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**BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

In the Matter of the Calculation of Final	)	<b>CASE NO. 2012-0671</b>
Compensation of:	)	
	)	<b>OAH NO. 2013080917</b>
BRUCE MALKENHORST, SR.,	)	
	)	
Respondent,	)	<b>CALPERS OPPOSITION TO</b>
	)	<b>MALKENHORST'S MOTION IN</b>
and.	)	<b>LIMINE <u>NO. 3</u></b>
	)	
CITY OF VERNON,	)	
	)	Hearing: June 13, 2014, 9:00 a.m.
	)	
Respondent.	)	
	)	
	)	

**MOTION IN LIMINE NO. 3 SHOULD BE DENIED**

This administrative proceeding concerns the determination of Malkenhorst's retirement allowance under the Public Employees' Retirement Law ("the PERL," Government Code section 20000, et seq.). CalPERS will prove that it determined Malkenhorst's retirement allowance in accordance with the PERL. CalPERS' witnesses on that point include its employees Tomi Jimenez, Lolita Lueras, Margaret Junker, and Chris Wall.

In his Motion in Limine No. 3, Malkenhorst speculates that Jimenez, Lueras, Junker, and Wall will try to testify as experts, give legal opinions, and provide evidence on matters about which they lack personal knowledge. However, the Motion fails to identify any specific evidence that must be excluded. "A motion in limine to exclude evidence is not a sufficient objection unless it was directed to a particular, identifiable body of evidence ...." (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1675.) General objections like those asserted by Malkenhorst are best left until the Hearing, when the ALJ can "determine the evidentiary question in its appropriate context." (*Id.*)

While specific evidentiary rulings should await the Hearing, the ALJ should expressly reject Malkenhorst's argument that CalPERS employees may not refer to or explain the PERL. Malkenhorst is wrong to suggest that CalPERS' discussion of the PERL would be equivalent to offering an expert legal opinion.

The CalPERS witnesses are not lawyers and they will not be offering legal opinions on what the PERL "means." Nor will the CalPERS witnesses testify to legislative intent, legislative history, principles of statutory interpretation, analysis of case law, or any other tool a true legal expert might use. Instead, the CalPERS witnesses intend to explain how their work requires them on a day-to-day basis to interpret and apply the PERL. The witnesses will further describe how they applied the PERL to Malkenhorst, explain *what* decisions CalPERS reached, *how* CalPERS reached its decision, and *why* CalPERS concludes that Malkenhorst's retirement allowance has been properly determined. Testimony of this nature is proper. (See *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1.

1           The issue in *Yamaha* was the weight the trial court should give to interpretive  
2 annotations prepared by the State Board of Equalization. The California Supreme Court  
3 explained that if the annotations were quasi-legislative rules, they would be binding, but if the  
4 annotations merely reflected informal interpretations of a statute, the weight given them would  
5 be “situational.” (*Id.* at p. 12.) The Court noted that “the agency’s view of [a] statute’s legal  
6 meaning and effect [lies] within the constitutional domain of the courts.” But the agency’s  
7 interpretation remains admissible because it “will often be interpreting a statute within its  
8 administrative jurisdiction” and “may possess special familiarity with satellite legal and  
9 regulatory issues.” (*Id.* at p. 11.)

11           It is not uncommon for agency executives to provide evidence on the agency’s informal  
12 interpretation of a statute. For example in *Galvez v. Federal Express* (N.D. Cal. 2011) 2011  
13 WL 1599625, \* 4,<sup>1</sup> the court considered a declaration from a former executive of the Division  
14 of Labor Standards Enforcement (“DLSE”). The declaration described how the DLSE  
15 interpreted a regulation, and the plaintiff objected on the ground that the declaration provided  
16 “improper expert testimony on the interpretation of a law.” (*Id.* at p. \*4.) Citing *Yamaha*, the  
17 court overruled the objection, noting the executive’s specialized knowledge about the  
18 operations of the DLSE. (*Id.*)

19           Similar is *Handyman Connection of Sacramento v. Sands* (2004) 123 Cal.App.4th 867,  
20 894-895. There, the court considered the testimony of a Contractors’ State Licensing Board  
21 executive in connection with the interpretation of a statute. Citing *Yamaha*, the court ruled  
22 “because the Board is charged with enforcing the statute and presumably has expertise in this  
23 field, its interpretation deserves some degree of deference.” (*Id.* at p. 895.)

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27  
28 <sup>1</sup> A copy of this decision is attached as Exhibit 1.

