



California Public Employees' Retirement System
Office of Audit Services
P.O. Box 942701
Sacramento, CA 94229-2701
TTY: (916) 795-3240
(916) 795-0900 phone, (916) 795-4023 fax
www.calpers.ca.gov

May 31, 2012

Employer Code: 0309
Job Number: P10-037

San Diego County Water Authority
Rod Greek, Controller
4677 Overland Avenue
San Diego, CA 92123

Dear Mr. Greek:

Enclosed is our final report¹ on the results of the public agency review completed for the San Diego County Water Authority. Your agency's written response, included as an appendix to the report, indicates agreement with the issues noted in the report with exception to the finding regarding workers compensation and the finding regarding individuals working at an affiliated entity. We reviewed your agency's response and the additional information provided. Based on the information contained in your agency's response pertaining to non-reportable compensation reported in the form of workers compensation, our finding has been removed from the report. In addition, based on the information contained in your agency's response pertaining to the Authority erroneously enrolling and reporting individuals from an affiliated entity, and the additional field review performed, we expanded Finding 5 to further clarify this issue. 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 and we appreciate the time and assistance of you and your staff during this review.

Sincerely,

Original Signed by Margaret Junker
MARGARET JUNKER, Chief
Office of Audit Services

Enclosure

cc: Risk and Audit Committee Members, CalPERS
Peter Mixon, General Counsel, CalPERS
Karen DeFrank, Chief, CASD, CalPERS
Mary Lynn Fisher, Chief, BNSD, CalPERS
Honorable Board of Directors, San Diego County Water Authority

¹ The enclosed review report does not constitute a final determination in regard to the findings noted within the report. The appropriate CalPERS' divisions will notify the Authority of the final determinations on the report findings and provide appeal rights at that time. All appeals must be made to the appropriate CalPERS division by filing a written appeal with CalPERS, in Sacramento, within thirty 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, California Code of Regulations.

Office of Audit Services



Public Agency Review

San Diego County Water Authority

**Employer Code: 0390
Job Number: P10-037**

May 2012

SAN DIEGO COUNTY WATER AUTHORITY

TABLE OF CONTENTS

| <u>SUBJECT</u> | <u>PAGE</u> |
|--|-------------|
| Results in Brief..... | 1 |
| Authority Background..... | 1 |
| Scope..... | 2 |
| Office of Audit Services Review Results | 3 |
| Finding 1: Compensation Earnable was not Reported | 3 |
| Finding 2: EPMC Resolution was not on File | 4 |
| Finding 3: Payrate was Incorrectly Reported..... | 5 |
| Finding 4: Temporary/Part-Time Employees were not Enrolled..... | 6 |
| Finding 5: Affiliate Entity Employees may have been Incorrectly Enrolled . | 7 |
| Conclusion | 10 |
| CalPERS Background..... | Appendix A |
| Objectives | Appendix B |
| Criteria | Appendix C |
| Authority Response..... | Appendix D |

SAN DIEGO COUNTY WATER AUTHORITY

RESULTS IN BRIEF

The Office of Audit Services (OAS) reviewed the San Diego County Water Authority's (Authority) enrolled individuals, member compensation, required retirement documentation and other documentation for individuals included in test samples. This review did not include a determination as to whether the Authority is a "public agency" (as that term is used in the California Public Employees' Retirement Law), and OAS therefore expresses no opinion or finding with respect to whether the Authority is a public agency or whether its employees are employed by a public agency.

A detail of the findings is noted in the Results section beginning on page three of this report. Specifically, the following findings were noted during the review:

- Statutory holiday pay was not reported.
- A revised resolution to pay and report the value of Employer Paid Member Contributions (EPMC) at 7% was not on file.
- Payrate was incorrectly reported.
- Temporary/part-time employees hired through temporary employment agencies were not enrolled in CalPERS membership when membership eligibility requirements were met.
- Individuals from an affiliated entity may have been incorrectly enrolled in CalPERS membership.

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

AUTHORITY BACKGROUND

The San Diego County Water Authority was formed in 1944 and is governed by a 36 member Board of Directors. The Authority's primary purpose is to provide a safe and reliable water supply to its 24 member agencies for domestic, municipal, and agricultural uses. Memoranda of Understanding (MOU) and employment agreements outline all Authority employees' salaries and benefits and state the terms of employment agreed upon between the Authority and its employees.

