

Law Offices of John Michael Jensen

11500 West Olympic Blvd Suite 550, Los Angeles CA 90064-1524
johnjensen@johnmjensen.com tel. 310.312.1100

November 5, 2015
BY FEDERAL EXPRESS

REQUEST TO SUPPLEMENT THE ADMINISTRATIVE RECORD

Re: Full Board Hearing on November 18, 2015

Board Secretary
California Public Employees' Retirement System
P.O. Box 942701
Sacramento, CA 94229-2701

Re: Bruce V. Malkenhorst, Sr. and City of Vernon, Respondents
CALPERS Case No. 2012-0671, OAH Case No. 2013080917

To the CalPERS Board of Administration:

Pursuant to Section II.E. of the CalPERS Board of Administration's *Statement of Policy and Procedures for Full Hearings Before the Board*, Bruce V. Malkenhorst, Sr. hereby requests that the Board permit the introduction of four (4) additional documents not previously included in the administrative record.

The documents are:

1. City of Vernon *Resolution No. 9942* dated May 11, 2009, setting the salary of the Vernon City Administrator at \$32,000 per month (\$384,000 per year);
2. City of Vernon *Resolution No. 10057* dated August 31, 2009, again setting the salary for the Vernon City Administrator at \$32,000 per month;
3. City of Vernon *Resolution No. 2010-33* dated March 1, 2010, maintaining the salary for the City Administrator at \$32,000 per month; and
4. Current Salary of the City Administrator of the City of Vernon indicating the City pays its City Administrator a salary of \$293,436 annually, plus longevity pay.

True and correct copies of those documents were attached to Respondent's Written Argument submitted for the Board's consideration at its September 17, 2015 meeting to consider adoption of the *Proposed Decision* of Administrative Law Judge Howard Cohen. Copies are also attached to this Request.

Reasons Documents Were Not Previously Introduced Into Evidence

Neither CalPERS nor Respondent offered these documents into evidence in the hearing because CalPERS defined the issues of the administrative proceeding to be the salary earned by

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California Public Employees' Retirement System
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Respondent prior to his retirement on June 30, 2005.

Further, ALJ Cohen had ruled prior to the hearing that CalPERS' *Statement of Issues* would govern the scope of the administrative proceedings. He indicated that events or occurrences after Respondent's retirement were irrelevant to the matters before the OAH.

The documents attached to this Request address the issue of the salary paid to Vernon's City Administrator after Respondent's retirement. As discussed below, this issue did not become relevant to the proceedings until ALJ Cohen found in his *Proposed Decision* that CalPERS' reduction of Respondent's "final compensation" amount was arbitrary, without sufficient legal authority, and constituted an abuse of discretion, including specifically because CalPERS had failed to consider the salary paid to Vernon's subsequent City Administrators.

Introduction of the Documents for Consideration by the Board is Consistent with ALJ Cohen's Findings and with CalPERS' Role as Pension Administrator

CalPERS has reduced Respondent's salary to that of the Acting City Clerk immediately after Respondent's retirement. ALJ Cohen, however, found that

Though CalPERS has discretion to determine payrate when there is no publicly available pay schedule, CalPERS must apply appropriate methods to ascertainable data in doing so. (CCR, § 570.5, subd. (b).) Selecting the salary for Acting City Clerk current at the time of respondent Malkenhorst's retirement, even though respondent Malkenhorst's duties and compensation as City Administrator, minus his additional titles and duties, exceeded those of the City Clerk position, is not appropriate under the PERL and is not a proper exercise of discretion.

(*Proposed Decision*, Legal Conclusion No. 26.)

ALJ Cohen found that determination of a proper final compensation figure in accordance with the PERL was within CalPERS' expertise. He noted that CalPERS had considered alternative measures for setting the final compensation rate during the audit and payrate review process but rejected them, and then said that

CalPERS might now determine that some elements of those measures can be appropriately applied. Pertinent payrate data might be derived from several sources. For example, it may be useful to CalPERS's calculations that within a year of adding City Administrator to his City Clerk title, respondent Malkenhorst's salary increased over 40 percent. No evidence was offered regarding the salary of respondent Malkenhorst's successor as City Administrator; the other titles having been stripped from that position, the payrate for the current City Administrator might provide data useful to CalPERS in recalculating an appropriate payrate for respondent Malkenhorst. Respondent Malkenhorst's enhanced responsibilities as City Administrator, and data bearing on his relative

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California Public Employees' Retirement System
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increase in payrate for assuming that position, mandate a dispassionate evaluation and recalculation, all in accordance with the principles set forth in the PERL.

