

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues  
Against:

ADEKUNLE M. ADERONMU and  
CITY OF HAWTHORNE,

Respondents.

Case No. 2014-1220

OAH No. 2015050586

**PROPOSED DECISION**

This matter was heard by David Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 22, 2015, in Los Angeles.

Rory J. Coffey, Senior Staff Attorney, represented Renee Ostrander (complainant).

Adekunle M. Aderonmu (respondent) was present and represented himself.

There was no appearance on behalf of the City of Hawthorne (the City).

Evidence and argument was offered. The record was closed and the matter was deemed submitted for decision on October 22, 2015.

**FACTUAL FINDINGS**

*Parties and Jurisdiction*

1. The Statement of Issues was filed by complainant in her official capacity as the Assistant Chief of the Customer Account Services Division for the California Public Employees' Retirement System (PERS).

2. On December 11, 2011, respondent first became employed by the City as the City Attorney. On March 29, 2013, the City Council terminated respondent's employment.

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3. By letter dated March 11, 2014, respondent and the City were notified of PERS' decision not to consider compensation that was paid by the City to respondent, and reported by the City to PERS, for a period after March 29, 2013, in determining respondent's retirement benefits. Respondent and the City were advised of their appeal rights.

4. By letter dated April 1, 2014, respondent filed a timely appeal and requested an administrative hearing.

5. There was no evidence of any appeal filed by the City. The City was properly served with notice of the hearing. Based on the City's failure to appear at the hearing, its default is noted under Government Code section 11520.

*Respondent's Hiring, Firing and Compensation*

6. On December 11, 2011, respondent first became employed by the City as the City Attorney. By virtue of his employment, respondent was a local miscellaneous member of PERS.

7. PERS is a defined benefit plan. Benefits for its members are funded by employee and employer contributions, as well as by interest and other earnings on those contributions. The amount of an employee's contributions is determined by applying a fixed percentage to the member's 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, PERS' Board of Administration (Board) sets employer contribution rates annually.

8. The City is a contracting agency with PERS for retirement benefits for its eligible employees. The provisions of the City's contract with PERS are governed by the California Public Employees' Retirement Law (the PERL; Gov. Code, § 20000 et seq.).

9. The amount of a member's service retirement allowance is calculated by applying a percentage figure, based upon the member's age on the date of retirement, to the member's years of service and the member's "final compensation," which is defined by statute and discussed in more detail below. In computing a member's retirement allowance, PERS staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member's "final compensation" for purposes of calculating the retirement allowance.

10. Respondent's employment agreement with the City, signed December 11, 2013 (exhibit 13), includes provisions relating to termination and severance pay. Item 5 of the agreement states:

**"TERMINATION OF AGREEMENT**

"A. Aderonmu shall be employed 'at-will' and shall have no property rights to City employment. A majority of the City Council may choose to terminate this agreement at any

time in accordance with the requirements of Hawthorne Municipal Code Sections 2.08.070, 2.08.080, and 2.08.090. Aderonmu shall be given thirty (30) days [sic] notice before the effective date of termination and shall have the opportunity to resign during this period. In lieu of thirty (30) days [sic] notice, Aderonmu may be placed on thirty (30) days administrative leave.

“B. Upon termination of this Agreement as set forth above, Aderonmu shall be entitled to receive a severance package from CITY which shall be equivalent to the lesser of (a) three (3) months’ salary at Aderonmu’s then current rate; [or] (b) salary at his then current rate for the number of months remaining in the term of this Agreement. The salary shall be paid in installments at the same time as other employees of the CITY represented by HEG [Hawthorne Executive Group] are paid. Aderonmu is also entitled to receive the same benefit for medical as City employees represented by HEG, and have access to the same plans, except where otherwise required by law during this 3-month period. Aderonmu is also entitled to receive the same benefit for earning vacation, sick and administrative leave time, as required by the HEG MOU [Memorandum of Understanding] during this 3-month period.”

