

Office of Audit Services



Public Agency Review

San Francisco Bay Area Rapid Transit District

Employer Code: 0393
CalPERS ID: 1135793148
Job Number: P11-018

April 2014



California Public Employees' Retirement System
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April 18, 2014

Employer Code: 0393
CalPERS ID: 1135793148
Job Number: P11-018

San Francisco Bay Area Rapid Transit District
Grace Crunican, General Manager
300 Lakeside Drive, 20th Floor
Oakland, CA 94612-3540

Dear Ms. Crunican:

Enclosed is our final report on the results of the public agency review completed for the San Francisco Bay Area Rapid Transit District (Agency). Your written response, included as an appendix to the report, indicates agreement with the issues noted in the report except for Finding 2A. We appreciate the additional information regarding Finding 2A that you provided in your response; however, after consideration of this information, our recommendation remains as stated in the report.

In accordance with our resolution policy, we have referred the issues identified in the report to the appropriate divisions at CalPERS. Please work with these divisions to address the recommendations specified in our report. It was our pleasure to work with your Agency 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: Board of Directors, San Francisco Bay Area Rapid Transit District
Matthew Burrow, General Counsel, BART
Scott Schroeder, Controller-Treasurer, BART
Risk and Audit Committee Members, CalPERS
Gina M. Ratto, Interim General Counsel, CalPERS
Karen DeFrank, Chief, CASD, CalPERS
Anthony Suine, Chief, BNSD, CalPERS

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

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SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

RESULTS IN BRIEF

The primary objective of our review was to determine whether San Francisco Bay Area Rapid Transit District (Agency) complied with applicable sections of the California Government Code, 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 during the review based on our sample testing. Details are noted in the Results section beginning on page two of this report.

- Pay schedules did not meet all the requirements of the CCR.
- Reported compensation did not always meet the criteria for special compensation.
- Certain special compensation was incorrectly reported.
- Holiday Pay was not reported as required.
- Employer Paid Member Contributions (EPMC) was not converted in compliance with the Agency's contract amendment.
- Eligible temporary and part-time employees were not enrolled into membership.
- Retired annuitants were not reinstated as required.
- An elected official was erroneously enrolled.

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

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

SCOPE

The Agency contracted with CalPERS effective December 1, 1958 to provide retirement benefits for local miscellaneous employees. The contract was amended effective July 1, 1976 to include retirement benefits for local safety members. By way of the Agency's contract with CalPERS, the Agency agreed to be bound by the terms of the contract and by the Public Employees' Retirement Law (PERL). The Agency also agreed to make its employees members of CalPERS subject to all provisions of the PERL.

As part of the Board approved plan for fiscal year 2011/2012, the OAS reviewed the Agency's payroll reporting and member enrollment processes as these processes relate to the Agency's retirement contract with CalPERS. The review period was limited to the examination of sampled records and processes from January 1, 2009 through December 31, 2011. The on-site fieldwork for this review was conducted from March 12, 2012 through March 16, 2012. The review objectives and a summary of the procedures performed are listed in Appendix A.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

OFFICE OF AUDIT SERVICES REVIEW RESULTS

1: Pay Schedules did not meet all the requirements of the CCR.

Condition:

The Agency did not identify position titles on its pay schedules. Additionally, the Agency's pay schedules for three employee groups referenced another document in lieu of disclosing the payrate. Payrate is limited to amounts listed on a publicly available pay schedule that identifies the position title for every employee position and does not reference another document in lieu of disclosing the payrate.

Recommendation:

The Agency should ensure its pay schedules meet all the CCR requirements.

The Agency should work with CalPERS Customer Account Services Division (CASD) to make any necessary adjustments to active and retired member accounts pursuant to Government Code section 20160.

Criteria:

Government Codes: § 20160, § 20636 (a), § 20636 (b)(1), § 20636 (d)
CCR: § 570.5

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

2: Reported compensation did not always meet the criteria for special compensation.

Condition:

Reportable special compensation is exclusively listed and defined in CCR section 571. Reportable special compensation is required to be contained in a written labor policy or agreement, available to all members in the group or class, part of normally required duties, performed during normal hours of employment, paid periodically as earned, historically consistent with prior payments for the job classification, not paid exclusively in the final compensation period, and not final settlement pay.

- A. The Agency incorrectly reported management incentive pay for Board appointed officers and executive managers reporting directly to the General Manager. For example, an individual, who reports directly to the General Manager, received management incentive pay in the amount of \$21,800 annually while all other executive managers in the same group or class received \$4,800 annually. Although the Agency states that management incentive pay meets the criteria for special compensation, OAS noted the Agency's employment agreement did not indicate the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation.
- B. The Agency incorrectly reported range master pay for one employee. Range master pay did not qualify as compensation earnable because it was not contained in a written labor policy or agreement.

Range master pay is not included in the Memoranda of Understanding (MOU) for the BART Police Managers' Association (BPMA) and the BART Police Officers' Association (BPOA). However, the MOUs give the Chief of Police the authority to approve additional special assignment pays. Compensation earnable is only reportable if it is specifically contained in a written labor policy or agreement that has been duly approved and adopted by an employer's governing body in accordance with requirements of applicable meeting laws.

- C. The Agency incorrectly reported vacation and floating holidays. The Agency allows employees in the BPOA group to forfeit vacation and floating holidays for pay after completion of 20 years of service. The Agency reported this increase for one employee as longevity and vacation step pay.

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Additional vacation and floating holiday compensation does not qualify as special compensation pursuant to CCR section 571.

- D. The Agency incorrectly reported standby, crew office, and exterior car cleaner pay as special compensation. These items are not included in the list that identifies and defines special compensation in the CCR. As a result these items should not be reported to CalPERS.

Recommendation:

The Agency should work with CASD to ensure all items reported as special compensation meet the definition of special compensation and are contained in a written labor policy or agreement.

The Agency should work with CASD to determine the impact of this erroneous reporting and make the necessary adjustments to active and retired member accounts pursuant to Government Code section 20160.

Criteria:

Government Codes: § 20160, § 20636 (a), § 20636 (c)(1), § 20636 (c)(2)
CCR: § 571 (a), § 571 (b), § 571 (b)(1)(F)

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3: The Agency incorrectly reported special compensation.

Condition:

The Agency reported special compensation incorrectly. Compensation earnable must be reported in accordance with CCR section 571.

- A. The Agency did not report all items of special compensation as separate entries. The MOU for the BPOA and BPMA groups combined numerous reportable and non-reportable items of special compensation under the special assignment pay and pay premium categories. Although special assignment pay and pay premiums are not exclusively listed and defined in the CCR, some of the items included within these categories may qualify as special compensation if correctly reported. To prevent inaccurate reporting, the Agency must identify each item of special compensation by reporting them as separate entries.
- B. The Agency incorrectly reported items of special compensation as base payrate and regular earnings for five employees in the BPOA and BPMA groups. Peace Officer Standard Training (POST) pay, educational incentive, and longevity pay are special compensation in accordance with CCR section 571 and must be reported separately from base payrate and regular earnings.

Recommendation:

The Agency should correctly report special compensation and discontinue reporting special compensation as base payrate and regular earnings.

The Agency should work with CASD to determine the impact of this erroneous reporting and make any necessary adjustments to active and retired member accounts pursuant to Government Code section 20160.

Criteria:

Government Codes: § 20160, § 20636 (a), § 20636 (c)(1), § 20636 (c)(2)
CCR: § 571 (a), § 571 (b), § 571 (b)(1)(F)

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4: The Agency did not correctly report holiday pay.

Condition:

Holiday pay is defined as additional compensation for employees who are normally required to work on an approved holiday because their positions require scheduled staffing without regard to holidays. If these employees are paid over and above their normal monthly payrate for approved holidays, the additional compensation is classified as holiday pay and reportable to CalPERS as special compensation. Additionally, holiday pay is considered overtime if employees work in positions that do not require scheduled staffing for holidays.

- A. The Agency incorrectly reported eight hours of regular earnings as special compensation for employees who worked on a holiday. Specifically, the Agency incorrectly reported the compensation by reducing regular earnings by eight hours and reporting it as holiday premium pay. As a result of this incorrect reporting, the Agency under-reported regular earnings by eight hours at the straight time rate of pay and over-reported special compensation by the same of amount.
- B. The Agency incorrectly reported compensation as holiday pay for an employee in one service period tested. Because the employee did not work in a position that required scheduled staffing without regard to holidays, the compensation is not reportable. Eight hours of holiday premium pay, at the half-time rate of pay, were erroneously reported as special compensation. Additionally, eight hours of regular earnings were incorrectly reported as special compensation at the straight time rate of pay as noted above.
- C. The Agency did not report holiday pay for two employees who worked in positions that required staffing without regard for holidays in the one pay period tested.

Recommendation:

The Agency should report regular earnings separate from special compensation.

The Agency should report holiday pay as special compensation when the pay meets conditions for reporting, and should also stop reporting holiday pay for employees who are not normally required to work on approved holidays.

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The Agency should work with CASD to determine the impact of this erroneous reporting and make the necessary adjustments to active and retired member accounts pursuant to Government Code section 20160.

Criteria:

Government Codes: § 20160, § 20636 (a), § 20636 (c)(1), § 20636 (c)(2)
CCR: § 571 (a), § 571 (b)

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5: The Agency did not convert EPMC to payrate in accordance with its contract provision.

Condition:

The Agency did not convert EPMC of seven percent to payrate in the final compensation period on behalf of an employee. The Agency elected an optional contract provision for certain employee groups that allow conversion of EPMC to payrate in the final compensation period. Subsequent to the on-site fieldwork, the Agency made the retroactive adjustment to convert the EPMC to payrate in the final compensation period for this employee.

Recommendation:

The Agency stated it made the retroactive adjustment for the employee. The Agency should also review the final compensation reported to CalPERS for the other employees within the BPMA and BPOA to ensure correct conversion of EPMC and identify any necessary adjustments.

Criteria:

Government Codes: § 20160, § 20692

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6: The Agency did not enroll eligible temporary/part-time employees into membership timely.

Condition:

Employees who work 1,000 hours within a fiscal year shall be enrolled into membership effective not later than the first day of the first pay period of the month following the month in which 1,000 hours of service were completed. Additionally, employees who have previous CalPERS membership are required to be immediately enrolled upon the first day of rendering services to the Agency.

- A. The Agency did not enroll temporary/part-time employees with prior membership. The Agency hired two employees through a temporary employment agency. Both had prior membership with CalPERS. As a result, these employees are required to be enrolled immediately with the Agency.
- B. The Agency did not enroll an employee, hired through a temporary agency, who worked more than 1,000 hours. The part-time employee was compensated for 1,767 hours in fiscal year 2010/2011, and met the membership eligibility requirement in the service period ending January 30, 2011.
- C. The Agency did not enroll an employee hired to work full-time for a period greater than six months. The employee was also incorrectly classified as an independent contractor. OAS determined the employee was in an employee/employer relationship with the Agency. The employment contract required this employee to work an average of 37.5 hours per week for more than six months in fiscal year 2008/2009. Therefore, this employee should have been enrolled into CalPERS membership effective March 18, 2009.

The employee was hired to provide group travel and administrative support services for the Capital Corridor Joint Powers Authority (CCJPA). The Agency is the managing partner of the CCJPA and provides all necessary administrative support. OAS determined that this employee worked for the Agency in an employee/employer relationship based on the following factors:

- An employee initially performed the group travel reservation program.
- The Agency determines the hours of work based on the needs of group travel.
- The employee is paid monthly.
- The employee submits a monthly timecard and is paid an hourly rate.

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- The individual was previously a temporary employee of the Agency.
- The Agency provided the employee with office space, equipment, stationery, and other Agency resources.
- Either the employee or the Agency can terminate the employment upon 15 days with prior written notice.
- The employee was required to do work that cannot be subcontracted out.

For the purposes of the PERL and for the programs administered by the Board of Administration of CalPERS (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 a precedential decision, *In the Matter of Lee Neidengard*, Precedential Dec. No. 05-01, effective April 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:

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

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Recommendation:

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

The Agency should also review the membership status of all temporary/part-time employees and enroll those that had previous membership with CalPERS.

The Agency should monitor the hours worked by temporary/part-time employees to ensure the employees are enrolled when membership eligibility requirements are met.

The Agency should work with CASD to assess the impact of these membership requirement issues and determine what adjustments, if any, are needed pursuant to Government Code section 20160.

Criteria:

Government Codes: § 20028 (b), § 20044, § 20160, § 20305 (a), § 20305 (B), § 20505

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

7: The Agency did not reinstate retired annuitants upon the retirees exceeding the allowable threshold.

Condition:

The Agency did not reinstate two CalPERS retirees hired through a temporary employment agency when the 960-hour threshold was exceeded in a fiscal year. Specifically, we noted the following:

- One retired annuitant retired on October 19, 2002 and worked 974 hours in the 2010/2011. The retired annuitant exceeded the 960-hour threshold in the pay period ending December 26, 2010 and was not reinstated.
- A second retired annuitant retired on December 16, 2007 and worked 965 hours in the 2010/2011 fiscal year. The retired annuitant exceeded the 960-hour threshold in the pay period ending April 17, 2011 and was not reinstated.

OAS identified a similar finding in its prior review of the Agency, dated June 2004, when the Agency did not review the hours worked by all retired annuitants and did not reinstate those that exceeded the 960-hour threshold.

Recommendation:

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

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

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

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

Criteria:

Government Codes: § 20160, § 21224 (a)

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8: The Agency incorrectly enrolled an ineligible elected official into membership.

Condition:

The Agency enrolled an ineligible elected official who was excluded from membership by a statutory exclusion in the Public Utilities Code section 99158. The Public Utilities Code specifically states, "A transit District may not establish or contribute to a pension or retirement benefit plan or purchase an annuity for any member of its governing board who first served as a member of the governing board after January 1, 1989." The ineligible elected official was enrolled in CalPERS optional membership subsequent to the effective date of the exclusion on August 27, 1991, and received 16.315 years of service credit to which he was not entitled. The Agency discontinued reporting contributions on behalf of this individual when it was brought to their attention that the employee may not qualify for optional CalPERS membership.

In addition, although membership eligibility requirements were not met, the elected official purchased five years of Additional Retirement Service Credit (ARSC). In order for a member to be eligible to purchase ARSC, the member must complete at least five years of credited CalPERS service.

As previously stated, the elected official mentioned above was not entitled to membership for the 16.315 years served as a board member. Therefore, because five years of service were not completed, the elected official was not eligible to purchase ARSC.

Recommendation:

The Agency should ensure that only eligible optional members are enrolled into CalPERS membership and reported to CalPERS.

The Agency should work with CASD to assess the impact of these membership requirement issues and determine what adjustments, if any, are needed pursuant to Government Code section 20160.

Criteria:

Government Code: § 20160
Public Utilities Code: § 99158

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

CONCLUSION

OAS limited this review to the areas specified in the scope section of this report and in the objectives as outlined in Appendix A. OAS limited the test of transactions to employee samples selected from the Agency'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. 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, California Code of Regulations.

Respectfully submitted,

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

Staff: Cheryl Dietz, CPA, Assistant Division Chief
Michael Dutil, CIA, CRMA, Manager
Diana Thomas, CIA, CIDA, Manager
Alan Feblowitz, CFE, Manager
Nuntawan Camyre, Auditor
Chris Wall, Auditor
Edward Fama, Auditor

**SAN FRANCISCO BAY AREA RAPID TRANSIT
DISTRICT**

APPENDIX A

OBJECTIVES

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

OBJECTIVES

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

- Whether the Agency complied with applicable sections of the California Government Code and Title 2 of the California Code of Regulations.
- Whether prescribed reporting and enrollment procedures as they relate to the Agency's retirement contract with CalPERS were followed.

This review covers the period of January 1, 2009 through December 31, 2011. This review did not include an assessment as to whether the agency is a "public agency," and expresses no opinion or finding with respect to whether the Agency is a public agency or whether its employees are employed by a public agency.

SUMMARY

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
 - Board of Director minutes and Board of Director resolutions
 - Agency written labor policies and agreements
 - Agency salary, wage and benefit agreements including applicable resolutions
 - Agency personnel records and employee hours worked records
 - Agency payroll information including Summary Reports and CalPERS listings
 - Other documents used to specify payrate, special compensation, and benefits for all employees
 - Agency ordinances as necessary
 - Various other documents as necessary
- ✓ 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

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

Agency's governing body in accordance with requirements of applicable public meeting laws.

- ✓ Reviewed CalPERS listing 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 enrollment practices for retired annuitants to determine if retirees were lawfully employed and reinstated when 960 hours were worked in a fiscal year.
- ✓ 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 entities to determine if the Agency shared employees with an affiliated entity and if the employees were CalPERS members and whether their earnings were reported by the Agency or by the affiliated entity.
- ✓ Reviewed the Agency's calculation and reporting of unused sick leave balances, if contracted to provide for additional service credits for unused sick leave.

**SAN FRANCISCO BAY AREA RAPID TRANSIT
DISTRICT**

APPENDIX B

AGENCY'S WRITTEN RESPONSE

NOTE: The names of individuals mentioned in the Agency's response were intentionally omitted from this appendix.



SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

300 Lakeside Drive, P.O. Box 12688
Oakland, CA 94604-2688
(510) 464-6000

2013

December 13, 2013

Tom Radulovich
PRESIDENT

Joel Keller
VICE PRESIDENT

Grace Crunican
GENERAL MANAGER

VIA USPS AND FACSIMILE – (916) 795-4023

DIRECTORS

Gail Murray
1ST DISTRICT

Joel Keller
2ND DISTRICT

Rebecca Saltzman
3RD DISTRICT

Robert Raburn
4TH DISTRICT

John McPartland
5TH DISTRICT

Thomas M. Blalock, P.E.
6TH DISTRICT

Zakhary Mallett
7TH DISTRICT

James Fang
8TH DISTRICT

Tom Radulovich
9TH DISTRICT

California Public Employees' Retirement System
400 "Q" Street
Sacramento, CA 95811
Attention: Margaret Junker, Chief
Office of Audit Services

Re: Response to Draft Public Agency Review Received under Cover Letter dated October 4, 2013

Dear Ms. Junker:

The San Francisco Bay Area Rapid Transit District ("District") is in receipt of the Office of Audit Service's (OAS) October 2013 Draft Audit Report ("Draft Report") relating to the District's contract with the California Public Employees' Retirement System ("CalPERS"). The District appreciates OAS's efforts in conducting its compliance review, as well as the opportunity to comment on the Draft Report.¹

The District agrees that there are several issues that need correction, and as detailed below, the District looks forward to working together with OAS to remedy any deficiencies in the District's compliance with its CalPERS contract. Where appropriate, we have provided additional information and articulated the basis for the District's disagreement with OAS's findings in the hopes that OAS may reconsider before issuing its final report.



FINDING'S, RECOMMENDATIONS, AND THE DISTRICT'S RESPONSE

Finding No. 1: Publically Available Pay Schedule

Pay Schedule did not meet all the requirements of the CCR.

Recommendation

The Agency should ensure its pay schedule meets all the CCR requirements. The Agency should work with CalPERS Customer Account Services Division (CASD) to make any necessary adjustment to active and retired member accounts pursuant to Government Code section 20160.

The District's Response to Finding and Recommendation No. 1

The District is currently working with CalPERS Customer Account Services Division as recommended to address these items.

Finding No. 2: Reported Compensation

Reported compensation did not always meet the criteria for special compensation.

Recommendation for Finding Nos. 2(A) - 2(C)

The Agency should work with CASD to ensure all items reported as special compensation meet the definition of special compensation and are contained in a written labor policy or agreement. The Agency should work with CASD to determine the impact of this erroneous reporting and make the necessary adjustments to active and retired member accounts to Government Code section 20160.

2A. Management Incentive Pay

Condition: *"The Agency incorrectly reported management incentive pay for Board appointed officers and executive managers reporting directly to the General Manager. The Agency's written labor policies did not indicate the provision for payment, including but not limited to, eligibility for and amount of the special compensation listed as management incentive pay.*

The Deputy General Manager, who reports directly to the General Manager, received management incentive pay in the amount of \$21,800 annually while all other executive managers in same the group or class received \$4,800 annually."

The District's Response to Finding and Recommendation No. 2A

As of March 2012, the active Board Appointees no longer receive Management Incentive Pay as a separate element of compensation. As of May 2012, all Executive Managers are eligible for the same amount of Management Incentive Pay.

The District will work with CalPERS Customer Account Services Division to address any outstanding issues regarding Management Incentive Pay on a prospective basis. However, the District respectfully disputes any retroactive adjustments that may impact retired employees because, as discussed below, the District diligently sought, and obtained, CalPERS' approval of the Management Incentive Pay Program. The District implemented and administered a program for Board Appointees and, subsequently, Executive Managers that was consistent with the policy that CalPERS approved. The District and its employees reasonably relied on CalPERS' prior approval of the Management Incentive Pay Program and any retroactive adjustment would unjustly impact those employees who have already retired.

In 2001, the District diligently worked with CalPERS' Actuarial & Employer Services Division to develop a Management Incentive Pay Program for Board Appointees that qualified the pay as special compensation. To ensure the pay met the criteria for special compensation, the District met with CalPERS staff in the Actuarial and Services Division, incorporated CalPERS' suggestions, and submitted its Management Incentive Pay Policy for Board Appointees to CalPERS for review and approval in 2001. (Letter from _____ to _____ Actuarial & Employer Services Division, dated August 20, 2001; Letter from _____ to _____ CalPERS Actuarial & Services Division, dated November 17, 2001). As a result of that process, the District reasonably understood its program met the special compensation criteria and relied on CalPERS' approval in its subsequent implementation and administration of its program for Board Appointees and Executive Managers.

The District respectfully disputes CalPERS' finding that Management Incentive Pay does not meet the criteria for special compensation as defined in CCR 571. The Management Incentive Pay for Board Appointees and Executive Managers was contained in a written labor policy or agreement, which reflect the basis for eligibility and amounts due during the audit period. As noted above, CalPERS reviewed and approved the terms and conditions of the Management Incentive Pay policy. The District's General Manager, pursuant to the General Manager's statutory authority to administer the District's personnel system, implemented the policy governing Management Incentive Pay for executive managers in a form that modeled the policy that CalPERS approved. (See, e.g. Payroll Policy Management Incentive Pay – Executive Managers Reporting Directly to the

General Manager, 1/1/09) Finally, the Management Incentive Pay policies for Board Appointees and Executive Managers are public records, have an effective date, are retained for not less than five years, and have always been immediately accessible and available for public review.

Additionally, the Management Incentive Pay was a term of the individual employment agreements and amendments of the Board Appointees and Executive Managers. Each of the agreements were duly approved and adopted by the District's Board in accordance with public meeting requirements, were listed as agenda items and adopted in open session. Each of the Board Appointee and Executive Manager agreements and amendments identify the title and position of each Board Appointee and Executive Manager, states the amount of incentive pay, contains an effective date, and remains available for public inspection.

The District also disputes OAS's findings that the District's policies do not adequately indicate the provisions for payment and improperly allow for differing awards of incentive pay. The provisions for payment are clearly set forth in the Management Incentive Pay policies and individual employment agreements and are the same criteria that CalPERS approved. The Management Incentive Pay policy, awards Management Incentive Pay to Board appointed officers "due to their unique knowledge, skills and abilities required in the exercise of their duties." CalPERS deemed this criteria to be adequate when it approved the policy in 2001.

The eligibility provisions for Management Incentive Pay are also consistent with the provisions that were set forth in the policy that CalPERS approved. The Management Incentive Pay policy specifies the amount of incentive pay that each Board Appointee and Executive Manager is to receive. The policy for Board Appointees provides that the General Manager is eligible for a higher amount of Management Incentive Pay than the other Board Appointees. CalPERS never advised or required that each Board Appointee be eligible for the same amount of Management Incentive Pay. Nor did CalPERS require that the District award pay pursuant to a specific formula. The policy for Executive Managers, modeled the Board Appointee policy, specifies the amounts that each Executive Manager will receive and also provides that certain executive managers, such as the Deputy General Manager, will receive a higher level of Management Incentive Pay than the other Executive Managers.

Since 2001, the District has administered its Management Incentive Pay Policy for Board Appointees and Executive Managers pursuant to terms and conditions that CalPERS approved. The District and its employees reasonably relied on CalPERS' approval. For these reasons, the District stands ready to work with CalPERS Customer Account Services Division to address any outstanding issues regarding Management Incentive Pay on a prospective basis; however, the

District respectfully disputes any retroactive adjustments that may impact retired employees or those employees in their final compensation period.

2B. Range Master Pay

Condition: The Agency incorrectly reported range master pay for one sampled employee. Range master pay did not qualify as compensation earnable because it was not contained in a written labor policy or agreement.

The District's Response to Finding and Recommendation No. 2B

The District will work with CalPERS Customer Account Services Division as recommended to address these items.

2C. Vacation & Holidays for Longevity Pay

Condition: The Agency incorrectly reported vacation and floating holidays.

The District's Response to Finding and Recommendation No. 2C

The District will work with CalPERS Customer Account Services Division as recommended to address these items.

2D. Standby Pay

Condition: The Agency incorrectly reported standby, crew office, and exterior car cleaner pay as special compensation.

Recommendation: The Agency should work with CASD to ensure all items reported as special compensation meet the definition of special compensation and are contained in a written labor policy or agreement.

The Agency should work with CASD to determine the impact of this erroneous reporting and make the necessary adjustments to active and retired member accounts pursuant to Government Code section 20160.

The District's Response to Finding and Recommendation No. 2C

The District will work with CalPERS Customer Account Services Division as recommended to address these items.

Finding No. 3: Special Compensation Reporting

The Agency incorrectly reported special compensation.

Recommendation

The Agency should correctly report special compensation and discontinue reporting special compensation as base payrate and regular earnings. The Agency should work with CASD to determine the impact of this erroneous reporting and make any necessary adjustments to active and retired member accounts pursuant to Government Code section 20160.

The District's Response to Finding and Recommendation No. 3

The District will work with CalPERS Customer Account Services Division as recommended to address these items.

Finding No. 4: Holiday Pay

The Agency did not correctly report holiday pay.

Recommendation:

The Agency should report holiday pay as special compensation when the pay meets conditions for reporting, and should also stop reporting holiday pay for employees who are not normally required to work on approved holidays. The Agency should work with CASD to determine the impact of this erroneous reporting and make the necessary adjustments to active and retired member accounts pursuant to Government Code section 20160.

The District's Response to Finding and Recommendation No. 4

The District will work with CalPERS Customer Account Services Division as recommended to address these items.

Finding No. 5: Employer Paid Member Contributions

The Agency did not convert EPMC to payrate in accordance with its contract provision.

Recommendation

The Agency stated it made the retroactive adjustment for the sampled employee. The Agency should also review the final compensation reported to CalPERS for the other

employees within the BPMA and BPOA to ensure correct conversion of EPMC and identify any necessary adjustments.

The District's Response to Finding and Recommendation No. 5

The recommendation has been implemented. The District found that the conversion of EPMC was applied correctly to the applicable BPMA and BPOA employees.

Finding No. 6: Membership Temporary/Part-Time Employees

The Agency did not enroll eligible temporary/part-time employees into membership timely.

Recommendation

The Agency should ensure that common law employees are enrolled into membership and reported to CalPERS. The Agency should also review the membership status of all temporary/part-time employees and enroll those that had previous membership with CalPERS. The Agency should monitor the hours worked by temporary/part-time employees to ensure the employees are enrolled when membership eligibility requirements are met. The Agency should work with CASD to assess the impact of these membership requirement issues and determine what adjustments, if any, are needed pursuant to Government Code section 20160.

The District's Response to Finding and Recommendation No. 6

The District is implementing measures to identify common law employees and enroll those who are eligible.

The District has implemented measures to review the CalPERS membership status of temporary/part-time employees and enroll those who are eligible.

The District has implemented measures to ensure that the hours worked by temporary/part-time employees are closely monitored for membership eligibility.

The District will work with CalPERS Customer Account Services Division as recommended to address these items.

Finding No. 7: Retired Annuitants

The Agency did not reinstate retired annuitants upon the retirees exceeding the allowable threshold.

Recommendation

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

The District's Response to Finding and Recommendation No. 7

The District has implemented measures to ensure that the hours of CalPERS retirees hired through a temporary employment agency are closely monitored so as not to exceed the allowable 960-hour threshold. The District will work with CalPERS Benefits Services Division as recommended to address these items.

Finding No. 8: Elected Official Membership

The Agency incorrectly enrolled an ineligible elected official into membership.

Recommendation

The Agency should ensure that only eligible optional members are enrolled into CalPERS membership and reported to CalPERS. The Agency should work with CASD to assess the impact of these membership requirement issues and determine what adjustments, if any, are needed pursuant to Government Code section 20160.

The District's Response to Finding and Recommendation No. 8

The District agrees that it should ensure that only eligible optional members are enrolled into CalPERS membership and reported to CalPERS. It is our understanding that the elected official in question, through his own private counsel, worked with CalPERS to secure the service credit and the ARSC for the requested periods. The District has not reported any further service time for this elected official. We believe CalPERS staff is privy to the correspondence between the elected official's private counsel and its staff on this issue. The District is willing to cooperate and work with CASD to assess the impact of these issues in the future.

CONCLUSION

Thank you once again for the opportunity to provide a response to the draft report. As you noted in your opening letter, the District's staff has worked hard to assist and cooperate with OAS during this audit process. Please contact me if we can provide you with any additional information.

Sincerely,

A handwritten signature in cursive script, appearing to read "Grace Crunican".

Grace Crunican
General Manager

cc: Matthew Burrows, General Counsel, BART
Scott Schroeder, Controller-Treasurer, BART
Carter Mau, Assistant General Manager, BART
Daphne Anneet, Esq.

¹ OAS granted the District an extension of the response deadline to December 13, 2013.