



California Public Employees' Retirement System
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May 25, 2012

Ref. No. 2012-0353



Dear Mr. Malkenhorst, Jr.:

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 1997 through the present in regards to your eligibility for membership in the California Public Employees' Retirement System (CalPERS) for services performed simultaneously in multiple positions as the Systems Coordinator I, Special Assistant to City Attorney, Acting City Clerk, Capitol Project Administrator, Acting Executive Director of Vernon Historical Preservation Society, and Assistant City Attorney II for the City and 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 and to specifically address your membership eligibility classification as a safety member.

Formal Determination

CalPERS has evaluated the information provided by you and the City and has determined that some of the 10.647 years of service reported by the City are not eligible for inclusion in this system. CalPERS has concluded that pursuant to Section 20300(h)¹, you provided professional legal services, or you were not in a valid City position; therefore, you are not eligible for CalPERS membership or benefits for any such service with the City.

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

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

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-employee³.

Systems Coordinator I

The City first entered you into membership on November 24, 1997 with the title of Systems Coordinator I. Documentation for this position includes a MSD-1 form. CalPERS has not identified any membership or compensation issues with this position and we have determined that this is a valid qualifying appointment, eligible for membership in CalPERS.

- I. CalPERS Has Determined You Were Providing Professional Legal Services And/Or Not An Employee Of the City.

¹ 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).

Special Assistant to the City Attorney

On April 1, 2004, the City appointed you as Special Assistant to the City Attorney. The documentation provided for this position is City Resolution No. 8398. The City was unable to provide any contracts, personnel documents or job duty statements for the position of Special Assistant to the City Attorney.

Section 20300(h) specifically excludes "...persons rendering professional legal services to a city, other than the person holding the office of city attorney, the office of assistant city attorney, or an established position of deputy city attorney."

We have determined that your position as Special Assistant to the City Attorney is excluded under Section 20300(h), as it is providing professional legal services to the City, and is not one of the positions listed in Section 20300(h).

Assistant City Attorney I

On January 17, 2007, the City also appointed you as Assistant City Attorney II. Documentation for this appointment includes City Resolution No. 9217. No personnel documents or job duty statements were provided for this position.

Officers of the City of Vernon are defined by Articles VI and VII of the Vernon City Charter. Article VII creates and defines other city officers, including a City Clerk, a City Treasurer, and a City Attorney. Additionally, Article VII, Chapter 7.4 permits the City Council to provide for other City Officers as needed, and states that the City Council "...shall fix the duties, tenure and compensation of such officers by ordinance."

Also, the City has identified multiple titles connected to the Assistant City Attorney, including Assistant City Attorney, Chief Assistant City Attorney, Assistant City Attorney I, Assistant City Attorney II, Assistant City Attorney III and Special Assistant to the City Attorney. Pursuant to Section 20300(h), only the person holding the office of Assistant City Attorney is eligible for membership in CalPERS.

- The City has produced no ordinance creating the Office of Assistant City Attorney.
- The Special Assistant to the City Attorney position is not the person holding the office of Assistant City Attorney.
- The Assistant City Attorney I position is not the person holding the office of Assistant City Attorney.

We have no evidence of a City ordinance establishing the Office of Assistant City Attorney, and even if the City could validate the office, it does not appear you ever held

the office; therefore, we deem that your positions of Special Assistant to the City Attorney and Assistant City Attorney I are excluded by Section 20300(h).

Acting City Clerk

On July 1, 2005 the City appointed you as Acting City Clerk. The documentation for this appointment is City Resolution No. 8790.

The City Clerk is an officer of the City, as defined by the Vernon City Charter Article VII, Chapter 7.1. 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

In October 2010, CalPERS sent a questionnaire to the City regarding your employment. Question 3 of the questionnaire asked if you had taken an oath of office, and requested any documents to validate such an oath. The City's reply in February 2011, states 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 Acting City Clerk.

Section 20322(a) states that elective officers are excluded from membership in CalPERS unless the officer files an election in writing to become a member. Section 20322(b) further defines elective officer to include appointive officers of a city or county. Per the City Charter, Chapter 7, Article 7.1, the City Clerk is appointed by the City Council. The City Clerk is therefore an elective officer within the meaning of Section 20322(b). The City has not provided, and CalPERS has no record of, an election of optional membership for this position.

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

Because the City cannot verify that you ever took an oath of office and because there is no evidence that you ever elected membership for your service as Acting City Clerk,

⁴ 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. See Government Code Section 36507.

⁵ See Government Code Section 1770, subdivision (i).

CalPERS has determined that service in this position is excluded under Section 20322(a).

Acting Executive Director of Vernon Historical Preservation Society

On April 5, 2006, the City also appointed you as Acting Executive Director of Vernon Historical Preservation Society (VHPS). The documentation for this appointment is VHPS Resolution No. VHPS-0009. No contracts, personnel documents or job duty statements were provided for this position.

Per City Resolution No. 7916, dated February 27, 2002, and a Legal Services Proposal from Orrick, Herrington & Sutcliffe, LLP, dated February 12, 2002, the VHPS was created and incorporated as a 501(c)(3) Charitable Corporation in or around July 2002. 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 VHPS is a separate entity, and not a department of the City; therefore, it does not appear that this position constitutes City employment within the meaning of Section 20028(b). The VHPS is not a contracting agency, and CalPERS has insufficient evidence to determine the nature and extent of the relationship between the City and the VHPS.

Because CalPERS cannot establish valid City employment for this position, we have concluded that service in this position is excluded under Section 20028(b) and therefore ineligible for CalPERS membership.

Capital Project Administrator

On April 5, 2006, the City also appointed you to the position of Capital Project Administrator. The documentation provided for this position is City Resolution No. 9003 and a job duty statement. The City was unable to provide any contracts or personnel documents for the position of Capital Project Administrator. Some of the pertinent facts from these documents included:

- The resolution provides no timebase or payrate, stating that the Assistant City Attorney shall serve in the position with no increase in salary.

Although this position appears to be valid employment with the City, CalPERS cannot determine the hours worked or the appropriate compensation. Additionally, Section 20069(a) defines service in CalPERS as service rendered with a contracting agency "...for compensation, and only while he or she is receiving compensation from that employer therefore..."

Because this position is not compensated, CalPERS has determined that it is not eligible for retirement service credit under Section 20069(a).

II. You Are Not Eligible to Receive Classification as a Safety Member

The City contracted to provide safety coverage for its City Attorneys, Assistant City Attorneys and Deputy City Attorneys under Section 20423.6(b)(3). The City has not provided adequate documentation to demonstrate that these positions meet all of the criteria necessary to qualify under this section.

Section 20423.6 in pertinent part states:

- (a) "Local safety member" also includes local prosecutors, local public defenders, and local public defender investigators.
- (b) For purposes of this part, "local prosecutor" means any one of the following:
...
- (3) A city officer or employee who meets all of the following criteria:
 - (A) He or she is or, on or after January 1, 2002, was employed in the office of the city attorney.
 - (B) He or she is or, on or after January 1, 2002, was primarily engaged in the active enforcement of criminal laws within any court operating in a county.
 - (C) His or her job classification is or, on or after January 1, 2002, was city attorney, deputy city attorney, chief deputy city attorney, assistant city attorney, chief assistant city attorney, or any other similar classification or title.
 - (D) His or her effective date of retirement is on or after the date this section becomes applicable to the member's contracting agency as provided in subdivision (g).

The City admitted in its January 31, 2012 response to the draft Public Agency review that it misclassified its attorneys. CalPERS cannot grant safety coverage for a position that does not qualify under the law. Therefore, even if you were eligible for CalPERS membership, you would not be eligible for the Safety classification for your service performed as Acting City Attorney, City Attorney and Assistant City Attorney I.

III. Compensation Earnable

If in the event documentation is provided to verify your eligibility for the positions of Special Assistant to the City Attorney, Acting City Clerk/City Clerk or Assistant City Attorney II, CalPERS' determination of what would be considered as "compensation earnable". 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 pursuant to Section 20160.

Based on findings cited in the Review, information provided by the City and review of payroll reports, CalPERS can only determine the payrate for portions of your employment with the City. Issues identified with payments reported to CalPERS include combining multiple payrates and determining the time base for which your payrate was reported. CalPERS has notified the City that they must correct the multiple payrates and provide documentation to determine a time base for the services rendered before a determination of payrate can be made.

Payrate

"Compensation" is defined in Government Code Section 20630 as:

"(a) As used in this part, compensation means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of any of the following:

- (1) Holidays.
- (2) Sick leave.
- (3) Industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code, Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or Section 44043 or 87042 of the Education Code.
- (4) Vacation.
- (5) Compensatory time off.
- (6) Leave of absence.

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636."

Section 20636 provides, in relevant part, as follows:

"(a) 'Compensation Earnable' by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b)(1) 'Payrate' means 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)..."

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."

Multiple Positions

In the event, sufficient documentation is provided to demonstrate that you held multiple positions on a full-time basis Section 20635 provides as follows:

"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. For the purposes of this part, overtime is the aggregate service performed by an employee as a member for all employers and in all categories of employment in excess of the hours of work considered normal for employees on a fulltime basis, and for which monetary compensation is paid."

When a member holds multiple positions CalPERS must determine which position is reportable for the calculation of retirement benefits and if those positions are part-time, according to Section 20967.

Section 20967 provides, in full, the following:

"For the purpose of calculating retirement benefits based on part-time service, except under Section 21381, compensation earnable shall be taken as the compensation that would have been earnable if the employment had been on a full-time basis and the member had worked full time, and shall conform to the definitions given in Section 20636.1 for school members and Section 20636 for all other members."

Determination of Compensation Earnable

Systems Coordinator – November 24, 1997 through March 30, 2004

CalPERS has determined you are eligible for membership with the position of Systems Coordinator and the payrates reported for the above time frame will be considered compensation earnable and no corrections are needed.

Special Assistant to the City Attorney – April 1, 2004 through June 30, 2005

CalPERS has determined this position to be excluded from membership therefore no compensation should be reported. However, if in the event documentation is provided by the City to substantiate your membership, the payrate reported for the specified time period would be considered compensation earnable and no corrections would be required.

Special Assistant to the City Attorney/Acting City Clerk/City Clerk – July 1, 2005 through December 30, 2006

CalPERS has determined this position to be excluded from membership therefore no compensation should be reported. However, if in the event documentation is provided by the City to substantiate your membership more documentation is required before a payrate can be determined.

According to documentation received from the City, you held the position of both Assistant to the City Attorney and City Clerk from July 2005 through December 2006 before being appointed Assistant City Attorney II. The City must identify the time base for each position before your full-time payrate can be determined. Once the time base is identified by the City, Sections 20635 and 20967, as stated above, provide the basis by which the payrate should be reported.

Assistant City Attorney II – January 17, 2007 through April 6, 2008

You were appointed Assistant City Attorney II effective July 2006. 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, the contract agreements between you and the City from January 2007 through September 2007 only require services for 100 hours which is well below the City's established full-time employment. CalPERS cannot determine a payrate for January 2007 through September 2007 for the reasons previously cited.

Employment contracts provided from October 2007 through your last day of employment indicate your contracted number of hours increased, therefore the compensation reported would be considered compensation earnable and no corrections would be needed.

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.⁶ 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. 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.

Normal Contributions

We have received your request for refund of member contributions. The contributions paid on your behalf by the City for the position of System Coordinator, from November 24, 1997 through March 31, 2004, appear to be eligible for refund.

Section 20053 defines "normal contributions" in relevant part as "contributions required to be paid by a member at the normal rates of contribution fixed by...contract..." Normal contributions also include payment of required contributions on behalf of a member by the employer.

⁶ 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.

Upon correction of payroll elements by the City, CalPERS will contact you regarding a refund and/or credit of the normal contributions in your member account. Reimbursement and/or credit for retirement contributions paid into the system on your behalf will be effectuated in accordance with State and Federal law.

Conclusion

Based on these determinations, you are not eligible for membership for much of your services rendered with the City. As noted above, 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 much of your time with the City, your service credit is overstated, 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 considered in reaching our determination or that may come to light in the future. 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 the Public Agency Review. 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.

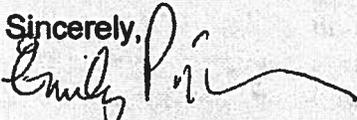
After the hearing is completed, the Administrative Law Judge will issue a Proposed Decision in approximately 30 days. The CalPERS Board of Administration will then make a determination whether to accept or reject that Proposed Decision. If the Board rejects the Proposed Decision, they will hold a Full 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, Division 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 at [REDACTED]

Sincerely,



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

cc Karen DeFrank
Joaquin Leon, City of Vernon