11. On March 29, 2013, the City Council held a special meeting and, by majority vote, terminated respondent’s employment as City Attorney effective immediately. The minutes state that respondent was then placed on administrative leave pursuant to his contract. (Exhibit 16.)

12. The City reported to PERS payroll on respondent’s behalf until September 20, 2013.

13. On September 14, 2013, respondent signed an application for service retirement. Respondent retired for service effective December 11, 2013, with 6.762 years of service credit, and has been receiving his retirement allowance from that date.

14. PERS reviewed the compensation reported by the City on behalf of respondent from March 30, 2013 through September 20, 2013, and determined that the compensation did not comply with the PERL and must be excluded in the calculation of respondent’s final compensation.

15. At the same March 29, 2013 City Council meeting when respondent was terminated, the City hired Russell Miyahira as Acting City Attorney until April 28, 2013 and, thereafter to be the City Attorney. The City then began reporting Mr. Miyahira’s salary to PERS.

16. Taras Kachmar has worked for PERS for 11 years and is a Retirement Program Specialist II. He communicated with the City to determine the reasons respondent continued to receive pay after his termination. The City notified Kachmar that respondent continued to receive his salary for six months after his termination for two reasons; to pay for

unused sick, vacation and other leave, and for three months as part of his severance package under his employment agreement.

17. Kachmar did not determine whether or not respondent's termination was lawful and valid. He determined that the pay reported by the City after respondent's termination was not part of respondent's final compensation for several reasons, including: respondent was no longer providing services to the City; another City employee, Mr. Miyahira, was appointed to the position of City Attorney and Mr. Miyahira's pay was reported by the City to PERS; respondent's continued pay in exchange for his leave balances, and for severance pay, does not meet the definition of final compensation; and even if the City Council meeting minutes stated that respondent was placed on administrative leave, those same minutes, and other documents, confirmed that respondent was terminated as of March 29, 2013.

#### *Parties Contentions*

18. PERS contends that respondent's termination on March 29, 2013, ended his service to the City, that compensation paid after that date was not in return for his services rendered on a full time basis and that, therefore, such compensation should not be included in the calculation of his "final compensation," as defined by statute and as used to determine his retirement allowance. Mr. Miyahira was providing services to the City at that time, and not respondent.

19. Respondent raises many contentions, some of which are discussed below. If not discussed, the contention was without merit as lacking in evidentiary support and/or legal support.

20. Respondent contends that he was on administrative leave after March 29, 2013, and was therefore entitled to pay that would be included in his "final compensation." He cites the Hawthorne Municipal Code in support.

21. Respondent contends that his termination on March 29, 2013, was unlawful and invalid and that PERS therefore cannot consider it as his last date of employment to determine his "final compensation." Respondent did not receive the written notice of termination required under the Hawthorne Municipal Code, nor did the City follow the necessary steps under that Code. He cites the Hawthorne Municipal Code and his employment agreement in support, as well as a form related to a deferred compensation plan wherein the City's Human Resources Manager wrote that respondent's last day of employment was December 13, 2013. (Exhibit G.)

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## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476.)

2. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 and footnote 5, the court generally considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found “the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence.”

3. In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof, as the moving party, to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

4. PERS’ interpretation of the PERL and its accompanying regulations is generally entitled to deference, since PERS is the agency charged with enforcing the law. (*City of Pleasanton v. Board of Administration of the California Public Employees’ Retirement System* (2012) 211 Cal.App.4th 522, 539.)

5. Based on the above, respondent has the burden of establishing by a preponderance of the evidence that he is entitled to an amount of final compensation that includes compensation received after March 29, 2013.

### *Final Compensation*

6. The formula for determining a member’s retirement benefit takes into account: (1) years of service; (2) a percentage figure based on age on the date of retirement; and (3) “final compensation.” (Gov. Code, §§ 20037, 21350, 21352, 21354.5; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.) The issue presented in this case relates to the computation of respondent’s final compensation.

