

Office of Audit Services



CalPERS

Public Agency Review

Pleasant Hill-Martinez Joint Facilities Agency

**CalPERS ID: 6102771088
Job Number: FR12-007**

February 2015



California Public Employees' Retirement System
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February 27, 2015

CalPERS ID: 6102771088
Job Number: FR12-007

Alan Shear, Assistant City Manager
Pleasant Hill-Martinez Joint Facilities Agency
525 Henrietta Street
Martinez, CA 94553

Dear Mr. Shear:

Enclosed is our final report on the results of the public agency review completed for the Pleasant Hill – Martinez Joint Facilities Agency (Agency). CalPERS received your Agency's written response to the draft report which disagreed with both original findings. A copy of your Agency's response is included as an appendix to the final report. Although CalPERS reviewed and considered your Agency's response, the information and contentions provided did not change our underlying findings.

Nevertheless, CalPERS modified the draft report to address some contentions contained in your Agency's response. To that end, CalPERS divided Finding 1 from the draft report into two findings (now included as Finding 1 and 2 in the final report) which resulted in Finding 2 of the draft report restated as Finding 3 in the final report. In the final report, Finding 1 addresses the Agency's failure to furnish necessary information and Finding 2 now addresses the Agency's change in formation and structure. In addition, we inserted an observation to the final report to address one of the contentions raised in your Agency's response.

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 Young Hamilton

YOUNG HAMILTON, Acting Chief
Office of Audit Services

Enclosure

cc: Board of Directors, Pleasant Hill – Martinez Joint Facilities Agency
Risk and Audit Committee Members, CalPERS
Matthew G. Jacobs, General Counsel, CalPERS
Anthony Suine, Interim Chief, CASD, CalPERS
Diane Alsop, Interim Chief, BNSD, CalPERS
Renee Ostrander, Assistant Chief, CASD, CalPERS

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RESULTS IN BRIEF

The California Public Employees' Retirement System (CalPERS) Office of Audit Services (OAS) previously issued its compliance review of the Pleasant Hill – Martinez Joint Facilities Agency (Agency) payroll and enrollment reporting procedures in December 2012 (Job Number P09-063). The December 2012 report did not include a determination as to whether the individuals enrolled and reported by the Agency were eligible for membership under the Agency. Consequently, OAS performed a second review to examine this issue. OAS found that the Agency did not provide certain information requested and necessary to determine the correctness of enrollment in the system, retirement benefits and the date the City of Pleasant Hill withdrew from the Agency. OAS also examined the employee/employer relationship of the seven sampled individuals reported to CalPERS by the Agency and found the Agency incorrectly enrolled and reported the seven sampled individuals. The sampled individuals were found to be common law employees of the City of Martinez (City) and not the common law employees of the Agency.

Details of the findings are noted in the Results section beginning on page three of this report.

AGENCY BACKGROUND

The Agency contracted with CalPERS effective February 1, 1983 to provide retirement benefits for local miscellaneous employees. By way of its agreement with CalPERS, the Agency agreed to be bound by the terms of its contract, and the Public Employees' Retirement Law (PERL). The Agency also agreed to make its employees members of CalPERS subject to all provisions of the PERL.

The Agency was originally established to provide services for the development and operation of shared facilities for the Cities of Pleasant Hill and Martinez. However, at the time of our review, OAS found the Agency no longer existed as originally defined. The Agency initially was governed by its own Board separate from the Cities of Pleasant Hill and Martinez. However, the arrangement subsequently changed, and the Agency is now governed by the Martinez City Council.

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

- Determining CalPERS membership eligibility for its employees.
- Enrolling employees into CalPERS upon meeting membership eligibility criteria.
- Enrolling employees in the appropriate membership category.
- Establishing the payrates for its employees.
- Approving and adopting all compensation through its governing body in accordance with requirements of applicable public meetings laws.

