



Board of Administration
California Public Employees' Retirement System

Agenda Item 5c1

June 13, 2012

ITEM NAME: Proposed Decision – In the Matter of the Calculation of Compensation Earnable of RICHARD G. KRENZ, Respondent, and DEPARTMENT OF INSURANCE, Respondent, Case No. 8517

PROGRAM: Compensation Review and Analysis

ITEM TYPE: Consent Action

PARTIES' POSITIONS

Staff argues that the Board of Administration should adopt the Proposed Decision.

Respondents argue that the Board of Administration should decline to adopt the Proposed Decision.

PROCEDURAL SUMMARY

Respondents Richard G. Krenz and Department of Insurance requested that the compensation Richard G. Krenz received from the Conservation and Liquidation Office (CLO) for his duties there as Special Deputy Insurance Commissioner and Chief Executive Officer be included with his salary as Deputy Chief Counsel for the Department of Insurance, as compensation earnable for purposes of calculating his service retirement allowance. CalPERS denied respondents' request. They appealed and the matter was heard by the Office of Administrative Hearings on August 31, October 25, and December 14, 2011. A Proposed Decision was issued on April 9, 2012, denying respondents' request.

ALTERNATIVES

- A. For use if the Board decides to adopt the Proposed Decision as its own decision:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated April 9, 2012, concerning the application of Richard G. Krenz and Department of Insurance; RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the decision.

Agenda Item 5c1

Board of Administration

June 13, 2012

Page 2 of 3

- B. For use if the Board decides not to adopt the Proposed Decision, and to decide the case upon the record:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated April 9, 2012, concerning the application of Richard G. Krenz and Department of Insurance, hereby rejects the Proposed Decision and determines to decide the matter itself, based upon the record produced before the Administrative Law Judge and such additional evidence and arguments that are presented by the parties and accepted by the Board; RESOLVED FURTHER that the Board's decision shall be made after notice is given to all parties.

- C. For use if the Board decides to remand the matter back to the Office of Administrative Hearings for the taking of further evidence:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated April 9, 2012, concerning the application of Richard G. Krenz and Department of Insurance, hereby rejects the Proposed Decision and refers the matter back to the Administrative Law Judge for the taking of additional evidence as specified by the Board at its meeting.

- D. Precedential Nature of Decision (two alternatives; either may be used):

1. For use if the Board wants further argument on the issue of whether to designate its Decision as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System requests the parties in the matter concerning the application of Richard G. Krenz and Department of Insurance, as well as interested parties, to submit written argument regarding whether the Board's Decision in this matter should be designated as precedential, and that the Board will consider the issue whether to designate its Decision as precedential at a time to be determined.

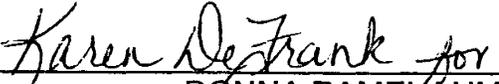
2. For use if the Board decides to designate its Decision as precedential, without further argument from the parties.

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, hereby designates as precedential its Decision concerning the application of Richard G. Krenz and Department of Insurance.

Agenda Item 5c1
Board of Administration
June 13, 2012
Page 3 of 3

ATTACHMENTS

- Attachment A: Proposed Decision
- Attachment B: Staff's Argument
- Attachment C: Respondent(s) Argument(s)



DONNA RAMEL LUM
Deputy Executive Officer
Customer Services and Support

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Calculation of
Compensation Earnable of:

RICHARD G. KRENZ,

Respondent,

and

DEPARTMENT OF INSURANCE,

Respondent.

CalPERS Case No. 8517

OAH No. 2011030404

PROPOSED DECISION

This matter was heard before Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings (OAH), on August 31, October 25, and December 14, 2011, in Sacramento, California.

Carol A. McConnell, Senior Staff Counsel, represented the petitioner California Public Employees' Retirement System (CalPERS).

Richard G. Krenz, (respondent), Attorney at Law,¹ represented himself.

Patricia Staggs, Deputy Chief Counsel, Department of Insurance (DOI), was present on August 31, 2011. Ms. Staggs made no appearances after this date.

Evidence was received and the record remained open for parties to submit written closing arguments. On January 13, 2012, OAH received respondent's Closing Brief which was marked as Exhibit O. On February 21, 2012, OAH received CalPERS' Closing Brief which was marked as Exhibit 18. On March 9, 2012, OAH received respondent's Closing Reply Brief which was marked as Exhibit P. The record closed on March 10, 2012.

¹ Richard G. Krenz, Assistant Chief Counsel and Bureau Chief Fraud Liaison Bureau, California Department of Insurance, 45 Fremont Street, Suite 2100, San Francisco, California 94105.

SUMMARY AND ISSUE

Respondent has worked as an attorney in the employ of DOI since 1992, primarily in San Francisco. In 1998, respondent was elevated to Deputy Chief Counsel, DOI Legal Division. For 15 months, from July 28, 1999 to October 22, 2000, while retaining his position at DOI, respondent was appointed to the Conservation and Liquidation Office (CLO) to serve as Special Deputy Insurance Commissioner (SDIC) and Chief Executive Officer (CEO). He was responsible to oversee the liquidation of insolvent insurance companies. He conducted his duties for the CLO out of a different office in San Francisco.

Respondent's compensation during the months he worked for the CLO consisted of his regular DOI salary (\$101,976), plus an additional salary paid by the CLO (\$93,024), for a total yearly salary of \$195,000. He received separate pay warrants from each entity. Though the DOI reported his income to CalPERS, the CLO did not. No employer or employee contributions were made relative to respondent's CLO income. After his position at the CLO terminated, respondent requested that his combined DOI and CLO income be used to calculate his retirement benefits. CalPERS denied his request on grounds that the CLO was not a contracting public agency and his CLO income was not paid from State funds nor considered compensation earnable.

Respondent is currently employed at the DOI and has not submitted a retirement application. The sole issue in this case is whether the income he received for his CLO service should be reported to CalPERS as "compensation earnable" and included in the calculation of his retirement allowance? For the reasons stated below, the answer is no.

FACTUAL FINDINGS

1. The Statement of Issues was made and filed on August 11, 2011, by Marion Montez, Assistant Division Chief, Customer Account Services Division, CalPERS, in her official capacity.
2. The DOI is an agency of the State of California. Respondent, as a DOI employee is a "state employee," and a member of CalPERS. (Gov. Code, §§ 20028, subd. (a); 20069.) The Board of Administration of the Public Employees' Retirement System (Board), oversees the administration of benefits including retirement allowances and disability retirement payments to beneficiaries including retired members, their designees, and their estates. (Gov. Code, §§ 20019; 20020.) The provisions by which the Board operates are set forth in the Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.)
3. Respondent has been a civil servant of the State of California since 1992 when he joined the DOI as staff counsel. In 1997 he was appointed Assistance Chief Counsel, DOI Legal Division. In October 1998 he was promoted to Deputy Chief Counsel, DOI Legal Division. His Notice of Personnel Action dated October 22, 1998 indicates "Classification

Title: Chief Counsel I, CEA [Career Executive Assignment]" and "Appointment Status: Civil Service, Permanent." Respondent's duties over the years have also included providing legal services to the CLO, an office of the Insurance Commissioner (Commissioner). The record reflects that at all times, respondent enjoyed civil servant status as a state employee.

4. The CLO operates as statutory trustee over insolvent and delinquent insurance companies doing business in California that have been seized by the Commissioner. While in the position of Deputy Chief Counsel, respondent was offered the position of Special Deputy Insurance Commissioner (SDIC) and Chief Executive Officer (CEO) of the CLO. The SDIC/CLO position was an "at will" assignment, meaning that he served at the pleasure of the Commissioner, then Chuck Quackenbush. Respondent accepted the assignment and his appointment was effective July 28, 1999. His decision to accept the CLO position was contingent on a guarantee that he would not lose his civil service status at the DOI.

Interjurisdictional Employee Exchange (Loan) Agreement

5. An "interjurisdictional employee exchange" (Loan) agreement was entered into between the DOI and the CLO "for purposes of loaning employee, [respondent], to serve in the capacity of Chief Operations Officer of the CLO." The Loan Agreement was executed on April 1, 2000, by respondent, Michael Kelley (Chief Deputy DOI), and Mark Lowden (CEO/CLO). (Gov. Code, §§ 19050.8, 19994.9; SPB Rule 427.) The term of the Loan Agreement was to be "no more than two years, effective April 1, 2000 – March 31, 2002." Either party could terminate the agreement at any time. A "Right of Return" provision stated, "Upon termination of this agreement, the employee shall return to his former classification, of Chief Counsel I, CEA, California Department of Insurance." Under "General Provisions" the Loan Agreement stated:

During the period of this Agreement, the employee shall retain his position as Chief Counsel I, CEA in the Department of Insurance in which he will maintain and accumulate seniority, promotional status, retirement, and other employee benefits. The employee will also maintain all rights to compete in CDI open and promotional exams.²

Respondent testified that during his CLO appointment, he continued to perform some Chief Counsel duties out of the DOI office (less than 15 percent of his time), but conducted the bulk of his work for the CLO in a different facility in San Francisco.

6. Prior to respondent's appointment as SDIC/CEO to the CLO, the position was held by William W. Palmer and before that, by Collin McRae. Unlike respondent, Mr. McRae resigned his position as Chief Counsel for the DOI before his appointment to the CLO. Mr. Palmer, though previously Chief Counsel at DOI, was apparently classified as a Career Executive Assignment, non-civil servant. Both predecessors executed two year

² In various exhibits, the Department of Insurance is referenced as either the CDI or the DOI. For purposes of this Decision, the acronym DOI will be used unless stated differently in direct quotes.

employment agreements (Agreements) with the Commissioner deputizing them to act as SDIC/CEO of the CLO. Both prior Agreements provided for an annual base salary of \$195,000 and a monthly automobile allowance of \$250. Both Agreements specifically stated, "The base salary shall be paid from the assets of the Estates, in accordance with the requirements of the California Insurance Code."

7. Though respondent's work at the CLO actually began on or about July 26, 1999, his Loan Agreement and a CLO Hiring Agreement (fixing his add-on salary), was not executed until eight months later in April 2000. The Loan Agreement stated that respondent was to serve the CLO in the "capacity of Chief Operations officer of the CLO." Because respondent's DOI salary was less than the base salary paid to his CLO predecessors, the CLO agreed to pay him "additional compensation" (add-on salary) to make up the shortfall. A CLO "Hiring Approval" form listed his formal title as "Director of Operations," his status "Exempt," and his "add-on" salary as \$93,024. His DOI salary during the relevant time period in 2000, was \$101,976 (\$8,498 per month). Hence, his total compensation from both assignments/entities was \$195,000.

8. Respondent received two separate pay warrants for his DOI and CLO work. For his DOI work, he continued to receive his regular pay warrant from the State of California, Controller's Office (Kathleen Connell). CalPERS retirement contributions as well as state and federal taxes, were deducted from his DOI monthly gross earnings. For his CLO work from April 1 to October 22, 2000, he received a separate warrant/advice, paid bi-monthly, and drawn on an account of the "California Insurance Commissioner's Conservation and Liquidation Office - Payroll Account" through ADP (Automatic Data Processing). ADP, Inc. is a private payroll administration outsourcing company. The CLO warrants were drawn on an account at Union Bank and not from the State Treasury. State and federal taxes, but no retirement contributions were deducted from respondent's CLO earnings. It is noted that respondent accrued a separate vacation balance for his work at the CLO collateral to his DOI leave balance.

9. Because of the eight month delay in fixing the terms of his CLO employment, there was a pay gap (from August 1999 through March 2000) during which respondent had not been paid for his CLO service.³ An e-mail from David Jolliffe, Accounting, dated June 12, 2000, addressed respondent's CLO earnings gap:

I have calculated Dick's salary "gap" from July 26, 1999 to March 31, 2000. He has received full compensation from April 1, 2000 already. The calculation is attached and, based on deducting CDI [California Department of Insurance or DOI] salary received from an annualized \$195,000, gives an exact amount of \$63,886.42....

³ Respondent's DOI salary during the "gap" period was : Effective October 1, 1998 - \$7,816 (Chief Counsel I/CEA; Effective October 1 - 1999 \$8,498 (Chief Counsel I/CEA); Effective November 13, 2000 - \$8,594 (Assistant Chief Counsel).

Retirement contributions were not deducted from the CLO “gap” pay warrant which was also drawn on the CLO account at Union Bank and processed by ADP. The paycheck memo stated: “Retro-earnings – Remuneration for holding SDIC position since 1999.”

10. In July 2000, Commissioner Quackenbush suddenly resigned and was replaced by retired judge, Harry W. Low. Respondent was notified by memorandum from Commissioner Low, dated September 22, 2000, that his Loan Agreement with the CLO was “terminated effective September 22, 2000 at the close of business.”⁴ Respondent was instructed to report to the DOI Legal Office for his duty assignment on the next business day. A second memorandum from Commissioner Low dated September 22, 2000, officially notified respondent that his Chief Counsel I, CEA appointment was terminated effective October 31, 2000.⁵ He was provided with information on his return rights to the DOI. It was determined that respondent would return to his “former position” as Assistant Chief Counsel in the DOI Legal Office, effective November 13, 2000, at a salary of \$8594, the maximum for the class. (SPB Rule 548.151.) Respondent remains in the position of Assistant Chief Counsel, Special Projects Bureau, Legal Office, DOI.

Respondent’s 2007 Request for Retirement Benefits based on Joint CLO/CDI Earnings

11. On April 19, 2007, respondent sent a memorandum to Dennis Ward, Chief of Operations at DOI requesting that his retirement benefits be based on his combined CDI/CLO earnings. Respondent included his year 2000 W-2 and Earnings Summaries from the DOI and the CLO. His DOI/State Controller earnings were \$102,712.57. His CLO earnings were \$111,451.16. Respondent’s total 2000 wages were \$214,163.73.⁶ By letter dated May 9, 2007, Mr. Ward forwarded respondent’s request to CalPERS for their consideration.

12. CalPERS reviewed respondent’s request for a higher compensation determination. By letter dated June 15, 2007, Sharen Scott, CalPERS Employer Reporting Section Manager, explained that respondent’s earnings from the CLO could not be included as compensation for purposes of his retirement calculations. CalPERS’ decision was based on the following: 1) Only monies paid from the State Treasury through the State Controller’s Office could be considered “compensation” and 2) Salaries for civil service employees must be paid in accordance with California State Civil Service Pay Scales. “Employees” is

⁴ Respondent brought to Commissioner Low’s attention the fact that his Loan Agreement contained a 30-day written notice statement. Hence, a revised notification memorandum was issued providing that the effective date of respondent’s termination from the CLO was October 22, 2000.

⁵ Commissioner Low issued a revised memorandum dated September 28, 2000, providing that the effective date of the termination of respondent’s Chief Counsel I, CEA appointment was November 12, 2000.

⁶ The year 2000 CLO earnings included “gap” remuneration that was partially earned in 1999.

defined in Government Code section 20028, and cites payment from "funds directly controlled by the state" to include "funds deposited and disbursed from the State Treasury in payment of compensation, regardless of their source." Ms. Scott pointed out that respondent's CLO wages were paid from a Union Bank account and the W-2 Earnings Statements showed that the CLO and CDI had different "Employer Identification Numbers." These facts indicate that respondent's 2000 income was from "two different funding sources." The letter advised respondent of his appeal rights which he timely exercised by letter dated July 26, 2007.

13. On or about January 9, 2008, in an effort to obtain additional facts, CalPERS legal counsel sent interrogatories to Patricia Staggs, Assistant Chief Counsel of the DOI. Ms. Staggs responded in two parts by letters dated June 27 (responses to questions one through four) and October 3, 2008 (responses to questions five through 11). Questions one through four sought information on the salary paid to DOI and CLO executives. Those questions and relevant answers are as follows:

Question 1a: During 2000 and 2001, were there other employees at the DOI besides respondent who held the position of Chief Counsel, CEA I?

Answer: Yes; however the position was elevated to the classification of Chief Counsel, CEA II.

Question 1b: If so, what were the salaries of any such employees in the years 2000 and 2001?

Answer: October 27, 2000, Reid McClaran, salary of \$9,024 per month; October 31, 2001, Mr. McClaran received a merit salary adjustment raising his salary to \$9,268 per month.

Question 2: During 2000 and 2001, were there other employees at the DOI besides respondent who held the position of Special Deputy Insurance Commissioner?

Answer: No. In September 2000, Governor Davis appointed retired judge Harry Low to the Office of Insurance Commissioner. Commissioners have the authority to run the CLO in any manner they see fit. There is no requirement that the SDIC/CEO of the CLO be a civil servant or private individual. In 1994, Insurance Commissioner Garamendi restructured the CLO and removed all civil service management of the new operation, thereafter appointing private professionals from insurance, banking, accounting, and claims industries as Officer of the CLO. They in turn hired private, "at will," employees to manage the insolvent estates of the bankrupt insurance companies. However, no statutes in the Insurance Code were changed as a result of the restructuring that would have prohibited the Commissioner from appointing a civil servant to the position of SDIC/CEO of the CLO. Any Commissioner may appoint either a civil servant or a private individual to head the CLO.

Question 2b: If so, what were the salaries of any such employees in the years of 2000 and 2001?

Answer: In 2001: Harry Levine as CEO of the CLO earned \$9,388 per month; Loren Suter as Deputy Commissioner earned \$8,505 per month. These salaries are

commensurate with the salary range for the CEA 5 which is \$8,493 to \$9,362 per month. All prior incumbents were paid \$195,000.

Question 3: Did any other employee holding the position of Chief Counsel, CEA I, in 2000 or 2001 receive an additional payment of approximately \$111,000 above and beyond the salary paid by the State Controller's Office besides respondent?

Answer: No

Question 4: Did any other employee holding the position of SDIC in 2000 or 2001 receive the additional payment of approximately \$111,000 above and beyond the salary paid by the State Controller's Office besides respondent?

Answer: No. The position of SDIC was not filled after respondent's termination of the interjurisdictional agreement by Commissioner Low. For the year 2001: Harry Levine as CEO of the CLO earned \$9,388 (\$112,656 per year). Loren Suter as Deputy Commissioner Overseeing CLO and DOI Administration earned \$8,505 per month (\$133,356 per year).

14. Questions five through 11 sought information on the relationship between the DOI and CLO. Those questions and relevant answers are as follows:

Question 5: Does the DOI consider the CLO to be part of the Department or a separate legal entity?

Answer: The CLO is an office of the Commissioner within the DOI. As a matter of law, it has no separate, independent legal identity. The office is structured and maintained separately to insure a clear distinction between the powers and duties imposed upon the Commissioner and DOI function as a regulator of the business of insurance within the state from those duties and obligations imposed upon the Commissioner as a "statutory trustee" of seized insolvent and delinquent insurance companies.

"The separation of the CLO office is to prevent the comingling of an insurer's private assets held in trust by the Commissioner from the state funds used by the DOI for the maintenance of its operations." This separation is "based upon the legal mandate in the Insurance Code that the cost and expenses for estate administrative services are to be paid, subject to approval, out of **private funds** held in trust by the Commissioner, whereas the costs and expenses for the maintenance of the department as a regulator are paid from **state funds**. Thus, it is necessary to keep separate both the source of funding and the services rendered between these separate and independent jurisdictional functions required under the California Insurance Code in the enforcement of its provisions." (Bold in original.) (Ins. Code, §§ 1010 to 1062, 1064.1 to 1064.13.)

Question 6: If the DOI considers the CLO to be a separate legal entity, please identify all authority that supports the DOI's position.

Answer: The DOI does not consider the CLO to be a separate legal entity.

Question 7: Does the DOI consider the employees at the CLO to be employees of the Department for any purpose? (i.e. workers' compensation, tax, benefits purposes, etc.)

Answer: "The private, at will, non-state employees hired by the CLO who provides the services of estate administration are not considered employees of the DOI for any purpose. They are not entitled to representation by the Attorney General's Office in the event of a law suit filed against a named CLO employee."

Question 8: Why have none of the employees at the CLO been enrolled in CalPERS?

Answer: "The work force hired by the CLO is comprised of private, at will, non-state employees. Payment of their salaries, as well as any other services provided in the administration of the estates, is paid from the private funds held in trust in the estate. The use of private employees in the administration of private assets held in trust by a public trustee is a long standing practice in California....The CLO has its own 401k retirement program available for the private employees it hires. Additionally, the salary ranges for the various professional positions within the CLO are much higher than the customary state pay ranges for professional staff...The DOI does not consider the CLO employees eligible to participate in CalPERS. No funding for such participation in CalPERS by the CLO employees has ever been provided by the DOI or the CLO."

"Persons specially employed by a public officer in his capacity as a trustee of a private trust are not public employees." (*Estate of McMillin* (1956) 46 Cal.2d 121; *Evans v. Superior Court* (1939) 4 Cal.2d 563, 574, 578-79.) "Assets of an insolvent insurance company to which the California Insurance Commissioner holds title do not become part of the public treasury, but are held in trust for the benefit of private parties." (*State v. Altus* (2005) 36 Cal.4th 1284.)

Question 9: What authority exists to support the contention that the employees at the CLO are not state employees?

Answer: "In 1994, all state civil servants were removed from the day to day operation of estate administration and were replaced by private, at will, professionals from the insurance, banking, accounting, claims, information technologies, and reinsurance industries. The Commissioner has unfettered discretion in how he or she fulfills the duties imposed under Article 14, of the Insurance Code." (Ins. Code, § 1037, subd. (g).)

"Payment of their salaries, as well as any other services provided in the administration of the estates, is paid from the private funds held in trust in the estate. If an estate has no assets the DOI is authorized to pay the costs of estate administration from the state funds used for the maintenance of the department. (Ins. Code, § 1035, subd. (a).) The CLO is best characterized as a "quasi-governmental" operation performing an important state function to protect the public."

Question 10: What authority exists to support the contention that the employees at the CLO are not civil service employees?

Answer: The California Supreme Court long ago recognized estate trust assets as not being “public funds” sufficient to trigger the application of civil service laws when those funds are used to pay for the services rendered to estates by non-state employees. (See *Evans, supra*; *McMillin, supra*; and *State, supra*.) The use of the services provided by state civil servants is permitted in the course of estate administration and mandated by the use of the Attorney General’s Office for estate legal representation. (Ins. Code, § 1036.)

Question 11: Please provide any documents which might help explain the answers to the questions raised above.

Answer: The DOI enclosed authority in support of its answers.

15. On March 18, 2009, Marion C. Montez, CalPERS Employer Services Division, responded to respondent’s appeal by denying his request to include CLO pay in his retirement benefits determination. The letter set forth the statutes relevant to compensation including Government Code sections 20630 (compensation), 20635 (overtime), and 20636 (compensable earnable, payrate, special compensation). CalPERS provided that no employer or employee contributions were paid to CalPERS for respondent’s CLO earnings and that CLO earnings did not constitute “compensation earnable” under the PERL. CalPERS outlined the following bases for denial of respondent’s appeal:

- a. *Overtime Not Compensable.* CalPERS determined that respondent’s CLO income was “overtime,” as it consisted of “additional services for the CLO...in excess of those duties and hours of work considered normal for employees in a full-time Chief Counsel position.” Also, it was not established that respondent worked two full-time positions, but rather, received a salary for the Chief Counsel position and the “difference between that amount and what was determined to be the full amount of the payments due SDIC/CEO/COO of the CLO.”
- b. *Pay not afforded other members in the Group or Class.* CalPERS determined that payments received from ADP for CLO work did not meet the definition of compensation earnable under the PERL. Compensation earnable for state members means the “average monthly compensation...upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay, and is composed of payrate and special compensation.” Since CLO payments to respondent were not made to any other individuals holding the position of Chief Counsel, it did “not constitute the average monthly compensation...for members in the Chief Counsel class.”
- c. *CLO Pay does not constitute Payrate.* CalPERS determined that the CLO payments did not constitute “payrate” which is “remuneration paid in cash out of funds paid by the employer to similarly situated members of the same group or class of employment.” Neither the DOI nor the State Controllers Office issued the payments in question, so the payments were not “paid in cash out of funds paid by the employer.”

d. *CLO Pay does not constitute Special Compensation.* CalPERS determined that the CLO payments did not constitute “special compensation” because special compensation “does not include compensation for additional services outside regular duties.” Since the Commissioner asked respondent to take on additional duties at the CLO, beyond those performed in the Chief Counsel position, the extra payments fall outside the PERL.

e. *CLO Pay does not constitute Compensation Earnable.* CalPERS determined that because the CLO payments did not meet the definition of either payrate or special compensation, they did not constitute compensation earnable. CalPERS stressed that compensation earnable is not based on individual effort. Rather, both components of compensation earnable are “measured by the amounts provided by the employer to similarly situated employees.”

A copy of the March 18, 2009 CalPERS determination letter was sent to Patricia Staggs, Deputy General Counsel, DOI. On April 14, 2009, respondent filed a “Second Notice of Appeal” and request for hearing.

CalPERS Retirement Program Specialist

16. Angel Gutierrez is a Retirement Program Specialist II at CalPERS. He has worked for CalPERS for thirteen years; nine of those years in his current division. He is responsible to ensure that compensation reported by employers is within the PERL. (Gov. Code, § 2000 et seq.) He has participated in courses and job training as well as worked closely with CalPERS management. Individual program specialists are supported by a system of peer and management review. At the time of respondent’s review, Mr. Gutierrez reported to Tomi Jimenez who reported to Marion Montez, Assistant Division Chief.

17. Mr. Gutierrez demonstrated a clear understanding of the law relative to compensation earnable. He explained that compensable earnable is composed of two items, pay rate and special compensation. Base pay is the “normal average monthly pay” while special compensation includes additional pay for services performed “during normal working hours” for special skills and job duties delineated through regulations and statutes. He explained that though California Code of Regulations, title 2, section 571, defines and lists items of special compensation, that regulation only applies to “contracting agencies and school employers.” Indeed, the first paragraph of that section clearly states as much:

The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement.

“‘Contracting agency’ means any public agency that has elected to have all or any part of its employees become members of this system and that has contracted with the board for that purpose....also...any county office of education, school district, or community college district that has elected to have all or part of its employees participate in a risk pool

and that has contracted with the board for that purpose.” (Gov. Code, § 20022.) Examples of contracting agencies include cities, municipalities, counties, water districts, airport districts, mosquito abatement districts, etc. State employees are members of CalPERS by law and do not have a contract. As such, they are not eligible for items of special compensation as provided for under this regulation. Also, the CLO is not a contracting agency of CalPERS and employees of the CLO are not members of CalPERS.

18. Colin McRae and William Palmer held officer positions at the CLO immediately preceding respondent. Both individuals executed employment agreements with the CLO which set their base pay at \$195,000. Mr. Gutierrez conducted a review of CalPERS membership records and confirmed that Colin McRae was not a member of CalPERS. William Palmer was a CalPERS member but on March 31, 1998, the same date he signed his CLO employment agreement, he permanently separated from CalPERS membership.

Circular Letter Addressing California Code of Regulations

19. A CalPERS Circular Letter dated August 19, 2011, was sent to all CalPERS employers to announce the adoption of a regulatory amendment (to Cal. Code Regs., tit. 2, § 571), and a new regulation (Cal. Code Regs., tit. 2, § 570.5), for the stated purpose of “clarifying existing law and making specific the requirements for publicly available pay schedule as that phrase is used in the definition of payrate.”⁷

Respondent erroneously insists that California Code of Regulations, title 2, section 571, applies to this case. As with statutory interpretation, the “usual and ordinary” meaning of the words control. (*Oden v. Board of Admin. of the PERS* (1994) 23 Cal.App.4th 194, 201.) “Any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner....A corollary to the rule...however, is that such construction must be consistent with the clear language and purpose of the statute.” (*Hudson v. Board of Admin. of the PERS* (1997) 59 Cal.App.4th 1310, 1324-1325.) There is nothing ambiguous, uncertain, or contradictory about the language of California Code of Regulations, title 2, section 571. It applies to “members employed by contracting agencies and school employers.” (see Factual Finding 17.) Since respondent is a “state member,” regulation section 571 is inapplicable to him.

⁷ On April 13, 2011, the Board adopted California Code of Regulations, title 2, section 570.5, and amended California Code of Regulations, title 2, section 571, subdivision (b), which defines “special compensation.” Only section 571, subdivision (b)(1) was amended to include the necessary terms of a “written labor policy or agreement” as defined in Government Code section 20049. Though section 570.5 applies to all employers, Section 571 applies only to schools and public agencies (not state employers). Because respondent is a state employee and this case does not involve a contracting public agency or school, section 571 is not applicable to these proceedings.

20. California Code of Regulations, title 2, section 570.5, which became effective in August 2011, is applicable to all employers reporting to CalPERS.⁸ As stated by the

⁸ (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;
- (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 with the requirements of subdivision (a) of a

Board in the August 19, 2011 Circular Letter, this regulation was adopted for the purpose of “clarifying existing law” and to “make specific” the requirements for “publicly available pay schedule” as that phrase is used in the definition of “payrate,” and “written labor policy or agreements” as used in the definition of “special compensation.” (Gov. Code, § 20636, subd. (g).) “While interpretation of a statute or regulation is ultimately a question of law, [the courts] must also defer to an administrative agency’s interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision.” (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1567.)

If the amendment merely clarified existing law, no question of retroactivity is presented. “[A] statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment” “because the true meaning of the statute remains the same.” (italics in original, *McClung v. EDD* (2004) 34 Cal.4th 467, 471.) California Code of Regulations, title 2, section 570.5, seeks to clarify and provide detail to existing retirement law. As such, it is applicable to retirement compensation determinations from the effective date of August 10, 2011, forward. At age 68, respondent is eligible to retire, but has not submitted a retirement application. As such, this administrative decision applies all laws and regulation currently in effect. (see *Prentice v. Board of Admin, CalPERS* (2007) 157 Cal.App.4th 983, 990, fn. 4.)

21. In 2000, respondent received pay warrants from two different entities, the DOI and CLO. Once per month, as a DOI employee, he received his regular pay warrant from the State of California. Twice per month, as a CLO employee, he received pay warrants from the CLO. There is no dispute that his DOI salary is “Persable.” Respondent contends that his CLO annual salary of \$93,024 (monthly salary of \$7,752, bi-monthly pay warrant of \$3,876), is also “Persable.” For the reasons set forth in Legal Conclusions 10-16, CalPERS properly denied his request.

22. Respondent called several CLO executives and counsel to testify about the agency’s history, management structure, personnel, and functions. It is undisputed that the CLO serves an important fiduciary duty in administering the dissolution of bankrupt insurance companies. Willard Roberts, an estate trust officer who has been with the CLO since 1994 recalled that under respondent’s management, there were 75 estates under closure with an asset value of approximately \$2.4 billion. Respondent traveled weekly between the CLO headquarters in San Francisco and office in Calabasas to manage personnel and assignments. Bob Fernandez, an estate trust officer and vice president who has been with the CLO since 1995 and reported to respondent, testified that respondent consistently put in 12 to 18 hours days during his time at the CLO.

The role respondent played in managing large estates in receivership is to be commended. His dedication to the task is undeniable. However, the “classification of

former CalPERS employer.

compensation earnable is not based on individual efforts” but is defined by the PERL. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)

23. In consideration of the entire record and applicable law, respondent’s CLO income cannot be considered compensation earnable. The CLO base pay was not provided to similarly situated employees, not contained in a publicly available pay schedule, amounted to overtime pay, and did not constitute payrate or special compensation. As such, the CLO payments cannot be used to calculate respondent’s retirement benefit.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. CalPERS is a “prefunded, defined benefit” retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198). The formula for determining a member’s retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) “final compensation” (Gov. Code, §§ 20037, 21350, 21352, 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)

2. Government Code section 20630 defines “compensation” as 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 holidays, sick leave, industrial disability leave, vacation, compensatory time off, and leave of absence. Compensation shall be reported in accordance with section 20636 and shall not exceed compensation earnable, as defined in section 20636. (Gov. Code, § 20630, subs. (a) & (b).)

3. “Compensation earnable” for “state members” means “the average monthly compensation, as determined by the board, upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay, and is composed of the payrate and special compensation of the member.” (Gov. Code, § 20636, subd. (g)(1).)

4. “Pay rate” for “state members” means “the average monthly remuneration paid in cash out of funds paid by the employer to similarly situated members of the same group or class of employment, in payment for the member’s services or for time during which the member is excused from work because of holidays, sick leave, vacation, compensating time off, or leave of absence. (Gov. Code, § 20636, subd. (g)(2).)

5. “Special compensation” for “state members” is defined in Government Code section 20636, subdivision (g)(3). Payrate and “special compensation” for state members do not include payments for final settlement pay, overtime, compensation for additional services outside regular duties, or other payments as determined by the board. (Gov. Code, § 20636, subd. (g)(4)(G), (H), (I), & (L).)

6. A “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. (Gov. Code, § 20636, subd. (e)(1).)

7. Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances or similar documents shall be public records available for public scrutiny. (Gov. Code, § 20636, subd. (d).) 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 criteria set forth in California Code of Regulations, title 2, section 570.5. (Cal. Code Regs., tit. 2, § 570.5.)

Legal Cause

8. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement, absent a statutory provision to the contrary. (*Greator v. Board of Administration* (1979) 91 Cal.App.3d 54, 57.)

9. Respondent did not meet his burden to establish that compensation he received for his work at the CLO is properly included as compensation earnable for the purpose of calculating his retirement benefits. Respondent’s CLO pay is specifically excluded by the PERL. (Gov. Code, § 20636, subd. (g)(4)(H) & (I).)

Legal Analysis

10. Regarding his CLO employment, respondent is not considered a state or public “employee” for purposes of the PERL. Respondent worked for two entities, the DOI and the CLO. As a DOI employee, his earnings were and continue to be subject to the PERL. His CLO employment, however, did not qualify him as a CalPERS member “employee.” To be an employee member of CalPERS, you must be a:

[P]erson in the employ of the state, a county superintendent of schools, or the university whose compensation, or at least that portion of his or her compensation that is provided by the state, a county superintendent of schools, or the university, is paid out of funds directly controlled by the state, a county superintendent of schools, or the university, excluding all other political subdivisions, municipal, public and quasi-public corporations. ‘Funds directly controlled by the state’ includes funds deposited in and disbursed from the State Treasury in payment of compensation, regardless of their source.

—(Gov. Code, § 20028.) The record is clear that the CLO operates on assets recovered from insolvent insurance companies. The money is maintained in a private account, separate from state funds, and is strictly controlled for operating expenses of the CLO. No PERS

contributions were withheld from respondent's "add-on" salary because the earnings were not eligible for PERS benefits.

11. Respondent's CLO salary was not "determined by the board, upon the basis of the average time put in by members in the same group or class of employment, in payment for the member's services." (Gov. Code, § 20636, subd. (g)(1).) Respondent privately negotiated his "add on" income which was finalized eight months after he began his CLO duties. The terms of his CLO employment are contained in two documents: 1) a Loan Agreement between DOI and CLO signed April 1, 2000, and 2) a Hiring Approval form, signed April 11, 2000, wherein the CLO agreed to pay him \$93,024 (the difference between his DOI salary and \$195,000). Clearly, the negotiated terms of his CLO employment were unique to him and not applicable to any board recognized group or class within the DOI.

12. Even at the CLO respondent was not in a "group or class" of executives. "A written employment agreement with an individual employee is not a labor policy or agreement within the meaning of the regulation. (*Prentice v. Board of Admin. CalPERS* (2007) 157 Cal.App.4th 983, 995.) The law "implicitly restricts the referenced policies or agreements to either policies which cover a whole class of employees or collective bargaining agreements." (*Ibid.*) Respondent's Loan Agreement and Hiring Approval form, setting his CLO "add on" salary at \$93,024, was unique to him. His two predecessors executed separate agreements with the CLO for salaries of \$195,000. However, even their agreements contain differing terms, notably Mr. McRae's Agreement contained a salary merit increase, whereas, Mr. Palmer's did not.

13. Respondent's CLO income does not meet the definition of "payrate" as set forth in the PERL. (Gov. Code, § 20636, subd. (g)(2).) His CLO services were not performed as a member of a "group or class," hence, his CLO pay was not provided to "similarly situated members of the same group or class." As such, the "add on" pay cannot be considered compensation earnable.

14. Respondent's CLO income does not meet the definition of "special compensation" as set forth in the PERL. Special compensation for state employees is defined in the PERL to include the monetary value, as determined by the board, of such expenses as living quarters, board, lodging, fuel, laundry, holiday pay, bonuses, educational incentive pay, maintenance and noncash payments, out-of-class pay, marksmanship pay, hazard pay, motorcycle pay, paramedic pay, emergency medical technician pay, Peace Officer Standards and Training (POST) certificate pay, split shift differential, and uniforms. (Gov. Code, § 20636, subd. (g)(3).)

The legislature also gave discretion to the board to promulgate regulations respecting other payments or special compensation that may be included in compensation earnable. (Gov. Code, § 20636, subd. (g)(2)(F) and (g)(3)(D).) Nothing in California Code of Regulations, title 2, section 570.5, applicable to state members, qualifies respondent's CLO employment or pay to be considered compensation earnable.

15. Respondent's concurrent work for the CLO amounts, in effect, to overtime work. He maintained his title and attendant responsibilities to the DOI while taking on additional duties as CEO of the CLO. He was appropriately compensated for his efforts. However, his CLO pay constitutes "compensation for additional services outside regular duties." (Gov. Code, § 20636, subd. (g)(4)(I).) The Legislature has expressly excluded overtime pay from computation of a member's pay rate or special compensation. (Gov. Code, §§ 20635, 20636, subd. (g)(4)(H) & (I).) "In doing so the Legislature has specifically considered instances where an employee is asked to take on additional duties and found that such additional duties are to be treated as excluded overtime." (*Prentice, supra*, 157 Cal.App.4th at p. 992.)

Conclusion

16. CalPERS correctly determined that respondent's CLO pay cannot be included as compensation earnable for purposes of calculating his retirement benefits. His work for the CLO ran from July 28, 1999 to October 22, 2000, concurrent with his duties as Deputy Chief Counsel for the DOI. The CLO is not a contracting public agency and is funded privately, outside of the State Treasury. The CLO did not make any employer or employee contributions to CalPERS during the term of respondent's contract with the CLO. At all times through the present, respondent continues to be a state member of CalPERS as an employee of the DOI only.

ORDER

The appeal of respondent Richard G. Krenz and respondent Department of Insurance to include respondent Krenz's CLO pay as compensation earnable for purposes of calculating his final service retirement allowance is DENIED.

DATED: April 9, 2012



DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings

MEETING
STATE OF CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
BOARD OF ADMINISTRATION

ROBERT F. CARLSON AUDITORIUM
LINCOLN PLAZA NORTH
400 Q STREET
SACRAMENTO, CALIFORNIA

WEDNESDAY, JUNE 13, 2012

9:39 A.M.

JAMES F. PETERS, CSR, RPR
CERTIFIED SHORTHAND REPORTER
LICENSE NUMBER 10063

1 PRESIDENT FECKNER: Oh, please record Mr. Boyken
2 as abstaining.

3 We are on 5c3.

4 Mr. Jelincic.

5 BOARD MEMBER JELINCIC: On 5c3, I would like to
6 suggest that we follow the advice of our counsel and
7 remand it back for taking of additional evidence.

8 PRESIDENT FECKNER: Is there a -- is that a
9 motion?

10 BOARD MEMBER JELINCIC: That's a motion.

11 PRESIDENT FECKNER: Is there a second?

12 BOARD MEMBER MATHUR: Second.

13 PRESIDENT FECKNER: It's been moved by Mr.
14 Jelincic, seconded by Ms. Mathur.

15 Any requests to speak?

16 Ms. Mathur.

17 BOARD MEMBER MATHUR: I think we should be a
18 little bit more clear about the additional evidence. And
19 so the additional evidence that I think we should be
20 seeking is how competent medical opinion establishes that
21 the member's actually and substantially incapable of
22 performing her usual and customary job duties.

23 PRESIDENT FECKNER: Okay. Mr. Shah, anything
24 you'd like to add?

25 MR. SHAH: No, sir, not at this time.

1 PRESIDENT FECKNER: Okay. On the motion before
2 you, any discussion on the motion?

3 Seeing none.

4 All in favor say aye.

5 (Ayes.)

6 PRESIDENT FECKNER: Opposed, no.

7 Motion carries.

8 We're on 5c6.

9 Mr. Jelincic.

10 BOARD MEMBER JELINCIC: I would again like to
11 move that we remand it for the taking of additional
12 evidence.

13 PRESIDENT FECKNER: Is there a second?

14 BOARD MEMBER MATHUR: Second.

15 PRESIDENT FECKNER: It's been moved and seconded,
16 seconded by Ms. Mathur, that we remand it to the
17 Administrative Law Judge for taking additional evidence.

18 Ms. Mathur.

19 BOARD MEMBER MATHUR: Again, I think we need to
20 clarify what we're seeking. And so the two issues are:

21 1) Whether the member's beneficiary designation
22 amended the pre-registration partnership agreement
23 executed by member and his surviving spouse. And if so,
24 whether the amended pre-registration partnership agreement
25 survived the subsequent marriage between Dr. Wilson and

1 Mr. Konou. And

2 2) Whether CalPERS properly rejected the
3 surviving spouse's disclaimers of interest executed in May
4 and July 2009 so as to permit distribution to the
5 surviving spouse as required by Section 21-493.

6 PRESIDENT FECKNER: All right. Any further
7 discussion on the motion?

8 Motion before you.

9 All in favor say aye.

10 (Ayes.)

11 PRESIDENT FECKNER: Opposed, no.

12 Motion carries.

13 Well, that ends Item 5, I believe, correct?

14 Item 6 is the consent item, is the information
15 item.

16 No requests to move anything.

17 So we move on to Item 7, Committee Reports and
18 Actions.

19 7a is Investment Committee.

20 For that I call on the Vice Chair, Mr. Diehr.

21 VICE PRESIDENT DIEHR: Thank you, Mr. President.

22 The Investment Committee met on June 11, 2012.

23 The Committee approved the following:

24 The transmittal of the CalPERS Placement Agent

25 Activity Report to the Legislature as required by AB 1743.



Office of Audit Services
P.O. Box 942701
Sacramento, CA 94229-2701
Telecommunications Device for the Deaf - (916) 795-3240
(916) 795-0900, FAX (916) 795-7836

November 12, 2010

Employer Code: 0069
Job Number: P10-005

City of Bell
Pedro Carrillo, Interim Chief Administrative Officer
6330 Pine Avenue
Bell, CA 90201

Dear Mr. Carrillo:

Enclosed is CalPERS' final report on the results of the public agency payroll reporting and membership enrollment review completed for the City of Bell (City). The City submitted a written response to the draft report on November 5, 2010,¹ which objected only to the first finding that information deemed necessary to determine the correctness of retirement benefits, reportable compensation, and enrollment in the retirement and health systems was requested but not provided. The City requested that the finding be revised to clarify that the City was responsive to CalPERS' requests. The letter also requested removal of the language suggesting that if the City failed to provide requested information, OAS would recommend that CalPERS consider termination of the City's contract pursuant to Government Code section 20572.² In reliance on the assurances given by the City in its response to the draft report that information OAS sought did not exist, revisions to the final report were made.³ The City's written response is included as appendix E to this report.

¹ It should be noted that the CalPERS auditors were on site at the City from July 27, 2010 to July 30, 2010, not from July 27 2010, to August 6, 2010, as stated on page 2 of 5 of your letter.

² Your letter asserts, among other things, that to the extent that Office of Audit Services sought, but did not receive documents, it is not the case that those documents exist but were not provided to CalPERS. Rather, you represent that "after diligent and exhaustive searching, it has become apparent that much of the documentation *simply does not exist* at the City."

³ The City's response to the draft report also included a document titled Declaration of Robert A. Orozco. CalPERS cannot verify the accuracy of certain of the statements made in the Declaration. Furthermore, it is not clear to CalPERS whether the documents did not exist, were not found, or were found but "could not be produced" due to a claim of privilege or for some other reason, based on Declarant's statement that "All responsive documents to this demand were produced. However after a diligent search and reasonable inquiry, the City could not produce any documents approving the contracts of [named individuals]."

Pedro Carrillo
November 12, 2010
Page 2

As to each other finding in the report, City raised no objection and indicated it is committed to working with CalPERS to correct issues on a going-forward basis. We have referred this matter to the appropriate divisions at CalPERS. The appropriate divisions at CalPERS will contact the City for follow-up. Thank you for the timely response to the draft report. We appreciate the time and assistance of you and your staff during this review.

Sincerely,

Original Signed by Margaret Junker

Margaret Junker, CPA, CIA, CIDA
Chief, Office of Audit Services

Enclosure

cc: Finance Committee Members, CalPERS
Peter Mixon, General Counsel, CalPERS
Lori McGartland, Chief, Employer Services Division, CalPERS
Holly Fong, Chief, Employer and Member Health Services, CalPERS
City Council Members, City of Bell

CITY OF BELL

PUBLIC AGENCY REVIEW



CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

OFFICE OF AUDIT SERVICES

**EMPLOYER CODE: 0069
JOB NUMBER: P10-005**

NOVEMBER 2010

CITY OF BELL

TABLE OF CONTENTS

<u>SUBJECT</u>	<u>PAGE</u>
Results in Brief.....	1
City Background.....	1
Scope.....	2
Civil Complaint.....	2
Two Criminal Felony Complaints.....	3
State Controller’s Office Audit.....	3
Office of Audit Services Review Results	5
Finding 1: Failure to Furnish Necessary Information to CalPERS.....	5
Finding 2: Payrates Failed to Qualify as Compensation Earnable	7
Finding 3: Special Compensation Reporting	12
Finding 4: Membership and Enrollment	14
Finding 5: Health Membership and Enrollment Documentation	17
Conclusion	19
CalPERS Background.....	Appendix A
Objectives	Appendix B
Criteria	Appendix C
CAO/Assistant to the CAO/Assistant CAO Payrates.....	Appendix D
City’s Response.....	Appendix E

CITY OF BELL

RESULTS IN BRIEF

The Office of Audit Services (OAS) reviewed the City of Bell's (City) enrolled individuals, member compensation, required health and retirement documentation and other documentation for individuals included in test samples. A detail of the findings is noted in the Results section beginning on page five of this report. Specifically, the following findings were noted during the review:

- Information deemed necessary to determine the correctness of retirement benefits, reportable compensation, and enrollment in the retirement and health systems was requested but was not provided (Government Code Sections 20221, 20222.5 and 22797).
- Payrates reported to CalPERS failed to qualify as compensation earnable (Government Code Sections 20049, 20630, 20635, 20636 and 20899).
- Non-reportable special compensation items were incorrectly reported as compensation earnable (Government Code Section 20636 and California Code of Regulations Section 571).
- The City failed to report earnings and submit retirement contributions on behalf of temporary/part-time employees who qualified to become members with CalPERS (Government Code Section 20630).
- The City failed to complete and submit membership forms to CalPERS to properly establish membership for elected officials (Government Code Section 20322).
- The City erroneously continued the membership of a former City Council member for services performed in an unsubstantiated position (Government Code Sections 20028, 20125).
- Eligibility verifications for dependents enrolled in CalPERS Health Benefits Program were not provided and required health enrollment forms were not maintained on file (Government Code Sections 22775 and 22797 and California Code of Regulations Section 599.500).

The pertinent sections of the Government Code and California Code of Regulations for each finding are described in greater detail under Appendix C.

CITY BACKGROUND

The City was incorporated on November 7, 1927, as a general law city of the State of California. It is located in Los Angeles County, California. In 2006, upon filing the approved City Charter with the California Secretary of State, the City became a Charter City. The City operates under the Council-Administrator form of government. To the extent that the documentation was located, Memoranda of Understanding (MOU), employment agreements and Position and Salary

CITY OF BELL

Schedules generally outline City employees' salaries and benefits and state the terms of employment agreed upon between the City and its employees.

The City contracted with CalPERS effective July 1, 1945, to provide retirement benefits for local miscellaneous and local safety employees. Effective August 1, 1990, the City contracted with CalPERS to provide health benefits to all eligible employees. The City amended its contract for retirement benefits to identify the length of the final compensation period as twelve months for all coverage groups. The City amended its retirement contract for local miscellaneous employees, effective April 16, 2007, to enhance retirement benefits by increasing the benefit formula from 2 percent at 55 years of age to 2.7 percent at 55 years of age.

SCOPE

As part of the Board approved plan for fiscal year 2010/11, the OAS reviewed the City's payroll reporting and member enrollment processes as these processes relate to the City's retirement and health contracts with CalPERS. The review period was limited to the examination of sampled records and processes from January 1, 1993 through June 30, 2010. The on-site fieldwork for this review was conducted over seven days on July 27, 2010 through July 30, 2010 and August 18, 2010 through August 20, 2010. The review objectives and a summary of the procedures performed, sample sizes, sample periods and findings are listed under Appendix B.

CIVIL COMPLAINT

On September 15, 2010, the California Attorney General filed a complaint with the Superior Court of California, County of Los Angeles, against City officials and others, including the Chief Administrative Officer (CAO), Assistant Chief Administrative Officer (Assistant CAO or Assistant to the CAO), Chief of Police, and certain current and prior named members of the City Council alleging waste of public funds, negligence, fraud, conflict of interest, breach of fiduciary duty and violation of public trust (sometimes referred to herein as the "Complaint" or the "Civil Action"). The Complaint alleges, among other facts, that each defendant received excessive and wasteful compensation and that the excessive and wasteful compensation could wrongfully increase retirement benefits. The Complaint seeks a judgment to, among other things (i) require the CAO, Assistant CAO and Chief of Police to make restitution to CalPERS, for any amount of pension benefits received that was in excess of what was reasonable and appropriate, *in an amount to be proven at trial*; (ii) require the CAO, Assistant CAO and Chief of Police to make restitution to the City, for compensation they

CITY OF BELL

approved and/or accepted and which was in excess of what was reasonable and appropriate, *in an amount to be proven at trial*; (iii) declare that all employment contracts and addenda of the CAO, Assistant CAO and Chief of Police executed in and after 2005 are null and void *ab initio*; (iv) declare that compensation paid to each defendant by the City in excess of what was reasonable, *in an amount to be proven at trial*, is not to be considered for determination of CalPERS pensions; and (v) enjoin the City from reporting to CalPERS any salaries of defendants in excess of what is reasonable and appropriate, *in an amount to be proven at trial*.

The Complaint seeks a judgment that the employment contracts of the CAO, Assistant CAO and the Chief of Police executed in and after 2005 are void from the date of their execution and seeks to have the Court determine the level of salaries that are reasonable and appropriate for all defendants, including named City Council members and as yet unnamed individuals. In light of the Complaint, no adjustment of payroll is recommended at this time for amounts that may have been erroneously reported as compensation earnable because the proper amount of compensation earnable may be decided by a ruling in the Civil Action. If any affected City Officer or employee should apply for retirement before conclusion of the Civil Action, the calculation of retirement benefits will take into account only compensation paid that was proper and authorized, pursuant to properly approved and publicly available valid contracts entered into prior to 2005, or pursuant to publicly available pay schedules that can be substantiated as meeting the definition of compensation earnable. Thereafter, if a final judgment in the Civil Action proves an amount of compensation different than that considered by CalPERS, the retirement allowance may be adjusted to reflect any proven increase or decrease in compensation earnable, provided it otherwise meets the requirements of compensation earnable.

TWO CRIMINAL FELONY COMPLAINTS

On September 20, 2010, the District Attorney for the County of Los Angeles filed two criminal felony complaints against certain City employees and City Council members. The complaints allege, among other facts, misappropriation of public funds, conflict of interest, and the falsification of public records by an official custodian.

STATE CONTROLLER'S OFFICE AUDIT OF CITY OF BELL'S ADMINISTRATIVE AND INTERNAL ACCOUNTING CONTROLS SYSTEM

On September 22, 2010, the State Controller released the first of three audits focusing on the City's finances. The audit covered the period from July 1, 2008

CITY OF BELL

through June 30, 2010, and found, among other facts, a lack of oversight by the City Council, that the City's internal control system was virtually non-existent and that the former CAO had, for all intents and purposes, complete control and discretion over how City funds were to be used. The audit also found that the City Council approved exorbitant salary and benefits for the former CAO without any accountability for performance and the former CAO continued this process by allowing enormous salaries for other administrative staff.

CITY OF BELL

OFFICE OF AUDIT SERVICES REVIEW RESULTS

Finding 1: The City did not provide requested information deemed necessary to determine the correctness of retirement benefits, reportable compensation, and enrollment in the retirement and health systems.

Recommendations:

The City must provide the specific information deemed necessary by CalPERS in order to determine the correctness of retirement and health benefits, reportable compensation, and enrollment in the retirement and health systems per Government Code Sections 20221, 20222.5 and 22797. While a failure to provide requested information could result in the termination of the City's contract with CalPERS pursuant to Government Code Section 20572, in the City's written response dated November 5, 2010, the City represented that much of the requested documentation does not exist at the City.

The City should work with CalPERS Employer Services Division and Health Benefits Branch to provide supporting documentation as can be located and produced in order to determine the correctness of retirement and health benefits, reportable compensation, and enrollment in the retirement and health systems.

Condition:

Prior to the on-site field visit in July 2010, OAS requested pertinent information to determine whether compensation earnable and enrollment in the retirement and health systems was properly reported to CalPERS. In addition, during and subsequent to our on-site field visit, OAS repeatedly made requests for information. Requests for information included, but were not limited to, the following documents:

- Publicly available pay schedules for the period 1993 - 2010
- Employment contracts and the City Council minutes indicating that the employment contracts were approved and authorized
- Memoranda of Understanding
- Rules and regulations
- The City's Municipal Code
- Job duty statements
- All City Council minutes from 1993 to present
- All documents used to specify compensation earnable

CITY OF BELL

- Payroll journals
- Personnel files
- Payroll records
- Information pertaining to the creation, duties and service of the unsubstantiated Assistant to the Food Bank Coordinator position
- Information to support health benefit dependent eligibility

Complete and necessary documentation to support specified employee payrates reported to CalPERS was not provided. While the City provided thousands of pages of documents, many of the documents provided by the City did not pertain to OAS requests. Many documents when provided were either unrelated to the City, or were in a form that would require OAS to find the relevant and requested information.

Due to the lack of clear documentation as to what amount employees were to be paid, and in light of the pending Civil Action in which the Court has been asked to establish the reasonable and appropriate salaries of all defendants, OAS cannot state with certainty what amounts constitute compensation earnable. In the instances where there is a lack of documentation to support the salaries and benefits granted to employees as being compensation earnable, such salaries and benefits will not be considered in the calculation of CalPERS retirement benefits.

For discussion on the missing information pertaining to membership enrollment and health benefits, refer to Findings 4 and 5 below.

CITY OF BELL

Finding 2: Payrates reported to CalPERS failed to qualify as compensation earnable.

Recommendation:

Only compensation earnable, as defined under Government Code Section 20636 and corresponding regulations, can be reported to CalPERS and considered in calculating retirement benefits. The City should ensure that all employees' salaries are properly reviewed, authorized and approved by the City Council. The City should also ensure that the reported payrate is set forth in a publicly available pay schedule.

The City should work with the CalPERS Employer Services Division to determine the impact of incorrect reporting and determine what adjustments are needed.

Condition:

OAS reviewed payrates reported to CalPERS for a sample that included, but was not limited to, the individuals who, during the time covered by this review (1993 to 2010), were holding the positions of CAO, Assistant to the CAO or Assistant CAO, Chief of Police, directors of various City departments, City Council members, management and staff. Though hampered by the unavailability of necessary information, based on the information provided by the City and obtained through other sources, OAS reconciled the payrates to the City's available salary information to determine whether payrates for the sampled employees were properly authorized and reported to CalPERS.

Employment Contracts Not Authorized by the City's Governing Board in an Open Public Meeting

The City did not provide responsive documentation showing that employment contracts which contained salary and benefit provisions had been reviewed and authorized by the City Council in a public meeting or were otherwise made publicly available. Consequently, OAS was unable to substantiate that the reported payrates for specified positions were properly authorized by the City Council in a public meeting and in accordance with requirements that the City maintain publicly available salary information.

A declaration dated November 5, 2010, provided by the City's interim City Attorney, (Declaration) stated that after a diligent search and reasonable inquiry,

CITY OF BELL

the City could not produce any documents approving the contracts of the CAO, Assistant to the CAO and Chief of Police.

Payrate Over-Reported: CAO

The compensation for the CAO was established by contracts dated September 1, 1993, September 1, 1994, and September 1, 1996. The City granted a series of increases by addenda to the 1996 contract which ranged from 8.33 percent up to 47.33 percent through July 2008. A summary of the CAO's contracted payrates from 1993 to 2010 is listed in Appendix D.

Because the City did not provide City Council minutes supported by evidence that the CAO employment contracts were properly authorized, OAS has been unable to verify that any of the contracts were properly and validly approved and signed by the City's governing board and publicly available. The Declaration stated that after a diligent search and reasonable inquiry, the City could not produce any documents approving the contracts of the CAO.

Based on the foregoing and the information that is available at the time of this review, OAS recommends that the payrate of the CAO be based upon the City's most recent publicly available pay schedule for the position, which is City Council Resolution No. 92-41 for fiscal year 1992/1993. Resolution No. 92-41 authorized a monthly salary of \$7,100 for the CAO position.

At this time, however, no adjustment to payroll is recommended for amounts that may have been erroneously reported as compensation earnable because the determination of the proper amount of compensation earnable is under consideration in the Civil Action. In addition, for 2005 and after, the Civil Action seeks a judgment declaring that all employment contracts and addenda executed for this position are null and void. Therefore, it is recommended that calculation of retirement benefits exclude compensation reported during this time period.

The City should work with CalPERS Employer Services Division and provide pertinent documentation as can be located and produced supporting the determination of proper payrate amounts for the period from September 1, 1993 through year-end of 2004.

Payrate Over-Reported: Assistant to the CAO

Payrates for the Assistant to the CAO cannot be verified as properly approved by the City Council. The Declaration stated that after a diligent search and reasonable inquiry, the City could not produce any documents approving the

CITY OF BELL

contracts of the Assistant to the CAO. The Assistant to the CAO position at the City was first filled July 1, 2003, in accordance with the terms of an employment contract. While the pay schedule in effect in 2003 included the position title of Assistant to the CAO, no payrate was disclosed; rather the salary was shown as "contract."

A summary of the Assistant to the CAO/Assistant CAO's contracted payrates from 2003 to 2010 is listed in Appendix D.

From the initial contract in 2003 until June 30, 2008, when the Assistant to the CAO was promoted to Assistant CAO, employment contracts provided that the duties of the Assistant to the CAO were "as set forth in the Bell Municipal Code and other applicable laws and regulations, and to perform such other proper duties as assigned by the [CAO]." While OAS requested copies of the pertinent provisions of the Bell Municipal Code describing the duties of the Assistant to the CAO, the City did not provide that information.

At this time no adjustment to payroll is recommended for amounts that may have been erroneously reported as compensation earnable because the determination of the proper amount of compensation earnable is under consideration in the Civil Action. In addition, for 2005 and after, the Civil Action seeks a judgment declaring that all employment contracts and addenda executed for this position are null and void. Therefore, it is recommended that calculation of retirement benefits exclude compensation reported during this time period.

However, the City should work with CalPERS Employer Services Division and provide pertinent documentation as can be located and produced supporting the determination of proper payrate amounts for the period from July 1, 2003 through year-end of 2004.

Payrate Over-Reported: City Council Members

In light of the pending Civil Action, in which the Court has been asked to establish the reasonable and appropriate salaries of all defendants, and which challenges the validity of City Council pay increases, OAS cannot state with certainty what amounts constitute compensation earnable for City Council members.

However, based on the review of available records, OAS concluded that the City over-reported the compensation earnable of City Council members by erroneously including additional compensation paid for serving on other municipal boards, commissions, or other local authorities with the full-time

CITY OF BELL

compensation received for services rendered as City Council members. In addition, based on factual allegations in the Complaint, it appears that increases in City Council member compensation exceeded statutory limits on city council member salaries for general law cities.

Elected City Council members are "elective officers" as defined by the Government Code. City Council members who have elected CalPERS membership and who are compensated are deemed to be serving on a full-time rather than a part-time basis and receive one year of service credit for each year of tenure in office.

OAS reviewed payroll records, Personnel Action Reports and resolutions and noted that compensation reported to CalPERS reflected payments that City Council members received as full-time City Council members, and additional compensation for serving in positions on up to six different boards. If a City Council member concurrently renders service in two or more positions, one or more of which is full-time, service in any concurrent part-time position is deemed overtime and is not reportable as compensation per Government Code Section 20635. Consequently, service on any additional municipal board, commission, department, committee, or other local authority by a City Council member should be considered overtime and should not be reported to CalPERS.

In 2001, City Council members' salaries for service on the City Council, excluding amounts received for additional service with other boards, commissions, or authorities, were increased from \$434 to \$673 per month. This appears to be the highest supportable payrate for City Council members, subject to the Court's final determination.

The City should work with CalPERS Employer Services Division and provide documentation as can be located and produced supporting the determination of a proper compensation earnable amount.

Payrate Over-Reported: Chief of Police

On May 29, 2009, the Chief of Police entered into an employment contract with the City to perform services as the Chief of Police, effective July 27, 2009. This contract compensated the employee \$38,083.50 per month, which the City reported to CalPERS. The contract was signed only by the CAO and the Chief of Police. Although OAS requested documentation, the City did not provide documentation to support that the employment contract was properly reviewed and authorized by the City's governing board in an open public meeting and available for public scrutiny. The Declaration stated that after a diligent search

CITY OF BELL

and reasonable inquiry, the City could not produce any documents approving the contracts of the Chief of Police. The City also did not provide a current salary schedule which included the salary range for Chief of Police. The most recent available documentation that CalPERS has been provided in which the City set forth the salary for the Chief of Police position is contained in Resolution No. 95-43 for fiscal year 1995/1996 which provided a monthly salary range for Chief of Police of \$5,842 to \$7,101.

At this time, however, no adjustment to payroll is recommended for amounts that may have been erroneously reported as compensation earnable for the period of employment because the determination of the proper amount of compensation earnable is under consideration in the Civil Action.

The City should work with CalPERS Employer Services Division and provide pertinent documentation as can be located and produced supporting the determination of proper payrate amounts for the period of employment for the Chief of Police.

CITY OF BELL

Finding 3: The City incorrectly reported non-reportable special compensation items to CalPERS including employer payments for employee participation in a deferred compensation plan and extra duty pay.

Recommendation

The City should only report items of special compensation as defined in California Code of Regulations Section 571.

The City should work with CalPERS Employer Services Division to assess the impact of this incorrect reporting and determine what adjustments are required.

Condition:

Non-Reportable Compensation Reported as Special Compensation

Employer Payments for Employee Participation in a Deferred Compensation Plan

The City incorrectly reported to CalPERS employer payments to a deferred compensation plan as special compensation. Specifically, payroll records obtained from the City indicated the City made payments into 401(a) accounts for the CAO and the Assistant CAO in fiscal years 2006/2007 through 2009/2010. The City erroneously reported these payments to CalPERS. The annual deferred compensation amounts paid ranged from \$44,000 in December 2006 to \$48,000 in January 2010. Employer payment to a deferred compensation plan is not a reportable item of compensation for CalPERS retirement purposes.

Extra Duty Pay

The City erroneously reported additional compensation up to \$832.65 per month as special compensation for extra duties performed as the City Clerk, City Treasurer, and Community Liaison. Specifically, the City paid and reported an additional 15 percent of base pay to two employees for duties rendered as City Clerk and City Treasurer in the sampled second pay period of June 2010 and first pay period of September 2008. Since these two employees held and were compensated for other full-time positions with the City, the additional compensation received for services rendered as City Clerk and City Treasurer is considered overtime and not reportable to CalPERS. Compensation received for additional service rendered as City Clerk and City Treasurer does not meet the definition of special compensation.

CITY OF BELL

Also, the City paid and erroneously reported an additional 10 percent of payrate to a Police Officer for service rendered as a Community Liaison. Additional compensation received for service rendered as a Community Liaison is not reportable as special compensation.

Temporary Assignment Pay – Informational Item

Records showed that effective June 21, 2010, the CAO authorized additional compensation as temporary assignment pay ranging from 10 percent to 15 percent of payrate for nine City employees including four Sergeants, two Acting Sergeants, two Police Captains and one Lieutenant. For example, the City's two Police Captains were to receive an additional \$1,627.50 per month for temporary assignments performed for neighboring cities. CalPERS has not yet received payroll information from the City covering services provided from June 21, 2010, forward. However, additional compensation for assignments performed for other cities does not meet the definition of special compensation and is not reportable to CalPERS.

CITY OF BELL

Finding 4: The City failed to comply with membership enrollment requirements:

- ***(a) The City failed to report earnings and submit retirement contributions on behalf of temporary/part-time employees who qualified to become CalPERS members.***
- ***(b) The City failed to complete and submit membership forms to CalPERS to properly establish membership for elected officials.***
- ***(c) The City erroneously continued the membership of a former City Council member for services performed in an unsubstantiated position.***

Recommendations:

(a) The City should ensure that compensation earnable is reported and retirement contributions are submitted beginning with the first service period in which an employee becomes a CalPERS member.

(b) The City should ensure elected officials choosing to become CalPERS members file the appropriate election in writing with CalPERS.

(c) The City must provide the specific information deemed necessary to determine the correctness of the continued enrollment in CalPERS for an individual's unsubstantiated services as an Assistant to the Food Bank Coordinator. The City should discontinue reporting to CalPERS individuals who are no longer employed by the City.

The City should work with CalPERS Employer Services Division to assess the impact of and to correct these incorrect reporting issues.

Conditions:

(a) Compensation Not Reported and Retirement Contributions Not Submitted for Temporary/Part-time Employees

OAS sampled four individuals in fiscal year 2008/2009 that were hired by the City as temporary/part-time employees. The City properly enrolled the individuals in CalPERS membership upon meeting the CalPERS membership requirement but failed to report earnings and submit retirement contributions on the members'

CITY OF BELL

behalf from the members' effective enrollment dates through June 30, 2009. Three of the individuals met membership eligibility by working 1,000 hours in fiscal year 2008/2009 and were enrolled effective February 2, 2009, March 16, 2009, and March 30, 2009, respectively. The fourth individual was enrolled in the prior fiscal year, effective June 8, 2008. Earnings should have been reported and contributions should have been submitted to CalPERS beginning with the first service period in which the employees became members.

(b) Required Membership Forms Not Submitted to Properly Establish Membership

Elected City Council members are "elective officers" as defined by the Government Code and, as such, are considered optional members of CalPERS. As optional members, City Council members are excluded from CalPERS membership unless they file a written election to become a member. OAS found that two City Council members had not filed written elections with CalPERS to become optional members even though they were enrolled as CalPERS members and their earnings were being reported. The City should have filed CalPERS form AESD-59 to establish elected officials' optional membership with CalPERS.

(c) The City erroneously continued the membership of a former City Council member for services performed in an unsubstantiated position.

In 2009, a City Council member was hired to fill a position titled Assistant to the Food Bank Coordinator (Assistant Coordinator). The City Council member, who was elected in 2003, resigned as a City Council member on August 17, 2009, and accepted the position of Assistant Coordinator effective that same date. The individual initially was paid \$7,666.61 per month as the Assistant Coordinator, which was the same as the monthly salary he had received for serving as a City Council member. The City provided the individual a five percent cost of living increase on September 1, 2009, boosting the monthly salary to \$8,050.

OAS sought to substantiate the existence of the Assistant Coordinator position by requesting documentation from the City such as a duty statement describing the nature of the position or Food Bank documentation such as a mission statement, policies, plans, organization chart, or communications between the Assistant Coordinator and the Food Bank Manager evidencing the existence of the position and/or services rendered by the Assistant Coordinator. OAS obtained an employment agreement effective August 17, 2009, between the City and the individual "to perform all duties necessary to assist with the City's efforts to provide food donation services to the community of Bell and to perform such

CITY OF BELL

other proper duties as assigned by the ...CAO." OAS also obtained Personnel Action Reports listing salary information. We requested further information to substantiate the existence of the Assistant Coordinator position or that services were rendered. The Declaration stated that after a diligent search and reasonable inquiry, the City could not locate any documents responsive to this request. Additionally, the payrate for the Assistant Coordinator position was not listed in a publicly available pay schedule and thus would not be compensation earnable for retirement purposes.

OAS concluded that the documentation provided was insufficient to support that the Assistant Coordinator position was an authorized City position and that the individual performed actual services for the City as a common law employee subsequent to resigning from the City Council in August 2009.

Per Government Code Section 20125, CalPERS shall determine who are employees and is the sole judge of the conditions under which individuals may be admitted to CalPERS. Only common law employees of agencies contracting with CalPERS for retirement coverage who also have compensation earnable are eligible for CalPERS membership. Government Code Section 20630 defines compensation as payment for services performed during normal working hours.

CITY OF BELL

Finding 5: The City contracted with CalPERS to provide health benefits to all eligible employees effective August 1, 1990. The City is responsible for providing employees with enrollment information and has the authority to request documentation needed to determine the eligibility of family members.

The City did not provide eligibility verifications for dependents enrolled in CalPERS Health Benefits Program and did not maintain required health forms on file.

Recommendation:

The City must ensure that the proper member and dependent enrollment documentation is on file at the City within 60 days from the date of the final report.

The City should work with CalPERS Health Benefits Branch to obtain the missing documentation and to cancel enrollment of any person who is found to be ineligible to participate in the CalPERS Health Benefits Program.

Condition:

OAS reviewed a sample of nine employees to assess the health benefits eligibility and enrollment of members and their dependents. Sample testing revealed that the City had not properly enrolled individuals in CalPERS Health Benefits Program. OAS was unable to ascertain that enrollments for individuals were proper because the City failed to provide required documentation that was requested such as marriage certificates and various dependent child documents. In addition, the City did not maintain required Declaration of Health Coverage (HB-12A) and Health Benefit Plan Enrollment (HBD-12) forms on file for some sampled employees. Specifically, the following exceptions were noted:

- The City failed to provide a marriage certificate supporting the enrollment of one employee's spouse.
- The City failed to provide birth certificates verifying the eligibility of five dependent children enrolled under four sampled members' health benefits. A non-formal hospital certificate was provided instead for two of these dependent children.
- The City failed to provide and maintain on file a required Affidavit of Eligibility for an economically dependent child.

CITY OF BELL

- The City failed to provide and maintain on file formal adoption documents for an adopted dependent child.

- The City failed to maintain on file copies of HB-12A forms for nine sampled employees. Additionally, the City failed to maintain on file and/or properly authorize HBD-12 forms for five dependents enrolled under two sampled members' health benefits.

CITY OF BELL

CONCLUSION

OAS limited this review to the areas specified in the scope section of this report and in the objectives as outlined in Appendix B. OAS limited the test of transactions to employee samples selected from the City's payroll and health records. Sample testing procedures provide reasonable, but not absolute, assurance that these transactions complied with the California Government Code except as noted.

The findings and conclusions outlined in this report are based on information made available or otherwise obtained at the time this report was prepared.

Respectfully submitted,

Original Signed by Margaret Junker
Margaret Junker, CPA, CIA, CIDA
Chief, Office of Audit Services

Date: November 2010
Staff: Michael Dutil, CIA, Senior Manager
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Adeeb Alzanoon
Edward Fama
Karen Harlan

CITY OF BELL

APPENDIX A

BACKGROUND

CITY OF BELL

BACKGROUND

California Public Employees' Retirement System

The California Public Employees' Retirement System (CalPERS) provides a variety of programs serving members employed by more than 2,500 local public agencies as well as state agencies and state universities. The agencies contract with CalPERS for retirement benefits, with CalPERS providing actuarial services necessary for the agencies to fund their benefit structure. In addition, CalPERS provides services which facilitate the retirement process.

CalPERS Employer Services Division (ERSD) manages contract coverage for public agencies and receives, processes, and posts payroll information. CalPERS Benefit Services Division (BNSD) provides services for eligible members who apply for service or disability retirement. BNSD sets up retirees' accounts, processes applications, calculates retirement allowances, prepares monthly retirement benefit payment rolls, and makes adjustments to retirement benefits. The Office of Employer and Member Health Services (EMHS), as part of the Health Benefits Branch (HBB), provides eligibility and enrollment services to the members and employers that participate in the CalPERS Health Benefits Program, including state agencies, public agencies, and school districts.

Retirement allowances are computed using three factors: years of service, age at retirement, and final compensation. Final compensation is defined as the highest average annual compensation earnable by a member during the last one or three consecutive years of employment, unless the member elects a different period with a higher average. Local public agency members' final compensation period is three years unless the agency contracts with CalPERS for a one-year period.

The employers' knowledge of the laws relating to membership and payroll reporting facilitates the employer in providing CalPERS with appropriate employee information. Appropriately enrolling eligible employees and correctly reporting payroll information is necessary to accurately compute a member's retirement allowance.

CITY OF BELL

APPENDIX B

OBJECTIVES

CITY OF BELL

OBJECTIVES

The objectives of this review which covers the period January 1993 through June 30, 2010, were limited to the determination that the City complied with applicable sections of the California Government Code (Sections 20000 et seq.) and Title 2 of the California Code of Regulations and that prescribed reporting and enrollment procedures as they relate to the City's retirement and health benefits contracts with CalPERS were followed. OAS completed a prior review covering the period of time from April 1, 2003 to March 31, 2006. The current review considers additional information that has become available since completion of Job # P05-039, (City of Bell Public Agency Review dated June 2006). The scope of this review did not include assessment of the validity of the City's 2007 amendment of its contract with CalPERS.

SUMMARY

Procedures, Sample Sizes, Sample Periods, and Findings

To accomplish the review objectives, OAS performed the following procedures. Related sample sizes, sample periods and findings are listed.

- ✓ Reviewed:
 - Contracts and subsequent amendments the City had with CalPERS
 - Correspondence files maintained at CalPERS
 - City Council minutes
 - Memoranda of Understanding and those employment agreements provided between the City and its employees.
 - Salary, wage and benefit agreements including applicable resolutions
 - Personnel files including Personnel Action Reports
 - City generated payroll information - Summary Reports and PERS listings
 - Other documents used to specify the payrate, special compensation and benefits of represented and unrepresented employees
 - Health Benefits Program enrollment and supporting documentation files
 - City ordinances
 - Various other documents as necessary
- Finding: See Finding 1.
- ✓ Interviewed staff members to obtain an understanding of the City's personnel and payroll procedures. Reviewed the payroll transactions and compared the City's payroll register with the data reported to CalPERS to determine whether the City correctly reported employees' compensation.

CITY OF BELL

- Sample Size and Period: Reviewed payroll transactions for 22 employees. Reviewed the second service period of June 2010 and the first service period of September 2008.
- Finding: See Finding 2 and Finding 3.
- ✓ Reviewed the City's payroll information reported to CalPERS for the sampled employees to determine whether employees' payrates were reported pursuant to publicly available pay schedules.
 - Sample Size and Period: Reviewed the City's payroll information reported to CalPERS for 22 employees for various time periods from June 1993 through June 2010.
 - Finding: See Finding 2.
- ✓ Reviewed the City's process for reporting payroll to CalPERS to determine whether the payroll reporting elements were reported correctly.
 - Sample Size and Period: Reviewed accuracy in the reporting of various payroll reporting elements in the second service period of June 2010 and the first service period of September 2008.
 - Finding: None.
- ✓ Reviewed the City's enrollment practices pertaining to optional members (elected officials), temporary/part-time employees, retired annuitants, and independent contractors to determine whether the individuals met CalPERS membership requirements.
 - Sample Size and Period: Reviewed the City's enrollment practices for a sample consisting of current City Council members, retired annuitants (there were none), four temporary/part-time employees in fiscal year 2008/2009 and four independent contractors in calendar years 2008 and 2009.
 - Finding: See Finding 4.
- ✓ Reviewed records for employees and their dependents to determine whether the City properly enrolled eligible individuals into CalPERS Health Benefits Program.
 - Sample Size and Period: Reviewed records for nine employees and their dependents for health plan enrollments recorded at CalPERS as of June 2010.
 - Finding: See Finding 5.

CITY OF BELL

APPENDIX C

CRITERIA

CITY OF BELL

CRITERIA

Finding 1: Failure to Furnish Necessary Information to the Board

Government Code § 20221, states:

Each state agency, school employer, and the chief administrative officer of a contracting agency or any other person who its governing body may designate shall furnish all of the following:

- (a) Immediate notice to the board, in the manner prescribed by the system, of the change in status of any member resulting from transfer, promotion, leave of absence, resignation, reinstatement, dismissal, or death.
- (b) Any additional information concerning any member that the board may require in the administration of this system.
- (c) The services of its officer and departments that the board may request in connection with claims by members against this system.

Government Code § 20222.5, states:

- (a) The board may, during the course of an audit, require each state agency, school employer, including each school district represented by a school employer, and contracting agency, to provide information or make available for examination or copying at a specified time and place, or both, books, papers, any data, or records, including, but not limited to, personnel and payroll records, as deemed necessary by the board to determine the correctness of retirement benefits, reportable compensation, enrollment in, and reinstatement to this system.
- (b) The information obtained from an employer under this section shall remain confidential pursuant to Section 20230.

Government Code § 20572, states, in part:

- (a) If a contracting agency ... fails for three months after demand by the board therefore to file any information required in the administration of this system with respect to that agency's employees, or if the board determines that the agency is no longer in existence, the board may terminate that contract by resolution adopted by a majority vote of its members effective 60 days after notice of its adoption has been mailed by registered mail to the governing body of the contracting agency....

Government Code § 20085, states, in part:

- (a) It is unlawful for a person to do any of the following:
 - (1) Make, or cause to be made, any knowingly false material statement or material representation, to knowingly fail to disclose a material fact, or to otherwise provide false information with the intent to use it, or allow it to be

CITY OF BELL

used, to obtain, receive, continue, increase, deny, or reduce any benefit administered by this system....

(b) For purposes of this section, "statement" includes, but is not limited to, any oral or written application for benefits, report of family relationship..., or continued eligibility for a benefit or the amount of a benefit administered by this system.

(c) A person who violates any provision of this section is punishable by imprisonment in a county jail not to exceed one year, or by a fine of not more than five thousand dollars (\$5,000), or by both that imprisonment and fine.

(d) A person violating any provision of this section may be required by the court in a criminal action to make restitution to this system ... for the amount of the benefit unlawfully obtained.

Government § 22797, states:

The board or an authorized representative may perform audits of each employer and may, at a specified time and place, require the employer to provide information or make available for examination and copying books, papers, data, and records, including, but not limited to, personnel and payroll records, as deemed necessary by the board to determine compliance with the provisions of this part. The information obtained from an employer shall remain confidential.

Finding 2: Public Salary Information and Payrate Reporting

Government Code § 20221, states:

Each state agency, school employer, and the chief administrative officer of a contracting agency or any other person who its governing body may designate shall furnish all of the following:

(a) Immediate notice to the board, in the manner prescribed by the system, of the change in status of any member resulting from transfer, promotion, leave of absence, resignation, reinstatement, dismissal, or death.

(b) Any additional information concerning any member that the board may require in the administration of this system.

(c) The services of its officer and departments that the board may request in connection with claims by members against this system.

Government Code § 20222.5, states:

(a) The board may, during the course of an audit, require each state agency, school employer, including each school district represented by a school employer, and contracting agency, to provide information or make available for examination or copying at a specified time and place, or both, books, papers, any data, or records, including, but not limited to, personnel and payroll records, as deemed necessary by the board to determine the

CITY OF BELL

correctness of retirement benefits, reportable compensation, enrollment in, and reinstatement to this system.

(b) The information obtained from an employer under this section shall remain confidential pursuant to Section 20230.

Government Code § 20085, states, in part:

(a) It is unlawful for a person to do any of the following:

(1) Make, or cause to be made, any knowingly false material statement or material representation, to knowingly fail to disclose a material fact, or to otherwise provide false information with the intent to use it, or allow it to be used, to obtain, receive, continue, increase, deny, or reduce any benefit administered by this system....

(b) For purposes of this section, 'statement' includes, but is not limited to, any oral or written application for benefits, report of family relationship..., or continued eligibility for a benefit or the amount of a benefit administered by this system.

(c) A person who violates any provision of this section is punishable by imprisonment in a county jail not to exceed one year, or by a fine of not more than five thousand dollars (\$5,000), or by both that imprisonment and fine.

(d) A person violating any provision of this section may be required by the court in a criminal action to make restitution to this system ... for the amount of the benefit unlawfully obtained....

Government Code § 20630, subdivision (b), states, in part:

Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.

Government Code § 20636, subdivision (a), defines compensation earnable by a member as, "the payrate and special compensation of the member...."

Government Code § 20636, subdivision (b)(1), defines payrate, in part, as follows:

"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....

Government Code § 20636, subdivision (d) states:

Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.

CITY OF BELL

Government Code § 20635, states:

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 full-time basis, and for which monetary compensation is paid. 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. This provision shall apply only to service rendered on or after July 1, 1994.

Government Code § 20899, states:

In computing the amount of service to be credited to a member who is entitled to credit under this part for service as an elective officer, a year of service shall be credited for each year of tenure in the office. A person serving in the office shall be deemed to be serving on a full-time rather than a part-time basis for all purposes of this part.

Government Code § 20049, states:

"Labor policy or agreement" means any written policy, agreement, memorandum of understanding, legislative action of the elected or appointed body governing the employer, or any other document used by the employer to specify the payrate, special compensation, and benefits of represented and unrepresented employees.

CalPERS Procedures Manual, Page 70, states, "Pay rate and special compensation must be in written schedules, ordinances, or similar documents that are available for public scrutiny."

Finding 3: Special Compensation Reporting

Government Code § 20635, states:

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

CITY OF BELL

and in all categories of employment in excess of the hours of work considered normal for employees on a full-time basis, and for which monetary compensation is paid. 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. This provision shall apply only to service rendered on or after July 1, 1994.

Government Code § 20636, subdivision (c)(1), states:

Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

Government Code § 20636, subdivision (c)(6), states:

The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section.

California Code of Regulations § 571 provides a list that exclusively identifies and defines special compensation items for members employed by a contracting agency and standards to which compensation must conform in order for items of special compensation to be used to calculate final compensation for an individual member.

Finding 4: Membership and Enrollment

Government Code § 20028 (a) defines an employee as, "Any person in the employ of any contracting agency."

Government Code § 20125, states:

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.

Government Code § 20322, states, in part:

(a) An elective officer is excluded from membership in this system unless the officer files with the board an election in writing to become a member. Upon electing to become a member, the officer may further elect at any time prior to retirement to receive service credit for his or her prior, excluded service by making the contributions as specified in Sections 21050 and 21051.

(b) As used in this part, "elective officer" includes ... persons elected to a city council or a county board of supervisors.

CITY OF BELL

CalPERS Procedure Manual page 46 through 49 titled Election of Optional Membership, states, "A completed and signed ***Election of "Optional" Membership Form*** (PERS-AESD-59), is required to validate and establish membership for an individual who qualifies as an "optional" member as an elective/appointive officer under G.C. section 20322. The form must be submitted with the ***Member Action Request Form*** (PERS-AESD-1), or after performing an electronic enrollment using ACES to satisfy the legal requirements."

Finding 5: *Health Membership and Enrollment Documentation*

Government Code § 22775, defines family member as:

"Family member" means an employee's or annuitant's spouse or domestic partner and any unmarried child, including an adopted child, a stepchild, or recognized natural child. The board shall, by regulation, prescribe age limits and other conditions and limitations pertaining to unmarried children.

Government § 22797, states:

The board or an authorized representative may perform audits of each employer and may, at a specified time and place, require the employer to provide information or make available for examination and copying books, papers, data, and records, including, but not limited to, personnel and payroll records, as deemed necessary by the board to determine compliance with the provisions of this part. The information obtained from an employer shall remain confidential.

Government Code § 20085, states, in part:

(a) It is unlawful for a person to do any of the following:

(1) Make, or cause to be made, any knowingly false material statement or material representation, to knowingly fail to disclose a material fact, or to otherwise provide false information with the intent to use it, or allow it to be used, to obtain, receive, continue, increase, deny, or reduce any benefit administered by this system....

(b) For purposes of this section, "statement" includes, but is not limited to, any oral or written application for benefits, report of family relationship..., or continued eligibility for a benefit or the amount of a benefit administered by this system.

(c) A person who violates any provision of this section is punishable by imprisonment in a county jail not to exceed one year, or by a fine of not more than five thousand dollars (\$5,000), or by both that imprisonment and fine.

(d) A person violating any provision of this section may be required by the court in a criminal action to make restitution to this system ... for the amount of the benefit unlawfully obtained.

CITY OF BELL

California Code of Regulations § 599.500, contains definitions that apply to the Public Employees' Medical and Hospital Care Act, including the following pertinent provisions:

(f) "Enroll" means to file with the employing office a properly completed Health Benefits Plan Enrollment Form electing to be enrolled in a health benefits plan....

(k) "Eligible" means eligible under the law and this subchapter to be enrolled....

(n) A child attains the status of "family member" at birth ... "family member" includes any unmarried child who is economically dependent upon the employee or annuitant, when there exists a parent-child relationship with the employee or annuitant....

CalPERS Public Agency Health Benefits Procedures Manual, page 03-03, states, in part, "CalPERS, as well as the contracting agency, have the right to request any documentation needed to support dependent eligibility at the time of enrollment, or any time thereafter."

The Declaration of Health Coverage form (HB-12A) is to ensure compliance with the Health Insurance Portability and Accountability Act (HIPAA). Effective January 1, 1998, each employee must sign the HB-12A when they are first eligible to enroll or when they make any change to their health coverage. This includes open enrollment changes, changing health plans when moving, adding or deleting a dependent, or when canceling health benefits. The employer must provide the HB-12A at the time the employee requests enrollment or with the HBD-12 form. The employer must also provide the employee a copy of the signed form and keep the original in the employee's file.

CITY OF BELL

APPENDIX D

PAYRATES

Chief Administrative Officer

Assistant to the Chief Administrative Officer

Assistant Chief Administrative Officer

CITY OF BELL

Chief Administrative Officer (CAO) Payrate

Based on review of documents provided by the City and otherwise obtained, OAS has identified salary (without fringe benefits) for the CAO position.

A summary of the CAO's payrates from 1993 to 2010 is listed in Table 1 below.

Table 1: CAO Payrate

Month/Year	Monthly Payrate	Percent increase	New Monthly Payrate
Sep-93	\$6,000.00		\$6,500.00
Sep-94	\$6,500.00	26.92%	\$8,250.00
Sep-96	\$8,250.00	33.33%	\$11,000.00
Sep-97	\$11,000.00	9.09%	\$12,000.00
Jul-98	\$12,000.00	8.33%	\$13,000.00
Aug-00	\$13,000.00	15.38%	\$14,999.83
Aug-01	\$14,999.83	13.33%	\$16,999.67
Oct-02	\$16,999.67	22.55%	\$20,833.35
Sep-03	\$20,833.35	10.00%	\$22,916.68
Sep-04	\$22,916.68	9.09%	\$25,000.02
Jul-05	\$25,000.02	47.33%	\$36,833.33
Jul-06	\$36,833.33	11.76%	\$41,166.67
Jul-07	\$41,166.67	10.53%	\$45,500.00
Jul-08	\$45,500.00	9.52%	\$49,833.33
* Sept-08	\$49,833.33	5.00%	\$52,325.04
Jul-09	\$52,325.04	12.00%	\$58,604.04

*In September 2008, terms of the CAO's employment with the City were broken up into five separate employment contracts. The CAO had one primary employment contract with the City to perform full-time duties as a CAO for \$18,455.00 per month and four other separate contracts with various authorities within the City. These authorities included Bell Community Housing Authority, Bell Public Financing

CITY OF BELL

Authority, Bell Surplus Property Authority and Bell Solid Waste and Recycling Authority (the Authorities). Each Authority agreed to compensate the CAO an additional \$8,467.51 per month, for a total additional payment of \$33,870.04 per month. Contract terms also included a 12 percent annual increase in fiscal year 2009-2010. The language in each Authority's contract described the duties of the Executive Director position "as emanating above and beyond the duties of the CAO for the City of Bell." Please see Table 2 below.

Table 2: Multiple Contracts: CAO Payrate

Month/Year	Aggregate Monthly Payrate	Position	Monthly Payrate Per Contract
Sept-08	\$52,325.04	CAO City of Bell	\$18,455.00
		Authority Ex. Director	\$8,467.51
		Authority Ex. Director	\$8,467.51
		Authority Ex. Director	\$8,467.51
		Authority Ex. Director	\$8,467.51
Jul-09	\$58,604.04	CAO City of Bell	\$20,669.60
		Authority Ex. Director	\$9,483.61
		Authority Ex. Director	\$9,483.61
		Authority Ex. Director	\$9,483.61
		Authority Ex. Director	\$9,483.61

CITY OF BELL

Assistant to the CAO Payrate Assistant CAO Payrate

Based on review of documents provided by the City and otherwise obtained, OAS has identified salary (without fringe benefits) for the Assistant to the CAO and Assistant CAO positions.

The Assistant to the CAO was promoted to Assistant CAO June 30, 2008, and granted a 20 percent pay increase on September 1, 2008. A summary of the Assistant to the CAO/Assistant CAO's payrates from 2003 to 2010 is listed in Table 3 below.

Table 3: Assistant to the CAO Payrate

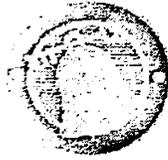
Month/Yr	Monthly Payrate	Percent Increase	New Monthly Payrate	Position
Jul-03			8,525.83	Assistant to CAO
Jul-04	8,525.83	27.06%	10,833.33	Assistant to CAO
Jul-05	10,833.33	42.31%	15,416.70	Assistant to CAO
Jul-06	15,416.70	10.81%	17,083.41	Assistant to CAO
Jul-06	17,083.41	2.54%	17,516.74	Assistant to CAO
Jul-07	17,516.74	11.89%	19,600.01	Assistant to CAO
Jul-08	19,600.01	8.50%	21,266.70	Assistant to CAO
Sep-08	21,266.70	20.00%	25,520.04	Assistant CAO
Jul-09	25,520.04	12.00%	28,582.44	Assistant CAO

CITY OF BELL

APPENDIX E

CITY'S RESPONSE

This Appendix includes the City's response letter dated November 5, 2010. It does not include additional attachments provided with the response.



CITY OF BELL

November 5, 2010

Margaret Junker, CPA, CIA, CIDA
Chief, Office of Audit Services
CalPERS
P.O. Box 942701
Sacramento, CA 94229-2701

Dear Ms. Junker:

Thank you for the opportunity to comment on the draft report of the Office of Audit Services' (OAS) review of the City of Bell. I have reviewed your letter of October 21, 2010 and the draft report attached to it, and, on behalf of the City of Bell, I thank you for taking the time to closely examine the City's compliance with the laws and regulations that govern the City's membership and participation in the CalPERS program for the benefit of the City's employees, past, present and future.

As you requested, this response will address the City's planned corrective actions to address the recommendations in the report; it will also, however (and with all due respect), point out some deficiencies or misunderstandings in the report. Given that the report is still in draft form, I hope that those misunderstandings can be clarified so that the final report fairly and accurately represents the City's true state of compliance with all applicable laws and regulations governing the City's participation in PERS and the City's current efforts to bring the City into full compliance with all of those laws and regulations.

Introduction: CalPERS Auditors On-Site at City of Bell

To start, I would like to thank you again for the significant deployment of resources CalPERS made with respect to the City of Bell starting around the summer of 2010. As you may recall, in July 2010, the *Los Angeles Times* broke the story about the excessive salaries being drawn by former Bell Chief Administrator [REDACTED] his Assistant CAO, the Police Chief and several members of the City Council. Soon thereafter, your office dispatched two auditors to the City. City staff made every effort to accommodate the auditors' requests for information and access. Specifically, representatives from OAS were present at Bell City Hall on the following occasions and requested information concerning the time periods as noted:

Margaret Junker, CPA, CIA, CIDA
CalPERS
November 5, 2010
Page 2 of 5

- OAS auditors were initially on-site at Bell City Hall from July 27, 2010 to August 6, 2010. During this portion of the audit, they requested to see various documents and records covering the time period of approximately 2006 through 2010.
- Your auditors returned for a second visit from August 18, 2010 through August 20, 2010). The auditors asked for documents and records from the year 2003 through 2010.
- Finally, though OAS auditors did not return physically to the City, but between September 8, 2010 and October 7, 2010, the City received various requests via email with an expanded scope of documents going all the way back to 1993.

The City's Responses to OAS Requests for Information

Here I note (with some distress) that, in several places, the draft report implies that the City purposefully withheld documents and information from CalPERS. Some specific examples include the following:

- The first bullet on page 1: "Information deemed necessary ... was requested but was not provided ..."
- At the end of the first paragraph on page 6: "Documents were not forthcoming for weeks, and finally, when provided, were either unrelated to the City, or were in a form that would require OAS to find the relevant and requested information."
- At the beginning of the last paragraph on page 7: "The only authorized salary documents provided by the City were City Council Resolutions rather than contracts."
- At the beginning of the second full paragraph on page 8: "Because the City has failed to provide City Council minutes supported by evidence that the [former] CAO employment contracts were ..."
- At the end of the second full paragraph on page 9: "However, despite repeated requests for a copy of a Bell Municipal Code provision describing the duties of the Assistant to the CAO, the City has failed to provide that information."
- Toward the end of the last paragraph on page 10: "The City also failed to provide a current salary schedule which included the salary range for the Chief of Police."

Margaret Junker, CPA, CIA, CIDA
CalPERS
November 5, 2010
Page 3 of 5

- The second-to-the-last sentence in the top paragraph on page 16: "However, as of the date of the issuance of this report, the City has failed to provide any other requested information to substantiate the existence of the Assistant [Food Bank] Coordinator position or that services were rendered."

Unfortunately, these statements paint an inaccurate picture of a non-responsive City. I was disheartened to read these characterizations, especially in light of the very cooperative and respectful relationship City staff had developed with the OAS investigators who spent so much time at City Hall.

Let me be clear: City of Bell staff spent many hours with OAS staff, providing both copies and access to original files as requested by the investigators. OAS investigators spent approximately a full ten days with unlimited access to all of the City's files, including official documents of the City Clerk (such as City Council agenda, minutes, resolutions and ordinances), payroll and personnel records and other financial and accounting information. When OAS personnel expanded the temporal scope of their investigation – several times – City staff provided access to any and all documents in City Hall that were responsive to the expanded requests.

Additionally, attached for your review and consideration is the Declaration of [REDACTED], one of the attorneys in the Office of Bell's Interim City Attorney, specifically addressing the individual document requests made by CalPERS and the City's responses.

To the extent that OAS sought but did not receive documents, I emphatically respond that it is not the case that those documents exist but were simply not provided to CalPERS. Rather, after diligent and exhaustive searching, it has become apparent that much of the documentation *simply does not exist* at the City. As the City's Interim Chief Administrative Officer, I am learning that the prior CAO fostered and maintained a culture of secrecy and cloister wholly incompatible with open government in California; contrary to the current administration and city staff, who have made every effort to assist, cooperate and provide any requested information to the extent of existence and knowledge.

I recognize that the position of the City's prior administration is untenable and contrary to the public interest. For that reason, I have taken many real and meaningful steps to open the City of Bell to the sunshine and disinfectant of public scrutiny and media glare. My staff and I are working diligently and earnestly to make the City as open and transparent as any city in this State, consistent with our rights and obligations under the Ralph M. Brown Act, the California Public Records Act and basic principals of public service and ethics. Indeed, Bell is probably one of the most open and exposed cities in California, if not the nation, and I welcome that openness. With it the City will begin to heal and recover from the abuses of the past.

Margaret Junker, CPA, CIA, CIDA
CalPERS
November 5, 2010
Page 4 of 5

To suggest that the City's inability to provide documents that do not exist is evidence of a continuation of that lamentable tradition, though, is unfair. Moreover, to recommend that the City's contract with CalPERS be "terminated" under Government Code section 20572 as a result of our inability to provide documents that in all likelihood do not exist would be a gross injustice and further punishment for sins of the past.

City's Requested Revisions

In light of the above, I respectfully request that the report be revised to reflect a more accurate description of the City's efforts to provide those documents that do exist and a tenor that recognizes the City's current efforts to correct the mistakes identified.

For example, Finding 1 at the top of page 5 could be re-worded as follows:

"The City does not possess and thus could not provide some of the requested information deemed necessary to determine the correctness of retirement benefits, reportable compensation, and enrollment in the retirement and health systems."

Additionally, the City respectfully requests that the recommendation to consider termination of the contract in Finding 1 be removed. The requirements of Government Code Section 20572 justifying termination are not met here. The City has not "failed for three months after demand by the board ... to file any information ..." Additionally, as noted above, the City is in the process of instituting best practices and operational controls that will address the issues OAS has identified in its report. The City cannot, however, turn back the clock or create documentation that simply does not exist. Again, to punish the organization and its employees for the mistakes and misdeeds of [REDACTED] would be entirely unfair and uncalled for.

City's General Response to Findings and Recommendations

The City recognizes that many of the findings in the report related to reporting issues and administrative matters such as proper completion of forms and reports are important to the smooth and accurate administration of the City's participation in the Program.

The City is committed to working closely with CalPERS to correct the identified issues on a going-forward basis, and welcomes CalPERS' offered assistance. Specifically, all of the Recommendations provide that the "City should work with CalPERS Employer Services Division" and/or "Health Benefits Branch" to address and correct the identified issues. Does this mean that representatives of either or both of those CalPERS divisions will be contacting

Margaret Junker, CPA, CIA, CIDA
CalPERS
November 5, 2010
Page 5 of 5

staff at the City to recommend specific actions by certain dates? Or, should the City take it upon itself to contact the Employer Services Division and the Health Benefits Branch to arrange the appropriate next steps? Either way, the City will do whatever is necessary to achieve compliance as soon as practicable; I need only to know whether the City should contact CalPERS or CalPERS will contact the City.

Conclusion

In conclusion, I reiterate my and the City's commitment to a new system of best practices and open government that should adequately address many of the issues identified in your report. I respectfully ask that the OAS reconsider its recommendation that the Board consider terminating its contract with the City, and that the report fairly characterize the City's inability to produce certain documents as a result of the past Chief Administrative Officer's approach to record keeping and municipal administration, not a willful failure to turn over documents that exist.

Thank you for your consideration.

Sincerely,



Pedro Carrillo
Interim Chief Administrative Officer

Attachment

c: Peter Mixon, General Counsel, CalPERS
Lori McGartland, Chief, ERSD, CalPERS
Holly Fong, Chief, CalPERS
Lourdes Garcia, Director of Administrative Services
Robert A. Orozco, Meyers Nave
James M. Casso, Interim City Attorney, Meyers

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