1 Under *Yamaha*, CalPERS may offer witnesses to provide its interpretation of the PERL  
2 statutes related to Malkenhorst's retirement allowance. The OAH should so rule and deny the  
3 Motion.  
4

5  
6 DATED: June 9, 2014

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8 By:  \_\_\_\_\_  
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Jason Levin

10 Attorneys for Complainant CalPERS  
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EXHIBIT 1

Westlaw

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(Cite as: 2011 WL 1599625 (N.D.Cal.))

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Only the Westlaw citation is currently available.

United States District Court,  
N.D. California.  
Alex GALVEZ, et al., Plaintiffs,  
v.  
FEDERAL EXPRESS INC., Defendant.

No. C07-2505 TEH.  
April 28, 2011.

Daniel L. Feder, Law Offices of Daniel L. Feder,  
Jacqueline Scott Corley, Michael John Von Loewen-  
feldt, Michael Kai Ng, Kerr & Wagstaffe LLP, San  
Francisco, CA, Peter B. Fredman, Attorney at Law,  
Berkeley, Ca, for Plaintiffs.

Sandra Colene Isom, Federal Express Corporation,  
Memphis, TN, for Defendant.

*ORDER GRANTING DEFENDANT'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT*  
THELTON E. HENDERSON, District Judge.

\*1 This matter came before the Court on April 25,  
2011, on a motion for partial summary judgment  
brought by Defendant Federal Express Inc. ("FedEx").  
After carefully considering the parties' written and  
oral arguments, the Court now GRANTS FedEx's  
motion for the reasons discussed below.

## BACKGROUND

The parties agree that FedEx's employment of  
Plaintiffs must comply with Industrial Wage Com-  
mission ("IWC") Wage Order 9, section 4:

### 4. MINIMUM WAGES

(A) Every employer shall pay to each employee

wages not less than seven dollars and fifty cents  
(\$7.50) per hour for all hours worked, effective  
January 1, 2007, and not less than eight dollars  
(\$8.00) per hour for all hours worked, effective  
January 1, 2008, except:

LEARNERS: Employees during their first 160  
hours of employment in occupations in which they  
have no previous similar or related experience, may  
be paid not less than 85 percent of the minimum  
wage rounded to the nearest nickel.

(B) Every employer shall pay to each employee, on  
the established payday for the period involved, not  
less than the applicable minimum wage for all hours  
worked in the payroll period, whether the remunera-  
tion is measured by time, piece, commission, or  
otherwise.

(C) *When an employee works a split shift, one (1)  
hour's pay at the minimum wage shall be paid in  
addition to the minimum wage for that workday,  
except when the employee resides at the place of  
employment.*

(D) The provisions of this section shall not apply to  
apprentices regularly indentured under the State  
Division of Apprenticeship Standards.

Cal.Code Regs. tit. 8, § 11090(4) (emphasis  
added). The parties also agree that the relevant min-  
imum hourly wage in 2006 was \$6.75. However, they  
disagree as to how section 4(C) should be interpreted.

The relevant facts are undisputed: Plaintiffs Al-  
exander Galvez and Marc Garvey formerly worked as  
couriers for FedEx. On May 30, 2006, Garvey worked  
from 7:30 AM to 12:00 PM and from 1:30 PM to 6:15  
PM, for a total of 9 hours, 15 minutes of paid work

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time. Although Garvey did not receive an additional premium for working a split shift, he was paid more than \$69.19, the minimum wage for 10 hours, 15 minutes of work.

On November 21, 2006, Galvez worked from 7:00 AM to 12:32 PM and from 1:47 PM to 8:08 PM, for a total of 11 hours, 53 minutes of paid work time. Like Garvey, Galvez also did not receive an additional premium for working a split shift. However, he was paid more than \$86.97, the minimum wage for 12 hours, 53 minutes of work.

The parties agree to assume, for purposes of this motion only, that the above two shifts were split shifts within the meaning of section 2(N) of IWC Wage Order 9, which defines a "split shift" as "a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods." Cal.Code Regs. tit. 8, § 11090(2)(N). FedEx contends that it satisfied its obligations under section 4(C) of the wage order. The company asserts that the regulation was designed to ensure that employees who work a split shift receive at least the minimum wage for all time actually worked plus one hour, meaning that an employee who makes more than the minimum wage might not receive any additional pay for working a split shift. Plaintiffs' position, by contrast, is that employees who work a split shift are entitled to receive their regular wages for the hours they worked plus a premium of one hour's pay at the minimum wage for working a split shift. Thus, Plaintiffs contend that they are entitled to an additional \$6.75, the relevant hourly wage at the time, as a premium for working a split shift on the two days discussed above.

## LEGAL STANDARD

\*2 Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty*

*Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The court may not weigh the evidence and must view the evidence in the light most favorable to the nonmoving party. *Id.* at 255.

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings or materials in the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the moving party will have the burden of proof at trial, it "must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.2007). However, on an issue for which its opponent will have the burden of proof at trial, the moving party can prevail merely by "pointing out to the district court ... that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. If the moving party meets its initial burden, the opposing party must then set out specific facts showing a genuine issue for trial to defeat the motion. *Anderson*, 477 U.S. at 250.

## DISCUSSION

FedEx's motion appears to raise an issue of first impression. Case law provides that the regulation applies to all workers, even those who make more than minimum wage, e.g., *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 558, 59 Cal.Rptr.2d 186, 927 P.2d 296 (1996); *Kerr's Catering Serv. v. Dep't of Indus. Relations*, 57 Cal.2d 319, 324–25, 19 Cal.Rptr. 492, 369 P.2d 20 (1962); however, the parties have cited no case, and this Court has found none, that addresses how to determine whether an employer has complied with its obligations under IWC Wage Order 9, section 4(C). Plaintiffs cite the California Supreme Court's statement that "the employer must pay the

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employee one additional hour of wages” when an employee works a split shift, *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1111, 56 Cal.Rptr.3d 880, 155 P.3d 284 (2007), but acknowledge that the statement was dicta. Moreover, the statement in *Murphy* does not describe how to determine whether an employer has satisfied its obligations under the regulation.

IWC wage orders are construed according to general principles of statutory interpretation. *Collins v. Overnite Transp. Co.*, 105 Cal.App.4th 171, 178–79, 129 Cal.Rptr.2d 254 (2003). Thus:

[W]e must look first to the words of the statute, because they generally provide the most reliable indicator of legislative intent. If the statutory language is clear and unambiguous our inquiry ends. If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs. In reading statutes, we are mindful that words are to be given their plain and commonsense meaning. We have also recognized that statutes governing conditions of employment are to be construed broadly in favor of protecting employees. Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation.

\*3 *Murphy*, 40 Cal.4th at 1103, 56 Cal.Rptr.3d 880, 155 P.3d 284 (citations and internal quotation marks omitted). When interpreting statutory language, courts must give “significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided.” *Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n*, 43 Cal.3d 1379, 1386–87, 241 Cal.Rptr. 67, 743 P.2d 1323 (1987).

This Court agrees with FedEx that the language of section 4(C) is not ambiguous. The regulation pro-

vides that one hour at minimum wage shall be paid “in addition to the *minimum* wage for that workday.” Cal.Code Regs. tit. 8, § 11090(4)(C) (emphasis added). Adopting Plaintiffs' interpretation would violate principles of statutory construction by substituting “regular wage” for “minimum wage.” In addition, Plaintiffs' reading would require that one hour at minimum wage be paid whenever a covered employee worked a split shift, which would render as surplusage the phrase “in addition to the minimum wage for that workday.” That is, under Plaintiffs' interpretation, the regulation would essentially read: “When an employee works a split shift, one (1) hour's pay at the minimum wage shall be paid, except when the employee resides at the place of employment.”

Plaintiffs argue that the “in addition to” language is important because it establishes that the split shift premium is an additional obligation to paying at least the minimum wage for the workday. This is not persuasive. While the split shift regulation does impose an additional requirement beyond paying an employee the minimum wage for hours worked, FedEx acknowledges this fact. There is no dispute that the regulation applies to all workers and not just those making minimum wage—that is, that an employer must pay employees who work a split shift at least the minimum wage for the hours actually worked and, in addition, for one additional hour as a result of requiring a split shift. The issue is how compliance with this regulation is determined.

The IWC did not separate the split shift regulation into its own section, as it did, for example, with “reporting time pay” in section 5. Instead, the regulation is contained in section 4, which governs “minimum wages.” Although Plaintiffs correctly argue that workplace regulations must be construed broadly in favor of protecting employees, the Court finds that the protection at issue concerns minimum wages. The plain language of the split shift regulation reflects an intent to ensure that an employee who works a split shift must be compensated highly enough so that he or



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she receives more than the minimum wage for the time actually worked plus one hour. Because the language in the wage order is clear, the Court's inquiry ends, and the extrinsic aids presented by the parties need not be examined.

However, even if this Court were to consider extrinsic aids, there is no indication that the regulation was designed to require that one hour at minimum wage be paid to every employee who works a split shift regardless of that employee's regular rate of pay. Plaintiffs argue that an opinion letter from the Division of Labor Standards Enforcement ("DLSE") supports their interpretation of the split shift regulation, but the Court finds the letter to stand only for the unremarkable proposition that the regulation applies to all employees and not just those earning minimum wage. The letter addresses a question from a PayLess Drug Stores manager about how to calculate overtime pay for certain employees. Plaintiffs cite the letter's statement that, "[i]n addition, your company would be liable for a split shift premium on the days an employee works the end of one shift and the beginning of the next (Monday, Tuesday and Wednesday of your example)." DLSE Opinion Letter 1986.12.01 at 1 (Ex. A to Opp'n). This states only that the split shift regulation would apply; it says nothing about how to calculate the wages due under that regulation, let alone how to do so if an employee makes more than the minimum wage.

\*4 The only evidence that discusses how to determine compliance with the split shift regulation weighs against Plaintiffs' interpretation. First, at a public meeting held on April 25, 1977, the IWC met to adopt a revised statement of the basis of four wage orders. A commissioner explained that:

In Subsection (C) the Commission continued the split-shift provision on the basis that a minimum wage worker's income should not be eroded by the additional expense involved in working a split-shift.

*Some employee representatives asked that the \$2.50 be paid in addition to whatever regular rate of pay was earned during the day, but most wage boards agreed that the premium should be paid in addition to the minimum wage for the hours worked.*

Apr. 25, 1977 Tr. at 28–29 (Ex. C to Def.'s Req. for Judicial Notice) (emphasis added).<sup>FN1</sup> Plaintiffs argue that this represents only the view of a single commissioner, but it appears to be the statement of a single commissioner speaking on behalf of the IWC. Although the statement refers to a different wage order, that order had the same language as Wage Order 9. Thus, the above statement is some evidence that the language in dispute was intended to be interpreted in FedEx's favor.

FN1. \$2.50 was the minimum hourly wage at the time.

Second, the 1978 version of the DLSE manual stated:

*The IWC emphasized in a statement of basis that the premium is to be paid in addition to the minimum wage for the day, and NOT in addition to whatever regular rate is paid. If the wage rate is higher than the applicable minimum wage, the excess over the minimum wage is credited toward the split shift premium.*

DLSE Operations & Procedures Manual § 10.48, page 5 (Ex. D to Def.'s Req. for Judicial Notice) (emphasis in original). While this statement loses some of its persuasive value because it was removed from later versions of the manual, FedEx relies on the declaration of Gregory Rupp, a former assistant chief (1995–2003) and acting deputy chief (2003–04) at DLSE, to state that the omission from later editions "is not an indication that the DLSE discontinued this method of determining compliance with the split shift

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requirement.... If the DLSE had changed its method of enforcing the split shift premium, that should have been included in later editions as a revision to explain the change and reason for the change.” Rupp Decl. ¶ 11. Rupp's declaration also states that, “[i]f an employee's wage rate was higher than the applicable minimum wage, the amount of regular wages that exceeded minimum wage was credited toward the split shift premium.” *Id.* ¶ 10, 241 Cal.Rptr. 67, 743 P.2d 1323.

Plaintiffs object to the Court's consideration of the Rupp declaration as improper expert **testimony** on the **interpretation** of a **law**, citing *Downer v. Bramet*, 152 Cal.App.3d 837, 199 Cal.Rptr. 830 (1984). However, the testimony that was excluded in *Downer* was testimony by two attorneys giving a legal opinion—a vastly different circumstance than that present here. In this case, Rupp has specialized knowledge about the operations of the DLSE and provides **testimony**, based on his personal knowledge, of how the **agency interpreted** the split shift **regulation**. The Court need not accept that interpretation as the correct legal interpretation, but the declaration is evidence of how the regulation was interpreted in practice. Although DLSE's own interpretation is not binding, it should be considered. E.g., *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal.4th 1, 7, 78 Cal.Rptr.2d 1, 960 P.2d 1031 (1998).

\*5 In the absence of any contrary evidence, DLSE's interpretation of the split shift regulation and the statement by the IWC concerning similar language in other regulations are persuasive. Both also comport with the Court's own reading of the regulation. Consequently, even if the Court agreed with Plaintiffs that the split shift regulation were subject to more than one reasonable interpretation, it would nonetheless adopt the interpretation supported by FedEx.

## CONCLUSION

For the reasons discussed above, the Court GRANTS FedEx's motion for partial summary judg-

ment. The wage order in question clearly and unambiguously states that an employee who works a split shift must receive one hour's pay at the minimum wage in addition to the *minimum*, not regular, wage for that workday—an interpretation that is also supported by extrinsic evidence. Accordingly, this Court concludes that an employer satisfies its obligations under the split shift regulation if it pays an employee who works a split shift at least the minimum wage for the actual time spent working plus one additional hour.

## IT IS SO ORDERED.

N.D.Cal.,2011.

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