California Public Employees' Retirement System
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May 25, 2012

Ref. No. 2012-0378

[redacted]

Dear Mr. Burnett:

The California Public Employees' Retirement System (CalPERS) undertook a Public Agency review of the City of Vernon (City) and the final report was released April 2012. CalPERS audit staff reviewed payroll reporting and membership enrollment processes of the City for individuals included in a test sample over service periods of July 1, 2002, through June 30, 2010. You were one of the test sample individuals.

As a result of CalPERS Public Agency review, CalPERS has reviewed all information available from 2002 through the present in regards to your eligibility for membership in CalPERS for services performed simultaneously in multiple positions as the City Director of Finance, Acting Finance Director, Finance Director, Treasurer of Natural Gas Financing Authority, Auditor of Natural Gas Financing Authority, Treasurer of Industrial Development Authority, Deputy City Treasurer and Executive Director of Redevelopment Agency as well as the compensation that the City reported to CalPERS on your behalf.

The purpose of this letter is to inform you of the results of that review.

CalPERS has concluded you were an independent contractor and not an employee of the City for some of the 4.462 years reported and thus were not eligible for membership for your services rendered with the City from December 3, 2002, to January 22, 2008; and, your arrears service credit was improperly granted.

Formal Determination

The City first entered you into membership on February 6, 2008, with the title of Director of Finance. The City then retroactively changed your membership date to December 3, 2002. There is no supporting documentation for the retroactive change.

CalPERS has concluded that pursuant to Government Code Sections 20300(b), you were an independent contractor and not an employee of the City for some portions of the

4.462 years reported; therefore, with the information available you are not eligible for CalPERS membership or benefits for any such service with the City.

I. CalPERS Has Determined You Were An Independent Contractor And Not An Employee Of the City of Vernon from December 3, 2002, to January 22, 2008.

Government Code Section 20125[1] 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." CalPERS looked to the California common law employment test to determine whether your status at the City was as an employee or independent contractor.

Section 20028 defines who may be an employee for purposes of membership in the retirement system. Section 20028(b) states that an employee is, "Any person in the employ of any contracting agency."

The common law employment test is used by the courts and the CalPERS Board of Administration to determine "employee" or "independent contractor" status under the Public Employees' Retirement Law (PERL)[2]. In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the desired result. If an employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the parties believe they are creating the relationship of employer-employee[3].

Director of Finance

The documentation provided for the Director of Finance position is a PERS-AESD-1, and a Consulting Services Agreement with Gursey, Schneider & Co. LLP. The City was unable to provide any personnel documents or job duty statements for the position of Director of Finance. Some of the pertinent facts from these documents included:

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[1] All further references are the California Government Code unless otherwise specified.

[2] See *Metropolitan Water Dist. v. Superior Court (Cargill)* (2004) 32 Cal.4th 491 which held the terms "independent contractor" and "employee" of a contracting agency must be defined with reference to California common law.

[3] The factors to consider are enunciated in *Tieberg v. Unemployment Ins. Bd.* (1970) 2 Cal.3d 943, 949 and *Empire Star Mines v. California Employment Com.* (1946) 28 Cal.2d 33, 43-44. See also CalPERS Precedential Decisions *In the Matter of the Statement of Issues of Lee Neidengard, Respondent and Tri-Counties Regional Center, Respondent,* Precedential Case No. 05-01 (2005) and *In the Matter of the Application to Contract with CalPERS by Galt Services Authority, Respondent, and City of Galt, Respondent,* Precedential Case No. 08-01 (2008).

- The agreement is with a 3rd Party CPA firm, and does not name you to a position. Your name appears only in the letterhead.
- The agreement is specifically for "consulting services".
- The agreement does not provide a scope of work, or any duties that may be identified as a City function or classification.
- The agreement does not provide any indication of direction or control by the City sufficient to meet the common law control test for an employer/employee relationship.
- Other documents submitted by the City indicate that you were not appointed to a Director position until a later date. (See below).
- The agreement provides no information regarding compensation.
- The agreement provides no information regarding employee benefits.

Without evidence of an established City position or of common law control by the City, CalPERS finds that services provided under this agreement are that of an independent contractor, not an employee.

Section 20300 provides exclusions to compulsory membership. Section 20300(b) specifically excludes from membership in CalPERS "Independent contractors who are not employees." It is our determination that your service from 2002 to 2008 as Director of Finance is excluded from membership by Government Code Section 20300(b), and that the retroactive membership date change was completed in error.

