

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

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

In the Matter of the Appeal Regarding  
Membership Eligibility:

NORMAN R. THORN,

and

CITY OF EL SEGUNDO,

Respondents.

Case No. 2015-0464

OAH No. 2015080976

**PROPOSED DECISION**

This matter was heard by Julie Cabos-Owen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, on April 28, 2016, in Los Angeles, California. The California Public Employees' Retirement System (CalPERS) was represented by Staff Attorney Preet Kauer. Norman R. Thorn (Respondent) was present and represented himself. City of El Segundo (City) was represented by T. Oliver Yee, with Liebert, Cassidy, Whitmore.

At the administrative hearing, the Statement of Issues was amended as follows: at page 3, line 14, the word "school" was changed to "agency."

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on April 28, 2016.

**FACTUAL FINDINGS**

*Jurisdiction and Issue*

1. Renee Ostrander, Chief of the Employer Account Management Division of CalPERS, filed the Statement of Issues while acting in her official capacity.
2. The City is a contracting agency with CalPERS, and its qualifying employees are members of CalPERS.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED May 16 20 16

Michael J. [Signature]

3(a). Respondent was hired by the City as an Information Systems Consultant (Consultant), through various consulting service agreements, from May 1, 1994, through June 30, 1999, and from May 1, 2000, through April 24, 2005.

3(b). From May 1, 1994, through June 30, 1999, Respondent worked for Progressive Solutions, Inc., which contracted with the City. In 1999, the City offered Respondent employment as Information Systems Manager for the City, but he was unable to accept because Progressive Solution's contract prohibited this. Consequently, Respondent discontinued working for Progressive Solutions, and took work as an independent consultant with the city of Pico Rivera. On May 1, 2000, Respondent returned to work for the City under contracts between Respondent (dba Business Productivity Systems from 2000 to 2001, and dba NOROC from 2002 to 2005) and the City. At these times, he was considered an independent contractor by the City and was not offered CalPERS membership.

4. On April 25, 2005, Respondent was hired as an employee of the City working as an Information Systems Division Manager. By virtue of this employment, Respondent became a local miscellaneous member of CalPERS beginning April 25, 2005.

5(a). On May 9, 2007, Bob Hyland, Human Resources Manager with the City, sent Respondent a memorandum stating:

As you know, the City's Administrative Code provides that management employees such as yourself . . . "shall accumulate vacation time based on their total years of service in a PERS or comparable agency." To date, only prior service as an employee in a variety of public sector agencies has been interpreted as establishing eligibility for this benefit. However, because of your extensive prior experience serving as an Information Systems consultant for [the City], as well as for a number of other municipalities in Southern California, City Manager Stewart is agreeable that the number of years you provided consulting services to [the City] be utilized in determining your new vacation accrual rate.

(Exhibit R-B-20.)

5(b). On an attached form, Respondent's prior service dates were listed as May 1, 1994 through June 30, 1999, and May 1, 2000 through April 24, 2005.

6. On October 26, 2010, Respondent signed a Service Retirement Election Application. He retired for service effective December 31, 2010.

7(a). On October 26, 2010, Respondent also submitted a Request for Service Credit Cost Information – Service Prior to Membership, seeking service credit and/or information regarding the cost of purchasing credit for service prior to membership (SPM) for his periods of employment as a Consultant for the City from May 1, 1994, through June 30, 1999, and from May 1, 2000 through April 24, 2005.

7(b). Page two of the Request for Service Credit contained sections which had to be completed by Respondent's employer, the City. On November 22, 2010, City Senior Management Analyst Jeanne McLeod signed and returned to CalPERS the completed page two of Respondent's Request for Service Credit. Under Section 5, entitled "Employer Certification," Respondent's employment dates were listed as May 1, 1994, through June 30, 1999, and from May 1, 2000 through April 24, 2005. Next to the words "Time Base," four boxes were available to be checked: Full Time, Part Time, Hourly, and Fraction of Full Time; the Part Time box was checked for Respondent. Below that, a line was provided next to the words "Average Number of Days or Hours Per Month;" the word "Days" had been circled and the number 12 was written on the line. Next to the words "Average Percentage or Fraction of Time Worked Per Month" was a line upon which was written "50%."

7(c). Ms. McLeod is no longer employed with the City and did not testify to explain her responses.

8. On May 14, 2013, in response to a CalPERS request for documents, the City sent CalPERS copies of City documents regarding Respondent's prior consulting services for the City. These documents included copies of contracts between the City and Respondent (dba NOROC) and several invoices (April 2001 to April 2005) and checks payable (September 2002 to March 2005) for Respondent's services provided to the City. The cover letter sent with the documents stated:

Check and invoice copies prior to September 2002 are not available. Those documents are past our retention policy.

For the requested period of 5/1/1994 through 6/30/1999 [Respondent] was an employee of Progressive Solutions Inc.

Progressive Solutions Inc. rendered information systems support and maintenance for the [City]. Documentation for that period is past our retention policy and is not available. Without the invoices, we are not able to determine what portion of the invoice billed was for [Respondent's] services.

(Exhibit R-C.)

9. On or about February 3, 2014, the City's Human Resources Director responded to CalPERS's Employment Relationship Questionnaire, stating:

As you are aware, [Respondent] was employed with the [City] as the Information Systems Manager from April 25, 2005 to December 30, 2010. The only documents housed in the Human Resources Department are documents pertaining to [Respondent's] employment tenure with the City. Human Resources has no documentation related to [Respondent's] service period from 2000-2005. Further, City administrators who may have been involved in hiring [Respondent] as a

consultant in 2000 are no longer working for the [City,] therefore, we are unable to forward this questionnaire to City staff for completion.

(Exhibit J.)

10. On February 10, 2014, Respondent sent a letter to CalPERS attaching documentation to support his argument that he was an employee of the City, rather than an independent contractor. Respondent noted:

CalPERS has taken over three years to evaluate this case. This long delay has caused many of the original records of my work to be destroyed, due to routine records destruction procedures. It appears from the statement [made by Ms. McLeod] that as of the time I requested this credit, enough records of my history with the City still existed to determine the exact dates and how much . . . I worked. . . . But CalPERS waited over two years before requesting any more information. After this excessively long delay these records no longer exist. I must therefore request that you utilize the records that are still available, and the formal stipulation made at the time the records were available, to reconstruct my work history enough to make a fair decision.

(Exhibit N.)

11. On April 30, 2014, Respondent wrote a letter to CalPERS, inquiring about the status of his Request for Service Credit and noting that he filed his request over three years prior. Respondent noted, "I have been told that due to this long delay, many of the records of my employment that existed when I requested the credit have now been destroyed due to routine records retention cycles." (Exhibit E.)

12(a). On May 16, 2014, CalPERS Chief of Customer Account Services Division, Karen DeFrank, sent Respondent a letter stating:

I would like to take this opportunity to apologize for the lengthy delays you have experienced while we obtain additional information from you and your former employer. CalPERS has determined that the technical services you provided for the period of May 1, 1994, through June 30, 1999, and May 1, 2000 through April 25, 2005, was that of an employee and not an independent contractor. Therefore, you are eligible to purchase this time as Service Prior to Membership (SPM).

(Exhibit O.)

12(b). A cost packet was enclosed with Ms. DeFrank's letter, indicating that Respondent could purchase service credit for 5.490 years, for the period of May 1, 1994, through June 30, 1999, and May 1, 2000 through April 25, 2005, with a lump sum cost of \$46,705.22.

13(a). On May 16, 2014, CalPERS also sent Respondent a detailed determination letter stating:

We have completed our review and have determined that the technical services you provided for the periods of May 1, 1994, to June 30, 1999, and May 1, 2000, through April 25, 2005, under the City were that of an employee and not an independent contractor.

[¶] . . . [¶]

This determination is based on our review of the information you and the City provided, such as Employment Relationship Questionnaires (ERQ) and (member) service agreements, invoice documents, and other documentation that indicated you were an employee, which include:

- You were requested by and required to participate in meetings with City personnel or the City Council.
- Emails from City personnel directly requesting you work on certain assignments.
- Invoices showed that you provide staff reports and status updates to City personnel.
- A Memorandum dated May 9, 2007 from Bob Hyland, Human Resources Manager, that advised your vacation accumulation would be based on your total years of service in a PERS or comparable agency. This memorandum further states that the employment period served with the City as a consultant for the City will be utilized in determining your new vacation accrual rate.

