

Office of Audit Services



Public Agency Review

Regional Water Authority

CalPERS ID: 6065061198
Job Number: P12-016

May 2015



California Public Employees' Retirement System
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May 29, 2015

CalPERS ID: 6065061198
Job Number: P12-016

John Woodling, Executive Director
Regional Water Authority
5620 Birdcage Street, Suite 180
Citrus Heights, CA 95610

Dear Mr. Woodling:

Enclosed is our final report on the results of the public agency review completed for the Regional Water Authority (Agency). CalPERS received your Agency's responses to the draft report which disagreed with both findings. A copy of your Agency's most recent response is included as an appendix to the final report. Although CalPERS reviewed and considered your Agency's responses, the information and contentions provided did not change our underlying findings. However, CalPERS acknowledges in reference to Finding 1, that an updated salary schedule was provided during the on-site fieldwork, and the schedule was forwarded to the appropriate CalPERS program area for review. Further, in regards to Finding 2, Sacramento Ground Water has applied to contract with CalPERS for retirement benefits and is being considered by CalPERS Employer Account Management Division.

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 Young Hamilton
YOUNG HAMILTON, Acting Chief
Office of Audit Services

Enclosure

cc: Debra Sedwick, Chair, Board of Directors, RWA
Isabel C. Safie, RWA Legal Counsel, Best Best and Krieger LLP
Nancy Marrier, Finance and Administrative Services Manager, RWA
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 California Public Employees' Retirement System (CalPERS) Office of Audit Services (OAS) reviewed the Regional Water Authority's (Authority) enrolled individuals, member compensation, retirement information and other documentation for individuals included in test samples. A detail of the findings is noted in the Results section beginning on page three of this report. Specifically, the following findings were noted during the review:

- Pay schedule did not identify the position title and payrate for each position.
- Service performed for a non-CalPERS contracting entity was improperly reported to CalPERS.

AUTHORITY BACKGROUND

The Authority was formed under a Joint Exercise of Powers Agreement on March 20, 1990 under the previous name of the Sacramento Metropolitan Water Authority. The members of the Authority are cities and water agencies located in and around the greater Sacramento area. The Authority is governed by a Board comprised of two representatives from each of the member agencies. Employee handbook and employment agreements outline the Authority employees' salaries and benefits and state the terms of employment agreed upon between the Authority and its employees. The Authority contracted with CalPERS effective October 12, 1992 to provide retirement benefits for local miscellaneous employees. At the start of the review in April 2013, the Authority had six employees enrolled in CalPERS for retirement benefits.

All contracting public agencies, including the Authority, 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.
- 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.

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- 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, the OAS reviewed the Authority's payroll reporting and member enrollment processes as these processes relate to the Authority's retirement contract with CalPERS. The review period was limited to the examination of sampled records and processes from April 1, 2010 through March 31, 2013. The on-site fieldwork for this review was conducted on April 22, 24, and 26, 2013.

This review did not include a determination as to whether the Authority is a "public agency" (as that term is used in the California Public Employees' Retirement Law), and OAS therefore expresses no opinion or finding with respect to whether the Authority is a public agency or whether its employees are employed by a public agency. The review objectives and a summary of the procedures performed are listed in Appendix B.

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OFFICE OF AUDIT SERVICES REVIEW RESULTS

Finding 1: Pay schedule did not identify the position title and payrate for each position.

Recommendation:

The Authority should list all employee payrates on a pay schedule and disclose the information pursuant to California Code of Regulations Section 570.5.

The Authority should work with CalPERS Employer Account Management Division (EAMD) to ensure that the Authority develops publicly available pay schedules that meet the criteria of California Code of Regulations Section 570.5.

The Authority should work with EAMD to determine the impact of this nondisclosure and make the necessary adjustments to active and retired member accounts, if any, pursuant to Government Code Section 20160.

Condition:

The Authority's pay schedule did not identify the position title and payrate for each position, and therefore was not in compliance with the requirements for publicly available pay schedules. Specifically, the January 1, 2013 pay schedule that was in effect during our sampled test period from February 18 to March 3, 2013 did not include the Executive Director's position and payrate.

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. According to 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;

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- 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 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).

Criteria:

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

California Code of Regulations: § 570.5

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Finding 2: Service performed for a non-CalPERS contracting entity was improperly reported to CalPERS.

Recommendation:

The Authority should ensure that compensation earnable and service credit reported to CalPERS is limited to payment for a member's service performed for the Authority. To the extent that a member provides service as a common law employee of another entity and that entity does not contract with CalPERS for retirement benefits, that service should not be reported to CalPERS.

The Authority should work with EAMD to determine the impact of this improper reporting and EAMD should make individual determinations and identify any necessary adjustments to active and retired member accounts required pursuant to Government Code Section 20160.

Condition:

California Public Employees' Retirement Law (PERL) 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. PERL 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." A contracting agency can report service credit and compensation earnable for services performed by its own employees. However, a contracting agency cannot report service credit and compensation earnable for services performed by the common law employees of another entity that does not contract with CalPERS. The PERL does not include a provision that authorizes a contracting agency to lend or lease its employees to a non-CalPERS contracting agency. Although Government Code Section 20284 under certain circumstances allows continued CalPERS participation for a state member assigned to perform work which is paid for out of funds not directly controlled by the state, there is no similar statute to authorize this for contracting agency members.