(Proposed Decision, Factual Finding No. 34.)

The four documents proposed for inclusion in the administrative record constitute exactly the type of evidence suggested by ALJ Cohen. Vernon did not fill the position of City Administrator or designate a salary for that position from the time of Respondent's retirement until May 2009 when it began listing the City Administrator position at an annual salary of \$384,000.

It is imperative that the Board consider those documents and what they demonstrate about Vernon's payment to City Administrators as part of its deliberations.

All of these documents are official documents and records of the City of Vernon. Judicial and official notice may be taken of legislative enactments and regulations issued by any public entity in the United States. (*Evidence Code*, §452(b); see also *Demos v. City of Indianapolis* (7th Cir. 2002) 302 F3d 698, 706 [district court can always judicially notice public statutes]; *Daghlian v. DeVry Univ., Inc.* (9th Cir. 2009) 574 F3d 1212, 1213, fn. 1 [court judicially noticed history of senate bill that would have established California Private Postsecondary Education Act of 2008 but was vetoed by Governor]; *Klay v. Panetta* (DC Cir. 2014) 758 F3d 369, 377 (J. Griffith concur.opn.) [recognizing court may take judicial notice of statutes].)

Thus, the evidentiary rules of the APA provide for the granting of official notice of documents that would be admissible under the *Evidence Code*.

Further, the Board has already accepted notice of these documents as they were attached to Respondent's Argument submitted for consideration at the Board's September 17, 2015 meeting to consider the *Proposed Decision*.

Conclusion

For all of the foregoing reasons, Respondent respectfully requests that the Board admit the four (4) documents attached to this Request into the administrative record and that it consider them as part of its deliberations at the Full Board Hearing on November 18, 2015.

Sincerely,


John Michael Jensen

JMJ:gm

Exhibit 1

RESOLUTION NO. 9942

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3 A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF
4 VERNON AMENDING RESOLUTION NO. 9639 BY AMENDING
5 SCHEDULE NOS. III AND XXIV, OF SAID RESOLUTION
6 REGARDING THE COMPENSATION, COSTS AND BENEFITS OF
7 ITS EMPLOYEES (AMENDMENT NO. 8)

8 WHEREAS, on June 16, 2008, the City Council of the City of
9 Vernon adopted Resolution No. 9639 to be effective on July 6, 2008,
10 regarding the compensation, costs and benefits of its employees (the
11 "Salary Resolution"); and

12 WHEREAS, Schedule No. XXIV, Exhibit X, of the Salary
13 Resolution provides for positions and salary scales of positions
14 within the Utilities & Government Infrastructure Department; and

15 WHEREAS, on May 11, 2009, the City Council of the City of
16 Vernon introduced Ordinance No. 1156 for first reading concerning the
17 reorganization of City Departments by eliminating the Utilities &
18 Government Infrastructure Department, which Ordinance is scheduled for
19 adoption on June 1, 2009; and

20 WHEREAS, the City Council of the City of Vernon desires to
21 eliminate the salary scales of the Director of Utilities & Government
22 Infrastructure and Legal Counsel within the Utilities & Government
23 Infrastructure Department from the Salary Resolution; and

24 WHEREAS, Schedule No. III, Exhibit C, of the Salary
25 Resolution provides for positions and salary scales of positions within
26 the City Administration Department; and

27 WHEREAS, the City Council of the City of Vernon desires to
28 create a salary scale for the position of City Administrator and create
the position and salary scale of an Executive Secretary to the City
Administrator position within the City Administration Department; and

1 WHEREAS, the City Council of the City of Vernon wishes to
2 amend Schedule Nos. III (Exhibit C) and XXIV (Exhibit X) of the Salary
3 Resolution to implement the aforementioned changes.

