

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Final Compensation
Benefit Calculation of:

NICHOLAS G. RODRIGUEZ,

Respondent,

CITY OF VERNON,

Respondent,

and

CITY OF PASADENA,

Respondent.

Case No. 2014-1023

OAH No. 2015031212

PROPOSED DECISION

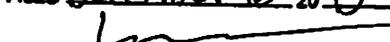
This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in Los Angeles on September 2, 2015. Complainant Public Employees' Retirement System was represented by Christopher Phillips, Senior Staff Counsel. Respondent Nicholas G. Rodriguez was present and represented by Dale L. Gronemeier, Attorney at Law. The City of Pasadena and the City of Vernon were not represented and did not make an appearance at the hearing.

At the outset of the hearing, complainant's motion to amend the Statement of Issues by interlineation was granted as follows: on page 2, paragraph III, line 9, the phrase "since that date" was deleted and the date of "October 10, 2012" inserted in its place. Respondent did not object to the motion.

During the hearing, complainant presented Exhibits 1 – 10, which were received in evidence, and the testimony of Greta Moritz, Staff Services Manager I, of

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED December 16 2015



CalPERS' Retirement Administration and Support Unit, and Julian Robinson, Senior Pension Actuary. Respondent presented documentary comprised of Exhibits A – H, which were received in evidence.

At the conclusion of the hearing, complainant's request to file written argument in response to respondent's hearing brief was granted and a briefing schedule was set. The parties were ordered to file briefs based on the preparation and receipt of the hearing transcript. Complainant was directed to file a brief two weeks after the receipt of the hearing transcript and respondent was directed to file a reply brief no later than two weeks thereafter. Respondent's Hearing Brief (Exh. I) was considered as his opening argument.

On September 24, 2015, complainant filed a letter providing notice to respondent and the Administrative Law Judge that the hearing transcript had been received on September 23rd. In the letter, complainant also confirmed the briefing schedule that was ordered at the hearing. Complainant's letter was marked as Exhibit 11 for identification.

On October 6, 2015, complainant filed a Closing Brief, which was marked as Exhibit 12 for identification. On October 19, 2015, respondent filed a Post-Hearing Brief, which was marked as Exhibit J for identification. The parties' briefs were received and the record was closed.

On November 13, 2015, after reviewing the parties' briefs, the Administrative Law Judge issued a Post-Hearing Order re-opening the record and requesting complainant to file a copy of the hearing transcript within ten days. The Post-Hearing Order was made because the parties' briefs made reference to specific portions of the hearing transcript and the Administrative Law Judge did not receive a copy of the hearing transcript. On November 18, 2015, complainant filed a hard copy of the hearing transcript. On November 19, 2015, the Administrative Law Judge received the hearing transcript, marked it as Exhibit 14, admitted it into evidence, and closed the record.

Oral, documentary, and stipulated evidence and written argument having been received, the Administrative Law Judge submitted this matter for decision on November 19, 2015, and finds as follows:

FACTUAL FINDINGS

1. On March 2, 2015, the Statement of Issues, Case Number 2014-1023, was made and signed for and on behalf of complainant California Public Employees' Retirement System, State of California (CalPERS), by Diane Alsup in her official capacity as Interim Chief, Benefit Services Division, CalPERS, Board of Administration, State of California.

2. (A) From in or about February 23, 1988, through on or about September 9, 2012, Nicholas G. Rodriguez (respondent) was employed with the City Attorney's Office of the City of Pasadena. He was a Deputy City Attorney and then an Assistant City Attorney for the City of Pasadena.

(B) On or about August 10, 2012, and as a result of an open recruitment process by an independent executive search firm, respondent was hired as the City Attorney for the City of Vernon. On September 10, 2012, respondent and the City of Vernon executed an At-Will Employment Agreement for Vernon City Attorney, which was for a three-year term. On December 6, 2013, respondent voluntarily resigned as City Attorney for the City of Vernon pursuant to an agreement. Respondent worked as the City Attorney for the City of Vernon from on or about August 10, 2012, through December 6, 2013

(C) By virtue of his employment with the City of Pasadena and the City of Vernon, respondent was or is a local miscellaneous member of CalPERS subject to the provisions of Government Code section 21150.

