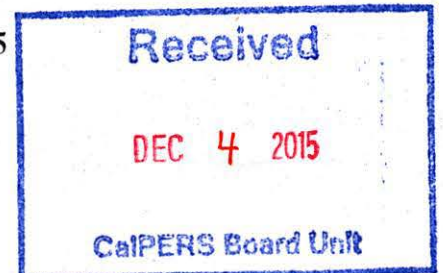


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December 3, 2015
BY FEDERAL EXPRESS

RESPONDENTS' ARGUMENT
Re: Full Board Hearing on December 16, 2015

Board Secretary
California Public Employees' Retirement System
P.O. Box 942701
Sacramento, CA 94229-2701



RE: Richard Lewis and City of San Bernardino, Respondents
CalPERS Case No. 2014-0256, OAH Case No. 2014040945

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)*.

The case presents a unique and unusual set of facts that is unlikely to recur.

By merit, Richard Lewis earned the right to hold the Battalion Chief ("BC") position. For the five years in question, Lewis (i) regularly performed the duties and responsibilities of the BC position and (ii) the City regularly paid him the BC pay and special compensation pursuant to publicly available pay schedule.

The City supported Lewis' right to a pension based on the BC pay.

Only CalPERS objected.

The nominal "Battalion Chief" title itself was the only thing that Lewis did not have. However, the PERL does not make distinctions for pension purposes based on titles. As relevant to this matter, the PERL looks at job duties and "group or class" both of which Lewis satisfied for the BC position.

Under the PERL, Lewis is entitled to have his pension calculated at the higher rate for BC. The compensation qualifies as payrate under Section 20636 (and it also qualifies as "special compensation" under Section 20636).

So why this dispute? Two questions:

- (1) Why is CalPERS denying Lewis the pension based on the BC pay if the PERL does not differentiate solely based on "title"?
- (2) Why did Lewis not have the BC title, especially if he regularly performed the BC duties and received the BC pay?

To answer the second question first, Lewis lacks the BC title because the City's fire management wrongly discriminated against Lewis in violation of Lewis constitutionally protected right to promote union activities.

So for all of those interested in protecting union activity, this case and the voting in this case should particularly interest you.

Richard Lewis was very active in rank and file union activities before the time period in issue here, and fire management did not like it. The undisputed testimony shows that the City recognized that its Fire Chief and fire management wrongly discriminated against Richard Lewis 'based on the Fire Chief's animus toward the rank and file union. (Testimony of Corey Glave ("CG"), 2/25/15, 108:9-10, CG 88:25-89:2 .) They did not want to give Lewis the BC position because they did not want Lewis in management.

In settling the federal discrimination law suit after taking depositions, the City recognized that Richard Lewis had been wrongly denied the promotion to BC when the City's Fire Chief or fire management wrongly chose someone lower on the promotion list over Lewis because of Lewis' union activities (Testimony of Corey Glave ("CG"), 2/25/15, 108:9-10.)¹

The City was motivated to settle the case because the federal Court in a second summary judgment action indicated that the reason that Lewis had been denied promotion was not merit but instead the Fire Chief's animus toward the union. (CG 109:7-10.) The federal court judge could exercise his equitable relief and order the City to promote Lewis to the actual position of BC, which would also include all the pay and benefits. (CG 89:2-5.)

In general, settlements can be preferred over time consuming, ill-advised, or expensive

¹ The fire management did not like Lewis because of his union activities. (CG 88:25-89:2.) Because of his prior union activities, the Fire Chief did not want Lewis in management. (CG 89:6-7.)

litigation (including when (i) staff counsel has a sharp personal animus to opposing counsel and is personally motivated to continue litigation or (ii) when highly paid outside counsel act in their natural self-interest to maximize their billing without sufficient independent oversight to determine whether further litigation is in the members' best interests).

Settlements are especially preferable when the facts and law are clear.

The City and Lewis settled. The settlement addressed in part Lewis' future employment with the City, including that he would continue to work for the City, the City would pay Lewis at the BC rate, he would continue to perform BC duties regularly, he would be in the Fire management group or class, and he would be entitled to all of the pay and benefits of the BC position, including a CalPERS pension payable at the BC rate.

Thereafter, the City personnel treated him as a member of Fire management, paid him pursuant to the publicly available pay schedules for the BC position, provided him use of a sports utility vehicle that BC used, and otherwise provided him with the rights and benefits of the BC, with one exception. The City still denied Lewis the title of BC. For Lewis, the title itself was inconsequential, simply a remaining last vestige of fire management's animus. He was a BC in every way except title.

It is clear that the City contributed and intended to retire Lewis with CalPERS and other pension benefits at the BC rate. The City explicitly and affirmatively put Lewis in the "group or class" that all other BC's were in. As CalPERS' witness Lolita Lueras acknowledged, it is the City—not CalPERS—which designates the group or class employees are in and the duties they shall perform.

Close in time with the settlement, the City requested that CalPERS review the issue of whether Lewis was entitled to a CalPERS pension based on the BC pay and provisions of the settlement agreement.

At the City's urging, CalPERS accepted to review the matter and provide a decision. The documents were sent to CalPERS Compensation Review Unit. CalPERS CRU reviewed the matter, determined that Lewis was entitled that a pension based on the BC pay, and explicitly directed the City to report the increase in the BC compensation (compared to Lewis' previous

Fire Captain compensation) as "temporary upgrade pay", which would entitle Lewis to the higher pension.

So at this point, the City, Lewis, and CalPERS all agree that he would receive a pension on the BC pay.

Moreover, CalPERS directed the City to report the pay as a form of special compensation, not as payrate.

CalPERS directed the City to report three years of back pay at the BC rate and required that the City pay contributions and reports for three years of retroactive pay.

For five years, Lewis worked, regularly performing the duties of the BC. The City regularly paid him the payrate and special compensation of a BC. Lewis was in the fire management collective bargaining unit. Lewis even took a pay cut consistent with other fire management, when the rank and file did not take a pay cut. Lewis did not work in the rank and file union during this period, but performed duties of a BC.

For five years of Lewis' work, the City reported Lewis pay each pay period at the BC rate and deducted contributions. The City had accepted CalPERS advice and reported Lewis' BC pay each month as "temporary upgrade pay".

For five years, CalPERS accepted contributions from the City (and from Lewis) at the BC rate and reports on Lewis at the BC rate. CalPERS raised no further issue.

During this five year period of employment when he could still "fix" any problem if it arose, Lewis called CalPERS and asked CalPERS whether it was processing and using the BC pay and contributions for his retirement. CalPERS confirmed to Lewis that his pay at the BC rate was PERSible for him, and that he would receive a pension based on the payrate and special compensation of a BC.

Just before Lewis' retirement, Lewis checked again with CalPERS to make sure that CalPERS will accept the BC pay for his final compensation. At retirement, CalPERS again assures Lewis that he is entitled to a pension based on the BC rate.

Therefore, up to this point (more than 5 years after the settlement), all parties consider the matter resolved. It was a big deal, but resolved in the way that the City and Lewis had agreed.

Over these five years, CalPERS has repeatedly assured all the parties that the BC pay is accepted and funded.

Six months *after* Lewis' retirement, CalPERS suddenly changed its mind. After a cursory review, CalPERS compensation review unit staff (the same unit that allowed the BC pay) disallowed the BC pay as "temporary upgrade pay", the same "upgrade" designation that CalPERS previously advised the City to report.

Moreover, CalPERS staff rejected the increased BC rate simply based on the job title of "Fire Captain" that was formally applied by the City in some documents to Lewis, as it was the nominal title of the lower position that was the default after the City denied him the BC title.

CalPERS completely ignored (and did not even ask about) that (1) Lewis regularly performed duties as a BC and (2) the City's designation of Lewis as in the fire management or confidential "group or class" that he shared with other Battalions Chiefs.

CalPERS' last-minute reversal is wrong on the law as the mere title is not sufficient evidence to deny the compensation. CalPERS must inquire into the duties that Lewis performed and the work group that he was assigned as fire management.

CalPERS' reversal of its long-standing direction is wrong because the City and Lewis specifically relied on CalPERS advice, decision, and designation of "temporary upgrade pay" for five years. Upon specific request, CalPERS offered its specific advice. No fact has changed, so CalPERS should not be allowed to change its determination, especially when it is contrary to the facts and law. It is barred by collateral estoppel and res judicata.

CalPERS reversal is untimely as it occurred five years later, after Lewis retired, and after it was no longer easy for Lewis and the City to address these issues in other ways that would be compliant. It is barred by laches.

CalPERS' reversal is wrong as it is counter to the law and evidence, including that in Proposed Decision.

CalPERS' reversal is wrong as the criteria that CalPERS itself claims should be applied—i.e., that it is up to the *City*, not CalPERS, to determine Lewis' "group or class" and work duties and to be compensated based on the City's publicly available pay schedules. It is

wrong because it exceeds CalPERS jurisdiction.

CalPERS' reversal is wrong as CalPERS staff testified in the hearing that typically CalPERS is going to use any payrate that was normal, consistent, and falls under compensation earnable. (Testimony of CalPERS' Lolita Lueras, ("LL"), 2/26/15, LL2 55:11-13.)² It is wrong as it violates Lewis rights to a liberal interpretation of the law, and an interpretation of the law that CalPERS allows for other members (i.e. equal protection, etc.)

CalPERS' reversal is wrong as it violated the PERL.

