# STAFF'S ARGUMENT TO DECLINE TO ADOPT THE PROPOSED DECISION

At the October 21, 2015, meeting, due to numerous legal as well as factual errors in the Proposed Decision, the Board of Administration (Board) requested a Full Board Hearing in connection with the appeal of David Lewis.

Staff requests that the Board deny the member's appeal of staff's determination that certain settlement payments are to be excluded from the calculation of his pension benefits.

## I

## SUMMARY OF CASE

Respondent Lewis retired from the City San Bernardino (City) Fire Department as Fire Captain effective November 30, 2012. (CP Exh. 11.) In his retirement application, Respondent Lewis confirmed that the position he held was that of a Fire Captain. On May 8, 2013, after reviewing pertinent documents, CalPERS staff issued a formal determination to the City and Mr. Lewis explaining that CalPERS would not include in the calculation of Respondent Lewis' final compensation, an amount reflecting an ostensible payment of "Temporary Upgrade Pay" (TUP) equivalent in bi-weekly payments in the amount of $1,560.50. (CP Exh. 3.) The determination letter addresses the qualifications for "special compensation" under the Public Employees' Retirement Law (PERL), citing Government Code section 20636 and Title 2, California Code of Regulations, section 571 (which includes the definition of TUP). The material factors in the determination were that the settlement proceeds were paid regardless of any additional services being required or rendered and that the payments would be paid for "an indefinite" period of time. This determination letter informed Mr. Lewis and the City of their rights to appeal the determination. Mr. Lewis timely appealed. The City initially objected to the determination but defaulted at the hearing.

On April 22, 2014, the Board issued a Statement of Issues (SOI). (CP Exh. 1.) The sole issue presented by the SOI was whether the settlement proceeds paid to Mr. Lewis, pursuant to a Settlement Agreement and General Release between him and his employer could be considered in the calculation of his pension benefit as an item of special compensation.

The hearing in this matter covered four days and included testimony of Respondent Lewis, CalPERS staff, current and former staff from the City of San Bernardino from both the Human Resources and Finance Department, the City Attorney's Office, a former City Council member and the former attorney for Respondent.

A Proposed Decision was issued on July 15, 2015, ordering that CalPERS shall include the settlement proceeds in Respondent Lewis' final compensation as "Temporary Upgrade Pay/special compensation." (Attach. D.)

At the Board hearing held on October 21, 2015, CalPERS staff argued for rejection of the Proposed Decision. (Attach. D, Subpart B.) Among the reasons that staff recommended rejection of the Proposed Decision was that the Administrative Law Judge (ALJ):

I. Erroneously concluded that payments made by Respondent City of San Bernardino (Respondent City or City) in settlement of an employment discrimination lawsuit brought against it by Respondent Richard Lewis (Respondent Lewis) qualified as an item of special compensation (specifically TUP) to be included in Respondent Lewis' final compensation for purposes of calculating his retirement allowance. (California Code of Regulations, title 2, §571 (a)(3).)

II. Concludes in *dicta* that the settlement payments may qualify as "payrate" notwithstanding the fact that this was not an issue before the Administrative Law Judge. (Government Code §20636(a)(b); Title 2, California Code of Regulations, §570.5.) Contrary to controlling case law and Board precedent, the Proposed Decision improperly defers to and relies solely upon the anecdotal understanding of Respondent City and Respondent Lewis as the bases for qualification of settlement payments as Battalion Chief payrate. The Proposed Decision also erroneously concludes that because the settlement payments Respondent Lewis received as a separate item on his pay warrant were based on the difference between the base salary of his actual position as a Fire Captain and that of a Battalion Chief, the salary schedule for the higher position constituted his "publicly available pay schedule," notwithstanding the fact that he was never actually promoted to such position.

III. The Proposed Decision acknowledges CalPERS' duty to correct errors under Government Code §20160, but fails to apply it in this case to permit correction of the City's erroneous reporting of Respondent Lewis' settlement payments.

IV. The Proposed Decision improperly applies the doctrine of equitable estoppel and omits any discussion of at least one critical element required for application of this doctrine to a public entity.

V. The Proposed Decision misconstrues the fact that allowing settlement payments will result in an unanticipated actuarial loss proscribed under the California Public Employees' Retirement Law (PERL).

On October 21, 2015, the Board rejected the Proposed Decision and set this matter for Full Board Hearing.

## II

## ISSUE PRESENTED

Shall the settlement payments be considered "Temporary Upgrade Pay/special compensation" and be included in Mr. Lewis's final compensation?

## III

## FACTUAL BACKGROUND

The case involves claims that amounts paid in settlement of a lawsuit are TUP. CalPERS disagreed, and therefore disallowed the claimed special compensation as TUP for Respondent Lewis. TUP for classic members is defined as compensation to employees who are "required by their employer or governing board to work in an upgraded position/classification of limited duration." (Cal. Code Regs, Title 2, §571(a)(3).) The employee entering into the temporary position must give up his or her previous duties and completely work in the upgraded position. TUP cannot be awarded for taking on duties in addition to the member's own job duties, as this would be considered "overtime" which is not reportable to CalPERS. The "limited duration" requirement means there has to be a finite period for the assignment.

Respondent Lewis sued the City for discrimination for its decision not to promote him from his position as a Fire Captain to the higher position of Battalion Chief over other candidates for that position. After a federal court partially dismissed his case against the City and the Fire Chief, the parties agreed to resolve the litigation through a "Settlement Agreement and General Release." Under the terms of that agreement, the City would pay Respondent Lewis back pay, "as if" he had been promoted when he claimed he should have been, and to pay him prospectively, by adding a separate supplemental amount to his monthly pay calculated on the difference between Respondent Lewis' actual pay as a Fire Captain and that of a Battalion Chief. (CP Exh. 6.) Respondent Lewis was specifically never promoted to the higher position and would receive the settlement proceeds whether or not he performed any duties of the higher position. The agreement requires the settlement payments to continue for an indefinite period of time. During these negotiations, the parties considered a lump sum payoff. However, because the City felt the lump sum was too high. (HT2/25/15 103/1-4.), the City opted to use the Public Employee's Retirement Fund as a method of leveraging the pay off. The agreement was silent as to whether the settlement payments would be reported to CalPERS.

After the settlement agreement was fully executed, the City contacted CalPERS as to how the City might report the settlement payments. The City was tentatively informed by CalPERS that since the payments could not qualify as payrate because the member would not be promoted, the payments should initially be reported as special compensation, possibly TUP. (CP Exh. 9.) However, the City was aware prior to the date of that response that Respondent Lewis would not be required to perform the

duties of a Battalion Chief. (CP Exh. 8.) On further review by CalPERS staff, it was determined that the payment did not qualify as TUP. (CP Exh. 3.) Therefore, Respondent Lewis' additional pay did not meet the definitional requirements described above to be classified as TUP.

The Proposed Decision presumes, without any analysis or even citing the pertinent sections of law, that the settlement payments were TUP. The Proposed Decision does not acknowledge or discuss the requirements of special compensation including that it be paid pursuant to a labor policy or agreement or that it be historically consistent. Other than a reference to CalPERS' determination letter, the Administrative Law Judge (ALJ) never mentioned the required criteria for "special compensation" and specifically TUP.

## ARGUMENT

I. The Proposed Decision Erroneously Concludes that the Proceeds from the Settlement Agreement Qualify as TUP.

The PERL defines "final compensation", in this particular case, as the highest average consecutive 12 months of "compensation earnable" (Gov. Code section 20042.) The PERL defines "compensation earnable" as the compensation paid by the employer as "payrate" and "special compensation." (Gov. Code section 20636(b).) "Payrate" is defined as 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, pursuant to publicly available pay schedules. (Gov. Code section 20036(b).) A similar definition applies to members who are not considered in a group or class.

"Special compensation" is generally defined as payments received by a member for special skills, knowledge, abilities, work assignment, workdays, or other work conditions. Special compensation must be paid pursuant to a written labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment, in addition to payrate. (Gov. Code section 20636(c).) The Board, pursuant to statutory mandate, has specifically and exclusively identified what constitutes special compensation and under what conditions payments to a member may qualify as special compensation. (See, 20636(c)(6); Cal. Code Regs., Title 2, §571.) The Board also has a specific and continuing duty to correct mistake of members, contracting employers, and the system, (Gov. Code §20160) and specifically to assure that compensation that has been reported conforms with the criteria established for compensation earnable. (Cal.Code Regs., §571, subd. (c).)

The type of special compensation that the ALJ determined applied in this case was TUP. (Cal.Code Regs., §571(a)(3).) TUP is defined as:

> "...compensation to employees who are **required** by their employer or

governing board or body to work **in an upgraded position/classification** for a **limited duration.**" (Emphasis added.)

In addition, even if an item of compensation is identified in regulation, it will not qualify as special compensation if it fails to meet a short litany of guidelines promulgated under (Cal. Code Regs., §571, subd. (b, (d).) In addition to being identified in subdivision (a), each item of special compensation must be:

- Contained in a written labor policy or agreement as defined at Government Code section 20049;
- Available to all members in the group or class;
- Part of normally required duties;
- Historically consistent with prior payments for the job classification; and,
- Not create an unfunded liability over and above PERS' actuarial assumptions.

If not affirmatively identified as such by CalPERS and determined to be in conformity with the criteria set forth in statute and regulations, the payments characterized as special compensation shall be excluded from the calculation of a member's final compensation. (See, *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522; *Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983.)

In addition, similar to the requirements for payrate, provisions for special compensation must be pursuant to and available for public scrutiny (Gov. Code §20636; CalPERS Precedential Decision *In re Randy Adams*, OAH case No. 10122030095).

The correct determination in this matter - that the settlement payments do not qualify as TUP - is obvious. As is evidenced from the settlement agreement itself, and the testimony of every witness, including Respondent Lewis, Respondent Lewis was never "required to work in an upgraded position/classification" in order to receive the additional pay. Further, while the PERL may not specifically define the term "limited duration", the rule of statutory construction compels the courts to defer to commonly accepted understanding of the words used in the text. In this case, absent his actual separation from service, the payments made to Respondent Lewis pursuant to the settlement agreement were of an unlimited duration, which is contrary to the definition of TUP.

Furthermore, even if the payments may otherwise be characterized as falling within TUP or any other item of special compensation, they nevertheless fail to meet the criteria set forth by statute and regulation. They were not paid "pursuant to a written

labor policy or agreement", but in accordance with a specific settlement agreement between Respondent Lewis and the City. (*Prentice v. Board of Administration*, supra, 157 Cal.App.4th at 995, [a settlement agreement is not a labor policy or agreement and a member cannot be more than one group or class for purpose of determining special compensation].) For the same reason, they were not "available" to other members of Respondent Lewis' group or class of employment. Even if partially paid retroactively, they were not historically consistent with Respondent Lewis' or any other employee's compensation. Finally, the payment created an unanticipated actuarial loss in excess of a half a million dollars. Accordingly, there is no support in law or reason for the conclusion reached by the ALJ in the Proposed Decision that the settlement payments should be included in Mr. Lewis' final compensation as Temporary Upgrade Pay/special compensation.

II. The Proposed Decision Erroneously Finds In Dicta That the Settlement Payments Qualify As Payrate.

As previously mentioned, "payrate" is defined under the PERL to be 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 during normal working hours, pursuant to a publicly available pay salary schedule. (Gov. Code §20636(b).) The Board has defined in regulation what may be considered a publicly available pay schedule (Cal. Code Regs., Title 2, §570.5; see also, CalPERS Precedential Decision *In re Randy Adams*, OAH case No. 10122030095.)

The issue of whether the settlement payments constituted "payrate" was not before the ALJ. (CP Exh. 1.) Although sharing certain overarching precepts, there are distinct differences in analyzing whether a payment consists of special compensation or payrate. Yet, in *dicta*, the Proposed Decision includes a finding that because the City and Respondent Lewis agreed to settle their lawsuit by paying Respondent Lewis "as if" he had been promoted, the payments were evidence of his "payrate" as a Battalion Chief. However, what does and does not qualify as payrate is not a subject of agreement by or between the employer and employee. (*Oden v. Board of Administration* (1994) 23 Cal.App. 4th 194, 201.) The City was not paying Respondent Lewis a supplemental amount bi-weekly because he was a Battalion Chief, but solely because of a settlement agreement. Individual settlement agreements do not constitute publicly available salary schedules. (*Molina v. Board of Admin.* (2011) 200 Cal.App.4th 61, 66-67; *In re Randy Adams,* CalPERS Precedential Decision OAH 012030095). Not even if, and particularly because, they reference other documents (Title. 2, Cal.Code Regs § 570.5.).

Although there were salary schedules for the position of Battalion Chief, the undisputed evidence is that Respondent Lewis was never promoted to the rank of Battalion Chief. Contrary to the finding in the Proposed Decision, other than inconsistent anecdotal instances, there is no evidence supporting the ALJ's finding that Respondent Lewis performed the duties of a Battalion Chief. Nor does the evidence indicate that his settlement agreement was, or even could, qualify as a salary schedule.

In essence the Proposed Decision disregards the applicable provisions of the PERL and case law and postulates that if it were the intent of the private settlement agreement to pay Respondent Lewis "as if" he had been promoted to the position of a Battalion Chief, and if there was a "publicly available pay schedule" for the position of Battalion Chief, then therefore his settlement payments, in addition to his "actual salary" as a Fire Captain, should be deemed to have been paid pursuant to the "publicly available pay schedule" of a Battalion Chief.

In arriving at this conclusion, the ALJ disregards the pertinent provision of the PERL and case law. The simple and undisputed fact is that Respondent Lewis was never promoted to a Battalion Chief and remained in the group and classification of Fire Captain until his retirement.

In the Proposed Decision the ALJ rejects the Board's holding in its precedential decision in *In re Randy Adams*, and finds:

> "Here the settlement agreement tied Mr. Lewis's settlement to a 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.... Nothing in the ...city charter, civil service rules excerpts or MOU excerpts is at odds with the finding reached in this matter. ...Absent the title, the settlement agreement made Mr. Lewis a battalion chief..."

The ALJ finding is completely inapposite with the pertinent evidence in this case and the law. It is not the purpose of the PERL to underwrite and promote settlement agreements between employers and their employees. . There is no evidence that the agreement was even submitted to a noticed hearing before the public. To the contrary, the evidence is that at best, the agreement was discussed in closed session and there is no evidence that it was ever reported out. If allowed to stand, the ALJ findings would undermine the very purpose underlying the PERL and civil service rules generally, by sanctioning private and potentially unlawful deals with employees. The ALJ rejected even the relevance of the Board's now precedential decision in *Adams*, and distinguished or simply ignored other case law. Had she properly recognized the holding in those cases, she should have concluded, as did those courts, that like the City Charter, bargaining agreements and civil service system, the PERL also is designed to prevent and remedy employers from making closed door side deals with individual members in order to spike their pension benefits.

In *Adams*, the court explained in detail the principle of the PERL that requires transparency, public notice and uniformity. Although specifically referring to "payrate", the same principles are applicable to compensation earnable generally:

> "13. Official notice was taken of Senate Bill 53, which was introduced in 1992 and enacted in 1993. SB 53 was designed to curb "spiking," the

intentional inflation of a public employee's final compensation, and to prevent unfunded pension fund liabilities. SB 53 defined "compensation payable" in terms of normal payrate, rate of pay, or base pay so payrates would be "stable and predictable among all members of a group or class" and "publicly noticed by the governing body." The legislation was intended to restrict an employer's ability to spike pension benefits for preferred employees and to result in equal treatment of public employees. (Senate File History Re: SB 53)

14. The reference to "publicly available pay schedules" set forth in Government Code section 20636, subdivision (b )(1), was added by the Legislature in 2006. Legislative history confirms that "the change was a matter of clarification." (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 990, fn. 4.)

15. Using a broad interpretation of "pay schedule" based upon the inclusion of a salary disclosed only in a budget has the vice of permitting an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees. And, a written employment agreement with an individual employee should not be used to establish that employee's "compensation earnable" because the employment agreement is not a labor policy or agreement within the meaning of an existing regulation and would not limit the compensation a local agency could provide to an individual employee by way of individual agreements for retirement purposes. (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 994-995.)

16. The term "publicly available" has been determined to be consistent with "a published monthly payrate," and a settlement payment that was not paid in accordance with a "publicly available pay schedule for services rendered on a full time basis during normal working hours" cannot be used to calculate the amount of a CalPERS retirement allowance. (*Molina v. Board of Admin., California Public Employees' Retirement System* (2001) 200 Cal.App.4th 53, 66-67.)

17. The PERS system, via its definitions of "compensation earnable" and "final compensation," contemplates equality in benefits between members of the "same group or class of employment and at the same rate of pay." There is clearly an intent not to treat members within the same class and at the same pay dissimilarly, although there is no intent to grant parity between employees of different classes and rates of pay. (*City of Sacramento v. Public Employees Retirement System* ( 1991) 229 Cal.App.3d 1470, 1492.)" (*Adams*, at pp. 19-20.)

The Proposed Decision presents a deficient and inconsistent understanding of the statutory, regulatory and precedential civil and administrative case law. If the Board should choose to examine this issue at the hearing, it should reject the erroneous analysis and conclusion in the Proposed Decision and conclude that the settlement payments do not constitute a payrate as defined under the PERL.

III. The Proposed Decision Acknowledges CalPERS' Duty to Correct Errors Under Government Code Section 20160 But Fails To Apply It In This Case to Permit Correction Of The City's Erroneous Reporting of Respondent Lewis' Settlement Payment.

The Proposed Decision recognizes that, pursuant to section 20160, the Board has the right and duty to correct errors of any member, contracting agency or of the system. (Attach D, sub. (A).) However, the Proposed Decision refuses to apply this statutory right/duty to CalPERS to correct any possible error by CalPERS staff in permitting the City to initially "report" the settlement payments as TUP. The Proposed Decision further fails to recognize that the mere act of reporting an item of compensation does not preclude CalPERS from correcting such error, at any time (Gov. Code § 20160, subd.(b); *City of Pleasanton v. Board of Administration*, supra, 211 Cal.App.4th at p. 522.) The Board's duty to make corrections to reported special compensation is also specifically addressed in Cal.Code Regs., §571, subd.(c). These obligations persist throughout the time a member and a member's beneficiary receive benefits, and are not truncated by statute of limitation or equitable principals of estoppel or laches.

IV. The Proposed Decision Improperly Applies The Doctrine of Equitable Estoppel.

The Proposed Decision improperly applies the doctrine of equitable estoppel. Estoppel is not available to provide Respondent Lewis a benefit not otherwise available under the express provisions of the PERL. Where estoppel is sought to be asserted against a governmental entity, a fifth element must be met - which the ALJ fails to adequately address - that the interests of the private party must outweigh the effect on the public interest and policies. Here, permitting estoppel would conflict with strong public interest against the spiking of individual compensation by permitting local agencies to artificially increase a preferred employee's retirement benefits (by providing the employee with compensation increases which are not available to other similarly situated employees), in conflict with express provisions of the PERL.

In *Chaidez v. Board of Administration* (2014) 223 Cal.App.4th 1425, the court, citing to earlier precedent, interpreted the Constitution to impose a duty on CalPERS to "'ensure the rights of members and retirees to their full, earned benefits.'" (*City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 544, quoting *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29.) But the statutory scheme governs the scope of the benefits earned. (*City of Pleasanton*, supra, 211 Cal.App.4th at p. 544, 149 Cal.Rptr.3d 729.) The constitutional mandate by which CalPERS operates does not include an overlay of fiduciary obligations justifying an

order to pay greater benefits than the statutes allow. In other words, the Constitution does not give [a member] a right to benefits he did not earn. Unlike the ALJ in the Proposed Decision, the court in *Chaidez* correctly articulated the principles of estoppel and concluded:

> "In the public pension context, equitable estoppel has been applied to redress "widespread, long-continuing" misrepresentations. But "no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations."

In this instance, Respondent Lewis seeks to have the Board grant him the right to use settlement payments as compensation earnable. His sole authority for such a request resides in a private settlement between himself and his employers that calculates the settlement payments as the difference between the compensation for the member's actual position and that of a higher one. It is undisputed that the agreement was not intended to promote Respondent Lewis to a position of Battalion Chief or even to certify that he was entitled to be paid for acting in such a capacity. The purpose of the agreement was simply to buy peace from further litigation. The payments were plainly not for services rendered, past or future, nor available to any other members of Lewis' actual group and class of employment. Respondent Lewis simply seeks to have the terms of the settlement agreement prevail over the PERL. In this pursuit, neither the doctrine of estoppel nor the claim of a breach of fiduciary duty is available to assist him in achieving this result.[1]

## V. The Proposed Decision Misconstrues The Fact That Allowing Settlement Payments Will Result in An Unanticipated Actuarial Loss Proscribed Under The PERL.

The PERL generally prohibits payments made to an individual employee which will result in unfunded liabilities from being included in a member's final compensation. The Proposed Decision acknowledges that the settlement agreement payments payable only to Respondent Lewis will increase the liability associated with his pension allowance by nearly $600,000. (CP Exh. 20.) However, the Proposed Decision erroneously finds that such increase is allowable because the City paid contributions on the payments while they were being paid. Because compensation on which the contributions were paid related to a position that never existed, other than as a result of

---

[1] "[A] breach of fiduciary duty theory is simply a way of restating his equitable estoppel claim.... PERS' fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. PERS has a duty to follow the law. As stated in *City of Oakland*, the policy reflected in the constitutional provision is to "ensure the rights of members and retirees to their full, earned benefits." (Citation) It does not authorize an order compelling PERS to pay greater benefits than section 20636 allows, either by estoppel or as tort damages for an inadvertent failure to timely correct a contracting agency's error. (Cf. § 20160, subd. (a)(3) [authorizing PERS to correct errors or omissions of members, contracting agencies, or itself, but not to provide the party seeking correction with a "status, right, or obligation not otherwise available" under the PERL].)" (*City of Pleasanton v. Board of Administration,* supra, 211 Cal.App.4th at p. 544.) Emphasis added.

the settlement agreement, the resulting increase in liability will be inadequately funded. (Cal.Code Regs, §571, sub. (b).)

VI. Conclusion

What comprises a member's compensation earnable for the purpose of calculating his or her pension allowance is defined by statute for the specific purpose of "preventing local agencies from artificially increasing a preferred employee's retirement benefits by providing compensation increases which are not available to other similarly situated employees. (*Prentice v. Board of Administration*, supra, 157 Cal.App.4th at p. 993.)

Perhaps Respondent Lewis is correct when he argues that his circumstances are unique. But this uniqueness is, in the end, his undoing. This uniqueness is limited to the fact that he was paid a supplemental amount pursuant to an individual agreement with his employer. The settlement agreement was about money. It did not affect his classification. His subjective belief to the contrary, or even performance of duties similar to those of a higher position, which the record does not prove occurred, could not and did not require the employer to appoint him to a higher position.

For good or ill, this was the bargain that Respondent Lewis accepted. It did not include a promotion, although that was apparently discussed. It did not include a lump sum payment for the difference in the amount he may have received in his pension had he been promoted or been required to perform the duties of a higher position. The agreement did not even address if the payments would be reported to CalPERS. He accepted the settlement agreement and the fact that at all times he would remain in the position of a Fire Captain. His rate of pay – regardless of the additional settlement proceeds he may have acquired – was correctly and properly, under the PERL, based on the compensation earnable by members of that classification.

CalPERS staff respectfully request that the Board of Administration uphold its determination that Respondent Lewis cannot include his settlement payments in his final compensation.

Wesley E. Kennedy
Senior Staff Attorney

# APPENDIX TO STAFF ARGUMENT

San Bernardino City Charter Section 186

Section 186. Salaries.

There is hereby established for the City of San Bernardino a basic standard for fixing salaries, classifications, and working conditions of the employees of the Police and Fire Departments of the City of San Bernardino, and the Mayor and the Common Council in exercising the responsibility over these departments vested in them by this Charter shall hereafter be guided and limited by the following provisions:

FIRST: Classification

The following classes of positions are hereby created in the Fire Department and Police Department of the City of San Bernardino, and the code numbers, titles, and salaries as hereinafter set forth are hereby established and fixed for such classes of positions. The letter "P" represents "Position" and the five steps in Attachment F

[¶]...

Each person employed in the Fire Department and Police Department shall be entitled to receive for his/her services in his/her position the applicable respective rate or rates of compensation prescribed for the class in which his/her position is allocated.

**Class of Position**

| **Classification Number** | **Title Fire Department** | **Title Police Department** |
|---|---|---|
| P1 (Steps a,b,c,d,e) | Firefighter, Battalion Chief Aide | Police Officer |
| P2 (Steps a,b,c,d,e) | Fire Prevention Inspector | Juvenile Officer, Detective, Senior Identification Inspector |
| P3 (Steps a,b,c,d,e) | Engineer | Sergeant |
| P4 | Captain, Assistant Fire Prevention Engineer | Lieutenant |

| | | |
|---|---|---|
| P5 | Battalion Chief. Drill Master, Fire Prevention Engineer | Captain, Superintendent of Records and Identification |
| P6 | Assistant Chief | Assistant Chief |
| P7 | Chief | Chief |

SECOND: Basic Salary Schedule

(a) The monthly salaries of Local Safety members of the San Bernardino Police and Fire Departments included in classifications P1, P2, P3 steps "a" and "e" of P4, PS, P6 and P7 shall be fixed on ... annually on August 1 of each succeeding year...

[¶]...[¶]

THIRD: Special Salary Provisions

The following special provisions shall apply in addition to the compensation received in accordance with the above salary positions:

[¶]...

(b) Police and Fire Departments: Any Local Safety member of the Fire and Police Departments temporarily acting in a position in a higher rank during periods of absence of the incumbent or during a vacancy in the position for more than ten (10) consecutive working days or five consecutive shifts, shall receive the same salary for the higher rank to which he/she would be entitled, were he/she promoted to that rank during the period in which the employee is acting in the higher rank. The Chief of the department in which the assignment to the higher rank occurs shall certify as to the assignment and the period of time worked in the higher rank to validate entitlement to the salary of the higher rank.

[¶]...

(e) Fire Fighters

(1) All employees (below the rank of Battalion Chief) assigned to an average 56 hours per week assignment shall be compensated at an hourly rate of time and one-half (12) their regular hourly rate of base pay, such compensation to be computed for each one quarter (3) hour increment worked in excess of their average 56 hour weekly assignment.

(2) All employees (below the rank of Battalion Chief) working a 40 hour per week assignment shall be compensated at an hourly rate of time and one-half (1/2) their

regular hourly rate of base pay, such compensation to be computed for each 30 minute increment worked in excess of their regular eight (8) hour per day assignment of their 80 hours assignment during each pay period.

SIXTH: Definitions

The words and terms defined in this subsection shall have the following meanings in this section:

(a) A Shift" means a 24-hour duty for the Fire Department, except for the positions of Chief, Assistant Chief, and local safety members working in the Fire Prevention Bureau, and such other local safety positions as may hereafter be granted a forty (40) hour average work week by resolution of the Common Council upon the recommendation of the City Manager.