[¶] . . . [¶]

The City has completed the employment certification section of the "Request for Service Credit Cost Information – Service Prior to Membership. . . ." On this certification form, next to the question, "Do you feel the service is eligible for purchase," the employer marked the box "Yes."

(Exhibit F.)

13(b). Based on Respondent's status as an employee, CalPERS determined that Respondent could elect to purchase additional service credit for his periods of employment. However, CalPERS also determined that these time periods did not qualify for CalPERS membership because Respondent "was serving on a less than qualifying time base prior to

becoming eligible for membership. . . .” (Exhibit F.) This determination was based on CalPERS finding that Respondent did not work 1,000 hours for the City during any fiscal year between 1994 and 2004.

14(a). On June 2, 2014, Respondent sent CalPERS a letter enclosing copies of his original timesheets and invoices sent by his employer, Progressive Solutions, to the City, from July 1997 through May 1999. In his letter, Respondent noted:

[I] have been performing an extensive analysis of all available physical data regarding my hours during the time in question. Unfortunately, much of the original data has been destroyed. The fact that the CalPERS investigation of this matter took over three years has allowed many additional years of additional data to be destroyed. Therefor[e] I have tried to use all of the data that is still available but I have been forced to estimate some missing data based on what data is still available.

[¶] . . . [¶]

I found that the information provided by the [City] was lacking in many ways. For example, whole months of data were missing from their records. These missing months made it appear that I had not met the criteria to be considered a CalPERS member. However with the information I was able to find, these gaps were addressed, and in fact, I did meet the criteria as you will see.

[¶] . . . [¶]

Please note that the law places the burden of maintaining time records on the employer, not the employee. [The City] elected to destroy their documents, leaving my documentation as the only available written proof.

[¶] . . . [¶]

My reconstruction has shown that I did indeed work more than 1,000 hours in 7 of the 9 complete CalPERS years. These hours are consistent with the [City’s] statement that I worked an average of 12 days per month over this entire period, as well as the other documents [the City] has provided.

(Exhibit G.)

14(b). In his June 2, 2014 letter, Respondent asserted that he worked the following number of hours for each of the designated fiscal years: 2004 to 2005 – 1,176 hours (including two months as a full time employee); 2003 to 2004 – 846 hours; 2002 to 2003 –

1,068 hours; 2001 to 2002 – 708 hours; 2000 to 2001 – 109 hours; 1998 to 1999 – 1,210; 1997 to 1998 – 1,346; 1996 to 1997 – 1,278 hours (estimated as an average of the 1997 to 1999 hours); 1995 to 1996 – 1,278 hours (estimated as an average of the 1997 to 1999 hours); 1994 to 1995 – 1,278 hours (estimated as an average of the 1997 to 1999 hours).

15(a). On June 24, 2014, CalPERS Retirement Program Specialist II, Jamila Nelson, sent an email to City Senior Management Analyst, Jody Scott, stating:

After we issued the determination [Respondent] was eligible to purchase this [service for employment from 1994-2004] based in part on the initial Service Prior to Membership (SPM) request form certified by the City, [Respondent] submitted additional information for re-consideration. This information is attached:

\* SPM, indicating [Respondent] worked for the City on average 12 days monthly at a 50% time-base

\* Progressive Solutions Invoice Information Service from 2001-2004

\* Project Timesheets

These later documents types [*sic*] indicate [Respondent] worked 1000 hours. This is in conflict with the SPM certification and other information about the amount of hours [Respondent] worked for the City. Also, the Progressive Solution information does not indicate what employer these services were performed at, nor do the project summary documents.

Please review this information [*sic*] and confirm the amount of hours by fiscal year fall under the City.

(Exhibit R-B-9.)

15(b). In stating that the SPM certification conflicted with Respondent's assertion that he worked 1,000 hours per year, Ms. Nelson interpreted the certifications of "part-time" time base and "50 percent" average time worked to mean that Respondent's 12 days per month were only four-hour days. This was an incorrect interpretation. (See Factual Finding 26(c).)

16. On September 3, 2014, Ms. Scott sent an email to Ms. Nelson, stating:

As you indicated, the Progressive Solution documentation sent to CalPERS does not indicate for which agency the services were rendered. . . . I could not readily identify if the services described in the Project Summaries was [*sic*] specifically for the [City] or another agency or company. We were unable to retrieve Progressive Solutions

invoices to verify the hours charged for the time period of the Project Summaries, July 1997 – May 1999, but the invoice dates were past our retention policy and have been destroyed.

The City Manager, Director of Finance, Information Systems Manager, Fiscal Services Manager, Director of Human Resources and I were hired subsequent to the time Progressive Solutions was providing consultant services to the City, and cannot provide any verification of type and amount of services rendered.

(Exhibit R-B-10.)

17. On September 4, 2014, Ms. Scott sent Ms. Nelson another email stating:

We have tried to recover information or documentation regarding Progressive Solutions and [Respondent's] consulting hours that are claimed for 1997-1998 and 1998-1999.

The City has served through its records to find any documentation that could confirm or refute the claimed hours. Unfortunately, we have not been able to locate any documents regarding either Progressive Solutions or [Respondent] at all, and therefore cannot verify the amount of time that [Respondent] might have performed services for the City in those years.

We agree that this new documentation is in conflict with [Respondent's] earlier certification to CalPERS of hours worked. Also, the project summaries are of no help in this analysis as they are extremely vague and non-specific. They do not indicate whether the hours claimed to have been performed were for the City or another client of Progressive Solutions. . . .

It is not reasonable for the City to be expected to validate services claimed to have been rendered by an employee of a consulting company approximately seventeen years ago. Any documentation that may have existed would have been destroyed under the City's documentation retention policy years ago. . . .

The City believes that [Respondent] must first come forward with reliable evidence that he performed services for the City during the 1997-1998 and 1998-1999 periods, and that accurately reflect the hours he worked for the City. Since he has not done so, CalPERS should reject his claim outright.

(Exhibit P.)

18. On September 8, 2014, Ms. Nelson sent Ms. Scott another email, stating:

While we have already determined that [Respondent] was providing services as a common law employee based on the information presented, the City responses below confirm the amount of hours worked cannot be verified for every fiscal year. Therefore, no membership that would result in any arrears cost will apply at this time. This case is being forwarded to our Service Credit section to continue the service credit purchase process.

(Exhibit P.)

19. In a September 8, 2014 CalPERS Request for Action, sent from Jamila Nelson to the Service Credit Division, Ms. Nelson noted:

Despite the City's position about [Respondent's] status, the information presented does support [Respondent] provided services to the City from about 1994-2005 as a common law employee. The City was given 30 days to appeal the SPM determination, but did not respond. So there is no dispute about allowing the credit to apply, just the amount of service.

Since the City cannot verify hours worked from the information [Respondent] presented to CalPERS for reconsideration that would result in Arrears determination, our recommendation is that [Service Credit] staff consider estimating the service credit for the period from 1994 to 2000 based on all info presented (SPM request, timesheet, or other info) and apply the information from Progressive Solutions to calculate service from 2001-2005.

G.C. section 20224 allows for this when it is impractical to determine from the records the length of service.

We will need to return this case for service credit processing with the recommendation stated above unless other verifying info can be submitted.

(Exhibit R-B-1.)

20. By letter dated October 24, 2014, Respondent and City were notified of CalPERS' determination and advised of their appeal rights. The determination was explained as follows:

This is regarding your request for membership eligibility in CalPERS for the services you provided to the City . . . from May 1, 1994 to June 30, 1999 and from May 1, 2000 to April 24, 2004.

Based on the information presented for review, there is insufficient information to confirm you qualified for membership in the System. . . .

Government Code section 20305 allows membership to apply to a qualified worker upon completing 1000 hours in a fiscal year. The City could not verify the information you provided for review to support the completion of 1,000 hours for any fiscal year between 1994 to 2004.

However, the City's certification of Service Prior to Membership (SPM) request and other information submitted for review can be applied toward the calculation of SPM credit. You may continue to work with staff from our Service Credit program area to receive cost information for this time frame.

(Exhibit H.)

