

Office of Audit Services



CalPERS

Public Agency Review

City of Albany

CalPERS ID: 7759437962
Job Number: P13-047

October 2015



California Public Employees' Retirement System
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October 30, 2015

CalPERS ID: 7759437962
Job Number: P13-047

Gene Boucher, HR Manager
City of Albany
1000 San Pablo Avenue
Albany, CA 94706

Dear Mr. Boucher:

Enclosed is our final report on the results of the public agency review completed for the City of Albany (Agency). Your written response included as an appendix to the report indicates agreement with the issues noted in the report except for Findings 2F, 6A, 6B, and 7. We appreciate the information regarding 2F, 6A, 6B, and 7 that you provided during our fieldwork and in your response. After consideration of this information, our recommendation remains as stated in the report; however, we added clarifying language to findings 6B, 2F and 7.

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: Council Members, City of Albany
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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RESULTS IN BRIEF

The objective of our review was to determine whether the City of Albany (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.
- Payroll information was incorrectly reported.
- Earned compensation was not reported.
- Contributions were incorrectly paid and reported.
- Eligible employee was not enrolled into membership as required.
- The Agency unlawfully employed a retired annuitant.
- Council members were not advised of optional membership rights.

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 May 1, 1966 to provide retirement benefits for local miscellaneous employees and safety (police and fire) employees. By way of the Agency's contract with CalPERS, the Agency agreed to be bound by the terms of the contract and 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 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 pay schedule did not meet all of the Government Code and CCR requirements.

Condition:

The Agency's pay schedule dated April 15, 2013 did not identify the position title and did not indicate the time base for every employee. In addition, the pay schedule referenced another document for the Fire Chief and City Attorney positions.

Only compensation earnable as defined under Government Code Section 20636 and CCR Section 570.5 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 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). There are no exceptions included in Government Code Section 20636(b)(1). When an employer fails to meet the requirement 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 regulation CCR Section 570.5.

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Recommendation:

The Agency should ensure its pay schedule meets all 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 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.

Condition:

- A. The Agency incorrectly reported Uniform Allowance for classic employees as a lump sum amount instead of as earned. The Agency provided an annual Uniform Allowance to safety employees and reported the allowance when paid instead of as earned. Pursuant to Government Code Section 20636(c)(3), the Agency shall identify the pay period(s) in which special compensation was earned.
- B. The Agency's written labor policy containing the provisions for uniforms did not include the conditions for payment of the uniforms including, but not limited to, eligibility for, and amount of special compensation as required by CCR Section 571.
- C. The Agency incorrectly reported various items of special compensation with base payrate and regular earnings for six employees during the pay period ended June 9, 2013. Special compensation should be reported separately from base payrate and regular earnings.
- D. The Agency over reported Education Incentive for a police sergeant. The Albany Peace Officer written labor agreement authorizes Education Incentives to police sergeants for college and advanced degrees. Specifically, police sergeants possessing an Associate's Degree were eligible for a two percent incentive and police sergeants possessing a Bachelor's Degree were eligible for a four percent incentive. The Agency incorrectly paid and reported a four percent Education Incentive for a police sergeant who only possessed an Associate's Degree in the pay period ended June 9, 2013. The Agency should have only reported a two percent incentive.
- E. The Agency incorrectly reported Temporary Upgrade Pay (Acting Pay) as special compensation for an employee. Specifically, the Agency paid the employee additional compensation for performing temporary additional duties. Although Temporary Upgrade Pay is exclusively defined within CCR Section 571, it was not included in a written labor policy or agreement as required. Therefore, the additional compensation is not reportable as compensation earnable.
- F. The Agency over reported Holiday Pay. Specifically, the Agency included special compensation in its calculation to determine Holiday Pay for a peace officer and four safety fire employees that resulted in an over payment and

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reporting of Holiday Pay. The Peace Officer Association's written labor agreement allows for one regular day of pay for each holiday that consist of compensation at the monthly rate of salary divided by 17.3334 and does not specify inclusion of special compensation. The Firefighter Association's written labor agreement states employees will be entitled to additional compensation of twelve hours straight-time pay on holidays and does not mention inclusion of special compensation in the calculation of Holiday Pay. Therefore, the Agency should not include items of special compensation in base payrate when calculating Holiday Pay.

Reportable special compensation is defined in CCR Section 571 (a) and must be reported if it conforms with all of the requirements listed in CCR Section 571 (b). Specifically, special compensation is required to be contained in a written labor policy or agreement indicating the eligibility and amount of special compensation. Also, special compensation must be available to all members in the group or class, part of normally required duties, performed during normal hours of employment, paid periodically as earned, and historically consistent with prior payments for the job classification.

Recommendation:

The Agency should report Uniform Allowance as special compensation in the period(s) earned.

The Agency should ensure that all items of special compensation are contained in a written labor policy or agreement that indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation.

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

The Agency should correctly report special compensation and only report items that qualify as special compensation.

The Agency should ensure the amount of Holiday Pay is correctly reported.

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

Criteria:

Government Codes: § 20120, § 20121, § 20160, § 20636
CCR: § 571

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3: The Agency incorrectly reported payroll information.

Condition:

- A. The Agency incorrectly reported payrate and earnings for an employee who worked in two part-time positions. Specifically, the employee worked part-time as a Maintenance Worker II with a monthly payrate of \$4,119.00 and part-time as a Lead Maintenance Worker with a monthly payrate of \$4,407.00. The Agency incorrectly reported only one payrate for the employee in the pay period ended June 9, 2014. The Agency should have reported payrate and earnings separately for each position. CalPERS will determine which position is contributory for reporting contributions. In addition, the Agency paid the employee at an incorrect rate of \$24.45 per hour for the 50 hours worked in the Lead Maintenance Worker position. The employee should have been paid at the correct rate of \$25.43 per hour. As a result, earnings were understated.
- B. The Agency incorrectly reported the monthly payrate and earnings for two employees working less than full time. The reported payrates did not agree with payrates for the Clerk Typist and Parking Enforcement Officer positions listed on the Agency's pay schedule for the pay period ended June 9, 2013. In addition, one employee was compensated at an incorrect hourly rate of pay.
- C. The Agency incorrectly reported the scheduled full-time hours per week for a safety fire employee. Specifically, the Agency incorrectly reported a 40-hour workweek for a full-time safety fire employee. The Agency's Firefighters Association written labor agreement required full-time fire safety employees to work a 56-hour workweek.

Payrate, earnings, and scheduled full-time hours are important factors in computing a member's retirement allowance because service credit and final compensation are directly related to these factors.

Recommendation:

The Agency should separately report payrate and earnings for any employee working in two positions and work with EAMD to determine which appointment is contributory for contribution reporting.

The Agency should ensure payrates and earnings are correctly reported.

The Agency should report the scheduled full-time hours per week that reflects the normal full-time work schedule for employees in the same work group.

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

Criteria:

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

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4: The Agency did not report compensation earned by an employee.

Condition:

The Agency did not report earnings for a Parking Enforcement Officer in the pay period ended February 25, 2012. Specifically, the Agency paid the less than full-time employee for 10 hours of work, 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 active and retired member accounts pursuant to Government Code Section 20160.

Criteria:

Government Codes: § 20160, § 20630, § 20636

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5: The Agency incorrectly paid and reported member contributions.

Condition:

- A. The Agency underpaid contributions to CalPERS for three police employees in the pay period ended June 9, 2013. Specifically, the Agency had a resolution to pay and report nine percent of normal member contributions as Employer Paid Member Contributions (EPMC) for the Albany Police Department employees. However, the Agency incorrectly excluded the value of EPMC from total earnings. As a result, EPMC was underpaid and reported.
- B. The Agency overpaid contributions for three fire safety employees in pay period ended June 9, 2013. Specifically, the Agency overpaid the Agency portion of the member contributions.
- C. The Agency overpaid contributions for a PEPRA fire safety employee in pay period ended June 9, 2013. The employee was required to pay the member contributions of \$309.95 and the Agency deducted the \$309.95 from the employee's earnings. However, the Agency remitted \$637.12 in contributions to CalPERS. As a result, the Agency overpaid member contributions.

Recommendation:

The Agency should pay and report the correct amounts for employer and member contributions.

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

Criteria:

Government Codes: § 7522.30, § 20160, § 20636, § 20691, § 20774, § 20775
CCR: § 569, § 571

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6: The Agency did not enroll eligible employees into membership.

Condition:

- A. The Agency did not enroll its part-time Fire Chief into membership. Specifically, the Agency agreed to a job sharing agreement with the City of Piedmont (City) in which the City's full-time Fire Chief would perform part-time Fire Chief services for both the City and the Agency with the Agency reimbursing the City for the Fire Chief's part-time services. 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.

OAS reviewed the Agency's Agreements for Shared Fire Personnel Services (Agreements) between the City and the Agency effective March 21, 2011 and April 16, 2012. The Agreements stated the Designated Fire Chief would perform approximately 20 hours of work each week for the City and 20 hours of work each week for the Agency. The Agreements described the duties for the Fire Chief specifying that the Agency's City Manager will supervise the designated Fire Chief while performing duties at the Agency. In addition, the 2011 and 2012 Agreements specified that the Agency shall pay the City an amount equal to one-half of the designated Fire Chief's total annual salary and benefit package in the amounts of \$133,375.72 and \$135,985.00, respectively. Furthermore, the Designated Fire Chief wore two badges, one representing the City and the other representing the Agency. The Agency also provided the Fire Chief with \$750.00 to be used to acquire Albany Fire Department Uniforms. OAS determined that the Agency did not enroll the Fire Chief when, in fact, he was performing the service of the Fire Chief on a part-time basis for the Agency and part-time for the City.

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 this part 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 another person or entity is the California common-law employment test as set forth in the California Supreme Court case entitled *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

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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 another as an employee 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 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 an Agency 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.

Although paid and reported by the City, OAS identified the common facts discussed below which support a finding that the employer/employee relationship existed between the Agency and the Fire Chief for the time worked at the Agency. As a result, the service credit and compensation earnable attributable to that service should have been reported to CalPERS under the Agency's contract with CalPERS. Based upon this finding, as well as the consideration of the secondary factors described above, OAS finds that the services identified for the Fire Chief were performed as a common-law employee of the Agency for the time periods specified, rather than a common-law employee of the City. These common facts include the following:

- The Fire Chief was responsible for providing general administration and oversight of the Agency's Fire Department including, but not limited to,

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budget administration, personnel management, and supervision as directed by the Agency's City Manager as provided by the contract between the Agency and City.

- The Agency's Fire Department staff reported to the Fire Chief.
- The Fire Chief met with the Agency's City Manager at least monthly for progress status and goal achievement discussion.
- The Agency's City Manager supervised the Fire Chief on Agency matters, provided direction to the Fire Chief regarding special projects or services to be performed for the Agency as specified in the contract between the Agency and City.
- The Agency provided the Fire Chief with a workspace, computer access, and other standard provisions required to perform the Fire Chief services desired by the Agency as specified in the contract between the Agency and City. All such equipment and supplies remained property of the Agency. In addition, the Agency provided up to \$750.00 in Uniform Allowance to be used to acquire Agency Fire Department uniforms.
- The Fire Chief attended meetings when necessary, such as Agency Council meetings when fire topics were presented. In addition, if he was unable to attend, the Fire Chief was responsible for sending a delegate such as the Battalion Chief or Captain.
- The Fire Chief wore a uniform with a City badge on one sleeve and the Agency badge on the other sleeve.
- The City designated its current Fire Chief to provide the shared Fire Chief services under the contract between the Agency and City. The contract stated that the City shall not assign any other person to provide those services without written consent of the Agency's City Manager. If the Fire Chief decided to terminate employment, both the Agency and City would be involved in the decision to hire a new Fire Chief.
- When the Fire Chief directs the Agency Fire Department activities, the Agency is responsible for the cost of defense and any liability arising out of the Fire Chief's services to the extent required by applicable law as stipulated in the contract between the Agency and City.
- The Agency reimbursed the City for the costs of the Fire Chief's services, one half of the costs of the total salary and benefit package.
- The Fire Chief worked as a part-time employee (approximately 20 hours per week) of the Agency and a part-time employee (approximately 20 hours per week) for the City.

For the reasons discussed above, OAS determined that the control over the individual is with the Agency for the time periods and services specified above. Combined with consideration of the secondary factors, OAS concludes that the Agency was the common-law employer for those time periods and services. Consequently, the portion of the individual's time serving the Agency should have been reported to CalPERS because the services were performed in the

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capacity of common-law employees of the Agency. Only the service performed by common-law employees of a contracting agency should be reported to CalPERS. When a contracting agency employs individuals in a part-time capacity, then only that part-time service should be reported to CalPERS. As a result, the Agency should have enrolled and reported the Fire Chief as a part-time employee.

- B. The Agency did not enroll other eligible employees into CalPERS membership under the Agency's contract with CalPERS. Instead, the employees were enrolled into membership and reported to CalPERS under an affiliated entity's contract.

OAS found that in 1998, the Agency's City Council determined it would be more efficient and cost effective to provide certain management, administrative, and special or general personnel services to the Agency through a joint powers authority instead of directly employing staff. The City Council then directed the City Administrator to form a joint powers authority with the Albany Community Reinvestment Authority. As a result, through a joint powers agreement the Albany Municipal Services Joint Powers Authority (JPA) was established as of July 20, 1998. The agreement identified that the Agency and the JPA would be governed by the same Board, and the principal office of the JPA would be the Agency's offices unless otherwise designated by the JPA.

In December 1998, the JPA began providing management, administrative, and special or general personnel staff to the Agency through an operating agreement. The operating agreement stated that the JPA had sufficient management and administrative personnel to provide such staff to the Agency. The operating agreement further stated that the JPA, in exchange for assistance, would provide the Agency with accounting/auditing services, payroll services, benefits services, human resource services, and office space. With regard to the staff that would be provided pursuant to the operating agreement, the classifications were identified as:

- City Administrator/Executive Director of the Reinvestment Agency
- Assistant City Administrator/Assistant to the City Administrator
- Child Care and Summer Camp Supervisor
- City Clerk
- Community Development and Environmental Resources Director
- Finance and Administrative Services Director
- Finance Analyst
- Maintenance and Engineering Manager
- Personnel Officer
- Planning Manager

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- Recreation and Community Services Director
- Secretary to the City Administrator
- Senior Services Director
- Any other classification as determined by the City of Albany and the Albany Municipal Services Joint Powers Authority

OAS selected four individuals from the classifications above to determine whether the individuals were common-law employees of the Agency or the JPA: the City Clerk, Public Works Director, Community Development Director, and Recreation and Community Services Director. OAS applied a common-law employment test and identified the following common facts which support a finding of control and indicate that the individuals were common-law employees of the Agency, rather than the JPA:

- The individuals provided services in Agency-established positions listed within departments on the Agency's organizational chart.
- The services provided are part of the Agency's normal operations.
- The services provided are integral, essential, and required for the Agency's continuation of business.
- The services provided are ongoing.
- The City Manager and/or the City Council had the right to direct how the individuals performed the work.
- All services are to be performed to the satisfaction of the Agency.
- The positions are listed on the current publicly available pay schedule of the Agency.
- The Agency provided the individuals with office space, desks, office equipment, stationary, and tools.
- The Agency agreed to maintain, repair and replace all equipment and supplies used by the individuals.
- The Agency agreed to clean the office space used by the individuals.
- The Agency provides all recruitment, testing, selection, and general personnel administration services for the JPA and its employees.
- The individuals are subject to the Agency's charter, Agency's city ordinance, department, administrative, and other adopted policies, procedures, rules and regulations.
- The individuals and the Agency's employees receive the same benefits.
- The Agency provides the amount or sum necessary to reimburse the JPA for the individuals' salaries and benefits.
- The Agency is responsible for payment of any and all local, state, and federal taxes, benefits, and retirement contributions on behalf of the individuals.

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In addition to the above characteristics shared by all four of the individuals, OAS noted the following specific responsibilities and employment details ascribed to the positions, further supporting a finding that the individuals were common-law employees of the Agency:

City Clerk

This individual was initially hired as a Community Development Associate on June 7, 2004 and appointed City Clerk on January 2, 2012. The job duty statement for the City Clerk position included the following duties to be performed for the Agency:

- Plan, organize, and coordinate the activities of the City Clerk's Office.
- Prepare and administer the Agency's departmental budget; assure effective and efficient use of budgeted funds, materials, and time.
- Perform a wide variety of complex and confidential duties for the City Council and City Administrator.
- Ability to co-sign the Agency's payroll and warrants and authorized to transfer Agency's funds.
- Perform indirect supervision over clerical staff.
- Direct administratively by the City Council. General direction is provided by the City Administrator.

Public Works Director

This individual was hired as a Public Works Director on October 29, 2012. The job duty statement for the Public Works Director position included the following duties to be performed for the Agency:

- Plan, direct, and manage the activities and operations of the Agency's Public Works Department.
- Oversee and participate in the development and administration of the Agency's department budget and the annual Capital Improvement Program; approve the forecast of funds needed for staffing, equipment, materials, and supplies; review monthly expenditure reports; invoices, and approve them for payment; implement budgetary adjustments as appropriate and necessary.
- Provide staff assistance to the City Manager; attend meetings and make presentations to the City Council, commissions, and other public agencies; prepare and present staff reports and other necessary correspondence.
- Select, train, supervise, motivate, and evaluate assigned personnel; set performance standards and evaluate performance; provide or coordinate

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staff training; worked with employees to correct deficiencies; implemented discipline and termination procedures.

- Received general policy direction from the City Council
- Received administrative policy direction from the City Manager.

Community Development Director

This individual was initially hired as a Planning Manager on June 1, 2006 and promoted to the position of Community Development Director on August 31, 2011. The job duty statement for the Community Development Director included the following duties to be performed for the Agency:

- Direct and coordinate the current and long-range planning, environmental services, engineering, building inspection and enforcement, and maintenance activities of the Agency.
- Direct and coordinate all building inspection and enforcement activities and services.
- Direct and coordinate the capital improvement needs of the Agency.
- Develop and present the operating and capital improvement budget for the Department.
- Respond to and resolve citizen inquires and complaints.
- Supervise, train, and evaluate staff; set performance standards, and evaluate performance; make personnel action recommendations.
- Receive general direction from the City Administrator, exercise direct and indirect supervision over professional, paraprofessional, technical, and support staff.

Recreation & Community Services Director

This individual was hired as a Recreation & Community Services Director on July 23, 2007. The job duty statement for the Recreation & Community Services Director included the following duties to be performed for the Agency:

- Plan, direct, supervise, and assume management responsibilities for the day-to-day operations and long-term goals and objectives of the Recreation & Community Services Department.
- Plan, direct, coordinate, and review the work plan for a staff of approximately 10 full-time and 25 part-time employees.
- Select, train, motivate, and evaluate Recreation & Community Services Department staff; provide or coordinate staff training; work with employees to correct deficiencies; implement discipline and termination procedures.

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- Manage and participate in the development and implementation of goals, objectives, policies, and priorities for assigned programs; develop and administer policies and procedures; review and develop annual fee schedule for public use of programs and services.
- Prepare and administer a \$1.5 million departmental operating budget and a \$4.5 million capital improvement budget; forecast funds needed for staffing, equipment, materials, and supplies; monitor and approve expenditures; implement adjustments.
- Exercise direct and indirect supervision over professional, paraprofessional, and support staff.

It is clear from the above job descriptions and duties that each individual was performing Agency functions, was engaged in essential Agency business and served at the direction of the Agency.

Furthermore, the Agency's Charter states that all officers and department heads, except as otherwise provided will be appointed by the City Council and hold office at the pleasure of the City Council. Additionally, the Charter states that the City Council will establish the qualifications for the City Clerk, one of the four sampled individuals, and the City Clerk shall be appointed by the Council. This is significant because the Charter's provisions show the City Clerk position is under the full control of the City Council. This is inconsistent with the Agency's assertion that the employees of the JPA are controlled by the JPA and are not common law employees of the Agency.

It is also important to note that OAS accessed the State Controller's Office (SCO) website in an effort to determine whether the Agency had reported the positions reviewed as Agency employees or JPA employees. The SCO website indicates that the Agency reported the four sampled individuals as Agency employees in 2013 and the JPA did not report any employees.

Based on our review of the above facts, OAS determined that the control over the sampled individuals is with the Agency, the individuals were officers and common-law employees of the Agency, and the individuals were incorrectly reported as employees of the JPA.

As previously discussed, 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 this part 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 person 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

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employee of another person or entity is the California common-law employment test as set forth in the California Supreme Court case entitled *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 2, 2008.

When applying the California common-law employment test, the most important factor in determining whether an individual performs services for another as employee 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 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.

Recommendation:

The Agency should ensure that common-law employees that meet membership eligibility requirements are enrolled and reported to CalPERS.

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

Criteria:

Government Codes: § 20022, § 20028, § 20030, § 20053, § 20056, § 20065, § 20120, § 20122, § 20125, § 20160, § 20283, § 20284, § 20460, § 20502, § 20630, § 20636

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7: The Agency unlawfully employed a retired annuitant.

Condition:

The Agency unlawfully employed a retired annuitant. In November 2010, the City Attorney was re-elected to serve a four-year term. In that same election, the voters passed an amendment to the Agency Charter that changed the City Attorney position from an elected office to an appointment effective December 6, 2011 or sooner if a vacancy occurs for that office. Prior to the City Attorney's retirement, on June 9, 2011, the Agency and the City Attorney entered into an employment agreement to appoint the City Attorney to the same position for the period of June 27, 2011 through December 31, 2011. More specifically, the agreement provided that the City Attorney would provide general legal services for the Agency in the same manner and scope as the City Attorney had provided during the previous terms of office.

The City Attorney retired on June 25, 2011. Pursuant to the employment agreement, the City Attorney returned to work June 27, 2011 performing the same duties as were performed in the previous term. As a result, the City Attorney received a retirement allowance and compensation for performing service in that elective office. Despite the fact that the City Attorney's employment with the Agency after June 25, 2011 was the result of an appointment, the City Attorney is nonetheless an "elective officer" under the PERL. Specifically, Government Code Section 20322(b) defines an elective officer as any appointive officer of a city or county occupying a fixed term of office. Therefore, the City Attorney remained an elective officer even after his June 25, 2011 retirement and thus OAS concludes the City Attorney did not vacate the position of City Attorney.

Pursuant to Government Code Section 21222, if a retired person serves, without reinstatement from retirement, in an elective office and part or all of his or her retirement allowance is based on service in that elective office, the portion of the allowance based on service in that elective office shall be suspended during incumbency in that elective office. The governing body of every employer other than the state shall cause immediate notice to be given to this system of the election of any retired person to an office of the employer. OAS contacted CalPERS Benefit Services Division (BNSD) and was informed that there was no record of notice given by the Agency.

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

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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.

Recommendation:

The Agency should work with BNSD to determine the appropriate course of action.

Criteria:

Government Codes: § 20160, § 20221, § 21202, § 21220, § 21221, § 21222

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8: The Agency did not offer optional membership to Council members.

Condition:

The Agency did not advise its Council members of their optional membership rights. Government Code Section 20322 states that an elective officer is excluded from membership in the CalPERS retirement system unless the officer files with the board an election in writing to become a member. An elective officer includes persons elected to a City Council. Government Code Section 20283 states, in part, that an employer must enroll an employee into membership when he or she becomes eligible.

Recommendation:

The Agency should work with EAMD to ensure elective officers are advised of CalPERS optional membership requirement.

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

Criteria:

Government Codes: § 20160, § 20283, § 20322

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Observation: The Agency's administration of the contract exclusion for hourly compensated employees is not clearly defined.

The contract between CalPERS and the Agency provides for the exclusion of employees compensated on an hourly basis. In response to a CalPERS request, the Agency provided its use and interpretation of the hourly exclusion and identified the employee classifications compensated on an hourly basis. The job titles the Agency responded with for application of the hourly exclusion differed from the titles provided to OAS at the time of its review. Therefore, it is not clear which employee titles the Agency intends to exclude. OAS recommends the Agency work with EAMD to clearly define the Agency's application of the contract exclusion for hourly compensated employees.

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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 California Code of Regulations.

Respectfully submitted,

Original signed by Beliz Chappuie

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

Staff: Cheryl Dietz, CPA, Assistant Division Chief
Diana Thomas, CIA, CIDA, Senior Manager
Alan Feblowitz, CFE, Senior Manager
Monica Bynum, 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 for additional service credits for unused sick leave.

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APPENDIX B

AGENCY RESPONSE

Note: The Agency provided an attachment to the response that was intentionally omitted from this appendix.

June 25, 2015

VIA FACSIMILE & U.S. MAIL

Mr. Young Hamilton
Acting Chief
California Public Employees' Retirement System
P.O. Box 942701
Sacramento, California 94229-2701

Re: *Response by City of Albany to CalPERS Draft Public Agency Review*
CalPERS ID: 7759437962
Client-Matter: AL098/005

Dear Mr. Hamilton:

The City of Albany ("City") received the draft public agency review ("Audit") prepared by the California Public Employees' Retirement System ("CalPERS"), Office of Audit Services ("OAS").¹ The City intends to work with CalPERS staff to make required corrections and amendments. However, the City does dispute some of the findings and recommendations. The City's rationale is set forth below.

FINDINGS, RECOMMENDATIONS, AND CITY RESPONSE

CalPERS made the following proposed findings and recommendations, which are set forth below and followed by the City's response to each finding and recommendation.

Finding 1: The pay schedule did not meet all of the Government Code and CCR requirements.

Recommendation:

The Agency should ensure its pay schedule meets all 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 active and retired member accounts pursuant to Government Code section 20160.

¹ The City was granted an extension until June 26, 2015 to respond to the draft public agency review.

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City's Response to Finding and Recommendation 1:

The City does not dispute CalPERS' recommendation and finding. On November 18, 2013, before the on-site field work for the audit began, the City updated its salary schedule and salary resolutions and they were adopted by the City Council. CalPERS should take the updated salary schedules into consideration in determining payrate for any affected employees. (Cal. Code Regs., tit. 2, § 570.5(b)(1).) The City will work with appropriate CalPERS staff to make any necessary corrections.

Finding 2: The Agency did not report special compensation as required.

Recommendation:

The Agency should report Uniform Allowance as special compensation in the period earned.

The Agency should ensure that all items of special compensation are contained in a written labor policy or agreement that indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation.

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

The Agency should correctly report special compensation and only report items that qualify as special compensation.

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

City's Response to Finding and Recommendation 2:

2.A. Uniform Allowance Reporting for Safety Employees

To the extent that CalPERS allows the City to pay the uniform allowance at the time stated in the MOUs and report the uniform allowance retroactively after it is paid, the City does not contest this finding and recommendation. However, if it is CalPERS' position that the City must renegotiate its MOUs to pay the uniform allowance per pay period, the City disputes this finding and recommendation.

The City contends that when the uniform allowance is paid to employees on an annual basis, it is earned when it is paid. 2 CCR section 571(a)(5) provides in relevant part:

Uniform Allowance - Compensation paid or the monetary value for the purchase, rental and/or maintenance of required clothing, including clothing made from specially designed protective fabrics, which is a ready substitute for personal

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attire the employee would otherwise have to acquire and maintain. This excludes items that are solely for personal health and safety such as protective vests, pistols, bullets, and safety shoes.

2 CCR 571(b) merely provides that it must be paid periodically as earned. If the governing MOU provides that the uniform allowance is paid to eligible employees on a particular date, that is the date it is earned and payable by the City. Such a practice is consistent with 2 CCR 571(b).

The City believes that its practice was in compliance with 2 CCR 571. However, one of the affected bargaining units has already modified their MOU so that the uniform allowance is paid every pay period throughout the year instead of paid in a lump sum. The City also understands that it can continue to pay the uniform allowances as provided in the MOU and report it retroactively after the payment is made.

Therefore, if it is CalPERS' position that the City can pay the uniform allowance on the dates stated in the MOUs, instead of every pay period, and report it retroactively, the City does not dispute this finding and recommendation. However, if CalPERS' position is that the City must report uniform allowance every pay period before the date for payment under the MOU, the City disputes this finding and recommendation.

2.B. Uniform Allowance Reporting for Maintenance Workers

The City does not dispute this finding. CalPERS auditors determined that positions receiving a uniform allowance and the amount of the payment were not clearly defined in the City's MOU with one bargaining unit. On April 21, 2014, the City Council approved an amended MOU that addresses CalPERS' concerns. The City will work with CalPERS staff to make any necessary corrections.

2.C. Reporting Items of Special Compensation In Base Payrate

The City does not dispute CalPERS' finding and recommendation. The City was reporting and paying the appropriate amount of payrate and special compensation, but the City combined some items of special compensation in payrate in its payroll reporting to CalPERS. CalPERS requires that payrate and special compensation be reported separately. As of February 2, 2014, the City modified its reporting practices to report payrate and all items of special compensation separately. The City also worked with Ms. Ochoa from CalPERS to make retroactive reporting adjustments for members identified by CalPERS. The City will work with appropriate staff to make any other necessary corrections.

2.D. Education Incentive Reporting for One Employee

The City does not dispute CalPERS' finding and recommendation. CalPERS determined that the City reported four percent in Education Incentive pay for a single employee, which is the

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amount under the Albany Peace Officers' Association MOU for employees who possess a bachelor's degree. However, the employee only held an associate's degree and should have received two percent in Education Incentive Pay under the Albany Peace Officers' Association MOU. The City's payroll staff worked with Ms. Ochoa of CalPERS to correct reporting errors for the affected employee.

2.E. Temporary Upgrade Pay Reporting

The City does not dispute CalPERS' finding and recommendation. The City reported Temporary Upgrade Pay for an employee who was working in an upgraded position. However, the employee was unrepresented and the applicable employee benefits schedule did not include Temporary Upgrade Pay or Acting Pay. The City corrected its reporting practices for this employee as of November 18, 2013. The City will work with the appropriate CalPERS staff to make any necessary corrections.

2.F. Holiday Pay Reporting

The City disagrees with CalPERS' finding and recommendation. CalPERS suggests that special compensation cannot be included in the calculation for Holiday Pay. However, the regulation does not specify that special compensation is not included. Holiday Pay is a statutory item of special compensation under Government Code section 20636(c) and may include payrate and special compensation. Title 2, California Code of Regulations ("CCR"), section 571(a)(5) provides in relevant part:

Holiday Pay - Additional compensation for employees who are normally required to work on an approved holiday because they work in positions that require scheduled staffing without regard to holidays. If these employees are paid over and above their normal monthly rate of pay for approved holidays, the additional compensation is holiday pay and reportable to PERS.

The regulation adopted by CalPERS does not exclude the inclusion of payrate and special compensation if that is what is "paid over and above their normal monthly rate of pay for approved holidays." Although CalPERS recently released Circular Letter No.: 200-064-14, which discusses Holiday Pay reporting, it does not mention the reporting of special compensation in Holiday Pay. There does not appear to be any administrative guidance stating that special compensation is excluded and the plain language of 2 CCR 571(a)(5) does not exclude special compensation from the amount reported.

Therefore, CalPERS should reverse its finding that the City incorrectly reported Holiday Pay.

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Finding 3: The Agency incorrectly reported payroll information.

Recommendation:

The Agency should work with EAMD who will inform the Agency of which appointment is contributory for contribution reporting.

The Agency should ensure payrates and earnings are correctly reported.

The Agency should report the scheduled full-time hours per week that reflects the normal full-time work schedule for employees in the same work group.

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

City's Response to Finding and Recommendation 3:

3.A. Incorrect Reporting for One Employee Working Two Part-Time Positions

The City does not dispute this finding and recommendation. The City reported only one payrate for an employee that worked in two part-time positions instead of reporting payrate separately for each position. On December 6, 2013, the City corrected the entries and has corrected its reporting practices for future reporting. The City will work with CalPERS staff to make any additional corrections.

3.B. Incorrect Reporting for Two Employees Working Less than Full-Time

The City does not dispute this finding and recommendation. The City reported the incorrect payrate for two employees working on a reduced schedule. On December 6, 2013, the City corrected the incorrect entries and has corrected its reporting practices for future reporting. A retroactive adjustment was also calculated for those instances where an hourly payrate was used. The City will work with CalPERS staff to make any additional corrections.

3.C. Incorrect Reporting for One Firefighter Employee

The City does not dispute this finding and recommendation. The City mistakenly reported one employee who regularly worked a 56-hour workweek as regularly working a 40-hour workweek. On December 6, 2013 the City corrected the reporting error. City staff also reviewed the reporting of all other fire employees and determined that no other corrections were required.

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Finding 4: The Agency did not report compensation earned by an employee.

Recommendation:

The Agency should report compensation when earned.

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

City's Response to Finding and Recommendation 4:

The City does not dispute this finding and recommendation. The City did not report 10 hours for one employee who worked a less than full-time schedule for the pay period ending February 25, 2012. The employee permanently separated from the City in January 2014. The City will work with the appropriate CalPERS staff to make any necessary corrections.

Finding 5: The Agency incorrectly paid and reported member contributions.

Recommendation:

The Agency should pay and report the correct amounts for employer and member contributions.

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

City's Response to Finding and Recommendation 5:

5.A Underreporting of EPMC Contributions

The City does not dispute this finding and recommendation. The City mistakenly excluded the value of Employer Paid Member Contributions ("EPMC") from compensation earnable for three employees in the pay period ending June 9, 2013. The exclusion resulted in underreporting. On or about December 9, 2013, City payroll staff revised the payroll system pay codes. EPMC has been correctly reported prospectively. The City will work with CalPERS staff to make any necessary corrections.

5.B. Overpayment of Member Contributions for Three Fire Employees

The City does not dispute this finding and recommendation. The City overpaid member contributions. The City will work with CalPERS staff to ensure that the City's employer account is properly credited or that the overpayment is remitted to the City.

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5.C. Overpayment of Member Contributions for One Employee in One Pay Period

The City does not dispute this finding and recommendation. The City overpaid member contributions. The City will work with CalPERS staff to ensure that the City's employer account is properly credited or that the overpayment is remitted to the City.

Finding 6: The Agency did not enroll eligible employees into membership.

Recommendation:

The Agency should ensure that common law employees that meet membership eligibility requirements are enrolled and reported to CalPERS.

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

City's Response to Finding and Recommendation 6:

6.A. The Piedmont Fire Chief

The City disagrees with the finding that the part-time Fire Chief was a common law employee of the City and should have been reported by the City. The Fire Chief was subject to the control of the City of Piedmont ("Piedmont") and was a common law employee of Piedmont.

Since the Public Employees' Retirement Law ("PERL") does not expressly define "employee," CalPERS uses the common law employment test. (*Metropolitan Water Dist. v. Superior Court (Cargill)* (2004) 32 Cal.4th 491; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949, cited with approval in *Cargill, supra*, 32 Cal.4th 491; *Neidengard* (2005) Precedential Decision No 05-01.) An important consideration is whether the employer has the right to control the manner and means of accomplishing the result. However, CalPERS must also consider secondary factors.

The City is a charter city and is empowered under the home rule provision of the California Constitution, article XI, section 5 to regulate, control, and govern its internal affairs. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1692-93.)² A charter city's power over its own internal affairs extends to its role as an employer and courts will look to the City's charter, civil service rules, and handbook in determining employment rights. (*Id.*) Charter provisions grant cities a right to prescribe reasonable duties and qualifications of employees. (*Leftridge v. City of Sacramento* (1943) 59 Cal.App.2d 516, 526, implied overruling recognized on other grounds.) A city also has power to interpret its own charter. (See *Mason v. Retirement Bd. of City and County of San Francisco* (2003) 111 Cal.App.4th 1221, 1229.) Due to the home

² The City of Piedmont is also a charter city empowered under the home rule provisions of the California Constitution.

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rule powers granted to the City, CalPERS should defer to the City in its determinations of its employment relationships, especially where the intent of the parties is clear.

In April of 2011, the City of Albany and the Piedmont entered into a Personnel Services Agreement (“Agreement”) in which Piedmont agreed to supply an employee of Piedmont to provide Fire Chief services for the City. Attached as Exhibit “A” is a copy of the April 4, 2011 Personnel Services Agreement. The parties also entered into a substantially similar Personnel Services Agreement on April 16, 2012, which is attached as Exhibit “B.” The Agreement specifically provides that the individual is an employee of Piedmont. (Exhibit B, section 1, paragraph a.) CalPERS errs in bifurcating the ultimate control of the Fire Chief by considering Piedmont and the City’s control separately. Piedmont can direct its employees to provide services pursuant to Piedmont’s Agreement with the City.

The Fire Chief remained an employee of Piedmont even when providing services under the Agreement. The City did not pay the Fire Chief directly for his services or provide him with any benefits as would be the case in an employee-employer relationship. Instead, the City paid Piedmont to provide Fire Chief services. (*Id.*, section 3, paragraph a.) The City of Piedmont paid the salary of the Fire Chief, provided him with employment benefits, and reported his compensation earnable to CalPERS. The Agreement also was paid as a flat rate and not an hourly rate. (*Id.*) The City Manager was charged with ensuring that the agreement was being performed. Ultimate supervision of an independent contractor by a high ranking City official is consistent with a principal-independent contractor relationship.

The performance of an independent contractor may still be supervised by the principal. (*McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [The principal retains broad general power of supervisions and control as to the results of the work to insure satisfactory performance.] See also *U.S. v. Sierra Pacific Industries* (E.D. Cal. 2012) 879 F.Supp.2d 1096, 1107.) The common law employment test does not require that an independent contractor be completely unsupervised. The fact that the Fire Chief met with the City Manager monthly is also of little significance. The City retains the right to ensure that the end product is in accordance with its desires and expectations. Moreover, the Agreement provides that the City Manager was to respond to personnel recommendations by the Fire Chief. (*Id.*, section 1, paragraph c.) The Fire Chief did not have the authority to dismiss City fire personnel or issue notices of intent to discipline. The Fire Chief’s inability to discipline City employees is inconsistent with an employee-employer relationship where the chief of the department generally makes personnel decisions.

The Agreement also contemplated that the parties would discuss the substitution of a new individual. (*Id.*, section 1, paragraph e.) The substitution provision suggests that the City was more concerned with obtaining services under the Agreement than to have services performed by any specified individual named in the Agreement. This is consistent with a principal-independent contractor relationship. Although the City retained the right to have input into a substitute, the City’s input is consistent with having the services supplied for the City. (*Id.*)

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Piedmont was also required to involve the City in designating a substitute if the named individual was unavailable for more than three weeks, suggesting the designated Fire Chief could be substituted. (*Id.*) That the City agreed to indemnify the Fire Chief to the *extent required by law* does not have any bearing on whether the relationship is one of principal-independent contractor. (*Id.*, section 6.)

It is also clear that the parties did not intend that the Fire Chief become a common law employee of the City. The Agreement provides that Piedmont will provide the services via an employee of Piedmont. Furthermore, part of the rationale for the Agreement was based on the reality that EMS and Fire Protection services have become increasingly consolidated at the county level and that more efficient and superior services could be provided through the Agreement. Thus, the Agreement provided increased public safety for both communities, but Piedmont maintained primary control over the Fire Chief and he remained an employee of Piedmont.

Finding that the Fire Chief was an employee of the City during the hours he provided services would also have detrimental effects on the pension benefits of the Fire Chief. To the extent that there is any ambiguity regarding the Fire Chief's status, that ambiguity should be resolved in favor of the pensioner. (*Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 459.) Moreover, CalPERS accepted full reporting from the City of Piedmont for the Fire Chief. CalPERS is now estopped from finding that he was not an employee of Piedmont. (*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 581; *City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 542.) CalPERS also owes its highest fiduciary duty to the members of the retirement system. (Cal. Const., art. XVI, § 17(a).)

Therefore, CalPERS should reverse its finding that the Fire Chief was a common law employee of the City and that the City was required to report the hours he performed services for the City under the Agreement. The City remains willing to work with CalPERS regarding a solution.

6.B. Enrollment of the Albany Municipal Services Joint Power Authority Employees
The Albany Municipal Services Authority Joint Powers Authority is a Separate Entity³

The Albany Municipal Services Authority Joint Power Authority ("JPA") is a distinct agency separate and apart from the City and the Albany Community Reinvestment Agency ("CRA"). As a distinct agency, it can exercise control over employees for the purposes of the common law employment test.

³ The City submitted substantial documentation to CalPERS regarding the JPA during the course of the audit. See the January 14, 2014 letter from Mr. Raskin to Ms. Bynum and accompanying attachments.

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On July 20, 1998, the City and the CRA formed a JPA. Attached as Exhibit "C" is a copy of the Joint Powers Agreement between the City and the CRA. Courts have recognized that a city and a redevelopment agency are distinct legal entities. (*County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1267; see also Health & Saf. Code, § 33100.) As separate public entities, the City and the Community Reinvestment Agency were permitted to form a joint powers authority. (Gov. Code, § 6502; Health & Saf. Code, § 33003.) The City could also have declared itself the redevelopment agency. (Health & Saf. Code, § 33003.) Although redevelopment agencies were dissolved as of February 1, 2012, the legislation dissolving redevelopment agencies also created successor agencies for winding down the agency. (See Health & Saf. Code, § 34177 et seq.) The legislation also provided that joint powers agreements in which redevelopment agencies were members were not invalid and may bind successor agencies. (Health & Saf. Code, § 34178(b).) The Albany redevelopment agency has not been completely dissolved. (See http://www.dof.ca.gov/redevelopment/successor_Agency_dissolution/view.php.)

The City and the CRA approved resolutions establishing the Albany Municipal Joint Powers Authority. Attached as Exhibit "D" is the resolution of the City Council establishing the JPA. Attached as Exhibit "E" is the resolution of the CRA establishing the JPA. Attached as Exhibit "F" is the Notice of Joint Powers Agreement and Statement of Facts filed with the Secretary of State. Attached as Exhibit "G" is the Registration Form for Commercial Employees filed with the Employment Development Department.

CalPERS has also recognized the JPA as a separate and distinct entity for the purposes of contracting with CalPERS for employee benefits on several occasions. CalPERS entered into a contract with the JPA and the JPA became a participant in CalPERS from and after July 12, 1999. Attached as Exhibit "H" is the contract between CalPERS and the JPA, which is signed by the Chief of CalPERS Actuarial & Employer Services Division. The JPA and CalPERS entered into an amendment to the JPA's CalPERS contract effective December 25, 2000. Attached as Exhibit "I" is a copy of the 2000 contract amendment. The JPA and CalPERS entered into another amendment that became effective on December 4, 2006. Attached as Exhibit "J" is the 2006 contract amendment. The JPA and CalPERS entered into another contract amendment that became effective on or about July 25, 2011. Notably, this contract amendment occurred during the audit period established for this public agency review and after CalPERS' precedential decision *Galt Services Authority* (2008) Precedential Decision No 08-01. Attached as Exhibit "K" is a copy of the 2011 contract amendment. The JPA Board of Directors also authorized the contract with CalPERS. Attached as Exhibit "L" is the JPA's resolution authorizing the CalPERS contract.

This case is distinguishable from *Galt Services Authority* (2008) Precedential Decision No 08-01. In *Galt Services Authority*, CalPERS refused to enter into a contract with the agency. Far from challenging the status of the JPA as a separate entity with its own employees, CalPERS entered into contracts with the JPA on several occasions and accepted the benefits under those

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contracts. Moreover, in the nearly 20 years since the JPA was formed CalPERS has accepted employer contributions from the JPA without questioning the separate status of the JPA. Thus, the JPA is an “employer” under the PERL. (Gov. Code, § 20030 [“Employer” “means the state, the university, a school employer, and any contracting agency employing an employee.”].)

As a distinct public entity and a distinct contracting agency, the JPA can have its own common law employees that are subject to the control of the JPA through its agents and are properly reported to CalPERS as employees of the JPA.

The Joint Powers Authority Has Common Law Employees

Since the JPA is a separate and distinct entity from the City, the employees transferred to the JPA are employees of the JPA and not employees of the City.

CalPERS places insufficient weight on the fact that the JPA controlled its own employees because CalPERS completely disregards the legal distinction between the JPA Board of Directors and the City Council. The same individuals can serve as the governing body of two separate entities.⁴ Members of the City Council sitting as directors of the JPA Board does not cause the separate entities to merge into a single unified employer.

It is permissible for directors and officers of a parent company to serve as directors and officers of a subsidiary without eliminating the separation between the entities. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 549, citing *United States v. Bestfoods* (1998) 524 U.S. 51, 69 [“This recognition that the corporate personalities remain distinct has its corollary in the “well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do ‘change hats’ to represent the two corporations separately, despite their common ownership.”] The fact that the members of the governing bodies are the same is of no significance. (See *Pacific States Enterprises, Inc. v. City of Coachella* (1993) 13 Cal.App.4th 1414, 1424 [“Well-established and well-recognized case law holds that the mere fact that the same body of officers acts as the legislative body of two different governmental entities does not mean that the two different governmental entities are, in actuality, one and the same.”].) Therefore, even though the members of the two governing bodies are the same, the separate bodies exercise and delegate separate control over employees.