OAS determined that the Authority reported full-time service credit for some of its employees despite the fact that these individuals appeared to have only provided part-time service for the Authority. These individuals also appeared to have provided service as common law employees to an affiliated entity, the Sacramento Groundwater Authority (SGA), on a part-time basis. It is this service performed for the SGA that appears to have been improperly reported to CalPERS. The SGA does not contract with CalPERS for retirement benefits. Under PERL Section 20966, for the purpose of calculating retirement allowances, credit for service rendered on a part-time basis in each fiscal year shall be based on the ratio that the

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service rendered bears to 1720 hours for services rendered on an hourly basis. In situations where part-time service is rendered to the contracting agency, that is what should be reported to CalPERS.

OAS reviewed various records and documentation for the Authority and the SGA, including budgets, cost sharing agreements, invoices, audit reports, and joint power authority (JPA) agreements. OAS also reviewed various employee documents for the six sampled employees, including personnel forms, job descriptions, and labor policies and agreements. OAS determined that the Authority was reporting its six employees on a full-time basis when, in fact, five of its employees were serving on a part-time basis for the Authority and on a part-time basis for the SGA.

The SGA is a separate and distinct entity (a joint powers authority) from the Authority with a separate board of directors, website, rules and procedures, bank accounts and budget. As noted above, the SGA is not a CalPERS contracted agency and therefore the earnings, service credit, and contributions reported which resulted in service credit earned for work performed on behalf of the SGA should not have been reported to CalPERS and should be corrected.

Management and control of CalPERS is vested in the CalPERS Board of Administration (Board) as provided in the PERL Section 20120. Each member and each person retired is subject to this part and the rules adopted by the Board pursuant to PERL Section 20122. PERL Section 20125 provides that 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 or entity is the California common law employment test as set forth in the California Supreme Court case entitled *Tieberg v. Unemployment Ins. App. Bd.*, (1970) 2 Cal. 3d 943, which was cited with approval in *Metropolitan Water Dist. v. Superior Court (Cargill)*, (2004) 32 Cal. 4th 491, and which was adopted by the Board in two precedential decisions, *In the Matter of Lee Neidengard*, Precedential Decision No. 05-01, effective April 22, 2005 and *In re 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 employee is the right of the principal to control the manner and means of job performance and the desired result, whether or not this right is exercised. Where there is independent evidence that the principal has the right to control the manner and means of performing the service in question, CalPERS will determine that an employer-employee relationship exists between the employee and the principal.

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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 an Authority 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.

OAS identified the common facts discussed below which support a finding that the affiliated entity, the SGA, controlled the manner and means of performing the work for the services provided to it and paid the Authority back for the costs related to the individuals performing that service. As a result, the service credit and compensation earnable attributable to that SGA service, should not have been reported to CalPERS under the Authority's contract with CalPERS. Based upon this finding, as well as the consideration of the secondary factors described above, OAS finds that the services identified for these individuals were as common law employees of the SGA for the time periods specified, rather than common law employees of the Authority. These common facts include:

- Individuals performed services for the SGA in accordance with a Cost Sharing Agreement as agents of the SGA.
- Individuals performed services under the direction and control of the SGA's Board and Executive Director.
- Individuals had the skill required to perform services for the SGA because both the RWA and the entity perform similar functions.
- RWA, which supplied or provided employees the instruments, tools, and the place to work, was reimbursed for those costs by the SGA.
- Individuals provided services to the SGA at will.
- The SGA reimbursed RWA for the costs of the individuals performing service for the SGA (including salaries, benefits, allowances, vacation pay, Public Employees' Retirement System participation payments, workers' compensation coverage, and any other employment-related cost), whether set forth in an employment agreement or otherwise. The 2004 Cost Sharing

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Agreement also confirms RWA's obligation to secure workers' compensation coverage for "SGA's employees and authorized volunteers."

- Individuals performed work on a regular basis for the SGA.
- Individuals were aware they were performing work for the SGA as documented in the responses to the Questionnaire Regarding RWA/SGA Employees.

In addition to the characteristics shared by five of the sampled individuals discussed above, OAS noted the following specific facts relative to the services provided to the SGA by individuals holding the positions described below, which further support that the individuals were not providing full-time common law service to the Authority as had been reported to CalPERS and were instead performing part-time service as common law employees of the SGA:

Executive Director

- The Employment Agreement for the Executive Director confirms the Executive Director is the Chief Executive Officer of RWA when performing work or duties for or on behalf of RWA and at such times, works under the direction and control of the RWA Board or Directors.
- Similarly, the Employment Agreement confirms the Executive Director is the Chief Executive Officer of SGA when performing work or duties for or on behalf of the SGA and at such times, works under the direction and control of the SGA Board of Directors.
- Served at the will and pleasure of both Boards as stated in the Executive Director's job description.
- Ensured the efficient and proper management and administration of both RWA and SGA.
- Supervised the implementation of adopted policies and actions of RWA and the SGA Board of Directors.
- Developed and directed the implementation of goals, objectives, policies, procedures and work standards for both RWA and the SGA.
- Prepared and administered annual budgets for RWA and SGA.
- Supervised the management of finances for both RWA and SGA.
- Supervised personnel related activities including performance reviews, hiring, terminating and resolving disciplinary issues for both RWA and SGA.
- Maintained effective working relationships with the RWA Board of Directors and its Executive Committee, and the SGA Board of Directors.
- Represented the RWA Board of Directors and the SGA Board of Directors on a regional, state and national level.
- The Executive Director was identified by RWA as working under the direction and control of the SGA fifty percent of the time in the Questionnaire Regarding RWA/SGA Employees.

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Principal Project Manager

- Fifty percent of work performed was for RWA and fifty percent of work performed was for the SGA according to the Questionnaire Regarding RWA/SGA Employees.
- Planned, organized and managed the most complex and politically sensitive projects and programs for the Executive Director, the RWA Board of Directors and the SGA Board of Directors.
- Provided highly complex staff assistance to the Executive Director, RWA Board of Directors and the SGA Board of Directors and member agencies.
- Received administrative direction from the Executive Director who worked under the direction and control of the Board of Directors of RWA when performing work or duties for or on behalf of RWA and who worked under the direction and control of the Board of Directors of SGA when performing work or duties for or on behalf of the SGA.
- Provided technical and policy support to the Executive Director and the RWA Board of Directors and the SGA Board of Directors.
- Served in the absence of the Executive Director.
- Identified by RWA as working under the direction and control of the SGA fifty percent of the time in the Questionnaire Regarding RWA/SGA Employees.

Finance & Administrative Services Manager

- Fifty percent of work performed was for RWA and fifty percent of work performed was for the SGA according to the Questionnaire Regarding RWA/SGA Employees.
- Planned, organized, supervised and participated in the financial and accounting operations of RWA and the SGA.
- Received direction from the Executive Director who worked under the direction and control of the Board of Directors of RWA when performing work or duties for or on behalf of RWA and who worked under the direction and control of the Board of Directors of SGA when performing work or duties for or on behalf of the SGA.
- Produced monthly financial reports/statements for the Executive Director and both Board of Directors.
- Updated and maintained RWA and SGA websites.
- Served as Secretary and Treasurer to RWA and the SGA Board of Directors.
- Identified by RWA as working under the direction and control of the SGA fifty percent of the time in the Questionnaire Regarding RWA/SGA Employees.

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Executive Assistant

- Fifty percent of work performed was for RWA and fifty percent of work performed was for the SGA according to the Questionnaire Regarding RWA/SGA Employees.
- Received direction from the Executive Director as stated in the Executive Director's job description.
- Performed a variety of highly responsible, confidential and complex administrative duties for the Executive Director and Board of Directors.
- Assisted with the overall administrative operations of RWA and the SGA.
- Identified by RWA as working under the direction and control of the SGA fifty percent of the time in the Questionnaire Regarding RWA/SGA Employees.

Project Research Assistant

- Seventy percent of work performed was for RWA and thirty percent of work performed was for the SGA according to the Questionnaire Regarding RWA/SGA Employees.
- Provided staff assistance to the Executive Director (who worked under the direction and control of the Board of Directors of RWA when performing work or duties for or on behalf of RWA and who worked under the direction and control of the Board of Directors of SGA when performing work or duties for or on behalf of the SGA) and higher level staff.
- Identified by RWA as working under the direction and control of SGA thirty percent of the time in the Questionnaire Regarding RWA/SGA Employees.

For the reasons discussed above, OAS determined that the control over the sampled individuals is with the SGA for the time periods and for the service specified above and after considering the secondary common law employment test factors, OAS concludes that the SGA was the common law employer for those time periods and services. Therefore, that portion of each individual's service was improperly reported to CalPERS because the services were not performed in the capacity of common law employees of the Authority. Only the service performed by common law employees of a contracting agency should be reported to CalPERS. Where a contracting agency employs individuals in a part-time capacity, then only that part-time service should be reported to CalPERS. Service performed for entities that do not contract with CalPERS should not be reported to CalPERS.

Criteria:

Government Codes: § 20022, § 20028, § 20030, § 20053, § 20065, §20120, §20122, § 20125, § 20284, § 20460, § 20630, § 20636, § 20966

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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 B. OAS limited the test of transactions to employee samples selected from the Authority's payroll records. Sample testing procedures provide reasonable, but not absolute, assurance that these transactions complied with the California Government Code except as noted. Since OAS did not review whether the Authority is a "public agency" (as that term is used in the California Public Employees' Retirement Law), this report expresses no opinion or finding with respect to whether the Authority is a public agency or whether its employees are employed by 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 Authority and any impacted individuals 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
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APPENDIX A

BACKGROUND

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BACKGROUND

California Public Employees' Retirement System

CalPERS provides a variety of programs serving members employed by more than 2,500 local public agencies as well as state agencies and state universities. The agencies contract with CalPERS for retirement benefits, with CalPERS providing actuarial services necessary for the agencies to fund their benefit structure. In addition, CalPERS provides services which facilitate the retirement process.

EAMD manages contract coverage for public agencies and receives, processes, and posts payroll information. In addition, EAMD provides services for eligible members who apply for service or disability retirement. In addition, EAMD provides eligibility and enrollment services to the members and employers that participate in the CalPERS Health Benefits Program, including state agencies, public agencies, and school districts. CalPERS Benefit Services Division (BNSD) sets up retirees' accounts, processes applications, calculates retirement allowances, prepares monthly retirement benefit payment rolls, and makes adjustments to retirement benefits.

Retirement allowances are computed using three factors: years of service, age at retirement and final compensation. Final compensation is defined as the highest average annual compensation earnable by a member during the last one or three consecutive years of employment, unless the member elects a different period with a higher average. State and school members use the one-year period. Local public agency members' final compensation period is three years unless the agency contracts with CalPERS for a one-year period.

The employer's knowledge of the laws relating to membership and payroll reporting facilitates the employer in providing CalPERS with appropriate employee information. Appropriately enrolling eligible employees and correctly reporting payroll information is necessary to accurately compute a member's retirement allowance.

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APPENDIX B

OBJECTIVES

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OBJECTIVES

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

- Whether the Authority 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 Authority's retirement contract with CalPERS were followed.

This review covers the period of April 1, 2010 through March 31, 2013. This review did not include a determination as to whether the Authority is a "public agency" and expresses no opinion or finding with respect to whether the Authority 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 Authority's personnel and payroll procedures, reviewed documents, and performed the following procedures.

- ✓ Reviewed:
 - Provisions of the Contract and contract amendments between the Authority and CalPERS
 - Correspondence files maintained at CalPERS
 - Authority board minutes and Authority board resolutions
 - Authority written labor policies and agreements
 - Authority salary, wage and benefit agreements including applicable resolutions
 - Authority personnel records and employee hours worked records
 - Authority payroll information including CalPERS Contribution Detail Reports
 - Other documents used to specify payrate, special compensation, and benefits for all employees
 - Various other documents as necessary
- ✓ Reviewed Authority payroll records and compared the records to data reported to CalPERS to determine whether the Authority correctly reported compensation.
- ✓ Reviewed payrates reported to CalPERS and reconciled the payrates to Authority 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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Authority's governing body in accordance with requirements of applicable public meetings laws.

- ✓ Reviewed CalPERS listing reports to determine whether the payroll reporting elements were reported correctly.
- ✓ Reviewed the Authority's enrollment practices for temporary and part-time employees to determine whether individuals met CalPERS membership requirements.
- ✓ Reviewed the Authority's enrollment practices for retired annuitants to determine if retirees were lawfully employed and reinstated when 960 hours were worked in a fiscal year.
- ✓ Reviewed the Authority's independent contractors to determine whether the individuals were either eligible or correctly excluded from CalPERS membership.
- ✓ Reviewed the Authority's affiliated entities to determine if the Authority shared employees with an affiliated entity and if the employees were CalPERS members and whether their earnings were reported by the Authority or by the affiliated entity.
- ✓ Reviewed the Authority'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 C

AGENCY'S WRITTEN RESPONSE



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March 31, 2015

VIA E-MAIL CHERYL_DIETZ@CALPERS.CA.GOV

Cheryl Dietz, Assistant Division Chief
California Public Employees' Retirement System
Office of Audit Services
PO Box 942701
Sacramento, CA 94229-2701

Re: Regional Water Authority

Dear Cheryl:

On behalf of my client, Regional Water Authority ("Authority"), I hereby submit this letter as an update to the response dated July 3, 2014 and submitted by Mr. Horowitz of Bartkiewicz, Kronick and Shanahan on behalf of the Authority ("Letter"). To be clear, the Authority's position with respect to Finding 1 and Finding 2 of the draft audit report dated June 12, 2014 ("Draft Report"), as detailed in the Letter, remains unchanged. As such, the Authority reserves all rights to pursue any means of resolving any action taken by CalPERS that proves detrimental to Authority employees.

However, out of an abundance of caution, Sacramento Groundwater Authority ("SGA") decided to submit a new agency application to CalPERS for a determination that it is eligible to establish a retirement contract with CalPERS. The application was submitted on February 2, 2015 and is currently being evaluated by members of the CalPERS' contract unit. Assuming that SGA is deemed eligible, we anticipate that the service impacted by Finding 2 would be reallocated from the Authority's CalPERS contract to the newly established SGA CalPERS contract, with no negative impact on current employees or retirees, now and in the future.

Therefore, we respectfully request that the finalization of the Draft Report be placed on hold until the CalPERS contract unit makes a determination on the eligibility of SGA to establish a contract.

Respectfully submitted,

Original signed by Isabel C. Safie

Isabel C. Safie
of BEST BEST & KRIEGER LLP

cc: Debra Sedwick, Chair, Board of Directors (via e-mail)
John Woodling, Executive Director (via e-mail)
Nancy Marrier, Finance and Administrative Services Manager (via e-mail)

APPENDIX D

Precedential Decision 08-01 – The
Matter of Galt Services Authority

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application to)	CASE NO. 8287
Contract with CalPERS by)	OAH NO. N-2007080553
)	
GALT SERVICES AUTHORITY,)	
)	PRECEDENTIAL DECISION
Respondent,)	08-01
)	
and)	EFFECTIVE: October 22, 2008
)	
CITY OF GALT,)	
)	
Respondent.)	

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code Section 11425.60, concerning the application of Galt Services Authority and City of Galt; hereby designates its final decision in the GALT SERVICES AUTHORITY and CITY OF GALT matter, as adopted by the Board on May 15, 2008, as a PRECEDENTIAL DECISION of the Board.

I hereby certify that on October 22, 2008, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the Board's final decision is a true copy thereof as adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
KENNETH W. MARZION, INTERIM CHIEF
EXECUTIVE OFFICER

Dated: NOV 13 2008

BY Original signed

PETER H. MIXON
GENERAL COUNSEL

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

1
2
3
4 In the Matter of the Application to) CASE NO. 8287
Contract with CalPERS by) OAH NO. N-2007080553
5)
6 GALT SERVICES AUTHORITY,)
Respondent,) DECISION
7)
8 and)
9 CITY OF GALT, ¹)
Respondent.)

11
12 This matter was heard before the Board of Administration of the California
13 Public Employees' Retirement System at its regular meeting on May 15, 2008,
14 pursuant to the Board's determination at its meeting of March 19, 2008, to hear this
15 matter as a Full Board Hearing.

16 RESOLVED, that the Board of Administration of the California Public
17 Employees' Retirement System hereby adopts as its own decision the Proposed
18 Decision dated January 29, 2008, concerning the application of Galt Services
19 Authority; RESOLVED FURTHER that this Board decision shall be effective 30 days
20 following mailing of the decision.

21
22 * * * * *

23 I hereby certify that on May 15, 2008, the Board of Administration, California
24 Public Employees' Retirement System, made and adopted the foregoing Resolution,
25 and I certify further that the attached copy of the administrative law judge's Proposed

26 // // // //

27 _____
28 ¹ Corrected caption.

1 Decision is a true copy of the decision adopted by said Board of Administration in said
2 matter.
3

4 BOARD OF ADMINISTRATION, CALIFORNIA
5 PUBLIC EMPLOYEES' RETIREMENT SYSTEM

6 Dated: *May 20, 2008* BY Original signed
7 KENNETH W. MARZION
8 INTERIM CHIEF EXECUTIVE OFFICER
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BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

GALT SERVICES AUTHORITY,

Respondent,

and

CITY OF GALT,

Respondent.

Case No. 8287

OAH No. 2007080553

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 5, 2007, in Sacramento, California.

S. Kingsley Macomber, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Roger K. Crawford, Attorney at Law, represented the City of Galt (City) and the Galt Services Authority (GSA). (The City and GSA are collectively referred to as "respondents.")

Evidence was received on December 5, 2007. The record remained open for the parties to file post-hearing briefs to address questions asked by the Administrative Law Judge and to respond to issues raised by the parties during the hearing. On January 8, 2008, CalPERS filed its post-hearing brief, which was marked for identification as Exhibit 27, and respondents filed their post-hearing brief, which was marked for identification as Exhibit B. The record was closed and the matter was submitted for decision on January 8, 2008.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED January 31 20 08

ISSUES

The following issues are before the Board of Administration for determination:

1. Upon transfer to the GSA under the terms of the Joint Powers Agreement, described in Finding 5 below, and the Revised Operating Agreement, described in Finding 12 below, do the officers of the City who hold positions created or defined by statute or municipal code (City Manager, City Clerk and Finance Director) become employees of the GSA such that the GSA may contract with CalPERS to make these officers members of CalPERS?
2. Upon transfer to the GSA under the Joint Powers Agreement and Revised Operating Agreement, do City employees become GSA employees such that the GSA may contract with CalPERS to make these employees members of CalPERS?¹

FACTUAL FINDINGS

1. The GSA is a public agency, established pursuant to the Joint Powers Agreement for the stated purpose of providing administrative, management, special and general services to the City. The City seeks to transfer employees to the GSA in order to provide the transferred employees with enhanced retirement benefits while, at the same time, avoiding the City's irrevocable prior participation in the federal Social Security Program. The GSA, as a public agency, has sought to contract with CalPERS to have its transferred employees become members of the system. CalPERS declined to contract with the GSA, contending that, under the common law employment test, the transferred employees will not become employees of the GSA but, instead, will remain employees of the City. The City and GSA appealed CalPERS's decision.

Stipulated Facts

The parties stipulated to the following facts:

2. The City is a general law city located in California and a "public agency" as defined by Government Code section 20056.
3. The Redevelopment Agency of the City of Galt (RDA) is a public government organization created by the City.

¹ The Statement of Issues also included two additional issues (Nos. 3 and 4 in Section XVI) relating to the Chief of Police and City Police Officers. As set forth in Finding 18, the parties stipulated that the City would not be transferring these positions to the GSA, so Issue Nos. 3 and 4 were no longer relevant and should be deleted. Pursuant to the stipulation of the parties, the Statement of Issues is amended to delete Issue Nos. 3 and 4 in Section XVI.

4. The current contract between the City and CalPERS, as amended effective January 1, 2006, provides retirement benefits under the "2% at 55" formula for miscellaneous members.
5. A Joint Powers Agreement creating the GSA was adopted by the City and the RDA on September 5, 2006. The purpose, powers, organization and other provisions governing the terms, organization and authority of the GSA are set forth in the Joint Powers Agreement.
6. The California Secretary of State acknowledged the filing of the GSA Joint Powers Agreement on September 26, 2006. The GSA was issued an Employer Identification Number by the IRS on October 2, 2006.
7. An Operating Agreement between the City and the GSA was adopted on October 17, 2006, wherein, among other things, the GSA agreed to provide certain administrative, management, special and general services to the City. Further, the GSA agreed to employ any and all individuals that were employed by the City and engaged to perform those services at the time those services were "transferred" to the GSA. Further details of the proposed relationship between the City and the GSA are set forth in the Operating Agreement.
8. Prior to entering into the Operating Agreement, the City met and conferred with the employee association representing its employees regarding the decision and effects of the Operating Agreement. The City also met with its unrepresented employees. This process resulted in a Memorandum of Understanding (MOU) with the represented employees that required the City, among other things, to ensure that the GSA would hire current bargaining unit employees to perform the services under the Operating Agreement without any loss or reduction of rights, benefits or seniority. The City entered into a similar agreement with its unrepresented employees. The terms affecting the transfer of employees to the GSA are set forth in the MOU and the City Agreement with Unrepresented Employees.
9. Implementation of the Operating Agreement was placed on hold pending CalPERS's approval of the GSA's request to enter into a contract for retirement benefits covering its employees.
10. The GSA initiated the process of contracting with CalPERS in October 2006. The scope of this request, as well as the nature of the benefits and the requested benefit formula, are set forth in Sections V and VI of the Statement of Issues.
11. On February 23, 2007, CalPERS notified the City (and the GSA) that it had determined that individuals to be employed by the GSA to perform the services under the Operating Agreement would remain subject to the control and direction of the City and, accordingly, under the applicable common law rules of employment, would remain City

employees and would not become GSA employees. CalPERS further concluded that, absent further supporting documentation, those individuals would remain subject to the contract already entered into between the City and CalPERS.

12. On March 12, 2007, the GSA and the City subsequently submitted a Revised Operating Agreement to CalPERS in an attempt to address the concerns CalPERS raised in its February 23, 2007 letter. The Revised Operating Agreement sets forth the proposed relationship between the City and the GSA and, for purposes of this matter, governs their contractual obligations to each other.

13. Under the Revised Operating Agreement, the GSA must hire City employees with no change in their wages, hours or terms of employment other than those recognized in the City's bargaining agreements, recognize existing City employee associations and assume the City's obligations under the City's existing bargaining agreements, and adopt and implement the City's existing personnel and employer-employee regulations and policies.

14. Under the Revised Operating Agreement, the City will continue in existence and carry out its municipal functions and duties as before. The following City employees will be transferred to the GSA under the Revised Operating Agreement: City Manager, City Clerk, City Finance Director, and all other permanent employees of the City except the City Treasurer, Chief of Police and all Police Officers who report to the Chief of Police. The Revised Operating Agreement neither prohibits nor obligates the GSA to change the personnel who will be provided to the City for carrying out its functions and duties.

15. The Revised Operating Agreement neither prohibits nor obligates the GSA to hire employees to manage and handle, among other things, its own internal operations. Further, the GSA is neither prohibited nor obligated to enter into a separate agreement to provide personnel and services to the RDA (or even a third agency).

16. All funds for GSA salaries, benefits and employee taxes will be provided by the City.

17. On April 25, 2007, CalPERS rejected the GSA's request to enter into a contract for retirement benefits. The GSA and the City filed a timely appeal on June 6, 2007.

18. Because the Chief of Police and Police Officers who report to the Chief of Police are not being transferred to the GSA and will remain employees of the City, the parties agreed that Issue Nos. 3 and 4 as set forth in Section XVI of the Statement of Issues do not need to be decided and are therefore moot. The parties stipulate that the Statement of Issues may be amended to delete Issue Nos. 3 and 4.

Additional Facts

The following additional facts were established through evidence presented at the hearing:

19. The contract that the GSA seeks to enter into with CalPERS would provide retirement benefits under a "2.7% at 55" formula for miscellaneous members.

20. The Joint Powers Agreement between the City and the RDA provides for the creation of the GSA as a joint powers authority under the Joint Exercise of Powers Act, Government Code section 6500 et seq. The agreement recites that the City and the RDA determined, among other things, that: (1) it was more efficient and cost-effective to provide certain management, administrative, special or general personnel services to the City and the RDA through a joint powers authority than by directly employing certain staff; (2) state law allows for a joint powers authority to provide such services; and (3) state law allows for certain functions of the City and the RDA to be provided by contract with the GSA. The agreement states that its purpose is to "jointly exercise" the common powers of the City and the RDA in the manner set forth in the agreement. Article III of the agreement provides:

TRANSFER OF SERVICES
ASSUMPTION OF RESPONSIBILITIES

On or after the Effective date, City or [RDA] may contract with GSA for personnel services. City or [RDA] may transfer to GSA employees of City or [RDA] and GSA shall become their employer under such terms and conditions as determined by GSA. All applicable employment rules, regulations, MOU's or collective bargaining agreement[s], ordinances, and resolutions may be adopted and ratified by the Board for such employees. Any and all employment records shall become the property of GSA.

21. At its regular meeting on September 5, 2006, the Galt City Council adopted Resolution No. 2006-116 establishing the GSA. The August 25, 2006 Agenda Item for that resolution explained that the creation of the GSA was "the first step in the process to withdraw from Social Security, which would enable the City to offer enhanced benefits to its employees." The Agenda Item stated that, once the GSA had been established and staff had filed for recognition with state and federal authorities, the City "would then be in a position to complete the process of assigning employees to the [GSA] and withdrawing from Social Security." The Agenda Item described the GSA as "an alternate employer for the City of Galt as a means of withdrawing from Social Security."

22. The MOU that the City entered into in October 2006 with the City's represented employees provides that the parties had "fully met and conferred over the decision as well as the effects of a potential contracting out of all bargaining unit work, with the accompanying 'transfer' of bargaining unit employees" to the GSA. The parties agreed that "all bargaining unit employees are transferred to and become employees of the GSA without any loss of rights, benefits or seniority" except as provided in the MOU. Among other things, the MOU provided that employees "transferred to the GSA will agree not to participate in the Social Security retirement program. (This removes the current 6.2% employee contribution and the employees will retain 6.2% in their salary.) Instead, they will be entitled to the Level 4 1959 Survivor Benefits through CalPERS, with employees responsible for the employee cost. (Currently, this cost is estimated at \$2.00 per month.)"

23. The City's unrepresented employees entered into a similar agreement with the City, entitled "Agreement with the City of Galt and the Unrepresented Employees, October 17, 2006, Establishment of an Alternate Employer." This agreement states, in relevant part, that it was "expressly understood that the unrepresented employees will support the effort to establish an alternate employer and to withdraw from participation in Social Security."

24. In addition to the provisions described in Findings 12-16 above, the Revised Operating Agreement also provides that the GSA agreed to "employ any and all individuals currently employed by City and engaged to perform services as set forth in 2(A)(i) above without any loss or reduction of rights, benefits or seniority or change in wages, hours and terms and conditions of employment, except as expressly set forth in any agreements or memorandum of understanding between City and the affected employees or their respective employee associations or as permitted by existing law or City rule, regulations, practice, procedure or policy." In addition, the agreement provides that the GSA will: (1) maintain the personnel records for these employees; (2) recognize all existing City bargaining units and assume all meet and confer obligations; (3) adopt all existing City rules, regulations, policies, practices and procedures covering personnel matters and employee-employer relations; (4) provide workers' compensation coverage for these employees; (5) arrange for its employees to participate in deferred compensation plans; (6) provide health and welfare benefit plans to its employees; (7) arrange for its employees to participate in a Flexible Benefit Plan; (8) prepare rules and regulations for its personnel administration; (9) provide all hiring, disciplinary, and general personnel administration for its employees; and (10) be responsible for the costs of all taxes; health and welfare benefits; vacation, sick, administrative and other types of leave; and other payments relating to its employees.

The Revised Operating Agreement provides that the City will: (1) set up and maintain all the bank accounts, petty cash, daily reports, budgeting, investment and auditing set out in the Joint Powers Agreement creating the GSA; (2) prepare payroll checks for GSA employees until the GSA had made arrangements for the preparation and processing of its payroll; (3) provide the GSA with office space, and all equipment and supplies, at the City's expense; and (4) transfer to the GSA an amount necessary to reimburse the GSA for the salaries and benefits of the employees.

25. Audrey Daniels is the Human Resources Director of Foster City and an independent consultant in human resources. He was engaged by the City as an advisor to present, develop and initially draft the Joint Powers Agreement, the Operating Agreement, and the Revised Operating Agreement. As Mr. Daniels explained, while the City will transfer to the GSA certain personnel with specific job descriptions, under the Joint Powers Agreement and Revised Operating Agreement, the GSA is not required to maintain those personnel or job descriptions once those employees are employed by the GSA. Instead, like any other employer, the GSA may, in the future, make changes in its personnel and job classifications as it deems appropriate. In addition, while the GSA will initially assume the City's obligations to represented employees under the collective bargaining agreements in effect at the time of the transfer, the GSA, in the future, may bargain with the unions and make those changes in the collective bargaining agreements to which the parties agree. After the transfer, the GSA will maintain its own personnel records and may develop its own personnel policies. The GSA will provide the management, administrative, special and general personnel services to the City as described in the Revised Operating Agreement and the City has the right to insist that the end results of those services be correct. According to Mr. Daniels, the GSA will determine how the services for the City will be performed and which GSA employees will perform those services.

26. Under the Joint Powers Agreement and the Revised Operating Agreement, the City will transfer to the GSA employees currently occupying the positions of City Manager, City Clerk, Finance Director, and other City positions, and the GSA will provide services to the City utilizing these transferred employees. There was no evidence to indicate that the City would transfer any vested statutory or ordinance-defined positions to the GSA. Nor was there any evidence to show that the City Council would cede to the GSA any of the City Council's discretion over its municipal authority.

27. While the evidence did not establish that the City intended to transfer any of its positions or cede any of its municipal authority to the GSA, from the documents described in Finding 21, it appears that the sole purpose of the City Council in establishing the GSA was to create an "alternate employer" for the City's employees in order to avoid the City's irrevocable prior participation in the federal Social Security Program and increase the retirement benefits the transferred employees will receive through CalPERS. Although the Joint Powers Agreement and the Revised Operating Agreement state that the GSA may provide additional services to entities other than the City in the future, there was no indication in the City Council documents that the GSA is, in reality, expected to perform any services for agencies other than the City.

LEGAL CONCLUSIONS

1. The law governing CalPERS is set forth in the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq. Government Code section 20022 defines a "contracting agency" to mean "any public agency that has elected to have all or part of its employees become members of this system and that has contracted with the board for that purpose." Government Code section 20028, subdivision (b), defines an "employee" to

mean “[a]ny person in the employ of any contracting agency.” Under Government Code section 20460, a “public agency may participate in and make all or part of its employees members of [CalPERS] by contract entered into between” the public agency’s governing body and the Board pursuant to the PERL. Under Government Code section 20461, the Board may “refuse to contract with ... any public agency for any benefit provisions that are not specifically authorized by [the PERL] and that the [Board] determines would adversely affect the administration of” CalPERS.

2. Pursuant to Government Code section 20125,² the Board determines who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under CalPERS. As the California Supreme Court held in *Metropolitan Water District v. Superior Court* (2004) 32 Cal.4th 491, 509 (*Cargill*), when determining whether individuals are employees of a public agency, CalPERS must apply the common law test for employment.

In *Cargill*, the Metropolitan Water District (MWD) contracted with several private labor suppliers to provide MWD with workers, classified as “consultants” or “agency temporary employees.” MWD did not enroll these workers in CalPERS’s retirement plans or provide them with benefits specified in the MWD Administrative Code. The workers alleged that MWD had the full right of control over the manner and means by which they provided services, and the labor suppliers merely provided MWD with payroll services. The court found that, if these allegations were proven, the workers would be MWD employees under the common law employment test and MWD would be required to enroll them in CalPERS.

3. In *Cargill*, the court held that the PERL requires contracting public agencies to enroll in CalPERS all common law employees.³ CalPERS argues that the common law employment test, which the *Cargill* court used to ensure that MWD’s employees would obtain pension benefits, should be applied in this matter to deny enrollment in CalPERS to GSA’s claimed employees. CalPERS’s argument is persuasive. Although the court in *Cargill* used the common law employment test to *provide* CalPERS pension benefits to MWD’s common law employees, CalPERS may use that same test to *deny* pension benefits to any persons who are not common law employees of the GSA.

4. In *Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, 949 (quoting from *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43-44), the California Supreme Court explained the common law test for employment as follows:

² Government Code section 20125 provides:

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.

³ Contracting public agencies may exclude employees under specific statutory or contractual provisions not relevant to this matter.

In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations.] Other factors to be taken into consideration are (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 the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman 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. (Rest., Agency, § 220; Cal. Ann., § 220.)

The court also recognized two additional factors: the extent of control, and whether the principal is or is not in business. (*Id.* at p. 950.)

5. In arguing that the City, and not the GSA, will remain the common law employer of the transferred employees, CalPERS cites to cases decided by federal courts under section 401, subdivision (a) of the Internal Revenue Code (IRC § 401(a)) involving professional employment organizations (PEO's), which "lease" management personnel, consultants and licensed professionals (such as attorneys, accountant, dentists and engineers) to businesses (recipients). For a pension plan to qualify under IRC § 401(a) and retain its tax-exempt status, an employer's retirement plan must be for the "exclusive benefit" of the employer's employees and their beneficiaries. In order to preserve its tax-qualified status under IRS § 401(a), CalPERS must ensure that its contracts with public agencies provide retirement benefits only to the agencies' common law employees.

6. In *Professional & Executive Leasing, Inc. v. Commissioner Internal Revenue Service* (9th Cir. 1988) 862 F.2d 751, Professional & Executive Leasing, Inc. (PEL), a PEO, filed a petition for declaratory relief seeking a determination that its retirement plans met the requirements of IRC § 401(a). PEL entered into employment contracts with the workers covered under PEL's retirement plans. PEL also entered into leases with the recipients to which PEL leased the workers. PEL prepared the workers' paychecks, withheld Federal and state income taxes, and paid Social Security and Federal unemployment taxes for each worker. PEL also paid worker's compensation premiums and state unemployment insurance premiums for the workers.

The court in *Professional & Executive Leasing, Inc.* determined that PEL's retirement plan did not qualify under IRC § 401(a) because it included non-employees and, therefore, was not exclusively for the benefit of employees. In reaching its decision, the court applied a employment test very similar to the common law employment test enunciated in *Tieberg*. The court found that PEL's control over the workers was not sufficient to establish an employment relationship even under the lower standard applicable to professionals. In addition, that court found that, although the contracts PEL entered into appeared to give PEL control over its workers, PEL's right to control was, at best, "illusory."

The court relied upon the following factors in reaching its conclusion: Almost all workers had a prior equity or ownership interest in the recipient to which they were assigned. PEL had the right to reassign workers to a different recipient, but it never exercised that right. PEL had no reason to reassign or fire a worker unless a recipient complained, an unlikely scenario because most workers had some control over the recipient to which they were leased. Similarly, PEL's control over the workers' salaries was illusory, because any change required approval by either the recipient or the worker. PEL did not conduct any screening of the workers except to verify their licenses to practice. The recipients: (1) provided the equipment, tools and office space for the workers; (2) furnished the workers with malpractice insurance; and (3) along with the workers, controlled the details of how and when the work was to be performed. (See also *United States v. Garami* (1995) 184 B.R. 834.)

7. CalPERS argues that, while these PEO cases involved private entities and professional employees, their reasoning is applicable to the public agency officers and employees in this case. CalPERS's argument is persuasive.

Under the terms of the Joint Powers Agreement and Revised Operating Agreement, the GSA must accept all the identified City officers and employees. The GSA is initially bound by the City's labor agreements and personnel rules and policies. While respondents asserted that the GSA could meet and confer with the union to change these agreements, rules and policies in the future, there appears to be little reason to do so because the City is the GSA's only client. Although the Joint Powers Agreement and the Revised Operating Agreement state that the GSA may provide additional services to entities other than the City in the future, there was no indication in the City Council documents that the GSA is, in reality, expected to perform any services for agencies other than the City.

The City will set up and maintain all the bank accounts, petty cash, daily reports, budgeting, investment and auditing for the GSA; prepare payroll checks for GSA employees until the GSA makes arrangements for the preparation and processing of its payroll; and provide the GSA with office space, equipment and supplies at the City's expense. While respondents emphasized that the GSA will just be providing services to the City, the Revised Operating Agreement provides that City will reimburse the GSA for the salaries and benefits of the employees, instead of paying for the value of the services it receives.

Even though the Revised Operating Agreement may allow the GSA to determine the duties and responsibilities of its personnel, all of its actions are subject to City approval. While the Joint Powers Agreement and Revised Operating Agreement ostensibly grant the GSA the authority to change personnel policies, take over the payroll function, and discipline the transferred personnel, the GSA has little incentive to assume these employer responsibilities once it has achieved what appears to be its sole purpose for existing: acting as the City's "alternate employer" so that the City may avoid its Social Security obligations and increase CalPERS retirement benefits for its transferred employees. (Findings 21 and 27.)

In sum, although the Joint Powers Agreement and Revised Operating Agreement appear to give the GSA control over the transferred officers and employees, the GSA's right of control is, at best, illusory.

8. CalPERS refused to contract with the GSA based upon its determination that, under the common law employment test, the transferred officers and employees would not, in reality, become the officers and employees of the GSA but, instead, would remain the officers and employees of the City. In making this determination, CalPERS properly exercised the authority granted under Government Code section 20125 and applied the test set forth in *Cargill*. Respondents failed to meet their burden of proving, by a preponderance of the evidence, that CalPERS's determination was incorrect.⁴

ORDER

CalPERS's refusal to contract with the Galt Services Authority is **AFFIRMED**.
Respondents' appeal is **DENIED**.

DATED: January 29, 2008

Original signed

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings

⁴ Given this conclusion, there is no need to address CalPERS's additional arguments regarding whether the City may contract out for the positions of City Manager, City Clerk or Finance Director; whether, under the Joint Powers Agreement and the Revised Operating Agreement, the City would be delegating any non-delegable authority to the GSA; or whether the City's efforts to withdraw from Social Security were prudent.