ATTACHMENT A

THE PROPOSED DECISION

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BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Calculation of Final Compensation of: RICHARD LEWIS, Respondent, and CITY OF SAN BERNARDINO, Respondent.	Case No. 2014-0256 OAH No. 2014040945

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on October 13, and 14, 2014, and February 25, and 26, 2015.

Wesley Kennedy, Senior Staff Counsel, represented petitioner Karen DeFrank, Chief, Customer Account Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

John Michael Jensen, Attorney at Law, represented respondent Richard Lewis, who was present throughout the hearing.

No appearance was made by or on behalf of respondent City of San Bernardino.

The parties' requests to submit written closings and for additional time to file them were granted. The matter was submitted on June 15, 2015.[1]

[1] Mr. Lewis's Post-Hearing Brief was received as Exhibit A. CalPERS's Closing Brief was received as Exhibit B. CalPERS's Request for Official Notice was received as Exhibit C. Mr. Lewis's Objection to the Request for Official Notice and Declaration were received as Exhibit D. CalPERS's Response was received as Exhibit E. Mr. Lewis's Reply Brief was received as Exhibit F. CalPERS's Reply Brief was received as Exhibit G.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED Jul 16 2015

ISSUE

Shall "Temporary Upgrade Pay / Special Compensation" and the value of Employer Paid Member Contributions (EPMC) be included in Mr. Lewis's final compensation calculation?

SUMMARY

This case presents a unique and unusual set of facts. Mr. Lewis was a fire captain for the City of San Bernardino who was wrongfully passed over for promotion to battalion chief. Mr. Lewis filed a lawsuit against the city that was resolved via a settlement agreement. The terms of the agreement provided that Mr. Lewis was awarded back pay as if he had been promoted, was to be paid in the future at a battalion chief rate, and was to be compensated for any overtime at a fire captain's rate of pay. This third term was unique because battalion chiefs are not paid overtime. Moreover, although paid as a battalion chief, Mr. Lewis was not given the job title of "battalion chief" and was not promoted. During the settlement, CalPERS was contacted regarding how the city was to report Mr. Lewis's future earnings and provided direction to the city payroll department. Mr. Lewis asserted that since he performed battalion chief duties, the settlement agreement awarded him all benefits of a battalion chief, and because CalPERS was notified about the settlement agreement and directed the city how to report it, his retirement calculations should include his pay as battalion chief. CalPERS asserted that because Mr. Lewis was not promoted to the position of battalion chief, continued to be paid overtime at a fire captain rate, and because his pay was temporary upgrade pay reported as special compensation, he was not entitled to have those payments or his EPMC included in his retirement calculations.

The evidence established that Mr. Lewis agreed to the settlement because he would be compensated at the battalion chief rate and that compensation would be factored into his retirement calculations. The evidence established that the city, which obtained an opinion from the city attorney's office, believed that the compensation was reportable to CalPERS. The evidence further established that the city notified CalPERS of the settlement with Mr. Lewis, sought advice from CalPERS regarding how to report that compensation, and reported Mr. Lewis's compensation as directed by CalPERS. CalPERS's position in this matter was little more than semantics, heavily relying on the job titles and the terms used in the compensation reported, as opposed to the clear intent of the parties. Moreover, to adopt CalPERS's position would be to ignore the realities of the litigation. Mr. Lewis sued the city because he had been wrongly passed over for promotion. In the litigation he sought to be promoted and/or receive battalion chief benefits. Additionally, the city reported Mr. Lewis's income to CalPERs as directed by CalPERS. To now allow CalPERS to escape its obligations because of how the city reported the earnings would be patently unfair.

Mr. Lewis is entitled to have his "Temporary Upgrade Pay / Special Compensation" and the value of EPMC included in his final compensation calculation.

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 8, 2013, CalPERS notified Mr. Lewis that it had classified his compensation as "Temporary Upgrade Pay" and that his EPMC did not qualify as "compensation earnable" for purposes of determining his final compensation calculation.

Mr. Lewis and the City of San Bernardino appealed that determination. On April 22, 2014, CalPERS filed its statement of issues, Mr. Lewis filed a notice of defense, and this hearing ensued.

As to the City of San Bernardino, upon proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default pursuant to Government Code section 11520.

Employment History

2. Mr. Lewis was employed by the City of San Bernardino Fire Department from 1981 until 2012, when he retired. The city is a public agency contracting with PERS for retirement benefits for its eligible employees. By virtue of his employment, Mr. Lewis was a local safety member of CalPERS.

Mr. Lewis promoted from fire fighter to engineer in 1986 and to fire captain in 1991. Mr. Lewis first took the examination for promotion to battalion chief in 2001 and made the eligibility list, but the list expired without him being promoted. Mr. Lewis took another examination in 2003 and again qualified for promotion to battalion chief. During the times that Mr. Lewis was on the battalion chief promotion lists, he was repeatedly assigned to perform battalion chief duties. In 2004 Mr. Lewis purchased Additional Retirement Service Credit for $133,717.34.

In 2005 Mr. Lewis and his union filed litigation against the city and the fire chief, Larry Pitzer, alleging that Mr. Lewis was wrongfully passed over for promotion to battalion chief. In 2007 Mr. Lewis and the city entered into a settlement agreement to resolve Mr. Lewis's lawsuit. The city paid Mr. Lewis pursuant to the terms of that settlement agreement until Mr. Lewis retired in 2012.[2]

Settlement Agreement

3. The Settlement and General Release Agreement entered into between the San Bernardino Professional Firefighters Union, Local 891 and Mr. Lewis, "on the one hand," and the city and Mr. Pitzer, "on the other hand," was signed by the parties in March 2007.

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[2] Currently, fire captains are in the Fire Safety bargaining unit, earning $9,127.70 monthly. Battalion chiefs are in the Fire Management bargaining unit, earning $12,202.90 monthly.

The agreement resolved the federal lawsuit filed by Mr. Lewis against the city and Mr. Pitzer because he had been passed over for promotion to battalion chief. Pursuant to the agreement, the city agreed to pay Mr. Lewis $75,000. Other "Substantive Terms of the Settlement" included:

> a) Mr. Lewis will be paid back from the effective date of [when he should have been promoted] to the present, less required tax withholdings. The back pay shall consist of the difference between Mr. Lewis's actual pay as Captain for all regular hours and what Mr. Lewis would have been paid during such period for such hours had he been a Battalion Chief.
>
> b) Mr. Lewis shall be compensated from the date of this Agreement forward as if he had been promoted to the position of Battalion Chief (including all current and/or future benefits granted to Battalion Chiefs) with the exception listed in subsection c, below.
>
> c) Mr. Lewis shall be compensated for all future overtime hours at the Captain rate; to wit, time and one half (1.5) for regular rate of pay Mr. Lewis will receive for Fire Captains of Mr. Lewis' experience and length of service.
>
> d) For a period of two years of the effective date of this Agreement, the City shall not reassign Mr. Lewis from the station he is currently assigned to without his consent.

Memos and Discussions Regarding Settlement Agreement

4. On April 9, 2007, the attorney representing the city in the litigation sent a letter to Stephanie Easland in the City Attorney's office enclosing the settlement agreement.

5. On May 24, 2007, Laura King, Payroll Supervisor, San Bernardino Finance Department, sent Stephanie Eastland, Assistant City Attorney, an interoffice memorandum regarding the settlement agreement, with a copy to Barbara Pachon, the City Finance Director, seeking clarification of terms of the settlement agreement. Specifically, she wrote:

> Please clarify the following [in subsection (a) of the agreement]:
>
> Shall the back pay be CalPERS reportable or not reportable compensation? If reportable, should it be defined as monthly pay rate (reportable retirement purposes) or special compensation (in addition to and separate from the pay rate, e.g., acting pay)?

Should that pay for regular hours earned while on Industrial Disability Leave (4850-injury pay) be excluded from tax withholdings?

¶...¶

Please clarify the following [in subsection (b) of the agreement]:

The date of the agreement?

Shall all regular pay earned, based on the difference between the Captain and Battalion Chief rate, be CalPERS reportable or non- reportable compensation?

Define benefits (e.g., lower monthly health contribution, no sell-backs, admin. hours, straight time overtime as BC)?

In accordance with the Charter 186 increases, effective August 1 of each year, should compensation be adjusted to correspond?

Should sell-back or payoff of leave balances, if any, include the difference between the Captain and Battalion Chief rate?

¶...¶

Please clarify the following [in subsection (c) of the agreement]:

Will any overtime hours worked by Mr. Lewis be in the capacity of a Battalion Chief and therefore, paid straight time?

6. A June 8, 2007, CalPERS's Customer Touch Point (CTP) entry documented contact between the CalPERS analyst and Ms. King. The CalPERS analyst documented: "per [employer] this member [Mr. Lewis] won a settlement per [employer] there is a retro lump sum and an ongoing pay rate increase for a promotion that the member will not be working in. [Employer] wants to know if this settlement is persable and how to report it. Please call and advise. Thank you."

7. A June 11 2007, CalPERS CTP entry documented contact between Carlous Johnson, CalPERS Compensation Review Analyst, Employer Services Division and Ms. King. Mr. Johnson documented "Left message with Laura [King] that we would have to

review agreement in order to make a determination as to whether or not it qualifies as reportable compensation."

8. On June 13, 2007, Stephanie Easland, assistant city attorney, sent a City Attorney Inter Office Memorandum to Ms. King, responding to Ms. King's inquiry regarding the terms of Mr. Lewis's settlement agreement. Ms. Easland noted:

> The back pay provision of the agreement is to compensate Captain Lewis as if he had been promoted to Battalion Chief; therefore, such back pay is part of Captain Lewis' monthly pay rate and is reportable to CalPERS for retirement purposes. That portion of back pay that would have been earned while on 4850 injury pay should be excluded from tax withholdings.
>
> All future monthly pay rates will be at the rate of Battalion Chief and will be CalPERS reportable compensation. This monthly pay rate should be fixed annually on August 1 to correspond with Charter §186 adjustments for Battalion Chiefs. Any payoff of leave balances should be at Captain Lewis' monthly pay rate at the time of such payoff.
>
> As to future overtime, the agreement provides for payment of such overtime at the rate of one and one half times the regular rate of pay a Captain of Richard Lewis' experience and length of service would receive at that time.
>
> As to future benefits, Captain Lewis is to receive all current and future benefits granted to Battalion Chiefs, in lieu of those granted to Captains, except for the overtime provisions previously discussed. The implementation of this provision should be from March 23, 2007, the date the agreement was fully executed [by the parties and their attorney].

9. On June 19, 2007, Ms. King sent the city attorney's office the exact same memo she sent on May 24, 2007, referenced above in Finding of Fact No. 5. She later made notations on the memo based upon Ms. Easland's and CalPERS's answers to her inquiry. The entries were to assist the payroll department in the future regarding how to report and track Mr. Lewis's earnings.

10. On July 5, 2007, Mr. Johnson, CalPERS Compensation Review Analyst, Employer Services Division, wrote a letter to Ms. King responding to her inquiry concerning the settlement agreement. Mr. Johnson wrote,

> The City has agreed to compensate Mr. Lewis at the Battalion Chief level retroactive back to October 2, 2004. Your

specific question is – should this compensation be reported as regular base pay and earnings or as special compensation - temporary up-grade pay.

Since Mr. Lewis will retain his current position title of Fire Captain, the compensation at the Battalion Chief's position should be treated as temporary up-grade pay, and reported as special compensation.

CalPERS request [sic] the City report this compensation on a monthly or semi-monthly basis retroactive back to October 2, 2004.

11. On October 9, 2012, Mr. Lewis signed an application for disability retirement, checking off the box marked "Service Pending Industrial Disability Retirement." He identified his position title as "Fire Captain." Mr. Lewis testified that pursuant to the settlement agreement, he would not get the title of battalion chief, just the benefits, so he listed his job title on the application as fire captain.

12. San Bernardino Resolution No. 2007-345 established a management and confidential employee compensation and benefits plan. The resolution set forth the compensation for safety and non-safety classifications noting that the compensation for safety classified employees would be determined in accordance with Charter Section 186. The resolution contained a section outlining the provision of uniforms, CalPERS's contributions, and noted that in 2000 the city adopted a resolution "for paying and reporting the value of the Employer Paid Member Contribution (EPMC) under the guidelines of Government Code Section 20636 (c)(4) pursuant to Section 20691. The City will report the nine percent (9%) Employee Contribution as Special Compensation under the current PERS laws."

Section M of the resolution provided for acting pay, stating that the "Mayor may assign an employee to discharge the duties of a higher classification for additional compensation as provided herein, in the event of a vacancy or during the temporary absence of that employee." A safety employee assigned to acting duty "in writing by the Mayor shall receive acting duty pay" as "governed by Charter Section 186."

13. The San Bernardino Fire Safety Employee's Memorandum of Understanding, effective from January 1, 2003, to January 30, 2009, set forth the rights and remedies of firefighters; acknowledging that local 891, the union, was the exclusive representative of employees in the ranks of firefighter, paramedic/firefighter, engineer, fire investigator and captain. Section 7, the retirement plan section, noted the city will continue to participate in CalPERS and that:

City will increase the base salary of all employees covered by this agreement by converting the nine percent (9%) Employer-Paid Member Contribution (EPMC) to base salary.

> This base salary is 'compensation earnable' as defined in section 20636 (c) of the California Government Code and shall be reported to the Public Employees' Retirement System (hereinafter PERS). . . . The employee contribution to PERS shall be made through automatic payroll deductions for the base salary in accordance with PERS [sic] regulations.
>
> For purposes of determining overtime compensation and other salary payments, including but not limited to, payoff of sick leave, vacation accruals, holiday accruals and comp time balances, the aforementioned nine percent (9%) base salary increase shall not be considered.

14. Mr. Lewis's CalPERS payroll detail report from 2003 to 2012 contained entries identified as regular payroll, special compensation, and retroactive salary adjustment. The document clearly reflected the change in Mr. Lewis's PERS' contributions and income following the settlement of his litigation. Moreover, the city reported Mr. Lewis's earnings as directed by CalPERS.

15. The San Bernardino Human Resources and Job Descriptions identified the monthly pay of a fire captain as $9,037, the income Mr. Lewis's CalPERS's records reflected he earned before he settled his lawsuit.

16. A January 1, 2008, Amendment to Contract between CalPERS and San Bernardino determined that fire fighters became members of the retirement system. The amendment set forth how final compensation was to be calculated and what contributions the city would provide.

17. A June 6, 2011, CTP entry documented Mr. Lewis's telephone call to CalPERS. The CalPERS analyst wrote: "inquiry on final comp used by our estimate and sent, called to IAA for further assistance, thanks." A CTP entry later that same day noted the following: "IAAL: [member received] SR estimate with $9757 listed as [final compensation] member states his employer has history of misreporting pay rate and special compensation info and requesting a return call to clarify pay rate and special compensation as reported by [employer]-member is paid biweekly; 15th and 31st of each month and wants to confirm correct [employer] reporting. Please call and advise, thanks."

18. A June 20, 2011, CTP note contained the following entry: "Reviewed payroll reported through 5/11-1service period. S/C is FLSA [Fair Labor Standards Act], Chief Officer Pay, EPMC, and temporary upgrade. Okay to calc[ulate] from transcripts."

19. Thereafter, on June 23, 2011, a CalPERS analyst made the following CTP entry: "Spoke to Member [Mr. Lewis] and assured him that all of his special compensation was allowed to be used in his retirement calculation."

20. On October 9, 2012, Mr. Lewis signed a disability retirement election application. As before, he again identified his position title as a "Fire Captain."

21. On October 26, 2012, CalPERS provided Mr. Lewis with an estimate of his industrial disability retirement. Should Mr. Lewis retire on November 30, 2012, he would be 61 years old and have 30.272 total years of service credit. CalPERS advised Mr. Lewis that "[w]hile completing your estimate we noticed that you have special compensation involved in your payroll. Special compensation is additional income you might receive for uniform allowance, holiday pay, longevity pay, etc., and is reported separately from your base pay. Please be aware that we will only include compensation that has been reported by your employer to date. Any special compensation not yet reported by your employer has not been included in your estimate."

22. On November 27, 2012, a San Bernardino Disability and Rehabilitation Hearing Officer issued a Findings of Fact and Conclusions of Law determining that Mr. Lewis was hired by the city "as a Firefighter on March 30, 1981, was later promoted to the position of Fire Captain and remained in that position until he retired on November 1, 2012." During his career Mr. Lewis sustained 10 different injuries, with a current diagnosis of "Large B Cell lymphoma in remission, hypertension, history of pancreatitis and gallstones, history of gastric ulcer, and sleep disorder." The San Bernardino Human Resources Department, Risk Management Division recommended that Mr. Lewis's work restrictions caused him to be a "qualified injured worker and in need of vocational retraining" and that he could not continue his employment at the fire department because they did not have a permanent modified duty status. The Risk Management Division recommended Mr. Lewis for an industrial retirement. The hearing officer concluded that Mr. Lewis was incapacitated "for the performance of his usual duties as a Fire Captain" and that he was "incapacitated for performance of the usual duties of the position for other California public agencies in CalPERS." Similar positions were unavailable. As such, Mr. Lewis's effective date of industrial retirement was November 1, 2012.

23. On January 19, 2013, Lolita Lueras, CalPERS Compensation and Employer Review, sent the city an e-mail seeking information regarding the payroll reported for Mr. Lewis. The City provided her with the requested information.

24. A January 19, 2013, CTP entry noted "compensation review pending BP response to inquiries sent 1/19/13 requesting documentation for temporary upgrade pay."

25. On January 29, 2013, CalPERS sent Mr. Lewis a letter advising him that "[i]n connection with your application for industrial disability retirement your employer has found you incapacitated for the performance of your duties as a Fire Captain. Your incapacity is industrial."

26. A February 13, 2013, CTP entry noted, "[Employer] provided incorrect information. DO NOT USE any special comp in the amount of $1560.50 for Temporary Upgrade pay. This compensation is for a settlement and is not reportable. Pay rate and other special compensation okay to calc[ulate] as earned."

27. On May 8, 2013, CalPERS sent letters to San Bernardino and Mr. Lewis advising that CalPERS had "recently completed a review of the compensation reported by the City" and "found compensation that does not comply with the California Public Employees Retirement Law (PERL)." CalPERS wrote: "The compensation in question has been identified as 'Temporary Upgrade Pay,' reported each pay period as special compensation in the amount of $1560.50." CalPERS noted that the city had provided the settlement agreement and internal city memoranda. The letter noted that the city sought direction from CalPERS on how to report that compensation during the settlement of Mr. Lewis's lawsuit, CalPERS instructed the city to treat it as temporary upgrade pay and report it as special compensation, and that the city had followed CalPERS's instructions. The letter noted that, "[a]fter for the documentation provided by the City, it has been determined that the special compensation identified as 'Temporary Upgrade Pay' does not qualify as reportable compensation for retirement purposes." CalPERS's letter cited to Government Code section 20160, that "addresses errors made by an employer and/or CalPERS," and Government Code section 20636 that defines compensation earnable. CalPERS noted that because Mr. Lewis was not working in the capacity of a battalion chief, but only receiving the benefits of that position, his temporary upgrade pay did not satisfy Section 20636, subdivision (c)(3), criteria that special compensation shall be for "services rendered during normal working hours." Additionally, because the "settlement agreement suggested that the Temporary Upgrade Pay was indefinite" it violated California Code of Regulations, title 2, section 571, subdivision (a)(3), which requires the employee to work in the upgraded position/classification for a "limited duration." Accordingly, the compensation was not reportable. Additionally, CalPERS asserted that because Mr. Lewis received the value of Employer Paid Member Contributions (EPMC) pursuant to a City resolution, it could not be used in his retirement calculation because it was "not offered to his classification of Fire Captain." Thus, "Mr. Lewis's retirement calculation was completed excluding the Temporary Upgrade Pay and value of EPMC." CalPERS requested that the "City reverse out all Temporary Upgrade and EPMC payments from our payroll system to recover the contributions paid on these benefits." CalPERS advised the City and Mr. Lewis of their appeal rights.

28. In its June 5, 2013, letter appealing CalPERS's decision, the San Bernardino City Attorney wrote that as part of the settlement agreement,

> Captain Lewis was to receive the pay of a battalion chief as though he were promoted to that position even though he remained a captain. The city corresponded with CalPERS to determine how this payment be reported. On July 5, 2007, CalPERS unequivocally instructed the City to report the extra pay as 'special compensation' pursuant to Government Code section 20636 so that it could be counted for retirement purposes. CalPERS went further and instructed the City report this compensation retroactive back to October 2, 2004 (the date Mr. Lewis should have been promoted). The City followed the instructions of CalPERS and has paid contributions at the battalion chief level.

> In December 2007, nearly 6 months after CalPERS indicated the additional income to be reported was acceptable as 'special compensation,' the *Prentice v. Board of Administration (CalPERS)* (2007) 157 Cal.App4th 983 case was published. The Prentice case stands for the proposition that a city manager's approximate 10% increase in salary did not constitute special compensation because the increase was not reflected in the published salary range and was not available to other managers.
>
> On May 8, 2013, CalPERS began second-guessing its 2007 decision to allow the additional compensation for Captain Lewis' retirement. The May 8, 2013, letter from CalPERS relies on Government Code section 20160 and argues that despite CalPERS' accord regarding the pay received by Captain Lewis, it is now taking the position that the agreed-upon designated special compensation would no longer be considered as such and would be excluded from his retirement pay.

The letter from the City Attorney outlined the requirements of Government Code section 20160, and asserted that CalPERS's position did not satisfy the constraints of that section. The City Attorney argued that the request to correct was untimely because CalPERS instructed the city to report the income of special compensation in July of 2007. At that time CalPERS "had all the same information available to it at that time that it does today. Thus, the decision by CalPERS to allow the increased pay to be reported as special compensation was intentional, with full knowledge of its effect, and cannot be argued as an error." The City Attorney also asserted that CalPERS could not meet the first prong of Section 20160 because it had all the facts available to it in July 2007, or, at the latest, in December 2007 when Prentice was published. As more than six months have elapsed, it was too late for CalPERS to correct the purported "error" now. In addition, the City Attorney further argued that CalPERS could not rely on the relief afforded by California Code of Civil Procedure section 473 because all of the CalPERS's "actions taken were knowingly authorized, were not a mistake, any surprise was never acted upon, and while there may be neglect, it is not of the excusable variety." The City Attorney cited to case law defining those terms, pointing out that they were not applicable here. The City Attorney noted that:

> In the present case, in 2007 CalPERS was provided all pertinent information and data to make a determination on what to do with the increased pay. CalPERS took the data and instructed the city [to] report the increased pay as special compensation so that it could be recovered during Captain Lewis' retirement. CalPERS cannot now argue that it was suddenly put into a situation to its detriment without fault or negligence of its own. Sudden realization cannot reasonably occur six years after the decision is made. In 2007, CalPERS made a decision fully apprised of all facts.

> At best, CalPERS could have argued the December 2007 *Prentice* case created surprise, but that argument needed to be made in 2008 soon after the case was published. Again, because six years has passed, it can no longer rely on mistake, inadvertence, surprise or excusable neglect because it is culpable in not using due diligence to correct any newly perceived error in the instructions for reportable compensation.

The City Attorney argued that even if Government Code section 20160 did apply, the applicable statute of limitations was three years under Code of Civil Procedure section 338, subdivision (a), governing actions based on statute, and expired in 2010; CalPERS could not claim that it did not realize the amount of money it was obligated to pay until Mr. Lewis retired, thereby tolling the statute of limitations until his retirement, because CalPERS was given all of that information in 2007; and that equitable estoppel precluded CalPERS from pursuing its current course of action. As the City Attorney noted,

> In the present case, on July 5, 2007, CalPERS informed the City and Captain Lewis that the increased salary would be considered 'special compensation' for purposes of retirement calculation. The City paid contributions to CalPERS based on its instructions and the employee relied on CalPERS' statements that the money would be paid as promised, and did not test for the battalion chief position again. Both the City and Captain Lewis relied on CalPERS' instructions to their detriment and CalPERS is estopped from reversing its decision six years after it was issued.

Finally, the City Attorney asserted that the *Prentice* case should not be applied retroactively.