As noted above, CalPERS applies the common law employment test to determine whether an individual is an employee for the purposes of enrollment in CalPERS. (*Tieberg, supra*, 2 Cal.3d at 949 and *Cargill, supra*, 32 Cal.4th at 496.)

⁴ Such an arrangement does not violate the incompatibility of offices doctrine since the Legislature explicitly allowed a city to designate itself as the redevelopment agency. (See *Long Beach Community Redevelopment Agency v. Morgan* (1993) 14 Cal.App.4th 1047, 1052, as modified on denial of reh'g (Apr. 27, 1993) [explaining statutory scheme]. In those cases, the governing body can designate itself the governing board of the redevelopment agency. (*Id.*)

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The Joint Powers Agreement provides that certain management, administrative, special, or general administrative services for the City and CRA would be carried out by the JPA. (Exhibit C.) The JPA is empowered to carry out the common personnel services powers of the member agencies. The JPA may also enter into contracts, employ agents, and adopt rules, regulations, and procedures. The Joint Powers Agreement names the Albany City Council as the JPA Board and provides that no officers, agents, or employees directly appointed by the JPA shall be deemed employees of the City or the CRA by reason of their employment by the JPA. The Joint Powers Agreement also provides that the City and CRA may transfer employees to the JPA under the Joint Powers Agreement and the JPA will become the employer of the transferred employees. Finally, the Joint Powers Agreement provides that the benefits of the agreement shall inure to the benefit of the member agencies' successors.

On October 5, 1998, the City entered into an Operating Agreement with the JPA. A copy of the Operating Agreement is attached as Exhibit "M." The Operating Agreement provides that the JPA shall provide management, administrative, special, or general personnel services to the City. The Operating Agreement incorporates the City's charter, ordinances, policies, rules, regulations, and salary schedule. The JPA provides the same health and retirement benefits as the City. The JPA also maintained its own workers' compensation policy for its employees.

Based on the Joint Powers Agreement, the member agencies could transfer functions to the JPA and transfer employees to the JPA to provide those services. When performing the services under the Joint Powers Agreement, as directed by the JPA Board, the individuals were performing services at the direction of the JPA for the member agencies. The employees also provided the specified services for more than one agency on behalf of the JPA, which is indicative of control by the JPA and not the City. The fact that some of the JPA employees were listed on a City organizational chart is not dispositive of control and is not a relevant factor in the common law employment test. Although the City required administrative services on an ongoing basis, the City could contract to have those services provided by the JPA.

As noted above, any ambiguity in the employees' status should be resolved in favor of the members. (*Lazan, supra*, 140 Cal.App.4th at 459.) CalPERS entered into a contract with the JPA and accepted reporting from the JPA and is now estopped from finding that the JPA has no common law employees. (*Crumpler, supra*, 32 Cal.App.3d at 581.)

The employees of the JPA are controlled by the JPA and are not common law employees of the City. The JPA properly reported the contributions of the employees and enrolled them in membership with the JPA. The City remains willing to work with CalPERS.

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Finding 7: The Agency unlawfully employed a retired annuitant.

Recommendation:

The Agency should work with BNSD to determine the appropriate course of action.

City's Response to Finding and Recommendation 7:

The City disagrees with this finding and recommendation. The appointment of the City Attorney was not in violation of the PERL. Finding 7 is based on incorrect facts and is unsupported in light of the City Charter.

The Audit misstates the facts applicable to the City Attorney. The Audit provides that the City Attorney served in his elected position from June 27, 2011 through December 31, 2011. However, the Audit is incorrect. The City Attorney ceased to be an elected official on June 26, 2011. At the time the City Attorney assumed office, the City Attorney position was an elected position. In late 2010, the City's voters passed an amendment to the City Charter that changed the office of City Attorney from an appointed office to an elected office. The Amendment to the City Charter provided that "[c]ommencing on December 6, 2011, *or sooner if there is a vacancy in the office*, the City Attorney shall be appointed by the City Council..." (City Charter, Section 3.01.) Attached as Exhibit "N" is Section 3.01 of the City Charter.

On June 26, 2011, the City Attorney retired from the City and his retirement was processed by CalPERS. At that point, the office of the City Attorney became vacant. The City Council, acting through its delegates was empowered under the City Charter to appoint an individual as City Attorney. On June 27, 2011, the individual was appointed to the office of City Attorney by the City Council through its delegate. The individual was appointed from June 27, 2011 until his appointment ended. The City Attorney's contract is attached as Exhibit "O." The Amendment to the City Attorney's contract is attached as Exhibit "P."

Under the City Charter, the City Attorney's elective office ended on June 26, 2011. CalPERS' references in the Audit to the individual remaining in an elected office are incorrect. The retirement allowance was not required to be suspended under Government Code section 21222. Moreover, the City was not required to report to CalPERS that the individual was elected in June 2011 to a City office, as he was appointed, not elected.

Therefore, Finding 7 should be reversed because it is based entirely on the individual serving in an elected office.

Finding 8: The Agency did not offer optional membership to Council members.

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Recommendation:

The Agency should work with EAMD to ensure elected officers are advised of CalPERS optional membership requirement.

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

City's Response to Finding and Recommendation 8:

The City does not dispute this finding and recommendation. On December 6, 2013, the City provided notice to the City Council members advising them of their eligibility to enroll in CalPERS membership. The City has also worked with Human Resources personnel to implement procedures to ensure that all future City Council members are informed of their right to elect optional membership in CalPERS. The City will work with CalPERS staff to make any necessary corrections.

Observation: The Agency's administration of the contract exclusion for hourly compensated employees is not clearly defined.

City's Response to the Observation:

The City's contract with CalPERS provides an exclusion for all hourly rated employees and hourly basis employees. Employees who meet these criteria are excluded from membership in CalPERS. Any employees that work less than 1,000 hours in a fiscal year will also be excluded under Government Code section 20305. The City will work with the Employer Account Management Division to define the City's administration of the contract exclusion.

CONCLUSION

The City objects to some of the findings and recommendations set forth above. However, the City will assist CalPERS by providing additional documentation or information required by CalPERS to assess the findings and recommendations disputed above. The City will work with CalPERS staff in order to make the necessary corrections and resolve outstanding concerns.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Original signed by Michael D. Youril

Michael D. Youril

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Enclosures