California Public Employees' Retirement System
Customer Account Services Division
Retirement Account Services Section
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May 25, 2012

[redacted]

Dear Mr. Malkenhorst, Sr.

This letter is to inform you that the California Public Employees' Retirement System (CalPERS) is currently examining the amount of your retirement allowance. Based upon information provided by the City of Vernon (City) in its payroll reports and additional information provided in the current audit process, CalPERS has preliminarily concluded that your retirement allowance will require a downward adjustment.

By way of background, CalPERS undertook a Public Agency review of the City and the final report was released April 2012. CalPERS audit staff reviewed payroll and other relevant records and compensation reported to CalPERS for individuals included in a test sample over service periods of July 1, 2002, through June 30, 2010. CalPERS has also completed a review of the compensation reported by the City on your behalf, and determined that some of the compensation reported to CalPERS does not comply with the California Public Employees' Retirement Law (PERL) and does not appear to meet the definition of compensation earnable.

This letter also serves to inform you that CalPERS is continuing to examine the amount of your retirement allowance and plans to delay a final decision relative to adjusting your retirement allowance so as to allow you the opportunity to present additional information, documentation, or argument that you would like CalPERS to consider prior to finalizing its decision. Thereafter, CalPERS will issue a formal written determination on these issues.

Preliminary Determination

CalPERS originally calculated your final compensation at the time of your retirement effective July 1, 2005 in the amount of $44,128 per month based upon compensation amounts reported by the City. This final compensation amount was then used to calculate your original retirement allowance $40,022.93 per month. As a result of the Public Agency review conducted by CalPERS Office of Audit Services (OAS), an investigation of all relevant information provided by the City and payroll records was undertaken. CalPERS investigated your final compensation amount and has preliminarily concluded that it appears to have been erroneously calculated at the time

of your retirement because it included reported pay amounts that are not authorized by the PERL.

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 Government Code Section 20636(b)(1)[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."

As detailed below, not all of the pay scales appear to have included amounts solely attributable to one position[2]. However, the City failed to provide copies of publicly available pay schedules for each of these positions with the percentages of time spent in each position.

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 in support of your pay amounts fail to comply with CCR Section 570.5 subdivision (a)(3)(4)(6) because:

- They fail to show the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

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[1] All further references are the California Government Code unless otherwise specified.
[2] The City at different times has reported that you served in a number of capacities simultaneously. For example in 1995, the Chief Deputy City Clerk stated you were serving as the "City Administrator/City Clerk, City Treasurer, Director of Finance and Personnel, Purchasing Agent, Executive Director of Light & Power, and Executive Director of the Redevelopment Agency.

- They fail to indicate 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.[3] 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 to this system."

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[3] Section 20636(b) and (c)(7)(B) also provides that special compensation does not include payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise. See also *In re the Matter of the Appeal of the Calculation of Benefits Pursuant to Employer's Report of Final Compensation Related to Roy T. Ramirez, and City of Indio,* (2000) CalPERS Precedential Board Decision No. 00-06, and *Prentice v. Board of Administration* (2007) 157 Cal.App. 4th 983.

The most recent amount of pay represented as payrate reported by the City for you is approximated $35,302 per month. Based on the documentation available to date, it does not appear that this reported amount meets the definitional requirements of "payrate" under the PERL

CalPERS cannot identify a salary that meets the payrate definition, and that was paid solely for the normal duties performed in the position of City Administrator. Information provided by the City suggests that the payrate for City Administrator was increased over the years as additional duties and positions[4] were added to your responsibilities. The pay associated with such additional duties and positions does not constitute compensation earnable and should not have been used in the calculation of your retirement benefits.

As a result, CalPERS has preliminarily concluded that the amounts reported to CalPERS by the City for your services do not appear to have been paid "pursuant to publicly available pay schedules" under the meaning of that phrase in the statutory and regulatory definitions for payrate. In addition, the amounts failed to meet other definitional requirements of payrate in so far as they were not for the normal duties of one full-time position and were amounts reported for duties or services performed for other simultaneous positions that would constitute "overtime" under the PERL.

CalPERS reviewed your compensation history to identify pay that would meet the definition of compensation earnable and that can be used for the purposes of determining your corrected final compensation and retirement benefit amount. The most recent payrate reported by the City that appears to meet the definition of "payrate," appears on a publicly available pay schedule for a single position, and which does not constitute pay for duties in addition to normal duties, or overtime, would be the pay reported for the position Acting City Clerk in the amount of $7875 per month as provided in Resolution 8780, signed June 29, 2005, effective July 1, 2005.

Since it appears that you were first appointed to the position of City Clerk July 1, 1977 and thereafter held that position throughout your tenure at the City, and there is a publicly available pay schedule available for duties related to this single position, the amount can be used for compensation earnable purposes in the process of determining your final compensation and retirement benefit amount. If it is determined that you were an elective officer as defined by the PERL then an election of benefits may have been required pursuant to Section 20322.

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[4] For example, the City at different times has reported that you served in a number of capacities simultaneously. In 1995, the Chief Deputy City Clerk stated you were serving as the "City Administrator/City Clerk, City Treasurer, Director of Finance and Personnel, Purchasing Agent, Executive Director of Light & Power, and Executive Director of the Redevelopment Agency."

Special Compensation

Additionally, in order to be included as a basis for retirement benefits, compensation reported to CalPERS must meet the definition of special compensation as defined in Section 20636, and specifically, in Section 20636(c)(2).

> "Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, **to similarly situated members of a group or class of employment** that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e)." (Emphasis added)

Section 20636(e) provides in relevant part:

> "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class.

Any compensation paid in addition to base pay must meet the definition of "special compensation" and must be an item of pay that has been expressly approved by the CalPERS Board. The approved list of special compensation items can be found in the CCR Section 571(a). Although, Longevity pay is listed as an approved item of special compensation, all items listed in CCR Section 571(a) must also meet all criteria listed in CCR Section 571(b).

The City reported longevity pay for you as the City Administrator at the level of 25 percent of your base pay upon reaching your 25 years of service. However, all other similarly situated city management positions received only 20 percent of base pay for 25 years of service. Since the longevity benefit paid on your behalf was higher than that of the other members of your group, it does not meet requirements of Section 20636 as noted above, nor does it meet all criteria listed in CCR 571(b)(2) which requires the amount be available to all members in the group or class.

The City reported a payrate that consisted of a base pay of $35,302 plus 25 percent longevity payment of $8,825.50 for a total of $44,128.00 from July 10, 2004 through your last day on payroll June 30, 2005. The correct amount of longevity pay that should have been reported would have been 20 percent of your base pay, where such base pay, met the definition of "payrate." Your original retirement benefit was based upon the longevity pay at 25 percent of an amount that failed to meet the definition of payrate and "special compensation." Since the amount included pay amounts that fail to meet the definition of "compensation earnable," your retirement benefit amount was erroneously calculated and will need to be corrected.

Authority for Correction of Retirement Allowance 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.[5] 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. The PERL includes provisions that address errors made by an employer and/or CalPERS and mandates corrections in certain instances.

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 subsection (a)(3)(e) and subsection (b) 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 20163(e) provides in pertinent part:

> ". . . Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the retirement allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled."

Section 20164 provides in pertinent part:

> "(a) The obligations of this system to its members continue throughout their respective memberships, and the obligations of this system to and in respect to retired members continue throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged. The obligations of the state and contracting agencies to this system in respect to members employed by them, respectively, continue until all of the obligations to this system in respect to those retired members,

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[5] 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.

> respectively, have been discharged. The obligations of any member to this system continue throughout his or her membership, and thereafter until all of the obligations of this system to or in respect to him or her have been discharged.
> (b) For the purposes of payments into or out of the retirement fund for the adjustment of errors or omissions, whether pursuant to section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:
> (1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment."

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. Should CalPERS ultimately determine that the additional information provided does not alter our preliminary findings; CalPERS will be required to correct the amount of your retirement allowance for the reasons described above. Moreover, should a final decision be reached that a reduction in your retirement allowance is required, CalPERS may be required to collect the overpayments made in error.

Section 20164 (b) states that where the system has made an erroneous payment to a member, the right to collect expires three years from the date of payment except where the payment is a result of fraudulent reports for compensation made. This further serves to confirm that if applicable, CalPERS will seek to collect back all overpayments authorized by statute.

Conclusion

We will await any information you wish to submit on or before June 25, 2012, and will consider it promptly upon receipt. If, after our review of the information, argument and documentation you provide, CalPERS' preliminary determination remains unchanged, CalPERS must make a reduction to your retirement benefit because the pay amounts reported by the City failed to meet the definition of compensation earnable and should not have been used to calculate your final compensation and retirement benefit. This correction would be based upon a final compensation amount adjusted from $44,128 to $9,450 per month. The corrected final compensation amount is calculated using the most recent pay amount that meets the definition of "payrate" in the amount of $7,875 along with the longevity payment of 20 percent of that base pay which approximates $1,575.60. Accordingly, your monthly retirement allowance would be reduced to $9,654.09 minus any authorized deductions. CalPERS will continue to pay the current amount of your allowance between now and the time of this hearing. However, should a decision be reached to reduce your allowance in the administrative process, CalPERS will seek to recover all overpayments made to you allowable under the law.

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. 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.

If you have any argument, information or documentation that would contradict the information outlined above, or that you would like CalPERS to consider relative to the issues described above prior to CalPERS issuing a formal determination in this matter, please provide it to CalPERS **no later than June 25, 2012**.

Any argument, information and/or documents you wish to submit to CalPERS should be directed to:

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

CalPERS will review any information provided and then proceed with a formal determination in this matter. CalPERS' formal determination will be communicated to you and the City by way of letter.

If you have any questions regarding this information, please call me directly at [redacted]

Sincerely,

for

TOMI JIMENEZ, Manager
Compensation and Employer Review
Customer Account Services Division

cc: Karen DeFrank
Joaquin Leon, City of Vernon