4 NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE
5 CITY OF VERNON AS FOLLOWS:

6 SECTION 1: The City Council of the City of Vernon
7 hereby finds and determines that the recitals contained hereinabove
8 are true and correct.

9 SECTION 2: Effective May 15, 2009, Schedule No. XXIV
10 (Exhibit X) of the Salary Resolution is hereby amended as indicated on
11 Exhibit A, which is attached hereto and made a part hereof by this
12 reference to implement the elimination of the salary scales of the
13 Director of Utilities & Government Infrastructure and Legal Counsel in
14 the Utilities & Government Infrastructure Department.

15 SECTION 3: Effective May 15, 2009, Schedule No. III
16 (Exhibit C) of the Salary Resolution is hereby amended as indicated on
17 Exhibit B, which is attached hereto and made part hereof by this
18 reference, to implement the creation of a salary scale for the position
19 of City Administrator within the City Administration Department and the
20 creation of the position and the appropriate salary scale for the
21 position of Executive Secretary to the City Administrator in the City
22 Administration Department.

23 SECTION 4: The provisions of Resolution Nos. 9639, as
24 amended by Resolution Nos. 9664, 9672, 9678, 9728, 9815, 9888 and 9906,
25 not consistent with or in conflict with this resolution are hereby
26 repealed; in all other respects, Resolution Nos. 9369, 9664, 9672,
27 9678, 9728, 9815, 9888 and 9906, shall remain in full force and effect.

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SECTION 5: The City Clerk of the City of Vernon shall certify to the passage of this resolution, and thereupon and thereafter the same shall be in full force and effect.

APPROVED AND ADOPTED this 11th day of May, 2009.

Hilario Gonzales

Name: Hilario Gonzales

Title: Mayor / ~~Mayor Pro-Tem~~

ATTEST:

Manuela Giron
MANUELA GIRON, City Clerk

1 STATE OF CALIFORNIA)
2) ss
3 COUNTY OF LOS ANGELES)

4 I, MANUELA GIRON, City Clerk of the City of Vernon, do hereby
5 certify that the foregoing Resolution, being Resolution No. 9942, was
6 duly adopted by the City Council of the City of Vernon at a regular
7 meeting of the City Council duly held on Monday, May 11, 2009, and
8 thereafter was duly signed by the Mayor or Mayor Pro-Tem of the City of
9 Vernon.

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12 MANUELA GIRON, City Clerk

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EX "B"

CITY ADMINISTRATION
SALARY SCALE

	MONTHLY SALARY	
CITY ADMINISTRATOR	STEP 1	32,000.00
EXECUTIVE SECRETARY TO THE CITY ADMINISTRATOR -	STEP 1	6,844.00
	2	6,487.00
	3	6,149.00
	4	5,828.00
	5	5,524.00
	6	5,238.00
	7	4,983.00
	8	4,704.00

SCHEDULE III
EXHIBIT "C"

cityadministration

Exhibit 2

RESOLUTION NO. 10,057

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3 A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF
4 VERNON AMENDING PREVIOUSLY AMENDED RESOLUTION NO.
5 9639 REGARDING THE COMPENSATION, COSTS AND BENEFITS
6 OF ITS EMPLOYEES ("SALARY RESOLUTION"), BY AMENDING
7 SECTIONS 12.b and 13.a(10) AND SCHEDULE NOS. III,
8 XV AND XXII OF THE SALARY RESOLUTION (AMENDMENT NO.
9 13)

10 WHEREAS, on June 16, 2008, the City Council of the City of
11 Vernon adopted Resolution No. 9639 to be effective on July 6, 2008,
12 regarding the compensation, costs and benefits of its employees, which
13 has subsequently been amended by Resolution Nos. 9664, 9672, 9678,
14 9728, 9815, 9888, 9906, 9942, 10,001, 10,021, 10,029 and 10,053 (the
15 "Salary Resolution"); and

16 WHEREAS, Schedule No. III, Exhibit C, of the Salary
17 Resolution provides for positions and salary scales of positions
18 within the City Administration Department; and

