OLYMPIC REGIONAL DEVELOPMENT AUTHORITY

ACCURACY OF EMPLOYEE RETIREMENT REPORTING

Report 2008-S-60
AUDIT OBJECTIVE

The objective of our audit was to determine whether the Olympic Regional Development Authority (ORDA) is complying with the requirements of the Employees’ Retirement System (ERS) when it enrolls individuals in the ERS and reports information about their earnings and days worked.

AUDIT RESULTS - SUMMARY

The State Comptroller’s Division of Retirement Services carries out the ERS’ day-to-day operations, which include enrolling new participants in the ERS and providing employers with guidance that will help them make sound decisions. Both New York State Law and the ERS have established requirements for employers regarding enrolling and reporting employees, as well as elected and appointed officials, to the ERS.

ORDA must enroll all full-time, permanent employees in the ERS, and it must notify all part-time, temporary, and provisional employees in writing of their right to membership in the ERS and enroll them if they elect to participate. We found ORDA needs to improve its practices to ensure it enrolls all full-time, permanent employees in the ERS. It also needs to ensure it properly enrolls those other employees who elect to participate in the ERS.

We found one full-time ORDA employee who was required to participate in the ERS beginning in early 1997, but whom ORDA had not enrolled in or reported to the ERS. We also found one full-time employee who was enrolled in, but not reported to, the ERS from October 2006 through January 2008, when ORDA officials discovered the error. Additionally, we found a seasonal employee who elected to participate in the ERS in November 2000, but who was not enrolled in or reported to the ERS.

ORDA officials agreed to work with ERS to enroll these employees and determine the amounts owed to the ERS by the employees and ORDA, based on past service. ERS officials estimate that it will cost ORDA nearly $22,000 to enroll the two full-time employees. They are also determining the amounts owed by the employees’ for their share of contributions and how these amounts should be paid to the ERS.

The ERS also requires that only employees, and not independent contractors, be enrolled in the ERS. We found ORDA hired an individual as its General Counsel who is also the full-time Executive Director of another State agency. ORDA pays this individual a flat fee of $24,000 per year regardless of the amount of time he actually works, and has reported this individual as a full-time ORDA employee for ERS purposes. Our analysis of this person’s working relationship with ORDA indicates he functions as an independent contractor working on retainer. Accordingly, we conclude this individual should not have been considered an employee for the purposes of ERS reporting. ORDA should notify ERS of this determination and recover the approximately $4,500 in retirement contributions it has made to the ERS on behalf of this individual.

Our report contains five recommendations to ORDA officials to correct the problems we identified during our audit. ORDA officials agreed with most of our recommendations, but took exception to our determination that the General Counsel should not be considered an employee for retirement purposes.
BACKGROUND

The New York State and Local Retirement System (NYSLRS) comprises two different retirement systems: the Police and Fire Retirement System and the Employees’ Retirement System (ERS). The ERS provides service and disability retirement benefits, as well as death benefits, to employees of participating public employers in non-teaching positions, exclusive of New York City. As of March 31, 2007, the NYSLRS held cash and investments with a value of more than $154.5 billion. More than 3,000 participating employers had enrolled about 1 million individuals in the NYSLRS, of whom about 627,000 were enrolled in the ERS.

To qualify for membership in the NYSLRS, an individual must be a paid employee of a participating employer. The employers are required to enroll all permanent full-time employees in the ERS, and offer participation in writing to part-time, temporary, and provisional employees. Participating employers are responsible for complying with the enrollment and reporting requirements contained in the New York Codes, Rules and Regulations and the ERS Employer’s Guide.

ORDA was created by the State in 1981 to manage the facilities that were used during the 1980 Olympic Winter Games at Lake Placid. It operates multiple recreational complexes throughout the Adirondack region in its efforts to encourage continuous use and enjoyment of the facilities and maximize their economic and social benefits to the region. As of November 30, 2007, 241 of ORDA’s 535 employees were participating in the ERS.