The Authority contracted with CalPERS effective March 1, 1951, to provide retirement benefits for local miscellaneous employees. The Authority's current contract amendment identifies the length of the final compensation period as twelve months for its miscellaneous employees. The Authority did not contract with CalPERS for health benefits.

SAN DIEGO COUNTY WATER AUTHORITY

All contracting public agencies, including the Authority, are responsible for the following:

- Determining CalPERS membership eligibility for its employees.
- Enrolling employees into CalPERS upon meeting membership eligibility criteria.
- Enrolling employees in the appropriate membership category.
- Establishing the payrates for its employees.
- Approving and adopting all compensation through its governing body in accordance with requirements of applicable public meeting laws.
- Publishing all employees' payrates in a publicly available pay schedule.
- Identifying and reporting compensation during the period it was earned.
- Ensuring special compensation is properly identified and reported.
- Reporting payroll accurately.
- Notifying CalPERS when employees meet Internal Revenue Code annual compensation limits.
- Ensuring the employment of a retired annuitant is lawful and to reinstate retired annuitants that work more than 960 hours in a fiscal year.

SCOPE

As part of the Board approved plan for fiscal year 2010/2011, the OAS reviewed the Authority's payroll reporting and member enrollment processes as these processes relate to the Authority's retirement contract with CalPERS. The review period was limited to the examination of sampled records and processes from January 1, 2008, through December 31, 2010. The on-site fieldwork for this review was conducted on April 11, 2011, through April 14, 2011. The review objectives and a summary of the procedures performed, sample sizes, sample periods and findings are listed in Appendix B.

SAN DIEGO COUNTY WATER AUTHORITY

OFFICE OF AUDIT SERVICES REVIEW RESULTS

Finding 1: Compensation earnable in the form of statutory holiday pay was not reported to CalPERS.

Recommendations:

The Authority should ensure statutory holiday pay is reported for all employees required to work on a holiday.

OAS recommends CASD work with the Authority to assess the impact of this non-reporting and determine what adjustments are needed.

Conditions:

During the entrance meeting, the Authority indicated its Operations Department required 24 hour staffing without regard to holidays. Pursuant to the Managerial/Supervisory Group MOU, section 8.3, any employee required to work on an authorized holiday shall be paid double (two times) the regular hourly pay for such work in addition to their regular pay. One sampled employee was required to work on a holiday during the 12/10-4 service period. The Authority paid an additional \$726.35 for hours worked on the holiday; however, the additional pay was not reported to CalPERS as special compensation. The Authority should have reported the additional pay received for working on a holiday as special compensation.

Criteria:

Government Code §20160, § 20636(c)(6)

California Code of Regulation § 571(a)(5)

SAN DIEGO COUNTY WATER AUTHORITY

Finding 2: The Authority did not submit a revised resolution to pay and report the value of EPMC at 7 percent.

Recommendation:

OAS recommends CASD work with the Authority to ensure the correct EPMC resolution to pay and report the value of EPMC at seven percent is filed with CalPERS.

Condition:

The latest EPMC resolution the Authority had on file at CalPERS stated it would pay and report 100 percent of the value of EPMC effective July 1, 2005. At that time, the member contribution was seven percent. The Authority subsequently amended its CalPERS contract to provide the enhanced Optional Benefit 2.5% @ 55 benefit formula effective July 1, 2006. To offset the additional costs associated with the enhanced benefit formula, the Authority's employees paid an additional one percent member contribution. OAS reviewed the Authority's HR Manual, MOUs, and board meeting minutes which stipulated the Authority would continue to pay and report the value of EPMC at seven percent, and the employees would pay an additional one percent member contribution. However, the Authority did not submit a revised resolution to CalPERS which specifies the conditions of this change.

Criteria:

California Code of Regulations § 571(a)(1)(A)

SAN DIEGO COUNTY WATER AUTHORITY

Finding 3: The Authority incorrectly reported a payrate that was not included on a publicly available pay schedule.

Recommendation:

The Authority should ensure payrates reported to CalPERS are pursuant to publicly available pay schedules.

OAS recommends CASD work with the Authority to assess the impact of this incorrect reporting and determine what adjustments are needed.

Condition:

The reported payrate for one sampled employee exceeded the authorized payrate. Specifically, on August 23, 2007, the board signed an individual employment agreement authorizing an annual salary of \$239,558, which equated to an hourly payrate of \$115.17. In January 2008, the Authority erroneously over-reported a payrate of \$126.49 per hour, through March 2008. On April 2, 2008, the Authority's board signed an amended employment agreement, which authorized an hourly payrate of \$116.50. The salary increase was retroactive to January 16, 2008. Despite the Authority authorizing the contract on April 2, 2008, for a payrate of \$116.50 retroactive to January 16, 2008, the Authority should have continued to report the \$115.17 hourly payrate until a higher payrate was properly and validly approved, signed by the governing board, and was public record available for public scrutiny. Therefore, the Authority over-reported the hourly payrate of \$126.49 from January 2008 through March 2008. It was noted the Authority reported an authorized and publicly available payrate from April 2008 to December 2010.

Criteria:

Government Code §20160, § 20636(b)(1)

SAN DIEGO COUNTY WATER AUTHORITY

Finding 4: Temporary/part-time employees hired through temporary employment agencies were not enrolled in CalPERS when the membership eligibility requirement was met.

Recommendation:

The Authority should monitor the hours worked by part-time employees hired through temporary employment agencies to ensure temporary/part-time employees are enrolled, earnings are reported, and retirement contributions are submitted when an employee meets the 1,000-hour membership eligibility requirement for CalPERS membership.

OAS recommends CASD work with the Authority to assess the impact of this membership issue and determine what adjustments are needed.

Condition:

OAS determined two sampled employees hired through temporary employment agencies qualified to become CalPERS members; however, the Authority did not enroll the employees upon meeting the membership eligibility requirement.

Specifically, during the 2008/2009 fiscal year, one sampled employee worked a total of 1,090 hours reaching the 1,000 hour eligibility requirement in the week ending June 13, 2009. During the 2008/2009 fiscal year, a second sampled employee worked a total of 1,044.58 hours reaching the 1,000 hour eligibility requirement in the week ending June 20, 2009.

Criteria:

Government Code §20160, § 20305(B), § 20028(b)

SAN DIEGO COUNTY WATER AUTHORITY

Finding 5: The Authority may have improperly enrolled individuals that were not the common law employees of the Authority.

Recommendation:

The Authority should ensure that only its common law employees are enrolled and reported to CalPERS. The Authority should not report the common law employees of other entities.

OAS recommends CASD work with the Authority to continue to assess whether any individuals have been misreported as Authority employees and assess the impact of this membership issue, and determine what adjustments, if any, are needed.

Condition:

In order to determine the membership eligibility status of employees performing services for the Water Conservation Garden Authority (WCGA), a separate entity affiliated with the Authority, we reviewed Authority and WCGA documentation to determine the relationship between the two entities.

For the purposes of the PERL and for programs administered by the Board of Administration of CalPERS (Board) the standard used for determining whether an individual is the employee of another person is the California common law 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*, (2004) 32 Cal. 4th 491, and which was adopted by the Board in a precedential decision, *In the Matter of Lee Neidengard*, Precedential Dec. No. 05-01, effective March 22, 2005.

Applying the California common law, 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.

Where there is no clear independent evidence that the principal has the right to control the manner and means of an individual's performance of the services in question, CalPERS, applying the California common law, will consider the following additional factors in determining whether an individual is an employee:

SAN DIEGO COUNTY WATER AUTHORITY

- (a) whether or not the one performing services is engaged in a distinct occupation or business;
- (b) 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;
- (c) the skill required in the particular occupation;
- (d) whether the principal or the individual performing the services supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (e) the length of time for which the services are to be performed;
- (f) the method of payment, whether by the time or by the job;
- (g) whether or not the work is a part of the regular business of the principal; and
- (h) whether or not the parties believe they are creating the relationship of employer-employee.

OAS identified the following common facts which appeared to support a finding of control by the WCGA and that the individuals were likely common law employees of the WCGA and not of the Authority.

- The Authority and five other agencies have entered into a Joint Powers Agreement to create the WCGA.
- The WCGA is an entity that is separate and distinct from the Authority.
- The WCGA owns and operates a water conservation garden on the campus of Cuyamaca College.
- Effective July 1, 2003, the Authority provided operation and maintenance services (the “O&M Services”) to the WCGA pursuant to an Agreement Regarding Operation and Maintenance Services.
- The Authority provided the O&M Services through individuals hired specifically for that purpose (the “Garden Staff”).
- The WCGA reimbursed the Authority for the cost of the O&M Services. The cost included personnel cost, salary and fringe benefit cost, overtime cost, additional CalPERS cost, and workers' compensation insurance cost.
- The Garden Staff only provided services to the WCGA and not to the Authority.
- The Garden Staff include key personnel, such as the WCGA Executive Director.
- The WCGA board had direction and control over the operations of the WCGA.
- The WCGA provided office space, supplies and equipment, storage facilities, tools, plants, fertilizer, pesticides, supplies and equipment for the provision of the O&M Services.
- Prior to the WCGA's agreement to provide the O&M Services, the Otay Water District provided the same O&M Services to the WCGA with some of the same employees.

SAN DIEGO COUNTY WATER AUTHORITY

- Following the termination of the Authority's agreement to provide the O&M Services, the Grossmont-Cuyamaca Community College Auxiliary entered into an agreement with the WCGA to provide the same O&M Services utilizing many of the same employees.

OAS concluded that approximately ten individuals may be the common law employees of the WCGA but have been reported to CalPERS as if they were common law employees of the Authority. CASD is the authoritative CalPERS program area authorized to make formal common law employee determinations. It is for that reason that OAS recommends that the CASD continue to work with the Authority to finalize these determinations for the individuals identified and for any other individuals that might be identified.

Criteria:

Government Code §20160, § 20502, § 20028(b), § 20125

SAN DIEGO COUNTY WATER AUTHORITY

CONCLUSION

OAS limited this review to the areas specified in the scope section of this report and in the objectives as outlined in Appendix B. OAS limited the test of transactions to employee samples selected from the Authority's payroll records. Sample testing procedures provide reasonable, but not absolute, assurance that these transactions complied with the California Government Code except as noted. The findings and conclusions outlined in this report are based on information made available or otherwise obtained at the time this report was prepared.

Since OAS did not review whether the Authority is a "public agency" (as that term is used in the California Public Employees' Retirement Law), this report expresses no opinion or finding with respect to whether the Authority is a public agency or whether its employees are employed by a public agency.

Respectfully submitted,

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

Date: May 2012

Staff: Michael Dutil, CIA, Senior Manager

Diana Thomas, CIDA, Manager

Karen Harlan, CIA, CGAP

Nuntawan Camyre

APPENDIX A

BACKGROUND

SAN DIEGO COUNTY WATER AUTHORITY

BACKGROUND

California Public Employees' Retirement System

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

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

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

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

APPENDIX B

OBJECTIVES

SAN DIEGO COUNTY WATER AUTHORITY

OBJECTIVES

The objectives of this review were limited to the determination of:

- Whether the Authority complied with applicable sections of the California Government Code (Sections 20000 et seq.) and Title 2 of the California Code of Regulations.
- Whether prescribed reporting and enrollment procedures as they relate to the Authority's retirement contracts with CalPERS were followed.

This review did not include a determination as to whether the Authority is a "public agency", and expresses no opinion or finding with respect to whether the Authority is a public agency or whether its employees are employed by a public agency. This review covers the period of January 1, 2008 through December 31, 2010.

SUMMARY

Procedures, Sample Sizes, Sample Periods, and Findings

To accomplish the review objectives, OAS interviewed key staff members to obtain an understanding of the Authority's personnel and payroll procedures, reviewed documents, and performed the following procedures. Related sample sizes, sample periods and findings are listed.

- ✓ Reviewed:
 - Provisions of the Contract and contract amendments between the Authority and CalPERS
 - Correspondence files maintained at CalPERS
 - Board of Directors minutes and resolutions
 - Authority written labor policies and agreements
 - Authority salary, wage and benefit agreements including applicable resolutions
 - Authority personnel records and employee hours worked records
 - Authority payroll information including Summary Reports and PERS listings
 - Other documents used to specify payrate, special compensation and benefits for all employees
 - Authority ordinances as necessary
 - Various other documents as necessary

SAN DIEGO COUNTY WATER AUTHORITY

- ✓ Reviewed Authority payroll records and compared the records to data reported to CalPERS to determine whether the Authority correctly reported compensation earnable.

Sample Size and Period: Reviewed 15 employees covering two sampled service periods - the first service period in July 2010 (7/10-3) and the second service period in December 2010 (12/10-4).

See Finding 1: Compensation earnable in the form of statutory holiday pay was not reported to CalPERS.

See Finding 2: A resolution authorizing the paying and reporting of the value of EMPC at 7% was not on file.

- ✓ Reviewed payrates reported to CalPERS and reconciled the payrates to Authority 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 Authority's governing body in accordance with requirements of applicable public meeting laws.

Sample Size and Period: Reviewed 15 sampled employees in the second service period in December 2010 (12/10-4). In addition, two sampled employees' payrates were tested over the review period, January 2008 through December 2010.

See Finding 3: Payrate was incorrectly reported. The reported payrate exceeded the authorized payrate.

- ✓ Reviewed PERS listing reports to determine whether the following payroll reporting elements were reported correctly: contribution code, pay code, work schedule code, service period, and member contributions.

Sample Size and Period: Reviewed 15 sampled employees in the first service period in July 2010 (7/10-3) and the second service period in December 2010 (12/10-4).

No Finding

SAN DIEGO COUNTY WATER AUTHORITY

- ✓ Reviewed the Authority's enrollment practices for temporary/part-time employees, independent contractors, and optional members to determine whether individuals met CalPERS membership requirements.

Temporary/part-time employees Sample Size and Period: Reviewed six temporary/part-time sampled employees hired by the Authority in fiscal years 2008/2009 and 2009/2010. In addition, reviewed two temporary employment agency employees in fiscal years 2008/2009 and 2009/2010.

See Finding 4: The Authority did not enroll temporary/part-time employees hired through temporary employment agencies who qualified to become CalPERS members.

Independent contractors Sample Size and Period: Reviewed four independent contractors covering calendar years 2009 and 2010.

No Finding

- ✓ Reviewed the Authority's practices for hiring and monitoring hours worked by retired annuitants

No Finding

- ✓ Reviewed and discussed with the Authority's employees the Authority's involvement with the Water Conservation Garden and reviewed the agreement between Authority and the Water Conservation Garden to determine whether employees qualified for CalPERS membership.

Sample Size and Period: Reviewed 11 sampled employees in the January 1, 2008 to December 31, 2010 period.

See Finding 5: The Authority may have improperly enrolled individuals that were not the common law employees of the Authority. Final findings could not be reached as OAS has not been provided sufficient information to finalize determinations on this issue prior to the issuance of this report. It is for that reason that OAS recommends that the Authority continue to work with CalPERS CASD to finalize these determinations for the individuals identified and for any other individuals that might be identified.

APPENDIX C

CRITERIA

SAN DIEGO COUNTY WATER AUTHORITY

CRITERIA

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

Government Code § 20125, states:

The board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.

Government Code § 20160 states:

a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part. Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status,

SAN DIEGO COUNTY WATER AUTHORITY

rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

- (1) That the correction cannot be performed in a retroactive manner.
- (2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.
- (3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

Government Code § 20305 (B), states, in part:

The person completes...1000 hours within the fiscal year, in which case, membership shall be effective not later than the first day of the first pay period of the month following the month in which...1000 hours of service were completed.

Government Code § 20502, states, in part:

The contract shall include in this system all firefighters, police officers, county peace officers, local sheriffs, and other employees of the contracting agency....

Government Code § 20636 (b)(1), states, in part:

"Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules.

Government Code § 20636 (c)(6), states, in part:

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

California Code of Regulations § 570.5, subdivision (a), states:

For purposes of determining the amount of compensation earnable pursuant to Government Code Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

- (1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;
- (2) Identifies the position title for every employee position
- (3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

SAN DIEGO COUNTY WATER AUTHORITY

- (4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;
- (5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;
- (6) Indicates an effective date and date of any revisions;
- (7) Is retained by the employer and available for public inspection for not less than five years; and
- (8) Does not reference another document in lieu of disclosing the payrate.

California Code of Regulations § 571(a)(1)(A) states:

A resolution or ordinance of the governing body must be provided to CalPERS indicating the group or class, effective date, and the percent or amount of EPMC being paid and reported as an item of special compensation. The resolution or ordinance must be formally adopted by the employer's governing body, and submitted to CalPERS for review and approval.

California Code of Regulations § 571 (a)(5), defines holiday pay as:

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.

