

Office of Audit Services



CalPERS

Public Agency Review

City of Downey

**CalPERS ID: 1504613451
Job Number: P14-027**

August 2015



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

August 28, 2015

CalPERS ID: 1504613451
Job Number: P14-027

Irma Youssefieh, Human Resources Director
City of Downey
P.O. Box 7016
Downey, CA 90241-7016

Dear Ms. Youssefieh:

Enclosed is our final report on the results of the public agency review completed for the City of Downey (Agency). Your written response, included as an appendix to the report, indicates agreement with the issues noted in the report except for Findings 2C, 2E, 2F, and 3B. We appreciate the additional information you provided on these findings. After consideration of the additional information, our recommendations remain as stated for Findings 2C, 2E and 2F. However, we added clarifying language to Findings 2C and 2F. In addition, based on the information provided during a telephone conference on August 18, 2015, Findings 3A and 3B were removed. We clarified Finding 3C and it is now listed in the final report as Finding 3.

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

Sincerely,

Original signed by Beliz Chappuie

BELIZ CHAPPUIE, Chief
Office of Audit Services

Enclosure

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

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RESULTS IN BRIEF

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

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

- Pay schedule did not meet all the Government Code and CCR requirements.
- Special compensation was incorrectly calculated and reported.
- The Agency incorrectly reported member contributions.
- Non-reportable compensation was reported as regular earnings.
- Eligible part-time employees were not enrolled into CalPERS membership.
- The Agency unlawfully employed retired annuitants.

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

SCOPE

The Agency contracted with CalPERS effective February, 1, 1958 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 2014-15, OAS reviewed the Agency's payroll reporting and member enrollment processes related to the Agency's retirement contract with CalPERS. The review was limited to the examination of sampled employees, records, and pay periods from July 1, 2011 through June 30, 2014. The review objectives and methodology are listed in Appendix A.

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OFFICE OF AUDIT SERVICES REVIEW RESULTS

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

Condition:

The Agency's pay schedule in effect during the pay period ended January 5, 2014 did not meet all of the Government Code and CCR. Specifically, the pay schedule was not duly approved and adopted by the employer's governing board in accordance with requirements of applicable public meetings laws.

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

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

Pay amounts reported for positions that do not comply with the payrate definition and pay schedule requirements cannot be used to calculate retirement benefits because the amounts do not meet the definition of payrate under Government Code Section 20636(b)(1). There are no exceptions included in Government Code Section 20636(b)(1). When an employer does not meet the requirements for a publicly available pay schedule, CalPERS, in its sole discretion, may determine an amount that will be considered to be payrate as detailed in CCR Section 570.5.

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Recommendation:

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

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

Criteria:

Government Codes: § 20160, § 20636

CCR: § 570.5

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2: The Agency did not correctly calculate or report special compensation as required by the CCR.

Condition:

- A. The Agency incorrectly calculated special compensation. The Agency's written labor agreement states that special compensation is calculated using base pay. However, the Agency used base pay plus additional special compensation amounts to calculate other items of special compensation. As a result, the Agency over reported special compensation to CalPERS.
- B. The Agency did not report Fair Labor Standard Act (FLSA) premium pay as special compensation. The Agency's fire shift employees work an average of 56 hours per week and receive FLSA premium pay when eligible. However, the Agency did not report the FLSA premium pay as special compensation. Government Code Section 20636(c)(6) states that premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the maximum work week or period established by FLSA are to be reported as special compensation.
- C. The Agency reported a special compensation item that did not qualify as special compensation. Specifically, the Agency's written labor agreements allow employees who have been working at the Agency for a certain period of time to receive Longevity Pay. However, the employees are only eligible to receive the Longevity Pay if they meet certain merit based standards. Longevity Pay, as defined in CCR Section 571, must be available to all employees who have been with an employer for a minimum period of time exceeding five years. Therefore, Longevity Pay as defined in the Agency's written labor agreement does not meet the definition listed in the CCR and does not qualify as special compensation.
- D. The Agency did not report the monetary value for the purchase and maintenance of uniforms for classic employees as special compensation. The Agency provided and maintained uniforms for maintenance employees that are required to wear uniforms, but did not report the monetary value for the purchase and maintenance of required clothing. Also, the Agency did not report the monetary value for the purchase of replacement uniforms for classic safety employees. The Government Code and CCR require compensation paid or the monetary value for the purchase, rental and/or maintenance of required clothing be reported for classic members as special compensation.