19 WHEREAS, the City Council of the City of Vernon desires to
20 create the position of Budget Auditor in the City Administration
21 Department with the appropriate salary scale; and

22 WHEREAS, Schedule No. XV, Exhibit O, of the Salary
23 Resolution provides for positions and salary scales of positions
24 within the Office of the Treasurer; and

25 WHEREAS, the City Council of the City of Vernon desires to
26 leave the salary scale for the City Treasurer blank because when an
27 employee serves in more than one position in more than one department
28 some positions are indicated in schedules without a salary scale; and

WHEREAS, Sections 12.b and 13.a(10) of the Salary Resolution
and Schedule XXII (Exhibit V) provide for uniform allowances for the
Fire and Police Departments for the 2008-2009

1 fiscal year; and

2 WHEREAS, the City Council of the City of Vernon desires to
3 amend Sections 12.b and 13.a(10) and Schedule XXII (Exhibit V) to
4 provide for uniform allowances for the 2009-2010 fiscal year; and

5 WHEREAS, the City Council of the City of Vernon wishes to
6 amend Sections 12.b and 13.a(10) and Schedule Nos. III (Exhibit C), XV
7 (Exhibit O) and XXII (Exhibit V) of the Salary Resolution to implement
8 the aforementioned changes.

9 NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE
10 CITY OF VERNON AS FOLLOWS:

11 SECTION 1: The City Council of the City of Vernon
12 hereby finds and determines that the recitals contained hereinabove
13 are true and correct.

14 SECTION 2: Effective August 30, 2009, Schedule Nos. III
15 (Exhibit C) and XV (Exhibit O) of the Salary Resolution are hereby
16 amended in their entirety as indicated on Exhibit A, which is attached
17 hereto and made part hereof by this reference.

18 SECTION 3: Effective as of July 1, 2009, Sections 12.b and
19 13.a(10) of the Salary Resolution are hereby amended to read as
20 follows:

21 12.b. Uniform Allowance.

22 The City shall provide a uniform allowance as specified in
23 Schedule XXII, Exhibit V, for the 2009-2010 fiscal year of the City,
24 for the purchase of Uniforms and related equipment.

25 13.a(10) Uniform Allowance for Miscellaneous
26 Personnel in the Police Department.

27 Vernon shall provide a uniform allowance as
28 specified in Schedule XXII, Exhibit V, for the 2009-2010 fiscal year of

1 the City for the purchase of uniforms for dispatchers, Records
2 Personnel, Department Secretary and Administrative Aide positions in
3 the Police Department.

4 SECTION 4: Effective as of July 1, 2009, Schedule XXII
5 (Exhibit V) of the Salary Resolution is hereby amended in its entirety
6 as indicated on Exhibit B, which is attached hereto and made a part
7 hereof by this reference. Any payment provided for in Schedule XXII
8 that was to occur prior to September 1, 2009, and that has not yet been
9 paid, shall be paid on the next payroll check following the adoption of
10 this resolution, or as soon thereafter as is practicable.

11 SECTION 5: The provisions of Resolution Nos. 9639, as
12 amended by Resolution Nos. 9664, 9672, 9678, 9728, 9815, 9888, 9906,
13 9942, 10,001, 10,021, 10,029 and 10,053 not consistent with or in
14 conflict with this resolution are hereby repealed; in all other
15 respects, Resolution Nos. 9639, 9664, 9672, 9678, 9728, 9815, 9888,
16 9906, 9942, 10,001, 10,021, 10,029 and 10,053 shall remain in full
17 force and effect.

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1 SECTION 6: The City Clerk of the City of Vernon shall
2 certify to the passage, approval and adoption of this resolution, and
3 the City Clerk of the City of Vernon shall cause this resolution and
4 her certification to be entered in the Book of Resolutions of the
5 Council of this City.

6 APPROVED AND ADOPTED this 31st day of August, 2009.

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9 Name: Hilario Gonzales

10 Title: Mayor / ~~Mayor Pro-Tem~~

11 ATTEST:

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13 MANUELA GIRON, City Clerk

1 STATE OF CALIFORNIA)
2) ss
3 COUNTY OF LOS ANGELES)
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5 I, MANUELA GIRON, City Clerk of the City of Vernon, do hereby
6 certify that the foregoing Resolution, being Resolution No. 10,057, was
7 duly passed, approved and adopted by the City Council of the City of
8 Vernon at a regular meeting of the City Council duly held on Monday,
9 August 31, 2009, and thereafter was duly signed by the Mayor or Mayor
10 Pro-Tem of the City of Vernon.

11 Executed this 31st day of August, 2009, at Vernon, California.

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13 _____
14 MANUELA GIRON, City Clerk

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EX "A"

CITY ADMINISTRATION
SALARY SCALE

		MONTHLY SALARY
CITY ADMINISTRATOR	STEP 1	32,000.00
BUDGET AUDITOR -	STEP 1	11,708.00
EXECUTIVE SECRETARY TO THE CITY ADMINISTRATOR -	STEP 1	6,844.00
	2	6,487.00
	3	6,149.00
	4	5,828.00
	5	5,524.00
	6	5,238.00
	7	4,983.00
	8	4,704.00

**SCHEDULE III
EXHIBIT "C"**

cityadministration

Exhibit 3

RESOLUTION NO. 2010-33

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VERNON AMENDING PREVIOUSLY AMENDED RESOLUTION NO. 9639 REGARDING THE COMPENSATION, COSTS AND BENEFITS OF ITS EMPLOYEES ("SALARY RESOLUTION"), BY AMENDING SECTION 4 AND SCHEDULE NOS. III, IV, XIII AND XIV OF THE SALARY RESOLUTION (AMENDMENT NO. 16)

WHEREAS, on June 16, 2008, the City Council of the City of Vernon adopted Resolution No. 9639 to be effective on July 6, 2008, regarding the compensation, costs and benefits of its employees, which has subsequently been amended by Resolution Nos. 9664; 9672; 9678; 9728; 9815; 9888; 9906; 9942; 10,001; 10,021; 10,029; 10,053; 10,057; 10,075 and 2010-06 (the "Salary Resolution"); and

WHEREAS, Section 4 of the Salary Resolution provides for contributions to be made to the California Public Employees' Retirement System (PERS); and

WHEREAS, the City Administrator has recommended that the City continue paying the employer's contribution to the PERS, but no longer pay the employees' contributions on behalf of City employees to the PERS; and

WHEREAS, Schedule No. III, Exhibit C, of the Salary Resolution provides for positions and salary scales of positions within the Office of City Administration; and

WHEREAS, by memo dated February 23, 2010, the Director of Personnel has recommended that the position and salary scale of Budget Auditor be eliminated in the Office of City Administration; and

WHEREAS, Schedule No. IV, Exhibit D, of the Salary Resolution provides for positions and salary scales of positions within the Office of City Clerk; and

WHEREAS, by memo dated February 24, 2010, the Director of Personnel has recommended that the salary scale for the position of City Clerk be eliminated; and

WHEREAS, the City Council of the City of Vernon desires to leave the salary scale for the City Clerk blank because when an employee serves in more than one position in more than one department some positions are indicated in schedules without a salary scale; and

WHEREAS, Schedule No. XIII, Exhibit M, of the Salary Resolution provides for positions and salary scales of positions within the Light & Power Department; and

WHEREAS, by memo dated February 23, 2010; the Director of Personnel has recommended the position and salary scale of Administrative Assistant to Engineering Manager be eliminated in the Light & Power Department; and

WHEREAS, Schedule No. XIV, Exhibit N, of the Salary Resolution provides for positions and salary scales of positions within the Office of the City Attorney/Public Prosecutor; and

WHEREAS, by memo dated February 23, 2010, the Director of Personnel has recommended the position and salary scale of Legal Services Administrative Secretary be eliminated in the Office of the City Attorney/Public Prosecutor; and

WHEREAS, the City Council of the City of Vernon wishes to amend Section 4; and Schedule Nos. III (Exhibit C), IV (Exhibit D), XIII (Exhibit M) and XIV (Exhibit N) of the Salary Resolution to implement the aforementioned changes.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VERNON AS FOLLOWS:

SECTION 1: The City Council of the City of Vernon

hereby finds and determines that the recitals contained hereinabove are true and correct.

SECTION 2: The City Council of the City of Vernon hereby amends Section 4 of the Salary Resolution to read as follows:

"SECTION 4: PERS CONTRIBUTIONS

The City shall make the required employer's contribution to PERS. Employees shall make the required employees' contribution to PERS."

SECTION 3: Effective March 1, 2010, Schedule Nos. III (Exhibit C), IV (Exhibit D), XIII (Exhibit M) and XIV (Exhibit N) of the Salary Resolution are hereby amended in their entirety, copies of which are attached hereto as Exhibit A.

SECTION 4: The provisions of Resolution Nos. 9639, as amended by Resolution Nos. 9664; 9672; 9678; 9728; 9815; 9888; 9906; 9942; 10,001; 10,021; 10,029; 10,053; 10,057; 10,075 and 2010-06, not consistent with or in conflict with this Resolution are hereby repealed; in all other respects, Resolution Nos. 9664; 9672; 9678; 9728; 9815; 9888; 9906; 9942; 10,001; 10,021; 10,029; 10,053; 10,057; 10,075 and 2010-06, shall remain in full force and effect.

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SECTION 5: The City Clerk of the City of Vernon shall certify to the passage, approval and adoption of this Resolution, and the City Clerk of the City of Vernon shall cause this Resolution and the City Clerk's certification to be entered in the File of Resolutions of the Council of this City.

APPROVED AND ADOPTED this 1st day of March 2010..

Hilario Gonzales
Name: Hilario Gonzales
Title: Mayor / ~~Mayor Pro Tem~~

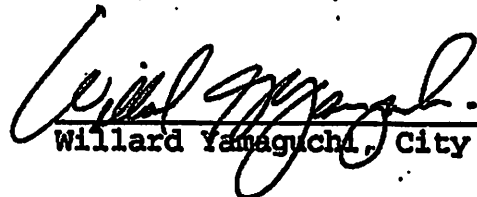
ATTEST:

Willard Yamaguchi
Willard Yamaguchi, City Clerk

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Willard Yamaguchi, City Clerk of the City of Vernon, do hereby certify that the foregoing Resolution, being Resolution No. 2010-33, was duly passed, approved and adopted by the City Council of the City of Vernon at a regular meeting of the City Council duly held on Monday, March 1, 2010, and thereafter was duly signed by the Mayor or Mayor Pro-Tem of the City of Vernon.

Executed this 1 day of March 2010, at Vernon, California.



Willard Yamaguchi, City Clerk

(SEAL)

EX "A"

CITY ADMINISTRATION
SALARY SCALE

	MONTHLY SALARY	
CITY ADMINISTRATOR	STEP 1	32,000.00
EXECUTIVE SECRETARY TO THE CITY ADMINISTRATOR -	STEP 1	6,844.00
	2	6,487.00
	3	6,149.00
	4	5,828.00
	5	5,524.00
	6	5,236.00
	7	4,963.00
	8	4,704.00

**SCHEDULE III
EXHIBIT "C"**

cityadministration

Exhibit 4



Effective June 28, 2015

City Council Monthly Compensation

The City Council receives the following compensation from the City of Vernon as authorized by California Law.

Name & Title	Monthly Council Compensation
W. Michael McCormick, Mayor	\$2,146
William Bill Davis, Mayor Pro-Tem	\$2,146
Luz Martinez	\$2,146
Yvette Woodruff-Perez	\$2,146
Melissa Ybarra	\$2,146

Executive Management

City Administrator

Mark C. Whitworth, the current City Administrator, receives a yearly compensation of \$293,436.

Top Executive Management

Job Title	Monthly Compensation (a)
City Attorney	\$21,120
City Clerk	\$11,203
Police Chief	\$20,117
Director of Public Works, Water & Dev. Services	\$20,117
Director of Health & Environmental Control	\$17,378
Director of Human Resources	\$16,333.34
Director of Gas & Electric	\$22,180
Director of Finance	\$17,500
Fire Chief*	\$18,379

(* Monthly compensation does not include premium pay)

To view the entire City of Vernon salary schedule please click here.