The compensation paid to Lewis was regularly and consistently paid over the last seven years of his employment with the San Bernardino Fire Department ("SBFD"). It is not final settlement pay.

FACTS

The City of San Bernardino ("City" or "San Bernardino") regularly and consistently paid Lewis the BC pay, reported that pay to CalPERS, and paid contributions to CalPERS on the BC salary.

After his settlement with the City, Lewis was otherwise in the "group or class" of other BC's: He was represented only by the bargaining unit that represented BC's. He was treated as a BC by the City and other BC's in management and confidential matters. He regularly performed the normal duties and responsibilities of a BC. He received the benefits and the detriments of the BC position, including a mandatory reduction in his pay and other concession that only BC's and others in management made. The City's HR department treated Lewis as a BC, including by having him act in a confidential manner to city employees on discipline issues. The SBFD treated Lewis as a BC when he worked on budgets, planned new fire stations, and acted on the fire scene.

Under the Public Employees' Retirement Law ("PERL", *Government Code*, §§20000, *et seq.*)³, Lewis' BC pay should have been reported as payrate for performing the regular duties of

² For ease of reference, attached as Exhibit A is a list of all witnesses called at hearing, along with the date of their testimony and pages in the transcript.

³ Unless otherwise indicated, all statutory references are to the *Government Code*.

BC. It was instead misreported as "temporary upgrade pay" only because of CalPERS' explicit and continuing direction to the City to do so.

In essence, the Fire Chief assigned Lewis the title of Fire Captain while also certifying or assigned him the actual duties of BC. Fire Chief denied Lewis the BC title due to Lewis' prior union activity for the rank and file.

In effect, Lewis was in fact promoted to fill and act in the position of Battalion Chief by the City in 2007, but the Settlement Agreement withheld the formal BC title. However, the denial of the BC *title* is not sufficient to deem the actual payrate to be noncompliant with the PERL.

CalPERS recognizes that the City determines the job duties of the position as well as the titles. Moreover, under the PERL, the relevant "group or class" issue is the similarity of job duties with other BC's, not the title or other matters. At the latest after 2007, Lewis regularly performed the duties of BC just like the other BC's and received the pay that other BC's received.

CalPERS mistakenly and overwhelmingly focuses on the formal title, then uses the "Fire Captain" title to argue that Lewis was not performing the duties of either a BC or an acting BC.

For example, the City did not indicate to CalPERS or its Compensation Review Unit analyst Lueras whether the Fire Management MOU applied to Lewis or whether the rank and file MOU applied to Lewis. When Lueras' single email to the City asked for a copy of the MOU, the City sent copies of both the Fire Management and rank and file MOU's and a copy of the Settlement Agreement. Lueras simply looked at the title of Fire Captain and wrongly determined that the rank and file MOU applied to Lewis while the Fire Management MOU did not. However, Lueras made this determination independent of the City, even though acknowledging that it is the City that makes the determination of job duties and position. (LL2 87:17-88:21.)

Lueras testified that her analysis of the pay rate reported was based on the title (of Fire Captain) that was on Lewis' disability retirement application, stating too broadly that "it was determined *as per the city* that that title fell under fire safety". (LL2 93:25-94:9.) But Lueras also admits that the City never told her or CalPERS which MOU applied to Lewis. (LL2 87:17-88:21.) She instead said that to her knowledge, Lewis was not in the Fire Management or

confidential group. (LL2 100:14-102:6.) Lueras thought that Lewis was solely in the rank and file group because the position title fell under the category of fire safety. (LL2 100:14-102:6.)

As another example, CalPERS claims that the City would have documented Lewis' work as an acting BC if Lewis was in the acting position. The testimony of Lewis, union attorney Corey Glave and City HR employee Helen Tran indicated that the City, and particularly the SBFD, did not document and was not required to document "acting pay". Instead, the City *Charter* indicates that the Fire Chief simply has to certify that Lewis was acting as a BC, which the Fire Chief did when he signed the Settlement Agreement.

Wrongly focusing on title nomenclature instead of duties, CalPERS is not allowed to use a title to deny a benefit based on whether a person is performing the duties of others in a similar group or class. Here Lewis was performing BC duties like others in the BC group or class on a regular basis. He was regularly and consistently paid the BC payrate pursuant to publicly available pay schedules for the BC position.⁴ Lewis is entitled to have the BC salary designated as payrate and used to underline a higher pension.

As a fallback position, CalPERS argues in its *Statement of Issues* that Lewis was not regularly performing the duties of BC. However, CalPERS admitted at the hearing that the City determines the duties. The evidence also overwhelmingly shows that Lewis *did* perform the BC duties. In the hearing, Lueras testified that CalPERS does not look at whether an individual is performing certain job duties or determine if a member has completed a checklist of duties because "that's getting into city affairs." (LL2 70:17-71:1.) The duties and work schedule are outside CalPERS' purview and instead are the provenance of the City's HR department or otherwise City affairs. (LL2 66:15-22.)

I. The City Included Lewis in the Fire Management Confidential Bargaining Group

The City treated Lewis as a member of the Fire Management group or class. Lueras admits that that is up to the employer to identify who the confidential employees are. (LL2 100:4-6.) Lueras admitted that the City groups its employees "based on the bargaining --

⁴ Again, the City wrongly reported and wrongly described Lewis' BC compensation as "temporary upgrade pay" and special compensation only because of *CalPERS'* prior guidance.

collective bargaining. That's how they group their individuals. So that's the one that was applicable." (LL2 105:17-109:21.)

If the bargaining group is how the City groups its individuals, then why did CalPERS not accept Lewis as a member of Fire Management, and therefore CalPERS accept his BC pay as payrate under Section 20636, since Lewis was receiving the same BC pay as other BC's? Lueras testified that if Lewis' employer had stated to Lueras that his category was under the Fire Management confidential MOU, "then it would have changed -- or could have changed -- my determination." (LL2 72:17-73:5.)

In her single email about this matter, Lueras requested information from the City about which MOU governed Lewis. The City supplied both the Fire Management MOU and the rank and file MOU. The only reason the City would supply the Fire Management MOU is because the City applied that Fire Management MOU to Lewis. Lewis himself corroborated this by testifying at length that the City applied the Fire Management MOU to him.

II. CalPERS' Determination Is Based Not on the PERL, But On CalPERS' Faulty Interpretation of the Applicable Facts and Law

Although CalPERS attempts to make a big deal over irrelevant or unrelated issues such as overtime, CalPERS fails to clarify that overtime is not PERSible under Section 20635.⁵ Some BC's get overtime and Fire Captains get overtime when it is part of FLSA-required firefighter duties. To the extent that any overtime could be reported, the City did not report any overtime for Lewis as Fire Captain that would not also qualify as overtime for a BC.

The only PERL issue in dispute is the amount of Lewis' final compensation. And that dispute is related solely to whether Lewis is entitled to have CalPERS base his pension on the actual final compensation that SBFD paid Lewis pursuant to publicly available pay schedules for the actual work responsibilities that he performed or was available and responsible to perform during his normal work day, even though he did not always have the formal title of Battalion Chief.

In this case, Lewis continued to work for the City before and after the settlement of the

⁵ Overtime that is not a regular part of a firefighter's job is not reportable to CalPERS.

City's inappropriate labor practice.⁶ The settlement was directed to restore Lewis in full to the benefits that he had accrued related to his past, current and future employment rights. The settlement only reset the clock at a specific time, and set the stage for the terms of his continuing work with the City as BC in all but title. The Agreement itself did not grant Lewis rights that he was not otherwise already entitled to. Lewis would have earned the pay of BC for the time that he worked for the City after October 2004 had the City not acted inappropriately.

Essentially, CalPERS' arguments are without basis. Based on a faulty premise, it has manufactured this dispute around the issue of "title". CalPERS ignores that Lewis' rights did not arise from the Settlement Agreement, but instead arose independently from Lewis' work, his civil service performance, and his entitlement to the BC position. The Settlement Agreement simply recognized the rights as wrongly denied, and added an unrelated impairment of not having the formal BC title.

In addition, CalPERS failed to make adequate inquiry, including failing to inquire into the merits such as the job duties that were normally part of Lewis' responsibilities to the City after the settlement.

There is no precedential case law directly on point. Although superficially similar because it involved a settlement agreement, the *Molina* case law involved a different situation where the employee did not work for the city after the dispute arose, and the settlement was separate and distinct from any work-related activities.

In any event, looking at the period after the settlement, Lewis is entitled to have the pension calculated on the payrate that was actually paid him for the duties that he actually performed or was responsible, available or required to perform. CalPERS cannot deny the pay rate simply because Lewis did not have the formal title at all times, especially because Lewis did actually perform on many occasions (and was available to perform at other times) all of the duties and responsibilities of a BC.

⁶ Fire Chief Pitzer wrongly failed to formally promote Lewis to Battalion Commander in October 2004 as required by City policies and procedures and past practice. The City ultimately recognized this labor violation in 2007, resulting in the effective promotion of Lewis to BC in all but name as documented in the 2007 Settlement Agreement.

In addition, Lewis was disabled for the last year-plus of his employment for the City, and he performed no work duties of any kind in this period. Pursuant to the CalPERS-San Bernardino contract, Lewis' final compensation period is his highest single year compensation. He received *Labor Code* section 4850 disability pay during his final year at his BC compensation rate. As a result, the issue of duties and titles should not negatively affect Lewis.