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- E. The Agency incorrectly reported Uniform Allowances for fire and police employee groups as a lump sum instead of when earned. The Agency reported the Uniform Allowances in the pay period ended in January 5, 2014 for fire employees and in pay period ended July 21, 2013 for police employees. Government Code Section 20636(c)(3) requires agencies to identify the pay period in which special compensation was earned.

- F. In addition, the Agency's written labor policies for maintenance employees who are required to wear uniforms did not meet all of the requirements of CCR Section 571(b)(1)(B). Specifically, the Agency's written labor policies did not include the conditions for payment of the uniforms, including but not limited to, eligibility for, and the amount of, the special compensation.

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 indicating the eligibility and amount of special compensation. Also, special compensation are available to all members in the group or class, part of normally required duties, performed during normal hours of employment, paid periodically as earned, and historically consistent with prior payments for the job classification. In addition, special compensation is not paid exclusively in the final compensation period and not final settlement pay.

Recommendation:

The Agency should correctly calculate special compensation in accordance with its written labor policies or agreements.

The Agency should report FLSA premium pay as special compensation to CalPERS.

The Agency should only report items of special compensation that qualify as stated in the Government Code and CCR.

The Agency should immediately begin reporting the monetary value of employer-provided uniforms and uniform maintenance for its classic members as special compensation.

The Agency should ensure special compensation of Uniform Allowance is reported in the pay period earned.

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The Agency should ensure its written labor policies for maintenance employees include the conditions for payment of the uniforms, including, but not limited to, eligibility for, and the amount of, the Uniform Allowance.

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

Criteria:

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

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3: The Agency incorrectly reported contributions.

Condition:

The Agency incorrectly reported the contributions on special compensation: the value of Employer Paid Member Contributions (EPMC) for classic employees in all bargaining units. Specifically, the Agency agreed to pay the entire member contributions as EPMC and also required its employees to pay the full contributions on the value of EPMC. Because the Agency agreed to pay the entire member contributions, it must then also pay the contributions on the value of EPMC. The Agency should have paid the full member contributions on the value of EPMC and remitted the contributions to CalPERS as EPMC.

Recommendation:

The Agency should ensure contributions are paid and reported to CalPERS in accordance with the Government Code.

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

Criteria:

Government Codes: § 20160, § 20630, § 20636, § 20691
CCR: § 569, § 571

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4: The Agency incorrectly reported non-reportable compensation with base payrate and regular earnings.

Condition:

The Agency incorrectly reported a lump sum retroactive adjustment of \$2,835.23 as part of base payrate and regular earnings in the pay period ended January 5, 2014. The lump sum was compensation to an employee for temporarily performing additional duties due to a supervisor vacancy. OAS found the additional compensation was not reportable because it does not meet the definition of Temporary Upgrade Pay as described in CCR Section 571. The definition states that Temporary Upgrade Pay is compensation paid to employees who are required to work in an upgraded position/classification of limited duration. Because the employee was only assigned temporary additional duties and did not work in an upgraded position, the compensation does not meet the definition of compensation earnable under Government Code Section 20636 and special compensation as provided for in CCR Section 571. As a result of adding a non-reportable compensation item to the payrate and earnings, the employee's payrate exceeded the amount listed in the approved pay schedule.

Recommendation:

The Agency should not report additional compensation unless it meets one of the definitions of special compensation listed in CCR Section 571.

The Agency should ensure payrate retroactive adjustments are correctly reported.

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

Criteria:

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

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

Condition:

- A. The Agency did not enroll a part-time employee who worked more than 1,000 hours in Fiscal Year 2013-14. Specifically, the part-time employee exceeded 1,000 hours worked in the pay period ended June 22, 2014 and was not enrolled into membership. Government Code Section 20305 requires employees who complete 1,000 hours of service within a fiscal year to be enrolled into membership effective not later than the first day of the first pay period of the month following the month in which 1,000 hours of service were completed.
- B. In addition, the Agency did not enroll an employee into CalPERS membership when eligibility requirements were met. Specifically, the employee began working for the Agency full-time on December 23, 2013; however, the Agency did not enroll the employee into CalPERS membership until January 6, 2014. The Agency should have enrolled the employee into CalPERS membership upon hire.

Recommendation:

The Agency should ensure employees are enrolled when membership eligibility requirements are met.

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

Criteria:

Government Codes: § 20044, § 20160, § 20305

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6: The Agency unlawfully employed retired annuitants.

Condition:

The Agency did not reinstate two retired annuitants who exceeded the 960-hour threshold for hours worked in Fiscal Year 2013-14. Specifically, two retired annuitants exceeded the 960-hour threshold of hours worked in the pay period ended June 23, 2014, but were not reinstated into CalPERS membership. Pursuant to Government Code Section 21224, a retired person may serve without reinstatement as long as he or she does not exceed a combined total of 960 hours worked for all employers in a fiscal year.

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.

Recommendation:

The Agency should monitor the hours worked by retired annuitants in order to limit the hours worked to 960 hours in a fiscal year, or immediately reinstate a retired annuitant into CalPERS membership if the retired annuitant's employment continues beyond the 960-hour threshold.

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.

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Criteria:

Government Codes: § 20160, § 21220, § 21224

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CONCLUSION

OAS limited this review to the areas specified in the scope section of this report and in the objectives outlined in Appendix A. The procedures performed provide reasonable, but not absolute, assurance that the Agency complied with the specific provisions of the PERL and CalPERS contract except as noted.

The findings and conclusions outlined in this report are based on information made available or otherwise obtained at the time this report was prepared. This report does not constitute a final determination in regard to the findings noted within the report. The appropriate CalPERS divisions will notify the Agency of the final determinations on the report findings and provide appeal rights, if applicable, at that time. All appeals must be made to the appropriate CalPERS division by filing a written appeal with CalPERS, in Sacramento, within 30 days of the date of the mailing of the determination letter, in accordance with Government Code Section 20134 and Sections 555-555.4, Title 2, of California Code of Regulations.

Respectfully submitted,

Original signed by Beliz Chappuie

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

Staff: Cheryl Dietz, CPA, Assistant Division Chief
Alan Feblowitz, Senior Manager
Chris Wall, Senior Manager
Jose Martinez, Lead Auditor
Earl Hsu, Auditor
Benjamin Banahene, Auditor

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APPENDIX A

OBJECTIVES

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OBJECTIVES

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

- Applicable sections of the California Government Code (Sections 20000 et seq.), California Public Employees' Pension Reform Act of 2013 (PEPRA), and Title 2 of the CCR.
- Reporting and enrollment procedures prescribed in the Agency's retirement contract with CalPERS.

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

METHODOLOGY

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

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

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

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

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APPENDIX B

AGENCY'S WRITTEN RESPONSE

July 2, 2015

VIA FACSIMILE, EMAIL, & U.S. MAIL

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

Re: *Response by City of Downey to CalPERS Draft Public Agency Review*
CalPERS ID: 1504613451
Client-Matter: DO040/055

Dear Ms. Hamilton:

The City of Downey ("City") received the draft public agency review ("Audit") prepared by the California Public Employees' Retirement System ("CalPERS"), Office of Audit Services ("OAS").¹ The City intends to work with CalPERS staff to make required corrections and amendments on a number of these items. However, the City disputes some of the findings and recommendations and requests that CalPERS reconsider its determination. The City's response and rationale is set forth below.

FINDINGS, RECOMMENDATIONS, AND CITY RESPONSE

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

Finding 1: The Agency's pay schedule did not meet all of the Government Code and California Code of Regulations ("CCR") requirements.

Recommendation:

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

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

¹ The City was granted an extension until July 2, 2015 to respond to the draft public agency review.

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City's Response to Finding and Recommendation 1:

The City Council adopted a salary schedule on February 10, 2015 that complies with Title 2, CCR section 570.5. (See http://www.downeyca.org/_blobcache/0000/0006/6130.pdf.) Under the California Code of Regulations, CalPERS must take into consideration the salary schedule adopted by the City Council in determining payrate and final compensation for City employees. (Cal. Code Regs., tit. 2, § 570.5(b)(1).)

The City also had job descriptions with salary ranges posted on its website. The salary ranges in the job descriptions were updated when a memorandum of understanding ("MOU") was entered into and approved by the City Council. In the past, when CalPERS requested information regarding employee compensation, the City provided pay tables along with the MOUs adopted by the City Council, which CalPERS accepted. Thus, the pay ranges were publicly available on the City's website and approved by the City Council, and any deficiencies under the CCR were technical.

The City will work with CalPERS staff to make any necessary corrections or adopt updated salary schedules that reflect the payrates adopted by the City Council and that were in effect at the time in question.

Finding 2: The Agency did not correctly calculate or report special compensation as required by the CCR.

Recommendation:

The Agency should correctly calculate special compensation in accordance with its written labor policies or agreements.

The Agency should report FLSA premium pay as special compensation to CalPERS.

The Agency should only report items of special compensation that qualify as stated in the Government Code and CCR.

The Agency should immediately begin reporting the monetary value of employer-provided uniforms and uniform maintenance for its classic members as special compensation.

The Agency should ensure special compensation of Uniform Allowance is reported in the pay period earned.

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

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City's Response to Finding and Recommendation 2:

2.A Special Compensation Over-reported

The City does not dispute this finding or recommendation. The City will work with CalPERS to make any necessary corrections regarding the over-reporting and to ensure that the City is properly credited for any excess contributions.

2.B Fair Labor Standards Act Pay

The City does not dispute this finding or recommendation. Fire suppression personnel are assigned to work an average of 192 hours in a 24-day work period under a 48/96 work schedule. The City has corrected its reporting practices going forward and is now reporting Fair Labor Standards Act premium pay. The City will work with appropriate CalPERS staff to make any necessary corrections.

2.C Longevity Pay

The City contends that CalPERS should accept reporting on "merit longevity pay" and allow the City to modify the merit longevity pay to comply with CalPERS' recent administrative guidance regarding the combining of longevity and merit pay.²

2 CCR section 571(a)(1) defines Longevity Pay as follows:

Longevity Pay - Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.

The plain language of "Longevity Pay" under 2 CCR section 571(a)(1) does not prohibit other conditions on the payment of Longevity Pay. Longevity Pay only provides that the period of service to receive Longevity Pay must exceed five years. It does not explicitly prohibit additional conditions on the payment. It was not clear from the regulatory language that combining Longevity Pay with a merit component such as satisfactory performance would lead to disqualification of the payment as Longevity Pay under the regulations. As CalPERS has observed, the practice of combining Longevity Pay with a merit component was a common practice among many public agencies. (CalPERS Circular Letter No. 200-064-014.) CalPERS had not previously indicated its interpretation through any administrative guidance and the City could not have been aware of CalPERS' unannounced position.

CalPERS also accepted the City's reporting of merit longevity pay for several years without objection. Given that CalPERS did not provide administrative guidance regarding the reporting of Longevity Pay until fairly recently and the fact that many agencies believed that it

² The modification will be subject to the City's obligations under the Meyers-Milias-Brown Act ("MMBA").

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was appropriate to combine longevity and merit factors in “Longevity Pay,” CalPERS should allow the City to report merit longevity pay until it can be corrected to reflect CalPERS’ recent administrative interpretation of “Longevity Pay.” At the very least, the regulation was ambiguous regarding whether “Longevity Pay” could include a merit component, as evidenced by the large number of agencies interpreting “Longevity Pay” as allowing a merit component and the issuance of the circular letter. Any ambiguity in the Public Employees’ Retirement Law (“PERL”) and CalPERS regulations delineating what constitutes “special compensation” must be interpreted in favor of the pensioners. (*Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 459.) The City and its employees should not be punished for being unaware that CalPERS would change its position.

Therefore, CalPERS should accept the reporting of merit longevity pay and allow the City to prospectively modify merit longevity pay to conform to recent CalPERS administrative guidance on a go forward basis.

2.D Monetary Value of Uniforms

The City does not dispute that it did not report the value of purchasing and maintaining uniforms for some the Maintenance, Miscellaneous, and Public Safety Auxiliary unit employees. The City plans to enter into a side letter with the affected employees to include the information required under 2 CCR section 571(b). The City will work with appropriate CalPERS staff to make any necessary corrections.

2.E Uniform Allowances Reported as Lump Sums

The City disputes that it incorrectly reported uniform allowances under the applicable labor agreements and the California Code of Regulations. Where the uniform allowance is paid to employees on an annual basis, it is earned when it is paid.

2 CCR section 571(a)(5) provides in relevant part:

Uniform Allowance - Compensation paid or the monetary value for the purchase, rental and/or maintenance of required clothing, including clothing made from specially designed protective fabrics, which is a ready substitute for personal attire the employee would otherwise have to acquire and maintain.

2 CCR section 571(b) provides that it must be paid periodically as earned. It does not provide that the uniform allowance must be paid every pay period. If the uniform allowance is paid on a specific date or in a specific pay period, that date is the date it is earned. This is especially true where the uniform allowance is not prorated where the employee separates from City service. The date for payment in the MOU is a condition to the payment of the uniform allowance and it is not earned until the condition is satisfied. This practice is consistent with 2 CCR section 571(b) and Government Code sections 20630 and 20636. CalPERS’ interpretation

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appears to be a recent and unarticulated departure from its past interpretation. In addition, CalPERS' requirement would impair a valid collective bargaining agreement. The City has binding labor agreements which provide that uniform pay is paid one time per year in a lump sum and that an employee does not earn that uniform pay unless and until the date it is paid.

Although the City disagrees with CalPERS' interpretation, the City has entered into side letters with the Fire Management and Fireman's Association to provide for a uniform allowance by pay period, effective December 22, 2014. The City entered into a similar agreement with the Police Officers' Association and the Police Management group, effective June 22, 2015. Thus, all prospective reporting will be by pay period. The City is willing to work with CalPERS to make any necessary corrections.

2.F Uniform Allowances

The finding and recommendation does not identify which unit or MOU it is referencing. However, the finding appears to be duplicative of finding 2.D and should be withdrawn.

Finding 3: The Agency incorrectly paid and reported payroll information.

Recommendation:

The Agency should submit a current resolution to CalPERS for review and approval.

The Agency should pay and report the value of EPMC as specified in the Agency's written labor policy or agreements.

The Agency should ensure contributions are correctly paid.

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

City's Response to Finding and Recommendation 3:

3.A EPMC Resolutions

The City will work with CalPERS to submit current Employer Paid Member Contributions ("EPMC") resolutions for all units.

3.B Reporting of EPMC

The City disputes this finding and recommendation. The Audit is not sufficiently clear regarding which bargaining units or employees it is referencing. As discussed below, where the City pays and reports EPMC, it pays and reports the entire member contribution. Given the City's EPMC policies, the City is unaware what reporting CalPERS is referencing and is unable

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to adequately provide a response or determine what CalPERS is requiring the City to correct. The City requests that CalPERS either withdraw the finding or provide additional information that will allow the City to provide an adequate response.

The City pays the full member contribution and reports the value of EPMC as special compensation for several employee units. For other units, or for some second tier employees within the units, the employee pays his or her entire member contribution. Based on the MOUs, for employees who have EPMC reported as special compensation, the City should be reporting the full value of EPMC as special compensation. The cost sharing under Government Code section 20516(f) does not change this result.

The Audit states that the City incorrectly reported the total member contribution as special compensation. As noted above, where the City pays EPMC, it pays and reports the entire amount. (See Maintenance Unit, Miscellaneous Unit, Fire Management, Fireman's Association, Police Management, Police Officers' Association, Public Safety Auxiliary, and Executive Management, Middle Management, Confidential/Exempt MOUs and benefits schedules. Available at:

http://www.downeyca.org/gov/hr/mous_n_reso_for_exec_mid_mgmt_conf_n_exempt_positions.asp.) Therefore, the City should be reporting the full-value of EPMC.

To the extent CalPERS' finding is stating that cost sharing under Government Code section 20516(f) has an effect on the EPMC, CalPERS does not cite any authority for such a proposition. Cost sharing under Government Code section 20516(f) is a separate mechanism and has no effect on the EPMC amount. Government Code section 20516(f) provides that the agreement is independent and is not part of the City's contract with CalPERS.

Therefore, the City correctly reported the total member contribution for those employees who receive EPMC and CalPERS should reverse the finding and recommendation.

3.C Full Contribution Amount on the Value of EPMC

The City does not dispute this finding and recommendation. To the extent that the City incorrectly required employees to pay the full value on EPMC, the City will work with CalPERS to correct any reporting errors and will ensure that employees are paying the appropriate employee and employer share under the relevant MOU.

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Finding 4: The Agency incorrectly reported non-reportable compensation with base payrate and regular earnings.

Recommendation:

The Agency should not report additional compensation unless it meets one of the definitions of special compensation listed in CCR Section 571.

The Agency should ensure payrates retroactive adjustments are currently reported.

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

City's Response to Finding and Recommendation 4:

The City does not dispute this finding. The City reported Temporary Upgrade Pay for one employee who was required to perform additional duties. The City will work with appropriate CalPERS staff to make any necessary corrections.

Finding 5: The Agency did not enroll part-time employees upon meeting CalPERS membership eligibility.

Recommendation:

The Agency should ensure employees are enrolled when membership eligibility requirements are met.

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

City's Response to Finding and Recommendation 5:

Enrolling Part-Time Employees

The City does not dispute this finding and recommendation. A part-time employee exceeded 1,000 hours in the final pay period of the year. The employee has separated from the City. The City will work with appropriate CalPERS staff to make any necessary corrections.

Late Enrollment

The City does not dispute this finding and recommendation. However, the City notes that the conditions set forth in Government Code section 20283 are not triggered because the employee was only enrolled in membership two weeks late.

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Finding 6: The Agency unlawfully employed retired annuitants.

Recommendation:

The Agency should monitor the hours worked by retired annuitants in order to limit the hours worked to 960 hours in a fiscal year, or immediately reinstate a retired annuitant into CalPERS membership if the retired annuitant's employment continues beyond the 960-hour threshold.

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.

City's Response to Finding and Recommendation 6:

The City does not dispute that two retirees exceeded 960 hours in the final pay period of the fiscal year. However, CalPERS should not reinstate the retirees because the overage was de minimis and the post-retirement employment substantially complied with the PERL and the Public Employees' Pension Reform Act ("PEPRA").

One retired annuitant inadvertently exceeded the 960 hour threshold by one hour and another exceeded the threshold by only 13.25 hours. The overage was unintentional and occurred only in the final pay period of the fiscal year. The overage occurred, in part, due to the fact that the City's pay periods did not line up with the fiscal year and certain pay periods crossed into more than one fiscal year. Given the relatively minor and unintentional overage, CalPERS should not invoke the harsh remedy of reinstatement.

The post-retirement employment substantially complied with the requirements of the PERL and PEPRA. Under the doctrine of substantial compliance, technical failures may be excused where the objective of the statute has been fulfilled. (*People v. Carroll* (2014) 222 Cal.App.4th 1406, 1421 ["The essential inquiry is whether under the circumstances the policies underlying the statute were served."]; See also *Ruiz v. Sylva* (2002) 102 Cal.App.4th 199, 211.) The post-retirement work by the retirees observed all of the post-retirement work restrictions under the PERL and PEPRA, other than the minor and unintended overage of hours identified in the Audit. Moreover, this overage occurred in the final pay period of the fiscal year. Given that the overage was only a minor and unintentional deviation from the complex restrictions set forth in the PERL and PEPRA, the post-retirement employment substantially complied with the law.

Therefore, the City requests that CalPERS not reinstate the retirees. The City will work with appropriate CalPERS staff to determine the appropriate course of action.

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CONCLUSION

The City objects to some of the findings and recommendations set forth above. The City will provide additional documentation or information required by CalPERS to assess the findings and recommendations disputed 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

Original signed by Michael D. Youril

MDY:kms