3. On or about November 7, 2013, respondent filed a Service Retirement Election Application with CalPERS. He selected Option 2 as his service retirement option. In a letter dated January 16, 2014, CalPERS informed respondent that his Service Retirement Election Application had been processed, that his retirement date was December 6, 2013, and that his monthly retirement benefit was \$10,527.89.

4. Respondent qualified for a service retirement from CalPERS based upon his years of service credit and his age at retirement. As set forth in an Account Detail Information Sheet attached to the January 16, 2014 letter from CalPERS, respondent earned 24.651 years of service credit at the City of Pasadena and 1.313 years of service credit at the City of Vernon. In addition, he had purchased five years of additional retirement service credit while employed with the City of Pasadena. Effective on December 6, 2013, respondent retired on the basis of service with a total of 30.964 years of service credit from both the City of Pasadena and the City of Vernon.

5. Respondent has been receiving a retirement allowance from CalPERS since his retirement date of December 6, 2013. In its January 16, 2014 letter, CalPERS advised respondent that final compensation is his highest average monthly pay rate for the last consecutive 12 or 36 months of employment based on his employer's contract with CalPERS. The issue in this appeal is the propriety of CalPERS' calculation of respondent's retirement benefit by the use and combining of two final compensation amounts from his jobs with two public agencies.

6. The City of Pasadena and the City of Vernon are public agencies that contract with CalPERS for retirement benefits for their eligible employees. The provisions of the contracts between CalPERS and the City of Pasadena and City of

Vernon are set forth in the Public Employees' Retirement Law (PERL) (Gov. Code, §§ 20000 et seq.).¹

7. (A) At all times relevant herein, the City of Pasadena contracted with CalPERS for a retirement formula commonly known as "2.5 percent at age 55" and elected a three-year, or 36-month, final compensation period under Government Code section 20037.

(B) At all times relevant herein, the City of Vernon contracted with CalPERS for a retirement formula commonly known as "2.7 percent at age 55" and elected a one-year, or 12-month, final compensation period under Government Code section 20042.

8. CalPERS calculated respondent's unmodified benefit or allowance under the contract with the City of Pasadena as follows:

a. To determine the highest consecutive 36-month period to calculate the final compensation under the City of Pasadena contract, CalPERS used 16 months of respondent's salary with the City of Vernon and 20 months of his salary with the City of Pasadena and determined that respondent's final compensation with the City of Pasadena was \$18,356.28 per month.

b. CalPERS then multiplied respondent's 29.651 years of service credit with the City of Pasadena by the benefit factor of 2.5 percent, which came to 74.127 percent [29.651×2.5].

c. CalPERS multiplied 74.127 percent by the amount of respondent's final compensation amount of \$18,356.28 to reach the figure of \$13,607.06 per month as his unmodified allowance.

9. CalPERS calculated respondent's unmodified benefit or allowance under the contract with the City of Vernon as follows:

a. To determine the highest consecutive 12-month period to calculate the final compensation under the City of Vernon contract, CalPERS used the highest consecutive 12 months of respondent's salary with the City of Vernon and determined that respondent's final compensation with the City of Vernon was \$21,038.73 per month.

b. CalPERS then multiplied respondent's 1.313 years of service credit with the City of Vernon by the benefit factor of 2.7 percent, which came to 3.545 percent [1.313×2.7].

¹ All section references are to the Government Code.

c. CalPERS multiplied 3.545 percent by the amount of respondent's final compensation with the City of Vernon of \$21,038.73 to reach the figure of \$745.84 per month as his unmodified allowance.