7. Final compensation is determined, in part, by calculating a member’s compensation earnable. Government Code section 20630, subdivision (a), generally 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.

8. Compensation earnable means payrate and special compensation, as defined in Government Code section 20636. As applicable here, special compensation is defined to include pay for certain activities, but does not include final settlement pay. (*Id.*, subd.

(c)(7)(A.) Final settlement pay is defined as pay in excess of compensation earnable granted to an employee in connection with separation from employment. (*Id.*, subd. (f).) The Board was authorized to promulgate regulations to further delineate what constitutes final settlement pay.

9. The Board promulgated California Code of Regulations, title 2, section 570, which adds that final settlement pay “is excluded from payroll reporting to PERS, in either payrate or compensation earnable,” and gives as an example severance pay.

10. Whether or not respondent’s termination was lawful or valid, he ceased working full time for the City as of March 29, 2013. Any compensation the City paid him after that date was part of his severance package and is not included in his “final compensation” for purposes of determining his retirement allowance benefits.

#### *Respondent's Contentions*

11. The placement of respondent on administrative leave as of March 13, 2013, does not change the outcome. As noted in the council meeting minutes, this action was taken under his contract. As noted in his contract, respondent was entitled to 30 days’ notice before any effective date of termination or, in the alternative, he could be placed on administrative leave for 30 days.

12. Respondent’s claims that the City did not follow termination requirements in the municipal code does not change the outcome. He was not denied a fair hearing of his dispute concerning his retirement allowance. In the setting of an action to dismiss a teacher from employment by a school district, the court, in *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831, 846 determined that the school district’s governing board violated the Ralph M. Brown Act (Gov. Code, § 54950 *et seq.*) by not providing proper notice that it was considering a decision to terminate a teacher and by discussing the subject in executive session. The court determined that the executive session violated the Brown Act. “However, the validity of the action taken by the Board is not affected by the violation of the Brown Act. (Citations.) Moreover, the fact that the Board’s decision was made during a meeting which violated the Brown Act did not in and of itself deny respondents a fair hearing.”

13. Admittedly, it is an inexact analogy to apply this reasoning to respondent’s situation. Whether the City followed proper procedures under the employment agreement or the Hawthorne Municipal Code in the process of his termination may give rise to other rights and remedies for respondent. However, respondent stopped working for the City as of the date of the City Council’s termination of him, yet the City continued to improperly report its payout of leave balances and severance pay to PERS as regular compensation. Whether or not the City followed proper procedures in the termination does not change the characterization of the pay reported to PERS after the termination. As noted above in Legal Conclusion 10, that pay should not be included in respondent’s “final compensation” for purposes of determining his retirement allowance.

14. Similarly, the treatment of administrative leave in the Hawthorne Municipal Code, and its possible application to respondent, does not affect PERS' determination of respondent's final compensation under the PERL and applicable regulations.

15. That the City Council minutes relate that the City terminated respondent and placed him on administrative leave at the same time does not entitle respondent to have his final compensation include his pay while on leave. It was clear that respondent was terminated and any pay after that was pursuant to provisions of his contract, allowing for administrative leave under certain circumstances as well as a severance package. He ceased working. His subsequent pay is not included in respondent's "final compensation" for purposes of determining his retirement allowance.

16. Respondent's contentions are not convincing, as they lack evidentiary support and/or legal support.

#### ORDER

The appeal of respondent Adekunle M. Aderonmu is denied. The compensation reported by the City of Hawthorne to the California Public Employees' Retirement System from March 30, 2013, through September 20, 2013, shall not be included in the calculation of respondent's final compensation.

DATED: November 6, 2015

DocuSigned by:  
*David B. Rosenman*  
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DAVID B. ROSENMAN  
Administrative Law Judge  
Office of Administrative Hearings