RESPONSE TO GRAND JURY REPORT

Report Title: **"Pension Enhancements: A Case of Government Code Violations and A Lack of Transparency"**

Report Date: **June 30, 2015**

Response by: **Marin County Board of Supervisors**

FINDINGS

- We disagree wholly or partially with the finding(s) numbered: **F1-F6**

RECOMMENDATIONS

- Recommendation number **R2** has been implemented.
- Recommendation(s) numbered **R1 and R3** will not be implemented because they are not warranted or are not reasonable.

Date: Signed: ______________________________

Number of pages attached: 6

Marin County Board of Supervisors

Response to Findings and Recommendations from Grand Jury Report

"Pension Enhancements: A Case of Government Code Violations and A Lack of Transparency" (April 9, 2015)

Given the extremely technical nature of this report, the County hired the law firm of Meyers Nave to review and advise the County on applicable Government Code sections, documents referenced in the Grand Jury bibliography and County actuarial reports.

FINDINGS

F1. The Employers appear to have repeatedly violated Cal. § Gov't Code 7507 by using the same actuarial evaluation report for many different pension increases and by failing to publicly disclose those increased costs before adopting them. The evaluations did not review the proposed increases for each individual bargaining unit; the Employers continued using the evaluation after years had passed. These factors appear to have contributed to the current unfunded liabilities of MCERA.

Response: Disagree.

Section 7507 states that a local legislative body "shall secure the services of an enrolled actuary to provide a statement of actuarial impact upon future annual costs." (Cal. Gov. Code § 7507) After full review by outside legal counsel, we have determined that in compliance with Section 7507 (and Section 31516, which also contains this requirement), the County secured the services of the actuarial firm William M. Mercer Incorporated ("Mercer") which issued actuarial reports dated February 23, 1999, July 23, 1999, June 5, 2001, and the actuarial firm Gabriel, Roeder, Smith & Company, which issued updated reports in 2004. In those reports, the actuaries provided "a statement of actuarial impact upon future annual costs" for a number of different potential retirement benefit increases for both "miscellaneous" and "safety" employees of the County.

This finding states that the County appears to have violated Government Code 7507 "by using the same actuarial evaluation report for many different pension increases." (Report at p. 10) Section 7507 does not preclude the use of a single actuarial report in connection with different pension increases. The actuarial reports commissioned by the County in fact addressed the cost of multiple different pension increases, for both "safety" and "miscellaneous" employees, including the pension increases that were ultimately granted by the County.

Our records indicate that the County has a practice of engaging an actuarial firm and evaluating costs if a pension change is contemplated. In certain situations, an actuarial study was requested, but predicted costs were too high so the change was not implemented by the County. For example, in 2005 there was a request to allow employees to buyback military and other qualifying public service time. After a full actuarial analysis, the County decided that the costs were prohibitive and determined that such a buyback was not feasible.

This finding goes on to state that the "evaluations did not review the proposed increases for each individual bargaining unit." (Report at p. 10) Section 7507 does not require that an actuarial study be conducted for each bargaining unit. Actuarial studies generally project the cost of a particular benefit increase, as a percentage of pay, for employees under a particular pension formula. Actuarial studies are not necessarily broken down by individual bargaining unit. Since the same pension enhancements were applied to all miscellaneous employees, using one study rather than a handful does not change the overall estimated costs. In addition, the County negotiated with all bargaining units to pay half of the estimated costs of the enhancement.

Although not specifically stated in Finding F1, the Grand Jury Report concluded that the Board approved 23 separate retirement enhancements between 2001 and 2005. The Grand Jury's count, however, was based on approvals of agreements with the County's numerous bargaining units. In fact, the Board approved four retirement enhancements during that period. Generally, employees were required to pay approximately half of the cost of the improvement.

Finding F1 states that employers "continued using the evaluation after years had passed." The documents reviewed by our outside legal counsel show that most of the pension increases approved by the Board occurred within 14 months of the date of the actuarial report that estimated the costs of those increases. The Grand Jury Report does not contain any analysis as to why the actuarial estimates were no longer valid at the time the Board voted on the pension increases.

F2. The County appears to have violated Cal. Gov't Code § 23026 by (a) failing to make the pension increases public through a "regularly scheduled meeting" of the Board, including through the use of consent agendas; (b) failing to provide public notice of that increase on a board agenda; (c) failing to provide a public notice of the "financial impact" that the increase would have on MCERA. These violations excluded the public from examining the fiscal impact of the pension increases and from participating in the board's decision process.

Response: Disagree.

Again, the County's outside legal counsel carefully researched this issue and reviewed all pertinent County documents prior to making legal conclusions. According to the legal analysis, the County substantially complied with Section 23026 in connection with every pension increase. The County made every pension increase public at a regularly scheduled public Board meetings by placing them on the Board agenda, sometimes on the regular agenda, sometimes on the consent agenda. At the time of the pension modifications, the Government Code did not prohibit placing these matters on the consent agenda. The Board provided public notice of the cost of the increased benefits in the Human Resources Director reports, which were included in the publicly available Board file created in connection with each agenda. The County made the agenda and reports available at least three business days in advance of the Board meeting. The County made the Human Resources Director reports available as hard copies in the Board's publicly available file. At some point, possibly beginning in mid-2002, the County also linked the reports to the on-line version of the Board agenda.

The County followed these procedures in every case, except that in some cases agenda items listed Board approval of CBAs with bargaining units, but did not specifically identify pension increases that were part of the agreements. In every case, however, the publicly available Human Resources Director's reports contained an explanation of the pension increases and the costs.

F3. The County appears to have violated Cal. Gov't Code § 31515.5 by (a) failing to make the pension increases public through a "regularly scheduled meeting" of the board, including through the use of consent agendas, (b) failing to provide prior public notice of that increase on board agendas, and (c) failing to provide a public notice of the "financial impact" that the increase would have on MCERA. The public appears to have been excluded from examining the fiscal impact of the pension increases and from participating in the approval process. It also appears that the public was unaware of potential future financial obligations.

Response: Disagree.

This finding states that the County appears to have violated section Cal. Gov. Code § 31515.5 for the same reason as in Finding F2. However, as stated in our response to Finding F2, our outside legal counsel has reviewed this finding and has concluded that the County listed the pension increase or CBAs on the agendas of regularly scheduled public Board meetings and provided a publicly available report from the Human Resources Director on their financial impact.

F4. The County appears to have violated Cal. Gov't Code § 31516 by (a) failing to secure an actuarial statement that explains the financial impact of the specific pension increase on MCERA and by (b) failing to make that actuarial report public at least two weeks prior to the adoption of the increase of benefits. This appears to have excluded the public from examining the fiscal impact of the pension increases, from participating in the board's decision-making process, and from understanding their potential future financial obligations.

Response: Partially Disagree.

Cal. Gov. Code Section 31516 contains the same requirements as section 7507. The County complied with the requirements by securing an actuarial statement on the impact of the specific pension increases, and making the actuarial information publicly available at a Board meeting in the reports authored by the Human Resources Director. However, in review of all pertinent documents, our outside legal counsel has determined that the County did not fully comply with sections 7507 and 31516 because it did not make the future costs available at a public meeting two weeks in advance of adoption of benefit increases.

F5. If the pension increases were not made in accordance with the California Government Code, the citizens of Marin County were never given proper notice about pension increases that are now costing them millions of dollars. These increases and associated liabilities are a contributing factor to why MCERA has a collective unfunded pension liability of approximately $536.8 million.

Response: Disagree.

The County substantially complied with the notice requirements of Government Code sections 7507, 23023 and 31515.5, 31516.

The unfunded liabilities are higher than what was previously projected in 2001 largely because investment earnings returned below the estimated 8.25% level, and because people are living longer today than projected 14 years ago – factors experienced by all other public employee retirement systems nationwide, particularly in the context of the most severe recession since the Great Depression. It is worth noting that MCERA's most recent unfunded liability estimate for the County, as of June 30, 2014, is $217.8 million.

F6. Because there appear to have been statutory violations, the future pension benefits provided for by the enhancements may or may not have vested as rights of the public employees under California law.

Response: Disagree.

Outside legal counsel has reviewed relevant case law and has advised that the Government Code sections at issue do not state that failure to comply makes pension increases void, and the County substantially complied with the requirements of the Government Code. In the opinion of outside legal counsel, based on the County's substantial compliance, there is no basis under the Government Code sections at issue to void the pension increases.

RECOMMENDATIONS

The Marin County Civil Grand Jury recommends that:

R1. The Employers develop, adopt and implement a policy and procedures (including staff training) to prevent future violations of the California Government Code when increases in pension benefits are proposed. The Employers should consider making their legal counsel responsible for ensuring compliance with the Government Code.

Response: This recommendation will not be implemented because it is not warranted. Given our efforts to reduce our unfunded retiree liabilities, we have no plans to offer increases in pension benefits. As a practical matter, statewide pension reform in 2012 does not allow it.

If a future Board is legally able to grant increased benefits and desired to do so, the County will ensure full compliance with the California Government Code by requiring written confirmation from MCERA's legal counsel that legal requirements have been fulfilled before any benefit increases can be implemented.

R2. The Employers develop, adopt and implement a policy for "reporting out" to the public regarding the employment and pension costs in terms of the amount and the Employer's ability to pay on a current cash flow basis.

This recommendation has been implemented. We have been very open and transparent about our unfunded retiree health and pension liabilities. We routinely report our long-term liabilities as part of our budget process and on an ongoing basis post on our County website relevant actuarial reports detailing our long-term pension and retiree health obligations. In addition, we send all property taxpayers information detailing our retiree liabilities as part of an insert to our property tax bills.

R3. Each Employer establish a Citizens' pension Oversight Committee comprised of resident tax payers who would: 1.) review pension funding levels in light of the Employer's ability to pay; 2.) review proposed pension changes before final Employer approval of my collective bargaining agreement; 3.) review the Employer's compliance with Government Codes related to pensions; 4.) develop written quarterly reports for the public as to the financial security of the pension fund.

This recommendation will not be implemented because it is not warranted. Existing structures are in place to monitor the County's financial stability and progress on efforts to reduce our unfunded retiree obligations.

Over the past several years the Board of Supervisors has taken several actions to reduce our long-term retiree liabilities including:

- allocating $32 million for accelerated payments to MCERA

- allocating over $50 million in payments to a retiree health trust and a commitment to annual payments of approximately $12 million
- negotiating a new, substantially lower-cost retiree health plan for all employees hired after 2008
- negotiating lower miscellaneous pension plans for employees hired after 2012
- implementing lower costs tiers for all employees hired after 2013 and dedicating any savings to paying down our existing unfunded liabilities

The MCERA board has fiduciary responsibility to ensure that the retirement plan is structurally sound and that annual contribution rates are set so that the system in financially secure over the long term.

The County's financials are regularly reviewed by independent bond rating agencies and the ratings are based on the ability to pay for their current and long-term obligations. One of the reasons we've consistently received the highest rating available to California counties is that we are proactively addressing our long-term retiree health obligations while most local governments are simply on a pay-as-you-go basis.

Lastly, our Fiscal Audit Advisory Committee, which includes two residents as well as representatives from our schools, cities and special districts, annually reviews our financial audits, which include our progress on meeting our long-term pension and retiree health obligations.