21. By letter dated November 10, 2014, Respondent filed a timely appeal and requested an administrative hearing. Respondent noted the following in support of his appeal:

CalPERS requested detailed data from [the City] regarding the number of hours I worked, in an effort to ascertain whether I met the 1000 hour threshold for CalPERS membership based on Government Code section 20305. The City . . . provided data which appeared to be complete and contiguous data for several years of my time worked. Upon closer examination I discovered that it had missing months of data in multiple calendar years, which implied that I had not worked in those months. These missing records were adverse to my claim of having worked over 1000 hours in a CalPERS fiscal year, and caused CalPERS to believe that [Respondent] had not met the required minimum. Federal 1099 tax documents prove that I was paid many thousands of dollars more in multiple tax years than was accounted for by the City's data. The missing months were not missing from the official 1099 data. I did work during these missing months and the tax documents prove it. . . .

[I] completed a forensic reconstruction of my hours of employment for CalPERS fiscal year 2002-2003, using Federal 1099 Tax Documents for two consecutive years [2002 and 2003]. This data . . . conclusively proves that I worked a total of 1088 hours in this CalPERS fiscal year. In fact, the data ties to the penny to both the Federal tax documents and to the time sheets I had initially submitted to CalPERS. I have attached copies of the invoices and time sheets that were missing from the City's data for the disputed time . . . .

[T]his is only one of the many years that [Respondent] worked well in excess of 1000 hours, but this fact is obscured by the City's lack of accurate data . . .

Since the quality of [the City's] recordkeeping . . . has been impeached, we feel that an alternative method of determining the appropriate level of membership in CalPERS . . . should be used. We believe this should be 100% for 10 years as indicated by the City's action in 2007 of awarding vacation at this level based on these prior years of service. . . .

(Exhibit I.)

22. Since CalPERS has determined that Respondent was a common law employee of the City for the years in question, this appeal is limited to the issue of whether Respondent qualifies for CalPERS membership due to his employment from May 1, 1994, through June 30, 1999, and from May 1, 2000, through April 24, 2005.

23(a). At the administrative hearing, Robert Ridley, former Accounting Manager for the City testified credibly on Respondent's behalf. Mr. Ridley worked for the City from October 28, 1996, through August 7, 1998, arriving after Respondent had already been working for the City. Mr. Ridley was Respondent's immediate contact at the City, and he directed the tasks Respondent was to perform and actively monitored where Respondent was on projects. Mr. Ridley did not recall ever speaking with anyone at Progressive Solutions. He did not believe Progressive Solutions was involved in assigning tasks to Respondent, but instead merely provided Respondent to the City for instruction.

23(b). Respondent was the sole information technology (IT) support for the City's finance department, assigned as needed to maintain an aging computerized financial system (including software and hardware) and to begin the update process. There was no other consultant working for the City finance department at that time. Respondent's work days were consistent, and Respondent worked the entire time Mr. Ridley worked for the City.

23(c). When Mr. Ridley started working with the City in 1996, Respondent worked two days per week, but eventually began working three days per week. Mr. Ridley could not recall the exact month or year Respondent converted to three days per week. However, he did recall that Respondent always worked full, eight-hour days.

24. At the administrative hearing, Respondent testified credibly and presented trustworthy documentation in the form of time sheets and corresponding invoices, all of which was uncontroverted. Respondent's credible evidence established the findings in Factual Findings 25, 26, 27, 28, and 30.

25. Respondent was the only consultant that Progressive Solutions provided to the City. This fact was corroborated by Mr. Ridley's testimony. It was also supported by the inclusion of Respondent's name and contact information (but no other representative of Progressive Solutions) in the City's prior phone list of key employees.

26(a). Respondent typically worked eight-hour days at the City. This fact was corroborated by Mr. Ridley's credible testimony and by Respondent's documentation submitted at the administrative hearing.

26(b). The documentation Respondent presented at the hearing included a contract between the City and Progressive Solutions for the 1998-1999 fiscal year which Respondent recently retrieved on the City's public-facing website. Respondent pointed out that the City had not sent this contract to CalPERS even though it remained in the City's computer system and was accessible via the City's website. The existence of this contract in the City's possession and control is contrary to the City's September 4, 2014 assertion that it had "not been able to locate any documents regarding . . . Progressive Solutions." (Exhibit P.) The contract required that the consultant (i.e. Respondent) would provide three days of services per week "in a minimum of eight (8) hour blocks." (Exhibit R-B-18.) In the event Respondent was unable to provide the needed coverage, the contract provided that he would "make up scheduled support services on another day." (*Id.*)

26(c). Respondent's evidence confirmed Ms. McLeod's certification on the Request for Service Credit that during the time frames in question (May 1, 1994, through June 30, 1999, and May 1, 2000 through April 24, 2005), he worked an average of 12 days per month. Respondent's uncontroverted documentation, Mr. Ridley's testimony, and Respondent's testimony collectively established that Respondent typically worked eight-hour days. Therefore, contrary to Ms. Nelson's interpretation, the "part-time/50 percent" time base in Ms. McLeod's certification apparently referred to the 12 days per month Respondent worked and not the number of hours per day (i.e., the certification did not indicate that Respondent worked four-hour days).

27(a). Respondent credibly confirmed that during the time he worked under the Progressive Solutions contracts (May 1, 1994, through June 30, 1999), the City was his only employer, and he worked for no other municipalities or entities. During those first five years, Respondent faxed his time sheets to Progressive Solutions and he was issued a check. He did not need to specify on his time sheets for whom he was working since virtually all his work was for the City. Respondent did work for another city through Progressive Solutions for four hours on one occasion in 1999, as specified in his February 1999 time sheet and corresponding invoice.

27(b). When Respondent returned to work for the City under his own contracts in May 2000, he also continued providing services to the city of Pico Rivera for the five years leading to his employment by the City in April 2005. The Pico Rivera timesheets and invoices were not presented at the administrative hearing and those hours were not included in the computation for this case.

28(a). Even after reviewing Respondent's time sheets and invoices, the City refused to certify for CalPERS that Respondent worked 1,000 hours during any of the fiscal years at

issue. However, at the administrative hearing, the City did not challenge the veracity of Respondent's documentation.

28(b). At the administrative hearing, the City provided the declaration of Jody Scott, attaching only a fraction of Respondent's timesheets, invoices and contracts for the services he provided to the City. The City's documentation was deficient and lacked numerous documents which Respondent had produced.

28(c). Additionally, Ms. Scott's declaration attached a summary of invoices for Respondent's services. The summary was not, as she declared, a document "maintained by the City in the ordinary course of business." (Exhibit R-C.) Instead, the summary appeared to have been prepared in response to CalPERS inquiries seeking certification of Respondent's hours. The summary noted, for the service dates May 1, 1994, through June 30, 1999, "Invoices for Progressive Solutions, [Respondent's] employer for the time period, not accessible – past retention period." This same notation was made for May 1, 2000, through March 31, 2001, even though Respondent was not working through Progressive Solutions for those dates.

28(d). Moreover, the summary did not account for time Respondent worked in July and August 2002, and the City attached no invoices for those months. This deletion of time caused the impression that Respondent had failed to meet the minimum of 1,000 hours for the fiscal year 2002-2003. However, once Respondent's documentation was cross-checked, the summary was revealed to be erroneous. Specifically, the City indicated in its summary that Invoice Number 9512 billed for Respondent's 63.5 hours of services provided in May 2002 and that Invoice Number 9513 billed for Respondent's 104 hours of services provided in June 2002. Thus, those hours were placed in fiscal year 2001-2002. Although Invoices Numbers 9512 and 9513 were not included in the City's supporting documentation attached to its summary, those invoices were included in Respondent's documentation. Invoice Number 9512 actually for Respondent's 63.5 hours of services provided in July 2002, and Invoice Number 9513 billed for Respondent's 104 hours provided in August 2002. The July 2002 and August 2002 invoice hours correspond with Respondent's time sheets for those months. Thus, those hours should be counted in fiscal year 2002-2003, bringing Respondent's hours for that fiscal year to over 1,000.

29. Despite the City's lack of documentation and the unreliability of its information, at the administrative hearing Ms. Nelson continued to assert that CalPERS could not make a determination that Respondent worked 1,000 hours in any fiscal year because the City could not verify this. However, Ms. Nelson admitted that, if Respondent's documentation is correct and if CalPERS had proof and validation from Respondent's employer that he worked over 1,000 hours in the 1997-1998, 1998-1999, and 2002-2003 fiscal years, he would be eligible for membership. However, Ms. Nelson insisted that CalPERS would need documents from the employer confirming that he worked those hours. She admitted that if an employer provides insufficient information or certification, a determination of service time (including any estimates pursuant to Government Code section 20224) would be handled on a case-by-case basis with consultation with management. Ms.