As additional equitable issues, Lewis asserts collateral estoppel, *res judicata*, equitable estoppel, promissory estoppel, laches, and that CalPERS has failed to state a ground on which it can proceed.

Settlement of Litigation

Cory Glave, Lewis' attorney in the employment discrimination action, testified that there were two lines of discussion in the settlement of the federal complaint that the City and/or city personnel violated Lewis' constitutionally protected right to promote union activity: One if Lewis was actually promoted to BC, and a second if he was not actually promoted to take the BC title. (CG 88:2-16.) It was also understood that if the City did not give Lewis the BC title, then the City would pay him the same wages and benefits as if he had been promoted to BC. (CG 88:9-11.)

If the City did not allow Lewis to become a BC, then the City would have to make Lewis financially whole for the losses that the City had caused. (CG 90:7-12.) But the lump sum was large. (CG 89:7-8, 90:22-91:2.)

When Lewis and the City negotiated those benefits, they initially calculated a lump sum which specifically included the difference in retirement benefits between Fire Captain and BC. (CG 88:12-14.) The City did not want to pay a lump sum for the future CalPERS retirement benefits, so the parties agreed, with the retirement benefits firmly in mind, that Lewis would be treated as if he had been promoted to BC without getting the actual promotion to the BC title.

Instead of offering a lump sum immediately, the City offered to pay Lewis as a BC and give him all the benefits, including the CalPERS benefits, instead of a lump sum at one time. (CG 89:9-11, 90:21- 91:2.) The City and Lewis' attorney specifically discussed Lewis' CalPERS retirement and the difference between a pension based on the BC wage and one based on the Fire

Captain wage. (CG 89:16-18.)

While agreeing that Lewis was entitled to all benefits, the reason that the parties did not specifically set out the CalPERS benefits was "because they're all included." (CG 93:24- 94:3.) The CalPERS benefit was part of what was being granted. (CG 94:5-7.) It was important that Lewis would get the CalPERS benefits at the BC rate. (CG 95:5-13.) The CalPERS benefits at the BC rate were a material term of the settlement agreement. (CG 96:8-10.)

Terms of the Settlement

In March 2007, the City and Lewis settled Lewis' discrimination lawsuit.

The relevant terms in the settlement are that the City agreed to provide Lewis all the benefits and rights of the BC position starting from the time that Lewis was inappropriately denied the promotion to the title of BC. (RL3 186:10-24.)

Specifically, the City ultimately came to a resolution of the dispute with Lewis, agreeing, *inter alia*, (i) to award Lewis back pay from the date of Moon's promotion (consisting of the difference between Lewis' existing pay as Fire Captain and the pay associated with a promotion to BC), (ii) to increase Lewis' compensation from the date of the City's agreement forward and pay him the BC salary paid pursuant to the City's publicly available pay schedules, and (iii) to ensure that Lewis would receive deferred compensation he was entitled to, including a pension calculated at his highest earnings at the BC pay scale.

In essence, the Settlement Agreement denied Lewis the title of the BC, but provided him with all of the substance and responsibilities of the BC position. For example, the City regularly paid Mr. Lewis the salary of the BC as it did the other BCs, at the publicly available rate of a BC. Lewis was represented by the management union and subject to the terms of the MOU that bound management. (RL1 187:1-10; 15-23, 188:20-24.)

The City acted to remedy its failure to timely promote Lewis to the BC position, including by granting Lewis the compensation and benefits to which BCs were entitled. Further, the City did so in its capacity as a charter city with constitutional autonomous rights to determine its own governance structure, hire and promote employees of its own choosing, designate those employees' job duties and responsibilities, and compensate those employees as the City deemed

appropriate.

The City later memorialized this in a March 2007 Settlement Agreement. (Exhibit 6.) However, the City's acknowledgement of its obligations and of Mr. Lewis' rights to all benefits accruing from a promotion to BC were already in existence prior to the Settlement Agreement.

Fire Chief Pitzer was a signatory on and party to the Settlement Agreement. Chief Pitzer agreed that Lewis was entitled to receive all of the rights and benefits of any other individual promoted to the position of BC. Chief Pitzer was the head of the SBFDD and ultimate authority in SBFDD.

The City's HR and Finance departments told Lewis that he was in Fire Management and a confidential employee. The City conferred confidential status and ranking on Lewis. The City's Finance department confirmed it when Lewis went in and he was told that he would be a confidential employee. Confidentiality is a responsibility under the Fire Management MOU. (RL3 200:7-24.)

Expectations of the City and Lewis

When drafting the settlement agreement, the City expressly considered whether the agreement would provide Lewis with a CalPERS pension based on the salary that was documented in the settlement agreement. (RL1 188:9-19.)

The documents show that the City queried the PERL law, researched it, and then made specific findings that the compensation was PERSible. The City then acted in reliance on this finding and paid contributions on the higher salary. (RL1 220:21-25.)

In the testimony before the Court, Councilmember McCammack testified that she understood or expected that Lewis would also be entitled to a CalPERS pension based on the salary of the BC. (WM 140:7-14.)

Importantly for purposes of this dispute, the City also recognized its obligation to ensure that Lewis would receive the deferred compensation he was entitled to, including an eventual CalPERS pension calculated based upon his highest earnings at the BC pay scale.

Lewis' Acceptance Conditioned on a CalPERS Pension at the BC Rate

Lewis would not have accepted the Settlement Agreement if it did not promise the

CalPERS pension at the BC rate. (CG 97:12-15.) There was no known risk of not getting the CalPERS pension at the BC rate when Glave and Lewis signed the settlement agreement. (CG 97:12-15.)

Glave said to Lewis that the Settlement Agreement will "get everything just as though you were promoted." And I said, 'That includes my retirement,' because obviously that's the biggest benefit of being promoted. And he said, 'It says all benefits.' " (RL3 170:9-15.)

The City was a party to the settlement agreement and the *Complaint* because the City was responsible for any damages. (CG 116:22-117:9.)

City Checked With CalPERS

In or about June 2007, shortly after signing the Settlement Agreement, the City contacted CalPERS for advice on how to implement its decisions concerning compensation and other PERSible benefits the City was now providing to Mr. Lewis.

At this time, Lewis was still working and the City could still effectively give him the full title of a BC for a full year or otherwise qualify him under CalPERS' rules in any other way that CalPERS may have sought to direct the City to act.

The City sent CalPERS a copy of the Settlement Agreement. (See reference in Exhibit 9.) In this manner, CalPERS was aware that the City was asking for a decision on how to treat this compensation for purposes of pension. CalPERS specifically ruled that the pay was PERSible and that it should qualify to increase Lewis' pension in the manner sought in this hearing.

In 2007, the Compensation Review Unit read the agreement and CalPERS analyst Carlous Johnson specifically responded that the BC pay was to be PERSible and reportable as "temporary upgrade pay". (RL3 172:15-20; Exhibit 9.)

CalPERS told the City to report it as temporary upgrade pay, a type of special compensation. (LL 78:18-79:3.)

In 2007, CalPERS analyst Carlous Johnson, the one who gave the City the advice, was the analyst that trained Luera "probably almost a year." (LL2 79:5-9.)

The City implemented Johnson's specific advice and reported the BC pay as temporary upgrade pay in every period thereafter until Lewis retired.

CalPERS' Duty to Provide Accurate Advice

As administrator of the City's pension obligations, CalPERS had fiduciary and contractual duties to provide the City with proper advice on how to implement its agreement and intent. The City had the right to rely on CalPERS' performance of those duties.

CalPERS had all of the information necessary to make a ruling on this matter.

After evaluating the request and applying its administrative experience and knowledge, CalPERS directed the City to calculate the difference between the pay Mr. Lewis received as Fire Captain and the new pay the City was awarding him pursuant to the BC pay scale, and then to report that difference as "temporary upgrade pay". CalPERS instructed the City to do so for the approximately three years of additional back pay (the difference between what Mr. Lewis had received as Fire Captain and what he should have received as BC), as well as do so for Mr. Lewis' pay going forward.

CalPERS also directed the City to pay employer and employee contributions calculated on the basis of the BC compensation rate paid to Mr. Lewis. Pursuant to the PERL and Regulations, and CalPERS' policies and procedures, "temporary upgrade pay" is PERSible compensation.

CalPERS never advised that there was any "time limit" or duration on how long such pay should be reported as "temporary upgrade pay", nor did it ever inform the City that the City needed to take any other actions to comply with CalPERS' policies and procedures concerning CalPERS' interpretation of the PERL. The City and Mr. Lewis relied on CalPERS' advice.

As the pension administrator for the City and purportedly the agency most qualified to determine the applicability of the PERL to effect the pension promises of the City, CalPERS could have chosen to direct the City to characterize and report Lewis' BC compensation in some other manner qualifying as PERSible pay rate or special compensation, or if necessary it could have directed the City to take some other action to ensure that Lewis' compensation qualified as PERSible compensation.

The City and Lewis were entitled to rely on CalPERS' expertise that the BC compensation had been properly reported and characterized to provide Lewis with the benefits

attributable to that compensation, including deferred income in the form of an eventual pension allowance payable by CalPERS.

No Policies and Procedures Governing CalPERS' Determination

In the Compensation Review Unit, there are no written policies or procedures. (LL1 76:5-77:11.)

