and he continued to be paid the same salary for the remaining job, he effectively had his monthly salary doubled. Under the PERL, such a huge increase in salary would be prohibited from consideration in the computation of final compensation under section 20636, subdivision (e)(2), which limits salary increases during the final compensation period to the average increase for all employees in the same membership classification, i.e., all of the city's miscellaneous members.

Discussion

33. From December 2007 until December 2010, the City of Vernon paid Toering a monthly salary of \$20,000. Toering understandably feels that the final compensation upon which his retirement allowance will be calculated should be based upon the monthly salary he actually received.

But the PERL imposes statutory restrictions upon what CalPERS can use as a member's payrate for purposes of computing his final compensation. One of those restrictions is that payrate can be based on only one position. If a member holds two positions, both of which are full time, only the highest paid one can be considered. If one of

the positions is full time and the other is part time, the part time job is considered as overtime and is excluded. (Section 20635.) In either case, the employee's payrate is based upon a single position.

34. The inescapable fact here is that from December 2007 until March 2010, Toering was being paid by the City of Vernon to serve in two positions at once, for which he was paid a single salary. Because section 20635 prohibits that – only one of his positions may be considered for purposes of determining the payrate that is used to calculate final compensation – the question becomes, how do you value the single position for which he is entitled to have his compensation counted?

The method CalPERS used was both reasonable and logical. It looked to the salaries of others in the city who were at a similar level of management responsibility – assistant and deputy directors of other city departments. This exercise showed that these “similarly situated employees” were earning salaries between \$10,347 and \$11,619 per month. Using those salaries as a benchmark, CalPERS computed an average and attributed that to Toering's position as Assistant Director of Industrial Development. This might not have been a perfect method, but since it is impossible to determine from the evidence whether, as Toering contended, his position was actually more valuable to the city than the other positions used to compute the average, it was an entirely reasonable one.

35. As to the situation from March 2010 through December 2010, when Toering was being paid \$20,000 per month for a single position, the provisions of section 20636, subdivision (e)(2), preclude that figure from being used as Toering's payrate for purposes of computing final compensation because it effectively represented a raise that would have outstripped anything other city employees in the miscellaneous classification had received.

36. The ultimate burden in this proceeding is on Toering to show that CalPERS has incorrectly determined his payrate for purposes of computing his final compensation. He has failed to meet that burden. It may have been that the documents the City of Vernon generated in creating his employment status did not reflect his true employment and pay status. And if that is the case, Toering was the victim of laxity or sloppiness on the part of the city in which he was employed. But Toering is stuck with the fact that the evidence in this proceeding showed that he was employed and compensated in two positions. And unfortunately for him, CalPERS is also stuck – with the strictures of the PERL that provide that final compensation must be based only upon a single position.

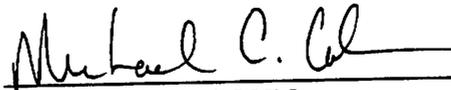
LEGAL CONCLUSIONS

Under subdivision (b) of section 20160, CalPERS is required to correct errors made by contracting agencies. Complying with this obligation, CalPERS reached the reasonable and justifiable determination that the proper payrate upon which to base Toering's final compensation is \$10,929.25 monthly. Toering has failed to present sufficient proof to show CalPERS's determination was incorrect.

ORDER

The appeal of respondent Robert Toering is denied. CalPERS shall calculate Toering's final compensation using a payrate of \$10,929.25 per month.

DATED: April 21, 2015



MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings