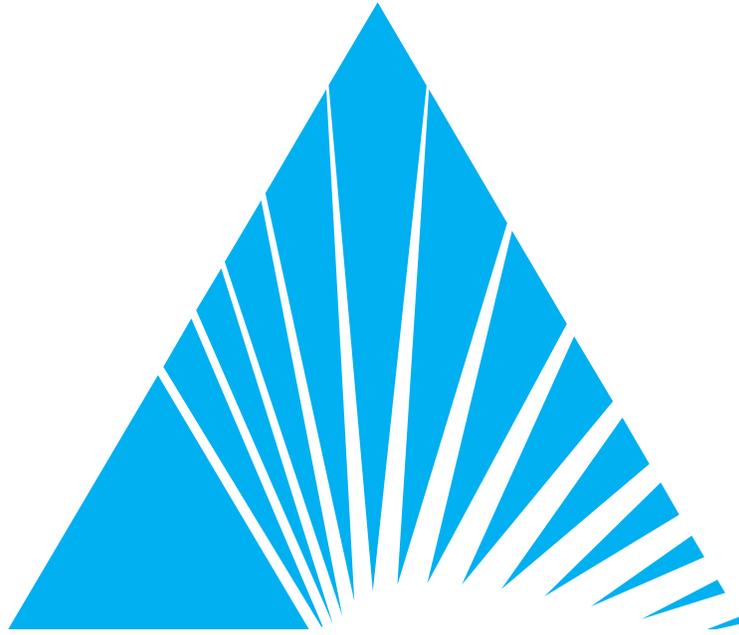


# **Office of Audit Services**



# **CalPERS**

## **Public Agency Review**

## **City of Laguna Niguel**

**CalPERS ID: 2367714625**  
**Job Number: P13-080**

**October 2014**



California Public Employees' Retirement System  
Office of Audit Services  
P.O. Box 942701  
Sacramento, CA 94229-2701  
TTY: (877) 249-7442  
(916) 795-0802 phone, (916) 795-7836 fax  
[www.calpers.ca.gov](http://www.calpers.ca.gov)

October 31, 2014

CalPERS ID: 2367714625  
Job Number: P13-080

Pamela Lawrence, Assistant City Manager  
City of Laguna Niguel  
30111 Crown Valley Parkway  
Laguna Niguel, CA 92677-2001

Dear Ms. Lawrence:

Enclosed is our final report on the results of the public agency review completed for the City of Laguna Niguel (Agency). Your written response, included as an appendix to the report, indicates agreement with the issues noted in the report except for Finding 4A. We appreciate the additional information regarding Finding 4A that you provided in your response. After consideration and analysis of this information, we have removed Finding 4A from the report. Although OAS' conclusion regarding the misclassification of the retired annuitant as an independent contractor remains unchanged, we are in agreement that the retired annuitant was not unlawfully employed for the period worked.

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 Phyllis Miller  
PHYLLIS MILLER, Acting Chief  
Office of Audit Services

Enclosure

cc: City Council Members, City of Laguna Niguel  
Risk and Audit Committee Members, CalPERS  
Matthew G. Jacobs, General Counsel, CalPERS  
Anthony Suine, Chief, BNSD, CalPERS  
Renee Ostrander, Assistant Chief, CASD, CalPERS

---

# CITY OF LAGUNA NIGUEL

---

## TABLE OF CONTENTS

<u>SUBJECT</u>	<u>PAGE</u>
Results in Brief.....	1
Scope.....	1
Office of Audit Services Review Results .....	2
1: Payrates .....	2
2: Special Compensation .....	3
3: Membership Enrollment .....	4
4: Retired Annuitant.....	5
5: Unused Sick Leave .....	6
Conclusion .....	7
Objectives .....	Appendix A
Agency Response .....	Appendix B

---

# CITY OF LAGUNA NIGUEL

---

## RESULTS IN BRIEF

The primary objective of our review was to determine whether the City of Laguna Niguel (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 findings during the review. Details are noted in the Results section beginning on page two of this report.

- Payrates were incorrectly reported.
- Special compensation was not reported as required by CCR Section 571.
- Part-time employees were not enrolled timely into CalPERS membership.
- Retired Annuitant required information was not reported.
- Unused sick leave was incorrectly reported.

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.

## SCOPE

The Agency contracted with CalPERS effective January 25, 1991 to provide retirement benefits for local miscellaneous employees. By way of the Agency's contract with CalPERS, the Agency agreed to be bound by the terms of the contract and by the Public Employees' Retirement Law (PERL). The Agency also agreed to make its employees members of CalPERS subject to all provisions of the PERL.

As part of the Board approved plan for fiscal year 2013-14, the OAS reviewed the Agency's payroll reporting and member enrollment processes as related to the Agency's retirement contract with CalPERS. The review period was limited to the examination of sampled employees, records, and pay periods from January 1, 2011 through December 31, 2013. The employees selected were not subject to the Public Employees' Pension Reform Act of 2013. The on-site fieldwork for this review was conducted from January 29 - 31, 2014. The review objectives and a summary of the procedures performed are listed in Appendix A.

---

# CITY OF LAGUNA NIGUEL

---

## OFFICE OF AUDIT SERVICES REVIEW RESULTS

1: The Agency reported incorrect payrates.

***Condition:***

- A. The Agency incorrectly reported a monthly payrate using an hourly payrate type for an employee. Specifically, the Agency reported an hourly payrate of \$4,109.99 in the pay period ending November 14, 2013. The payrate type should have been monthly.
- B. The Agency incorrectly reported payrate for a newly hired employee. The employee was hired on January 12, 2012 and the Agency incorrectly lowered the payrate to match earnings. As a result, payrate was under reported.

Payrate is an important factor in computing a member's retirement allowance because service credit and final compensation are directly related to the payrate and earnings reported for a member.

***Recommendation:***

The Agency should ensure payrate types and payrates are correctly reported.

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

---

# CITY OF LAGUNA NIGUEL

---

**2:** The Agency did not report special compensation as required by CCR Section 571.

***Condition:***

- A. The Agency did not report the monetary value of uniforms and uniform maintenance for employees who are required to wear uniforms. Specifically, the Agency provided uniforms to Recreation, Maintenance, and Lifeguard employees, but did not report the value of the purchased uniforms. CCR Section 571 requires the monetary value for the purchase, rental, and/or maintenance of required clothing, a statutory item, be reported as special compensation. However, the Agency did not report the value of the purchased uniforms as special compensation. In addition, the Agency's written labor agreement did not indicate the conditions for payment of the uniforms, including but not limited to, the eligibility for, and amount of, special compensation.
- B. The Agency did not report Holiday Pay for an employee who worked in a position that required scheduled staffing without regard to holidays. The Agency's written labor agreement states for those employees required to work on a holiday shall receive pay computed at one and one-half times the hourly rate for the number of hours actually worked. In December 2011, the employee was paid additional compensation for working eight hours on a holiday. However, the additional compensation was not reported as special compensation. Pursuant to CCR Section 571, Holiday Pay is a statutory item and should have been reported to CalPERS as special compensation.

***Recommendation:***

The Agency should report the monetary value of uniforms as special compensation and ensure the conditions for payment are contained in a written labor policy or agreement.

The Agency should ensure that Holiday Pay for all eligible employees is reported in the period earned.

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

***Criteria:***

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

---

## CITY OF LAGUNA NIGUEL

---

**3:** The Agency did not enroll part-time employees into membership when eligibility requirements were met.

***Condition:***

The Agency did not enroll three part-time employees into membership when the 1,000-hour membership requirement was met. Specifically, the employees were compensated for over 1,000 hours in fiscal year 2012-13. The three employees met membership requirements in pay period ending March 14, 2013, May 23, 2013, and June 20, 2013, respectively. As a result, the employees should have been enrolled into membership no later than the first pay period of the month following the month in which 1,000 hours of service were completed.

***Recommendation:***

The Agency should ensure part-time employees that meet membership eligibility are enrolled.

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

***Criteria:***

Government Codes: § 20125, § 20160, § 20305

---

## CITY OF LAGUNA NIGUEL

---

4: Retired annuitants' information was not reported as required.

***Condition:***

The Agency did not enroll and report the retired annuitants' hours. Specifically, OAS reviewed four retired annuitants over two fiscal years and found that the Agency did not enroll three of them into CalPERS membership or report their hours. Although the retired annuitants did not exceed 960 hours in a fiscal year, the Agency did not report all hours and compensation in my|CalPERS as required.

***Recommendation:***

The Agency should enroll and report the retired annuitant hours and earnings in my|CalPERS pursuant to Government Code Section 20121.

The Agency should work with CalPERS Benefit Services Division (BNSD) to determine the appropriate course of action and make any necessary adjustments to member accounts pursuant to Government Code Section 20160.

***Criteria:***

Government Codes: § 20120, § 20121, § 20160

---

## CITY OF LAGUNA NIGUEL

---

5: The Agency did not report the correct number of unused sick leave balance.

***Condition:***

The Agency incorrectly certified the number of unused sick leave days for three retiring members. Specifically, the Agency overstated the number of sick leave days for the retirees. In addition, the Agency did not report an unused sick leave balance for one employee. As a result, the retiring member's sick leave balance was understated. Retiring members are eligible for additional service credit for unused sick leave accrued by the member during the normal course of employment. The total number of unused sick leave hours at retirement is converted to days to determine the additional service credit.

***Recommendation:***

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

The Agency should work with CASD to make any necessary adjustments to the retired member's account pursuant to Government Code Section 20160.

***Criteria:***

Government Codes: § 20160, § 20965

---

# CITY OF LAGUNA NIGUEL

---

## 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 Phyllis Miller  
PHYLLIS MILLER, CPA, CIA  
Acting Chief, Office of Audit Services

Staff: Cheryl Dietz, CPA, Assistant Division Chief  
Alan Feblowitz, CFE, Manager  
Earl Hsu, Auditor

---

**CITY OF LAGUNA NIGUEL**

---

# **APPENDIX A**

## **OBJECTIVES**

---

# CITY OF LAGUNA NIGUEL

---

## OBJECTIVES

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

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

## 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
  - Agency Board minutes and Agency Board resolutions
  - Agency written labor policies and agreements
  - Agency salary, wage and benefit agreements including applicable resolutions
  - Agency personnel records and employee hours worked records
  - Agency payroll information including Contribution Detail Transaction History reports
  - Other documents used to specify payrate, special compensation, and benefits for employees
  - 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 Agency's governing body in accordance with requirements of applicable public meeting laws.
- ✓ Reviewed CalPERS reports to determine whether the payroll reporting elements were reported correctly.

---

## CITY OF LAGUNA NIGUEL

---

- ✓ Reviewed the Agency's enrollment practices for temporary and part-time employees to determine whether individuals met CalPERS membership requirements.
- ✓ Reviewed the Agency's employment practices for retired annuitants to determine if retirees were lawfully employed and reinstated when 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.

---

## CITY OF LAGUNA NIGUEL

---

# APPENDIX B

## AGENCY RESPONSE

Note: The Agency provided an attachment to the response that was intentionally omitted from this appendix. Additionally, the names of individuals mentioned in the Agency's response were intentionally omitted from this appendix.

September 25, 2014

**VIA FACSIMILE & OVERNIGHT MAIL**

Ms. Phyllis Miller  
California Public Employees' Retirement System  
P.O. Box 942701  
Sacramento, California 94229-2701

**Re: *Response by City of Laguna Niguel to CalPERS Draft Audit Report***  
***CalPERS ID 2367714625***  
**Client-Matter: LA013/001**

Dear Ms. Miller:

The City of Laguna Niguel ("City" or "Agency") received the August 5, 2014 draft audit report prepared by the California Public Employees' Retirement System ("CalPERS"), Office of Audit Services ("OAS").<sup>1</sup> The City has worked cooperatively with CalPERS' staff during the auditing process and intends to continue to do so. However, the City disputes some of CalPERS' findings and rationale in the draft audit report. The City's position is set forth below.<sup>2</sup>

**FINDINGS, RECOMMENDATIONS, AND AGENCY RESPONSE**

In its draft audit report, CalPERS made the following proposed findings and recommendations.

**Finding 1:** The Agency reported incorrect payrates.

***Recommendation:***

The Agency should ensure payrate types and payrates are correctly reported.

---

<sup>1</sup> The City was initially given until August 26, 2014 to respond, but CalPERS graciously granted the City an extension to September 26, 2014.

<sup>2</sup> The City believes that it is premature to file a formal appeal at this time as no final decision has been made. However, in the event that CalPERS believes that its draft audit report triggers any timeline to file a formal appeal, CalPERS may consider this response the City's formal appeal of its decision and request for an administrative appeal pursuant to Title 2, California Code of Regulations, section 555.1.

Ms. Phyllis Miller

Re: *Response by City of Laguna Niguel to CalPERS Draft Audit Report*

September 25, 2014

Page 2

The Agency should work with CalPERS Customer Account Services Division<sup>3</sup> to make any necessary adjustments to active and retired member accounts pursuant to Government Code Section 20160.

**Agency's Response to Finding and Recommendation 1:**

Finding 1 states that the City incorrectly reported an employee's payrate as an hourly payrate of \$4,109.99 instead of as a monthly payrate of \$4,109.99. Finding 1 also states that CalPERS incorrectly lowered a payrate for a newly hired employee to match earnings.

The City agrees with CalPERS' finding and recommendation. The City made clerical errors in entering an employee's payrate and reducing other employee's payrate to reflect actual earnings for an employee who was hired in the middle of the year. The City will work with appropriate CalPERS' staff to make any necessary corrections.

**Finding 2:** The Agency did not report special compensation as required by CCR Section 571.

***Recommendation:***

The Agency should report the monetary value of uniforms as special compensation and ensure the conditions for payment are contained in a written labor policy or agreement.

The Agency should ensure that Holiday Pay for all eligible employees is reported in the period earned.

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

**Agency's Response to Finding and Recommendation 2:**

Uniform Pay

The City agrees with CalPERS' finding and recommendation and will report the monetary value of all required uniforms for CalPERS "classic members." The City understands that uniform allowances are not included in compensation earnable for "new members" and therefore should not be reported to CalPERS. The City will work with appropriate CalPERS' staff to make any necessary corrections.

Holiday Pay

The City agrees with CalPERS' finding and recommendation. The City incorrectly reported hours worked on a holiday as overtime hours for an employee who was required to

---

<sup>3</sup> Sometimes referred to as CASD.

Ms. Phyllis Miller

Re: *Response by City of Laguna Niguel to CalPERS Draft Audit Report*

September 25, 2014

Page 3

work on a holiday and received pay at one and one-half times the hourly rate of pay for all hours worked. The City will work with appropriate CalPERS' staff to make any necessary corrections.

**Finding 3:** The Agency did not enroll part-time employees into membership when eligibility requirements were met.

***Recommendation:***

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

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

**City's Response to Finding and Recommendation 3:**

The City agrees with CalPERS finding that it did not enroll three employees into CalPERS membership when these employees reached 1,000 hours in a fiscal year. The City will work with CalPERS staff to make any necessary corrections and will take steps to ensure that all hours are properly recorded and that employees are enrolled in membership when they reach 1,000 hours.

**Finding 4:** Retired annuitants' employment did not comply with all Government Code requirements.

***Recommendation:***

The Agency should ensure that compensation paid to retired annuitants who perform services as interim employees does not exceed the compensation limits listed in the Government Code.

The Agency should report the hours worked by retired annuitants.

The Agency should work with CalPERS Benefit Services Division (BNSD) to determine the appropriate course of action and CASD to make any necessary adjustments to active and retired member accounts pursuant to Government Code Section 20160.

**City's Response to Finding and Recommendation 4:**

Finding 4 states that the City employed a retired annuitant as the Interim Director of Finance from July 2011 through January 2012 under conditions that did not comply with the Public Employees' Retirement Law ("PERL"). Specifically, the draft audit report concludes that 1) the individual was a common law employee and was paid an hourly wage in excess of the amount permissible under Government Code section 21224; and 2) the City paid the retired

Ms. Phyllis Miller

Re: *Response by City of Laguna Niguel to CalPERS Draft Audit Report*

September 25, 2014

Page 4

annuitant \$100 per hour, to perform services as Interim Director of Finance, but the pay schedule for the position provides a salary that is equivalent to \$77.37 per hour.

The City disputes this finding on the grounds that the appointment was made under Government Code section 21221(h) rather than section 21224 and Government Code section 21221(h) in effect during nearly the entire appointment did not prohibit the wage paid to the retired annuitant. Moreover, even under Government Code section 21224, the wage paid to the Interim Director of Finance was not impermissible under the statutory language in effect during the appointment.

The appointment was made under Government Code section 21221(h)

CalPERS erred in finding that the appointment as Interim Director of Finance was made under Government Code section 21224 instead of 21221(h). Under Government Code section 21221(h), the governing body can appoint a person to a position deemed by the agency to be of limited duration and requiring either specialized skills or during an emergency to prevent stoppage of public business.<sup>4</sup>

The City's previous Director of Finance resigned in June 2011 and it was necessary for the City to appoint someone to run and oversee the Finance Department while the City actively recruited for a permanent Director of Finance. The Interim Director of Finance was appointed by the City Council due to his specialized skills and experience to serve for a limited duration during recruitment of a permanent Director of Finance. At its June 6, 2011 meeting, the City Council authorized the City Manager to engage [REDACTED] as the Interim Director of Finance at a rate of \$100 per hour. All the essential terms of the appointment were made and approved by the City Council at an open meeting. Attached as Exhibit "A" is a copy of the June 6, 2011 City Council Agenda. Attached as Exhibit "B" is the June 6, 2011 City Council Agenda Minutes.

The Agenda Report sets forth [REDACTED] experience and skills in the area of municipal finance. Attached as Exhibit "C" is a copy of the Agenda Report concerning appointment of the Interim Director of Finance. The limited-duration of this appointment is evidenced by the actual time [REDACTED] served as Interim Director of Finance, the title he was given, and the active recruitment by the City of a permanent Director of Finance. Moreover, on the Purchase Order hiring [REDACTED], one of his duties includes assisting the City with the recruitment and selection of a new Director of Finance. A copy of the Purchase Order is attached as Exhibit "D." Job postings for a permanent Director of Finance are attached as Exhibit "E."

---

<sup>4</sup> We note that the statutory language of Government Code section 21221(h) did not contain the word "interim" or require that the appointment be "during recruitment for a permanent appointment" until January 1, 2012. However, the position in question was designated as interim and the City was actively recruiting for a permanent Director of Finance.

Ms. Phyllis Miller

Re: *Response by City of Laguna Niguel to CalPERS Draft Audit Report*

September 25, 2014

Page 5

Therefore, the appointment satisfied the elements of Government Code section 21221(h) and CalPERS should have analyzed the appointment under that section instead of Government Code section 21224.<sup>5</sup>

Statutory language of Government Code section 21221(h) during the appointment

The statute in effect from the time when the appointment was made in July 2011 until January 1, 2012 did not contain *any* language regarding the rate of pay.<sup>6</sup> Therefore, the City Council had discretion to determine the rate of pay. CalPERS' finding inserts language and meaning to the statute that was not contemplated by the legislature during the relevant time period and would improperly impose liability on the City [REDACTED] for legal obligations that did not exist at the time.

On January 1, 2012, during the final month of the appointment, Government Code section 21221(h) was amended by AB1021 to add language stating, "[t]he compensation for the interim appointment shall not exceed the maximum published pay schedule for the vacant position."<sup>7</sup> The bill analysis for AB 1021 makes clear that the change was substantive. The analysis provides, "The bill would prohibit the compensation for the interim appointment from

---

<sup>5</sup> To the extent CalPERS finds any technical defects, the doctrine of substantial compliance is applicable. "Substantial compliance" means actual compliance in respect to the substance essential to every reasonable objective of the statute, as distinguished from mere technical imperfections of form. [citations]. The essential inquiry is whether under the circumstances the policies underlying the statute were served." (*People v. Carroll* (2014) 222 Cal.App.4th 1406, 1421; *Ruiz v. Sylva* (2002) 102 Cal.App.4th 199, 211.) Here, all the essential elements of Government Code section 21221(h) were met. The City Council, at a noticed and public meeting, directed the City Manager to engage [REDACTED] as the Interim Director of Finance at a salary of \$100 per hour during recruitment of a permanent Director of Finance. The City Council has no way to act but through its employees.

<sup>6</sup> From the time of appointment until January 1, 2012, Government Code section 21221(h) stated: Upon appointment by the governing body of a contracting agency to a position deemed by the governing body to be of a limited duration and requiring specialized skills or during an emergency to prevent stoppage of public business. These appointments, in addition to any made pursuant to Section 21224, shall not exceed a total for all employers of 960 hours in any fiscal year. When an appointment is expected to, or will, exceed 960 hours in any fiscal year, the governing body shall request approval from the board to extend the temporary employment. The governing body shall present a resolution to the board requesting action to allow or disallow the employment extension. The resolution shall be presented prior to the expiration of the 960 hour maximum for the fiscal year. The appointment shall continue until notification of the board's decision is received by the governing body. The appointment shall be deemed approved if the board fails to take action within 60 days of receiving the request. Appointments under this subdivision may not exceed a total of 12 months.

<sup>7</sup> During January 2012, Government Code section 21221(h) stated: Upon interim appointment by the governing body of a contracting agency to a vacant position during recruitment for a permanent appointment and deemed by the governing body to require specialized skills or during an emergency to prevent stoppage of public business. These appointments, including any made pursuant to Section 21224 or 21229, shall not exceed a total for all employers of 960 hours in any fiscal year. *The compensation for the interim appointment shall not exceed the maximum published pay schedule for the vacant position.* The governing body of a contracting agency shall appoint a retired person only once under this subdivision. The interim appointment made under this subdivision shall not continue under Section 21224 or 21229 after the 12 months. (Emphasis added.)

Ms. Phyllis Miller

Re: *Response by City of Laguna Niguel to CalPERS Draft Audit Report*

September 25, 2014

Page 6

exceeding the maximum published pay schedule for the vacant position.”<sup>8</sup> Thus, until January 1, 2012, there was no language in Government Code section 21221(h) that restricted the amount of pay provided to interim appointments.

Later, after the appointment ended, SB1021 added language to Government Code section 21221(h) that is similar to the current language. After the changes made by SB 1021 went in effect, Government Code section 21221(h) stated:

The compensation for the interim appointment shall not exceed the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule for the vacant position divided by 173.333 to equal an hourly rate. A retired person appointed to a vacant position pursuant to this subdivision shall not receive any benefits, incentives, compensation in lieu of benefits, or any other forms of compensation in addition to the hourly rate.<sup>9</sup>

Again, this was a substantive change. The bill analysis for SB 1021 states, “[t]he bill would also prohibit an appointee from receiving any benefit, incentive, compensation in lieu of benefits, or any other form of compensation in addition to the hourly pay rate.”<sup>10</sup> There was no language that prohibited “any benefits, incentives, compensation in lieu of benefits, or any other forms of compensation in addition to the hourly rate” during January 2012. Therefore, the City was not prohibited from providing an increased hourly rate in lieu of benefits in January 2012.

Accordingly, the City was not in violation of the PERL’s restrictions on compensation for retired annuitants with respect to the Interim Director of Finance from July 2011 through January 2012 and CalPERS should strike this portion of the finding.

---

<sup>8</sup> See [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_1001-1050/ab\\_1028\\_bill\\_2011003\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1001-1050/ab_1028_bill_2011003_chaptered.pdf).

<sup>9</sup> The current language of Government Code section 21221(h) is as follows:

Upon interim appointment by the governing body of a contracting agency to a vacant position during recruitment for a permanent appointment and deemed by the governing body to require specialized skills or during an emergency to prevent stoppage of public business. A retired person shall only be appointed once to this vacant position. These appointments, including any made concurrently pursuant to Section 21224 or 21229, shall not exceed a combined total of 960 hours for all employers each fiscal year. *The compensation for the interim appointment shall not exceed the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule for the vacant position divided by 173.333 to equal an hourly rate. A retired person appointed to a vacant position pursuant to this subdivision shall not receive any benefits, incentives, compensation in lieu of benefits, or any other forms of compensation in addition to the hourly rate.* A retired annuitant appointed pursuant to this subdivision shall not work more than 960 hours each fiscal year regardless of whether he or she works for one or more employers.

<sup>10</sup> See [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201120120SB1021](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1021).

Ms. Phyllis Miller

Re: *Response by City of Laguna Niguel to CalPERS Draft Audit Report*

September 25, 2014

Page 7

Even if the appointment was made under Government Code Section 21224, CalPERS applied the wrong version of the statute

During the duration of the Interim Director of Finance's appointment, Government Code section 21224 stated in relevant part that, "the rate of pay for the employment shall not be less than the minimum, nor exceed that paid by the employer to other employees performing comparable duties." Government Code section 21224 currently provides that "[t]he compensation for the appointment shall not exceed the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule divided by 173.333 to equal an hourly rate. A retired person appointed pursuant to this section shall not receive any benefit, incentive, compensation in lieu of benefits, or other form of compensation in addition to the hourly pay rate."