Nelson acknowledged that in its final determination, CalPERS found that there was insufficient information to confirm that Respondent qualified for membership.

30(a). Respondent provided no time sheets or invoices for the time period prior to July 1, 1997. The evidence did not establish the number of hours Respondent worked for the City during the fiscal years 1994-1995, 1995-1996, and 1996-1997. It was not established in either Respondent's or Mr. Ripley's testimony when Respondent began working three days per week rather than two. Consequently, the evidence did not establish that Respondent worked 1,000 hours during fiscal years 1994-1995, 1995-1996, and 1996-1997.

30(b). Based on Respondent's credible documentation and the testimony of Respondent and Mr. Ripley, with some corroboration by the City's documentation, Respondent established that he worked over 1,000 hours for the fiscal years 1997-1998, 1998-1999, and 2002-2003. He did not establish that he worked 1,000 hours for the fiscal years 2000-2001, 2001-2002, and 2003-2004.

30(c). Specifically, regarding the 1997-1998 fiscal year, Respondent worked the following number of hours per month: July 1997-58.2 hours; September 1997 – 125.50 hours; October 1997 – 121.70 hours; November 1997 – 112.70 hours; December 1997 – 120 hours; January 1998 – 116.20 hours; February 1998 – 104 hours; March 1998 – 148.30 hours; April 1998 – 116.50 hours; May 1998 – 99.50 hours; and June 1998 – 112 hours. The total hours Respondent established that he worked during the 1997-1998 fiscal year was 1,234.60.

30(d). Specifically, regarding the 1998-1999 fiscal year, Respondent worked the following number of hours per month: July 1998-112 hours; August 1998 – 104 hours; September 1998 – 124 hours; October 1998 – 112 hours; November 1998 – 24 hours; December 1998 – 112 hours; January 1999 – 96 hours; February 1999 – 96 hours; March 1999 – 120 hours; April 1999 – 104 hours; and May 1999 – 120 hours. The total hours Respondent established that he worked during the 1997-1998 fiscal year was 1,124.

30(e). Specifically, regarding the 2002-2003 fiscal year, Respondent worked the following number of hours per month: July 2002-63.5 hours; August 2002 – 104 hours; September 2002 – 96.5 hours; October 2002 – 19.75 hours and 75.5 hours (two invoices); November 2002 – 32 hours and 64 hours (two invoices); December 2002 – 64 hours, 39 hours, and 8 hours (three invoices); January 2003 – 77 hours; February 2003 – 78 hours; March 2003 – 56 hours; April 2003 – 94.5 hours and 5 hours (two invoices); May 2003 – 114 hours and 7 hours (two invoices); and June 2003 – 107 hours. The total hours Respondent established that he worked during the 1997-1998 fiscal year was 1,104.75.

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## LEGAL CONCLUSIONS

1. Respondent has established that he qualifies for membership due to his employment during the 1997-1998 fiscal year, as set forth in Factual Findings 2 through 30, and Legal Conclusions 2 through 8.

2. Respondent has the burden of proof regarding his entitlement to the retirement benefits for which he has applied. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) He has met his burden.

3. Section 20125 provides, "The board shall determine who are employees and is the sole Judge of the conditions under which persons may be admitted to and continue to receive benefits under this system."

4. Section 20224 provides:

If it is impracticable for the board to determine from the records the length of service, compensation, or age of any member, or if any member refuses or fails to give the board a statement of his or her state service, compensation, or age, the board may estimate the length of service, compensation, or age.

5. Section 20305 provides:

(a) An employee whose appointment or employment contract does not fix a term of full-time, continuous employment in excess of six months is excluded from this system unless:

(1) He or she is a member at the time he or she renders that service and is not otherwise excluded pursuant to this article or by a provision of a contract.

(2) His or her position requires regular, part-time service one year or longer for at least an average of 20 hours a week, or requires service that is equivalent to at least an average of 20 hours a week for one year or longer, unless he or she elects membership pursuant to Section 20325.