10. Based on Findings 6 – 9 above, CalPERS added the sum of \$13,607.06 per month under the City of Pasadena contract and the amount of \$745.84 per month under the City of Vernon contract to calculate the total and final unmodified benefit or allowance for respondent as \$14,352.90 per month [$\$13,607.06 + \745.84].²

11. In a letter dated April 14, 2014, respondent asked CalPERS' to review its calculation of his pension or retirement benefit. Respondent questioned CalPERS' calculation of his retirement benefit based on a "mix" or "blend" of a final compensation amount from his service with the City of Pasadena and a final compensation amount from his service with the City of Vernon. Respondent asserted, in part, that there is no statutory or regulatory authority supporting CalPERS' mixing or blending of the final compensation amounts to determine his retirement benefit.

12. (A) In a letter dated May 9, 2014, Geri Romeo (Romeo), Staff Services Manager II, of CalPERS' Retirement Application and Calculation Section, replied to respondent's request that CalPERS review and re-calculate his retirement benefit. Romeo explained that a member's retirement benefit is calculated by multiplying the member's years of service credit, a benefit factor, and final compensation for each employer and adding the totals together to arrive at an unmodified allowance. The benefit factor is based on the member's age and his employer's retirement formula. The retirement formula as well as the final compensation are benefit provisions that are contracted for and by each employer. Romeo advised respondent that the final compensation used to calculate his retirement benefit was based on the benefit provisions contracted by each of his employers, the City of Pasadena and the City of Vernon.

(B) Romeo indicated that the City of Pasadena contracted for a three-year final compensation under Government Code section 20037, which provides that final compensation is the highest average annual compensation earnable by a member during three consecutive years of employment. Romeo stated that CalPERS determined that his highest consecutive three-year final compensation was from December 6, 2010, through December 5, 2013, and was \$18,356.28 per month.

(C) Romeo indicated that the City of Vernon contracted for a one-year final compensation under Government Code section 20042, which provides that final

² CalPERS's calculation of respondent's unmodified allowance set forth in Findings 8 – 10 is based on the parties' Stipulation Re: Undisputed Facts (Exh. 10). It was not established how CalPERS determined that respondent's retirement allowance under his Option 2 election was \$10,527.89 per month. However, respondent did not challenge that determination.

compensation is the highest average annual compensation earnable by a member during a one-year period of employment. Romeo stated that CalPERS determined that his highest consecutive one-year final compensation was from September 6, 2012, through September 5, 2013, and was \$21,038.73 per month.

(D) In conclusion, Romeo advised respondent that CalPERS had “correctly determined [his] highest average consecutive one-year and three-year compensation periods.” She indicated that there is no authority in the PERL to allow CalPERS to calculate his retirement benefit in a different manner. Romeo added that, had respondent worked at the City of Vernon for three years, his highest consecutive three-year compensation for purposes of calculating his final compensation under the contract with the City of Pasadena would have been based wholly on his higher salary from the City of Vernon.

13. On July 16, 2014, respondent filed a timely appeal from the determination by CalPERS that his retirement benefit is \$10,527.87 per month and the decision not to re-calculate his retirement benefit. In his appeal, respondent has requested that the Board of Administration of CalPERS direct its staff to calculate his monthly pension benefit based on his highest one-year final compensation from his job with the City of Vernon. He asserted that CalPERS has impermissibly, and without statutory authority, reduced or diluted his retirement benefit by averaging or mixing his highest one-year compensation from the City of Vernon with his highest consecutive three years of compensation from the City of Pasadena. Respondent contended that, under Government Code section 20042 and the contract between CalPERS and the City of Vernon, his retirement benefit should be calculated with a single, final compensation that is based only on his highest one-year of compensation earned during his employment with the City of Vernon preceding his retirement.

14. (A) Greta Moritz, Staff Services Manager in the Retirement Administration and Support Unit (Moritz), testified about the procedures that CalPERS followed in calculating respondent’s retirement allowance. First, the CalPERS computer system automatically calculated respondent’s final compensations from his employment with the City of Pasadena and City of Vernon and determined an unmodified retirement benefit for him. Due to the high dollar amounts of respondent’s salaries and final compensation, CalPERS staff manually verified the data or information reported by the employers regarding respondent’s pay rates or salaries and found no discrepancies.

(B) Second, as established by Moritz’s testimony, CalPERS recognizes that a member may have more than one public employer in his career before electing to retire. Each public employer or agency may contract with CalPERS for the computation of a retirement benefit based on a different final compensation period under the PERL. In general, a member’s final compensation is calculated by use of the continuous 12 month or 36 month average of his highest pay rate and the use of a 12-month or 36-month period is dependent upon the employer’s contract. Where a

member has more than one employer, the member will have a different final compensation calculation for each job and will have more than one final compensation calculation. CalPERS then calculates the member's unmodified retirement allowance under the terms of the contract and formula applicable to each public employer or agency and combines or adds the allowances together to determine the final amount of the member's retirement benefit.

(C) In this matter, as established by Moritz's testimony and the documentary evidence, respondent had worked for the City of Pasadena, which contracted for the calculation of final compensation under section 20037 which requires use of the highest average annual compensation earned during three consecutive years, or 36 months, of employment, and for the City of Vernon, which contracted for the calculation of final compensation under section 20042 which requires use of the highest average annual compensation earned during one year, or 12 months, of employment. Because respondent earned his highest compensation when he worked for the City of Vernon for 16 months, CalPERS used that higher 16 months of salary as well as 20 months of his salary with the City of Pasadena to calculate his final compensation for 36 months under the City of Pasadena contract.

(D) In his appeal, Moritz understood that respondent seeks to use his higher salary and higher 12-month final compensation period under section 20042 from his employment with the City of Vernon in the calculation of his total retirement benefit. Respondent would then seek to use that higher final compensation with the service credit and 2.5 percent formula under the City of Pasadena contract, which Moritz testified was not consistent. Moreover, Moritz indicated that the use of the higher 12-month final compensation would not only increase respondent's final compensation with the City of Pasadena but also cause the City of Pasadena to have a liability or obligation to pay for that increase which was not contracted for under its contract pursuant to section 20037.

15. As established by the testimony of Julian Robinson, Senior Pension Actuary, CalPERS has never enforced or applied a 12-month final compensation period under section 20042 to calculate a member's final compensation and retirement benefit that was earned under section 20037. If respondent's 12-month final compensation earned with the City of Vernon under section 20042 were to be used to calculate respondent's 36-month final compensation earned with the City of Pasadena under section 20037, then there would be an unfunded liability of \$2,000 per month payable by the City of Pasadena. When a public agency, such as the City of Vernon contracts for a 12-month final compensation period under section 20042, CalPERS classifies that final compensation period as an optional benefit and assesses the public agency with higher contribution amounts to account for the difference. The 36-month final compensation period under section 20037 is considered a standard contract provision and its pension costs are built into the public agency's basic contribution to the CalPERS pension plan.

* * * * *

Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Grounds do not exist to grant respondent's appeal to re-calculate his service retirement benefit or allowance using a one-year final compensation under Government Code section 20042 in that respondent failed to carry his burden of proof in this Statement of Issues matter, based on Findings 1 – 15 above.

2. Government Code section 20037 provides, in pertinent part, that, for a local member who is an employee of a contracting agency that is subject to this section, "final compensation" means the highest average annual compensation earnable by the member during the three consecutive years of employment immediately preceding the effective date of his retirement or during any other period of three consecutive years during his membership in this system which he designates in his application for retirement.

3. Government Code section 20042 provides, in pertinent part, that, on the election of a contracting agency, "final compensation" for a local member employed by that agency whose retirement is effective and with respect to benefits based on service to the agency shall be computed under section 20037 but with the substitution of the period of one year for three consecutive years.

4. Where a public entity enters into a contract with CalPERS, the pension amount for any covered employees will necessarily be determined by the PERL. (Gov. Code, § 20000, et seq.; See *Molina v. Board of Administration, etc.* (2011) 200 Cal.App.4th 53, 64-65.) The full amount of a public employee's monthly taxable income is not always the determinative sum for the employee's pension. Rather, only compensation earnable is considered by CalPERS in determining the amount of an employee's ultimate pension benefits. (*Molina v. Board of Administration, etc., Ibid. at p. 67.*)

5. Under the PERL, the determination of which benefits and items of pay constitute "compensation" is crucial to the computation of an employee's ultimate pension benefits. The pension is calculated to equal a certain fraction of the employee's "final compensation," which is multiplied by a fraction based on age and length of service. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App. 3d 1470, 1478-1479.)