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- Publishing all employees' payrates in a publicly available pay schedule.
- Identifying and reporting compensation during the period it was earned.
- Ensuring special compensation is properly identified and reported.
- Reporting payroll accurately.
- Notifying CalPERS when employees meet Internal Revenue Code annual compensation limits.
- Ensuring the employment of a retired annuitant is lawful and reinstating retired annuitants that work more than 960 hours in a fiscal year.

SCOPE

As part of the Board approved plan for fiscal year 2012-13, OAS reviewed the Agency's member enrollment processes as these processes relate to the Agency's retirement contract with CalPERS. OAS performed and issued its report on the compliance review of the Agency's payroll reporting and enrollment reporting procedures in December 2012. During the course of performing the initial review, OAS identified a potential common law employee enrollment issue as to whether the individuals being reported to CalPERS for retirement purposes were employees of the Agency or the City. As a result, OAS performed a second review to further analyze this issue. In so analyzing, OAS also found that the Agency no longer operated consistent with its formation documents.

The second review was originally limited to the determination of the employee/employer relationship of the individuals enrolled and reported by the Agency. This review examined records and processes from January 1, 2007 through September 30, 2012 in order to evaluate the membership enrollment practices of the Agency and relevant documents related to the Agency's formation and history. The employees selected in this review were not subject to the Public Employees' Pension Reform Act of 2013.

This review did not include a formal determination as to whether the Agency is a "public agency" (as that term is used in the California Public Employees' Retirement Law), and OAS therefore expresses no formal opinion or finding with respect to whether the Agency is a public agency or whether its employees are employed by a public agency. However, OAS finds that the Agency was not operating in accordance with the initial formation documents and no longer exists as originally defined. Further, OAS finds that the Agency is no longer governed by its own Board and is instead governed by the Martinez City Council. As a result, the Agency does not perform membership enrollment and retirement benefit processes as a separate and distinct entity from the City. Additional investigation and review will be required before a formal determination can be made on the Agency's status as a public agency.

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OFFICE OF AUDIT SERVICES REVIEW RESULTS

Finding 1: The Agency was unable to provide information necessary to determine the correctness of retirement benefits, enrollment processes and changes to its initial formation and structure.

Condition:

The Agency failed to provide information related to when the City of Pleasant Hill withdrew as a member of the Agency and when the Martinez City Council took over for the previous governing Board of the Agency. This information is critical to determine the correctness of retirement benefits, enrollment in the retirement system and whether the Agency remains eligible to contract for retirement benefits.

Subsequent to the on-site field visit, numerous emails were sent between the Agency and OAS discussing the documents requested. On October 16, 2013 a formal letter was sent to the Agency. Requests for pertinent information included, but were not limited to, the following documents:

- Job applications, job offer letters, and 2012 W-2's for the seven sampled employees
- All documents related to the withdrawal of the City of Pleasant Hill from the Agency
- All documents which addressed the date the Martinez City Council took over for the Agency Board as the governing body

On November 27, 2013, the Agency sent a letter to OAS stating that that all relevant and unprivileged documents that could be located had been provided, with the exception of three Attorney-Client Privilege memos from the City Attorney to:

1. The Martinez City Manager dated August 12, 1982
2. The Martinez City Manager and the Administrative Services Director dated March 10, 1986
3. The Martinez Mayor, Council and City Manager dated January 30, 2005

Notwithstanding these representations by Agency staff, the fact remains that the Agency did not provide information that should have been on file about its formation and the history of participation by one of its founding members. This information may be critical to determine certain issues related to the Agency's status as a public agency and whether the Agency remains eligible to contract for retirement benefits as well as enrollment practices and retirement benefits.

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In its response, the Agency states it cooperated and supplied all relevant, non-privileged documentation on this issue. However, the Agency has not provided any information that would demonstrate that the Agency continues to operate in accordance with its formation documents or that it continues to operate as a lawful joint powers authority. Nor has the Agency provided information to demonstrate that the City of Pleasant Hill continues to participate as a member of the joint powers authority.

Recommendation:

The Agency must provide the specific information deemed necessary by CalPERS in order to determine the correctness of retirement benefits, enrollment and participation in the retirement system as per Government Code Sections 20221 and 20222.5.

The Agency should work with CalPERS Customer Account Services Division (CASD) to provide additional information and supporting documentation as can be located and produced in order to determine the correctness of retirement benefits, and enrollment in the retirement system. The Agency should provide any and all information or documentation it has to demonstrate it is operating in accordance with its formation documents and that it continues to operate as a lawful joint powers authority. The Agency should also provide any information or documentation that it has that might show that the City of Pleasant Hill continues to participate as a member of the joint powers authority.

Criteria:

Government Codes: § 20056, § 20057, § 20221, § 20222.5

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Finding 2: The Agency did not operate consistently with formation documents and is no longer separate from the City.

Condition:

The Agency no longer exists as it was originally defined. OAS found the City of Pleasant Hill withdrew as a participating member in Agency. However, despite several requests, the Agency failed to provide information to confirm when that separation took place. The Agency is no longer controlled by a Board that is separate from the Cities of Pleasant Hill and Martinez. Rather, the Agency is controlled solely by the Martinez City Council. Per the Joint Exercise of Powers Agreement (JPA) which created the Agency, its purpose was "To provide for the development and operation of shared facilities and services for the two cities." The purpose and the structure of the Agency no longer exist as established under the JPA.

The June 30, 2010 and 2011 City's Comprehensive Annual Financial Reports (CAFR's) both stated:

The Pleasant Hill/Martinez Joint Facilities Agency is established for the purpose of providing cost-effective services for employees participating in the Miscellaneous CalPERS retirement plan. The Agency is controlled by the City and has the same governing body as the City, which also performs all accounting and administrative functions for the Agency.

The current purpose and structure of the Agency and acknowledgement that City employees participate in the Agency's retirement plan (CalPERS) indicate that the Agency is no longer a separate entity from the City. Additionally, the City and the Agency do not have separate revenue sources, the City pays the JFA payroll directly, and the City and the Agency operate from the City's address.

The Agency's response confirms it does not dispute that the members of the City of Martinez City Council and the members of the Agency are the same but disputes the significance of that fact. The JPA between the Cities of Pleasant Hill and Martinez provides that the Agency shall be a public agency separate from Pleasant Hill and separate from Martinez. The JPA further provides that the Agency's Board shall consist of five members (the Mayor of each city, the City Managers of each City and one additional member as determined by the other four). The JPA does not authorize the Martinez City Council to serve as the Board for the Agency. To the extent that the Agency no longer operates as a joint powers authority because it has only one member, it fails to exist as the entity that contracted with CalPERS. Government Code Section 6502 provides in pertinent part that if authorized by their

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legislative or other governing bodies, two or more public agencies by agreement may jointly exercise any power common to the contracting parties. If the City of Pleasant Hill no longer participates in this Agency, then there are no longer two public agencies participating and the entity may not constitute a lawful joint powers authority. For these reasons, OAS finds these issues significant to this finding.

Recommendation:

The Agency should work with CASD to determine whether it remains eligible to participate as a public employer in CalPERS. Only entities that meet the definition of public agency are eligible to participate in the retirement system. If the Agency no longer constitutes a joint powers authority because it has just one public entity participating, and it is no longer separate from the City of Martinez, CASD should determine how this may impact Agency's contract with CalPERS.

Criteria:

Government Codes: § 6502, § 20056, § 20057

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Finding 3: The Agency incorrectly enrolled ineligible individuals into membership.

Condition:

The Agency incorrectly enrolled and reported individuals who were not eligible for membership under the Agency's contract with CalPERS. OAS finds in applying the common law employment test, all seven of the sampled individuals were under the control of the City and therefore found to be the common law employees of the City for the reasons discussed below. As such, these individuals should not have been reported by the Agency.

Government Code Section 20460 provides in relevant part that any public agency may participate in and make all or part of its employees members of this system by contract. Government Code Section 20022 defines a contracting agency as any public agency that has elected to have all or any part of its employees become members of this system and that has contracted with the Board for that purpose. However, a contracting agency cannot report service credit and compensation earnable for services performed by individuals that are the common law employees of another entity.

Management and control of CalPERS is vested in the CalPERS Board of Administration (Board) as provided in Government Code Section 20120. Each member and each person retired is subject to the PERL and the rules adopted by the Board pursuant to Government Code Section 20122. Government Code Section 20125 provides that the CalPERS Board of Administration (the Board) shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system. For the purposes of the PERL and for programs administered by the Board, the standard used for determining whether an individual is the employee of another person is the California common law employment test as set forth in the California Supreme Court case titled *Tieberg v. Unemployment Ins. App. Bd.*, (1970) 2 Cal. 3d 943, which was cited with approval in *Metropolitan Water Dist. v. Superior Court (Cargill)*, (2004) 32 Cal. 4th 491, and which was adopted by the Board in two precedential decisions, *In the Matter of Lee Neidengard*, Precedential Decision No. 05-01, effective April 22, 2005, and *In the Matter of Galt Services Authority*, Precedential Decision No. 08-01, effective October 22, 2008.

Applying the California common law employment test, the most important factor in determining whether an individual performs services for another as an employee is the right of the principal to control the manner and means of job performance and the desired result, whether or not this right is exercised. Where there is independent evidence that the principal has the right to control the manner and

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means of performing the service in question, CalPERS will determine that an employer-employee relationship exists between the employee and the principal.

Other factors to be taken into consideration under the common law employment test are as follows:

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

The court in the *Tieberg* case cited above also recognized two additional factors: the extent of control and whether the principal is or is not in business.

OAS reviewed the services provided by seven individuals enrolled under the Agency to determine whether the individuals were common law employees of the Agency or the City. The sampled positions consisted of the Assistant City Manager, Deputy Public Works Director, City Engineer, Finance Manager, Public Works Superintendent, Senior Management Analyst and Police Dispatcher.

OAS identified the common facts discussed below which support a finding that the City, rather than the Agency, controlled the manner and means of performing the work. Based upon that finding, as well as the consideration of the secondary factors cited above, OAS finds that the individuals were common law employees of the City, rather than the Agency. These common facts include:

- The individuals provided services in City established positions for departments found on the City's organizational chart.
- The services provided were part of the City's normal operations.
- The services provided were integral and essential to the City's continuation of business.
- The work performed was at City offices during normal business hours.
- The City provided the individuals with office space, desks, and the use of City equipment such as computers, copy and fax machines, and telephones.
- The City had the right to control how the individuals performed work.
- The position titles were included in the City's pay schedule and compensation plan.

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- Employment was pursuant to the City of Martinez Civil Service Rules and Regulations which address rules related to hiring, probationary periods and reports, disciplinary action, termination, benefits, performance evaluations, salary and wage determinations, promotions and demotions, vacation and other leave benefit accruals, administrative leave and so forth.
- Pursuant to the City of Martinez Civil Service Rules, disciplinary appeals not resolved with the decision by the City Manager can be appealed to the City's Civil Service Commission.
- Six of the seven individuals reviewed were hired by the City Manager and one was hired by the Chief of Police.
- The positions held by the individuals were covered by the City's Management Compensation Plan, effective January 1, 2011, with the exception of the Police Dispatcher who is represented by the City's Police Non-Sworn Employees' Association MOU, effective July 1, 2011. The City's Management Compensation Plan is issued on City Letterhead and provides all employer authority and obligations to the City, and not to the Agency. Similarly, the current MOU for the City's Non-Sworn Employees' Association is an agreement between the City of Martinez and the Association (the Agency is not a party to the agreement) and provides all employer authority and obligations to the City (not the Agency).

In addition to the characteristics shared by all seven of the individuals, OAS noted the following specific responsibilities ascribed to the positions, further supporting a finding that the individuals were common law employees of the City:

Senior Management Analyst

This individual managed citywide and specialized projects and programs, conducted studies of administrative, organizational and operational issues, evaluated impacts of new or proposed legislation, and directed and coordinated administrative operations. The individual prepared and presented reports both with the City organization and to external bodies, participated in the preparation of budgets, ensured compliance with local, State and Federal requirements, filed government mandated reports, and administered city contracts.

This individual reported to the Assistant City Manager. City Personnel Action Forms documented his initial hiring as a Management Analyst and later promotion to Senior Management Analyst.

Assistant City Manager

This individual directed operations of specific City departments as assigned by the City Manager, participated in setting City budget policy direction, assumed a lead role on high profile projects with citywide impact, assisted the City Manager in citywide strategic planning efforts, and played a key role on the City's executive department head management team. This individual reported to the City Manager and served as Acting City Manager in his or her absence.

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This individual was a party to an employment agreement between the individual and the City which stated the City agrees to employ the individual as Assistant City Manager. The employment agreement failed to reference the Agency at all. A duty statement for this position also identified the City as the employer. Correspondence from the City to this individual confirmed that employment would be with the City and the position would be covered under the City's Management Compensation Plan, which included the pay schedule establishing the payrate for the position.

Deputy Public Works Director

This individual planned, directed, and coordinated the daily work of the City's maintenance, water treatment plant, building and construction inspection, construction management, code enforcement, and parking staff. The individual met with the Maintenance Superintendent, Water Treatment Plant Manager and Building Division personnel to ensure daily operations were performed in an efficient and cost effective manner, which included selecting employees, planning, organizing, and assigning work. The individual provided technical direction to plan review, permit, inspection and code enforcement staff. The individual participated in the preparation of the department's budget, monitored expenditures, made recommendations on staffing and equipment needs, met with developers and contractors to facilitate projects and, managed in-house and capital projects. The individual also provided staff services to the City Council and other City Boards and commissions. This individual reported to the City's Public Works Director.

The job description for the Deputy Public Works Director position is a City document. City Personnel Action Forms documented the individual's initial hire by the City as a Building Inspector I, "termination" with the City and "employment" with the Agency for the same position, and later a promotion to Deputy Public Works Director.

City Engineer

This individual managed and directed the activities of the Engineering Division of the City's Community Development Department, including development review, transportation engineering, and construction inspection. The individual planned, coordinated and administered all Engineering Division activities, reviewed conditions of approval for subdivisions and site developments, approved subdivision agreements, approved improvement plans, parcel maps and final maps, and established and administered standard specifications for street setback maps and other documents as required by Municipal Code. The individual also reviewed traffic engineering reports, letters and control measures, developed transportation plans, made presentations on division activities and related matters to the City Council and the City Commission. The individual evaluated division staffing arrangements and work assignments, set performance standards for division staff, and trained engineering personnel. In addition, the individual performed professional civil engineering work and was authorized to sign documents on behalf

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of the City as "City Engineer." This individual reported to the City's Public Works Director. A City Personnel Action Form documents the hire of this individual as City Engineer.

Finance Manager

This individual directed the activities of the Finance Division of the City's Administrative Services Department and managed financial functions such as accounting, payroll, accounts payable and receivable and business licensing activities. The individual planned, organized, and coordinated all Finance Division activities, prepared and administered the division budget, set up and maintained the financial records, and coordinated preparation of the city budget. This individual reported to the Assistant City Manager.

A City Personnel Action Form documents the individual's initial hiring as Finance Manager. The benefits for the position were covered under the City's Management Compensation Plan, which included the pay schedule establishing the payrate for the position. The conditions of employment for this position, including appointments and termination, were covered under the City's Civil Service Rules.

Public Works Superintendent

This individual directed the operation of the City's Public Works Division, including organizing, planning and directing street, park, waterline, building, automotive and other mechanical equipment maintenance and repair activities. The individual also directed the corporation yard activities, including the day-to-day operations of the Maintenance Division. The individual cooperated with other departments in planning capital improvement projects, and prepared the public works budget. This individual reported to the Deputy Public Works Director and the job description was on a city form. City Personnel Action Forms documented this individual's initial hiring as an Equipment Mechanic and later promotion to Public Works Superintendent.

Police Dispatcher

This individual facilitated communications between members of the public and personnel of the Police Department and other public service agencies. The duties performed included operating the communications center using telephones, radio, computer and related equipment, maintaining and entering information into local, regional and national computer databases, and inputting data to facilitate the dispatching and recording of law enforcement and other operational tasks of the Martinez Police Department. This individual reported to the City's Police Department's Dispatch Supervisor.

A City Personnel Action Form documented the individual's initial hiring as a Police Clerk/Dispatcher. The benefits for the position were covered under the City's Police Non-Sworn Employees' Memorandum of Understanding, which included the pay schedule which established the payrate for the position.

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OAS determined that the control over all seven individuals reviewed is with the City and after considering the secondary factors, OAS concludes that the City was the common law employer of these individuals. Therefore, these individuals were improperly reported as employees of the Agency. Only common law employees of a contracted agency should be reported to CalPERS.

OAS also noted that in a prior Board Precedential Decision, *In re the Matter of Galt Services Authority and City of Galt*, with facts somewhat similar to those found here, CalPERS refused to contract with Galt Services Authority based upon the determination that under the common law employment test, the transferred officers and employees would not, in reality, become officers and employees of the Authority but, instead, would remain the officers and employees of the City of Galt. In the *Galt* case, a joint powers agreement was entered into between the City of Galt and its redevelopment agency, for the stated purpose of providing administrative, management, special and general services to the City of Galt. In that case, a City Council agenda item described the Authority as “an alternate employer for the City of Galt as a means of withdrawing from Social Security.” Under those circumstances, the decision confirmed that in making this determination, CalPERS properly exercised the authority granted under Government Code Section 20125 and applied the test in *Cargill*. In so doing, the individuals at issue were required to be reported as the common law employees of the City rather than the Authority.

OAS has found that all seven sampled individuals reported by the Agency were actually common law employees of the City. Further investigation is required to determine whether the remaining individuals being reported by the Agency are the common law employees of the Agency or of the City. It will also need to be determined whether the Agency has any common law employees.

Recommendation:

The Agency should ensure that only common law employees of the Agency are enrolled into membership and reported to CalPERS. The Agency should not report individuals who are common law employees of another entity.

The Agency should work with CASD to assess the impact of the membership enrollment issue and make the necessary adjustments to all active and retired member accounts pursuant to Government Code Section 20160. CASD should also work with the Agency to determine whether any of the other individuals being reported by the Agency are the common law employees of the Agency or whether all such individuals are actually common law employees of the City. Finally, should it be determined that the Agency has no common law employees, the Agency should work with CASD to determine what additional steps need be taken to correct these issues.

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Criteria:

Government Codes: § 20028, § 20056, § 20125, § 20160, § 20460, § 20502

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Observation: The Agency's sampled individual positions reviewed were reported by the City of Martinez as City employees to the State Controller's Office in 2009, 2011, 2012 and 2013.

OAS accessed the State Controller's Office (SCO) website in an effort to verify that the Agency had reported the positions reviewed here as Agency employees. In so doing, not only did OAS find that the Agency failed to report employees to the State Controller's Office since 2009, the City of Martinez actually reported the sampled individual positions reviewed here as city employees in 2009, 2011, 2012 and 2013.

In its response to the draft audit report, the Agency contends that the fact that the Agency's governing body is made up of the same members as the City of Martinez City Council and that they hold joint meetings does not prevent the Agency from having its own common law employees. The Agency further contends in its response that none of the Agency's employees should be considered employees of the City of Martinez. Notwithstanding these representations, the City has in fact reported these sampled individual positions as city employees to the State Controller's Office.

The findings, conclusions and observations outlined in this report are based on information made available or otherwise obtained at the time this report was prepared.

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CONCLUSION

OAS limited this review to the area specified in the scope section of this report and in the objectives outlined in Appendix A. OAS limited the membership enrollment test to individuals selected from the Agency's employee roster. OAS found that all seven Agency individuals were common law employees of the City, and therefore were erroneously enrolled and reported by the Agency. OAS did not make a determination as to whether the Agency remains eligible to contract as a public agency. However, OAS did determine that the Agency is no longer operating as it was originally defined, the purpose and the structure of the Agency no longer exists, and the Agency is no longer a separate entity from the City. Further investigation and review is required to determine whether the Agency remains eligible to contract for retirement benefits as a public agency.

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 and City 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 Young Hamilton

YOUNG HAMILTON, CPA, CIA, CISA
Acting Chief, Office of Audit Services

Staff: Cheryl Dietz, CPA, Assistant Division Chief
Diana Thomas, CIA, CIDA, Senior Manager
Terry Heffelfinger, Auditor
Noah Schreier, Auditor

APPENDIX A

OBJECTIVES

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

This review did not include a determination as to whether the Agency is a "public agency," and expresses no opinion or finding with respect to whether the Agency is a public agency or whether its employees are employed by a public agency.

SUMMARY

To accomplish the review objectives, OAS interviewed key staff members to obtain an understanding of the City'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
 - City's organizational chart
 - The City's comprehensive annual financial reports
 - Employment relationship questionnaires
 - Benefit agreements including applicable resolutions
 - Agency ordinances as necessary
 - Various other documents as necessary
- ✓ Reviewed the employee/employer relationship of the Agency's employees to determine if the employees were employees of the Agency or the City.

APPENDIX B

AGENCY'S WRITTEN RESPONSE

July 22, 2014

VIA EMAIL & U.S. MAIL

Ms. Margaret Junker, Chief
California Public Employees' Retirement System
P.O. Box 942701
Sacramento, California 94229-2701

Re: *Response by Pleasant Hill - Martinez Joint Facilities Agency to CalPERS Draft Audit Report*

Dear Ms. Junker:

The Pleasant Hill – Martinez Joint Facilities Agency (“Agency”) is in receipt of the June 20, 2014 Draft Audit Report prepared by the California Public Employees’ Retirement System (“CalPERS”), Office of Audit Services (“OAS”).¹ While the Agency has worked cooperatively with CalPERS’ staff and intends to continue to do so, the Agency disputes CalPERS’ findings and rationale. The Agency’s position is set forth below.²

FINDINGS, RECOMMENDATIONS, AND AGENCY RESPONSE

In its Draft Audit Report, CalPERS made the following proposed findings and recommendations.

Finding 1: The Agency was unable to provide information necessary to determine the correctness of retirement benefits, enrollment processes and changes to its initial formation and structure.

Recommendation:

The Agency must provide the specific information deemed necessary by CalPERS in order to determine the correctness of retirement benefits, enrollment and participation in the retirement system as per Government Code sections 20221 and 20222.5.

¹ The Agency was initially given until July 11, 2014 to respond, but CalPERS graciously granted the Agency an extension to July 25, 2014 to provide its response.

² The Agency 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 is of the belief that its draft audit report triggers any timeline to file a formal appeal, CalPERS may consider this response the Agency’s formal appeal of its decision and request for an administrative appeal pursuant to Title 2, California Code of Regulations, section 555.1.

Ms. Margaret Junker

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The Agency should work with CalPERS Customer Account Services Division (CASD) to provide supporting documentation as can be located and produced in order to determine the correctness of retirement benefits, and enrollment in the retirement system.

The Agency should also work with CASD to determine whether it remains eligible to participate as a public employer in CalPERS under its current structure. Only entities that meet the definition of public agency are eligible to participate in the retirement system.

Agency's Response to Finding and Recommendation 1:

The Agency disagrees with this finding and recommendation. The Agency cooperated with CalPERS and supplied all relevant, non-privileged information in its possession or under its control requested by CalPERS during the audit. In a letter dated November 27, 2013, the Agency informed CalPERS that all pertinent information had been supplied, with the exception of only a few specifically identified documents subject to the attorney-client privilege.

The OAS alleges that the Agency failed to provide necessary information regarding the City of Pleasant Hill's withdrawal from the Agency and when the City of Martinez City Council took over for the previous governing board of the Agency. CalPERS also alleges that the JPA no longer appears to exist as established under the JPA and that the Agency is controlled solely by the City of Martinez City Council.

The Agency expended great effort attempting to comply with CalPERS' requests. In 2012 and in 2013, the Agency contacted the City of Pleasant Hill regarding any documentation it had on file regarding the City of Pleasant Hill's withdrawal as a member of the Agency. Specifically, the Agency contacted the City of Pleasant Hill Finance Director and Deputy Clerk regarding any documents on file concerning the Agency including, agreements, amendments to agreements, staff reports, or any other documents describing Pleasant Hill's relationship to the Agency. The Agency exchanged numerous emails and made several telephone calls to the City of Pleasant Hill to discuss the requested documents, but none were found.

CalPERS also states that information critical to a determination of whether the Agency is a public agency was not supplied, but makes no specific finding. To the extent CalPERS' statement suggests that the Agency is not a public agency, the Agency notes that there are no documents or evidence cited by CalPERS indicating that the Agency is not a public agency. Moreover, a "public agency" for the purposes of contracting with CalPERS is defined very broadly under the Public Employees' Retirement Law. (Gov. Code, §§ 20056, 20057.) The Agency undoubtedly meets the definition of a public agency under the Public Employees' Retirement Law.

Therefore, the Agency has cooperated with CalPERS and supplied all relevant, non-privileged documentation requested by CalPERS under the Agency's possession, custody, or control to

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assist with this audit. The Agency is also willing to continue working with CalPERS on the issue to determine if documents not under its possession, custody, or control exist.

Finding 2: Individuals enrolled by the Agency appear to be common law employees of an affiliated agency.

Recommendation:

The Agency should ensure that only common law employees of the Agency are enrolled into membership and reported to CalPERS. The Agency should not report individuals who are common law employees of another entity.

The Agency should work with CASD to assess the impact of the membership enrollment issue and make the necessary adjustments to all active and retired member accounts pursuant to Government Code section 20160. CASD should also work with the Agency to determine whether any of the other individuals being reported by the Agency are the common law employees of the City [of Martinez]. Finally, should it be determined that the Agency has no common law employees, the Agency should work with CSAD to determine what additional steps need to be taken to correct these issues.

Agency's Response to Finding and Recommendation 2:

The Agency is a separate entity from the City of Martinez and employees of the Agency are not common law employees of the City of Martinez.

CalPERS applies the common law control test as set forth in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949 and *Metropolitan Water Dist. of Southern California v. Superior Court* (Cargill) (2004) 32 Cal.4th 491, 496 to determine whether an individual is an "employee" for the purposes of enrollment in CalPERS membership. The most important factor is whether the principal has the right to control the manner and means of job performance and the desired result. However, CalPERS may also consider additional secondary factors.

The Agency does not dispute that the members of the City of Martinez City Council and the Agency are the same, but disputes the significance of that fact. The Agency and the City of Martinez City Council hold joint meetings. There is nothing impermissible about having the same members sit on separate boards. For example, the governing bodies of city councils often hold joint meetings and sit as the housing authority. Similarly, city councils often sat as the city redevelopment agency before they were abolished. The governing bodies of the agencies can delegate authority and control their respective employees as separate entities. Therefore, the fact that the Agency's governing body is made up of the same members as the City of Martinez City Council and that they hold joint meetings does not prevent the Agency from having its own common law employees.

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CalPERS has not cited any authority showing that it is impermissible for the City of Martinez and the Agency to hold joint meetings or be comprised of the same members. Moreover, CalPERS has not cited any legal authority or documentary evidence suggesting that the Agency no longer exists separate and apart from the City or Martinez.

None of the Agency's employees should be considered employees of the City of Martinez, and therefore, none should be enrolled as members under the City of Martinez's CalPERS contract.

CONCLUSION

Based on the above, the City objects to CalPERS' Findings and Recommendations as described above, but will continue to work with CalPERS to provide any documentation or data it may need.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Original Signed By Michael D. Youril

Michael D. Youril

SMB:MDY:kms

cc: Jeffrey A. Walter