"In the Compensation Review Unit, every single case is different. The amount of documentation we need is completely different. So also, the treatment of inquiries is completely different.... [E]ach situation that we come across is completely unique in itself. I couldn't say definitively how he [Johnson] came to his determination." (LL2 79:15-22.)

City's Expectation That the Settlement Agreement Would Be PERSible

Stephanie Easland was the City's attorney who advised the City on PERL matters, on contract matters, on charter matters and on human resources matters. (Testimony of Stephanie Easland ("SE"), 2/25/15, 20:17-22.)

Easland received a memo from the City's payroll officer, Laura King Yavornicky, in regard to how to implement the provisions of the Settlement Agreement. (SE 27:9-30:19.) Payroll was trying to see how the extra salary was to be reported to CalPERS. (SE 31:4-7.)

Easland's understanding was that "if it's CalPERS reportable, it would go towards their future retirement amounts." (SE 31:20-32:2.) Easland responded in writing that "all future monthly pay rates will be BC rate and CalPERS reportable". (Exhibit 4.) Easland said that Lewis was "being paid as if he had been promoted to the BC position." (SE 33:8-17.)

Easland looked at the CalPERS law on Westlaw and the CalPERS website. (SE 33:20-35:2.) She might have contacted Jim Odlum, the attorney who represented the City in the dispute with Lewis. (SE 36:22-25.)

The Settlement Agreement contained the language that "Lewis was to receive all current and future benefits granted to BC." (SE 38:12-19.) BC's did not have a contract so the benefits were set forth in resolutions that applied to BCs. (SE 38:14-19.) Easland assumed that the City reported the BC pay to CalPERS for Lewis. (SE 39:9.)

Based on the Agreement, Easland's understanding was that Lewis was getting paid as a

BC and it would get reported to CalPERS accordingly. (SE 39:18-20.) She assumed that getting a CalPERS pension based on the BC pay was "negotiated and the reason to get paid as a BC." (SE 40:7-9.) "One of the results of the settlement agreement was to receive an increased retirement." (SE 40:22-41:3.)

When Easland reviewed the Settlement Agreement, she assumed after reviewing it that the City agreed to increase Lewis' salary to the BC pay to "ultimately increase the retirement as if he had been promoted to BC." (SE 41:19-23.) Easland never heard the term "temporary upgrade pay" while working for the City. (SE 46:10-12.)

If CalPERS had told Easland that the BC pay was not reportable, then she would have "double-checked the settlement agreement to see if we were in violation of the settlement agreement." (SE 48:4-12.)

Councilmember Wendy McCammack testified that she raised the issue of whether Lewis was going to receive a CalPERS benefit associated with the BC pay and she was told by the City Manager and the City Attorney that Lewis would receive a CalPERS benefit based on the BC pay. (WM 140:7-14.)

McCammack said that she could not assume it would be anything but PERSible because the City was required to pay its contributions based on the BC pay for Lewis. (WM 142:1-6.) If CalPERS was going to require the City to pay contributions for Lewis based on the BC pay, then the BC pay had to be PERSible for Lewis. (WM 142:1-6.) McCammack asked the City Manager or City Attorney whether CalPERS was accepting the contributions at the BC rate for Lewis and the City told her that CalPERS was. (WM 143:3-6.)

Lewis Checked to Make Sure Appropriate Contributions Were Being Taken Out for CalPERS

After the Settlement Agreement was implemented, Lewis checked to make sure the correct percentage was being taken out of his BC pay for CalPERS. (RL3 170:21-25.)

All BC Positions Filled

From the time of the settlement to his retirement, all of the other BC positions were always filled. (RL3 173:8-9.)

Publicly Available

The BC pay was publicly available. It was published on a publicly available pay schedule through the salary resolution of the City. (SE 77:2278:6.) The fact that Lewis was paid as a BC was public information because he was a public employee. (WM 135:4-5.)

The Settlement Agreement was discussed in closed session and then subsequently discussed in open session. (WM 134:22-136:24.) Lewis was publicly recognized as being paid as a BC. (WM 137:12-14.)

Duties of Fire Captain and BC

Many of the duties of a BC are similar to the duties of a Fire Captain (RL3 193:3-5.)

Lewis Regularly Performed the Duties of BC

Lewis regularly performed the duties of a BC on a day-to-day basis. (RL3 155:2-17.) "The day is full of stuff like that." (RL3 155:16-17.) "It's not our job where we would go in and two hours you do this, two hours you do that; it's throughout the shift on an as-need basis. So if I wasn't needed to go somewhere to deal with some issue, I might be going over the budget on the remodels for the stations or gathering information for the new station to be built...." (RL3 155:8-13.)

Lewis performed the duties that were not any different from those of any other BC. (RL3 201:10-17.)

On a day-to-day basis, Lewis met with other BC's in preparation for them to go in to do discipline. "So I was there with them before they went in. Usually not at the fire station because it was confidential information. Employee disciplines are protected...." (RL3 186:20-25.)

Lewis did numerous things on a regular basis that were exactly what a BC would do. (RL3 153:25-154:25.)

Part of the BC duties were to take care of discipline issues within the SBFD personnel. (RL3 152:7-14.)

Lewis performed the duties of a BC in both emergency incidents and some administrative things. For example, he managed the budget for the remodel of the fire station. (RL3 151:14-25.)

The daily duties of a BC "were sporadic in as much as the emergency calls are

throughout the day, and obviously not planned or scheduled. So fill-in work was done all the time, whether that was managing a budget, or doing employee evaluations, or doing research on a policy and procedures for fire ground safety or training." (RL3 154:6-14.)

A BC's work is done all over the city. (RL3 155:18-20.)

Lewis also performed the duties of a BC when on a fire site, when responding to fire calls, when planning a new fire station, and when appearing in BC uniform. (RL3 179:10-21, 183:13-184:9.)

Lewis testified that he was instrumental in getting a new fire station built in the Cajon area. (RL3 152:1-6.)

Lewis also did the administrative duties of a BC or acting as a BC. (RL3 194:3- 194:15)

Lewis performed BC duties "on a regular basis at least once a week and probably more. With the way we work is three shifts consecutively, on four shifts off, and then back to three on. So basically, you did a cycle. That's what we call the cycle, and we did those on a weekly basis. And so during the course of that period of time, all of the things that we've talked about, the advice to the BCs, especially the discipline because it was an ongoing thing with many employees." (RL3 194:7:15.)

Lewis performed oversight supervision of the Battalion on a very regular basis. Also, "[s]ometime during the 72-hour period I would end up either in a BC position on an incident, because San Bernardino is a very busy city, or as administrative oversight for the Battalion. And ... more regularly than that, maybe depending on the time, I was actively involved in advising them on disciplinary issues and doing administrative things as far as the budgets, the equipment...." (RL3 195:3-19.)

Each of those were "things that only a BC would do and I did on a regular basis each cycle. Whether it was filling in trying to prepare budgets, or disciplinary things. Those were things that took up time but they fit in between the emergency responses, the training, the development of policies and procedure." (RL3 196:25-197:7.)

Lewis also developed policies and procedure for the fire department, which only management does. (RL3 196:6:25 to 197:7)

Lewis performed the duties of BC, like "taking care of the staffing requirements, going through planning out the next shift, responding of the incidents, training evaluations." (RL1 178:22-25.)

CalPERS Testimony in Hearing

When pressed in cross examination, CalPERS Compensation Review Analyst Lolita Lueras admitted that if Lewis worked in the same location as a BC, performed the duties of a BC, and was in the Fire Management group similar to other BC's, Lueras would put Lewis in the group or class that the agency told her an individual falls under.

When pressed in cross examination, CalPERS Lueras admitted that the job title is not determinative, it is whatever the City deems is the correct group or class:

Q If the city treated Mr. Lewis in the management confidential fire group, then would you accept that designation?

A Again, I look at the agency to provide me the information to substantiate the information given to me.

THE COURT: Is that a yes or no, ma'am?

THE WITNESS: Repeat your question.

BY MR. JENSEN:

Q If the city placed Mr. Lewis and treated him as a management confidential group, would you put him in the management confidential group?

MR. KENNEDY: Relevancy.

THE COURT: Overruled.

THE WITNESS: This is a loaded question.

THE COURT: You basically keep saying you rely on the information from the city. Counsel is saying if the city told you he was in the confidential management group, would you put him in the confidential management group?

THE WITNESS: If the steps leading up to making that determination on my end matched the information that the agency was pointing me to, then, potentially, yes.

BY MR. JENSEN:

Q But you just said you relied on the city to determine what group or class he was in.

A I have a starting point and I start with my data that I have in front of me.

Q So in other words you don't rely on the city to determine the group or class?

A I have a starting point that I have to start from.

Q What is the starting point?

A The payroll information that's input in the system.

Q And what's the next step?

A The next step would be to verify the pay rate that was reported.

Q But we're talking about group or class. Did you look at the code section of group or class?

A I did.

Q And what are the individual separate variations in group or class?

MR. KENNEDY: She just quoted them for the record. It's been asked and answered.

THE COURT: It's defined by statute.

BY MR. JENSEN:

Q Did you look at work location of Mr. Lewis as part of your starting point?

A No.

Q Did you look at job duties?

A No.

Q And so do you defer to the city on those two issues?

A That wasn't an issue in the payments that were reported. This is a very small portion of a very large statute.

Q So do you --

A There's a line of thinking that you must go through and also keep into consideration all payments afforded to an individual must also be available to an entire group or class.

Q So Mr. Lewis was paid at the BC rate?

MR. KENNEDY: Objection.

MR. JENSEN: Excuse me, Mr. --

THE COURT: Counsel, you have to let him finish his question before you jump in, okay?

Why don't you sit down and calm down. Go ahead.

BY MR. JENSEN:

Q Assume Mr. Lewis was paid at the BC rate, were the other BC's paid at the BC rate?

A Assuming he was paid at that rate, were the others paid at that rate?

Q Would he fall into that? Would that same BC rate be available to the other BCs?

A I think we're generalizing it a little bit. So BCs receive the same pay as BC, yes.

Q So if he was paid the BC rate, he would be paid -- the pay would be available to all BCs if he was in that group?

MR. KENNEDY: Your Honor, vague question.

THE COURT: Overruled.

THE WITNESS: Because the person was receiving payments does not stick them in a group.

MR. JENSEN: Okay. This is frustrating because there is a definition --

MR. KENNEDY: Objection, your Honor.

THE COURT: You can all make arguments in closing.

MR. JENSEN: Okay.

THE COURT: Do you have anymore questions?

BY MR. JENSEN:

Q So let me just lastly phrase it.

What would be the other logical work-related grouping variables that you would consider in Mr. Lewis's case?

A None. Because the city groups their employees based on the bargaining -- collective bargaining. That's how they group their individuals. So that's the one that was applicable.

(LL2105:17-109:21.)

"The job title is a specific portion of a group. So in Mr. Lewis's instance, he is a fire safety employee rank five, if you will. They follow the same MOU. So he would be subject or entitled into the benefits and payments in his group or class, which is identified as fire safety Rank and File by his employer. If his employer had stated to me that his category was that under the management confidential MOU, then it would have changed -- or could have changed -- my determination." (LL2 72:17-73:5.)

"However, I was also given a Settlement Agreement that mirrored the instructions that were given to me by the city that he was a rank and file employee." (*Ibid.*)

CalPERS' New Determination Disallowing Reporting as "Temporary Upgrade Pay"

CalPERS now claims the increase in salary was not "temporary upgrade pay" because it was not temporary, nor was it other types of special compensation. (LL2 69:5-6.)

CalPERS also says that it is not payrate because Lewis held the title of Fire Captain, not the title of BC, and that the reported regular pay rate was that of a Fire Captain, not a BC. (LL2 72:12-13.) CalPERS also argues the compensation could not be payrate because Lewis did not regularly perform the duties of a BC, but then in testimony said that it is up to the City to determine the actual duties. (LL2 70:17-71:1.)

CalPERS in general does not like to see compensation earnable or compensation reported that is sporadic and not consistent, stable, routine predictable. (LL2 65:25-66:5.) Lueras admitted, however, that the payments were reported to CalPERS consistently and predictably. (LL2 66:7-11.)

Further, CalPERS does not look at whether the duties were performed sporadically or consistently, but rather whether the pay was reported consistently or sporadically, (LL 67:1-10.)

Lueras said that even if Lewis' compensation was consistently reported at the BC rate, it

would not qualify as compensation earnable because the Settlement Agreement said that Lewis would remain in the Fire Captain position and be compensated at the level of BC. "So in my mind, that's making him a group or class of one which cannot happen for compensation earnable purposes." (LL2 69:7-19.)

Lueras said that if an employee consistently performed the duties of a BC, CalPERS would look to see that the payments were consistent and regularly in amount over time. But she also testified that the duties and work schedule are outside of CalPERS' purview and instead are the provenance of the HR department or City affairs. (LL2 66:15-22.)

In this case, the City determined that Lewis did perform duties of the BC, and the City paid Lewis regularly at the BC rate. CalPERS, however, wants to interject itself into the City's affairs and argues Lewis was not entitled to the payrate of the BC because he did not regularly perform the duties of BC. But even Lueras says that the duties are the City's to determine. (LL2 66:15-66:22.)

Lueras said that she would not change her determination unless there was no Settlement Agreement. (LL274:25-75:19.)

Lueras said that when reviewing a temporary upgrade pay position or an upgrade payment that was reported to the system, she generally asks for personal action forms showing that the employee was entitled to the payments pursuant to an MOU or a written member policy or agreement, but that in this case she was given the Settlement Agreement that she considered outside of what was written in the MOU. (LL2 76:23-77:9.)

"In other words, you look for the city to document each time there is an acting position in order to substantiate the temporary upgrade pay. If there is no underlying documentation, then CalPERS would deem the payment not reportable. If you can't substantiate a payment, it wouldn't be reported to the system. (LL2 77:10-18.)

Lueras said that CalPERS typically will accept compensation that was reported consistently. She said that final settlement pay is excluded (LL2 51:4), but that she saw nothing in the Settlement Agreement that constituted a "red flag to look for final settlement pay" such as language that anticipated an end date of employment (LL2 56:8-14.)

LAW AND ARGUMENT

Introduction

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.

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 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.

Collateral Estoppel and Res Judicata. Collateral estoppel and *res judicata* apply to bar CalPERS' reduction of Lewis's pension in this quasi-judicial proceeding. (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 356-357.)

(1) The issues in the 2007 determination and direction and in the current process are identical;

(2) The 2007 determination was made pursuant to CalPERS' formal authority and duty to apply the PERL. CalPERS' staff have authority to make final determinations pursuant to CalPERS delegated authority to make *final* decisions. (§§20099, 20134; CCR §555.) The 2007 determination was actually litigated in a quasi-judicial process once the City of San Bernardino sent the Settlement Agreement to CalPERS and CalPERS' Carlous Johnson determined it to be "temporary upgrade pay". *Sims* explained, "[a]n

issue is actually litigated "[w]hen [it] is *properly raised*, by the pleadings or otherwise, and is submitted for determination, and is *determined*...." (*People v. Sims* (1982) 32 Cal.3d 468, 484, italics in original.) CalPERS had the opportunity to litigate the matter further but chosen not to;

(3) The contested BC position, settlement agreement, and pay issues were necessarily decided when CalPERS provided the City with the designation of temporary upgrade pay;

(4) CalPERS' determination showed it considered and resolved the matter;

(5) The determination, the City and the City's attorneys' understanding, and then ongoing treatment and acceptance of regular reporting of Lewis' increased compensation as temporary upgrade pay for six years indicated that the determination was final; and

(6) The dispute was between the same parties (Lewis and CalPERS, and likely the City of San Bernardino).

Res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy. (*Commissioner of Internal Revenue v. Sunnen* (1948) 333 U.S. 591.) *Res judicata* and collateral estoppel bar CalPERS from re-litigating a quasi-judicial determination considering evidence. (*Hollywood Circle, Inc. v. Dep't of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 732.) The re-litigation of issues that could and should have been pursued in a prior proceeding action is also barred. (*Takahashi v. Board of Regents* (1988) 202 Cal.App.3d 1464.) Collateral estoppel is grounded on the premise that "once an issue has been resolved in a prior proceeding, there is no further fact-finding function to be performed." (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 864.) No new fact has arisen. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763.) CalPERS does not have statutory authority to reopen a decided matter.⁷ (*Gutierrez v. Bd of Ret. of Los Angeles Cnty Employ. Retirement Ass'n* (1998) 62 Cal.App.4th 745.) Collateral estoppel and *res judicata* can prevent the impeachment of a prior final judgment. *Berg v. Davi* (2005) 130 Cal.App.4th 223. Additionally,

⁷ The correction of errors and omissions is not authority to reopen a case. (See *Gov't Code* §§20160, 20164; *Gutierrez v. Bd. of Ret. of Los Angeles Cnty Employees Ret Ass'n.* (1998) 62 Cal.App.4th 745.)

CalPERS has failed to state a fact or law that would allow it to proceed under *Gov't Code* section 11506.

Laches. Determined in 1007, laches bars CalPERS' prosecution of this case at this late date. CalPERS argues in 2015 that it could not previously figure out what occurred, but CalPERS had the opportunity to investigate or litigate earlier when information was fresher but chose not to pursue it.

Charter City Autonomy. Charter cities enjoy "autonomous rule over municipal affairs pursuant to article XI, section 5 of the California Constitution, 'subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law.'" (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352.) Two core "municipal affairs" reserved for determination by charter cities are (i) the compensation of municipal employees and (ii) the structure of government (including structuring offices, duties, and positions). (*Cal. Const.*, art. XI, §5(b); *Johnson v. Bradley* (1992) 4 Cal.4th 389.)

The City exercised its right to become a charter city and reserved complete power over compensation of its government officials and the structure of its sub-government offices. (*City of San Bernardino City Charter; First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650.) The City structured the settlement to provide the pay and benefits of the BC position lacking only the title of BC. (Exhibit 6.) Pursuant to its *Charter*, resolutions, and ordinances, the City paid Lewis the BC salary and benefits in cash, pursuant to publicly available pay schedules, for services that the City required that he render on a full-time basis during normal working hours.

Even under the more restrictive general law, the City establishes the duties or position. (*Gov't Code*, §§36501, 36505, 41005.) By ordinance, the City may authorize or require one position to perform various duties, including of other positions. (*Gov't Code*, §40805.5, 40812.) As an example, a city by ordinance may transfer or require performance of the City Clerk's duties and responsibilities by other offices. (*Gov't Code*, §40805.5; see also §§51505, 51507.) The city can require the City Clerk and other positions to perform "additional duties". (*Gov't Code*, §40812.) (Once a charter city, City of San Bernardino had vastly greater power to

establish duties or position.) When not otherwise provided for, each deputy possesses the powers and may perform the duties attached by law to the office of his principal. (*Gov't Code*, §1194.) When an officer discharges *ex officio* the duties of another office than that to which he is elected or appointed, his official signature and attestation shall be in the name of the office the duties of which he discharges. (*Gov't Code*, §1220.) The limitations on performing multiple duties are against an individual simultaneously being elected to "incompatible offices" (which does not apply to this situation). (*Gov't Code*, §1099; *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311.)

PERL Statutes

Interpretation in Favor. The Supreme Court has held that "[a]ny ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner." (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 490.)

PERL Scheme Does Not Address Titles. The PERL does not address titles. There is no implication in the PERL that the Legislature delegated authority to CalPERS to restrict or proscribe pensions based on the titles of jobs. In fact, the PERL describes groups or classes based on the similarity of duties.

Not Final Settlement Pay or Pay In Anticipation of Retirement. Lewis received the increased BC compensation dating from 2007 (and actually including two years of retroactive payments that CalPERS directed the City to report to CalPERS.) Lewis did not retire until 2012. While Section 20636(e)(2) permits CalPERS to review the pay increases received by an employee in the three to five years prior to retirement if they exceed those received by other employees in their group or class, there were no above-average or significant pay increases in the three to five years preceding Lewis' retirement, other than the pay raises (and at least one pay *reduction*) that all of the BC's received.

Further, Lewis was forced to retire on industrial disability after he was diagnosed with lymphoma. This occurred long after the 2007 settlement whereby the City provided him with the compensation and all other benefits of the BC position. The compensation increase to the BC rate was clearly not in anticipation of retirement.

No Retroactive Application. CalPERS must apply statutes in the PERL and/or the *California Code of Regulations* that were in effect on Lewis' retirement. CalPERS cites *C.C.R.* §570.5, even though it did not become operative until August 10, 2011, years after these matters occurred and after Lewis' retirement.

A. Lewis' Compensation as BC Meets CalPERS' Requirements

Lewis was legally entitled to hold the position of BC at the SBFD and to receive the compensation, deferred compensation and pension rights, and benefits flowing therefrom. He received the BC compensation for full-time work.

Lewis' BC salary thus qualifies as "compensation earnable" pursuant to *Government Code* section 20636 – he received a monthly rate of pay and was paid for performing services on a full-time basis during normal working hours based on a publicly available pay schedule duly adopted by the City.

B. Group or Class

Section 20636(b) of the PERL says payrate is the rate of pay "paid ... to similarly situated members of the same group or class of employment". Section 20636(e)(1) defines "group or class of employment" as "a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping."

Lewis both functioned as and performed the duties of a BC like the other BC's, and he was a member of the Fire Management confidential employee bargaining unit like other BC's. This, not formal title, determines which "group or class" he belongs in.

C. "Regular Rate of Pay"

"An employee's 'regular rate' of pay is 'the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed.' " (*Parth v. Pomona Valley Hosp. Med. Ctr.* (9th Cir. 2010) 630 F.3d 794, 802, quoting *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 424.)

The regular rate by its very nature must reflect all payments, which the parties have agreed, shall be received regularly during the workweek, exclusive of

overtime payments. It is not an arbitrary label chosen by the parties; it is a fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts.

(*Walling v. Youngerman-Reynolds, supra*, at 424-425.)

D. Labor Code Requirements Re "Average Weekly Earnings"

When Lewis went on paid disability leave in July 2011 because of injuries and illness incurred in connection with his work at the SBFD, his BC wages were used to calculate his disability pay. He received disability compensation based on the monthly earnings he received based on the publicly available BC pay scale.

This is an implicit determination that his wages were what he received as BC, irrespective of what duties he performed. For example, *Labor Code* section 4453 sets disability payments based on "average weekly earnings". Further, CalPERS cannot argue that Lewis was performing Fire Captain duties (as opposed to BC duties) during his highest and final year of compensation because he was on disability leave and was not performing the duties of *any* active firefighter position.

I. CalPERS Must Accept Mr. Lewis' BC Compensation as Payrate and "Compensation Earnable"

A. Prior Advice

After considering all of the facts relevant to the situation, CalPERS explicitly instructed the City to report a portion of Mr. Lewis' BC compensation as "temporary upgrade pay". CalPERS has now apparently decided its instructions were in error. CalPERS must correct those errors, and cannot punish the City or Mr. Lewis for its incorrect advice.

The clearest way to correct the errors is to recognize that Lewis is entitled to use the BC pay as "payrate under Section 20636.

B. Correction of Errors and Omissions

Government Code sections 20160, *et seq.*, state that CalPERS and contracting agencies (such as the City) have a mandatory duty to correct their errors and omissions which negatively

impact members, and that this duty continues throughout the lifetime of the member and his/her beneficiaries.

CalPERS argues or implies that Lewis or the City were in some manner responsible for incorrectly reporting a portion of his BC compensation as "temporary upgrade pay", despite the fact that the City submitted such reports after being explicitly directed to do so by CalPERS.

C. Compensation Earnable and Payrate

"Compensation earnable" consists of a member's "payrate" and "special compensation" (Gov.Code, § 20636,) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

An employee's "payrate" is the monthly amount of cash compensation received by the employee "pursuant to publicly available pay schedules." (Gov.Code, § 20636, subd. (b)(1).)

(b)(1) "Payrate" means 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, pursuant to publicly available pay schedules. "Payrate," for a member who is not in a 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, subject to the limitations of paragraph (2) of subdivision (e)⁸. Gov't Code § 20636 (West)

"It has been beyond dispute that pay received for the performance of all normally required duties ... constitutes compensation under PERS law.' " (*City of Fremont v. Board of Administration*, supra, 214 Cal.App.3d at p. 1031, 263 Cal.Rptr. 164.) *City of Sacramento v. Pub. Employees Ret. Sys.*, 229 Cal. App. 3d 1470, 1484, (Ct. App. 1991)

⁸ Gov't Code § 20636 (e)(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

D. Special Compensation "Temporary Upgrade Pay"

CalPERS determined that Lewis' BC compensation qualified as "temporary upgrade pay". *California Code of Regulations* section 571(a)(3), Premium Pay, states:

Temporary Upgrade Pay – Compensation to employees who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration."

There is no definition in the PERL or the Regulations which further defines what constitutes "limited duration". The time period during which Lewis received the BC pay clearly had a start and end point and therefore was of limited duration.

Further, if CalPERS insists that Lewis' receipt of the BC compensation was not of limited duration, but was permanent in nature, then CalPERS should either correct the prior reporting and include all of the BC compensation in Lewis' base salary or instruct the City to make such corrections, and then calculate Lewis' pension based on that increased base salary.

There is also no definition in the PERL or the Regulations which further defines what it means to "work in an upgraded position/classification". As a charter city and Lewis' employer, the City had constitutional autonomy and authority to determine what duties Lewis performed or did not perform. CalPERS has no authority under the PERL to evaluate the specific duties performed by any employee.

Instead, CalPERS has the ministerial duty as applied to the instant case to (i) accept the City's determination that Lewis was eligible to and would receive compensation pursuant to a publicly approved pay schedule at the rate paid to BC's, and (ii) accept the City's determination of whatever duties Lewis would then perform for the City in exchange for that compensation.

E. CalPERS Must Either Accept the Disputed Portion of Lewis' BC Compensation As "Temporary Upgrade Pay", As "Payrate" Or Must Now Appropriately Redesignate It

If CalPERS, despite explicitly advising the City to report a portion of Lewis' compensation as "temporary upgrade pay", now believes that compensation must be reported to CalPERS in some other fashion or designation, CalPERS is obligated to establish the correct designation such that Lewis receives the full PERSible benefit of all of his BC compensation.

For example, *C.C.R. §571(a)(1)* – Incentive Pay, includes the following:

Bonus – Compensation to employees for superior performance such as "annual performance bonus" and "merit pay".... A program or system must be in place to plan and identify performance goals and objectives.

The fact that Lewis performed as a BC on an acting basis before he took the BC promotional tests, then achieved exemplary scores in those tests, and then continued to be called on to regularly perform BC duties such as taking command of fire suppression events under the Incident Command System, constituted "superior performance." Moreover, Lewis did so pursuant to his high scores in the BC promotional test, which meets the definition of "a program or system ... in place to plan and identify performance goals and objectives."

As another example, *C.C.R. §571(a)(4)* – Special Assignment Pay, includes the following:

Confidential Premium – Compensation to rank and file employees who are routinely and consistently assigned to sensitive positions requiring trust and discretion.

Pursuant to the Settlement Agreement and the City's decision to award Mr. Lewis the benefits and rights of BC, he became a member of the confidential Fire Management staff of the SBFD and was mandated to carry out his duties with trust and discretion. If CalPERS maintains that he did so while remaining a member of the SBFD rank and file holding the position of Fire Captain, then the additional compensation he received would constitute "compensation to rank and file employees who are routinely and consistently assigned to sensitive positions requiring trust and discretion."

II. Lewis Qualifies for Inclusion of EPMC in His Pension Calculation

All safety employees at the SBFD at the time of Lewis' retirement were entitled to inclusion of EPMC in their "compensation earnable", whether a member of the rank and file employees covered by Local 891 of the San Bernardino Professional Firefighters Union or a member of the Fire Management confidential employees' bargaining unit.

Accordingly, CalPERS must include EPMC in Mr. Lewis' pension calculation, regardless of the outcome of the dispute concerning his base salary.

III. Not Final Settlement Pay, *Molina* Does Not Apply

CalPERS Lueras said that CalPERS did not determine Lewis' compensation to be final settlement pay and that it did not appear to have been such. (LL2 57:19-58:18.)

(f) As used in this part, "final settlement pay" means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay.

(Section 20636.)

Although superficially similar because it involved a settlement agreement, the *Molina* case law involved a different situation where the employee did not work for the city after the dispute arose. The payrate for the position [Molina] had held with Oxnard was \$8,527.98 per month and it was not affected by the settlement payout. (*Molina v. Bd. of Admin., California Pub. Employees' Ret. Sys.* (2011) 200 Cal.App.4th 53, 66.) The settlement in *Molina* was separate and distinct from any work-related activities. Molina, however, was not reinstated by Oxnard for a year at a published monthly payrate that would have generated \$200,000 in yearly compensation. Rather, he was reinstated for a single day at his *normal* monthly rate. Thus, there was no legal basis for his assertion that \$200,000 of the settlement payment should increase Molina's pension benefits. (*Molina, supra*, at 66-67.)

Lewis on the other hand performed the BC duties during his normal work hours and was paid the BC rate regularly and consistently for years.

AFFIRMATIVE DEFENSES

I. CalPERS' Duty to Correctly Inform

CalPERS was fully informed in or about June 2007 of the City's decision to compensate Lewis in accordance with the BC pay scale listed on the City's publicly available pay schedule. It was fully informed of the City's intent to provide Lewis with deferred compensation in the form

of a pension, including one administered by CalPERS, based upon the BC compensation that the City paid to Lewis. It was also fully informed of the fact that the City requested advice from CalPERS about how to properly report Lewis' BC compensation so that he would qualify for an eventual pension based upon that compensation.

CalPERS then explicitly instructed the City how to report Lewis' BC compensation in a manner that would meet CalPERS' requirements and provide him with the promised pension based upon that compensation. The City had no reason or basis to dispute CalPERS' explicit reporting instructions. The City duly followed CalPERS' reporting instructions from June 2007 through Lewis' retirement effective on November 1, 2012. The City also made all employer and employee contributions to CalPERS that were attributable to the reported compensation, and CalPERS accepted all such contributions.

CalPERS has contracted with the City to administer the City's pension promises. CalPERS holds itself out as the agency with the expertise and experience necessary to correctly administer the pension system of the City and all other CalPERS contracting entities. The City had the legal right to rely on CalPERS to provide it with accurate advice concerning the implementation of the City's pension promises.

CalPERS has obtained no new information about Lewis' compensation since it first instructed the City how to report Lewis' compensation in June 2007. There have been no material changes in the situation or CalPERS' knowledge of the situation from that period to the present.

If CalPERS now asserts that Lewis' compensation was incorrectly reported, this is entirely the fault and responsibility of CalPERS. CalPERS had an affirmative duty to inform the City and Lewis of any reporting issues. CalPERS' failure to do so until now constitutes either the failure to form a valid contract with the City for the provision of pension rights and benefits, including the rights and benefits of Lewis, and/or a breach of the CalPERS-City contract.

Duty to Inform. CalPERS has a fiduciary duty to provide timely and *accurate* information to its members. (See *In re Application of Smith* (March 31, 1999) PERS Prec. Dec. No. 99-01 ["The duty to inform and deal fairly with members also requires that the information conveyed be complete and unambiguous"]; see also *City of Oakland v. Public Employees'*

Retirement System (2002) 95 Cal.App.4th 29, 40.)

Misinformation. CalPERS and its officers are charged with the fiduciary relationship described in *Civil Code* section 2228: "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

As this court has previously noted, "[i]n the vast development of pensions in today's complex society, the numbers of pension funds and pensioners have multiplied, and most employees, upon retirement, now become entitled to pensions earned by years of service. We believe that courts must be vigilant in protecting the rights of the pensioner against powerful and distant administrators; the relationship should be one in which the administrator exercises toward the pensioner a fiduciary duty of good faith and fair dealing."

(*Symington v. City of Albany* (1971) 5 Cal.3d 23, 33, 95.)

This fiduciary relationship is judicially guarded by the application of *Civil Code* section 2235, which provides that "[a]ll transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

(*Hittle v. Santa Barbara County Employees Retirement Assn.*, *supra*, at 393-394.)

Equitable Estoppel. CalPERS takes the position is that estoppel can never apply to it as a matter of law. CalPERS essentially says it cannot be held accountable when it repeatedly and consistently provides Members and/or contracting agencies with incorrect advice over a long period of time and those Members and agencies rely on and act upon that advice to their significant harm. In short, CalPERS grants itself absolute immunity from any prior mistakes, no matter how egregious.

Thus, the doctrine of equitable estoppel is a rule of fundamental fairness, founded on concepts of equity and fair dealing, that prevents a party from profiting from

the detriment he or she induced another to suffer. It is based on the theory that a party who by declarations or conduct misleads another to the latter's prejudice should be estopped to prevent the former from obtaining the benefit of his or her misconduct; provides that a person may not deny the existence of a state of facts if he or she intentionally led another to believe a particular circumstance to be true and to rely upon that belief to his or her detriment; and applies to prevent a person from asserting a right where his or her conduct or silence makes it unconscionable for him or her to assert it. Thus, equitable estoppel precludes a party from asserting rights he or she otherwise would have had against another when his or her own conduct renders assertion of those rights contrary to equity.

(30 Cal.Jur.3d, *Estoppel and Waiver*, §1.)

If CalPERS' *current* position is correct that Lewis' BC compensation was improperly reported to CalPERS or that any other element of Lewis' employment with the SBFD disqualified him from receiving the pension benefits associated with his BC compensation, then CalPERS utterly failed to notify the City and Lewis of this fact. The harm caused by this failure to notify is no minor matter. Lewis maintained employment at the City with the full understanding that his BC compensation earned at the City would be PERSible income and would be eligible for use in calculating his eventual pension.

In the words of our state Supreme Court, Lewis' long term detrimental reliance on a seemingly reasonable representation by CalPERS creates one of those " 'exceptional cases' where 'justice and right require' that the government be bound by an equitable estoppel." (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 501 ("*Mansell*").)

II. CalPERS is Estopped from Denying the Use of Mr. Lewis' BC Salary

Lewis is not seeking to impose strict liability on CalPERS for every representation that it makes to its 1.5 million Members. However, he is also entitled to estop CalPERS from denying its representation of a reasonable benefit. Rather than immunize CalPERS, the estoppel promotes the Constitution and qualifies as an "exceptional case" where "justice and right require" such estoppel in the words of *Mansell*.

A. Elements of Equitable Estoppel

It is well established that the doctrine of estoppel may be applied against a government body where justice and right require it. (*Mansell, supra; Piazza Properties, Ltd. v. Department of*

Motor Vehicles (1977) 71 Cal.App.3d 622, 631.)

Elements of Estoppel. The requisite elements for equitable estoppel are the same whether applied against a private party or the government: (1) the party to be estopped was apprised of the facts, (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended, (3) the party asserting estoppel was ignorant of the facts, and (4) the party asserting estoppel suffered injury in reliance on the conduct. (*Mansell, supra*, at 489.)

Equitable Estoppel Against CalPERS. All four elements of estoppel are satisfied here: (1) CalPERS knew or should have known that it promised pension benefits to Lewis based upon the BC compensation he received from the City, even though CalPERS would later claim it was unauthorized to provide those benefits; (2) CalPERS either intended this representation of pension benefits to be relied upon, or Lewis had the right to believe it was so intended; (3) Lewis was unaware of the fact that CalPERS would later disavow such representations; and (4) Lewis relied upon the conduct of CalPERS in making his career plans to his injury. (See *Driscoll v. City of Los Angeles, supra*.)

Lewis Can Prove All Elements. Lewis can establish that he meets all essential elements of estoppel. CalPERS explicitly or implicitly represented to Lewis that it would grant him the pension rights and benefits flowing from his BC compensation at the City.

Further, if CalPERS now contends that the City's reporting of Lewis' BC compensation was improper, Lewis has proven that he "did not have actual knowledge of the true facts [and] did not have notice of facts sufficient to put a reasonably prudent man upon inquiry, the pursuit of which would have led to actual knowledge." (*Banco Mercantil v. Sauls, Inc.* (1956) 140 Cal.App.2d 316.)

Nothing from CalPERS put Lewis on notice that CalPERS would disallow the use of his BC compensation and associated EPMC in the calculation of his pension benefits before he retired.

Evidence Not in Conflict. Although estoppel is generally a question of fact, when the evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an

estoppel is a question of law. (*Driscoll v. City of Los Angeles, supra*, at 305.)

B. CalPERS' Authority to Effect What Estoppel Would Accomplish

CalPERS asserts that estoppel is never available against it because it is mandated to apply the provisions of the PERL and CalPERS' Regulations (or at least CalPERS' *interpretation* of those provisions) and estoppel is never available "where the government agency to be estopped does not possess the authority to do what it appeared to be doing."

This completely ignores the central holding in the *Mansell* case where the Supreme Court found that imposition of estoppel would require the government to not only exceed what it was statutorily allowed to do, but in fact would contravene constitutional limitations (the constitutional bar on the alienation of tidal lands. The Supreme Court made clear that estoppel may be a rare or highly unusual remedy, but it is authorized and mandated "where justice and right" require such estoppel.

Moreover, CalPERS *does* have authority to allow the use of Lewis' BC compensation in calculating his pension.

CalPERS has "plenary authority and fiduciary responsibility for ... administration of the system", subject among other things to the mandate that "[a] retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty." (Cal. Const., art. XVI, §17.) If CalPERS is permitted to seriously and repeatedly misinform a Member in ways that cause the Member permanent, irreparable and substantial harm, this would eviscerate the mandate to put the interest of Members above all other duties. The constitutionally mandated fiduciary duties certainly give CalPERS the authority to now award Lewis a pension based on his BC compensation at the City, even if that compensation does not meet all of the technical requirements that CalPERS (wrongly) asserts.

Government Code section 20125 states that CalPERS is the "sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system".

CalPERS also has statutory authority under the so-called "correction statutes" to permit Lewis the use of his BC compensation in calculating his pension benefits as a correctable error, if indeed the reporting of that compensation was incorrect.

Nothing in the PERL precludes CalPERS from determining that an award of pension benefits utilizing Lewis' BC compensation is appropriate.

C. CalPERS Is Estopped From Now Disallowing Lewis' BC Compensation

The doctrine of equitable estoppel is based on the theory that the party estopped has misled the other party to its prejudice, and may be applied against a governmental body where justice and right require it. (*Piazza Properties, supra; Emma Corp. v. Inglewood Unified School District* (2004) 114 Cal.App.4th 1018.) Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing to be true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it. (*Leasequip Inc. v. Dapeer* (2002) 103 Cal.App.4th 394; *California Evidence Code* §623.)

The requisite elements for equitable estoppel are met in this case: (1) The party to be estopped (CalPERS) was apprised of the facts; (2) the party to be estopped (CalPERS) intended by its conduct to induce reliance by the other party (Lewis) on the explicit and implicit promises that Lewis could utilize his BC compensation at the City in the calculation of his eventual pension (and acting in such a way as to cause Lewis reasonably to believe reliance was intended); (3) the party asserting estoppel (Lewis) was ignorant of the facts, if indeed any facts exist which would otherwise support CalPERS' recent refusal to provide a pension based upon the BC compensation; and (4) the party asserting estoppel (Lewis) suffered injury in reliance on CalPERS' conduct, to wit: he accepted continued employment at the City, made his retirement plans and left City employment believing that his BC compensation was PERSible. Lewis retired from CalPERS with this understanding and thereby ended his career, only to find that he would be receiving a far smaller pension allowance from CalPERS than he had been promised.

If those estoppel elements are established against the government, the court must then balance (i) the burden on the party asserting estoppel if the doctrine is not applied against (ii) the public policy that would be affected by the estoppel. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 400-401.)

As the doctrine of equitable estoppel states, justice and right require that CalPERS be

estopped from now disallowing use of Lewis' BC compensation and associated EPMC in the calculation of Lewis' retirement pension.

III. CalPERS' Breach of Constitutional and Fiduciary Duties Owed to Lewis

CalPERS has been a trust arrangement since its inception, with the Board of Administration acting as trustee for the members as beneficiaries. The Board owes fiduciary duties to each member individually and to the membership collectively. Standard trust duties apply. (*Hannon Engineering, Inc. v. Reim, supra*, at 425 [pension plans create a trust relationship between pensioner-beneficiaries and the trustees of pension funds who administer retirement benefits; trustees must exercise their fiduciary trust in good faith and deal fairly with the pensioners-beneficiaries].)

When adopted in 1992, however, Proposition 162 strengthened and extended these fiduciary duties. The amended California Constitution now reads in relevant part:

Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following:

(a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

(b) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.

(*Cal. Const.*, art. XVI, §17.)

In addition to CalPERS' pre-existing trust and fiduciary duties, Proposition 162 mandates

that a retirement board shall have *fiduciary responsibility to its members and beneficiaries above all other duties*. In other words, the constitutional changes were not simply aimed at blocking "outside forces" (i.e., the government) from exerting control over the disposition and management of pension funds, but were also directed at ensuring that *the pension systems themselves* fulfilled their fiduciary responsibilities to their respective memberships.

The constitutional duties are not simply general statements of responsibility. Rather, they must actually guide CalPERS' day-to-day communications with its Members, such as Lewis, including imposing a specific duty of care on CalPERS to ensure the accuracy of its communications with its Members.

As the California Court of Appeals ruled in *City of Oakland v. Public Employees' Retirement System, supra*, "[CalPERS] owes a fiduciary duty to provide timely and accurate information to its members". (*City of Oakland, supra*, at 40, italics in original.) CalPERS itself has recognized this same duty to accurately inform in its precedential decision *In Re Application of Smith*, where CalPERS adopted the *Proposed Decision* of the ALJ stating, "[t]he duty to inform and deal fairly with members also requires that the information conveyed be complete and unambiguous." (*In Re Application of Smith, supra*.)

A. CalPERS Breached Its Fiduciary Duties Owed to Lewis

Under California law, a breach of fiduciary duty includes (1) the existence of fiduciary relationship giving rise to fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach. (*Estate of Migliaccio v. Midland Nat'l. Life Ins. Co.* (C.D. Cal. 2006) 436 F.Supp.2d 1095.)

CalPERS' unjust disallowance of the use of Lewis' BC compensation in the calculation of his pension allowance meets each of the elements to bring a breach of fiduciary claim against CalPERS.

B. The Existence of A Fiduciary Relationship Giving Rise to Fiduciary Duty

CalPERS and Lewis were engaged in a fiduciary relationship-giving rise to a fiduciary duty. It has been held that the administrator of a pension is a fiduciary in its relationship with its pensioner. In *Hittle v. Santa Barbara County Employees Retirement Assn., supra*, at 392-393, the

Supreme Court concluded that trustees who administer pension plan retirement funds owe fiduciary duties of good faith and fair dealing towards the pensioner-beneficiaries.

Similarly, in *Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 43-45, the court acknowledged the existence of fiduciary duties owed by a retirement plan and its administrator to a pension plan beneficiary. Pensions and retirement systems have fiduciary obligations to deal fairly and have a duty to inform employees.

CalPERS is an administrator of pensions and is in a fiduciary relationship with its Members, specifically Lewis. CalPERS also has fiduciary duties to its member-beneficiaries, which have a Constitutional basis in Article XVI, Section 17, of the California Constitution.

CalPERS' also has other fiduciary duties as provided by statute.

As seen by both case law and statute, CalPERS had a duty to deal with Lewis fairly and in good faith. Included within the fiduciary obligation is the duty to fully inform its Members of their options in obtaining retirement benefits, as stated in CalPERS' own Precedential Board decision, *In re William R. Smith, supra*.

C. CalPERS' Breach of Fiduciary Duty

CalPERS has breached this duty by failing to fully and timely inform and/or correctly inform Lewis of how its interpretation of the PERL would apply to Lewis' BC compensation and its use in calculating his pension allowance.

IV. CalPERS' Actions Provide Unjust Enrichment to CalPERS

CalPERS freely and knowingly accepted employee and employer contributions associated with Lewis' BC compensation earned at the City. Contribution amounts are established on the basis of actuarial estimates of the pension allowances CalPERS will eventually be required to pay to individuals based on the salaries they earned.

CalPERS' refusal to calculate Lewis' pension allowance on the basis of his BC compensation, even though that compensation meets all requirements of the PERL concerning what constitutes "final compensation", means CalPERS has collected and is retaining funds in excess of the pension allowance the contributions were expected to pay for. CalPERS thus would accrue a windfall if the pension benefits paid to Lewis are reduced as CalPERS has done,

resulting in an unjust enrichment to CalPERS' benefit and to the detriment of Lewis and the City.

V. CalPERS Is Barred By Laches

Laches is such unreasonable delay by a plaintiff in asserting a right to relief as will render the granting of relief inequitable. (*Nicolopoulos v. Superior Court* (2003) 106 Cal.App.4th 304; 30 Cal.Jur.3d, *Equity* §36.) Laches will operate as a bar in equity to the successful maintenance of the plaintiff's cause of action. (*Cahill v. Superior Court of City and County of San Francisco* (1904) 145 Cal. 42; *Kleinclaus v. Dutard* (1905) 147 Cal. 245; 30 Cal.Jur.3d, *Equity*, §36.) The defense of laches requires unreasonable delay in bringing suit plus either acquiescence in the act about which plaintiff complains, or prejudice to the defendant resulting from the delay. (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351; *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614.)

Procedures and Evidence, Proposed Decision

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. 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 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).**

CONCLUSION

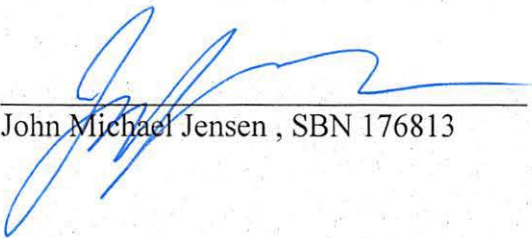
The facts and law in the *Proposed Decision* show that Mr. Lewis is entitled to a pension based on the final compensation of a Battalion Chief and the value of EPMC.

The *Proposed Decision* is legally and factual correct.

It should be adopted.

Respectfully Submitted,

December 4, 2015



John Michael Jensen , SBN 176813