6. Where a review or appeal of a determination by CalPERS requires a court to interpret the PERL or a CalPERS regulation, CalPERS' interpretation of the PERL is to be accorded great weight unless clearly erroneous. (*City of Sacramento v. Public Employees' Retirement System, Ibid.*; *Prentice v. Board of Administration* (2007) 157 Cal.App. 4th 983, 989.)

7. Discussion—In this matter, CalPERS determined respondent's service retirement benefit by separately calculating his final compensation for his 29.651 years of service with the City of Pasadena and his final compensation for his 1.313 years of service with the City of Vernon. The City of Pasadena had contracted for a 36-month final compensation period under section 20037. The City of Vernon had contracted for a 12-month final compensation period under section 20042. CalPERS has interpreted sections 20037 and 20042 to require the calculation of separate final compensation amount for each of respondent's two jobs in order to determine unmodified benefits or allowances and then the addition of the unmodified allowances to determine respondent's retirement benefit.

In this appeal, respondent has made a number of arguments in support of his contention that his final compensation for calculating his retirement benefit should be based solely on the provisions of section 20042 and his highest average compensation earnable during his more than one year of employment with the City of Vernon. Respondent also argues that only the "2.7 percent at age 55" retirement formula under section 20042 and the City of Vernon contract should likewise be used to calculate his retirement benefit.

Respondent complains that CalPERS did not calculate his final compensation and retirement benefit based on his highest compensation earnable but diluted his retirement benefit by mixing and blending his final compensations from his jobs with the two public agencies. Because he last worked for the City of Vernon before electing to retire on the basis of service, respondent asserts that he should receive a retirement benefit under the provisions of the City of Vernon's contractual election under section 20042 which provides for a 12-month final compensation period and takes into account his highest salary for his career. He argues, in part, that section 20042 as well as section 20037 are unambiguous on their face and require a single final compensation under either a 12-month period or a 36-month period of a member's highest compensation earnable. Respondent observes that neither section 20042 nor section 20037 mentions multiple final compensations, unlike section 20039, which states, in part, that "the member may have more than one final compensation." Invoking the doctrine of *inclusion unius, exclusion alterius*, respondent argues that the absence of any mention of multiple final compensations in sections 20042 and 20037 means that the Legislature did not intend to have multiple final compensations under these sections. Respondent thus concludes that there is no statutory authority for CalPERS to blend or mix final compensations from his two jobs. Rather, he contends that sections 20037 and 20042 specifically reference a single final compensation. In this matter, respondent asserts that his final

compensation should be based on his employment with the City of Vernon and its contract under section 20042.

Respondent's various arguments were not persuasive. Respondent failed to demonstrate that CalPERS' interpretation of sections 20042 and 20037 for determining respondent's service retirement allowance from the City of Vernon and City of Pasadena is unreasonable or erroneous. As established by case law, the interpretations by CalPERS of sections 20042 and 20037 as reflected in the facts of this matter are entitled to great weight. Respondent may take some solace in the fact that he did obtain benefit of his higher salary at the City of Vernon inasmuch as CalPERS calculated his 36-month final compensation under the City of Pasadena contract by including his 16 months of service with the City of Vernon.

* * * * *

Wherefore, the following Order is hereby made:

ORDER

1. The appeal or request of respondent Nicholas G. Rodriguez for recalculation of his service retirement benefit is denied, based on Conclusions of Law 1 – 7 above, jointly and for all.
2. The Statement of Issues, Case Number 2014-1023, OAH Number 2015031212, and the determination of the California Public Employees' Retirement System, are affirmed.

Dated: December 11, 2015

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Vincent Nafarrete
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Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings