

ATTACHMENT C
RESPONDENT'S ARGUMENT

Respondent's Argument in Richard Lewis

The Board should adopt “in its entirety” the *Proposed Decision* in the *Matter of the Calculation of Final Compensation of Richard Lewis*. (OAH 2014040945). *Gov.C. § 11517(c)(2)(A)*. Both the City and Mr. Lewis presented facts and law in the appeal process that proved Mr. Lewis was entitled to the higher pension.

The case presents a unique and unusual set of facts that is unlikely to recur. The twenty three (23) page *Proposed Decision* accurately makes factual findings consistent with the evidence presented in the four (4) day hearing. It is undisputed that Mr. Lewis worked his whole career for the City of San Bernardino. Mr. Lewis was fully qualified and available to take a higher position, including more than satisfying all of the duty requirements and being the next on the civil service promotion list. However, Mr. Lewis was illegally denied a promotion that he was fully and legally entitled to receive. It was alleged that the Fire Chief denied Mr. Lewis the promotion because the Fire Chief objected to Lewis’ prior union advocacy and union organizing activities.

Union activity is protected under the law. Mr. Lewis’ union activity was not a legitimate reason to deny a promotion. Mr. Lewis filed a civil rights case in federal court. One of the remedies available was to compel the City to promote him.

The City subsequently corrected its unlawful action, documented the settlement of the dispute, and agreed to provide Mr. Lewis with all of the compensation and benefits applicable to the higher position retroactively and prospectively. As such, the City sought to provide Mr. Lewis with much of what he had been wrongly denied. **Importantly, the resolution of the dispute did not create new rights, but rather justly provided Mr. Lewis with rights that he already earned and was already entitled to.** The Settlement and resolution provided Mr. Lewis with the rights that had been wrongfully denied by the City’s prior inappropriate acts.

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After resolving the dispute, the City contacted CalPERS. The City sought CalPERS' advice, including on how to report the past and future compensation to CalPERS to ensure that Mr. Lewis would receive a retirement benefit based on the higher compensation.

The City staff specifically and repeatedly telephoned senior analysts in the CalPERS Compensation review Unit (CRU) for advice, information, and approval. The analysts in CalPERS' Compensation Review Unit accepted the City's calls and agreed to provide the City with advice and a determination. The City then provided documentation to CalPERS CRU to aid in CalPERS determination. Shortly thereafter, the senior analyst in CalPERS CRU reviewed the documents and specifically found that Mr. Lewis was entitled to a higher pension based on the compensation of the Battalion Chief.

CalPERS CRU analyst communicated and advised the City on how to proceed. The CRU analyst specifically instructed the City on how to report Mr. Lewis higher compensation, to make contributions based thereon, and how to characterize and to treat part of Mr. Lewis' compensation as "Temporary Upgrade Pay", a form of special compensation (that Mr. Lewis qualified for).

Relying on CalPERS advice and review, the City reported Mr. Lewis' compensation to CalPERS as directed. Biweekly, the City reported part of Mr. Lewis' compensation as "Temporary Upgrade Pay", paid contributions on the compensation, and continued to do so for the next few years.

Mr. Lewis asked CalPERS about the special compensation and CalPERS assured Mr. Lewis that it was included in his retirement calculation. Members of the City council inquired into the resolution of the dispute and were told by the City that CalPERS had advised the City on

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how to proceed and that CalPERS accepted the contributions that would produce the higher pension.

The situation remained the same for years: the City, CalPERS, and Mr. Lewis all relied on, understood, and acted under the belief that CalPERS had agreed and accepted that Mr. Lewis was entitled to a pension based on the salary and EPMC of a Battalion Chief.

Mr. Lewis was injured on the job, went out on 4850 time for a year, and then retired with 30.272 years of service for the City. The City personnel office instructed Mr. Lewis on how to fill out the retirement application, and Mr. Lewis retired on November 1, 2012.

After retirement and without any change in facts, CalPERS subsequently made a different interpretation based on an incorrectly reading of the law and inadequate understanding of the facts. Inaccurately, CalPERS incorrectly relied on a small number of semantics that are belied by the actual details.

CalPERS' *Statement of Issues* ignored its prior determination, misunderstood the situation, focused on semantics, was legally defective, and did not make any good faith or real inquiry of the City to inquire into any additional facts. CalPERS' *Statement of Issues* and its administrative arguments ignore the law and evidence that overwhelmingly supported Mr. Lewis and his entitlement to the higher pension even before the hearing began.

In response, the City forcefully opposed CalPERS arguments. Mr. Lewis also vigorously opposed CalPERS and fully litigated the matter.

A four-day hearing was held with several key witnesses from the City of San Bernardino that each supported Mr. Lewis' entitlement to a higher pension. Attorneys in the City Attorney's office, and several other key City employees testified and produced compelling evidence that CalPERS had specifically directed the City on how to report, characterize, and deal with the

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retirement aspects arising from the resolution of the dispute. Mr. Lewis, councilmember Wendy McCammack, and other high ranking City officials testified and produced facts that support a finding in Mr. Lewis' favor, including about (i) the City grouped and dealt with Mr. Lewis as an employee in the class of persons subject to the fire management MOU, (ii) Mr. Lewis regularly performed Battalion Chief duties in the normal course of his work week, and (iii) CalPERS assured Lewis and the City that the amount of Mr. Lewis' pension would be based on the higher salary associated with the Battalion Chief.