Additionally, CalPERS notes that part of this service appears to be the same as a previous request that was denied. In February 2009, the City requested prior service for eight individuals, including yourself. The City, on your behalf, requested service retroactive to November 2002. Supporting documents provided by the City included the same Consulting Services Agreement with Gursey, Schneider & Co. LLP noted above. CalPERS notified the City in a letter dated April 3, 2009, that the documentation provided was insufficient to show employment in a valid position, and requested specific documentation such as resolutions, job duty statements or personnel forms. In June 2009, the City met with CalPERS to discuss this letter, and CalPERS explained the common law criteria and what was needed in order to verify employment. The City indicated they would respond by August 2009; however, no response or follow up was ever received.

<u>Acting Finance Director</u>

On April 13, 2005, you were appointed to the position of Acting Finance Director. The documentation provided for the Acting Finance Director position is City Resolution No. 8699. The City was unable to provide any personnel documents or job duty statements for the position of Acting Finance Director. Some of the pertinent facts from these documents included:

- The resolution states that a City Accountant is being appointed as Acting Finance Director. It does not identify you by name.
- If the resolution in fact applies to you, it contradicts the date and title previously provided by the City.

- The resolution provides no information regarding duties or scope of services.
- The resolution provides no information regarding compensation.

Because the information provided does not establish common law employment, and because the information contradicts other documents pertaining to this time period, CalPERS has insufficient information to establish employment with the City. During this time, the City continued to contract with you under the Consulting Services Agreement with Gursey, Schneider & Co. LLP. CalPERS has, therefore, concluded your service for this period of time was performed under the Consulting Services Agreement with Gursey, Schneider & Co. LLP. As noted above, service under this agreement for Consulting Services is excluded from membership in CalPERS by Sections 20300(b).

Finance Director/Treasurer-Redevelopment Agency

On September 21, 2005, the City appointed you as Finance Director/Treasurer of the Redevelopment Agency (RDA). The documentation supporting this appointment is RDA Resolution No. RA-262. The City was unable to provide any personnel documents or job duty statements for the position. Additionally, the resolution indicates the position is not compensated.

Pursuant to Section 20069(a) service with a contracting agency is reportable to CalPERS only if it is compensated. CalPERS must therefore conclude that this position is not reportable for retirement purposes.

Finance Director

On September 21, 2005, the City appointed you to the position of Finance Director. The documentation supporting this appointment is City Resolution No. 8863. The City was unable to provide any personnel documents or job duty statements for the position of Finance Director. Some of the pertinent facts from these documents included:

- The resolution provides no information regarding duties or scope of services.
- The resolution provides no information regarding hours worked or compensation.
- The resolution provides no indication of direction or control by the City sufficient to meet the common law control test for an employer/employee relationship.

The information provided does not establish common law employment. During this time, the City continued to contract with you under the Consulting Services Agreement with Gursey, Schneider & Co. LLP. CalPERS has, therefore, concluded your service for this period of time was performed under the Consulting Services Agreement with Gursey, Schneider & Co. LLP. As noted above, service under this agreement for Consulting Services is excluded from membership in CalPERS by Sections 20300(b).

Treasurer/Auditor of Natural Gas Financing Authority

On May 3, 2006, the City appointed you as Treasurer/Auditor of Natural Gas Financing Authority (the Authority), a Joint Power Authority (JPA). Documentation for this appointment includes City Resolution No. 9014 and Authority Resolution VNGFA-001. No personnel documents or job duty statements were provided for this position.

The Joint Powers Act permits a JPA to be an agreement between two existing entities, or the creation of a new, separate entity. City Resolution No. 9014 creates the Authority as of April 10, 2006.

- The resolution specifically states that the Authority is "...established as a separate entity under the Joint Powers Act...".

Section 20028 defines who may be an employee for purposes of membership in the retirement system. Section 20028(b) states that an employee is, "Any person in the employ of any contracting agency."

The Authority is a separate entity, and not a department of the City; therefore, it does not appear that these positions constitute City employment within the meaning of Section 20028(b). The Authority is not a contracting agency, and CalPERS has insufficient evidence to determine the nature and extent of the relationship between the City and the Authority.

Because CalPERS cannot establish valid City employment for these positions, we must conclude they are ineligible for CalPERS membership. Additionally, the service provided as Treasurer/Auditor of Natural Gas Financing Authority overlaps with the Consulting Services Agreement with Gursey, Schneider & Co. LLP. As noted above, your service performed under the Consulting Services Agreement with Gursey, Schneider & Co. LLP, is excluded from CalPERS membership by Government Code Section 20300(b).

Treasurer of Industrial Development Authority

On May 21, 2007, the City also appointed you as Treasurer of Industrial Development Authority (IDA). The documentation provided for this position is IDA Resolution IDA-17. The City was unable to provide any personnel documents or job duty statements for this position.