(3) His or her employment is, in the opinion of the board, on a seasonal, limited-term, on-call, emergency, intermittent, substitute, or other irregular basis, and is compensated and meets one of the following conditions:

[¶] . . . [¶]

(B) The person completes 125 days, if employed on a per diem basis or, if employed on other than a per diem basis, completes 1,000 hours within the fiscal year, in which case, membership shall be effective not later than the first day of the first pay period of the month following the month in which 125 days or 1,000 hours of service were completed. For purposes of this subdivision, "day" means each eight-hour period of employment worked by an employee paid on a per diem basis so that membership is effective after he or she has completed 1,000 hours of compensated service in a fiscal year.

6. Respondent argued that because the term of one of the Progressive Solutions contracts with the City under which Respondent was providing services ran from September 1, 1998, to September 30, 1999, and required the consultant to work at least 24 hours per week, his service came under the purview of Government Code section 20305, subdivision (a)(2). He asserted that he should have become a member of CalPERS under that contract. This argument was not persuasive. The contract was between the City and Progressive Solutions, not the City and Respondent. Even though Respondent was the sole employee of Progressive Solutions providing consulting services at that time, the contract did not require that Respondent be the employee to provide the consulting services for the duration of the contract. Since Respondent's position did not "require service that is equivalent to at least an average of 20 hours a week for one year or longer," Government Code section 20305, subdivision (a)(2) did not apply. Instead, CalPERS must look to the hours of service that Respondent provided to the City.

7(a). As noted by Ms. Nelson, typically CalPERS looks to the employer to verify information regarding its employees, including the employee's hours worked. However, in this case, the City provided a paucity of documentation, some of which was erroneous, in response to CalPERS's inquiry. The City's verification was shown to be unreliable in determining whether Respondent worked 1,000 hours in any fiscal year. As acknowledged by Ms. Nelson, if an employer provides insufficient information or certification, a determination of service time (including any estimates pursuant to Government Code section 20224) would be handled on a case-by-case basis.

7(b). Respondent argued that Government Code section 20224 was applicable in this case because it is "impracticable for [CalPERS] to determine from the records the length of service." Consequently, Respondent urged that CalPERS estimate the length of his service using the documents which remained in existence. He also pointed to Ms. McLeod's certification, indicating that he worked 12 days per month, which at eight hours per day, added up to over 1,000 hours per month. Respondent's argument was not persuasive. This case does not involve merely determining Respondent's "length of service" but involves the determination of Respondent's eligibility for membership based on the number of hours per fiscal year Respondent worked. Respondent did not establish that Government Code section 20224 was applicable to this case. Additionally, there is no need to estimate the number of hours Respondent worked for the fiscal years 1997-1998, 1998-1999, 2000-2001, 2001-2002, 2002-2003, and 2003-2004, since Respondent provided documentation of his hours worked

for those years. Respondent seeks to estimate the hours worked to be over 1,000 for the fiscal years 1994-1995, 1995-1996, and 1996-1997. Although Ms. McLeod's certification indicated that he worked an average of 12 days per month during the entire 10 years in question, the evidence indicated that Respondent may have been working less than three days per week during fiscal years 1994-1995, 1995-1996, and 1996-1997. Therefore, estimating that Respondent worked 1,000 hours during those fiscal years would be inappropriate.

7(c). In this case, Respondent established that he worked over 1,000 hours for the fiscal years 1997-1998, 1998-1999, and 2002-2003.

8. Pursuant to Government Code section 20305, subdivision (a)(3)(B), since Respondent completed 1,000 hours within the fiscal year 1997-1998, his membership "shall be effective not later than the first day of the first pay period of the month following the month in which . . . 1,000 hours of service were completed." At the end of April 1998, Respondent completed 1,023.10 hours of service for the fiscal year. Consequently, Respondent's membership in CalPERS shall be effective on May 1, 1998.

#### ORDER

The appeal of Respondent Norman Thorn, seeking CalPERS membership due to his employment prior to April 25, 2005 is granted. Respondent's membership in CalPERS shall be effective as of May 1, 1998.

DATED: May 13, 2016

DocuSigned by:  
*Julie Cabos-Owen*  
18236F95DE98452  
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JULIE CABOS-OWEN  
Administrative Law Judge  
Office of Administrative Hearings