In the administrative process, CalPERS did not introduce significant or persuasive evidence into the administrative record that would support its position to not provide the pension based on the Battalion Chief compensation. CalPERS mainly pointed to semantic entries on forms that were divorced from context or meaning or practice.

In the hearing and in the *Proposed Decision*, Mr. Lewis met his burden to provide evidence to prove that he was entitled to the higher pension under several different theories. CalPERS failed to introduce evidence to overcome the specific facts found by ALJ Matyszewski and set forth correctly in the *Proposed Decision*.

ALJ Matyszewski correctly makes legal conclusions based on the PERL and California law. The ALJ correctly provide several independent legal grounds for ruling in Mr. Lewis' favor.

The *Proposed Decision* cites the appropriate *Government Code* sections that establish compensation, pay rate, compensation earnable, and special compensation. ALJ Matyszewski also correctly interprets the current law of equitable estoppel against a government agency. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462). Factually, equitable estoppel is satisfied. CalPERS received the settlement agreement and sent the City a letter on how to report it. CalPERS "assured" Mr. Lewis that his higher salary would be included. Neither the City nor Mr.

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Lewis had any knowledge that CalPERS would not include the increase. Mr. Lewis relied on CalPERS representation to his detriment in the ways listed in the *Proposed Decision* and the administrative record. Applying the four part test, the *Proposed Decision* establishes that CalPERS is equitably estopped from now asserting that Mr. Lewis' "Temporary Upgrade Pay" and the value of his EPMC not be included in this final compensation calculation. (Paragraph 17, page 21 of the *Proposed Decision*).

The *Proposed Decision* also recognizes that equitable estoppel may not be applied when doing so "would have the effect of granting to the state's agents the power to bind the states merely by representing that they have the power to do so. *Page v. City of Montebello* (1980) 112 Cal.App.3d 658,667.

However, the result in the *Proposed Decision* does not extend beyond the power inherent in the PERL. The result was available under the PERL in several different ways. For an example of one way, the result in the Proposed Decision was required because (1) the City grouped Mr. Lewis in the class of employees subject to the Fire Management MOU; (2) Lewis regularly performed Battalion Chief duties in his normal work; (3) The City paid Mr. Lewis pursuant to the publicly available pay schedules for a Battalion Chief; and (4) all PERL and other requirements were satisfied. Thus, the Battalion Chief pay was Mr Lewis' "pay rate".

Without regard to whether equitable estoppel applies, the *Proposed Decision* rejects CalPERS' position. The *Proposed Decision* finds as a fact that "for all intents and purposes", the City by the settlement agreement (and otherwise) placed Mr. Lewis in the class of battalion chiefs and treated him like a battalion chief. Mr. Lewis regularly performed Battalion Chief tasks in his normal workweek, and was grouped by the City under the Memorandum of Understanding that pertained to fire management and other Battalion Chiefs. Mr. Lewis' back pay was

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calculated using publicly available pay schedules and his future pay was based on publicly available pay schedules and the MOU for Battalion Chief. Mr. Lewis continued to work for the City at the pay listed in the publicly available pay schedules for several years after resolving the dispute. ((Paragraph 18, page 21 of the *Proposed Decision*)

Regarding EPMC, Mr. Lewis was entitled to EPMC in any case. There are no grounds for denying Mr. Lewis EPMC.

As a policy issue, Mr. Lewis' retirement benefits were not artificially increased by the resolution of the dispute. Instead, the resolution of the dispute worked to provide Mr. Lewis with the retirement benefits that he was already entitled to. CalPERS reliance on *Prentice* or *Molina* is misplaced, as this case does not involve any artificial increase or "spiking". CalPERS' reliance on *Prentice* is also misplaced because Mr. Lewis was included in the group of Battalion Chiefs, not a group of one. (Paragraph 18, page 21-22 of the *Proposed Decision*)

In practical effect, CalPERS' argument in the administrative hearing (and likely before the Board) would create an injustice on Mr. Lewis by forcing on him the consequences of a (subsequently corrected) prohibited act by the City of San Bernardino. CalPERS should not support or encourage inappropriate employment acts (such as denying Mr. Lewis the promotion that he earned) by making the injured party suffer the (now corrected) consequences that were the purpose or motive underlying the unlawful activity. **In other words, if the Proposed Decision is not adopted, then CalPERS denies Mr. Lewis his appropriate earned benefits (and thereby backs inappropriate, unconstitutional, and anti-union activities).**

The facts and law in the *Proposed Decision* show that Mr. Lewis is entitled to a pension based on the final compensation of a Battalion Chief and the value of EPMC. The *Proposed Decision* is legally and factual correct. It should be adopted.