CalPERS has no information regarding the formation, structure or functions of the IDA. It appears to be a JPA, similar to the Authority. Because CalPERS cannot establish valid City employment for these positions, we must conclude they are ineligible for membership. Additionally, the service provided as Treasurer of Industrial Development Authority overlaps with the Consulting Services Agreement with Gursey, Schneider & Co. LLP. As noted above, your service performed under the Consulting Services Agreement with Gursey, Schneider & Co. LLP, is excluded from CalPERS membership by Government Code Section 20300(b).

II. CalPERS Has Determined You Were An Employee Of the City of Vernon But Cannot Verify Hours Worked from January 22, 2008, to August 2, 2010.

Finance Director

On January 22, 2008, you were appointed to the position of Finance Director. The documentation provided for the Finance Director position is City Resolution No. 9527, and an Employment Agreement dated January 22, 2008. The City was unable to provide any personnel documents or job duty statements for this position.

- The stated purpose of Resolution No. 9527 is to make you an employee of the City for "...participation in the California Public Employees' Retirement System..."

The resolution provides no further information regarding duties; however, the submitted Employment Agreement does appear to establish employment with the City. Specifically, the agreement states that you:

- Shall be employed by the City.
- Shall be paid in accordance with the City's regular payroll practices.
- Shall be subject to all standard withholding deductions.
- Shall have salary increases at the same time and in the same percentage as other City employees.

Although the agreement lacks specific information as to duties, it appears to meet certain common law criteria for an employer/employee relationship. CalPERS has determined that you were an employee of the City in this position; however, the City has not provided sufficient information to verify hours worked and compensation. CalPERS reserves the right to revise this determination should additional information become available.

III. Final Compensation Cannot Be Determined.

Under the PERL, the amount of compensation earnable that an employer reports to CalPERS is used to determine member contributions, final compensation and to calculate retirement benefit allowances. Compensation earnable consists of "payrate" and "special compensation". If CalPERS determines that compensation is or has been reported in error, and that amount does not constitute compensation earnable as defined in the PERL, then CalPERS has a duty to correct the error.

Payrate

All payrates or base pay reported must comply with Section 20636(b)(1) which provides in relevant part as follows:

> "the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for **services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules.** 'Payrate,' for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e)." (Emphasis added)

Additionally, Section 20636(d) provides, "[N]otwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny."

A "payrate" must also be listed in a publicly available pay schedule which meets all criteria listed in California Code of Regulations (CCR) Section 570.5. The publicly available pay schedules provided by the City fail to comply with CCR Section 570.5 subdivision (a)(3)(4)(6) because:

- They fail to show the payrate for each identified positions, which may be stated as a single amount or as multiple amounts within a range;
- They fail to indicated the time base, including but not limited to, whether the time base is hourly, daily, bi-weekly, monthly bi-monthly, or annually; and,
- They fail to indicate an effective date and date of any revisions.

CCR Section 570.5 (b) states:

> "Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including but not limited to, the following:
>
> (1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;
> (2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;
> (3) Last payrate for the member that is listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for a different position.
> (4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms to the requirements of subdivision (a) of a former CalPERS employer.

Additionally, in order to constitute payrate, pay must be for services rendered on a full-time basis during normal working hours and cannot be for additional duties or services related to other positions. Pay related to services performed that constitute "overtime", as that term is defined under the PERL are not reportable for retirement purposes. Section 20635 provides in pertinent part,

> "When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service.
>
> If a member concurrently renders service in two or more positions, one or more of which is full-time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full-time, the position with the highest payrate or base pay shall be reported this system."

Payrates cannot be determined or verified by CalPERS for several areas of your employment due to the lack of relevant information received from the City. Not all pay schedules presented by the City appear to have included amounts solely attributable to one position and conflicting information regarding the time base for which your positions were paid, increases CalPERS inability to determine payrates.

As indicated above, Section 20636 and California Code of Regulations section 570.5 defines the requirements for a publicly available pay schedule, including, but not limited to identifying the position title for every employee position; showing the payrate for each identified position; providing a time base; and indicating an effective date and the date of any revisions.

The pay schedules provided by the City have several positions where the salary has been omitted or indicated the salary as $0.00. The City has indicated in its questionnaire responses to OAS that it recognizes full time employment as 173.3333 hours per month and has stated all pay schedules provided are intended for full time employment, unless noted otherwise. However, in contrast, at times in your employment the contract agreements between you and the City only require services for 120 hours which is below the City's established full time.