APPENDIX D

AUTHORITY RESPONSE



San Diego County Water Authority

4677 Overland Avenue • San Diego, California 92123-1233
(858) 522-6600 FAX (858) 522-6568 www.sdcwa.org

November 8, 2011

MEMBER AGENCIES

Carlsbad
Municipal Water District

City of Del Mar

City of Escondido

City of National City

City of Oceanside

City of Poway

City of San Diego

Fallbrook
Public Utility District

Helix Water District

Lakeside Water District

Oliverhain
Municipal Water District

Otay Water District

Padre Dam
Municipal Water District

Camp Pendleton
Marine Corps Base

Rainbow
Municipal Water District

Ramona
Municipal Water District

Rincon del Diablo
Municipal Water District

San Dieguito Water District

Santa Fe Irrigation District

South Bay Irrigation District

Vallecitos Water District

Valley Center
Municipal Water District

Vista Irrigation District

Yuma
Municipal Water District

OTHER REPRESENTATIVE

County of San Diego

California Public Employees' Retirement System
Margaret Junker, Chief
Office of Audit Services
P.O. Box 942701
Sacramento, CA 94229-2701

Re: San Diego County Water Authority Response to Draft Public Agency Review Report
October 2011, Employer Code: 0309, Job Number: P10-037

Dear Ms. Junker:

This letter constitutes the response of the San Diego County Water Authority to the findings and recommendations contained in the draft report of your compliance review in relation to the Water Authority's contract with the California Public Employees' Retirement System, which was transmitted by letter dated October 17, 2011 to Rod Greek, the Water Authority's Controller. As requested by your October 17 letter, the Water Authority responds to each finding and states its agreement or disagreement with each recommendation.

| CalPERS Finding and Recommendation | Water Authority Response |
|---|--|
| Finding 1: Compensation earnable in the form of statutory holiday pay was not reported to CalPERS. | The Water Authority agrees that holiday pay as defined by Gov't Code § 20636(c)(6) and 2 Cal. Code of Regs. § 571(a)(5) is reportable as special compensation. |
| Recommendations: The Authority should ensure statutory holiday pay is reported for all employees required to work holidays. The Authority should work with CalPERS CASD to assess the impact of this non-reporting and determine what adjustments are needed. | The Water Authority agrees with the recommendations. |

A public agency providing a safe and reliable water supply to the San Diego region

| | |
|---|--|
| <p>Finding 2: Non-reportable compensation in the form of workers' compensation pay was erroneously reported to CalPERS</p> | <p>The Water Authority disagrees with the finding. Gov't Code § 20630 (a) defines compensation to include remuneration in payment for services performed during normal working hours or for time during which an employee is excused from work because of "(6) Leave of Absence." Pursuant to its memoranda of understanding and compensation plans, the Water Authority compensates its employees at their regular rate of pay for reasonable actual on duty time spent during a work day when the employee is away from the job site receiving authorized treatment for an on-the-job injury or illness. This pay is not chargeable to an employee's sick time, and is not paid if the employee is eligible to receive workers' compensation benefit payments for the same time. For internal accounting purposes, such compensation payments are denoted as "work' comp" time rather than "regular," "sick," or other category of compensable time.</p> |
| <p>Recommendations:</p> <p>The Authority should discontinue reporting workers' compensation pay to CalPERS.</p> <p>The Authority should work with CalPERS to assess the impact of this incorrect reporting of compensation and determine what adjustments are needed.</p> | <p>The Water Authority disagrees that it has improperly reported payments to CalPERS.</p> <p>The Water Authority will change its internal accounting designation for the payments in question to avoid confusion.</p> <p>CalPERS should amend its final report to delete Finding 2 and the corresponding recommendations.</p> |
| <p>Finding 3: The Authority did not submit a revised resolution to pay and report the value of EPMC at 7 percent.</p> | <p>Whenever the Water Authority board of directors has proposed to adopt or change retirement benefits for Water Authority employees, it has been the Water Authority staff practice to consult with CalPERS and based on that consultation the Water Authority has taken action, approved contracts, or adopted resolutions substantially in the form directed or provided by CalPERS. The Water Authority followed that practice with respect to paying and reporting to CalPERS the EMPC benefit approved by the Water Authority's board of directors. It is now informed that CalPERS desires a new resolution in a specific format provided by CalPERS.</p> |
| <p>Recommendation:</p> <p>The Authority should file an updated resolution to pay and report the value of EMPC at 7 percent.</p> | <p>The Water Authority will provide an updated resolution in the format requested by CalPERS.</p> |

