

Office of Audit Services



Public Agency Review

Fallbrook Public Utility District

CalPERS ID: 2373193306
Job Number: P14-001

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: 2373193306
Job Number: P14-001

Brian Brady, General Manager
Fallbrook Public Utility District
P.O. Box 2290
Fallbrook, CA 92088-2290

Dear Mr. Brady:

Enclosed is our final report on the results of the public agency review completed for the Fallbrook Public Utility District (Agency). Your written response, included as an appendix to the report, indicates agreement with the issues noted in the report except for Findings 5A and 5B. We appreciate the additional information that you provided in your response. After consideration of this information, we have removed Finding 5A and clarified Finding 5B which is now Finding 5. In addition, clarifying language was added to Finding 1.

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: Board of Directors, Fallbrook Public Utility District
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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FALLBROOK PUBLIC UTILITY DISTRICT

RESULTS IN BRIEF

The primary objective of our review was to determine whether the Fallbrook Public Utility District (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 of the Government Code and CCR requirements.
- Regular earnings were incorrectly reported.
- Special compensation was not reported as required.
- An eligible temporary employee was not enrolled into membership.
- Payrate was incorrectly reported.

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

SCOPE

The Agency contracted with CalPERS effective October 9, 1992 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.

This review did not include a determination as to whether the individuals reported by the Agency were Agency employees or employees of another entity, Rainbow Municipal Water District. Therefore, OAS does not express an opinion or finding with respect to whether these individuals were employees of the Agency or another entity. OAS will continue with a focused review on the employee/employer relationship of the individuals and will issue a separate report pertaining to the employee/employer status determination upon conclusion of our focused review. The review objectives and a summary of the procedures performed are listed in Appendix A.

FALLBROOK PUBLIC UTILITY DISTRICT

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, effective July 1, 2013, did not meet all of the Government Code and CCR requirements. Specifically, the pay schedule did not list all positions and payrates on one document. The pay schedule referenced another document to identify the position titles. Subsequent to the onsite fieldwork, the Agency updated the format of the pay schedule with a revised date of September 22, 2014 to include all positions and payrates on one document. The revised pay schedule was submitted to EAMD for review to ensure it meets Government Code and CCR requirements.

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). When an employer does not meet the requirements for a

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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.

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 incorrectly reported regular earnings.

Condition:

The Agency incorrectly reported regular earnings for a Utility Worker II. Although the Agency paid the employee bi-weekly regular earnings in the amount of \$1,698.40, it reported earnings of \$1,660.80. As a result, regular earnings were under reported by \$37.60.

Recommendation:

The Agency should ensure earnings 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, § 20630, § 20636

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3: The Agency incorrectly reported special compensation.

Condition:

- A. The Agency incorrectly reported Bonus Pay as special compensation. Specifically, the Agency reported \$10,000.00 in Bonus Pay for the General Manager during the pay period ending December 21, 2012. Bonus Pay was only available to the General Manager and was not available to employees in next closest group or class of employment. Therefore, Bonus Pay is not reportable special compensation.
- B. The Agency incorrectly reported Longevity Pay 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. OAS noted the Agency provided Longevity Pay for the Human Resource Administrator and an Engineering Technician II in the amounts of \$2,994.68 and \$1,900.08, respectively. 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 associated with merit does not qualify as special compensation.
- C. The Agency incorrectly reported the monetary value for uniforms as a lump sum instead of identifying the pay period in which the special compensation was earned. Government Code Section 20636 requires the Agency to identify the pay period(s) in which the special compensation was earned.
- D. The Agency's written labor agreements did not include the conditions for payment of the uniforms purchased and maintained. CCR Section 571 requires that the conditions for payment including, but not limited to, eligibility for, and amount of, the special compensation be included in a written labor policy or agreement.

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.

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Recommendation:

The Agency should stop reporting non-reportable Bonus Pay and Longevity Pay as special compensation.

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

The Agency should ensure that special compensation is reported as earned.

The Agency should ensure the conditions for payment of special compensation items are contained in a written labor policy or agreement as required by the CCR.

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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4: The Agency did not enroll an eligible temporary employee into membership.

Condition:

The Agency did not enroll a temporary employee who worked more than 1,000 hours in Fiscal Year 2012-13. Specifically, the temporary employee worked more than 1,000 hours in the pay period ending May 24, 2013, but 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.

Recommendation:

The Agency should monitor the hours worked by temporary employees to ensure employees are enrolled into membership when 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, § 20283, § 20305

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5: The Agency incorrectly reported the payrate for a retired annuitant.

Condition:

The Agency reported an incorrect payrate for a retired annuitant. Specifically, the Agency reported a monthly payrate of \$13,722.80 (the equivalent of \$79.17 per hour) for a retired annuitant who worked as a Lead Plant Operator. The Agency should have reported a payrate of \$36.54 per hour, the amount paid to the retired annuitant.

The Agency submitted documentation with its response indicating that the payrate was corrected. This information was submitted to EAMD for review.

Recommendation:

The Agency should report correct payrates to CalPERS in accordance with an approved pay schedule.

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

Criteria:

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

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CONCLUSION

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

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

Respectfully submitted,

Original signed by Beliz Chappuie

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

Staff: Cheryl Dietz, CPA, Assistant Division Chief
Diana Thomas, CIA, CIDA, Senior Manager
Terry Heffelfinger, Lead Auditor
Aileen Wong, Lead Auditor
Sean Gerardo, Auditor

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APPENDIX A

OBJECTIVES

FALLBROOK PUBLIC UTILITY DISTRICT

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."

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.

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.

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- ✓ Reviewed payrates reported to CalPERS and reconciled the payrates to Agency public salary records to determine whether base payrates reported were accurate, pursuant to publicly available pay schedules that identify the position title, payrate and time base for each position, and duly approved by the Agency's governing body in accordance with requirements of applicable public meetings laws.
- ✓ 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 calculation and reporting of unused sick leave balances, if contracted to provide for additional service credits for unused sick leave.

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APPENDIX B

AGENCY RESPONSE

NOTE: Due to the confidentiality of the documents provided with the Agency's written response, copies of the documents referred to in the Agency's written response were omitted from this Appendix. Additionally, the names of individuals mentioned in the Agency's response were intentionally omitted from this appendix.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Indian Wells
(760) 568-2611
Irvine
(949) 263-2600
Los Angeles
(213) 617-8100
Ontario
(909) 989-8584

3390 University Avenue, 5th Floor, P.O. Box 1028, Riverside, CA 92502
Phone: (951) 686-1450 | Fax: (951) 686-3083 | www.bbklaw.com

Sacramento
(916) 325-4000
San Diego
(619) 525-1300
Walnut Creek
(925) 977-3300
Washington, DC
(202) 785-0600

Isabel C. Safie
(951) 826-8309
isabel.safie@bbklaw.com

July 17, 2015

VIA CERTIFIED MAIL AND E-MAIL
YOUNG_HAMILTON@CALPERS.CA.GOV

Young Hamilton, Acting Chief
Office of Audit Services
CalPERS
P.O. Box 942701
Sacramento, CA 94229-2701

Re: Response by Fallbrook Public Utility District to June 4, 2015 Draft Audit Report

Dear Ms. Hamilton:

We submit the following on behalf of our client, Fallbrook Public Utility District (“District”). The District is in receipt of the Office of Audit Services’ (“OAS”) June 4, 2015 draft audit report (“Draft Report”) related to the District’s contract with the California Public Employees’ Retirement System (“CalPERS”). The District appreciates the efforts of OAS in performing its compliance review and the opportunity to comment on the Draft Report. Although our written response was due June 18, 2015, the District was graciously given an extension until July 17, 2015 to provide this response. We thank you for granting us this additional time to prepare our response.

As detailed below, the District does not dispute Finding 1 but we respectfully draw your attention to the fact that the District is currently in compliance with the requirements of Section 570.5. Therefore, no further action is necessary with respect to Finding 1. We respectfully request that the District’s compliance thereto be reflected in the final audit report. Further, the District accepts the conclusions noted at Finding 2, Parts A, C and D of Finding 3 and Finding 4. The District will work with designated representatives of CalPERS to make the appropriate corrections. Although the District also agrees with the conclusions drawn with respect to Part B of Finding 3 and will take the necessary steps to make the appropriate corrections, we respectfully ask that any adjustments consistent with Part B of Finding 3 be limited to the three year statute of limitations specified in Government Code Section 20164. However, we respectfully and vigorously disagree with Finding 5 as stated in detail below. It is our hope that this response will provide you with additional information that will change OAS’ determinations with respect to Finding 5. As such, we respectfully request that you review this response with



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care and that you consider revising the Draft Report as we request prior to issuing the final audit report.

FINDINGS AND THE DISTRICT'S RESPONSE

In order to facilitate your review of the District's position with respect to each of the five findings noted in the Draft Report, we have organized our comments in chronological order based on the order of the findings.

FINDING 1: THE AGENCY'S PAY SCHEDULE DID NOT MEET ALL OF THE GOVERNMENT CODE AND CCR REQUIREMENTS.

Response:

Please rest assured that the District ensures that only compensation earnable, as defined under Government Code Section 20636 and corresponding regulations, is reported to CalPERS. Although the Draft Report brought to light some minor issues with the District's reporting practices, the District's staff appreciates OAS' review of these practices as this will only improve its reporting to CalPERS. Further, please note that the District is now in compliance with the requirements of California Code of Regulations Section 570.5 ("Section 570.5"). Specifically, the District's pay schedule was approved by the Board of Directors ("Board") at their publicly held meeting on September 22, 2014. Resolution No. 4834 and the pay schedule are enclosed as Attachment A. The approved pay schedule was reviewed and approved in advance by the auditor, [REDACTED]. Given that the District became compliant with Section 570.5 *shortly after* the field audit was concluded and *prior* to when the Draft Report was issued, and currently meets the requirements of Section 570.5, we respectfully submit that no further action is warranted with respect to Finding 1. Consistent with this, we respectfully request that the District's compliance thereto be reflected in the final audit report.

FINDING 2: THE AGENCY INCORRECTLY REPORTED REGULAR EARNINGS.

Response:

The District agrees with Finding 2 and will work with designated representatives of CalPERS to make the appropriate corrections.



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FINDING 3: THE AGENCY INCORRECTLY REPORTED SPECIAL COMPENSATION.

Response:

The District agrees with Parts A, C and D of Finding 3 and will work with designated representatives of CalPERS to make the appropriate corrections.

Although the District also agrees with the conclusions drawn with respect to Part B of Finding 3 and will take the necessary steps to make the appropriate corrections, we point your attention to the three year statute of limitations reflected in Government Code Section 20164. While this pertains to payments into or out of the retirement fund, any corrections resulting from adjustments consistent with Part B of Finding 3 could result in reductions in the allowances of retirees and, therefore, payments into the retirement fund in the form of repayments of overpaid retirement allowances. Since such payments would be subject to Section 20164, we respectfully ask that any adjustments consistent with Part B of Finding 3 be limited to the three year statute of limitations which would also be consistent with the scope of the audit period.

FINDING 4: THE AGENCY DID NOT ENROLL AN ELIGIBLE TEMPORARY EMPLOYEE INTO MEMBERSHIP.

Response:

The District agrees with Finding 4 and will work with designated representatives of CalPERS to make the appropriate corrections.

FINDING 5: THE AGENCY UNLAWFULLY EMPLOYED RETIRED ANNUITANTS.

Response:

The District strongly disagrees with Finding 5. Specifically, the District did not unlawfully employ retired annuitants. First, with respect to Part B of Finding 5, the monthly payrate of \$13,722.80 reported by the District for the retired annuitant working in the Lead Plant Operator classification was a result of a clerical error. That is, this retired annuitant was not paid the foregoing amount. Rather, he was paid the monthly payrate of \$6,333.60 (the equivalent of \$36.54 per hour) which is consistent with the payrate listed in the District's pay schedule for the position of Lead Plant Operator. The foregoing is supported by the documents enclosed as Attachment B. The correction to the misstated payrate was made prior to the



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issuance of the Draft Report. Thus, we respectfully request that Part B of Finding 5 be removed from the final audit report in its entirety.

With respect to Part A of Finding 5, the District Representative was not an employee of the District and, therefore, was not subject to the retired annuitant rules set forth in the Public Employees' Retirement Law.

As noted in the Draft Report, the retired annuitant hired as the District Representative was previously employed as the District's General Manager but retired from this position on July 5, 2011. This critical position was immediately filled by the current General Manager, [REDACTED] effective July 19, 2011. The delay between the former General Manager's retirement and the commencement of [REDACTED] tenure was solely attributed to routine steps that were necessary in order for [REDACTED] to be cleared to serve as General Manager. Thus, it is not accurate to conclude that the District Representative continued to serve in the role of General Manager nor that he continued to perform the duties of the General Manager even after his retirement. As indicated in the document enclosed as Attachment C, the job description for the position of General Manager is as follows:

Under policy direction of the Board of Directors, to serve as chief executive officer of the District; to manage, plan, organize and control public utility water and wastewater programs, services and resources in accordance with short- and long-term goals, policy statements and directives; to interpret and administer policies of the Board; and to perform related work as required.

The District Representative did not make decisions, hire, fire, discipline, develop policy, authorize District payments, or perform any other function within the scope of the General Manager's duties. As such, he was not an employee of the District. Rather, he was a consultant to the District solely in an advisory position for a limited period of time and for limited purposes.

CalPERS applies the common law employment test to determine employee status for CalPERS retirement purposes.¹ Thus, in determining whether one who performs services for another is an employee the most important factor is the right to control the manner and means of accomplishing the desired result. If a service recipient has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. The reverse implication, then, is if the service recipient has no such right of control, then an employee-employer relationship cannot exist. Rather, the relationship is that between independent contractor and service recipient.

¹ See Metropolitan Water District of Southern California v. Superior Court, 32 Cal. 4th 491, 502 (2004).



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Other factors to be taken into consideration when determining employee status for CalPERS retirement purposes are: (a) whether or not the service provider is engaged in a distinct occupation or business; (b) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) who supplies the instrumentalities, tools, and the place of work for the service provider; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; and (g) whether or not the parties believe they are creating the relationship of employer-employee.²

As a preliminary matter, while not explicitly stated, the Draft Report implies that it is not possible for a former employee to hold a consultant position and be considered an independent contractor subsequent to the employee's retirement. We strongly disagree with this implication. First, the last day that the retired annuitant referenced in Part A of Finding 5 ("Retired Annuitant") served as an employee of the District was July 5, 2011 when he held a position that is not only now held by someone else but more importantly, is comprised of far broader job functions and responsibilities than the scope of services that the Retired Annuitant performed for the benefit of the District. Second, the Internal Revenue Service ("Service") has recognized that it is possible for a former employee to retire from service and return to service for the same employer in a different capacity as an independent contractor.³ The Service noted that a former retired employee returning in a consulting and advisory capacity is properly characterized as an independent contractor if the former employer will not "exercise supervision over the [individual] in the performance of his advisory services, will [not] require his compliance with detailed orders or instructions . . . there will be no established work schedule nor will it be necessary for the [individual] to obtain the employer's permission to be absent from work." Interestingly enough, it appears that in the case considered by the Service, the individual was performing consulting and advisory services with respect to duties he previously held, but was not exercising the responsibilities attendant to those duties. Rather, he was providing information pertaining to those services so that the employees performing those services would be better informed and prepared.

In the Retired Annuitant's case, he was similarly providing consulting and advisory services to the District. Further, the District did not have control over the manner and means of accomplishing the desired outcome. Subject to delivering the expected work product or deliverable, the Retired Annuitant determined the appropriate course of conduct and methods to deliver the expected services. He set his own hours and did not have an established work

² See *Tieberg v. Unemployment Ins. Bd.*, 2 Cal. 3d 943, 949 (1970).

³ See Revenue Ruling 69-647



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schedule. In fact, he worked on a very limited basis and was not expected to be available at any specified time. He conducted his consulting services outside of District facilities. More importantly, the Retired Annuitant did not possess any decision-making authority nor did he exercise any supervisory function over any District department or employee. In addition, the Retired Annuitant provided similar consulting and advisory services to other entities during the same period that he was contracted with the District to provide consulting services, including Hadronex, J-Power and the San Diego County Water Authority.

We understand that the first invoice submitted by Retired Annuitant to the District included services that were described as “Acting GM” for the very limited period from July 6, 2011 through July 19, 2011 (“Period”). As stated above, this was a brief period of time during which [REDACTED] had not yet been cleared to serve as General Manager. While the Retired Annuitant did not maintain offices at the District during the Period, he appears to have been asked to remain on standby in the event that any issues that District staff could not handle arose. However, the Retired Annuitant did not exercise any of the general manager duties during this period nor was District staff advised that the Retired Annuitant was serving in this role for the limited Period. In fact, any issues that would have been handled by the general manager during the Period were handled jointly, on a temporary basis, by the Engineering Manager and Administrative Services Manager. Further, the services that the Retired Annuitant provided starting on July 20, 2011, had nothing to do with the “Acting GM” designation since the new General Manager, [REDACTED], had begun his employment by that time.

As you are well aware, the test to determine whether an individual is an employee or an independent contractor is a balancing test. The factors identified in Finding 5 which purportedly support the determination that the Retired Annuitant was an employee of the District are most certainly not supportive of that determination. In fact, two of the cited factors – that the General Manager position was an established position shown on the District’s organizational chart and that the Retired Annuitant was the former General Manager – have nothing to do with whether the services he provided as the District Representative were those of an employee. Nor is the fact that he provided information to the Board of Directors the same as reporting directly to the Board of Directors as noted in the Draft Report. Again, he was not subject to the control of the Board of Directors nor any employee of the District and the mere fact that he provided information to the Board is not inconsistent with independent contractor status. This is just not a dispositive factor because independent contractors do and must provide information to the entity that retained their services. Instead, the factors that have been laid out in the prior paragraph are more indicative of independent contractor status than employee status.

It is also relevant for you to consider the effect of the District’s notification by e-mail dated June 8, 2012 to [REDACTED] of its agreement with the Retired Annuitant. If an issue



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existed with that arrangement, CalPERS should have advised the District and Retired Annuitant of that determination. The fact that it failed to do so led the District to the reasonable conclusion that there was no issue with the District's arrangement with the Retired Annuitant. A copy of the e-mail correspondence to [REDACTED] is enclosed as Attachment D.

For the reasons laid out above, we respectfully submit to you that the Retired Annuitant was an independent contractor rather than an employee. As such, Part A of Finding 5 is erroneous and should be excluded from the final audit report.

CONCLUSION

In closing and on the basis of the preceding, we respectfully request that CalPERS reconsider its findings and recommendations with respect to Finding 5 as discussed in detail above and that you include acknowledgments in the final audit report reflecting the District's correction of the deficiencies noted in Finding 1, Finding 2, Parts A, C and D of Finding 3 and Finding 4. We further request that you limit the correction period with respect to Part B of Finding 3 to the audit period.

We thank you for the opportunity to submit this written response and we look forward to working with OAS and CASD to ensure that the final recommendations and the implementation of said recommendations are not only appropriate but equitable.

Respectfully submitted,

Original signed by Isabel C. Safie

Isabel C. Safie
of BEST BEST & KRIEGER LLP

cc: Brian Brady, General Manager (via e-mail)
Casey Walters, Human Resources Administrator (via e-mail)