AUDIT FINDINGS AND RECOMMENDATIONS

Enrollment of Eligible Employees

ORDA is a participating employer in the ERS. According to the ERS Employer’s Guide, a participating employer must enroll all full-time, permanent employees in the ERS. The ERS refers to this group as mandatory employees. Other employees, such as those who are part-time, temporary, or provisional, must be given the option to enroll, although they cannot be required to do so. The ERS refers to this second group as optional employees.

ORDA is required by Section 45 of the New York State Retirement and Social Security Law to notify all optional employees in writing of their right to membership in the ERS, and to obtain a signed acknowledgment from the employees that they were so notified. Additionally, ORDA must retain these signed acknowledgments. Failure to retain signed acknowledgment forms from optional employees may result in future claims from employees who assert they were not notified of their option to participate in the ERS.

The ERS Employer’s Guide also requires that participating employers report earnings and days worked information only for eligible employees. Such information should not be reported for non-employees, such as independent contractors or consultants, because they are not eligible to join the ERS.

Each month, ORDA reports the earnings and days worked to the ERS for each enrolled employee. The ERS provided us with reports
for the months of September, October, and November 2007. We compared the names on the ERS reports with payroll registers provided to us by ORDA for the same months. Our tests showed that the names of all individuals on the ERS reports also appeared on the ORDA payroll registers. However, we identified two full-time ORDA employees who were required to participate in the ERS, and one optional employee who had elected to participate, but were not properly enrolled and reported to the ERS:

- One mandatory employee was required to participate in the ERS beginning in early 1997, but had not been enrolled in or reported to the ERS. This employee was originally hired as a seasonal employee and he opted not to participate in the ERS. However, in 1997 he became a permanent, full-time employee, at which time ORDA was required to enroll him in the ERS and begin reporting his earnings and days worked. Through March 2008, his unreported earnings totaled $317,356 for 3,055 workdays.

- A second mandatory employee was enrolled in, but not reported to, the ERS from the time of enrollment in October 2006 through January 2008, when ORDA officials discovered the error. As a result, this employee had unreported earnings of $33,701 for 340 workdays through the end of March 2008.

- One seasonal employee elected to participate in the ERS beginning on November 24, 2000. However, ORDA failed to process the enrollment or report this employee’s earnings or service to the ERS.

As a result of the above errors, both ORDA and the individual employees may be responsible for making retirement contributions based upon their past service and unreported earnings. ORDA officials indicated they have already begun the process of enrolling these individuals and providing information necessary to calculate amounts due for past periods. Officials have also committed to amending their hiring and monitoring procedures to provide greater assurance that newly-hired employees are enrolled properly in the ERS.

At the time of our fieldwork, ORDA was working with the ERS to determine the employer and employee contributions due for each of the mandatory employees. ERS officials estimated the employer contribution due from ORDA, as of early April 2008, totaled $21,828. The employees’ share of contributions had not yet been determined. ORDA must also work with the optional employee, who must decide between several options. The employee may elect to: enroll in the ERS now and buy back the non-member service credits; enroll now and decline to buy back the non-member service credit, but still retain the right to buy it back at a later date; or not join the ERS at this time. At the time of our audit, the employee had not made a decision.

We also reviewed ORDA’s personnel files for individuals in certain employee titles to determine whether any consultants or independent contractors had been erroneously reported as employees. IRS Publication 15A, along with established ERS precedent and opinions governing employer reporting that are now codified in regulation, establish the guidelines for determining whether workers are employees or independent contractors. These guidelines focus on the predominant nature of the relationship between the worker and employer. In general, when management
exercises a significant degree of control over a worker’s activities, and provides the worker with rights and benefits commensurate with employment, the worker should be considered an employee. Conversely, a worker who does not receive customary benefits and exercises a significant degree of independence regarding how, when, and where assigned tasks are performed, should be considered an independent contractor.

