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May 25, 2012

Ref. No. 2012-0347



Dear Mr. Olivo:

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 1994 through the present in regards to your eligibility for membership in CalPERS for services performed in multiple positions as the Deputy City Attorney, Assistant City Attorney, City Attorney and Legal Counsel for the City of Vernon (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 the review and to specifically address membership eligibility, arrears service credit and the purchase of Additional Retirement Service Credit (ARSC).

CalPERS has concluded you were not eligible for membership for your services rendered with the City; your arrears service credit was approved in error; and, the purchase of ARSC on April 15, 2005 was improperly granted.

Formal Determination

The City first entered you into membership on July 28, 2002, with the title of City Attorney. The City then requested prior service for the period of November 1, 1994 through July 2002, and on December 29, 2002, you were credited with 7.700 years of arrears service and your membership date was changed to November 1, 1994. Your title for this period was noted as Deputy City Attorney.

CalPERS has evaluated the information provided by you and the City and has determined that the 15.265 years of service reported by the City are not eligible for inclusion in this system. CalPERS has concluded that pursuant to Government Code sections 20300(b) and 20300(h)¹, you were an independent contractor and not an employee of the City or you provided professional legal services; therefore, you are not eligible for CalPERS membership or benefits for much of your service with the City. Since you were neither an employee of the City, nor a member of CalPERS, from November 1, 1994 to September 4, 2002, the arrears service was granted in error, and all payments received must be returned to you in accordance with CalPERS' policies.

Additionally, even if CalPERS were able to establish that you were an employee of the City, we have insufficient documentation of time base and hours worked to establish when you would have qualified for membership². Because CalPERS cannot determine a membership date and cannot verify hours worked, your service credit with the City also cannot be determined.

A member must have a minimum of five years of service to purchase additional retirement service credit (ARSC). Since CalPERS cannot determine your service credit with the City, the ARSC purchase was improper. Reimbursements and /or credit will be effectuated with State and Federal law.

I. CalPERS Has Determined You Were An Independent Contractor Or Providing Professional Legal Services And Not An Employee Of the City from November 1, 1994 to December 31, 2004.

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." 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 "[a]ny 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)³. 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.

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

² See Govt. Code Sections 20962, 20966, 20636

³ 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.

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-employee⁴.

Deputy City Attorney

There is no verifiable documentation provided for the Deputy City Attorney position. The City was unable to provide any personnel documents or job duty statements for the position of Deputy City Attorney, and although some City Council minutes appear to appoint you as an employee, no title, no timebase or payrate has been provided. Other minutes provided show a title of Legal Secretary but there is no indication of how that applies to you.

Section 20028(b) states that an employee for retirement purposes is "[a]ny person in the employ of any contracting agency".

Without evidence of an established City position, or of common law control by the City, CalPERS cannot find that this position constitutes employment within the meaning of Section 20028(b).

It is our conclusion that your service from November 1, 1994, to April 1, 1999, as Deputy City Attorney is ineligible for membership in CalPERS, and that the arrears service credit was granted in error.

Assistant City Attorney

On April 1, 1999, the City also appointed you as Assistant City Attorney. Documentation for this appointment includes City Resolution No. 7292 and an Attorney Employment Agreement. No personnel documents or job duty statements were provided for this position.

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 specifically states that the City does not know the number of hours required.
- The Agreement provides no full time payrate, instead granting a monthly retainer for up to forty hours per month, and provides two different hourly rates for hours above forty.

Officers of the City of Vernon are defined by Articles VI and VII of the Vernon City Charter. Article VI defines the Office of City Administrator. 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."

- The City has produced no ordinance creating the Office of Assistant City Attorney.

Additionally, City officers are required by statute to take an oath prescribed by the California Constitution before entering office.⁵ Failure to take and file an oath of office will result in a vacancy of the office.⁶

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

Because the City does not appear to have established an Office of Assistant City Attorney, or that you ever occupied that office, CalPERS has determined that your service for this time period is excluded under Section 20300(h).

City Attorney

On November 1, 1999, the City appointed you to the position of City Attorney. Documentation supporting this appointment includes City Resolution No. 7432. The

⁵ 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 36505.

⁶ See Government Code 1770, subdivision (i).

City was unable to provide any personnel documents or job duty statements for the position of City Attorney.

As noted above for the position of Acting City Attorney, City officers are required by statute to take an oath prescribed by the California Constitution before entering office. Failure to take and file an oath of office will result in a vacancy of the office⁷.

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

Because the City cannot verify that you took an oath of office, CalPERS must conclude the office vacant, and your employment for this period of time is excluded from membership in CalPERS by Section 20300(h).

Legal Counsel

On October 16, 2003, the City also appointed you as Special Counsel. Documentation for this appointment includes City Resolution No. 8398. No personnel documents or job duty statements were provided for this position.

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 concluded that your position of Legal Counsel with the City 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.

II. You Were Improperly Granted Arrears Service Credit And Allowed To Purchase Additional Retirement Service Credit.

Section 20163 allows a member who was not brought into CalPERS membership timely to receive service credit for the period in arrears. Also, Section 20909 allows a member to purchase ARSC. As indicated above, CalPERS has concluded you were neither an employee of the City, nor a member of CalPERS, from November 1, 1994, to September 4, 2002. Since you were not an employee of the City, nor a member of CalPERS, you were granted the arrears service credited in error. Since CalPERS cannot determine if you have the required 5 years of service to purchase ARSC, your ARSC purchase was in error. Reimbursement and/or credit for retirement contributions, arrears service credit and ARSC paid into the system on your behalf will be effectuated in accordance with State and Federal law

⁷ See Government Code 1770, subdivision (i).

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 benefits 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 with 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 to 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 have conflicting information regarding the time base, for which of your positions were paid. As such, CalPERS is unable to determine your payrate.

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, shows the payrate for each identified position, provides a time base, and indicates an effective date and the date of any revisions. 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, some of the contract agreements between you and the City

indicate you will be paid a retainer fee and hourly payrates depending on the amount of service rendered in a given month. Due to the conflicting and lack of information, CalPERS cannot determine the time base for which your payrate was reported.

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, in the event even though you are able to demonstrate eligibility for CalPERS membership, you must provide accurate and sufficient information for CalPERS to verify your compensation before such compensation can be used to calculate a retirement allowance.

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.

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.

Conclusion

Based on these determinations, you are not eligible for membership for your services rendered with the City. As such, Reimbursement and/or credit for retirement contributions paid into the system on your behalf will be effectuated in accordance with

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.

State and Federal Law. Due to our determination that you are not a member and not eligible to have purchased service credit or receive arrears service credit, you are not 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 should be mailed to the following address:

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

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.

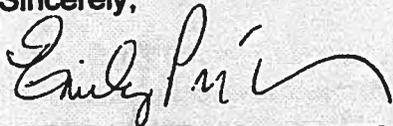
Depending on the current caseload of the OAH and the assigned attorney, the hearing date may be set several months after the case is opened. The OAH will typically offer its earliest available hearing date that meets the schedule of both parties. If you choose not to be represented by an attorney, the 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.

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