| | |
|---|--|
| <p>Finding 4: The Authority incorrectly reported a payrate that was not included on a publicly available salary schedule.</p> | <p>The Water Authority has provided information showing that all payments under the August 23, 2007 employment agreement amendment, including payments made on account of a retroactive pay increase authorized by the employment agreement amendment executed on April 2, 2008, were properly paid and reported. The pay schedule and applicable employment agreements are publicly available.</p> |
| <p>Recommendation:</p> <p>The Authority should ensure payrates reported to CalPERS are pursuant to publicly available pay schedules. The Authority should work with CalPERS CASD to assess the impact of this incorrect reporting and determine what adjustments are needed.</p> | <p>The Water Authority's classification and salary schedule is publicly available. The schedule provides that the salary for the General Manager and General Counsel is "set by the board of directors." This is accomplished pursuant to employment agreements, which are also publicly available. The Water Authority complies with applicable laws regarding public records and public employee compensation.</p> |
| <p>Finding 5: Temporary/part-time employees hired through temporary employment agencies were not enrolled in CalPERS when the membership eligibility requirement was met.</p> | <p>The Water Authority agrees that certain temporary/part-time employees hired through temporary employment agencies were not properly enrolled in CalPERS. The Water Authority assigned responsibility for monitoring hours of temporary/part-time employees to the temporary employment agencies in the service contracts with such agencies.</p> |
| <p>Recommendation:</p> <p>The Authority should monitor the hours worked by part-time employees hired through temporary employment agencies to ensure temporary/part-time employees are enrolled, earnings reported, and retirement contributions are submitted when an employee meets the 1,000 hour membership eligibility requirement for CalPERS membership.</p> <p>The Authority should work with CalPERS CASD to assess the impact of this membership issue and determine what adjustments are needed.</p> | <p>The Water Authority will more closely monitor work hours of employees hired through temporary employment agencies to ensure compliance with CalPERS requirements. The Water Authority will work with CalPERS CASD to assess the impact of this issue and determine what adjustments are needed.</p> |
| <p>Finding 6: The Authority erroneously enrolled and reported individuals from an affiliated entity to CalPERS.</p> | <p>The Water Authority strongly disagrees with CalPERS determination regarding the Water Authority employees assigned to perform services at the Water Conservation Garden.</p> <p>The Water Conservation Garden Authority (WCGA) is a joint powers agency organized and</p> |

existing pursuant to Government Code §§ 6500 et seq., and operates pursuant to the Irrigation District Act. Although the Water Authority itself, or any of the WCGA's public agency members themselves, could own and operate the water conservation garden, they have instead chosen to band together to provide this public resource through a joint powers agreement. By pooling resources, the agencies achieve a public benefit in a more efficient, cost effective manner.

The WCGA has no employees. Instead, the WCGA has, since its formation, contracted for operation and maintenance services with a constituent member public agency. Initially, the Otay Water District provided the operation and maintenance services using its employees. Effective July 1, 2003, the Water Authority agreed to provide those services using Water Authority employees. The service agreement between the Water Authority and WCGJPA was terminated December 2010. In consequence, certain Water Authority employees terminated their Water Authority employment and subsequently became employees of the Grossmont-Cuyamaca Community College District.

Service agreements of this nature, where public agency A provides services to another public agency B using public agency A employees are common and expressly authorized by law. (Government Code § 54981, see also Government Code § 6504 and Water Code §§ 22230 and 23100.)

Under the service agreement, the Water Authority agreed to operate and maintain the Water Conservation Garden according to standards established by the WCGA board of directors. In addition to assigning Water Authority employees to operate and maintain the garden, the Water Authority agreed to indemnify the WCGA for acts and omissions of the Water Authority employees and also of volunteer docents; it also provided property damage and liability insurance for the garden. In consideration of these services, the WCGA agreed to pay the Water Authority the full cost of the services as well as to provide office space, tools, and other equipment at the garden.

In order to fulfill its obligations under the service agreement, the Water Authority established certain job classifications, established salaries for those job classifications, hired persons to fill those job classifications, enrolled those persons in its medical, dental, and vision insurance programs, enrolled those persons in CalPERS, and otherwise provided those persons with all the same benefits as other Water Authority employees. Further, with respect to volunteer docents, the Water Authority adopted a resolution pursuant to Labor Code § 3363.5 providing workers compensation benefits to those volunteers.

Throughout the course of the service agreement, the Water Authority retained full control over and supervision of the employees hired and assigned to perform the required operation and maintenance services. Although the WCGA board of directors had the ability to determine the general scope of services, its control over the means and methods of work was indirect. The WCGA had no power to hire, fire, discipline, or otherwise affect the employment status of any person providing the services.

The arrangement between the Water Authority and the WCGA is factually distinguishable from the leased employee arrangement discussed in *Metropolitan Water District v. Superior Court (Cargill)* (2004) 32 Cal. 4th 491. There the issue was whether persons providing services to a CalPERS contracting agency by a private company were required to be enrolled in CalPERS. The Supreme Court, applying the common law test for determining whether a person is an employee, determined that the persons were co-employees of the contracting agency and the private company, and there was no exception available to the contracting agency for failure to enroll the persons in CalPERS.

Similarly, the CalPERS precedential decision referenced in the draft report, *In the Matter of Lee Neidengard*, Precedential Dec. No. 05-01, is factually distinguishable. That decision involved an application for purchase of service credit by a person performing services for a contracting agency

ostensibly as an independent contractor. The contracting agency was seeking to deny retirement benefits on the ground that the person was not an employee. The situation of the Water Authority, the WCGA, and the employees performing the services at the garden is different from those addressed in *Cargill and Neidengard*.

Under the service arrangement, the Water Authority, a contracting agency, provides services (which benefit the Water Authority) to another public agency that has no employees and is not a contracting agency. The employees in question are enrolled in CalPERS as Water Authority employees. Although the WCGA reimburses the Water Authority for the cost of the Water Authority providing the relevant services, including the cost of payments the Water Authority makes to CalPERS because of the employees providing the operation and maintenance services, this reimbursement does not change the conclusion that the persons are employees of the Water Authority and were properly enrolled in CalPERS as such.

The draft report appears to be premised on the mistaken assumption that a joint powers agency must have employees. But, from its inception, the WCGA has never had any employees of its own. Rather, as authorized by law, it has contracted with one of its constituent member public agencies to provide operation and maintenance services at the garden through employees of the constituent member agency. These people were enrolled in CalPERS, first as employees of the Otay Water District, then as employees of the Water Authority, and now as employees of the Community College District.

A copy of the 2003 service agreement, including all of its attachments, between the Water Authority and the WCGA is attached. The Water Authority is prepared to submit additional evidence and legal authority that the employees in question were Water Authority employees and properly enrolled as such in CalPERS, including without limitation employment agreements, employment records, payroll records, and other documents as may be necessary for a proper CalPERS determination.

November 8, 2011

| | |
|--|--|
| <p>Recommendation:</p> <p>The Authority should only enroll eligible Authority employees into CalPERS membership.</p> <p>The Authority should work with CalPERS CASD to assess the impact of this membership issue and determine what adjustments are needed.</p> | <p>The Water Authority has properly enrolled the Water Authority employees hired pursuant to the Water Authority's obligations under its contract with the Water Conservation Garden. The Water Authority disagrees that it has improperly reported payments to CalPERS. CalPERS appears to be placing undue reliance on contract provisions that gave the WCGA board of directors the ability to determine what the garden would look like, its hours of operation, the services provided to the public, appropriate staffing levels, and other general performance criteria appropriate for a public educational and recreational facility. In doing so, CalPERS appears to ignore the plain language of the applicable contracts. Further, it appears to ignore applicable law permitting public agencies to contract for services with other public agencies. Finally, CalPERS provides no practical solution particularly to the employees who are already enrolled and vested as members of CalPERS.</p> <p>CalPERS should amend its final report to delete Finding 6 and the corresponding recommendations.</p> |
|--|--|

The Water Authority's management and legal counsel are prepared to meet with you and your staff to further discuss the report and these responses. We appreciate the assistance and cooperation that your staff has provided during this public agency review. If you require further information from the Water Authority, or would like to schedule a meeting please contact Rod Greek, Controller, 858-522-6679, rgreek@sdca.org, or me, 858-522-6791, dhentschke@sdca.org.

Sincerely,



Daniel S. Hentschke
General Counsel

Enclosure

cc: Maureen A. Stapleton, General Manager
Sandra Kerl, Deputy General Manager
Rod Greek, Controller