> [That case] was published . . . Almost six months after CalPERS sent its letter instructing the City to report the increased pay as special compensation. Thus, it was not the law of the land at the time CalPERS instructed the city to report the increased pay. It can be distinguished because the pay schedule for Captain Lewis is actually published and is available to all individuals holding the position of battalion chief pursuant to the City's salary resolution, the labor agreement with the Fire union, and the settlement agreement with Captain Lewis. Additionally, CalPERS permitted the city to report the special compensation unlike in *Prentice* where it prohibited the salary increase.
>
> Furthermore, the *Prentice* case should not be applied retroactively because of the [City's] estoppel argument.

Other Documents

29. CalPERS presented calculations asserting that if Mr. Lewis were to prevail on his claim there would be a $509,668 unfunded liability. Mr. Lewis rejected that contention because the city made all contributions to CalPERS based upon his higher pay as a result of the settlement agreement. Thus, the liability is not "unfunded."

30. Several City Resolutions documented the city council's votes on various retirement and compensation plans, including EPMC, approved for certain city employees. One resolution outlined the mayor's duties regarding acting pay and assigning employees to higher classifications "in the event of a vacancy or during the temporary absence of an employee."

31. The City Charter authorized overtime pay for firefighters "below the rank of Battalion Chief."

32. Mr. Lewis filed a brief asserting that res judicata/collateral estoppel barred CalPERS from not including his battalion chief salary and EPMC in his final compensation calculations.

Witness Testimony

33. Richard Lewis testified about his employment and work duties. He asserted that because of his activities as union president, he and the fire chief did not get along. As such, he was passed over for promotion to battalion chief even though he scored higher on the exam than the individual who was promoted. Mr. Lewis sued the city for this wrongful act and reached a settlement whereby he would receive all the benefits of a battalion chief. During negotiations, the fire chief would not agree to give Mr. Lewis the title of "battalion chief." Mr. Lewis explained that because he was assured that he would be receiving all the benefits of a battalion chief, he accepted that settlement offer.

Mr. Lewis "wanted to make sure" that the terms of the agreement included retirement benefits. Mr. Lewis was assured that his retirement benefits would be at a battalion chief rate. Having his retirement calculated at the battalion chief rate was a "material term" for him to settle his lawsuit. Had he not been so informed, Mr. Lewis would never have agreed to settle. Mr. Lewis explained that, because of his deep involvement with the union and its contracts, he was extremely familiar with all the various benefits firefighters received and was very concerned about his retirement. Mr. Lewis communicated several times with both the city representatives and CalPERS to ensure that his benefits were correctly reported and that his battalion chief pay was included in his pension. He was repeatedly assured that those benefits were included. In fact, he checked again on this issue with CalPERS when he and his wife were in CalPERS's office discussing his disability retirement. Mr. Lewis brought his payroll stubs to that CalPERS meeting because he wanted to confirm that his battalion pay was counting towards his retirement. His CalPERS analyst assured him it was. Mr. Lewis was not aware that CalPERS had instructed the city to report the pay increase as "temporary upgrade pay," as it did not indicate that on his paystubs. However, he was

assured by the CalPERS analyst that all of his pay was counting towards his retirement. Again, because of all of his union work, Mr. Lewis was very familiar with the reporting process and knew that some items of pay are not "PERS-able," which was why he wanted to make certain that his increase in pay from his settlement agreement was included in his retirement calculations.

Mr. Lewis testified that after the settlement, he regularly performed all of the duties of a battalion chief. He was referred to as "chief," wore a battalion chief uniform, received the uniform allowance given to battalion chiefs, drove a battalion chief vehicle, received the battalion chief $500 yearly award, was given the 120 yearly hourly administrative allowance given to battalion chiefs, received battalion chief administrative pay, and received battalion chief pay. Mr. Lewis never reapplied for a battalion chief position because he was already acting as, and being paid as, a battalion chief. Mr. Lewis testified about all the duties he performed as a battalion chief. His testimony regarding his work in this capacity was unrefuted. The evidence established that Mr. Lewis performed the duties of a battalion chief.

34. Corey Glave, the attorney who represented Mr. Lewis in his lawsuit against the city, testified that retirement benefits were discussed when "all benefits" were discussed. The parties agreed that Mr. Lewis would retain the title of fire captain but have all the benefits of a battalion chief. The parties agreed that overtime would be at the fire captain rate was because the city had concerns that paying overtime at a battalion chief rate would be very costly for the city. The parties discussed the difference in retirement benefits between a battalion chief and fire captain. The parties agreed to give Mr. Lewis back pay as if he had been promoted on the date when he should have been promoted and all future earnings and retirement benefits would be at a battalion chief rate. The discussions centered on the fact that Mr. Lewis would receive all benefits that battalion chiefs received. The settlement agreement did not explicitly itemize all of the battalion chief benefits because the words "all benefits" meant all battalion chief benefits, including retirement benefits. Mr. Glave testified that it was important to Mr. Lewis that he be paid at a battalion chief rate. If Mr. Glave or Mr. Lewis ever had a concern that retirement benefits were not included, they never would have settled. It was "always clear during the negotiations" that retirement would be at the battalion chief rate; this was a material issue to the negotiations.

35. Wendy McCammack, a federal and state tax preparer, who owns three small businesses, served 13 years on the city council. She was a council member during Mr. Lewis's litigation. Ms. McCammack was extremely familiar with the policies and procedures of the fire department because she met with every single department head in the city because she wanted to have an understanding of the workings of the city management and its employees. She performed "due diligence" and "lots of fact-finding" regarding city employees. She served on several council committees and "learned lots of information" regarding the personnel board and the different issues with the different departments. She was well aware of the issues regarding Mr. Lewis's failure to be promoted, as well as being aware of several promotion issues in the fire department.

The city attorney informed the council of a potential lawsuit when Mr. Lewis was passed over for promotion. It was her understanding that Mr. Lewis should have been

promoted to battalion chief but was not because of political retribution. Ms. McCammack testified that during the settlement negotiations she asked why the city simply did not promote Mr. Lewis to battalion chief. It was her understanding that the city was going to resolve the litigation by promoting Mr. Lewis to battalion chief. There were public discussions about paying Mr. Lewis at the battalion chief rate.

Ms. McCammack was involved in the settlement discussions, part of which entailed the fact that since Mr. Lewis was going to work as a battalion chief and receive the pay of a battalion chief. Ms. McCammack asked whether he would also receive battalion chief retirement benefits. She was told he would receive battalion chief retirement benefits. She suggested the city contact CalPERS to make sure that CalPERS would accept the settlement agreement as counting towards a battalion chief retirement. Ms. McCammack specifically made this inquiry because there were occasions when CalPERS would accept salaries as submitted by the city and other times it would not. She was assured that CalPERS would accept this settlement as a battalion chief retirement. Furthermore, she could not imagine that the settlement was not "PERS-able" because the city was paying into CalPERS for Mr. Lewis at the battalion chief rate and, if the city was doing so, Mr. Lewis's retirement would be no different than other employees for whom the city made contributions and the employee retired at that rate.

The settlement agreement was presented to the city council for approval. The council discussions regarding the settlement were based on the assumptions that CalPERS would accept the retirement benefit as a battalion chief retirement. The city intended to provide Mr. Lewis with a CalPERS retirement at the battalion chief rate. The term "all benefits" in the settlement agreement included retirement benefits, and it was her understanding that those benefits were "PERS-able."

In her role on city council, Ms. McCammack had "constant discussions" regarding the number of battalion chiefs, fire captains, and assistant chiefs that were needed to serve the public. She was always concerned that there were a sufficient number of battalion chiefs because she wanted to make sure the city had the appropriate number of staff. Mr. Lewis was counted among the battalion chiefs. Ms. McCammack had personal knowledge that Mr. Lewis performed battalion chief duties. She attended as many fire incidents in her district as possible and battalion chiefs were always present. Mr. Lewis's fire house was very close to her district and she observed him several times, at least once a month, at those incidents. Mr. Lewis was the battalion chief in charge, performed battalion chief duties, wore a battalion chief uniform, and drove a battalion chief vehicle. Mr. Lewis was also asked to make presentations to the city council and he would not have done so unless he was a battalion chief because fire captains did not make presentations to the council. Mr. Lewis appeared in public as a battalion chief.

36. Laura King,[3] San Bernardino Payroll Manager, Finance Department, testified that her duties included implementing the agreed-upon resolutions and memoranda of

[3] Laura King has since married and is now known as Laura Yavornicky. However, because all of the documents introduced at hearing bear her former name, she will be referred

understandings (MOUs) approved by the city council. She drafted the memorandum to the city attorney's office because the finance department had questions regarding how to implement the terms of Mr. Lewis's settlement agreement. She explained that as payroll manager, she would need to know how to accurately report the terms to CalPERS. Ms. King used the fire management MOU for Mr. Lewis because the settlement agreement referenced battalion chief benefits. Battalion chiefs are covered under the fire management MOU and the city attorney's office advised that the benefits would be under the fire management MOU and that the benefits included pension benefits. She was told that Mr. Lewis would receive a battalion chief pension.

Ms. King contacted CalPERS before implementing the payroll to ensure that she did it correctly. The city attorney's office was involved in the discussions with CalPERS seeking CalPERS's direction for how to report Mr. Lewis's salary. Mr. Johnson, from CalPERS, provided Ms. King with CalPERS's response which she, and the city, considered was CalPERS's "final answer." Immediately following Mr. Johnson's letter, the city began implementing Mr. Lewis's compensation as directed by CalPERS and never heard anything further from CalPERS until 2013. Per CalPERS's direction, payroll reported Mr. Lewis's salary as the base pay of a fire captain plus "special compensation," which was the difference between fire captain pay and battalion chief pay. Ms. King made the CalPERS code notations on her memorandum based on CalPERS's response to guide the payroll department with future reporting. She made the notations as a "tickler" to ensure that each year Mr. Lewis's salary adjustment was consistent with the terms of the settlement agreement.

37. Stephanie Easland, a former San Bernardino Senior Assistant City Attorney, was tasked with answering the finance department's memorandum. Ms. Easland looked at the language of the settlement agreement, researched applicable law, reviewed documents on the CalPERS website, reviewed the PERL and the Government Code, and reviewed all the annotated cases. Given that this was an issue the city had never addressed before, Ms. Easland spent "more time" researching it. Ms. Easland testified that the city retained outside counsel for representation in Mr. Lewis's lawsuit and she contacted that attorney to ask him how the income was to be treated for retirement purposes as agreed to by the parties. Ms. Easland never contacted CalPERS, although she reviewed CalPERS law.

Ms. Easland's interpretation of the settlement agreement was that Mr. Lewis was to receive any benefits that battalion chiefs received, including retirement benefits. It was her understanding that Mr. Lewis was to be paid at a battalion chief rate and that was what the city reported to CalPERS. She did note that the settlement agreement gave him overtime pay, something battalion chiefs do not receive, but she concluded that he was receiving all other battalion chief benefits. It was her understanding that Mr. Lewis agreed to a settlement that increased his salary which in turn would "ultimately increase his retirement." Had she ever leaned that the increase in salary was not reportable she would have had to perform additional research to determine if that placed the city in violation of the settlement agreement. She acknowledged the *Prentice* case was decided after the settlement with Mr.

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to in this decision as Laura King.

Lewis was reached, but the settlement agreement placed Mr. Lewis in the class of battalion chiefs because he received those benefits.

Ms. Easland testified that to serve in an acting role, there must be council approval. She does not recall Mr. Lewis ever getting that approval. The city charter and the MOU control how acting roles are determined and carried out. However, the purpose of designating an employee as "acting" is so the employee can receive the higher salary. If Mr. Lewis was already receiving the higher salary pursuant to the settlement agreement, there would be no need to designate him as "acting."

38. Helen Tran, San Bernardino Human Resources Division Manager, was not involved with Mr. Lewis's litigation or settlement; although she was aware there was a lawsuit. Ms. Tran testified that if an MOU allowed an employee to perform duties in a higher acting capacity, a personnel action form would typically be generated, approved, and the individual employee would receive the higher acting pay. However there could be other documents, such as the settlement agreement at issue here, authorizing that situation. Based on her review of the documents, Ms. Tran noted that Mr. Lewis was treated as a fire management employee even though he was never given the title or position of battalion chief, and he was not just getting paid a battalion chief salary, he was acting as a battalion chief.

39. Lolita Lueras, CalPERS Retirement Program Specialist II, testified that compensation determinations are based on the applicable code sections and regulations. She explained that although employers report categories of earnings, CalPERS makes the final determination of whether the reported earnings are "compensation earnable." Her job duties include determining if compensation reported is compensation earnable. Ms. Lueras testified that CalPERS provides "lots of education" to employers explaining the different payroll categories, including printed materials, on-line publications and analysts to answer questions. However, she explained that answers given to members who inquire are merely "responses" and not "final determinations." Moreover, "it is not uncommon" that there are adjustments made to those responses given, even after members retire.

Ms. Lueras testified that based upon her review of the documents, she determined that Mr. Lewis was a fire captain, entitled to fire captain benefits only. Under the settlement agreement, Mr. Lewis received some benefits reserved for fire captains and some that battalion chiefs received. Because the settlement agreement was specifically directed towards Mr. Lewis, and not available to an entire "group or class," it was impermissible given the *Prentice* holding. Additionally, Mr. Lewis's salary increase obtained by his settlement agreement had not resulted in his pay rate being elevated. The increase in pay was reported as "Special Compensation" but that pay differential did not satisfy the requirements to qualify as "Special Compensation." Other factors Ms. Lueras relied on to make her determination were her assumptions that Mr. Lewis was not performing the duties of a battalion chief, although she admitted that she did not review any duty statements, so she did not know Mr. Lewis's regular duties. She also based her determination on the presumption that the battalion chief payments to Mr. Lewis "could have stopped" at any time, and the fact that Mr. Lewis listed "fire captain" as his occupation on his CalPERS

retirement application. Ms. Lueras disallowed Mr. Lewis's EPMC because that was a benefit paid to battalion chiefs and, because she determined he was a fire captain, it was disallowed. Moreover, EPMC was a benefit being provided just to Mr. Lewis, a fire captain, and no other similarly situated members, i.e. fire captains, placing him in a class of one, again making it an ineligible benefit.

Ms. Lueras testified that Mr. Johnson's July 5, 2007, letter to the city was not a final determination. She acknowledged that her final determination was at odds with Mr. Johnson's letter, and the other analysts' opinions documented in the CTP. Ms. Lueras explained that she reached her conclusion after "reviewing all the documents." However, she failed to establish that she looked at any information that was different from what Mr. Johnson or the other analysts reviewed. Moreover, since there were no substantial changes in Mr. Lewis's reported salary after he settled his litigation, and as CalPERS was given all of those documents before Mr. Johnson authored his letter, it was not established that there was anything "new" to review other than the *Prentice* holding. As noted below, that holding is distinguishable given the facts presented here.

40. David Clement, CalPERS Senior Pension Actuary, calculated the difference in Mr. Lewis's retirement as a battalion chief and as a fire captain. He testified that allowing Mr. Lewis to receive battalion chief retirement benefits would cause an "unanticipated increase in liability" of $509,668. He explained that this figure represented the additional liability the city would assume if Mr. Lewis won is appeal. However, Mr. Clement was not aware that the city had paid higher contributions to CalPERS because of Mr. Lewis's higher earnings after the settlement agreement took effect. Thus, his assumption that contributions had not been made was incorrect thereby making his testimony non-persuasive.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54).

2. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Applicable Code Sections

3. Government Code section 20630 defines "compensation."

4. Government Code section 20636 defines "compensation earnable" as the "payrate and special compensation of the member as defined by subdivisions (b), (c), and (g) and as limited by section 21752.5."

5. Government Code section 20636, subdivision (b)(1), defines "payrate" as "the

normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours. 'Payrate,' for a member who is not any group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours..."

6. Government Code section 20636, subdivision (c), provides the exclusive list of those items that are considered "special compensation," which items include payment a member receives for special skills, knowledge, abilities, or work assignment. Special compensation does not include final settlement pay, payments made for additional services rendered outside normal working hours or other payments the board has not affirmatively determined to be special compensation.

Regulatory Authority

7. California Code of Regulations, title 2, section 571, subdivision (a), exclusively identifies those items that may be included in "special compensation." Subdivision (b)(2) provides that special compensation must be "available to all members in a group or class."

Applicable Case Law

8. The court in *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478-1479, summarized the general principles governing determination of a public employee's retirement allowance:

> Under the PERL, the determination of what benefits and items of pay constitute 'compensation' is crucial to the computation of an employee's ultimate pension benefits. The pension is calculated to equal a certain fraction of the employee's 'final compensation' which is multiplied by a fraction based on age and length of service. . . . 'Final compensation' is the 'highest average annual *compensation earnable* by a member during the three consecutive years of employment immediately preceding the effective date of his retirement' or other designated consecutive three-year period. . . . Both the employer and the employee are required to make contributions to the system, based on a percentage of 'compensation.'

Authority to Correct an Error

9. Government Code section 20160 authorizes CalPERS to correct an error or omission of any active or retired member or any contracting agency. The request to correct the error or omission must be made within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

10. Government Code section 20164 provides that CalPERS's obligations to its members continue throughout their membership in CalPERS or throughout the life of retired members. The section sets forth limitations for the filing of civil actions.

11. When the error is made by the member or contracting agency, the six month time limit applies. If not, CalPERS may correct any errors throughout the life of the retired member. (*City of Oakland* (2002) 95 Cal.App.4th 29, 50.) Applying those sections here, if the error was made by Mr. Lewis or the city when reporting the settlement to CalPERS in 2007, the six month time limit has run. If the error was not made by the city or Mr. Lewis, then CalPERS may correct it at this time. However, for the reasons stated below, even assuming CalPERS can fix the error at this juncture, CalPERS's determination that the "special compensation" and EPMC may not be counted towards Mr. Lewis's retirement is rejected.

CalPERS's Request for Official Notice

12. CalPERS filed a Request for Official Notice attaching a CalPERS decision and excerpts from city documents.[4] The *City of Bell* decision is not controlling because it is not precedential and its facts are distinguishable. In *Bell*, the employee's salary was not based on a publicly available pay rate. Here, the settlement agreement tied Mr. Lewis's rate of pay to the publicly available battalion chief pay rate. Moreover, Mr. Lewis's settlement agreement was created to right a wrong, namely the wrongful passing over of Mr. Lewis for promotion. Such was not the case in *Bell*. Thus, that case is not controlling. Nothing in the attached city charter excerpts, civil service rules excerpts or MOU excerpts is at odds with the findings reached in this matter. Absent the title, the settlement agreement made Mr. Lewis a battalion chief subject to all the benefits of that position as outlined in the publicly available battalion chief documents.

Equitable Estoppel

13. With regard to the well-established doctrine of equitable estoppel, "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." (*Seymour v. Oelrichs* (1909) 156 Cal. 782, 795, quoted in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488.)

14. "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury . . . . The doctrine of equitable estoppel may be applied against the government where justice and right require it."

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[4] Although the Request cites to Exhibits 15 and 16, no such documents were attached. Instead, four documents labeled Exhibits A, B, C, and D were attached.

(*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305-306.) The party asserting the estoppel bears the burden of proof. (*Killian v. City and County of San Francisco* (1978) 77 Cal. App. 3d 1, 16.)

15. "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*City of Long Beach v. Mansell, supra,* 3 Cal.3d at 496-497.)

16. However, it is generally "held that the power of a public officer cannot be expanded by application of this doctrine." (*Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 667.) In other words, the doctrine may not be applied when doing so "would have the effect of granting to the state's agents the power to bind the state merely by representing that they have the power to do so." (*Ibid.*)

17. Applying the elements of equitable estoppel set forth above, the evidence established that (1) CalPERS was fully apprised of the settlement agreement; (2) that CalPERS sent the city a letter directing it how to report Mr. Lewis's new salary and the city complied with that directive and CalPERS "assured" Mr. Lewis that his higher salary would be included in his retirement calculations; (3) neither Mr. Lewis nor the city had any knowledge that CalPERS would not include the salary increase in Mr. Lewis's retirement calculations; and (4) Mr. Lewis relied on CalPERS's representations to his detriment, as he never sought to have his job title changed and never re-applied for battalion chief again and he only agreed to the settlement because of the assurances the his salary increase would be included in his retirement calculations. Thus, CalPERS is equitably estopped from now asserting that Mr. Lewis's "Temporary Upgrade Pay" and the value of his EPMC not be included in his final compensation calculation.

Evaluation

18. Even presuming that equitable estoppel does not apply, CalPERS's position is still rejected. Mr. Lewis settled his wrongful employment practices litigation by agreeing to receive retroactive pay from the date he should have been promoted to battalion chief and receive all future pay and benefits of a battalion chief. Contrary to the facts presented in *Molina v. Board of Administration* (2011) 200 Cal.App.4th 53, Mr. Lewis's back pay was calculated using publicly available fire captain and battalion chief pay rates, and his future pay was to be based on the publicly available battalion chief pay rate and the benefits identified in the publicly available MOU. Further, unlike Mr. Molina, Mr. Lewis continued to work for several years after resolving his litigation.

Similarly, CalPERS's reliance on *Prentice v. Board of Administration* (2007) 157Cal.App.4th 983, was misplaced. In that case, the raise was only offered to Mr. Prentice, he was alone in a class of one. Here, however, the clear, unambiguous language of the settlement agreement placed Mr. Lewis in the battalion chief class giving him the pay and

"all the benefits" of battalion chiefs. For all intents and purposes, the settlement agreement placed Mr. Lewis in the class of battalion chiefs; he was not in a class by himself. Unlike Mr. Prentice, Mr. Lewis's retirement benefits were not "artificially increased." They were set at the publicly available battalion chief rate. The settlement was open, obvious, and immediately brought to CalPERS's attention. Even though Mr. Lewis would receive the overtime benefits of a fire captain, this was not enough to place him in a class of one because the overwhelming import of the settlement agreement was that Mr. Lewis was in the battalion chief class. A more accurate interpretation of the overtime term was that it was merely additional consideration negotiated between the parties to settle the litigation. It is also worth noting that, by the terms of his settlement agreement, Mr. Lewis ran the risk that if battalion chief benefits were ever reduced or eliminated in the future, he, too, would suffer that reduction/elimination.

CalPERS defined "special compensation" contrary to the facts presented. It was established that Mr. Lewis was wrongfully passed over for promotion and was now going to be paid as a battalion chief because of his special skills, knowledge, abilities, or work assignment. The sums were not paid as final settlement pay or for additional services rendered outside Mr. Lewis's normal working hours. The salary and benefits given to Mr. Lewis were "available to all members in the group or class" of battalion chiefs. Thus the increase in pay qualified as special compensation. Other assumptions made by CalPERS were also erroneous. The evidence established that Mr. Lewis regularly acted as a battalion chief. CalPERS's assumption that he did not perform those duties was incorrect. CalPERS's assumption that the payments to Mr. Lewis could stop at any time failed to take into account that doing so would place the city in breach of the settlement agreement, thereby spurring further litigation. Finally, CalPERS's reliance on the job title used by Mr. Lewis in his retirement applications was not persuasive because Mr. Lewis agreed during the settlement negotiations that he would not get the battalion chief title, but he would get "all" the battalion chief benefits. Relying on his job title put form over substance and was at odds with the clear intent of all the parties – an intent CalPERS was advised of during the 2007 negotiations.

CalPERS's disallowance of the EPMC benefits was based on CalPERS's erroneous presumption that Mr. Lewis was a fire captain. Because the facts established that he was in the class or group of battalion chiefs, Mr. Lewis was entitled to "all benefits" of a battalion chief, including EPMC.

CalPERS's argument that allowing Mr. Lewis to receive these retirement benefits will "open the floodgates" and require CalPERS to recognize any compensation as pensionable overlooks the facts of this case. Namely, the city paid Mr. Lewis the battalion chief rate as set forth in the publicly available pay rate and publicly available fire management MOU. Furthermore, the city informed CalPERS of the settlement agreement, sought CalPERS's input on how to report it to CalPERS, and followed CalPERS's directions. Mr. Lewis also made inquiries to CalPERS about the settlement to insure that it would count towards his retirement. CalPERS "assured" him that it would apply.

The evidence presented established that Mr. Lewis was in the class of battalion chiefs and entitled to all benefits of battalion chiefs, which included retirement benefits.

ORDER

Richard Lewis's appeal of CalPERS's decision regarding his final compensation is granted. CalPERS shall include "Temporary Upgrade Pay / Special Compensation" and the value of Employer Paid Member Contributions (EPMC) in Mr. Lewis's final compensation calculation.

DATED: July 15, 2015

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings