

# **Office of Audit Services**



# **CalPERS**

## **Public Agency Review**

### **City of Millbrae**

**CalPERS ID: 2606600411**  
**Job Number: P13-061**

**February 2016**



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February 29, 2016

CalPERS ID: 2606600411  
Job Number: P13-061

Kenneth Spray, Finance Director  
City of Millbrae  
621 Magnolia Avenue  
Millbrae, CA 94030

Dear Mr. Spray:

Enclosed is our final report on the results of the public agency review completed for the City of Millbrae (Agency). Your written response, included as an appendix to the report, indicates agreement with the issues noted in the report except for Finding 2. After consideration of your response, our recommendations remain as stated in the report.

In accordance with our resolution policy, we have referred the issues identified in the report to the appropriate divisions at CalPERS. Please work with these divisions to address the recommendations specified in our report. It was our pleasure to work with your Agency. We appreciate the time and assistance of you and your staff during this review.

Sincerely,

Original signed by Beliz Chappuie

BELIZ CHAPPUIE, Chief  
Office of Audit Services

Enclosure

cc: City Council Members, City of Millbrae  
Risk and Audit Committee Members, CalPERS  
Matthew G. Jacobs, General Counsel, CalPERS  
Anthony Suine, Chief, BNSD, CalPERS  
Renee Ostrander, Chief, EAMD, CalPERS  
Carene Carolan, Chief, MAMD, CalPERS

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# CITY OF MILLBRAE

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# CITY OF MILLBRAE

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## RESULTS IN BRIEF

The objective of our review was to determine whether the City of Millbrae (Agency) complied with applicable sections of the California Government Code (Government Code), California Public Employees' Pension Reform Act of 2013 (PEPRA), California Code of Regulations (CCR) and its contract with the California Public Employees' Retirement System (CalPERS).

The Office of Audit Services (OAS) noted the following findings during the review. Details are noted in the Results section beginning on page two of this report.

- The pay schedule did not meet all of the Government Code and CCR requirements.
- Special compensation was not reported as required by the Government Code and CCR.
- Compensation earnable was not reported for two employees.
- Payrate and earnings were incorrectly reported.
- A retroactive salary adjustment was incorrectly reported.
- Eligible employees were not enrolled into membership timely.
- An optional member was not correctly enrolled.
- A retired annuitant's employment was not in accordance with all Government Code requirements.
- Unused sick leave was incorrectly reported.

OAS recommends the Agency comply with applicable sections of the Government Code, PEPRA, CCR and its contract with CalPERS. We also recommend the Agency work with the appropriate CalPERS divisions to resolve issues identified in this report.

## SCOPE

The Agency contracted with CalPERS effective July 1, 1950 to provide retirement benefits for local miscellaneous and fire safety employees. By way of the Agency's contract with CalPERS, the Agency agreed to be bound by the terms of the contract and by the Public Employees' Retirement Law (PERL). The Agency also agreed to make its employees members of CalPERS subject to all provisions of the PERL.

As part of the CalPERS Board of Administration (Board) approved plan, OAS reviewed the Agency's payroll reporting and member enrollment processes related to the Agency's retirement contract with CalPERS. The review was limited to the examination of sampled employees, records, and pay periods from July 1, 2010 through June 30, 2013. The review objectives and methodology are listed in Appendix A.

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## OFFICE OF AUDIT SERVICES REVIEW RESULTS

**1:** The Agency's pay schedule did not meet all of the Government Code and CCR requirements.

***Condition:***

The Agency's pay schedule for Fiscal Years 2012-13 and 2013-14 did not meet all the requirements of the Government Code Section 20636 and CCR Section 570.5. Specifically, the City Council member position was not listed on the pay schedule.

Only compensation earnable as defined under Government Code Section 20636 and corresponding regulations can be reported to CalPERS and considered in calculating retirement benefits. For purposes of determining the amount of compensation earnable, a member's payrate is limited to the amount identified on a publicly available pay schedule. Per CCR Section 570.5, a pay schedule, among other things, must:

- Be duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;
- Identify the position title for every employee position;
- Show the payrate as a single amount or multiple amounts within a range for each identified position;
- Indicate the time base such as hourly, daily, bi-weekly, monthly, bi-monthly, or annually;
- Be 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;
- Indicate an effective date and date of any revisions;
- Be retained by the employer and available for public inspection for not less than five years; and
- Not reference another document in lieu of disclosing the payrate.

Pay amounts reported for positions that do not comply with the payrate definition and pay schedule requirements cannot be used to calculate retirement benefits because the amounts do not meet the definition of payrate under Government Code Section 20636(b)(1). When an employer does not meet the requirements for a publicly available pay schedule, CalPERS, in its sole discretion, may determine an amount that will be considered to be payrate as detailed in CCR Section 570.5.

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***Recommendation:***

The Agency should ensure its pay schedule meets all of the Government Code and CCR requirements.

The Agency should work with CalPERS Employer Account Management Division (EAMD) to identify and make adjustments, if necessary, to any impacted active and retired member accounts pursuant to Government Code Section 20160.

***Criteria:***

Government Codes: § 20160, § 20636

CCR: § 570.5

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**2:** The Agency did not report special compensation as required by the Government Code and CCR.

***Condition:***

- A. The Agency incorrectly reported Holiday Pay as a lump sum amount for employees required to work without regard to holidays. Specifically, the Agency reported Holiday Pay in the pay period ended June 8, 2013 as lump sum amounts instead of in the pay periods in which the holiday hours were earned. Government Code Section 20636(c)(3) requires the Agency to identify the pay period(s) in which special compensation was earned.
- B. The Agency incorrectly reported Uniform Allowance as lump sum amounts for fire safety employees. Specifically, the Agency provided an annual Uniform Allowance of \$641.50, which was paid and reported on a semi-annual basis. Government Code Section 20636(c)(3) requires the Agency to identify the pay period(s) in which special compensation was earned.
- C. The Agency incorrectly included Fair Labor Standard Act (FLSA) Premium Pay in base payrate and regular earnings for fire safety employees in the pay period ended June 8, 2013. FLSA Premium Pay is a statutory item that is required to be reported as special compensation pursuant to Government Code Section 20636 and CCR Section 571. Therefore, FLSA Premium Pay should be reported separately from base payrate and regular earnings.
- D. The Agency incorrectly included Paramedic Pay and/or Water Certification Premium in base payrate and regular earnings for employees in the pay period ended June 8, 2013. Both items of special compensation are defined in the Agency's written labor policies and are exclusively listed as special compensation in CCR Section 571. Therefore, Paramedic Pay and/or Water Certification Premium should be reported as special compensation separately from base payrate and regular earnings.
- E. The Agency incorrectly reported a cash-out for floating holidays as regular earnings for the Deputy Fire Chief in the pay period ended June 8, 2013. Floating holiday cash-out pay is not reportable compensation because it does not meet the definition of Holiday Pay pursuant to CCR Section 571

***Recommendation:***

The Agency should ensure that special compensation is reported in the pay periods earned.

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The Agency should report special compensation separately from base payrate and regular earnings.

The Agency should not report cash-outs for floating holidays in regular earnings.

The Agency should work with EAMD to identify and make adjustments, if necessary, to any impacted active and retired member accounts pursuant to Government Code Section 20160.

***Criteria:***

Government Codes: § 20160, § 20630, § 20636  
CCR: § 571



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**3:** The Agency did not report compensation earned by two employees.

***Condition:***

The Agency did not report earnings for two employees in the pay period ended June 8, 2013. Specifically, the Agency paid the Interim Finance Director \$5,946.40 and a maintenance worker \$1,501.92, but did not report the earnings to CalPERS.

***Recommendation:***

The Agency should report compensation when earned.

The Agency should work with EAMD to identify and make adjustments, if necessary, to any impacted active and retired member accounts pursuant to Government Code Section 20160.

***Criteria:***

Government Codes: § 20160, § 20630, § 20636

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**4:** The Agency incorrectly reported base payrate and regular earnings.

***Condition:***

- A. The Agency incorrectly reported seven hours of overtime in regular earnings in the pay period ended June 8, 2013. Specifically, the Agency compensated and reported \$349.58 as overtime for an unrepresented management employee. Compensation for overtime is not reportable pursuant to Government Code Section 20635.
- B. The Agency reported an incorrect payrate for a Council Member in the pay period ended June 22, 2013. The Council Member was paid a monthly payrate of \$327.75. However, the Agency reported the payrate as hourly instead of monthly.

Payrate and earnings are important factors in computing a member's retirement allowance because service credit and final compensation are directly related to these components.

***Recommendation:***

The Agency should ensure compensation for overtime hours are not reported to CalPERS as regular earnings.

The Agency should work with CASD to ensure payrates are reported correctly.

The Agency should work with EAMD to identify and make adjustments, if necessary, to any impacted active and retired member accounts pursuant to Government Code Section 20160.

***Criteria:***

Government Codes: § 20160, 20630, § 20635, § 20636

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**5:** The Agency incorrectly reported a retroactive salary adjustment.

***Condition:***

The Agency incorrectly reported a lump sum retroactive salary adjustment for the Deputy Fire Chief as part of regular earnings in the pay period ended June 8, 2013. Specifically, the Deputy Fire Chief received a salary increase on May 31, 2013 that was retroactive to January 1, 2013. However, the Agency incorrectly reported the retroactive salary adjustment of \$3,052.44 as regular earnings in the pay period the adjustment was paid instead of the periods earned.

Retroactive salary adjustments used to capture salary increases covering multiple periods should be reported to CalPERS as a separate transaction type rather than adding it to payrate and earnings in the pay period it was paid. For retroactive pay increases, the Agency should also provide the inclusive dates of the increase as well as the new payrate, total earnings, and contributions for the period of the increase.

***Recommendation:***

The Agency should ensure the retroactive salary adjustments are reported in the pay period in which the special compensation was earned.

The Agency should work with EAMD to identify and make adjustments, if necessary, to any impacted active and retired member accounts pursuant to Government Code Section 20160.

***Criteria:***

Government Codes: § 20120, § 20121, § 20160, § 20630, § 20636

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**6:** The Agency did not enroll part-time employees upon meeting CalPERS membership eligibility.

***Condition:***

The Agency did not enroll four part-time employees who worked more than 1,000 hours in Fiscal Year 2012-13. Specifically, one part-time employee exceeded 1,000 hours in March 2013 and the other three exceeded 1,000 hours in June 2013. However, none of the employees were enrolled into membership. Government Code Section 20305 requires employees who complete 1,000 hours of service within a fiscal year to be enrolled into membership effective not later than the first day of the first pay period of the month following the month in which 1,000 hours of service were completed.

Government Code Section 20283 provides that any employer that fails to enroll an employee into membership when he or she becomes eligible, or within 90 days thereof, when the employer knows or can reasonably be expected to have known of that eligibility shall be required to pay all arrears cost for member contributions and administrative costs of five hundred dollars (\$500) per member as reimbursement to this system's current year budget.

***Recommendation:***

The Agency should ensure that part-time employees are enrolled when membership requirements are met.

The Agency should work with EAMD to identify and make adjustments, if necessary, to any impacted active and retired member accounts pursuant to Government Code Section 20160.

***Criteria:***

Government Codes: § 20044, § 20160, § 20283, § 20305

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**7:** The Agency incorrectly enrolled a City Council member.

***Condition:***

The Agency incorrectly enrolled a City Council member. The Agency did not have the Council member complete the Optional Membership Form prior to enrollment in membership. Upon electing to become a member, an elective officer should be enrolled as an optional member. Government Code Section 20322 states that an elective officer is excluded from membership unless the officer files with the Board an election in writing to become a member. Government Code Section 20283 states, in part, that an employer must enroll an employee into membership when he or she becomes eligible. An elective officer includes persons elected to a City Council or County Board of Supervisors.

***Recommendation:***

The Agency should work with EAMD to ensure elective officers are advised of their CalPERS optional membership rights when first elected and file the appropriate election in writing with CalPERS for those who elect to be members.

The Agency should work with EAMD to identify and make adjustments, if necessary, to any impacted active and retired member accounts pursuant to Government Code Section 20160.

***Criteria:***

Government Codes: § 20160, § 20283, § 20322

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**8:** Retired annuitant employment did not comply with all Government Code requirements.

**Condition:**

The Agency unlawfully employed a retired annuitant. The retired annuitant was hired as an independent contractor on January 23, 2010 to perform duties of a Project Manager. During Fiscal Year 2012-13, the retired annuitant worked a total of 1,032.50 hours. Government Code Sections 21221(h) and 21224 limits the hours worked by a retired annuitant to 960 hours for all employers in any fiscal year. The Agency did not reinstate the retired annuitant who exceeded the 960-hour threshold in Fiscal Year 2012-13. Additionally, the Agency did not report the hours worked and earnings paid to the retired annuitant to allow for the monitoring of the 960-hour limit.

Government Code Section 20460 provides in relevant part that any public agency may participate in and make all or part of its employees members of this system by contract. Government Code Section 20022 defines a contracting agency as 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. Government Code 20028 defines an employee as any person in the employ of any contracting agency. Management and control of CalPERS is vested in the Board as provided in Government Code Section 20120. Each member and each person retired is subject to the PERL and the rules adopted by the Board pursuant to Government Code Section 20122. Government Code Section 20125 provides that 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.

For the purposes of the Government Code and for programs administered by the Board, the standard used for determining whether an individual is the employee of a contracting agency is the California common-law employment test as set forth in the California Supreme Court case titled *Tieberg v. Unemployment Ins. App. Bd.*, (1970) 2 Cal. 3d 943, which was cited with approval in *Metropolitan Water Dist. v. Superior Court (Cargill)*, (2004) 32 Cal. 4th 491, and which was adopted by the Board in two precedential decisions, *In the Matter of Lee Neidengard*, Precedential Decision No. 05-01, effective April 22, 2005, and *In the Matter of Galt Services Authority*, Precedential Decision No. 08-01, effective October 22, 2008.

Applying the California common-law employment test, the most important factor in determining whether an individual performs services for a contracting agency is the right of the principal to control the manner and means of job performance and the desired result, whether or not this right is exercised. Where there is independent

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evidence that the principal has the right to control the manner and means of performing the service in question, CalPERS will determine that an employer-employee relationship exists between the employee and the principal.

Other factors to be taken into consideration under the common-law employment test are as follows:

- Whether or not the one performing services is engaged in a distinct occupation or business.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the principal or the individual performing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.
- The length of time for which the services are to be performed.
- The method of payment, whether by the time or by the job.
- Whether or not the work is a part of the regular business of the principal.
- Whether or not the parties believe they are creating the relationship of employer-employee.

Using the common-law control test, OAS determined the retired annuitant was working for the Agency as an employee not an independent contractor. OAS determined that this individual was working for the Agency in an employee/employer relationship based in part on the following information obtained from the employment relationship questionnaire, employment agreement, and personnel action form.

- The individual began providing services for the Agency on January 23, 2010.
- The individual's work was directed, supervised, and reviewed by the Financial Services Manager.
- The individual was required to attend Agency meetings.
- The Financial Services Manager determined the hours of work and controlled how the individual performed the work.
- The individual was paid on an hourly basis in accordance with the Agency's pay schedule.
- The individual's compensation was subject to standard applicable tax withholdings and related requirements.
- The individual submitted a record of hours worked to the Finance Director every two weeks, consistent with the Agency payroll schedule.

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- The Agency required that the individual agree to remain in the exclusive employ of the Agency and not accept employment from on behalf of any person, firm, corporation, or entity during the term of employment with the Agency unless approved by the Finance Director in advance.
- The individual was covered by the Agency's workers' compensation carrier.
- The individual was required to perform the services at the Agency premises.
- The Agency had the right to control how the individuals work was performed.
- The Agency provided the individual with the office, and office equipment.
- The services performed were part of the Agency's normal operations.

OAS determined that the Project Manager is a common law common law employee of the Agency and not an independent contractor. The employee is retired from the CalPERS system and is therefore subject to the retired annuitant laws set forth in Government Code Sections 21221(h) and 21224. OAS reviewed all relevant factors and determined the weight of the documentation indicated that direction and control of the Project Manager was with the Agency. As such, the retired annuitant should not have exceeded 960 hours worked in any fiscal year, and the Agency should have reported the hours worked and earnings paid to allow for the monitoring of the 960-hour limit.

Government Code Section 21220 addresses the conditions and consequences of unlawful employment of a person who has been retired under this system. The Government Code states that any retired member employed in violation of this article shall reimburse this system for any retirement allowance received during the period or periods of employment that are in violation of law, pay to this system an amount of money equal to the employee contributions that would otherwise have been paid during the period or periods of unlawful employment plus interest thereon and contribute toward reimbursement of this system for administrative expenses incurred in responding to this situation, to the extent the member is determined by the executive officer to be at fault.

The Government Code also states that any public employer that employs a retired member in violation of this article shall pay to this system an amount of money equal to employer contributions that would otherwise have been paid for the period or periods of time that the member is employed in violation of this article, plus interest thereon and contribute toward reimbursement of this system for administrative expenses incurred in responding to this situation, to the extent the employer is determined by the executive officer of this system to be at fault.



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***Recommendation:***

The Agency should monitor hours worked by retired annuitants in order to limit the hours worked to 960 hours in a fiscal year, and immediately reinstate retired annuitants who exceed the 960-hour threshold.

The Agency should enroll the retired annuitant in my|CalPERS and report the hours they work.

OAS recommends the Agency work with CalPERS Benefit Services Division (BNSD) to determine the appropriate course of action.

***Criteria:***

Government Code: § 20160, § 21202, § 21220, § 21221, § 21224

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**9:** The Agency reported incorrect unused sick leave balance for a retiring member.

***Condition:***

The Agency did not certify the correct number of sick leave days for one retiring member. Specifically, the Agency certified that the retiring member had 107.31 days of unused sick leave at the time of retirement. However, the correct balance was 82.91 days. As a result, the Agency overstated the retiring member's unused sick leave by 24.34 days.

***Recommendation:***

The Agency should ensure the correct amount of unused sick leave for retiring members is reported to CalPERS.

The Agency should work with EAMD to identify and make adjustments, if necessary, to any impacted active and retired member accounts pursuant to Government Code Section 20160.

***Criteria:***

Government Codes: § 20160, § 20965

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## CONCLUSION

OAS limited this review to the areas specified in the scope section of this report and in the objectives outlined in Appendix A. The procedures performed provide reasonable, but not absolute, assurance that the Agency complied with the specific provisions of the PERL and CalPERS contract 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. This report does not constitute a final determination in regard to the findings noted within the report. The appropriate CalPERS divisions will notify the Agency of the final determinations on the report findings and provide appeal rights, if applicable, at that time. All appeals must be made to the appropriate CalPERS division by filing a written appeal with CalPERS, in Sacramento, within 30 days of the date of the mailing of the determination letter, in accordance with Government Code Section 20134 and Sections 555-555.4, Title 2, of CCR.

Respectfully submitted,

Original signed by Beliz Chappuie

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BELIZ CHAPPUIE, CPA, MBA  
Chief, Office of Audit Services

Staff: Cheryl Dietz, CPA, Assistant Division Chief  
Chris Wall, Senior Manager  
Antonio Madrigal, Lead Auditor  
Zachary Barlow, Auditor

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# APPENDIX A

## OBJECTIVES

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## OBJECTIVES

The objectives of this review were limited to determine whether the Agency complied with:

- Applicable sections of the Government Code (Sections 20000 et seq.), PEPRA, and Title 2 of the CCR.
- Reporting and enrollment procedures prescribed in the Agency's retirement contract with CalPERS.

Effective January 1, 2013, new enrollments are checked against the PEPRA definition of "new member," regardless of whether the enrollment is for a first time CalPERS member or an existing member. All members that do not fit within the definition of a new member are referred to as "classic members."

## METHODOLOGY

To accomplish the review objectives, OAS interviewed key staff members to obtain an understanding of the Agency's personnel and payroll procedures, reviewed documents, and performed the following procedures.

- ✓ Reviewed:
  - Provisions of the contract and contract amendments between the Agency and CalPERS
  - Correspondence files maintained at CalPERS
  - Agency Board minutes and Agency Board resolutions
  - Agency written labor policies and agreements
  - Agency salary, wage, and benefit agreements including applicable resolutions
  - Agency personnel records and employee time records
  - Agency payroll information including Contribution Detail Transaction History reports
  - Documents related to employee payrate, special compensation, and benefits
  - Various other relevant documents
- ✓ Reviewed Agency payroll records and compared the records to data reported to CalPERS to determine whether the Agency correctly reported compensation.
- ✓ Reviewed payrates reported to CalPERS and reconciled the payrates to Agency public salary records to determine whether base payrates reported were accurate, pursuant to publicly available pay schedules that identify the position title, payrate and time base for each position, and duly approved by the Agency's governing body in accordance with requirements of applicable public meetings laws.

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- ✓ Reviewed CalPERS reports to determine whether the payroll reporting elements were reported correctly.
- ✓ Reviewed the Agency's enrollment practices for temporary and part-time employees to determine whether individuals met CalPERS membership requirements.
- ✓ Reviewed the Agency's employment practices for retired annuitants to determine if retirees were lawfully employed and reinstated when unlawful employment occurs.
- ✓ Reviewed the Agency's independent contractors to determine whether the individuals were either eligible or correctly excluded from CalPERS membership.
- ✓ Reviewed the Agency's affiliated entity organizational structure to determine whether employees of the affiliated entity qualified for CalPERS membership and were enrolled as required.
- ✓ Reviewed the Agency's calculation and reporting of unused sick leave balances, if contracted to provide additional service credits for unused sick leave.

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# **APPENDIX B**

**AGENCY'S WRITTEN RESPONSE**

CITY OF MILLBRAE  
FINANCE DEPARTMENT MEMORNDUM

Date: February 18, 2016

To: CalPERS Office of Audit Services

From: Kenneth Spray, Finance Director

Original signed by Kenneth Spray

Re: Responses to CalPERS Public Agency Review

Responses to CalPERS' Public Agency Review, Job No. P13-061, are as follows:

- 1) The Agency's pay schedule did not meet all of the Government Code and CCR requirements.

The City has corrected this with respect to Council members.

- 2) The Agency did not report special compensation as required by the Government Code and CCR.

This item is not applicable as the City contracts for service for public safety, no longer on City payroll.

- 3) The Agency did not report compensation earned by two employees.

The City concurs with the finding.

- 4) The Agency incorrectly reported base payrate and regular earnings.

The City concurs with the finding.

- 5) The Agency incorrectly reported a retroactive salary adjustment.

The City concurs with the finding.

- 6) The Agency did not enroll part-time employees upon meeting CalPERS membership eligibility.

The City concurs with the finding.

- 7) The Agency incorrectly enrolled a City Council member.

The City concurs with the finding.

- 8) Retired annuitant employment did not comply with all Government Code requirements.

The City concurs with the finding.

- 9) The Agency reported incorrect unused sick leave balance for a retiring member.

The City concurs with the finding.