Due to the conflicting and lack of information, CalPERS cannot determine the time base for which your payrate was reported, nor can CalPERS determine for which of the multiple positions services were being rendered and reported as compensation The City must provide documentation to substantiate services were being rendered on a full time basis and the payrate associated with each position you attained before a determination of payrate can be made. Therefore, if in the event you are able to demonstrate eligibility for CalPERS membership, the City must provide accurate and sufficient information for CalPERS to verify your compensation before such compensation can be used to calculate a retirement allowance.

IV. CalPERS Has Determined You Were In an Invalid Or Excluded Position.

Deputy City Treasurer

On January 22, 2008, you were appointed to the position of Deputy City Treasurer. The documentation supporting this appointment is an Employment Agreement dated January 22, 2008. There are no resolutions, personnel forms or job duty statements to support this appointment.

Although the Employment Agreement provides a title of Deputy City Treasurer, it notes this title only as "services in other capacities" to the duties as Finance Director. No other information has been provided by the City to document this position or appointment. Although this position may meet the common law criteria for employment, absent any information regarding duties, time base and compensation, CalPERS cannot make any further determination regarding this appointment.

City Treasurer

City documents list you as the City Treasurer; however, no documentation specific to the appointment period has been provided. There are no resolutions, personnel forms or job duty statements to support this position.

Additionally, the City Treasurer is an officer of the City, as defined by the Vernon City Charter Article VII, Chapter 7.2. City officers are required by statute to take an oath prescribed by the California Constitution before entering office[4]. Failure to take and file the constitutional oath will result in a vacancy of the office.[5]

The City has stated that all Vernon employees are required to take an oath of office. The City referred CalPERS to the City's Policies and Procedures for more information. The Policies and Procedures submitted by the City include a form; "Oath or Affirmation of Allegiance for Public Officers and Employees" that all employees are required to sign.

- The City was unable to provide a signed form or statement indicating you ever took the oath of office for City Treasurer.

Absent an oath of office[6], CalPERS must conclude the office is vacant[7].

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[4] See Government Code 36507.
[5] See Government Code 1770, subdivision (i).
[6] See Section 3 of Article XX of the California Constitution requires all public officers and employees, except such inferior officers and employees as may be by law exempt, to take an oath of office before they enter upon the duties of their offices or employment. The term "public officer and employee" is defined to include every officer and employee of the state "... every county, city, city and county, district, and authority, including any department, division, bureau, board, commission, agency, or instrumentality of any of the foregoing." Government Code section 1360 requires all officers to take and subscribe the constitutional oath prior to entry on the duties of office. This has been held to apply to county as well as state officers, but not employees. (*Hirschman v. County of Los Angeles* (1952) 39 Cal. 2d 698, 703.) The court in *People ex rel. Chapman v. Rapsey* (1940) 16 Cal. 2d 636, held that the positions of city judge and city attorney were both offices.
[7] See Government Code 1770, subdivision (i).

Additionally, elected or appointed City officers are optional members of CalPERS pursuant to Section 20322(a), and are excluded from membership until they sign an election in writing to become a member.

- The City was unable to provide a signed election form for membership in the office of City Treasurer.

Section 20322 in pertinent part states:

(a) An elective officer is excluded from membership in this system unless the officer files with the board an election in writing to become a member. Upon electing to become a member, the officer may further elect at any time prior to retirement to receive service credit for his or her prior, excluded service by making the contributions as specified in Sections 21050 and 21051.

(b) As used in this part, "elective officer" includes any officer of the Senate or Assembly who is elected by vote of the members of either or both of the houses of the Legislature, and any appointive officer of a city or county occupying a fixed term of office, as well as officers of the state or contracting agencies elected by the people, and persons elected to a city council or a county board of supervisors.

Although the agreement appears to meet common law criteria for employment, absent an oath of office, and absent a written election of membership, CalPERS must conclude that you were not holding a valid office of the City for this portion of the agreement, and service in this position is excluded from membership in CalPERS under Section 20322(a).

V. Non-Compensated Employment Is Not Reportable To CalPERS.

Executive Director – Redevelopment Agency

On March 1, 2010, you were appointed as Executive Director of the RDA. The documentation provided for the Executive Director position is RDA Resolution No. RA-383. There are no personnel forms or job duty statements to support this appointment.

Although the resolution provides no information regarding the duties of this position, CalPERS generally accepts that an Executive Director is in charge of the day-to-day administration of an agency, and will be a common law employee of the agency. In this case, the resolution also notes that this position is not compensated.

Pursuant to Section 20069(a) service with a contracting agency is reportable to CalPERS only if it is compensated. CalPERS must therefore determine that this position is not reportable for retirement purposes.

