



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

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Dear Mr. Whitworth:

The California Public Employees' Retirement System (CalPERS) undertook a Public Agency Review (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 currently available in regards to the compensation reported by the City on your behalf, and concluded 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.

Based on findings cited in the Review, information provided by the City and review of payroll reports, CalPERS cannot determine the time base for which your payrate was reported or which of your multiple positions services were rendered and compensation was reported. CalPERS has notified the City that they must provide documentation to substantiate the full-time payrate for the services with each position you held before a determination of payrate can be made.

Preliminary Determination

Payrate

"Compensation" is defined in Government Code Section 20630¹ 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 All further references are to the California Government Code unless otherwise specified.

- (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."

Pay Schedules

As detailed below, not all of the pay scales appear to have included amounts solely attributable to one position. However, the City failed to provide copies of publicly available pay schedules for each of your positions as Fire Chief and City Administrator with the percentages of time spent in each position.

Section 20967 provides 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.

Currently, according to documentation received from the City, you hold the position of both Fire Chief and City Administrator. CalPERS cannot determine how much service was rendered in each of those positions and, according to the pay schedules, only the position of Fire Chief is compensated while the City Administrator is listed with a salary of \$0.00.

For a pay schedule to be considered compliant with the PERL, it must first meet the criteria listed in the California Code of Regulations (CCR) Section 570.5 that provides the following:

- “(a) For purposes of determining the amount of compensation earnable pursuant to Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:
- (1) Has been duly approved and adopted by the employer’s governing body in accordance with requirements of applicable public meetings laws;
 - (2) Identifies the position title for every employee position;
 - (3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;
 - (4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;
 - (5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer’s internet website;
 - (6) Indicates an effective date and date of any revisions;
 - (7) Is retained by the employer and available for public inspection for not less than five years; and
 - (8) Does not reference another document in lieu of disclosing the payrate.

If the pay schedule fails to meet the requirements delineated in subdivision (a) the CalPERS Board may determine an amount that will be considered to be payrate using documentation including, but not limited to, the following listed in subsection (b):

- (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 with the requirements of subdivision (a) of a former CalPERS employer.”

Multiple Positions

When the full-time payrate is substantiated for both Fire Chief and City Administrator, the time base for each must then be clarified. 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 states in pertinent part: “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.

In the event the City determines you held both 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.”

Your employment agreement of July 1, 2006, does not fix a time base for the position of Fire Chief. However, on December 3, 2007, pursuant to Resolution No. 9491 and Contract No. 9493, you entered into a new employment agreement with the City. This agreement specifies that you shall be employed full-time as the City's Fire Chief. The City has provided no resolutions or contracts to document your appointment to City Administrator. However, even if the City Administrator position was verified, 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 6, Article 6.1, the City Administrator is the Chief Administrative Officer of the City, appointed by the City Council. The City Administrator 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. Absent such an election in writing pursuant to Section 20322, CalPERS has determined that this position is excluded from membership in CalPERS.

Authority for Correction for Amounts Erroneously Reported

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.² 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

Although we have no retirement application on file, these issues must be resolved before any request can be completed. If in the near future you plan on submitting a retirement application, your retirement warrant will be held until all issues regarding your compensation have been resolved.

In order to be considered for membership in the position of City Administrator, CalPERS requests the City provide a signed written Optional Member Election Form and information to verify the full-time payrate for the positions in which you are rendering service as well as a time base for each eligible position. Providing this information will help ensure timely processing of your retirement application.

² 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.

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.

Please note 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 the 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.

If you have any questions regarding this information please contact me at

Sincerely,



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

cc: Karen DeFrank
Joaquin Leon, City of Vernon