



California Public Employees' Retirement System  
Customer Account Services Division  
Retirement Account Services  
P.O. Box 942709  
Sacramento, CA 94229-2709  
TTY: (877) 249-7442  
888 CalPERS (or 888-225-7377) phone • (916) 795-4166 fax  
www.calpers.ca.gov

June 17, 2013

**AMENDED**

Desi Alvarez  
[REDACTED]

Dear Mr. Alvarez:

The California Public Employees' Retirement System (CalPERS) previously notified you and the Chino Basin Watermaster (Agency) by letter dated February 20, 2013 that the payrate reported on your behalf by the Agency from May 3, 2011 through May 4, 2012, does not comply with the California Public Employees' Retirement Law (PERL) and will not be used to calculate your retirement benefits. The Agency reported an annual salary of \$228,000.00 which calculates to a monthly amount of \$19,000.00. At that time you were notified of your right to appeal CalPERS' determination. CalPERS received both your and the Agency's timely appeal.

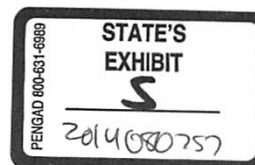
In the Agency's appeal, dated April 19, 2013, they indicated that you were placed on administrative leave from November 9, 2011 through May 4, 2012. It was clear to the Agency that you would no longer be the CEO and your employment status would effectively be severed on November 9, 2011. You would continue to receive payment from the Agency through May 4, 2012, the expiration date of your Employment Agreement, however you were "terminated" on November 9, 2011. Therefore, CalPERS is sending this amended appeal rights letter for the denial of Severance pay.

The Agency's appeal states in pertinent part:

**STATEMENT OF THE FACTS**

**Employment of Mr. Alvarez as CEO**

...As with many executives, Mr. Alvarez was unwilling to leave his current position without some assurance that he would be compensated adequately for the risk of leaving his current employment to assume the permanent CEO position at Watermaster. Accordingly, Mr. Alvarez and Watermaster entered into a one-year employment agreement, effective



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May 3, 2011 (the "Employment Agreement"), under which Mr. Alvarez would receive his compensation for the remainder of the one year period in the event that he was involuntarily terminated without cause. This provided Mr. Alvarez with a certain level of security in the event that the job change did not work out by providing him the ability to meet his financial obligations while searching for another position.

#### **Search for New CEO/General Manager**

Shortly after joining Watermaster, it became clear to Watermaster that Mr. Alvarez was not the right person for the CEO position at Watermaster, and he was placed on administrative leave on November 9, 2011. Mr. Alvarez remained on administrative leave through May 4, 2012, the expiration date of the Employment Agreement. Danielle D. Maurizio acted as interim CEO from November 9, 2011 through January 17, 2012. Ken Jeske then acted as interim CEO from January 17, 2012 through September 7, 2012.

Your Employment Agreement states in section 9.a.

#### **9. Severance.**

- a. **Termination without Cause.** In the event Executive's employment is terminated without cause prior to the end of the first year of the Employment Term, Watermaster will pay the Executive the full salary amount for the first year of the Employment Term plus provide for the health and other benefits that were being provided to Executive for the remaining portion of such first year of the Employment Term, minus the amount of any salary already paid during that first year of the Employment Term. After the first year of the Employment Term, Executive shall not be entitled to any other payment of salary under this Agreement for a termination without cause, except for payments owed through the date of termination.

All compensation reported to CalPERS must meet the definition of compensation as defined in Government Code (GC) §20630 in order to qualify as reportable compensation for retirement purposes. The Agency's payment for Severance pay does not qualify as reportable compensation under GC §20636.

GC §20636(f) states "final settlement pay" means any pay that are granted or awarded to a member in connection with or in anticipation of a separation from employment. The Severance pay outlined in your Employment Agreement meets the definition of final settlement pay and is not reportable to CalPERS.

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The service credit associated with the Severance pay awarded to you from November 9, 2011 through May 4, 2012 will be rescinded from your total service credit and will not be used to calculate your retirement benefits.

Also the reported payrate does not meet the definition of "Payrate" as provided in Government Code (GC) §20636(b) (1).

GC §20636(b) (1) defines "Payrate" in relevant part as:

(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).

"Payrate" must also meet specific provisions in the California Code of Regulations (CCR) §570.5.

CCR §570.5 states:

(a) For purposes of determining the amount of "compensation earnable" pursuant to Government Code 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;

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- (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.

(b) 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.

CalPERS has determined that your reported payrate is not pursuant to a publicly available pay schedule that complies with all of the criteria set forth in CCR §570.5. In reviewing your reported compensation the Agency provided CalPERS your Employment Agreement effective May 3, 2011.

This Agreement indicates a position title of Chief Executive Officer. The Agency provided a document titled CHINO BASIN WATERMASTER SALARY MATRIX 2012/2013. Your position of Chief Executive Officer is not located on this document nor does any classification contained therein provide for a salary of \$228,000.00. The Agreement is signed by Kenneth Willis, Chairman of the Watermaster Board; however, as indicated by March 31, 2011 Agency Board Minutes the Agreement was approved in confidential session at a closed session special meeting.

CalPERS' fiduciary responsibility to all of its participants and business partners dictates that CalPERS use only the amount approved by a publicly available pay schedule that complies with CCR 570.5 to calculate final compensation.

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The City of Downey provided CalPERS with a pay schedule effective October 22, 2007 through April 30, 2011, that does show your position of Deputy City Manager, Special Projects and does comply with CCR 570.5. The City reported a monthly salary of \$15,860.00.

The City also provided for Employer Paid Member Contributions (EPMC) reported as special compensation pursuant to CCR §566.1, which states in pertinent part:

(a) A contracting agency or school employer may report the value of all or part of the normal contributions required to be paid by a member, for an individual or "group or class" of employees. A contracting agency may also, by contract amendment(s), convert Employer Paid Member Contributions (EPMC) to compensation earnable for a group or class of employees, only during the period of final compensation. A school employer may also, by contract amendment(s), convert EPMC to compensation earnable if all districts under the County Office of Education pass Resolutions for same. Either provision: (1) reporting the value of EPMC as compensation; or (2) converting EPMC to compensation earnable, can only be provided to an individual if the most closely related group also has the same EPMC provision.

The City of Downey reported the value of EPMC in the amount of \$580.60 each bi-weekly pay period as special compensation to be used in your retirement benefit calculation.

Therefore, CalPERS will use the monthly rate of \$15,860.00 plus the monthly special compensation amount of \$1,268.80 ( $15,860.00 \times 8$  percent) from the City of Downey to calculate your retirement benefits. CalPERS will not use the service credit awarded from November 9, 2011 through May 4, 2012.

Accordingly, CalPERS is required to recalculate your retirement allowance without Severance pay retroactive to July 2, 2012. Once the adjustment is complete, the CalPERS Benefits Services Division will notify you in writing of your revised allowance, the amount of overpaid retirement benefits, as well as options for repaying the overage. In addition, CalPERS has requested the City to: (1) reverse all Severance pay reported on your behalf from our payroll system, and (2) recover the corresponding contributions paid on this benefit.

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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.

Enclosed 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.

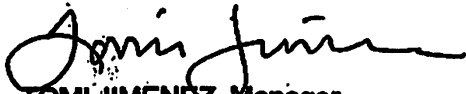
Your appeal should be mailed to the following address:

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

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If you have any questions or concerns regarding this matter, please contact  
Nicole Horning at 888 CalPERS (or 888-225-7377).

Sincerely,



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

Enclosure

cc: **KAREN DEFRANK, Division Chief  
Chino Basin Watermaster**