Authority for Correction for Amounts Erroneously Reported that Do Not Appear to Meet the Definition of Compensation Earnable

CalPERS was established by statute, the PERL, which grants it certain authority. The California Constitution also grants the CalPERS Board of Administration, as the board of a public retirement system, certain powers. CalPERS has no authority other than those granted by the PERL and the Constitution and has the authority to pay benefits to a member only when authorized and only in amounts authorized.[8] CalPERS has no authority to use a final compensation amount that is calculated with amounts of pay that do not meet the definition of compensation earnable.

PERL section 20120 states that the management and control of this system is vested in the board. Section 20125 further provides that the board shall determine who are employees and is the sole judge of the conditions under which a person may be admitted to and continue to receive benefits under this system.

Section 20160 outlines the criteria for correcting errors and omissions and requires the board to correct all actions taken as a result of errors or omissions of any contracting agency or this system. Corrections of errors or omissions made pursuant to section 20160 shall be such that the status, rights, and obligations of all parties are adjusted to be the same that would have been, if the act that would have been taken, but for the error or omission, was taken at the proper time. Section 20160 requires CalPERS to correct errors made by an employer or by the system. Once an error is discovered, CalPERS is required to take action to correct it and is permitted to pay only those benefits authorized under the PERL.

Conclusion

Based on these determinations, you are not eligible for membership for some of your service rendered with the City. As such, reimbursement and/or credit for retirement contributions paid into the system on your behalf will be done in accordance with State and Federal law. Due to our determination that you are not a member for some of your service rendered with the City and not eligible to have purchased service credit or arrears, you may not be eligible to receive a monthly retirement benefit from CalPERS.

Where the determinations given above are the result of insufficient information, the City may provide additional documentation to supplement the information previously submitted. Any additional information must be submitted within 30 days of the date of this letter and must be specific and clearly show evidence that you properly held such positions and these positions were established and meet the requirements outlined by law, resolution or ordinance.

This letter highlights some of the major concerns identified by CalPERS in its determination. However, the issues identified in this letter are not exhaustive, nor are they intended to reflect all of the legal, technical and administrative issues that we

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[8] See CalPERS Precedential Decision *In re the Matter of the Appeal of Decreased Level of Retirement Allowance of Harvey H. Henderson* (1998) CalPERS Precedential Board Decision No. 98-02 and California Constitution, Art. XVI, section 17.

considered in reaching our determination. In addition, this letter does not repeat all of the issues and facts identified in Public Agency Review. Thus, it should be read in conjunction with these documents. CalPERS reserves the right to raise additional issues relating to the determinations listed above. If additional issues are raised, you will be notified and granted additional appeal rights as to any new findings.

It should also be noted that upon the discovery of additional information, CalPERS reserves the right to raise additional issues relating to the determinations listed above. If additional issues are raised, you will be notified and granted additional appeal rights as to those issues.

You have the right to appeal the decision referred to in this letter if you desire to do so, by filing a written appeal with CalPERS, in Sacramento, within **thirty days of the date of the mailing of this letter,** in accordance with Government Code section 20134 and sections 555-555.4, Title 2, California Code of Regulations.

An appeal, if filed, should set forth the factual basis and legal authorities for such appeal. A copy of the applicable statute and Code of Regulations sections are included for your reference. If you file an appeal, the Legal Office will contact you and handle all requests for information.

Your appeal will be set for hearing with the Office of Administrative Hearings (OAH). The assigned CalPERS attorney will contact you to coordinate a hearing date. Depending on the current caseload of the OAH and the assigned attorney, the hearing date may be set several months after the case is opened. The OAH will typically offer its earliest available hearing date that meets the schedule of both parties. If you choose not to be represented by an attorney, the assigned CalPERS lawyer will be in direct communication with you during the appeal process. If you do hire an attorney, please let CalPERS know immediately so our attorney can work directly with him or her.

Attached is an informational brochure on the General Procedures for Administrative Hearings.

After the hearing is completed, the Administrative Law Judge will issue a Proposed Decision in approximately 30 days. The CalPERS Board of Administration will then make a determination whether to accept or reject that Proposed Decision. If the Board rejects the Proposed Decision, they will hold a Full Board Hearing in order to review the entire hearing record again before finalizing their decision.

Your appeal should be mailed to the following address:

Karen DeFrank, Chief
Customer Account Services Division
P.O. Box 942709
Sacramento, CA 94229-2709

If you have any questions or concerns regarding this matter, please contact Christina Rollins of my staff a[redacted]

Sincerely,

EMILY PEREZ de FLORES, Manager
Member Reporting Section
Customer Account Services Division

cc: Karen DeFrank
Joaquin Leon, City of Vernon