

# Inconsistent Compensation & Hiring Practices Perpetuate Pay Disparities

## Office of the Inspector General



### Investigation Results

BART used bona fide factors in determining the starting salary for an employee who is not in a protected class (Employee A), which is an allowable practice. Bona fide factors include experience, seniority, and education, among others, and are used to justify pay differentials for people performing substantially similar work. However, BART did not use bona fide factors in determining salary for nine other employees who are in [protected classes](#) and work in the

same job classification as Employee A. This created a \$15,000 annual pay differential between Employee A and the nine employees in the protected classes. Employee A was able to negotiate a higher starting salary when joining the District, while the other nine employees said they were told they could not negotiate their starting salaries or believed that doing so would risk their career advancement opportunity.

BART also reclassified another employee who is not in a protected class (Employee B) to a higher-level job classification with a higher pay band after having them perform work commensurate with that higher position for almost two years. Given the length of time Employee B was performing the work, the District had an evident need for an employee to be placed in a higher job classification. The reclassification ensured Employee B was in a job classification reflective of the work they were performing. However, it bypassed an opportunity for BART employees to participate in a promotional recruitment, including the nine employees in the protected classes who might have been applicants for the job given their roles at the District. Additionally, Employee B was paid more than another employee (Employee C) who is also in a protected class. Employee C was in a higher job classification and had significantly more years of BART service than Employee B.

The inconsistent use of bona fide factors, lack of clarity regarding District practices, and deviation of recruitment processes do not reflect the District's aim to provide for an equitable workforce. Instead, they create distrust among employees and perpetuate the pay and employment disparities affecting protected classes. The results of this investigation support the need for the District to conduct a districtwide pay equity audit, which can identify where pay inequities may exist and whether factors such as race or gender may impact compensation. Such audits include reviewing policies and current standards to identify critical areas of risk and highlight areas where improvements are needed. It should be noted that Human Resources has been doing work in this area to assist employees in progressive pay increases reflective of their time and experience with the District.



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Providing independent oversight of the District's use of revenue.



Our investigation involves a total of 12 BART employees, including Employee A and Employee B who are not in a protected class, and 10 employees in protected classes. None of the employees were involved with or accused of improper conduct. To protect their identities, we do not name them or their job classification.

While this investigation uncovered practices that allow for or create pay disparities, it was not intended to determine whether those disparities are the result of discrimination. Such determinations are the responsibility of BART’s Office of Civil Rights (OCR). However, we did note that the evidence available to us did not suggest that discrimination was a factor in the pay decisions made for the 12 employees, though it did support that BART’s past pay decisions created the appearance of discrimination.

Research supports that pay disparities reduce employee retention and organizational efficiency and effectiveness. Conversely, organizations that prioritize pay equity create more equitable and transparent pay practices that allow them to hire and retain highly qualified employees, which improves operations. It also helps reduce claims of discrimination, which are costly to investigate and/or litigate.

## Recommendations

- 1 Ensure the nine employees in the protected classes are compensated in a manner reflective of their experience, education, and other applicable bona fide factors.
- 2 Use bona fide factors consistently across all departments when determining compensation for any new or existing BART employees.
- 3 Ensure all internal and external applicants understand that they may negotiate their starting salary and that doing so will not jeopardize their offer, but that the District is not required to accept their requests.
- 4 Ensure managers involved with recruitment understand the District’s provision to allow applicants to negotiate starting salaries.
- 5 Limit non-represented employee temporary upgrades to six months or until a recruitment is completed to fill a vacancy.
- 6 Maintain salary assessments for employees for the duration of their employment.
- 7 Complete a districtwide pay equity audit.
- 8 Ensure that the improvements identified in these recommendations are reflected in standard operating procedures.
- 9 Update the Non-Rep Handbook to be reflective of current employment terms and conditions for non-represented employees.

*Management agreed with our recommendations. See page six for details.*



## Allegations & Background

We received allegations regarding pay and employment discrimination. The complainant had filed similar complaints with the OCR, which is responsible for ensuring the District’s compliance with Equal Employment Opportunity (EEO) laws. Therefore, we did not investigate whether BART violated EEO laws. Our investigation focused on whether there was any improper behavior leading to the pay disparities. Additionally, all the employees discussed in this report are non-represented, meaning a union does not represent their employment interests and there is no collective bargaining agreement between them and the District. Instead, the District has a “Non-Rep Handbook” that covers the terms and conditions of their employment.

## Key Findings

Documentation supports that the department that hired the nine employees in the protected classes has a standard to give employees hired into certain classifications “the same starting salaries” instead of relying on Human Resources’ salary assessments, which consider bona fide factors in determining starting salary. This is supported by that department’s request to have seven of the nine employees in the protected classes “receive the same starting salary,” regardless of bona fide factors such as experience and education identified by Human Resources. The remaining two salary assessments were not available for review, but those employees’ salaries match the salaries of the seven employees whose salary assessments we examined. Employee A and each of the nine employees in the protected classes have varying degrees of experience and education with some individuals having a college degree while their counterparts do not, as it is not a required qualification, and several years more experience than their colleagues as shown in the table below.<sup>1</sup> Only Employee A’s salary is reflective of using bona fide factors in determining compensation.

**Table: Comparison of Salaries & Bona Fide Factors**

		Years of Experience Based on Date Hired for Current Position				
		Current Salary*	Managerial or Supervisory Experience	BART Experience	Transportation Experience	Degree
Employees in Protected Classes	Employee A	\$185,347	19	0	25	Master’s
	Employee 1	\$170,606	13	18	8	None
	Employee 2	\$170,606	10	0	5	Bachelor’s
	Employee 3	\$170,602	10	21	10	None
	Employee 4	\$170,605	28	27	16	None
	Employee 5	\$170,602	14	32	14	None
	Employee 6	\$170,602	9	16	6	None
	Employee 7	\$170,602	27	32	27	None
	Employee 8	\$170,602	13	9	3	None
Employee 9	\$170,602	6	9	6	Associate’s	

\*Current Salary Used Due to Differing District Salary Schedules at Time of Each Employee’s Hire

<sup>1</sup> Data in the table comes from employee applications and pay data provided to us by Human Resources.



Bona Fide Factors
Experience
Education
Seniority
Training

[Section 1197.5](#) of the California Equal Pay Act (CEPA) was amended on January 1, 2019, to allow for the use of bona fide factors such as education and experience in determining compensation.<sup>2</sup> Although Employee A’s employment with the District predates that amendment, we confirmed that BART used bona fide factors in determining their salary and that they do have more experience and a higher education than their colleagues in the protected classes, six of whom BART hired after the 2019 CEPA amendment went into effect. While we did not evaluate whether BART complied with CEPA because doing so falls under the OCR’s purview, we did use it to understand the use of bona fide factors to validate pay differences among employees.

In addition to bona fide factors, Employee A’s salary with their employer prior to BART was a factor in determining Employee A’s starting salary with the District. Also, according to the department manager who selected to hire Employee A, the District was compelled to offer Employee A more than typically offered by BART because the District was having a difficult time filling managerial positions. Of note, to reduce wage gaps, CEPA was amended in January 2018 to prohibit relying on salary history as a factor in determining what salary to offer an applicant. Employee A’s employment with the District also predates the 2018 amendment.

Bona fide factors, prior salary, and the District’s difficulty in filling vacancies aided in Employee A’s ability to negotiate a higher starting salary with the District. Human Resources has said that applicants may negotiate their starting salary, though that does not mean applicants will be offered their desired compensation. However, the nine employees in the protected classes said they were not given the opportunity to negotiate a starting salary with some also saying that they were told they could not. Some also felt that questioning the offered starting salary would jeopardize their opportunity. Although we did not receive documentation to confirm that the nine employees were told they could not negotiate salaries, we obtained evidence that the manager of their department believes it is “not true” that applicants may negotiate starting salaries. This supports the likelihood that the employees in the protected classes, who were internal applicants for the job classification in question, believed they could not negotiate for a salary that they felt was commensurate of their experience, education, training, or other applicable bona fide factors.

Although the use of bona fide factors is allowable and supports Employee A’s salary, not using them for the nine employees in protected classes created pay differences that laws like CEPA attempt to overcome. It also led to the nine employees distrusting the District and believing discrimination is the reason they receive a lower salary than Employee A. This was exacerbated when the District reclassified another employee, Employee B, into a higher-level job classification with a higher pay band. Pay bands are the ranges of allowable pay for BART job classifications.

In 2021, due to a District reorganization, Employee B was reclassified into a position with similar duties as the one they had prior to the reorganization. A year and a half later, Employee B was again reclassified, this time into the higher-level job classification with the higher pay band. Based on evidence supplied for our investigation, Employee B was reclassified into this higher position to align their job classification with their duties. Pay and

<sup>2</sup> The Equal Pay Act has undergone multiple revisions with the most significant taking place in 2016 and the most recent in 2023.



salary documentation for Employee B supports that they received “limited over-the-range” pay to perform work in a higher classification for approximately nine months prior to their first reclassification. The District’s Non-Rep Handbook includes a provision for temporary upgrade pay when an employee performs duties regularly assigned to a higher classification and provides for the employee to receive premium pay when doing so. The Non-Rep handbook is silent on the maximum duration of temporary upgrades and has not been updated since 1996 to reflect current employment terms and conditions for non-represented employees. However, temporary upgrades are intended to be for a limited duration to fill a temporary vacancy.

BART discontinued Employee B’s premium pay four months after the first reclassification. However, evidence supports that Employee B was required to continue to perform duties regularly assigned to a higher classification for 11 months after the discontinuation of the premium pay, which is what prompted the second reclassification. Employee B did not receive a salary increase at the time of the second reclassification, but the higher pay band affords the possibility.

The second reclassification supports that Employee B was placed in a job classification reflective of the work they were performing. However, it meant that the District did not have to conduct a recruitment to fill a labor need. Given the job classification of the nine employees in the protected classes, they would have been likely candidates for the higher position as it is seen as a career advancement opportunity for employees in their job position. Therefore, though the reclassification is supported, it further demonstrates that BART practices did not support the intent of laws such as CEPA or the District’s goal to ensure equity among its employees.

	Salary 3/2022	Position Ranking	Protected Class
Employee B	\$209,177	Lower	No
Retired Employee	\$195,198	Higher	Yes

We also noted that Employee B received a higher salary in the lower job classification than Employee C who is in a protected class and who worked in a higher job classification prior to retirement. Employee C worked for the District

for 47 years and was in the higher job classification prior to Employee B joining the District. It is important to make this note here because this investigation includes assessing BART’s aim to support an equitable workforce. Studies support that ensuring pay equity shows employees that they are valued for their contributions, experience, and skills, which can improve employee engagement and result in higher overall job satisfaction. Combined, those factors can make program and operations efficient and effective.

The issues described above indicate the necessity and importance of completing pay equity audits. Such audits include researching pay rates and assessing any differences in pay relative to age, race, gender, seniority, and other criteria. Pay equity audits, or reviews, assist an organization in reducing the risk of violating laws and avoiding costly discrimination lawsuits, and help ensure compensation practices are fair and competitive. As such, they are useful tools in enterprise risk management.



## BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG RECOMMENDATIONS

### **Report Title: Inconsistent Compensation & Hiring Practices Perpetuate Pay Disparities**

1	<b>Recommendation:</b>	Ensure the nine employees in the protected classes are compensated in a manner reflective of their experience, education, and other applicable bona fide factors.
	<b>Responsible Department:</b>	Human Resources
	<b>Implementation Date:</b>	June 5, 2023
	<b>Corrective Action Plan:</b>	The Class & Compensation team has commenced a salary analysis and will make any necessary adjustments.
2	<b>Recommendation:</b>	Use bona fide factors consistently across all departments when determining compensation for any new or existing BART employees.
	<b>Responsible Department:</b>	Human Resources
	<b>Implementation Date:</b>	June 5, 2023 (continuous)
	<b>Corrective Action Plan:</b>	BART's Salary Analysis & Determination procedure has been amended to reflect the Class & Compensation Team will continue to utilize bona fide factors when establishing the salaries for non-rep and AFSCME salaried employees (including Transportation); however, for all other represented classifications the compensation is governed by the base wage schedules as defined in their respective collective bargaining agreements.
3	<b>Recommendation:</b>	Ensure all internal and external applicants understand that they may negotiate their starting salary and that doing so will not jeopardize their offer, but that the District is not required to accept their requests.
	<b>Responsible Department:</b>	Human Resources
	<b>Implementation Date:</b>	June 5, 2023
	<b>Corrective Action Plan:</b>	For all new non-rep and AFSCME salaried positions, BART will incorporate language in the respective postings that informs candidates that their starting salaries are negotiable.
4	<b>Recommendation:</b>	Ensure managers involved with recruitment understand the District's provision to allow applicants to negotiate starting salaries.
	<b>Responsible Department:</b>	Human Resources



## BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG RECOMMENDATIONS

### **Report Title: Inconsistent Compensation & Hiring Practices Perpetuate Pay Disparities**

	Implementation Date:	June 5, 2023
	Corrective Action Plan:	Hiring managers will continue to be provided with a draft of the job posting, which will now include language that starting salaries are negotiable (see Recommendation 3).
5	Recommendation:	Limit non-represented employee temporary upgrades to six months or until a recruitment is completed to fill a vacancy.
	Responsible Department:	Human Resources
	Implementation Date:	June 5, 2023 (continuous)
	Corrective Action Plan:	BART is working to clear its backlog of temporary upgrade appointments, which is due mainly to the 2021 District Retirement Incentive Program. On a parallel track, BART is in the process of revising its Temporary Upgrade policy. Pursuant to this revised policy, temporary assignments will typically last for no longer than six (6) months unless otherwise approved by the Assistant General Manager, Administration and in all cases BART will continue to administer the temporary upgrade program consistent with the CalPERS regulations.
6	Recommendation:	Maintain salary assessments for employees for the duration of their employment.
	Responsible Department:	Human Resources
	Implementation Date:	May 15, 2023 (continuous)
	Corrective Action Plan:	Since 2021, all employee salary analysis records have been (and will continue to be) uploaded and maintained within the respective employee files. Most, but not all, employee records prior to 2021 contain salary assessments.
7	Recommendation:	Complete a Districtwide pay equity audit.
	Responsible Department:	Human Resources
	Implementation Date:	FY25



## BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG RECOMMENDATIONS

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	<b>Corrective Action Plan:</b>	The District agrees to the recommendation and will conduct a Districtwide pay equity audit in FY25.
8	<b>Recommendation:</b>	Ensure that the improvements identified in these recommendations are reflected in standard operating procedures.
	<b>Responsible Department:</b>	Human Resources
	<b>Implementation Date:</b>	June 5, 2023
	<b>Corrective Action Plan:</b>	The Class & Compensation standard operating procedures have been documented and are in the process of being finalized, which will incorporate the necessary improvements.
9	<b>Recommendation:</b>	Update the Non-Rep Handbook to be reflective of current employment terms and conditions for non-represented employees.
	<b>Responsible Department:</b>	Human Resources
	<b>Implementation Date:</b>	Draft July 3, 2023; Final late summer/fall 2023
	<b>Corrective Action Plan:</b>	A comprehensive update to the Non-Rep Handbook is in process and will include updated and necessary changes to employment terms and conditions.