We identified one individual, ORDA’s General Counsel who was hired in 2006, whom ORDA reported as a full-time employee, but who does not meet ERS standards for an employee. We found the Counsel, who is currently paid a total flat fee of $24,000 per year regardless of the time actually worked, is also the full-time Executive Director of another State agency. He does not have an office at ORDA and does most of his ORDA-related work at the other State agency, based on requests from ORDA. He does not work any regularly scheduled hours for ORDA, nor does his pay vary based on the amount of work, if any, that he performs. The Counsel also receives no other customary employment benefits from ORDA, such as insurance or leave time, other than a biweekly payroll check and retirement benefits. We therefore concluded that this individual predominantly functions in the same manner as would an independently-contracted attorney working on retainer and exercising significant control over where, when, and how he performs his duties. As a result, he should not have been considered an ORDA employee for the purposes of ERS reporting.

In responding to our draft report, ORDA officials indicated that, at the time the Counsel was hired, they requested advice about the propriety of the arrangement from the State Ethics Commission (now known as the Commission on Public Integrity). However, we found the request, and the Commission’s advice, were not related to whether the Counsel would be a bona fide employee for retirement purposes. Instead, both focused on avoiding violations of Section 73 (4) of the State Public Officers Law, which precludes a State officer or employee from selling goods or services having a value in excess of $25 to any State agency, absent an award let after public notice and competitive bidding.

In their response, ORDA officials also contend that their intent was always to create an employer-employee relationship. As evidence of such, officials assert that they exercise two types of control over the Counsel that are mentioned as indicators of possible employment in IRS guidance provided to employers:

- **Behavioral Control** - in that ORDA can direct the Counsel to attend meetings and to complete tasks in a specific timeframe, can revise the final product of the Counsel’s work and can determine whether to follow the Counsel’s advice.
- **Financial Control** - in that the Counsel is paid a regular wage through the payroll system, does not have his own law firm or separate business office, and does not seek work from other clients.

However, the behavioral control that ORDA describes is no different than the requirements that would normally be placed on an independently contracted attorney, who could also be directed to attend meetings or complete work within certain time frames and whose advice ORDA could choose to follow or disregard. Further, while the existence of other outside clients could be a strong indication that the Counsel is an independent contractor, the absence of such a clientele
does not necessarily indicate employment. Rather, it is the predominant nature of the Counsel’s relationship with ORDA, and not with other potential clients or employers that determines eligibility for ERS purposes. In this case, we conclude that the Counsel’s similarity to other ORDA employees is limited to the fact that his retainer fee is paid biweekly through the payroll account. As such, we conclude he is ineligible for ERS credit based on these payments.

We estimate that, by properly treating the Counsel as an independent contractor instead of an employee, ORDA would save approximately $4,000 each year in the form of ERS contributions and the employer's share of Social Security and Medicare tax payments. In addition, by retroactively correcting this error to the time when the Counsel was first engaged in 2006, ORDA should be able to recover about $4,500 in employer contributions incorrectly made to the ERS.

Finally, the ERS provided us with a list of all other ORDA employees who were also reported as working for another ERS-participating employer during our scope period. We reviewed this information for selected employees to determine if the earnings, days worked, duties, and work locations were reasonable and found no discrepancies.

Accuracy of Reported Earnings and Days Worked

ERS rules require participating employers to establish a standard workday for each employee title. A standard workday can be as many as eight hours, but no fewer than six hours. The ERS also has rules for determining how earnings and days worked should be calculated and reported. Generally, the employer should calculate days worked by dividing total hours worked for the month by the number of hours in the standard work day for that position. Days worked include paid sick leave, vacation leave, holidays, and certain other types of leave. Earnings include gross amounts paid during the reporting period, less certain amounts such as payments for unused sick leave.

To test ORDA’s reporting to ERS of employee earnings and days worked, we selected a random sample of 20 ORDA employees. For each employee in our sample, we compared days worked and earnings reported to the ERS for the months of September, October, and November 2007 with the corresponding ORDA payroll registers. We calculated the days worked by adding up the hours worked according to the payroll registers for that month and dividing by the standard workday (ORDA has established a standard workday for all its employee titles). We calculated the earnings by adding up the earnings recorded in the payroll registers for that month and deducting any amounts not allowed by the ERS. We found no discrepancies between the payroll registers and amounts reported to the ERS.

ERS rules also require employers to report earnings and days worked for full-time, permanent employees from the date of their appointment in their position. For employees with optional membership, earnings and days worked should generally be reported from the ERS registration date forward. We reviewed a sample of 20 employees who were added to or deleted from ORDA’s payroll between September and November 2007 to determine whether ORDA accurately reported each employee’s earnings and days worked and found no discrepancies.

Lastly, the ERS has rules for determining how the days worked by appointed officials should be calculated and reported. ORDA’s Chief
Executive Officer (CEO) is its only paid appointed official. We found that a standard workday has been properly established for the CEO. ORDA also requires the CEO to complete time records, which are then used appropriately to compute the days worked to be reported to the ERS.

Recommendations

1. Complete the process of enrolling the two identified mandatory employees in the ERS, including reporting previous earnings and days worked and determining related amounts owed to the ERS for past service.

2. Develop a system to ensure that all mandatory employees are enrolled in and properly reported to the ERS.

3. Work with the identified optional employee to determine whether the employee wishes to enroll in the ERS, and if so, to process the enrollment and any related adjustments.

4. Ensure that optional employees who elect to participate in the ERS are enrolled in and reported to the ERS timely.

   (ORDA officials agreed with Recommendations 1 through 4 and indicated several actions have already been taken to correct enrollment problems.)

5. Discontinue reporting payments made to the General Counsel for ERS credit and work with the ERS to make the appropriate adjustments to past service records and recover contributions improperly paid.

   (ORDA officials disagreed with our determination and presented information which they believe is indicative of an employer-employee relationship.)

State Comptroller’s Note: As discussed on pages 5 and 6 of this report, the substance of the Counsel's relationship with ORDA is predominantly the same as an independently-contracted attorney. If the relationship continues as it was at the time of the audit, ORDA should provide for its Counsel through a formal contract awarded as a result of public notice and competitive bidding. However, a contract may not be required for the services of Counsel if ORDA substantially changes terms and conditions to reflect the criteria of an employer-employee relationship. It is also important to note that the Ethics Commission ruling on this matter did not make a determination of whether or not the relationship that existed between ORDA and its Counsel did, in practice, constitute employment. The ruling simply advised that the Counsel needed to be an employee or needed to be awarded the work through competitive bidding in order to comply with the State Public Officers Law. Our audit has established that the Counsel was not, in practice, functioning as an employee. Hence, there is no inconsistency between our audit and the Ethics Commission ruling on this matter.

AUDIT SCOPE AND METHODOLOGY

We conducted our performance audit in accordance with generally accepted government auditing standards. We audited ORDA’s enrollment of individuals in the ERS and its reporting of retirement information to the ERS. Our audit covers the period April 1, 2005, through February 8, 2008.

To accomplish our audit objective, we reviewed State laws and regulations addressing employer participation in the ERS,
focusing on the requirements for employee enrollment and reporting of earnings and days worked. We also reviewed ORDA’s guidelines in these areas. We interviewed ORDA officials and staff to identify the policies and procedures in place for enrolling employees in the ERS and reporting information about their earnings and days worked to the ERS.

To determine whether the individuals who were not enrolled in the ERS had been notified appropriately of their eligibility for enrollment, we reviewed ORDA’s personnel files for selected employees. We also reviewed personnel files and interviewed appropriate ORDA officials to determine whether any consultants or independent contractors had been reported erroneously as employees.

To determine whether earnings and days worked information was reported accurately to the ERS, we compared the information on file at the ERS with ORDA payroll registers for September, October, and November 2007. We also reviewed these payroll registers to determine whether the employees reported to the ERS by ORDA for those months were, in fact, on the payroll. In addition, the ERS provided us with a list of ORDA employees who were also reported to the ERS by another participating employer.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State’s accounting system; preparing the State’s financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

**AUTHORITY**

This audit was performed pursuant to the State Comptroller’s authority under Article X, Section 5, of the State Constitution and Section 2803 of the Public Authorities Law.

**REPORTING REQUIREMENTS**

A draft copy of this report was provided to ORDA officials for their review and comment. Their comments were considered in preparing this report, and are included as Appendix A.

Within 90 days of the final release of this report, as required by Section 170 of the Executive Law, the Chairman of the Olympic Regional Development Authority shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons therefor.

**CONTRIBUTORS TO THE REPORT**

Major contributors to this report include Frank Houston, John Buyce, Greg Petschke, Sharon Salembier, Jennifer Paperman, Ray Barnes, W Sage Hopmeier, Richard Podagrosi, Andre Spar, and Dana Newhouse.
August 22, 2008

Mr. Frank J. Houston – Audit Director
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Division of State Government Accountability
123 William Street – 21st Floor
New York, NY 10038

Re: Report 2008-S-60
NYS Olympic Regional Development Authority (ORDA)

Dear Mr. Houston:

This letter is in response to a recent audit performed at the New York State Olympic Regional Development Authority regarding Accuracy of Employee Retirement Reporting: 2008-S-60.

Five recommendations were suggested regarding current practices, many of which we have already addressed or are changing procedures to comply with the findings. Attached, you will find a formalized response to issues identified by the audit.

I want to call your attention, however, to the audit’s suggestion to discontinue the practice of treating General Counsel as an employee. In reviewing the matter in greater detail, ORDA believes that its General Counsel is properly considered an employee, especially in view of the guidelines provided in IRS Publication 15-A. Please see the attached response for the specifics regarding ORDA’s conclusion.

In view of our belief that General Counsel is in fact an employee, we request that consideration be given to our argument before the audit results are finalized.

Should you have any questions or concerns, please do not hesitate to contact me.

Kindest regards,

Ted T. Blazer, President and CEO

cc. Thomas Lukacs
Kathy Bushy
David McKillip
RESPONSE
REPORT 2008-S-060

This response is based upon the "Audit Findings and Recommendations" starting on page 3 of the Draft Audit and is done in asseratium.

FINDING (Pg 4): "...we identified two full-time ORDA employees who were required to participate in the ERS, and one optional employee who had elected to participate, but were not properly enrolled and reported to the ERS."

RESPONSE: ORDA acknowledges and agrees with the findings regarding the two full-time permanent employees and has taken the necessary steps to ensure enrollment and proper corrective measures. ORDA also points out that with respect to one of the employees, ORDA discovered the oversight and had initiated the necessary corrective measures prior to audit.

With respect to the part-time employee in question, ORDA points out that the on-site auditor felt, based on the employee's personnel file as a whole, the employee had meant to decline optional membership and actually never intended on participating in the ERS. ORDA concurs with the on-site auditor. Nevertheless, as the staff member is part-time, he had left service and, despite attempts to phone the employee, ORDA was unable to make contact with the employee to clarify whether enrollment in the ERS was desired. ORDA will clarify with the staff member upon his re-hire.

FINDING (pg 5): "...we concluded this individual [General Counsel] functions as an independently-contracted attorney working on retainer...He should not have been considered an ORDA employee for the purposes of ERS reporting."

RESPONSE: Pursuant to the audit, "IRS Publication 15-A establishes the guidelines for determining whether workers are employees or independent contractors," (15-A, 4). ORDA asserts that General Counsel is an employee within the meaning of IRS guidelines. Specifically, Publication 15-A examines three broad categories to determine whether somebody is acting as an independent contractor or an employee: (1) Behavioral Control; (2) Financial Control; and (3) the Type of Relationship.
Behavioral Control

"The key consideration is whether the business has retained the right to control the details of a worker’s performance or instead has given up that right." (15-A, 6). Publication 15-A also acknowledges “A business may lack the knowledge to instruct some highly specialized professionals,” (15-A, 6). In this instance, the employee in question acts as General Counsel – a highly specialized profession that requires admittance into the New York State Bar Association – obviously an area in which the employer lacks specialized knowledge. Further, ORDA clearly retains the right to control the details of the worker’s performance. ORDA acknowledges certain professional freedom associated with General Counsel insomuch as methodology – but such professional freedom extends no further than it does for many of its other employed positions including, but not limited to: Director of Finance, Director of Events, Director of Corporate Development, Marketing Managers, Venue Managers, etc. In addition, ORDA clearly retains the right to control the details of General Counsel’s work as much, if not more, than other employed positions in such key areas as: directing Counsel to meetings, directing Counsel to complete assigned tasks in a specific timeframe, revising the final product of Counsel’s work, determining whether to follow Counsel’s advice. In this respect, the employee-employer relationship between General Counsel and ORDA is no different that an attorney working for a law firm.

Financial Control

Insofar as Financial Control is concerned, ORDA clearly has the right to control the business aspects of the worker’s job. Publication 15-A looks to five distinct areas of consideration. 15-A states, “An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time.” This is consistent with ORDA’s treatment of General Counsel.

In addition, 15-A provides “An independent contractor is generally free to seek out business opportunities,” regarding the extent to which an independent contractor makes his/her services available to the relevant market (15-A, 6). ORDA emphasizes that General Counsel does not have his own law firm, does not maintain a business office nor does Counsel seek out or make himself available to any clients.

15-A also deems the extent of unreimbursed business expenses relevant. Specifically, “Fixed ongoing costs that are incurred regardless of whether work is performed are especially important.” Once again, ORDA asserts that General Counsel does not incur ongoing costs related to his profession (attorney) outside of those costs incurred related to his work for ORDA – again, consistent with an employee determination.

15-A also considers whether the worker can earn a profit or loss (independent contractors can make a profit or loss). Profit and loss are non-considerations with respect to General Counsel’s work.
Last, Publication 15-A examines the worker’s investment: “An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else.” ORDA acknowledges that General Counsel may have investment in equipment (not facilities) he uses in performing services for ORDA; but ORDA asserts that such investment is not significant (ie computer). Further, ORDA points out that, in many instances, it is ORDA’s facilities that are used to conduct Counsel’s work (meeting rooms, phone, facsimile, copiers, computer, etc.). Clearly, General Counsel meets the IRS’s Financial Control test as well.

**Type of Relationship**

The last area of consideration under 15-A pertains to the type of relationship that exists. There is no formal contract (ORDA asserts that a formal agreement would exist if General Counsel were an independent contractor). It is unquestionable that ORDA intended to create an employer-employee relationship as ORDA has engaged this particular employee with the expectation that the relationship will continue indefinitely. While General Counsel does not receive benefits that many employees receive, ORDA asserts that General Counsel would not be eligible for leave benefits under existing policy. Further, there is no fixed period associated with Counsel’s relationship with ORDA (as there would be with an independent contractor). Last, but not least, Counsel’s services are a key aspect of the regular business of the company. ORDA has a plethora of contracts into which it enters, ORDA has significant legal issues on a regular basis, a myriad of statutes exist pertaining to ORDA’s normal operations, etc. - all of which require regular attention from an attorney. In order to achieve that end, Counsel is directed by the President and Senior Vice President as to what work must be performed and what order to follow in order to control how work results are achieved. In fact, in said instances, at the end of the day, ORDA presents its legal position as its own work and not that of retained counsel.

Based upon the foregoing review of the Internal Revenue Service’s own guidelines, in conjunction with the manner in which counsel is directed, the need for the service performed, the permanency of the relationship and the other reasons listed above, it is clear that existing counsel is an employee of ORDA.

In conclusion, we would be remiss not to point out that a determination that General Counsel is an independent contractor would be in violation of Public Officers’ Law §73.4 and contrary to a previously received opinion from the Commission on Public Integrity formerly known as NYS Ethics Commission.

In view of the above, ORDA firmly believes that its General Counsel has been properly classified as a dual service employee.