The statutory language in effect during the appointment did not mandate that the rate of pay be based on a publically available pay schedule or that the hourly rate be exclusive of "any benefit, incentive, compensation in lieu of benefits, or other form of compensation in addition to the hourly pay rate." CalPERS apparently interprets the statute as if it is the current version. The draft audit report states that the City "compensated [the Interim Director of Finance] at a rate that exceeded the maximum payrate for this position" and cites the amount contained in the pay schedule as evidence. This analysis ignores the amendments to Government Code section 21224.<sup>11</sup> As noted above, the bill analysis for SB 1021 indicates that the changes regarding retiree pay limits were substantive. Therefore, even under Government Code section 21224, the City was not limited to the amount on the pay schedule in setting the Director of Finance's compensation.

Therefore, even if CalPERS believes the appointment was made under Government Code section 21224, the City was in compliance with the plain language of the statute as it existed during the appointment.

The Interim Director of Finance was an independent contractor and was not subject to the PERL's restrictions on post-retirement employment

CalPERS determined that the Interim Finance Director, [REDACTED], was a common law employee of the City. The City contends that [REDACTED] was an independent contractor rather than an employee. Independent contractors are not subject to the PERL's restrictions on post-retirement employment.<sup>12</sup>

<sup>11</sup> *Krupnick v. Duke Energy Morro Bay, L.L.C.* (2004) 115 Cal.App.4th 1026, 1030, citing *Shoemaker v. Myers* (1990) 52 Cal. 3d 1. ["We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous."]; *McAlpine v. Superior Court* (1989) 209 Cal.App.3d 1, 7 ["A statute must be construed as a whole while avoiding an interpretation which renders any of its language surplusage."]

<sup>12</sup> Circular Letter No. 200-002-14.

Ms. Phyllis Miller

Re: *Response by City of Laguna Niguel to CalPERS Draft Audit Report*

September 25, 2014

Page 8

Since the PERL does not expressly define "employee," CalPERS uses the common law. (*Metropolitan Water Dist. v. Superior Court (Cargill)* (2004) 32 Cal.4th 491; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949, cited with approval in *Cargill, supra*, 32 Cal.4th 491.) The primary consideration is whether the employer has the right to control the manner and means of accomplishing the result. However, CalPERS must also consider secondary factors.

The draft audit report does not give the proper weight to some of the factors in the common law employment test. For example, CalPERS did not give appropriate consideration to the fact that the parties believed they were entering into a principal-independent contractor relationship, not an employer-employee relationship. ██████████ set his own hours, subject only to the approval of the City Manager. ██████████ billed the City for his services on a monthly basis. Moreover, ██████████ was engaged for a finite period during the recruitment for a permanent Director of Finance and to assist the City in recruiting and selecting such an individual. He was highly skilled and given a great deal of discretion in overseeing and organizing the department. Although he reported to the City Manager, it is not inconsistent with a principal-independent contractor relationship for the independent contractor to ultimately report to the City Manager.

Based on the above, ██████████ was an independent contractor rather than a common law employee of the City, and therefore, was not subject to the PERL's post-retirement work restrictions.

#### Reporting of hours and pay rate

The City agrees with CalPERS that it must enroll current CalPERS retired annuitants in my|CalPERS and report their hours and compensation. However, the City also notes CalPERS finding that none of the retired annuitants exceeded 960 hours in a fiscal year. The City will work with CalPERS' staff to correct any errors and will ensure that the hours and compensation of retired annuitants are reported in my|CalPERS in the future.

**Finding 5:** The Agency did not report the correct number of unused sick leave balance.

#### ***Recommendation:***

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

The Agency should work with CASD to make any necessary adjustments to the retired member's account pursuant to Government Code Section 20160.

Ms. Phyllis Miller

Re: *Response by City of Laguna Niguel to CalPERS Draft Audit Report*

September 25, 2014

Page 9

**City's Response to Finding and Recommendation 5:**

The City agrees with CalPERS finding that the sick leave balances for three employees was incorrectly reported. The City will work with CalPERS' staff to correct any errors and will ensure that sick leave balances are properly reported in the future.

**CONCLUSION**

The City objects to CalPERS' findings and recommendations in the draft audit report as described above. As to the findings and recommendations not disputed by the City, the City will work with CalPERS' staff in order to make the necessary corrections.

Very truly yours,

LIEBERT CASSIDY WHITMORE



Michael D. Youril

SMB:MDY:kms