

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA
MARY AGNES MATYSZEWSKI, ADMINISTRATIVE LAW JUDGE

In the Matter of Calculation of Final)
Compensation of:)
) No. 2014040945
RICHARD LEWIS,)
)
) Respondent,)
)
) and)
)
CITY OF SAN BERNARDINO,)
)
) Respondent.)
_____)

TRANSCRIPT OF PROCEEDINGS
San Bernardino, California
Thursday, February 26, 2015

Reported by:

BRITTANY GUTIERREZ
Hearing Reporter

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In the Matter of Calculation of Final Compensation of:)
RICHARD LEWIS,) No. 2014040945
Respondent,)
and)
CITY OF SAN BERNARDINO,)
Respondent.)
_____)

1 APPEARANCES:

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I N D E X

1					
2	COMPLAINANT'S				
	Witnesses:	Direct	Cross	Redirect	Recross
3	Lolita Lueras		13	37	51
4				94	100
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6	David Clement	203	224	263	272
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8	RESPONDENT'S				
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9	Helen Tran		111	120	127
10	Richard Lewis	138	157	185	188
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14	COMPLAINANT'S:		Marked for	Received
			Identification	In Evidence
15	19	Three pages of e-mail	85	86
16		communication		
17	20	Mr. Clement's Demonstrative	223	223
18	21	Client Election to Purchase	222	223
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		knowledgeable at CalPERS		
23	47	One-page document of	139	185
24		Mr. Lewis's notes		
25				

1 San Bernardino, California, Thursday, February 26, 2015

2 9:00 a.m.

3

4

5 THE COURT: On the record in the Matter of the Statement
6 of Issues by CalPERS Against Richard Lewis and the City of
7 San Bernardino. Case Number 2014-0256. OAH number
8 2014040945. We're at day four of the hearing.

9 Off the record we had some discussions regarding
10 the subpoena to CalPERS. The evidence introduced yesterday,
11 Exhibit 38, is actually the PMK deposition subpoena to the
12 person most knowledgeable with the city. I've marked as
13 Exhibit 46 the PMK subpoena to the person most knowledgeable
14 of CalPERS and I'm going to receive that document.

15 (Respondent's Exhibit 46 was marked for
16 identification by the Court and received
17 in evidence.)

18 THE COURT: Exhibit 40 and Exhibit 46 were subpoenas.
19 40 to Mr. Suine, S-u-i-n-e, one to CalPERS PMK, and the
20 language of the subpoena: "Sought documents determining
21 what are in CalPERS' possession and control which address
22 CalPERS policy and procedure for how employees of CalPERS
23 are to calculate the "final compensation" -- the words were
24 in quotes -- of safety employee. A: Who have a one year
25 financial compensation period. B: Placed on disability

1 leave from active duty. C: Who remain on disability leave
2 for at least the final year without performing any active
3 duty employment responsibilities. And D: Who then retire
4 without returning to active duty."

5 And the PMK deposition, in addition to that, also
6 contained a requirement that the Deponent bring with him
7 copies of any and all documents in CalPERS possession and
8 control which address CalPERS policy and procedure for how
9 employees of CalPERS are to calculate the final compensation
10 of safety employees who meet the criteria set forth in the
11 paragraphs above.

12 And, Mr. Kennedy, can you please explain to me what
13 you did in response to those subpoenas?

14 MR. KENNEDY: Well, your Honor, I made inquiries of the
15 Department and at multiple levels and addressing the PMK to
16 Mr. Suine. In particular determined that there were no
17 responsive documents other than as Ms. Lueras has testified
18 previously to, and that's the PERL and the applicative
19 regulations. And as I indicated to the Court off the
20 record, in abundance of caution there are online
21 precedential decisions that CalPERS maintains a precedential
22 decision database online. But that I don't think is
23 responsive, but to the extent that it might fall even
24 outside the H's of that. The Court, as I understood, and
25 Mr. Jensen as I understand, is well aware of that as well.

1 Also, CalPERS of course maintains online
2 information to providers on how to report payroll. But,
3 again, that's reflective of the provisions of the PERL as
4 are the circular letters. As are any public agency
5 documents. They are essentially intending to reiterations
6 of the PERL to the employers in their use of reporting.

7 THE COURT: And to determine whether or not there are
8 policies or procedures for those items itemized through A
9 through D.

10 MR. KENNEDY: We did not find any policy and procedures,
11 as I understand that definition to be, as far as directives
12 to staff that were formal or official to require them to do
13 anything other than what is required under the PERL.

14 THE COURT: Thank you. Mr. Jensen?

15 MR. JENSEN: Yes, your Honor.

16 We sought documents under Subpoena Duces Tecum for
17 the person most knowledgeable at CalPERS, as well as the
18 Division Head of the Benefits Division for documents as the
19 subpoena read that CalPERS employees would use in the
20 calculation of final compensation to find under 20636 using
21 20630 as the compensation method -- as the compensation
22 definition first and the documents we sought were about
23 CalPERS policy or procedure regarding the use of payments or
24 Industrial Disability Leave or disability leave which would
25 includes Labor Code Section 4800 and 4850.

1 And we sought the subpoena to get those documents
2 and particularly about the way CalPERS employee's use to
3 calculate those benefits. Today we showed the Court and
4 opposing Counsel CalPERS documents that are titled General
5 Information For All Reporting Methods, which CalPERS
6 produces as a means of informing employers on how to report
7 certain information, including payments under Labor Code
8 Section 4800, 4850. And we consider this to be a policy or
9 procedure by which CalPERS instructs reporters or reporting
10 agencies to report this period or this compensation under
11 4850. And that this would constitute a policy or procedure
12 by which CalPERS processes the information used to calculate
13 the pension benefit and final compensation.

14 There are two different code sections that are
15 involved. Compensation is in 20630, which in this document,
16 page 70 of the reporting method that I will make official
17 notice of, it uses the disjunctive term "or," meaning that
18 there is two different ways of submitting information on
19 compensation to CalPERS. One of which is the information
20 that Ms. Lueras testified to, which is basically revolving
21 around hours and payments out of or normal work in a
22 position which included duties; that is one subsection.

23 And then there's a separate disjointed part which
24 says that time and compensation for which a member is
25 excused from work as an Industrial Disability Leave or other

1 disability leave are reportable as compensation. And it
2 specifically says that Labor Code Section 4850 is included
3 in the definition above for various safety measures. But
4 with respect 20636, there is a -- which was part of the
5 inquiry that we made in the subpoena is there's a subsection
6 20636(g)(2)(d) which says -- or 20636(g) which indicates
7 that payments for disability or Industrial Disability shall
8 be included in compensation earnable, and it's a mandatory
9 provision which is separate from the other definitions or
10 subsections under compensation earnable.

11 So we've requested information on that as well and
12 we have not received any information on any documents or
13 policy or procedures from that. And so we believe that even
14 if Mr. -- or assuming Mr. Kennedy made a good-faith
15 search -- and I'm not calling into question his diligence --
16 we've found documents, and we believe there are responsive
17 documents that we should be allowed to have a person most
18 knowledgeable on these matters testify.

19 And so our ultimate request on this is that there
20 is the specific area of expertise which we believe has not
21 been addressed and there should be an individual who is most
22 knowledgeable about this specific provision which apply in
23 this case. And we seek the testimony of that individual, if
24 they do exist.

25 THE COURT: What's the specific area of expertise you

1 don't think Ms. Lueras addressed?

2 MR. JENSEN: Well, we can look at her testimony. I
3 believe what I asked Ms. Lueras was whether she considered
4 4850 payments in her analysis, and I believe she said no.

5 And we can look at the transcripts because I don't
6 have them in front of me.

7 MR. KENNEDY: Just for the record, I believe that's a
8 misrepresentation of the transcript.

9 MR. JENSEN: Well, Mr. Kennedy has the transcripts right
10 in front of him so --

11 MR. KENNEDY: I would also like to point out to the
12 Court before we go much further than this, that subsection
13 under 20636 of the Government Code is a section covering the
14 determination of what constitutes as compensation earnable,
15 not final comp. but compensation earnable.

16 And the specific subsection applies to employees
17 and only to employees of the State of California, not to
18 PAs. So even if Mr. Jensen might or even be right, which I
19 don't believe he is in the implication he's making -- his
20 legal argument he's making -- is correct, I don't believe it
21 wouldn't be applicable in this case anyway because that
22 applies to state employees, not to local employees such as
23 Mr. Lewis.

24 If you look at (g), beginning of (g), (g)(1),
25 notwithstanding Subdivision (a) Compensation Earnable for

1 State Members Means -- and it goes on. And (g) is not in
2 our Statement of Issues in this case, and the reason it's
3 not is because those provisions apply for the calculation of
4 final compensation, which is treated differently for state
5 employees.

6 THE COURT: And I'm looking at my notes of the testimony
7 regarding 4850 and her testimony was that the issue of 4850
8 it's not relevant for their determination regarding final
9 compensation. She is familiar with the term 4850. You
10 asked whether it would be included and she said in amount of
11 services more or less, it would be less. 4850 is allowed to
12 be reported. So it may be recorded as though the person
13 were working and not on workers' comp.

14 4850 meets the definition of compensation under
15 20630(a)(3). Compensation earnable, it doesn't matter
16 whether it's 4850. 4850 has no bearing on what compensation
17 is recorded. Compensation would not change whether it was
18 4850 or not. It would continue to be recorded as though the
19 member was still working. 4850 is no different than regular
20 pay. And that CalPERS would look at the pay rate and have
21 to go back to the public schedules and the employer must
22 comply with compensation earnable for it to be utilized for
23 retirement. The compensation reported would be directly
24 related to, if they were meeting all the criteria to qualify
25 for compensation earnable.

1 So my finding in looking at everything is I don't
2 see where she didn't address the analysis of 4850. And I
3 look at the subpoenas, what they asked for was policy and
4 procedure regarding how CalPERS employees are told to
5 instruct. So I have no reason to doubt Mr. Kennedy's
6 representation that they don't have those policies and
7 procedures.

8 CalPERS, on its website tells the reporters to
9 report it's not a policy and procedure for the employees
10 determining final compensation for separate issues. But
11 that's not to say that I don't believe that I consider and
12 take official notice of everything online how CalPERS told
13 how to report, and how they're going to calculate the
14 recording, and that it's all under the PERL. And I can't
15 consider all of that information when I make any final
16 determination.

17 I don't find that CalPERS violated the request for
18 subpoena since I have no reason to doubt Mr. Kennedy's
19 representation of what he did in this Matter.

20 MR. KENNEDY: And one other thing. I just, again, in a
21 huge abundance of caution, not that there might not be a
22 writing somewhere that is simply, again, just reflective of
23 the PERL. It might tell employees, "Refer to the PERL."

24 THE COURT: Right. I don't find that there was a
25 violation of the subpoena request. And I don't see where

1 Ms. Lueras did not address 4850. If she had taken the stand
2 and told me that she can't answer any questions on 4850 and
3 doesn't know anything about it, that would be different.
4 But she's still under oath if you feel -- sorry. Still
5 under subpoena power and under oath, and if you feel like
6 you need more, I'll let you call her back to the stand.

7 MR. JENSEN: Thank you, your Honor.

8 THE COURT: Yep.

9 MR. KENNEDY: Does Mr. Jensen wish to call Ms. Lueras
10 back to the stand?

11 MR. JENSEN: Yes, I'd like to.

12 THE COURT: You want to do that now?

13 MR. JENSEN: Whenever.

14 THE COURT: Ma'am, you can retake the stand. I remind
15 you you are still under oath.

16 Sir, cross-examination?

17 MR. JENSEN: Thank you, your Honor.

18 Good morning, Ms. Lueras.

19 THE WITNESS: Good morning.

20

21 CROSS-EXAMINATION

22 BY MR. JENSEN:

23 Q I'd like to refer your attention to 20636.

24 A In the PERL?

25 Q Before I do that. So which --

1 THE COURT: Ma'am, am I reading what I have in my notes
2 a reflection of your testimony?

3 Do you disagree with anything that I have said to
4 your testimony?

5 THE WITNESS: No.

6 THE COURT: Okay. Thank you.

7 BY MR. JENSEN:

8 Q Are you familiar with 4850 time?

9 A Yes.

10 Q And just to clarify, what is it?

11 A 4850 time is given to safety members who are
12 injured on the job and are receiving workers' compensation
13 payments.

14 Q And how is it used in the calculation of a
15 individual's benefit?

16 A So 4850 time, the employer is instructed to
17 continue reporting compensation to CalPERS as if the member
18 was still working. So they remain whole.

19 So if it is utilized in the calculation of time
20 compensation it would be treated as any other payroll in the
21 system.

22 Q And so did you consider 4850 time in the
23 calculation of Mr. Lewis's benefit?

24 MR. KENNEDY: Objection. Vague. I mean, relevance as
25 to the word "time."

1 THE COURT: Why don't you narrow it down to what time
2 period.

3 BY MR. JENSEN:

4 Q In your calculation or analysis, did you consider
5 4850 payments, or time in Mr. Lewis's benefit?

6 MR. KENNEDY: Objection. Compound. Payment or time.

7 MR. JENSEN: I can uncompound it, your Honor.

8 THE COURT: Go ahead. Thanks.

9 BY MR. JENSEN:

10 Q Ms. Lueras, did you consider 4850 time in your
11 analysis of Mr. Lewis's benefit calculation?

12 MR. KENNEDY: Again, objection. Same objection to the
13 use of the term "time." Ms. Lueras is calculating the
14 benefit.

15 THE COURT: Right. 4850 is a payment not really a time.

16 Is that the objection?

17 MR. JENSEN: Is that what your objection is?

18 MR. KENNEDY: Yes.

19 MR. JENSEN: You just made an objection about
20 compound --

21 MR. KENNEDY: The question --

22 THE COURT: Basically, is the question that when she
23 made her final calculation regarding his retirement
24 benefits, was 4850 included in that calculation?

25 MR. JENSEN: Sure.

1 THE COURT: No. Is that what you are asking?

2 MR. JENSEN: I was asking -- yeah. That's correct.

3 THE COURT: Okay.

4 BY MR. JENSEN:

5 Q In your analysis of Mr. Lewis's pension
6 calculation, was 4850 payments included in your analysis?

7 A In my area we don't complete the calculations of
8 benefits. We are tasked with reviewing the final
9 compensation period and determining whether or not final
10 compensation period constitutes compensation earnable.

11 In Mr. Lewis's case, without looking at the final
12 compensation period in front of me, I'm not sure if it
13 overlaps the time that he was receiving 4850 payments, that
14 could be possible; but, again, we go through the same steps
15 that we would with a regular payroll. It doesn't look any
16 different on our end. It's not coded any differently. It
17 looks like regular payroll as if the member was continuing
18 to work.

19 Q Assuming the facts that you've heard is that
20 Mr. Lewis was disabled for the last 18 months of his period
21 of service with the city, and received 4850 payments during
22 that last 18 months, would that make a difference in your
23 analysis?

24 A No.

25 Q Okay. So can I refer your attention to the

1 compensation section in the PERL?

2 MR. KENNEDY: Are we referring to section 20 --

3 MR. JENSEN: 20630.

4 THE WITNESS: Yes.

5 BY MR. JENSEN:

6 Q Do you have that in front of you?

7 A I do.

8 Q And are you familiar with this term? With this
9 term "compensation definition"?

10 A Yes.

11 Q Do you see in the first paragraph that there's this
12 phrase "or" between the phrase for member services performed
13 during normal working hours, and then there's the word "or"
14 for the time which the members are excused from work?

15 A Yes.

16 Q So what does the word "or" mean to you?

17 A That there are two options.

18 Q Two options.

19 And are they completely different options?

20 A Well, one is for service rendered, and the second
21 is for time for which a member is excused for work.

22 Q And you see in Subsection 3 that there's Industrial
23 Disability Leave?

24 A Yes.

25 Q This is payment payable pursuant to Sections 4800

1 and 4850?

2 A Yes.

3 Q Okay. So do the rules about normal working hours
4 apply to payments received for 4850 time?

5 MR. KENNEDY: Objection. Asks for a legal conclusion.

6 THE COURT: Overruled.

7 THE WITNESS: So you are asking if regular work schedule
8 applied to time excused from work?

9 MR. JENSEN: Yes. You can answer that.

10 THE WITNESS: In what way?

11 BY MR. JENSEN:

12 Q I'm asking in your analysis if Mr. Lewis was on --
13 since Mr. Lewis was on Industrial Disability Leave for his
14 last one year and he had a one year final compensation
15 period, isn't the 4850 time -- is the payment that is
16 compensation under 20630?

17 MR. KENNEDY: Again, you know, your Honor, objection.
18 The question is vague. It's asking for a legal conclusion.
19 And, again, quite frankly, it's a disjointed question
20 that -- I don't understand it.

21 THE COURT: If she understands it she can answer.

22 As I understand the law -- correct me if I'm
23 wrong -- basically you are going to get your paycheck for
24 working, or you are going to get the 4850 because you're out
25 on injury. But either way, that's like a paycheck.

1 THE WITNESS: Right.

2 THE COURT: And that's what my employer reports.

3 THE WITNESS: Correct.

4 THE COURT: 4850 is just so someone knows I'm not at the
5 office; I'm home injured.

6 THE WITNESS: Yes.

7 THE COURT: What you are telling me through your
8 testimony for your calculations is it doesn't matter whether
9 I'm at work or out on 4850.

10 THE WITNESS: Correct.

11 THE COURT: Okay.

12 BY MR. JENSEN:

13 Q So to rephrase that then, you just accept the 4850
14 pay as the correct compensation for that period?

15 MR. KENNEDY: Misstates the testimony.

16 THE COURT: Overruled.

17 THE WITNESS: So it falls into the definition of
18 compensation. 4850 time is compensation.

19 BY MR. JENSEN:

20 Q And then what would be the next step in your
21 analysis?

22 A My analysis?

23 Q Assuming that he received 4850 time for his final
24 year of compensation period?

25 A Okay. Again, so any time compensation is reported

1 to the system, and final compensation period is chosen, the
2 Compensation Review Unit, which I am from, we review the
3 compensation in the system and insure that it's compensation
4 earnable. The next step would be to take the compensation
5 reported to the system and insure it meets the definition of
6 compensation earnable. So that's a two-step process.

7 You start with pay rate. Review the pay rate, make
8 sure it's pursuant to a publicly available pay schedule --

9 Q Let me just stop you there because where is the pay
10 rate for 4850 from?

11 Where is the --

12 MR. KENNEDY: Objection. Assumes facts not in evidence.
13 He's making a legal argument.

14 MR. JENSEN: I'm just trying find --

15 THE COURT: He's just trying to find out -- so basically
16 you check the pay rate but because it's 4850, what would you
17 look at?

18 THE WITNESS: The same thing. The publicly available
19 pay schedule.

20 THE COURT: You would look to see what kind of employee
21 this person is and look at that?

22 THE WITNESS: Correct.

23 THE COURT: Okay.

24 BY MR. JENSEN:

25 Q And where does the 4850 -- how is it reported to

1 CalPERS?

2 MR. KENNEDY: Sorry. Excuse me. Again, relevance as to
3 question of time.

4 THE COURT: Overruled. Basically if I'm on 4850, what
5 does CalPERS know?

6 THE WITNESS: So, again, 4850 time isn't distinguished
7 in our payroll system. It's reported as if the member was
8 continuing to work. So there would be a pay rate reported
9 and the compensation that the member received while actually
10 working would be reported as well.

11 BY MR. JENSEN:

12 Q Let me turn your attention 20636 Compensation
13 Earnable Definition. You mentioned pay rate.

14 Do you, at that point, look at whether the person
15 who is disabled is similarly situated to other people?

16 THE WITNESS: So --

17 MR. KENNEDY: Vague. Do we look at --

18 THE COURT: Do you understand the question?

19 THE WITNESS: Not really.

20 THE COURT: Okay.

21 BY MR. JENSEN:

22 Q You said you do an analysis of compensation
23 earnable; is that correct?

24 A Yes.

25 Q And I believe you said that the 4850 time

1 qualifies -- you do analysis under pay rate; is that
2 correct?

3 A Right.

4 Q And when you do that analysis, do you look at
5 whether the disabled person is similarly situated to other
6 people in the group or class?

7 A That is not a consideration that I make as far as
8 the person being disabled. When I review the payroll I look
9 at it as it's being reported. Like I said, there's no
10 indication to me that that person is not working. Unless
11 the employer tells me that person was on 4850 time I would
12 have no other way of knowing.

13 So with regard to group or class, yes, group or
14 class still does apply to a person that's on 4850 time. I
15 look to the employee first on the service retirement
16 application to identify what their title is. If there's any
17 discrepancies between the title and the pay rate reported
18 and the salary schedule that I find, I will reach out to the
19 employer and ask questions on why there is a discrepancy.
20 And if it so happens that that person is at a different
21 title leave or position I would verify that as well.

22 But, again, the payroll that's reported to the
23 system while a member is on 4850 time looks no different
24 than the payroll that's reported for a person that's
25 working. And I believe we have an exhibit with the

1 transcript, so you can look and there's no difference there.

2 MR. KENNEDY: For the record, it's Exhibit 14 in CalPERS
3 exhibits.

4 THE COURT: Okay.

5 MR. KENNEDY: And I also believe that the --

6 MR. JENSEN: Mr. Kennedy, I'm doing the cross, please.

7 THE COURT: Everybody take a deep breath.

8 Go ahead.

9 BY MR. JENSEN:

10 Q So in pay rate definition it says, "For services
11 rendered on a full-time basis."

12 Did you apply that part of the rule to someone
13 who's on 4850 time?

14 MR. KENNEDY: I'm sorry. Are you referring to 20630
15 now?

16 THE COURT: Where are the words coming from?

17 MR. JENSEN: Ms. Lueras, do you know?

18 THE WITNESS: Can you repeat your question?

19 BY MR. JENSEN:

20 Q In pay rate definition --

21 MR. KENNEDY: Vague as to "pay rate definition."

22 Can we have a reference?

23 THE COURT: Still looking at 20630.

24 MR. KENNEDY: 20630.

25 ///

1 BY MR. JENSEN:

2 Q Ms. Lueras, do you know what I'm looking at?

3 A I believe referring to Government Code Section
4 20636.

5 THE COURT: Counsel, I don't want a witness guessing if
6 you are referring to something specific -- then otherwise
7 your questions won't match up -- her answers won't match up
8 to your questions if she's assuming one thing and you are
9 asking something else.

10 What are you specifically asking about?

11 BY MR. JENSEN:

12 Q Just to be clear, Ms. Lueras, we're now in your
13 analysis 20636(b)(1) pay rate.

14 And was your testimony that you undertake a pay
15 rate analysis of 4850 benefits in your work?

16 MR. KENNEDY: Asked and answered repeatedly.

17 THE COURT: What she is telling me is -- and correct me
18 if I'm wrong -- it doesn't come to her as 4850, it comes to
19 her as compensation.

20 THE WITNESS: Right.

21 BY MR. JENSEN:

22 Q Do you look into whether there was payment for
23 services rendered on a full-time basis when it's 4850 time?

24 A So it's according to services rendered on a
25 full-time basis, but we go back to Section 20630 and it

1 says, "Or excused from work." And the accepted excuses from
2 work are listed in 4850, time is one of them.

3 So because it's compensation, it then meets pay
4 rate. They were excused from work. It's an accepted
5 excuse, so it's as if they were working.

6 MR. KENNEDY: Objection. Move to strike as
7 nonresponsive.

8 MR. JENSEN: No, I think it's --

9 THE COURT: Overruled.

10 MR. JENSEN: It's --

11 THE COURT: Everybody, overruled. Just to shortcut it,
12 here's what I understand your testimony to be. Correct me
13 if I'm wrong now.

14 Basically, when you do the analysis of the final
15 compensation, it didn't matter to you whether he was working
16 or not working. You don't know either one. And what you
17 looked at -- we've been calling the Delta -- but what you
18 looked at is when CalPERS made the final determination is
19 he's a Fire Captain who's getting a Battalion Chief -- which
20 he shouldn't be.

21 So basically the Delta is what you discounted
22 whether it was 4850 or working time.

23 THE WITNESS: Right. So the Delta was reported as
24 special compensation and that's what I deemed didn't fit the
25 definition for communication earnable. Again, it didn't

1 matter if it was 4850 or regular work time.

2 MR. KENNEDY: And, your Honor, for the sake of saving
3 some time, I don't know if the witness heard what she said.
4 I heard what she said. She had made it and I believe -- she
5 can correct me if I'm wrong --

6 MR. JENSEN: Your Honor, he's --

7 THE COURT: Stop.

8 MR. JENSEN: -- coaching the witness.

9 THE COURT: No, he's not. Stop.

10 MR. KENNEDY: I believe at one point there was a
11 statement that inferred that there was an equivalency
12 between compensation and pay rate. And those are two
13 distinct --

14 THE COURT: I know that. Basically when you are talking
15 about pay rate, you were looking at Fire Captain pay rate
16 verses Battalion Chief and that's the determination that
17 CalPERS made that he should have been retired at Fire
18 Captain not Battalion Chief.

19 THE WITNESS: Right.

20 THE COURT: Whether or not the last year was out injured
21 or working.

22 THE WITNESS: Right. So the pay rate reported was Fire
23 Captain.

24 MR. KENNEDY: I just want to be very specific, under the
25 PERL you don't determine pay rate necessarily -- just

1 because it comes in as compensation under 20630 does not
2 equate it.

3 Does that mean it's pay rate?

4 THE WITNESS: No.

5 MR. JENSEN: And your Honor --

6 MR. KENNEDY: 20636.

7 MR. JENSEN: Your Honor, the inquiry is really about
8 4850 time as being separate from these in the disjointment
9 from having these other conditions about work in a specific
10 job.

11 THE COURT: What are you getting at? Because she said
12 repeatedly it didn't matter whether it was 4850 or if he was
13 at work.

14 MR. JENSEN: What she said this morning was different.

15 THE COURT: What did she say?

16 MR. JENSEN: She said this morning that because it was
17 accepted under 20630 as Industrial Disability Leave, under
18 20630 that under 20636 the pay rate definitions and
19 requirements about rendering on a full-time basis pursuant
20 to publicly available pay schedule that those didn't apply
21 because it was satisfied as a disability payment.

22 THE COURT: I don't think the question was about -- what
23 I heard her say was: When she looked at her final
24 compensation if he was out on leave, it's an allowable term
25 20630. You can be 4850 qualified. So therefore, you can

1 use 4850 when you are working that last year.

2 THE WITNESS: Right.

3 MR. JENSEN: Okay. But, your Honor, I just want to
4 clarify because it's important. They are using this pay
5 rate definition in 20636 saying that he didn't work
6 full-time in a BC duties or something like that, in order to
7 disqualify the higher payments to him.

8 And I'm saying that she's using sections of the pay
9 rate definition which logically couldn't apply in it's final
10 compensation year because he was out on disability. And I
11 believe she just said that they don't require full-time work
12 during normal working hours when it's a 4850 payment; is
13 that correct, Ms. Lueras?

14 THE WITNESS: I think you are mixing apples with
15 oranges.

16 BY MR. JENSEN:

17 Q Let me just ask you the question.

18 When it's a 4850 time and a person is on
19 disability, do you require them to work full-time during
20 normal working hours?

21 A They wouldn't be working because they are on
22 disability leave.

23 Q Right. And so -- go ahead.

24 A Which is an excused absence from work.

25 Q So which tests do apply under pay rate when it's a

1 4850 pay?

2 MR. KENNEDY: Asked and answered.

3 THE COURT: Overruled.

4 THE WITNESS: So, again, pay rate that's reported to the
5 system has to be verified against a publicly available pay
6 schedule. So when 4850 time is reported to the system,
7 again, I would not know the difference unless it was pointed
8 out to me by the employer. The employer would be the one to
9 tell me the person wasn't actually working. It's still
10 reported as if they were working.

11 So for example, instead of using 4850 time we'll
12 use vacation. I'm on vacation for a month at work; however,
13 my full-time pay rate and earnings would continue to be
14 reported as if I was working because I have accrued a
15 vacation. Same thing goes for 4850 time. This member is
16 excused from work, they continue to report that member as if
17 they were working full-time. So it's as if they were
18 working full-time. So no, they were not performing the
19 duties, but they were excused from work as if they were
20 working full-time.

21 So reporting that compensation to us it still has
22 to go through the process of "is it pay rate?" Is it
23 special compensation under the compensation of earnable
24 statute?

25 ///

1 BY MR. JENSEN:

2 Q But you don't require someone to work -- there's no
3 requirement that they work full-time during normal working
4 hours?

5 MR. KENNEDY: Asked and answered.

6 THE COURT: Overruled.

7 THE WITNESS: In essence, no.

8 MR. JENSEN: Okay. And --

9 MR. KENNEDY: Again, objection as to relevancy. CalPERS
10 doesn't require anybody to work. I don't know, it's vague
11 as to the term "requires to work."

12 THE COURT: Overruled. Your point it well taken,
13 Mr. Kennedy.

14 BY MR. JENSEN:

15 Q I just want to turn your attention down to
16 Subsection (g) of 20636(g)(1)?

17 A Yes.

18 Q And it says, "Compensation earnable for state
19 members means the average monthly compensation, as
20 determined by the board, upon the basis of the average time
21 put in by members in the same group or class at the same
22 rate of pay."

23 And then (g)(2) it says, "Notwithstanding the pay
24 rate for state members means the average monthly
25 remuneration paid in cash out of funds paid by the employer

1 to similarly situated members for the group or class, for
2 payment or member's service or for --

3 MR. KENNEDY: Your Honor, I'd like to make an objection
4 just for sake of time. Document speaks for itself.
5 Ms. Lueras has the PERL in front of her.

6 THE COURT: Overruled.

7 BY MR. JENSEN:

8 Q So are you familiar with this section?

9 MR. KENNEDY: Objection, your Honor, as to relevancy.
10 Subsection (g) applies to state employees on it's face this
11 is not a state employee. It's also not included in our
12 Statement of Issues for that reason.

13 THE COURT: Can I see the code section, please?

14 THE WITNESS: Sure.

15 THE COURT: Subsection (g)(2) is for state members.

16 MR. JENSEN: I understand, your Honor. And I want to
17 get her knowledge about whether there's a similar section
18 for other members and local members and --

19 THE COURT: Then ask her that question. But (g)(2)
20 doesn't apply, so it's irrelevant.

21 BY MR. JENSEN:

22 Q Is there a companion section that's applicable to
23 other members, other than state members, which allows time
24 off to be considered compensation earnable without respect
25 to any other --

1 MR. KENNEDY: Your Honor, I make an objection to
2 argumentative. Asking for legal conclusion. He's made the
3 assumption about time off, et cetera, is, you know --

4 MR. JENSEN: Your Honor, I just want to make this. This
5 is one of the issues that I've requested a witness to
6 testify about is the different policy and practice of
7 CalPERS regarding using this 4850 time in compensation or
8 earnable compensation. And, you know, I've tried to develop
9 testimony. There's been a lot of --

10 MR. KENNEDY: I don't --

11 MR. JENSEN: -- interference in my request for this
12 information.

13 It seems very relevant to me about what sort of
14 rules they apply to the 4850 payments. And the testimony
15 I've been getting is essentially that they apply, you know,
16 they sometimes apply them, sometimes don't. And it seems to
17 me to be very odd to say that they apply these rules about
18 normal working hours when someone has a disability or that
19 they look back on the prior period before the disability,
20 when the compensation section is disjointed.

21 MR. KENNEDY: I have --

22 THE COURT: Stop, Counsel.

23 That's your argument. The witness is testifying
24 about how she has determine it. I don't find that she is
25 not knowledgeable and isn't answering your question. You

1 may not like her answers, but you can make that argument to
2 me.

3 MR. JENSEN: I mean --

4 THE COURT: I don't find that she's not -- right now you
5 are trying to ask her about a state employee and her
6 knowledge of that, and it's not relevant to this proceeding.

7 MR. JENSEN: I understand, your Honor. So if I can just
8 develop that a little bit.

9 BY MR. JENSEN:

10 Q What is the difference between state and the local
11 employees with respect to 4850 time?

12 A I don't --

13 MR. KENNEDY: Vague.

14 THE COURT: Go ahead.

15 THE WITNESS: I don't review state members so I'm not
16 sure.

17 BY MR. JENSEN:

18 Q So what's your area of expertise in the
19 Compensation Review Unit?

20 A Public agencies and schools.

21 Q And so are you aware of any policies or procedures
22 regarding the use of 4850 time in the Compensation Review
23 Unit?

24 MR. KENNEDY: It's been asked and answered.

25 THE COURT: She didn't testify about it. He can ask the

1 question.

2 THE WITNESS: So are there any policies and procedures
3 in place for state members?

4 BY MR. JENSEN:

5 Q No.

6 In the Compensation Review Unit regarding 4850
7 time?

8 A No.

9 Q And do you look at the Labor Code at all because
10 4850 is in the Labor Code?

11 A No. We don't review the Labor Code because --

12 MR. KENNEDY: Vague. Relevance.

13 THE COURT: Overruled. She just said no.

14 THE WITNESS: We determine compensation.

15 MR. JENSEN: Just a few more questions, your Honor.

16 BY MR. JENSEN:

17 Q Can you identify the legal authority that you have
18 that applies the job duties -- let me strike that.

19 What legal authority do you have that allows you to
20 look at the 4850 payment and see that, and use the prior job
21 characteristics in changing the 4850 payment?

22 MR. KENNEDY: Objection. Competency. This witness is
23 not -- well, he's asking for a legal interpretation of this
24 witness.

25 THE COURT: Well, it also assumes facts not in evidence.

1 I didn't hear her tell me that she changes the 4850 payment.
2 I didn't hear her tell me the job characteristics. She said
3 she got numbers and to her she's not told whether it was
4 4850 or normal work time, and it doesn't matter. And she
5 checks the publicly available pay schedule to see the
6 person's title. If they were getting paid. If this was the
7 correct compensation being reported and makes a
8 determination.

9 THE WITNESS: Correct.

10 BY MR. JENSEN:

11 Q And so in your mind is the 4850 payment in 20630
12 any different than compensation that is received for work?

13 A No.

14 Q And in your experience are disability payments any
15 different than compensation received in work?

16 MR. KENNEDY: Vague.

17 THE WITNESS: I'm not sure I'm understanding your
18 question.

19 BY MR. JENSEN:

20 Q In your work, is there any time disability payments
21 are treated differently than compensation for work?

22 A No. Again, because it reported exactly the same.

23 Q And --

24 MR. KENNEDY: Move to strike. I object on the grounds
25 that the question was vague as to what is meant by "is

1 compensation treated the same." As long as it's her
2 analysis of final comp.

3 THE COURT: Okay.

4 BY MR. JENSEN:

5 Q And in your office do you ever review industrial
6 disability payments?

7 MR. KENNEDY: Objection. Vague. Relevancy.

8 THE COURT: Do you understand the question?

9 THE WITNESS: I don't know. What do you mean by
10 "industrial disability payments."

11 BY MR. JENSEN:

12 Q Have you heard the term "industrial disability
13 payments"?

14 A The only term I've heard is Industrial Disability
15 Retirement.

16 Q Do you ever review Industrial Disability
17 Retirements?

18 A So if a industrial disability application is
19 received, yes, we do review the compensation that was
20 reported and insure it's compensation earnable, just like
21 any other retirement case.

22 Q And in your mind is there a difference between
23 Industrial Disability Retirement time and 4850 time?

24 MR. KENNEDY: Objection. Lack of foundation. Vague.
25 Relevancy.

1 THE COURT: Industrial disability is when a person is
2 injured on the job and they are go out for retirement on
3 that basis.

4 MR. JENSEN: Right. Mr. Lewis filed an Industrial
5 Disability Retirement application.

6 MR. KENNEDY: Technically --

7 THE COURT: That's not what's in front of me.

8 MR. JENSEN: And what I'm asking is just for the
9 witness's --

10 MR. KENNEDY: The question was, "Does the witness review
11 Industrial Disability Retirement?"

12 THE COURT: Mr. Kennedy, if you could not interrupt
13 Counsel, I would appreciate it.

14 MR. KENNEDY: Thank you, your Honor.

15 MR. JENSEN: I'm just trying to plum her knowledge of
16 disability payments.

17 THE COURT: And she said repeatedly they don't matter.

18 MR. JENSEN: Right.

19 I have no further questions.

20 THE COURT: Any redirect?

21 MR. KENNEDY: Yes.

22

23 REDIRECT EXAMINATION

24 BY MR. KENNEDY:

25 Q You have the PERL still until front of you,

1 Ms. Lueras?

2 A I do.

3 Q And looking at -- unfortunately --

4 MR. KENNEDY: Can I have one minute, your Honor?

5 THE COURT: Yeah.

6 MR. KENNEDY: Would you like a PERL too?

7 THE COURT: That would be great. I didn't pack mine
8 when I came up.

9 (Off the record)

10 THE COURT: Back on the record.

11 Ma'am, I remind you you are still under oath.

12 BY MR. KENNEDY:

13 Q Ms. Lueras, in your job you essentially review and
14 make adjustments if necessary to reported compensation to
15 make sure it conforms with the requirements under 20636 and
16 other parts of the PERL for compensation earnable to be used
17 in calculation of a member's retirement; right?

18 A Correct.

19 MR. JENSEN: Vague as to "other parts."

20 THE COURT: Overruled.

21 THE WITNESS: Correct.

22 BY MR. KENNEDY:

23 Q So merely the fact -- employers, ideally, are going
24 to report compensation of employees that are equivalent or
25 close to what is compensational but --

1 MR. JENSEN: Objection.

2 MR. KENNEDY: -- they don't always do that, do they?

3 MR. JENSEN: Objection. Assumes facts not in evidence.

4 Testimony by the attorney.

5 THE COURT: Sustained.

6 MR. KENNEDY: Do you make --

7 MR. JENSEN: Move to strike the prior comment --

8 MR. KENNEDY: Please refer to --

9 THE COURT: Everybody make an objection and stop, okay.

10 Go ahead, Counsel.

11 BY MR. KENNEDY:

12 Q You have the PERL in front of you; correct?

13 A Yes.

14 Q Please take a look at 20630, and this was the

15 section we were talking about, the definition of

16 compensation under the --

17 THE COURT: Do you need one?

18 MR. JENSEN: Yeah. I'm online.

19 THE COURT: Okay.

20 MR. KENNEDY: Right.

21 THE WITNESS: Repeat your question.

22 BY MR. KENNEDY:

23 Q That's the definition of compensation for the PERL?

24 A Correct.

25 Q Not every amount of money that's paid to a member

1 by their employer even qualifies as compensation?

2 MR. JENSEN: Objection. Leading question on redirect.

3 MR. KENNEDY: Is that correct?

4 THE COURT: Overruled.

5 THE WITNESS: Correct.

6 BY MR. KENNEDY:

7 Q So these categories of compensation are at least
8 reportable?

9 MR. JENSEN: Objection. Is there a question?

10 THE COURT: That was his question.

11 MR. JENSEN: I'm sorry, objection. Testimony by -- I'd
12 move to strike --

13 MR. KENNEDY: Is that correct?

14 THE COURT: Overruled.

15 THE WITNESS: Correct.

16 BY MR. KENNEDY:

17 Q Could you look at 20630(b)?

18 A Yes.

19 Q Okay. And in that provision it talks about the --
20 basically expressed how the employer is supposed to report
21 the compensation in (a) to CalPERS; correct?

22 THE COURT: Sir, I'm going to just remind you this is
23 direct not cross. You are asking cross-examine questions.

24 MR. KENNEDY: What I'm trying to do is there was
25 questions concerning 20630(a), but (b) was never discussed

1 by Mr. Jensen and this last sentence --

2 MR. JENSEN: Objection. Your Honor --

3 THE REPORTER: One at a time.

4 THE COURT: Everybody just stop. Okay.

5 Sir, you need ask open-ended questions on direct
6 exam.

7 MR. JENSEN: Your Honor, I move to strike his testimony.

8 THE COURT: He's not testifying.

9 Go ahead, Mr. Kennedy, what was your question?

10 BY MR. KENNEDY:

11 Q Do you apply this as a tie between -- in other
12 words, you testified for compensation you look to get the
13 compensation reported, then you go to 20636 and review it as
14 to whether it's compensation earnable under 20636; correct?

15 MR. JENSEN: Objection. Leading.

16 THE COURT: Overruled. He's just trying to summarize
17 her testimony.

18 BY MR. KENNEDY:

19 Q Correct?

20 A Correct.

21 Q And, in fact, that's what 20630(b) is expressing;
22 correct?

23 MR. JENSEN: Objection, your Honor. Leading.

24 THE COURT: Overruled.

25 THE WITNESS: Correct.

1 BY MR. KENNEDY:

2 Q Direct your attention to the 20036.

3 A Yes.

4 Q And should I say this succinctly, and correct me if
5 I, at all, misstate your testimony.

6 But I understood from your testimony that --

7 THE COURT: No. You are not doing that, Counsel.

8 Ask her an open-ended question.

9 BY MR. KENNEDY:

10 Q If a member retires while on disability, are you
11 going to consider the payments that they received, let's say
12 on disability leave, the same? Treat those and review those
13 the same as if that payment had been received while they
14 were working?

15 MR. JENSEN: Objection, your Honor. A leading question.

16 THE COURT: Overruled.

17 THE WITNESS: Only if they fall under the category of
18 4800 or 4850.

19 BY MR. KENNEDY:

20 Q And when we look at 20036, do you consider that
21 section basically as being instructive of we consider the
22 position when reviewing that 4850 pay, we're going review
23 the pay rate -- the compensation reported --

24 THE COURT: I'm going to strike your question because
25 it's a leading question. An open-ended question is: What

1 do you do with 20036 for your calculations, ma'am?

2 THE WITNESS: 20036 is basically saying that industrial
3 disability payments must be determined to be compensation
4 before they are used in a calculation of benefits.

5 THE COURT: And then did you go back to the PERL for
6 20636 to see if it's compensational?

7 THE WITNESS: Correct. Correct.

8 THE COURT: Thank you.

9 BY MR. KENNEDY:

10 Q You were sitting through all the testimony in this
11 hearing; right?

12 A Yes.

13 Q And thus far, have you heard anything that would
14 have altered your determination in this matter?

15 A Altered my --

16 Q Alter your determination concerning the percability
17 of the Delta payment for the Battalion Chief?

18 A No.

19 MR. JENSEN: Objection. Vague as to "Delta payment".

20 MR. KENNEDY: Do you understand what I mean?

21 THE COURT: Overruled. His question is: Did you hear
22 anything in the last several days that changed your mind?

23 THE WITNESS: I didn't hear anything that changed my
24 mind regarding the Delta or the temporary upgrade pay that
25 was reported as special compensation pay, no.

1 BY MR. KENNEDY:

2 Q And as to pay rate, do you look to what other
3 members of a similar group and class as the member who is
4 retiring, do you look to their -- to the pay rate of other
5 members in the similar group or class to determine what is
6 allowable as of the specific members pay rate?

7 A Right. So the pay rate must be pursuant to the pay
8 schedules, paid to similar situated members. Yes, part of
9 20636.

10 Q So you have a publicly available pay schedule?

11 A Right.

12 Q What position did Mr. Lewis retire in?

13 A Fire Captain.

14 Q Okay. And under Exhibit 14 in our tab --

15 A Respondent's?

16 Q No -- yeah. That one; is that correct?

17 We have the payroll detail reports; correct?

18 A Correct.

19 Q Okay. And are you familiar with the pay rate that
20 exists? The publicly available pay schedule that existed in
21 San Bernardino at this time for Fire Captains?

22 A Yes, I do believe that was one of the documents
23 that I reviewed.

24 Q And is the pay rate for this member reported in
25 this detail?

1 A Yes, there is a pay rate listed.

2 Q And under pay rate, what pay rate is being
3 reported?

4 A Several different pay rates, but the last reported
5 pay rate for the effective date of December 31st, 2012,
6 which is the last date of the pay period was \$9,037.

7 Q And does that conform to your understanding to the
8 pay rate for what the Fire Captain is?

9 A Without looking at the pay schedule -- I'm looking
10 at Exhibit 15 in CalPERS binder, and that's the pay schedule
11 that I used to verify that the 9,037 for Fire Captain was
12 reported as the pay rate.

13 Q Now, there's a separate category under earnings?

14 A Yes.

15 Q And how do you take that into consideration in your
16 determination for pay rate or for comp. earnable.

17 A So earnings isn't taken into consideration for
18 compensation earnable. Earnings is there to calculate the
19 amount of service the member would receive for that pay
20 period.

21 Q And what gets reported under the category of
22 earnings?

23 A So pay rate is the full-time pay rate for the
24 person or for the position. And then the earnings are the
25 actual number of hours worked. So if a person were working

1 part-time it would reflect part-time service. If working
2 full-time more than likely the pay rate would match.

3 Q As far as the determination of what the time comp.
4 would be, you would look at the pay rate, not the earnings?

5 A Correct.

6 Q Okay. And then the other column --

7 THE COURT: Can I stop you one second.

8 In a case like this where people can work overtime,
9 earning could also be reflective of the overtime?

10 THE WITNESS: Only the overtime falls under the category
11 of FLSA, Fair Labor Standards Act. It's actually an item of
12 special compensation. That is a little more involved with
13 determining whether or not it is reportable, but overtime in
14 general actually is excluded under 20635.

15 BY MR. KENNEDY:

16 Q Right. And employers are not to report overtime?

17 A Correct.

18 THE COURT: No, but my question is: For the earnings on
19 Exhibit 14, that's basically what your paycheck is?

20 THE WITNESS: No.

21 THE COURT: What's the earnings?

22 THE WITNESS: There could be a variation. Whatever is
23 actually reportable to CalPERS would be reflected in the
24 earnings. So we've had discussion about other items being
25 included in member's paycheck. Let's say car allowance or

1 deferred compensation payments, those wouldn't be captured
2 in the earnings. So it's reflective of whatever is
3 reportable to the system.

4 THE COURT: So earnings is what the employer is
5 reporting to CalPERS?

6 THE WITNESS: Correct.

7 THE COURT: That's not the same thing as what is earning
8 compensable that you use for determining whether or not they
9 can calculate it in retirement?

10 THE WITNESS: So I don't think I'm following your
11 question.

12 THE COURT: Earnings is just what the employers report,
13 but that doesn't mean that's what you're gonna give the
14 retirements based on.

15 THE WITNESS: Right. The final compensation is based on
16 the pay rate and the special compensation.

17 BY MR. KENNEDY:

18 Q And items such as overtime are not to be reported?

19 A Correct.

20 Q And unless they somehow -- or an item such as
21 deferred comp., certain types of deferred comp. are not to
22 be reported?

23 MR. JENSEN: Objection, your Honor.

24 MR. KENNEDY: Correct?

25 MR. JENSEN: Is there a question? It's leading if there

1 is.

2 THE COURT: Overruled.

3 THE WITNESS: Correct. Deferred comp. is not.

4 MR. KENNEDY: I just want to make sure that -- I thought
5 the Court's question was that somehow I could take the
6 determination of whether overtime was paid by looking at the
7 earnings.

8 THE COURT: No. That was not my question. My question
9 was: Can overtime be included in this earning what they
10 reported to you?

11 THE WITNESS: It shouldn't be, no.

12 BY MR. KENNEDY:

13 Q The Delta, as we referred to it, payments for the
14 BC pay was reported to CalPERS as special compensation;
15 correct?

16 A Correct. Temporary upgrade pay.

17 Q And your opinion is it doesn't qualify as temporary
18 upgrade pay?

19 MR. JENSEN: Objection, your Honor. Please instruct the
20 leading questions.

21 THE COURT: Yeah. And you are going over stuff she said
22 at length in her original testimony. His recross was only
23 on this 4850 issue. She already talked about at length on
24 the first day of hearing about what her calculations
25 included.

1 Objection is sustained.

2 BY MR. KENNEDY:

3 Q You talked about the 4850 pay and the argument from
4 Counsel appears to be, or the statement that Counsel made
5 appears to be -- let me -- is it somehow by virtue of the
6 fact that those payments exceeded the pay rate of a Fire
7 Captain that they should be included as comp. earnable
8 because they were paid in the last 18 months of his
9 employment?

10 Can you define what your understanding of final
11 settlement pay is?

12 A So final settlement --

13 MR. JENSEN: Objection.

14 Okay. Go ahead, I'm sorry.

15 THE WITNESS: Final settlement pay is actually payment
16 paid to members in anticipation of separation from
17 employment. And they are specifically excluded.

18 BY MR. KENNEDY:

19 Q And is it made in excess of their normal pay rate?

20 A Right. The term is defined in the Regulation 570.
21 I don't know if you want me to read it.

22 Q No.

23 A Okay.

24 Q But would pay given to someone in anticipation of
25 their -- in addition to their pay rate in anticipation or

1 contemplation of their separation from service that is
2 excessive pay rate constitute final settlement pay?

3 A It could, yes.

4 Q So if I were to tell you that Mr. Lewis received
5 pay that was in addition to what the Fire Captain normally
6 received, and was given to him with the anticipation or
7 contemplation of his separation from service, would you
8 qualify that or disallow that as final settlement pay?

9 MR. JENSEN: Objection. Improper hypothetical.

10 THE COURT: You have to prove those facts. You may
11 answer the question.

12 MR. KENNEDY: I believe Mr. Glave testified to the fact
13 that the --

14 THE COURT: Don't argue, Counsel. That's your
15 hypothetical. I'll have to look through everything to see
16 if those facts were established.

17 THE WITNESS: So if the payments paid were in excess of
18 the payments -- I'm sorry. Repeat your question.

19 BY MR. KENNEDY:

20 Q Is it your determination that the normal pay rate
21 for Mr. Lewis is that of a Fire Captain?

22 A Yes.

23 Q And did he receive compensation reported in excess
24 of that pay rate?

25 A He received special compensation payments, yes.

1 Q And either his pay rate or special compensation --
2 can either pay rate or special compensation be allowed if it
3 also constitutes final settlement pay?

4 A No. Final settlement pay is excluded.

5 Q So if you found these payments to be in excess of
6 pay rate or special compensation, and were given to him in
7 anticipation or contemplation of the separation from
8 service, would they be disallowed then, notwithstanding that
9 they might otherwise qualify but disallowed on the basis of
10 final settlement pay?

11 MR. JENSEN: Objection, your Honor. Vague and ambiguous
12 and incomprehensible.

13 THE COURT: Overruled.

14 THE WITNESS: Yes. They could be deemed final
15 settlement pay excluded.

16 MR. KENNEDY: No other questions, your Honor.

17 THE COURT: Recross?

18 MR. JENSEN: Yes.

19

20 RECCROSS-EXAMINATION

21 BY MR. JENSEN:

22 Q Ms. Lueras, so final settlement pay is the
23 anticipation of retirement; is that correct?

24 A Final settlement pay is any pay or cash conversions
25 of employees benefits in excess of compensation earnable

1 that are granted or awarded to a member in connection with
2 or anticipation of separation of employment. That's the
3 definition in the California Code of Regulation 570.

4 Q So aren't all retirement benefits only an
5 anticipation of no longer working anymore?

6 A I don't think I'm following you.

7 Q Don't you only get retirement benefits when you
8 separate from your employment?

9 MR. KENNEDY: I'm sorry?

10 THE WITNESS: I don't understand your question.

11 BY MR. JENSEN:

12 Q Aren't all retirement benefits only when you retire
13 and no longer work?

14 A You receive your retirement warrant after you
15 retire, of course, yes.

16 Q The language there is, "In anticipation of
17 separation;" is that correct?

18 A That is --

19 MR. KENNEDY: That misstates the --

20 MR. JENSEN: Well, what is the language that you were
21 just referring to? The last paragraph or the last part of
22 that phrase.

23 THE COURT: In anticipation of a separation from
24 employment.

25 ///

1 BY MR. JENSEN:

2 Q Is that in anticipation of separation from
3 employment?

4 A Right. That a few words from it.

5 Q Does that modify the whole paragraph?

6 A Sorry.

7 Q Is a final settlement pay in anticipation of
8 retirement or separation of employment?

9 A So it's pay or cash conversions of employee
10 benefits --

11 Q I know what it reads.

12 What does it mean?

13 A So I'll give you an example.

14 Q No, no, no. What does it mean? Does it mean --

15 MR. KENNEDY: Well, I --

16 THE COURT: You are asking her for legal interpretation.

17 MR. JENSEN: Well, in your --

18 THE COURT: It means what it says. If she gives an
19 example, golden parachutes are severance pay.

20 BY MR. JENSEN:

21 Q And what is the defining characteristic of final
22 settlement pay that's different than other types of
23 retirement benefits?

24 A Say again.

25 Q What is the defining characteristic of final

1 settlement pay that's different than other types of
2 retirement benefits?

3 A I don't think I'm understanding. You're saying
4 different types of retirement benefits? I'm sorry.

5 Q Or different than any other -- yeah, retirement
6 benefit.

7 THE COURT: Here's what he is saying. If you look at
8 the language of 570, you are getting a final pay in
9 anticipation of leaving employment, which if I retire, I've
10 left the employment.

11 So what's the difference between the retirement you
12 are getting and this that you are getting in anticipation of
13 retirement? In both cases you are leaving employment.

14 THE WITNESS: Right. So I'm getting confused by the
15 retirement benefit. Because when I hear retirement benefit
16 I'm thinking of the pay check system that the member
17 receives once they retire.

18 So what this is referring to is any payments --
19 best way for me to explain it is an example. I am getting
20 ready -- I plan on retiring within the next year, within the
21 next 18 months. My employer says you've been awesome this
22 entire time you've been with us. We want to do you a favor
23 and bump your pay rate up, or give a bonus incentive because
24 we know you are leaving and we want to reward you for the
25 superior performance that you've given us over the years.

1 THE COURT: Or for example, some of the school districts
2 gave gold parachutes for people to leave so they didn't have
3 to do layoffs.

4 THE WITNESS: Exactly. So giving an extra incentive to
5 someone in anticipation of their separation. "We know you
6 are leaving, here's what we're going to give you." Or, "We
7 want you to leave, we'll give you this if you leave."

8 THE COURT: That number is not used even though you bump
9 me up, you don't use that for my retirement, you use what my
10 pay was.

11 THE WITNESS: Right. We're going to use anything that
12 was normal, consistent, and falls under compensation
13 earnable.

14 BY MR. JENSEN:

15 Q Okay. You listened to testimony yesterday of
16 Mr. Glave?

17 A Yes.

18 Q Did you believe that the way he characterized the
19 settlement and the underlying dispute, did you believe that
20 the settlement agreement was final settlement pay?

21 A Do I believe the --

22 Q Did you believe that the payment or the matters in
23 this settlement agreement could be considered final
24 settlement pay?

25 A Without reviewing the language one more time in the

1 severance agreement, it looks as though it was an agreement
2 made to settle a dispute. It could potentially be in
3 anticipation of severance, but, again, without reading the
4 entire argument I couldn't come to that conclusion.

5 Q And how could it potentially be in anticipation
6 of -- well, how could it potentially be final settlement
7 pay?

8 A So usually when we come across final settlement pay
9 with settlement agreements, settlement agreements to us are
10 a red flag to look for final settlement pay.

11 If there's language in there saying, "We're giving
12 you this because you are leaving on this day," or something
13 of that nature anticipating an end date of employment, then
14 that would call for review of final settlement pay.

15 Q And did you want to just take a look at this
16 agreement? It's in Exhibit 1 of the blue binder there,
17 Exhibit 2.

18 A Exhibit 2.

19 Q One and two are the same.

20 A I'll look at one.

21 Q That's fine.

22 THE COURT: Respondent's 1.

23 MR. JENSEN: Respondent's 1. Tell me when you've
24 finished.

25 THE WITNESS: I've read L.A.W. 011 through L.A.W. 017.

1 BY MR. JENSEN:

2 Q And do you believe that this agreement provides for
3 final settlement pay?

4 A I don't see anything in there that stipulates an
5 end date to Mr. Lewis's complainant, no.

6 Q Let me ask you this: Again, do you believe that
7 any payments would qualify or determine to be final
8 settlement pay?

9 MR. KENNEDY: Objection. It's limited to that document?
10 Is that the question?

11 THE COURT: He's asking her to look at the document.
12 Go ahead. Overruled.

13 THE WITNESS: So there are several other documents that
14 I have to look at to the make sure it's not final settlement
15 pay. Usually questions to the employer are to make sure
16 it's not final settlement pay.

17 THE COURT: Did you ever make a determination that any
18 of this was final settlement pay?

19 THE WITNESS: No. No determination.

20 BY MR. JENSEN:

21 Q And in your opinion right now, based on the
22 information you received in this case, are the payments
23 pursuant to final settlement pay?

24 A I'm just going through the dates in my head we went
25 over. So this was signed in 2007. He went out on the

1 disability 2010 -- I don't remember that date.

2 Just reading this document, I don't know.

3 Q You don't know, or no, it would not be final
4 settlement pay?

5 A Just reading this I don't know if it would
6 constitute final settlement pay.

7 Q And in all of the documents that you reviewed, do
8 you have enough information to determine whether it was
9 final settlement pay?

10 MR. KENNEDY: Are we going to look at documents or the
11 testimony?

12 BY MR. JENSEN:

13 Q In all the documents, testimony, and other matters
14 that you've reviewed in this Matter, what would be your
15 opinion regarding whether payments contributed to this
16 Settlement Agreement to be final settlement pay?

17 A Without going over all the documents right here
18 today, it wouldn't appear to be final settlement pay.

19 Q Let me move on to this issue about -- give you a
20 hypothetical.

21 If an individual is given a promotion which is
22 going to take effect in, say, three months --

23 MR. KENNEDY: I'm sorry. I'm having difficulty hearing.

24 MR. JENSEN: Oh, okay.

25 ///

1 BY MR. JENSEN:

2 Q Hypothetical, an individual is given a promotion
3 that's going to take effect in three months and he's a
4 safety officer, say he's a Fire Captain. And the day before
5 that promotion is going to go in effect, he's injured and
6 goes out on 4850 time. The next day the promotion takes
7 effect, he's promoted to Battalion Chief, and he holds that
8 Battalion Chief position for a year but performs no duties.

9 What would be your opinion about the rate at which
10 he should receive his final pension?

11 MR. KENNEDY: Objection. Vague. It's incomplete.

12 THE COURT: Overruled.

13 THE WITNESS: So in that instance, all of that
14 information would be housed under the employer, not under
15 CalPERS.

16 BY MR. JENSEN:

17 Q So the employer reports him a Battalion Chief for
18 that year, but he's performing no duties and he's actually
19 disabled, but he's entitled to the promotion before.

20 Assuming those facts.

21 A I don't really like hypotheticals. I just want to
22 say that because every instance is completely different. We
23 can have what appears to be the same situation for two
24 members; however, very minor details change determination,
25 very minor details.

1 Q I'm trying to get that information about what minor
2 details makes a difference to you.

3 So tell me, in this hypothetical what minor
4 differences would change your decisionmaking?

5 MR. KENNEDY: Objection. Vague. It's asking now the
6 witness to create the hypothetical.

7 THE COURT: Sustained. Basically the original question,
8 ma'am, if you could answer was: If you are going to be
9 promoted to the next step up, but before the promotion takes
10 effect you are injured, so you are out to 4850, but now for
11 this next year -- I'm hurt today and I'm promoted tomorrow.

12 What gets reported to CalPERS? And does CalPERS
13 consider that person in a promoted position or in a position
14 you were in when you were actually working?

15 MR. KENNEDY: And, your Honor, I'll make an argument
16 that there's no evidence that that's a scenario in this
17 case, and that would be a completely irrelevant question.

18 MR. JENSEN: Well --

19 THE COURT: There's issue regarding him being out
20 injured.

21 MR. KENNEDY: But it assumes that he was being promoted,
22 and the agreement itself expressly states --

23 THE COURT: Right. Exactly. I understand.

24 MR. JENSEN: I can make a different -- first, if I could
25 have the answer to the hypothetical.

1 MR. KENNEDY: I object to the hypothetical.

2 THE COURT: The objection is overruled. It was just my
3 question.

4 THE WITNESS: So, again, going back to not having all of
5 the documents in front of me, but it's dependant on how the
6 employee themselves report the payroll to us. Because,
7 again, I've said when the payroll comes in, we know no
8 defense of whether it's 4850 or if the person is actually
9 working. It's a pay rate earning special compensation
10 reported to us. Again, that would be entirely dependant on
11 how the employer reports to us.

12 THE COURT: But I expect the promotion tomorrow but I'm
13 injured today, you would expect the employer would then
14 report starting tomorrow my promoted time, my promoted
15 salary. And when you look at stuff, you would look at my
16 promoted title and the publicly available pay rate for my
17 promoted position, even though I did no duties because I was
18 out injured.

19 THE WITNESS: It's hard for me to answer it because --
20 let's put it this way, if the employer reported let's say
21 Fire Captain pay rate and the special compensation, I would
22 verify that that is compensation earnable. Same goes for if
23 the employer decided to report a pay rate and special
24 compensation for a Battalion Chief, I would then look to
25 make sure that is, in fact, compensation earnable as well.

1 So both instances would be correct.

2 THE COURT: Right. And to verify you would look at the
3 title of my position and the publicly available pay rate of
4 my position.

5 THE WITNESS: Right.

6 THE COURT: Because you verified that I've been promoted
7 to that position to earn the higher amount?

8 THE WITNESS: I would first look at the employee's
9 retirement application and see what position title is
10 actually indicated there. If it matches the salary schedule
11 that was reported for that position, no other questions
12 would be asked. But if there were any discrepancies, I
13 would reach out to the employer.

14 THE COURT: And in this case, because Mr. Lewis wasn't
15 promoted to Battalion Chief, that's why. He was a Fire
16 Captain.

17 THE WITNESS: I didn't look -- oh, I did look at Fire
18 Captain because that was the pay rate that was reported.
19 And that was the position that I was informed that he was
20 in.

21 MR. JENSEN: And --

22 THE COURT: Okay. Follow up.

23 And who informed you of that?

24 THE WITNESS: It was on his retirement application and I
25 also verified with the city because there was a slight

1 difference in the pay rate that was reported, and I think it
2 was just because I didn't have an updated salary schedule.

3 Oh, and I also noticed that there was some special
4 compensation that may have been contributed to Battalion
5 Chief. So I actually posed the question to the city, "Which
6 position is he in?" And then I was instructed that he was
7 Fire Captain and provided the Settlement Agreement.

8 THE COURT: Thank you.

9 BY MR. JENSEN:

10 Q Just two quick areas.

11 You mentioned that you look at how the city
12 reported it; is that correct?

13 A Yes.

14 Q And are you aware that CalPERS instructed the city
15 on how to report it?

16 A I'm aware of Carlous Johnson's letter, yes.

17 Q And do you think Carlous Johnson told the city
18 correctly how to report it?

19 A No. I believe that the correct instructions were
20 don't report it at all.

21 Q And so if you listen to the testimony here, and
22 assume that there was a promise on the city's behalf to
23 provide a pension at the BC rate, how would the city have
24 accomplished that?

25 MR. KENNEDY: Objection. Calls for speculation. Vague.

1 THE COURT: Overruled.

2 MR. KENNEDY: It also assumes facts not in evidence.

3 THE COURT: That parts overruled.

4 THE WITNESS: So my job is to determine if the
5 compensation reported to the system is, in fact,
6 compensation earnable. I don't get into the matters of the
7 city between them and their employees.

8 BY MR. JENSEN:

9 Q But you just previously indicated it depends on how
10 the city would have reported it. Whether it's accurately to
11 satisfy the compensation earnable definition.

12 Was that your testimony?

13 MR. KENNEDY: No. I'm sorry. It misstates.

14 THE COURT: His question was, "Is that your testimony?"
15 So overruled.

16 THE WITNESS: So say it one more time so I'm following.

17 BY MR. JENSEN:

18 Q So my question was to you: How could the city
19 accomplished the result of providing any pension for
20 Mr. Lewis at the BC rate?

21 MR. KENNEDY: Objection. Calls for speculation. It's
22 vague because it's asking about employment practices, and if
23 they would have promoted him.

24 THE COURT: Sustained. She can give you the reasons why
25 CalPERS is not going to recognize the BC rate and she's done

1 that repeatedly.

2 MR. JENSEN: Right.

3 THE COURT: You can ask her what would CalPERS have
4 needed to give him the BC rate for retirement?

5 THE WITNESS: Promoting him. That's the bottom line.

6 Because there is a Settlement Agreement, I have to
7 look at the documentation. I can't unsee that
8 documentation. I know that these payments were given to him
9 as a result of a settlement. It wasn't because the member
10 was promoted to that position, and therefore, the payroll
11 associated to the position that he was in was reported to
12 our system.

13 BY MR. JENSEN:

14 Q And have you heard the testimony today that
15 Mr. Lewis performed some of the duties or all of the duties
16 of the BC compensation.

17 Would that make a difference in your analysis?

18 MR. KENNEDY: Objection. There's been no testimony he
19 ever performed all of the duties of a BC.

20 THE COURT: I'm going to allow her to answer that
21 because the CalPERS letter -- one of the basis says that he
22 didn't perform duties and there was an issue whether or not
23 he did.

24 So overruled.

25 THE WITNESS: It's my understanding by hearing all the

1 testimony that it was sporadic, mostly in case of emergency
2 or if there was short staffing. So CalPERS, in general,
3 doesn't like to see compensation earnable or compensation
4 reported that is sporadic and not consistent, stable,
5 routine predictable.

6 BY MR. JENSEN:

7 Q Wasn't the BC compensation reported stable and
8 predictable to CalPERS?

9 A The payments were reported to the system constant,
10 or predictably, but that doesn't necessarily constitute it
11 as compensation earnable.

12 Q I understand.

13 But your testimony was that CalPERS liked to see
14 consistent reporting of payments?

15 THE COURT: No. She said what they'd want to see is
16 they did the consistent, sporadic routine to work, not
17 reporting; correct?

18 THE WITNESS: So, again, this is going -- this is like a
19 hybrid of going into HR or city affairs. We just see the
20 numbers that are coming in. If the agency says this person
21 is a Battalion Chief, I have no other reason to believe
22 otherwise.

23 THE COURT: Right.

24 THE WITNESS: If they said Fire Captain.

25 THE COURT: Stop you there.

1 What do you want to see is that he's not sporadic,
2 not unstable, not unroutined?

3 THE WITNESS: So payments, payments in general. Again,
4 just from sitting in on all of the testimony understanding
5 that there's a process in place on receiving temporary
6 upgrade pay or --

7 THE COURT: From the day reported forward, that was
8 reported routinely; correct?

9 MR. KENNEDY: Your Honor --

10 THE WITNESS: It was reported every pay period, yes.

11 MR. KENNEDY: Can I --

12 MR. JENSEN: Mr. Kennedy, this is cross.

13 MR. KENNEDY: -- to tie this back. The challenge
14 here -- the assertion that this was special comp. and the
15 claim was temporary upgrade pay.

16 Essentially when we get the crossover between --
17 special compensation is an exclusive list. It isn't just
18 like, "Do we feel this person should have this or not have
19 this," or whatever. We're not involved in the city or what
20 the city does. But to be reportable it has to fall under
21 the definition. And so when we look, we're going to look at
22 the definition of temporary upgrade pay, and it has specific
23 definitions as to things that would otherwise be the numbers
24 being reported they would say were these numbers being paid
25 for temporary upgrade pay.

1 THE COURT: Right. And I see CalPERS letters, so I know
2 what they did. So he's allowed to probe that.

3 BY MR. JENSEN:

4 Q And so with respect to your testimony, is CalPERS
5 likely to see the payments regularly reported to CalPERS; is
6 that correct?

7 A That's -- yes.

8 Q And that occurred; is that correct?

9 A The compensation was reported consistently, yes.

10 Q Okay. So CalPERS doesn't have a problem with that?

11 MR. KENNEDY: Objection to the term "consistently."

12 MR. JENSEN: Objection. That was her testimony.

13 THE COURT: Stop. Everybody stop. Okay.

14 Let him finish. Each of you are interrupting each
15 other constantly.

16 MR. JENSEN: Your Honor, I'm just trying to
17 cross-examine.

18 THE COURT: And I understand that.

19 Her answer was, "It was reported consistently."

20 MR. JENSEN: And so --

21 MR. KENNEDY: Vague as to time.

22 THE COURT: Special compensation from the date of the
23 Settlement Agreement forward was reported consistently;
24 correct?

25 THE WITNESS: Right.

1 BY MR. JENSEN:

2 Q And so is the CalPERS issue that Mr. Lewis -- the
3 compensation didn't qualify his temporary upgrade pay; is
4 that correct?

5 A Right. The special compensation did not meet the
6 temporary upgrade pay.

7 Q And did you analyze under pay rate at a regular
8 payment for the duties and responsibilities that Mr. Lewis
9 performed for the city?

10 A So looking at the Settlement Agreement, even if
11 let's say the Battalion Chief pay rate was reported
12 consistently, because I had the Settlement Agreement in
13 front of me, it would not qualify as compensation earnable.

14 Q Because?

15 A Because it specifically said that the member would
16 continuously be in the Fire Captain position; however, be
17 compensated at the level of Battalion Chief. So in my mind,
18 that's making him a group or class of one which cannot
19 happen for compensation earnable purposes.

20 Q It cannot happen at all for compensation because
21 the group or class?

22 A So I'll go to 20636(e)(1) talks about group or
23 class of agreement.

24 Q Hold on a second.

25 A Sure. Are you okay?

1 Q Yeah.

2 A So group or class employment is defined in
3 20636(e)(1) as, "A number of employees considered together
4 because they share similarity to the job duties, work
5 location, collective bargaining unit, or other logical
6 work-related grouping. One employee may not be considered a
7 group or class."

8 Q And can you refer to me where it says job title in
9 there?

10 MR. KENNEDY: Document speaks for itself.

11 THE COURT: I think Counsel was not in there.

12 BY MR. JENSEN:

13 Q And so did you inquire into what job duties
14 Mr. Lewis performed?

15 MR. KENNEDY: Asked and answered.

16 THE COURT: Overruled.

17 THE WITNESS: Again, that's getting into city affairs.

18 I don't sit at my desk and determine if a member has
19 completed a checklist of duties. That's not what I do.

20 What I do is determine if the payments reported to
21 our system are compensation earnable and can be used in
22 calculation of retirement benefits. In this case I was
23 given a Settlement Agreement that stipulates payments that
24 were only given to Mr. Lewis. They were not given to any
25 other member of his group or class of employees. That alone

1 excludes those payments from compensation earnable.

2 BY MR. JENSEN:

3 Q Let me just have you look at the definition. You
4 just said the group or class of employees means employees
5 considered together because of job duties.

6 A It's a list of things.

7 Q And there has been testimony that Mr. Lewis
8 performed the job duties of the BC, Battalion Chief.

9 Did you hear that?

10 A I did.

11 Q Would he be considered in the same group or class
12 of the other people that performed the job duties as a BC?

13 A Again, I was given documentation and instruction
14 from the city and validated by Mr. Lewis himself on his
15 retirement application that his group or class of employment
16 was that of a Fire Captain.

17 Q That was his job title?

18 A I go off of whatever documentation is given to me.
19 Again, if the city had given me documentation saying that
20 Mr. Lewis was a Battalion Chief, I have no reason to not
21 believe that. But that's not what was give to me. I was
22 given documentation showing that Mr. Lewis was a Fire
23 Captain, and was given benefits of a secondary position.
24 And his position of Fire Captain, there were no other Fire
25 Captains that received similar payments.

1 Q And so, again, you are referring to the title of
2 Fire Captain in the settlement agreement; is that correct?

3 A Yes.

4 Q And you are referring to the title of Battalion
5 Chief in the publicly available pay schedule; is that
6 correct?

7 A Right.

8 Q And you are saying that the title in a Settlement
9 Agreement of Fire Captain did not match the title of the
10 Battalion Chief on the publicly available pay schedule; is
11 that fair to say?

12 A So the reported pay rate was that of a Fire Captain
13 and not a Battalion Chief.

14 Q And yet you've just referred me to a code section
15 that talked about similarity in job duties and job location.

16 A Yes.

17 Q And so how does a job title fit into this
18 definition of group or class?

19 A So the job title is a specific portion of a group.
20 So in Mr. Lewis's instance, he is a fire safety employee
21 rank five, if you will. They follow the same MOU. So he
22 would be subject or entitled into the benefits and payments
23 in his group or class, which is identified as fire safety
24 Rank and File by his employer. If his employer had stated
25 to me that his category was that under the management

1 confidential MOU, then it would have changed -- or could
2 have changed -- my determination; however, I was also given
3 a Settlement Agreement that mirrored the instructions that
4 were given to me by the city that he was a Rank and File
5 employee.

6 Q If there is testimony that we elicit later today
7 that Mr. Lewis was in Fire Management subject to that MOU,
8 would that make a difference in your determination?

9 A No. Again, because I don't rely on what people --
10 sorry. Let me back up.

11 I rely on the documentation that's given to me. I
12 can't unsee the documentation I've seen. That's the
13 documentation I use. I also relied on the city to explain
14 what was going on with the situation. It was explained to
15 me in a way that I understood, and I was able to verify what
16 was reported to the system.

17 MR. KENNEDY: And I may --

18 THE COURT: This is cross. Don't jump in.

19 MR. KENNEDY: I just want --

20 THE COURT: No, Counsel. Out of line. You can wait
21 till your redirect.

22 MR. JENSEN: Ms. Lueras, I'm not asking you to unsee
23 anything. What we're trying to do in this hearing is show
24 that the terms used to be placed in context with the meaning
25 and placed in context of the --

1 THE COURT: What's your question Counsel?

2 BY MR. JENSEN:

3 Q Okay. So you just mentioned that something that
4 would be relevant to change your mind was whether -- what
5 management group, or if Mr. Lewis was in the Fire Management
6 group; is that correct?

7 MR. KENNEDY: Objection. Vague. Nonresponsive. It
8 doesn't reflect the testimony. I think she's referring to
9 Battalion Chief, if he was in the same group as a Battalion
10 Chief.

11 THE COURT: Overruled.

12 THE WITNESS: Again, my job is to determine if the
13 payments reported are compensation earnable. Bottom line,
14 that's what my job is.

15 BY MR. JENSEN:

16 Q And what I'm trying to do is give you information
17 to help you make that determination. And so I'm asking for
18 what additional information would help you make that. And
19 you mentioned this issue about whether he's in -- which
20 bargaining unit he's in.

21 Is that one piece of information that might be
22 helpful?

23 MR. KENNEDY: Asked and answered.

24 THE COURT: Overruled.

25 THE WITNESS: So I think you're underlying question that

1 you want answered is: Is there any documentation that would
2 overturn my determination?

3 The answer is no.

4 BY MR. JENSEN:

5 Q There's nothing I could say that would overturn it?

6 A My determinations are my determinations. And all
7 of the documents that are presented to me, even the
8 testimony that I've heard over the past four days, would not
9 change my determination.

10 Q So the only thing that would change it is if he was
11 actually historically promoted to BC; is that correct?

12 A The only that would change it is if the agency
13 reported BC and there was no Settlement Agreement.

14 Q So the existence of the Settlement Agreement itself
15 is problematic for you?

16 A Yes.

17 Q The existence of the dispute underlying the
18 Settlement Agreement, is that problematic too?

19 A I'm not aware of the dispute.

20 Q Did you hear the testimony yesterday by Mr. Glave?

21 A Yes.

22 Q Did that inform you --

23 MR. KENNEDY: Objection. Relevancy.

24 THE COURT: Overruled.

25 THE WITNESS: I understand there was maybe some

1 personnel issues.

2 BY MR. JENSEN:

3 Q Okay. So the Settlement Agreement -- the existence
4 of a Settlement Agreement is problematic for you --

5 A Yes.

6 Q -- correct?

7 And is it fair to say that his nonformal
8 appointment to the full BC position, is that problematic to
9 you?

10 MR. KENNEDY: Objection. Vague. "Nonformal promotion."

11 THE COURT: He said, "Nonformal appointment." Use the
12 correct term.

13 BY MR. JENSEN:

14 Q Yeah. That he was not formally promoted to BC. Is
15 that a problem?

16 A My problem is the documentation given to me did not
17 support a person working the position of Battalion Chief.

18 Q And the testimony here today about him performing
19 the duties of Battalion Chief, does that make a
20 difference -- in this hearing -- make a difference to you?

21 A No.

22 Q And why not?

23 A Again, the documentation presented to me supported
24 the facts that Mr. Lewis was Fire Captain. I do not ask the
25 agency what duties does this member performer. At best,

1 what I ask for when I'm reviewing a temporary upgrade pay
2 position or an upgrade payment that was reported to the
3 system, generally I ask for personal action forms showing
4 that the person was, in fact, entitled to the payments
5 pursuant to an MOU or any written member policy or
6 agreement.

7 In this case I was given a Settlement Agreement,
8 which was actually outside of what was written in the MOU
9 under their, I believe, acting pay.

10 Q And so in other words, you look for the city to
11 document each time there is an acting position in order to
12 substantiate the temporary upgrade pay?

13 A Yes.

14 Q And if there is no underlying documentation, then
15 what do you do?

16 A They we would deem the payment not reportable. If
17 you can't substantiate a payment, it wouldn't be reported to
18 the system.

19 MR. KENNEDY: Again, I'll object --

20 MR. JENSEN: Objection --

21 THE COURT: Stop. He's making a legal objection.

22 MR. KENNEDY: I'm making a legal objection as to the
23 assumption of the fact that there was or was not any
24 documentation. Mr. Lewis himself testified he was never
25 compensated in the acting position. So it's irrelevant.

1 The question is irrelevant.

2 THE COURT: Overruled.

3 MR. JENSEN: Does the answer stand?

4 THE COURT: The answer stands.

5 BY MR. JENSEN:

6 Q So was Carlous Johnson previously in your position
7 of this compensation review?

8 A Yes.

9 Q And so there was documentation submitted to Carlous
10 Johnson on the Settlement Agreement -- was submitted to
11 Carlous Johnson; is that correct?

12 A Yes.

13 Q And for Carlous Johnson, is it your understanding
14 that was sufficient for him to make the determination that
15 it was temporary upgrade pay?

16 MR. KENNEDY: Calls for speculation.

17 THE COURT: Overruled.

18 THE WITNESS: I think I testified in the first day in
19 reading Carlous's letter, it was my understanding he was
20 instructing the city on what bucket -- I put "bucket" in
21 quotes -- that the compensation would be reported in.

22 The city was instructed to report it as special
23 compensation. I don't know how far Mr. Johnson went in
24 making that determination; if he went through the process of
25 actually determining whether or not it was compensation

1 earnable. That wasn't apparent in my review of his file. I
2 don't know what process he went through to come to that
3 determination.

4 BY MR. JENSEN:

5 Q But, again, Mr. Johnson trained you; is that
6 correct?

7 A Yes, I did train with him.

8 Q For how long?

9 A For probably almost a year. Again, that was in my
10 first day of testimony as well.

11 Q Right. And what I'm asking is: So you are
12 familiar -- in during that year -- with his process?

13 MR. KENNEDY: Asked and answered. Relevancy.

14 THE COURT: Overruled.

15 THE WITNESS: Again, working in the Compensation Review
16 Unit, every single case is different. The amount of
17 documentation we need is completely different. So also, the
18 treatment of inquiries is completely different. So me
19 knowing his general process, yes, maybe I did know his
20 general process; but, again, because of each situation that
21 we come across is completely unique in itself. I couldn't
22 say definitively how he came to his determination.

23 BY MR. JENSEN:

24 Q But in this case it's not different, it's exactly
25 the same?

1 MR. KENNEDY: I'm sorry. I couldn't hear the statement.

2 BY MR. JENSEN:

3 Q In this case, it's the exact same case presented to
4 CalPERS. You received the Settlement Agreement; is that
5 correct?

6 A I don't understand your question.

7 Q You said each case is different, but I'm saying in
8 this case it's not different, it's the exact same matter; is
9 that correct?

10 MR. KENNEDY: Is that -- vague.

11 BY MR. JENSEN:

12 Q Is there anything else that's arisen that you've
13 looked at that's different from what Mr. Johnson had?

14 A All I had from Mr. Johnson's file --

15 MR. KENNEDY: Objection. It calls for speculation. It
16 lacks a foundation as to what Mr. Johnson looked at.

17 THE WITNESS: In Mr. Johnson's file all that was in
18 there was a copy of his letter, a fax cover page, as well as
19 a Settlement Agreement. That's all that I had that
20 Mr. Johnson potentially reviewed. If he reviewed anything
21 further, I'm not aware of.

22 However, in my determination I did contact the city
23 to understand the payments.

24 BY MR. JENSEN:

25 Q And let me ask you, do you have the power to make

1 final decisions?

2 A Theoretically, no.

3 Q Who has the power to make final decisions in the
4 Compensation Unit?

5 A Final decisions --

6 MR. KENNEDY: Objection. Vague as to the term "final
7 decisions." Lack of foundation.

8 THE COURT: Overruled.

9 THE WITNESS: With respect to determination letters that
10 are sent out to members regarding denial of payments, those
11 are signed by what was then my Staff Services Manager II,
12 and is now my Staff Service Manager III.

13 BY MR. JENSEN:

14 Q And did Mr. Johnson hold that position?

15 A No.

16 Q So when you make these determinations, are the
17 agencies entitled to rely on them?

18 MR. KENNEDY: Objection. Argumentative.

19 THE COURT: Sustained.

20 BY MR. JENSEN:

21 Q What is the purpose of making determinations in the
22 Compensation Review Unit for employers?

23 MR. KENNEDY: Objection. As far as the term
24 "determination." It would have almost a turn of heart
25 definition.

1 THE COURT: Sustained.

2 MR. JENSEN: Your Honor, I'd like to make an offer of
3 proof here that there are collateral estoppel and res
4 judicata arguments.

5 THE COURT: I'm aware of that.

6 MR. JENSEN: And in a certain case an equitable estoppel
7 too, but it's an idea about whether there's new and
8 additional facts that came in and what changed --

9 THE COURT: Right. Then ask her that.

10 BY MR. JENSEN:

11 Q Okay. What new and additional facts came into your
12 possession that changed your determination from what
13 Mr. Johnson made?

14 MR. KENNEDY: Objection, your Honor. That assumes that
15 what Mr. Johnson did was a determination.

16 THE COURT: Sustained. Take out the last part.

17 BY MR. JENSEN:

18 Q What new or different information came into your
19 possession that was different than what Mr. Johnson had?

20 A I'm not aware of everything Mr. Johnson had in his
21 possession.

22 THE COURT: I want to know what you saw in his file and
23 talking to the city.

24 THE WITNESS: That was the extent of my reach. Verified
25 pay rate, special compensation, contacted the city because I

1 had questions, received a response.

2 THE COURT: When you talked to the city, did you ask
3 what duties Mr. Lewis performed?

4 THE WITNESS: No, I don't question the duty.

5 THE COURT: Did anyone to your knowledge talk to the
6 city or anyone at the city about his duties?

7 THE WITNESS: Not that I'm aware of.

8 BY MR. JENSEN:

9 Q And what was the pay rate -- was the city's pay
10 rate available to Mr. Johnson?

11 MR. KENNEDY: Objection. Calls for speculation.

12 THE COURT: Sustained. She doesn't know.

13 BY MR. JENSEN:

14 Q Was there any fact outside of the facts in the
15 Settlement Agreement that you received that was important to
16 you in making your determination?

17 MR. KENNEDY: Asked and answered, your Honor.

18 THE COURT: Other than what she talked to the city
19 about.

20 MR. JENSEN: Other than what she talked to the city
21 about.

22 THE WITNESS: That's the only information I had to work
23 with.

24 THE COURT: Just so it's clear, what exactly was the
25 nature of your conversation with the city and who did you

1 talk to?

2 THE WITNESS: I believe I have the e-mail in my file
3 actually. I'm not exactly sure of the contact person that I
4 e-mailed, but I did have a series of questions asking what
5 MOU Mr. Lewis fell under and also requested additional
6 information regarding the temporary upgrade payments.

7 THE COURT: I see you looking at Mr. Kennedy.

8 Can we have that e-mail marked as an exhibit?

9 MR. KENNEDY: I think we do actually. I think this may
10 be in Exhibit 17. I think it's 17.

11 MR. JENSEN: Your 17?

12 MR. KENNEDY: The e-mails.

13 THE WITNESS: I think that's the response.

14 THE COURT: All of 17 is Georgia Chamberlain's, Senior
15 Finance Specialist, e-mail from the City of San Bernardino.

16 MR. KENNEDY: I think there were additional e-mails in
17 here.

18 THE COURT: You've got number 11.

19 THE WITNESS: It looks to be just the response from the
20 city to me.

21 MR. KENNEDY: Do you have it?

22 THE WITNESS: Should be --

23 MR. JENSEN: If I could get a copy.

24 THE COURT: Exhibit 10 and the index is wrong. It
25 called it 11 but 11 is the application, 10 is the e-mail.

1 Those are between Laura, Yavornicky,
2 Y-a-v-o-r-n-i-c-k-y, and Anne, no last name, and Matt
3 Fratus, F-r-a-t-u-s. It's a one-page document with an
4 e-mail from Matt to Anne and then from Matt to the Laura.

5 MR. JENSEN: Can I get a copy of that, please?

6 MR. KENNEDY: Well, let me look at it. And if we want
7 to take a break, I need to go to the restroom anyway.

8 THE COURT: We're coming up on 11:30, so I need give the
9 court reporter a break. We're going to go off the record
10 for 15 minutes.

11 MR. KENNEDY: Thank you.

12 (Off the record)

13 THE COURT: Back on the record. Ma'am, I remind you you
14 are still under oath.

15 I've marked as Exhibit Complainant's 19 the three
16 pages of the e-mail communication that's include Ms. Lueras
17 original e-mail. And page one of Exhibit C19 is already in
18 evidence as Exhibit 17 for Complainant.

19 (Complainant's Exhibit 19 was marked for
20 identification by the Court.)

21 BY MR. JENSEN:

22 Q So Ms. Lueras, can you review this document,
23 please?

24 A Yes.

25 THE COURT: I'm going to receive C19 into evidence.

1 (Complainant's Exhibit 19 was received
2 in evidence by the Court.)

3 BY MR. JENSEN:

4 Q Is this the e-mail that you sent?

5 A Yes, with other e-mails as well.

6 Q Other e-mails.

7 Can you explain what do you mean by that?

8 A I directed my question it looks like to the
9 incorrect area. There were a couple e-mails in between
10 within the city.

11 (Phone ringing)

12 MR. KENNEDY: This might be Ms. Tran.

13 Hello, Wes Kennedy.

14 THE COURT: We're off the record.

15 (Discussion off the record)

16 THE COURT: Back on the record.

17 Ma'am I remind you you are still under oath.

18 BY MR. JENSEN:

19 Q So looking at this document, who did you contact
20 for information about Mr. Lewis?

21 THE COURT: The document speaks for itself.

22 BY MR. JENSEN:

23 Q How did you choose Neil Thomsen of the Water
24 Department to contact for information about Mr. Lewis?

25 A So within my CalPERS system that we work from in

1 the business partner, or employer file, or electronic file,
2 it list contacts, and he was listed as one of the contacts.

3 Q And so did you make a direct inquiry of -- who did
4 you inquire of follow up for these documents?

5 MR. KENNEDY: Document speaks for itself.

6 THE COURT: Sustained.

7 BY MR. JENSEN:

8 Q Are there any other documents that you requested?

9 A That was the only e-mail that I sent to the city, I
10 believe.

11 Q And --

12 THE COURT: For the record, she's referring to C19.

13 MR. JENSEN: Your Honor, it's C17.

14 THE COURT: No. It's C19 the entire three pages.

15 MR. JENSEN: I'm sorry. I stand corrected there.

16 BY MR. JENSEN:

17 Q So did the city ever send you a pay schedule?

18 A I accessed the ones on their website.

19 Q How did you chose which pay changes to search for?

20 A There should only be one pay schedule.

21 Q Your request is, "provide me with the pay schedules
22 for this pay rate."

23 Did you find a pay schedule for that pay rate?

24 A For the 9075?

25 Q Or what did you find?

1 A I found a pay schedule that matched the 9037.

2 Q And did you follow up with the city after receiving
3 this letter from Georgia Chamberlain for any information?

4 A I don't recall.

5 Q Which MOU is the position of the Fire Captain
6 under? Fire Management or fire safety; is that correct?

7 MR. KENNEDY: I'm sorry?

8 THE COURT: The document speaks for itself. The city
9 answered her question.

10 BY MR. JENSEN:

11 Q And did the city indicate to you which MOU applied
12 to Mr. Lewis?

13 A The city responded stating they provided me with a
14 Settlement Agreement, as well as a letter from Carlous
15 Johnson. And they also indicated that Fire Captain is
16 covered under the fire MOU; however, on the position of Fire
17 Battalion Chief is covered under the Fire Management period
18 covered in October 5th, 2004, to the date of return.

19 Q So the city never told you which was applicable to
20 Mr. Lewis?

21 A No. My question asked --

22 MR. KENNEDY: Objection.

23 THE WITNESS: -- which category the position title fell
24 under.

25 ///

1 BY MR. JENSEN:

2 Q And did the city ever provide you with answers to
3 your other questions in your e-mail?

4 A I was directed to their website.

5 Q So you asked a question, "What position was
6 Mr. Lewis filling to receive the temporary upgrade pay, and
7 how long he'd been receiving the pay?"

8 Did they respond to those questions?

9 A I was provided the Settlement Agreement.

10 Q So in other words the documents that you used in
11 your analysis was the Settlement Agreement, the MOU for
12 Battalion Chief, and the MOU for the Fire Captain; is that
13 correct?

14 A I used the Settlement Agreement, and the fire
15 safety MOU, and the confidential management MOU that listed
16 Fire Management.

17 Q Any other information that you used in your
18 analysis?

19 THE COURT: Other than the salary schedule she's already
20 talked about.

21 MR. JENSEN: Other than the salary schedule.

22 MR. KENNEDY: And whatever she saw on the webpage.

23 THE COURT: She hasn't said that, so no.

24 THE WITNESS: What I recall from reviewing this is I
25 reviewed our system that houses all the information

1 regarding Mr. Lewis's account. Part of that is payroll
2 transcripts. Start with the payroll transcripts, from there
3 and with every single account I review and then seek pay
4 scheduling. And then MOU or other written policy or
5 agreement that substantiate any special compensation
6 payments made.

7 BY MR. JENSEN:

8 Q And then in this case you also reviewed the
9 Settlement Agreement?

10 A So in this instance when I was requesting
11 substantiation of the special commission payments, I was
12 provided the Settlement Agreement as such substantiation.

13 Q So are aware of the dates of the applicable MOU for
14 each of those groups?

15 MR. KENNEDY: Objection. Vague. And the document
16 speaks for itself.

17 THE COURT: Sustained.

18 MR. JENSEN: I think I have no further questions. I'll
19 just take a minute or two.

20 THE COURT: Take your time.

21 BY MR. JENSEN:

22 Q Oh, let me ask you, did you see anywhere where
23 there was phraseology about temporary upgrade benefits?

24 MR. KENNEDY: I'm sorry. Anywhere?

25 THE COURT: What do you mean?

1 BY MR. JENSEN:

2 Q In the review of the information that you received,
3 either in the MOUs, or the settlement agreements, or the
4 payroll transcripts.

5 Is there any mention, description of this temporary
6 upgrade?

7 MR. KENNEDY: I'm going to object to the question. Is
8 he asking did she see the words "temporary upgrade pay"?

9 THE COURT: That's what he's asking.

10 THE WITNESS: Yes. Temporary upgrade pay was reported
11 in the payroll system.

12 BY MR. JENSEN:

13 Q And how was it designated as temporary upgrade pay?
14 Can you show me in the transcripts?

15 A It's not in the transcripts. It's actually a
16 secondary screen that you have to access by clicking on the
17 special compensation.

18 Q Do you have documentation of that here?

19 A Yes.

20 THE REPORTER: Can I please ask you both to speak up a
21 bit.

22 MR. JENSEN: Yeah. Sure.

23 THE REPORTER: Thank you.

24 MR. KENNEDY: Thank you. I've been very good this time.
25 Last time I was on the record.

1 THE COURT: And, ma'am, I didn't hear the last part.

2 You have to access it by clicking on --

3 THE WITNESS: On the special compensation amount, and
4 then it takes you to a secondary screen.

5 THE COURT: Thank you.

6 MR. KENNEDY: What exhibit are you referring to?

7 THE WITNESS: So --

8 MR. JENSEN: Which document are you looking at?

9 THE WITNESS: I'm in the blue binder. It's Respondent's
10 binder.

11 THE COURT: Okay.

12 THE WITNESS: It's Exhibit 17.

13 THE COURT: Which page?

14 THE WITNESS: I'm looking at the first page.

15 THE COURT: Okay. Thanks.

16 THE WITNESS: Yes. So this is the screen that would
17 populate once I clicked on a special compensation amount.
18 It gives me a breakdown of the categories for what types of
19 special compensation were reported. And if you look down
20 towards the bottom of the page, there is "educational
21 incentive" under type, value of employer paid member
22 contribution, as well as temporary upgrade pay.

23 BY MR. JENSEN:

24 Q And what did you do with this information when you
25 saw on your screen that it says temporary upgrade pay?

1 A This is the screen I look at first, prior to
2 gathering any documentation. This is to get familiar with
3 the payroll that was reported in the system. I select a
4 sample of special compensation amounts that were reported,
5 and review the breakdowns, and that's where I begin to
6 gather information.

7 So I would gather information regarding the
8 educational incentive. The value of employer paid member
9 contribution, as well as the temporary upgrade pay. And if
10 there were other special compensation items, I would also
11 investigate those as well.

12 Q And you said you would investigate them. So tell
13 me what was your process of investigating this temporary
14 upgrade pay?

15 A So any time we see temporary upgrade pay we contact
16 the --

17 MR. KENNEDY: Your Honor, is this going -- I know we
18 don't stand to threshold, but this is repeating the first
19 day of testimony, and it's almost reduplicative of the first
20 day and it's going way beyond any scope --

21 THE COURT: It is.

22 MR. JENSEN: It is duplicative. I'll withdraw it.

23 So one last question.

24 BY MR. JENSEN:

25 Q Which MOU did you use in your analysis of

1 Mr. Lewis?

2 A I looked at both MOUs, both the fire safety and the
3 management confidential.

4 Q And did you determine that Mr. Lewis was in one or
5 the other of those groups?

6 A Based on the pay rate that was reported, as well as
7 the title that was on his service -- excuse me -- disability
8 retirement application, it was determined as per the city
9 that that title fell under fire safety.

10 MR. JENSEN: I have no further questions.

11 THE COURT: Any redirect?

12

13 FURTHER REDIRECT EXAMINATION

14 MR. KENNEDY: Testify what it was you mean by the
15 management confidential MOU.

16 My understanding is --

17 MR. JENSEN: Objection, your Honor.

18 THE COURT: No. I don't want your understanding of her
19 testimony.

20 MR. KENNEDY: Is it your understanding --

21 THE COURT: No. That's direct. Sorry, that's leading.
22 Open-ended, Counsel.

23 BY MR. KENNEDY:

24 Q What's your understanding of the position that
25 Mr. Lewis held?

1 A My understanding is that he was a Fire Captain.

2 Q Was that a management position?

3 A No.

4 Q So when you're referring to you looked at the
5 management confidential MOU, what you are referring to is
6 that --

7 MR. JENSEN: Objection, your Honor.

8 MR. KENNEDY: Are you referring that he was not
9 covered --

10 THE COURT: No, no, no.

11 MR. KENNEDY: -- under the management MOU?

12 MR. JENSEN: Objection.

13 THE COURT: Sustained.

14 BY MR. KENNEDY:

15 Q You were present for the testimony of Mr. Glave?

16 A Yes.

17 Q And do you recall Mr. Glave indicated that
18 Mr. Lewis's position as Fire Captain was not management?

19 A Yes.

20 Q In fact, there's been repeated testimony if you
21 recall -- do you recall the repeated testimony in this case
22 that he was Rank and File?

23 A Yes.

24 Q And the position of Fire Captain is Rank and File?

25 A Yes.

1 Q And are the duty statements for both the Fire
2 Captain and Battalion Chief -- are you aware they're on the
3 San Bernardino webpages?

4 A I believe they were presented as evidence.

5 Q And were you referred by San Bernardino to those
6 webpages as part of that e-mail?

7 MR. JENSEN: Objection. That document speaks for
8 itself. It's leading and it's contrary to her testimony.

9 THE COURT: Sustained.

10 BY MR. KENNEDY:

11 Q Did you look at the webpage for San Bernardino
12 County?

13 MR. JENSEN: Objection. Vague as to the webpage. And
14 vague and ambiguous as to time.

15 THE COURT: Overruled.

16 THE WITNESS: Yes, I did access the city's website.

17 BY MR. KENNEDY:

18 Q And are you aware of whether -- you've heard the
19 time of sporadic services that Mr. Lewis has performed on
20 occasions, functions he's performed that may be similar to
21 those of the BC?

22 MR. JENSEN: Objection. Your Honor, this is testimony
23 and inappropriate.

24 THE COURT: Sustained.

25 MR. JENSEN: Move to strike from the record.

1 THE COURT: Sustained.

2 BY MR. KENNEDY:

3 Q Is there any special compensation that would be
4 allowable to compensate -- no.

5 Under the temporary upgrade pay, would Mr. Lewis be
6 entitled to qualify for the type of services that you've
7 heard described in the testimony in this case?

8 MR. JENSEN: Objection. Leading again.

9 THE COURT: Sustained.

10 No, sorry. That's overruled. You can answer.

11 THE WITNESS: From hearing the testimony it sounds as
12 though Mr. Lewis did not qualify for what the city calls
13 "acting pay." There's a specific requirement that is in
14 place, prior to receiving those payments. From the
15 testimony that I've heard it does not sound as though
16 Mr. Lewis had fulfilled those requirements.

17 BY MR. KENNEDY:

18 Q And is the list of special compensation under the
19 PERL exclusive?

20 A Yes. Under 571(a), it's exhausted list.

21 MR. KENNEDY: I have no other questions, your Honor.

22 THE COURT: Thank you, ma'am. You are released.

23 MR. KENNEDY: I do have one more question, your Honor.

24 THE COURT: I guess we're back in. I just released her.

25 ///

1 REDIRECT EXAMINATION (Continued)

2 BY MR. KENNEDY:

3 Q The MOU you were referring to before is management
4 and confidential?

5 A Yes.

6 Q Okay. And so apparently it covers two categories.
7 You are referring to the management; correct?

8 MR. JENSEN: Objection, your Honor.

9 THE COURT: Sustained. You are leading, Counsel.

10 MR. KENNEDY: Is there --

11 MR. JENSEN: Your Honor, I believe Ms. Tran is here --

12 MR. KENNEDY: Is management --

13 THE COURT: Everybody stop one second.

14 We're going off the record because the witness
15 showed up.

16 (Discussion off the record)

17 THE COURT: Back on the record.

18 Ma'am, I remind you you are still under oath.

19 BY MR. KENNEDY:

20 Q Let's assume that Mr. Lewis performed some
21 confidential employee functions, but wasn't management.

22 Would you come to -- still be the same conclusion
23 that he did not qualify for a Battalion Chief pay --

24 MR. JENSEN: Objection, your Honor.

25 MR. KENNEDY: -- or temporary upgrade pay?

1 MR. JENSEN: Objection, your Honor. Assumes facts not
2 in evidence and incompetence of her testifying about --

3 THE COURT: Overruled. It's a hypothetical. He's got
4 to the establish the facts.

5 You can answer, ma'am.

6 THE WITNESS: I don't think I was following your
7 question a hundred percent.

8 BY MR. KENNEDY:

9 Q The MOU referred to as management and confidential.

10 A Yes.

11 Q And is it your understanding that the management
12 was for positions higher than Fire Chief?

13 MR. JENSEN: Objection. Misstates the record. "Higher
14 than Fire Chief."

15 THE COURT: Sustained.

16 BY MR. KENNEDY:

17 Q I'm sorry. Higher than a Fire Captain?

18 A Listening to testimony it sounds as though Fire
19 Captain is below Battalion Chief; correct.

20 Q And the determination of confidential -- if someone
21 were a confidential employee, would that qualify them for
22 temporary upgrade pay as a Battalion Chief?

23 MR. JENSEN: Objection. Assumes facts not in evidence.
24 Improper hypothetical.

25 THE COURT: Overruled. He's got to establish the facts.

1 THE WITNESS: Yeah. I don't think I'm following your
2 question.

3 BY MR. KENNEDY:

4 Q Do you know what a confidential employee is?

5 A That's up to the employer to identify who the
6 confidential employees are.

7 MR. KENNEDY: And -- never mind.

8 I can make a legal argument on it. No other
9 questions.

10 MR. JENSEN: Your Honor, just follow up.

11

12 FURTHER RECROSS-EXAMINATION

13 BY MR. JENSEN:

14 Q To your knowledge, was Mr. Lewis in the fire
15 management confidential group?

16 A No.

17 Q Was he a confidential employee?

18 A No.

19 Q Was he a management employee?

20 A No.

21 Q And was he a solely Rank and File member?

22 A Yes.

23 Q And what do you base that on?

24 A Again, going back to the position title fell under
25 the category of fire safety.

1 Q So you are basing it solely on the title of the
2 position that was reported?

3 A I rely on the agency to tell me what group or class
4 it falls under.

5 Q But you just mentioned that the employer determines
6 what group an individual is in; is that correct?

7 A The agency should identify what position titles to
8 fall under what category.

9 Q Did they did they do that in this case?

10 A Yes.

11 Q And so what you are saying is basically by
12 designating Mr. Lewis in a Fire Captain title that that is
13 the group or class that he is in; is that correct?

14 A Because the information that was given to me stated
15 that Mr. Lewis was a Fire Captain. I then looked to his
16 group or class, the broader spectrum would be the fire rank
17 and file.

18 Q And my question was: You base that solely on the
19 job title?

20 A I base that on information given to me by the
21 agency.

22 Q What part of the information?

23 MR. KENNEDY: It's been asked and answered, your Honor.

24 THE COURT: Overruled. She's dancing around the answer.

25 THE WITNESS: Again, the information that's given to me

1 by the agency --

2 THE COURT: Wait. What's the information given to you
3 by the agency is his question?

4 THE WITNESS: They were reporting a Fire Captain pay
5 rate. The agency informed me that the Fire Captain is
6 covered under the fire MOU. That's my line of thinking.

7 MR. JENSEN: No further questions, your Honor.

8 THE COURT: Thank you, ma'am. Now you are released.

9 MR. KENNEDY: And would it change your opinion --

10 THE COURT: I've got to swear her. I released her.
11 You are done.

12

13 LOLITA LUERAS,
14 recalled as a witness, and having been previously duly
15 sworn by the Court, was examined and testified as follows:

16 THE WITNESS: Yes, thank you.

17

18 FURTHER REDIRECT EXAMINATION

19 BY MR. KENNEDY:

20 Q And does anything you have heard today in the
21 testimony of this case thus far from any of the witnesses
22 change your opinion that he was otherwise improperly grouped
23 and classed in the category of Fire Captain?

24 A I believe he was correctly grouped in the category
25 of fire safety.

1 Q Except for the fact that he's actually --

2 MR. JENSEN: Objection, your Honor.

3 THE COURT: Counsel you've got to ask her direct
4 questions. Nothing changed her opinion.

5 BY MR. KENNEDY:

6 Q Is it not true though that he constituted, based on
7 the pay, he constituted that that would make him -- if he
8 received that pay, he would not be -- he would be a group or
9 class of one; correct?

10 MR. JENSEN: Objection, your Honor.

11 THE COURT: Sustained.

12 BY MR. KENNEDY:

13 Q You previously testified PERL prohibits someone
14 from being a group or class of one?

15 A Correct.

16 Q And if someone falls -- and Mr. Lewis based on the
17 additional pay or settlement payments being reported --

18 MR. JENSEN: Objection.

19 MR. KENNEDY: -- constitutes group --

20 THE COURT: Counsel, you are arguing. You are not
21 asking questions.

22 BY MR. KENNEDY:

23 Q Based on the testimony you've heard through this
24 case, you classified Mr. Lewis as group or class one?

25 A Yes.

1 Q For purposes of compensation?

2 A Correct.

3 Q And when you are reviewing a group or class of one,
4 are you directed by the PERL then to refer to the pay rate
5 and the compensation provided to similar people in the same
6 group or class that was reported for the individual?

7 A Correct.

8 Q That would bring you back, regardless of what he
9 was paid, back to --

10 MR. JENSEN: Objection, your Honor.

11 MR. KENNEDY: -- the pay rate required --

12 THE COURT: Counsel, you are making an argument.

13 MR. JENSEN: Argumentative.

14 THE COURT: Sustained. You --

15 BY MR. KENNEDY:

16 Q So if you had to regard the pay of group or class
17 of one, would you go to a similar group or class?

18 MR. JENSEN: Objection, your Honor.

19 THE COURT: What's the objection?

20 MR. JENSEN: Withdraw.

21 THE WITNESS: Yes.

22 BY MR. KENNEDY:

23 Q And in this case that would be Fire Captain.

24 A Yes.

25 Q And that was, in fact, how he was reported. And

1 that was supported by the schedules that you saw?

2 A Correct.

3 MR. KENNEDY: No other questions.

4 MR. JENSEN: Let me just do a follow up.

5

6 FURTHER RECROSS-EXAMINATION

7 BY MR. JENSEN:

8 Q Isn't it true that the group or class is based on
9 duties and similar work location?

10 MR. KENNEDY: Objection. Misstates the --

11 THE COURT: Overruled.

12 THE WITNESS: A group or class is defined 20636(a)(1) as
13 a number of employees considered together because they share
14 similarities and job duty, work location, collective
15 bargaining unit, or other logical work-related grouping.

16 BY MR. JENSEN:

17 Q So here's a hypothetical: If Mr. Lewis worked in
18 the same location as Battalion Chief, performed the duties
19 of the Battalion Chief, and was in the management group of
20 similar to Battalion Chief, what group or class would you
21 put him in?

22 A Again, I look to the agency to tell me what group
23 or class an individual falls under.

24 Q Based on job title; is that correct?

25 A Whatever they deem is the correct process to put

1 them in a group or class. In this case --

2 Q So if the city treated Mr. Lewis in the management
3 confidential fire group, then would you accept that
4 designation?

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

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

8 THE WITNESS: Repeat your question.

9 BY MR. JENSEN:

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

13 MR. KENNEDY: Relevancy.

14 THE COURT: Overruled.

15 THE WITNESS: This is a loaded question.

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

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

23 BY MR. JENSEN:

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

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

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

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

6 Q What is the starting point?

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

8 Q And what's the next step?

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

11 Q But we're talking about group or class.

12 Did you look at the code section of group or class?

13 A I did.

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

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

18 THE COURT: It's defined by statute.

19 BY MR. JENSEN:

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

22 A No.

23 Q Did you look at job duties?

24 A No.

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

1 issues?

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

5 Q So do you --

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

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

11 MR. KENNEDY: Objection.

12 MR. JENSEN: Excuse me, Mr. --

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

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

16 BY MR. JENSEN:

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

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

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

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

25 Q So if he was paid the BC rate, he would be paid --

1 the pay would be available to all BCs if he was in that
2 group?

3 MR. KENNEDY: Your Honor, vague question.

4 THE COURT: Overruled.

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

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

9 MR. KENNEDY: Objection, your Honor.

10 THE COURT: You can all make arguments in closing.

11 MR. JENSEN: Okay.

12 THE COURT: Do you have anymore questions?

13 BY MR. JENSEN:

14 Q So let me just lastly phrase it.

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

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

22 MR. JENSEN: No further questions.

23 MR. KENNEDY: I do have one more.

24 THE COURT: Of course.

25 ///

1 FURTHER REDIRECT EXAMINATION

2 BY MR. KENNEDY:

3 Q The determination -- I just want to clarify one
4 point.

5 The determination of group and class is one made by
6 CalPERS; correct?

7 MR. JENSEN: Your Honor, is this a question?

8 THE COURT: Counsel, you are leading again. I'm going
9 to strike your question.

10 BY MR. KENNEDY:

11 Q Do you rely on the city to determine what group or
12 class is under 20636 and the PERL?

13 MR. JENSEN: Objection, your Honor. Leading.

14 THE COURT: Overruled.

15 THE WITNESS: We do not rely on the city to apply 20636.

16 BY MR. KENNEDY:

17 Q Your determinations of group and class is for the
18 purposes of commission earnable -- is determined by whom?

19 A By the statute.

20 Q And the statute doesn't -- and by who?

21 A Per CalPERS.

22 Q And it's a process is it not?

23 MR. JENSEN: Objection. Leading.

24 THE COURT: Overruled.

25 THE WITNESS: Yes.

1 BY MR. KENNEDY:

2 Q And it's a determination made, based upon a variety
3 of factors; correct?

4 A Correct.

5 MR. KENNEDY: Thank you. No other questions.

6 THE COURT: Thank you. You are released.

7 You want to go grab Ms. Tran?

8 MR. JENSEN: Mr. Kennedy, you want to go get her?

9 THE COURT: Ma'am, please state your name for the
10 record, and I'll remind you you are still under oath because
11 you were not released.

12 Go ahead.

13

14 HELEN TRAN,

15 recalled as a witness, and having been previously duly sworn
16 by the Court, was examined and testified as follows:

17 THE WITNESS: My name is Helen Tran. I'm the HR
18 Division Manager with the City of San Bernardino.

19 Do I need to spell my name?

20 THE COURT: No, you are good.

21 Mr. Kennedy just had a couple follow-up questions.

22

23 CROSS-EXAMINATION

24 BY MR. KENNEDY:

25 Q Ms. Tran, you were asked last time to go back and

1 check on some information.

2 Do you recall what that was?

3 A To check the personnel record whether there was
4 documents indicating Mr. Lewis's higher active pay for the
5 Battalion Chief; is that correct?

6 THE COURT: Yes, that was.

7 BY MR. KENNEDY:

8 Q What did you find?

9 A There was no documents in the personnel file that I
10 can see.

11 Q Okay. And had they been generated, that's where
12 they would be --

13 MR. JENSEN: Objection. Lacks foundation.

14 THE COURT: Overruled.

15 MR. JENSEN: Lacks person knowledge.

16 THE COURT: Overruled.

17 BY MR. KENNEDY:

18 Q Had they existed, that's where they would be
19 logged; correct?

20 MR. JENSEN: Same objection. Lacks foundation.

21 THE COURT: Overruled.

22 THE WITNESS: The process for that would be, yes. But I
23 wasn't at that time -- I wasn't an HR analyst, so I'm not
24 sure.

25 ///

1 BY MR. KENNEDY:

2 Q And do you recall that when you were here I had
3 asked to you determine whether or not that same process
4 consisted prior to your commencement of employment in 2006?

5 A Yes.

6 Q And did you make that inquiry?

7 A I would have to look into it further. But, again,
8 at that time I was an HR analyst. I'm not sure if there was
9 anything done differently, but that's the process in San
10 Bernardino.

11 Q I requested that you make an inquiry at your office
12 whether the same process existed prior to your arrival
13 there, say back as 2004 or five?

14 MR. JENSEN: Asked and answered.

15 THE COURT: No. Overruled.

16 THE WITNESS: I was there since 2006.

17 THE COURT: No. What he's saying is when you were here
18 testifying and you said that you weren't there so you
19 couldn't know what the process was, he asked you to look
20 into -- go back to your office and see before you got there,
21 was it the same process. And he's asking if you did that.

22 THE WITNESS: No.

23 BY MR. KENNEDY:

24 Q Okay. Do you have any information, as you sit here
25 today, that that process was any different in the five years

1 before you came to work for the city?

2 MR. JENSEN: Objection. Calls for speculation.

3 THE COURT: Overruled.

4 MR. KENNEDY: Actually the two years before.

5 THE COURT: Overruled. He's asking does she have any
6 information.

7 THE WITNESS: If I have information if that was before I
8 got there?

9 BY MR. KENNEDY:

10 Q Yes.

11 A I can't take that position since, again, I haven't
12 really looked into it thoroughly to see if there was any
13 indication --

14 Q Do you have any information, as you sit here today,
15 to believe that it was any different in the years 2004 or
16 2005?

17 MR. JENSEN: Objection, your Honor. Calls for
18 speculation. Asked and answered.

19 THE WITNESS: I don't have --

20 THE COURT: Also, the follow-up question is: You have
21 no information one way for the other?

22 THE WITNESS: I don't have any information.

23 BY MR. KENNEDY:

24 Q And when you arrived at work here in 2006, were you
25 aware in the use of Personnel Action Forms for this purpose?

1 A Upon my hire that was --

2 MR. JENSEN: Objection.

3 THE WITNESS: -- that was the process.

4 MR. JENSEN: Objection. Vague as for this process

5 and --

6 THE COURT: The process we're talking about is Personnel
7 Action Forms; correct?

8 MR. KENNEDY: For the purpose of recording --

9 THE COURT: Acting pay.

10 BY MR. KENNEDY:

11 Q That was the process when you were hired?

12 A Correct.

13 Q Okay. What MOUs are Fire Captains covered under?

14 A Fire safety.

15 Q Anymore specific? How about management
16 confidential?

17 A They would not be management confidential.

18 Q Are the policies and procedures that are applicable
19 or allowed for receiving acting pay controlled as a matter
20 by the city charter and the safety MOU?

21 MR. JENSEN: Objection. Leading question and lacks
22 foundation.

23 THE WITNESS: I'm not clear --

24 THE COURT: Overruled.

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BY MR. KENNEDY:

Q What are the procedures for an employee being paid acting pay, not the qualifications, but the procedure that would be followed for a receipt of pay?

A Higher acting pay?

Q Correct.

A It would be processed. I've seen it change from the time I've been there, gone to Counsel, or be administratively --

Q Sorry?

A Gone to Counsel and certainly administratively. It would have to -- would be city manager approval.

Q So it would -- I'm sorry.

Can you repeat that again?

A From my time and appointment there, there was a case where higher acting pay and part-time employees were taken to Counsel, but then with the new city attorney there is interpretation that that could be done administratively and approved by the city manager's office. So currently --

MR. KENNEDY: Approved to what?

THE COURT: City manager.

BY MR. KENNEDY:

Q So it would be signed off by --

A By city manager. That's final approval. That's

1 currently the process. So higher acting pay and part-time
2 employees are now approved administratively without going to
3 Counsel.

4 Q And that's Personnel Action Form you were talking
5 about?

6 A Yes. Personnel Action Form.

7 Q Okay. And you said prior to that it would go to
8 city counsel?

9 A Yes. Prior to our new city attorney.

10 Q And that also would have been reflected in your
11 file?

12 A Correct.

13 MR. JENSEN: Objection. Vague as to time.

14 THE WITNESS: As in the new policy?

15 MR. KENNEDY: As well as the old process.

16 THE COURT: Is the new process in personnel records as
17 well? Like if the city manager signs off --

18 THE WITNESS: Oh, yes, it would. They are personnel
19 action forms, yes, they would go into the file.

20 BY MR. KENNEDY:

21 Q And do you have any information that Mr. Lewis was
22 ever paid acting pay?

23 A Again, I can't answer because at that time I'm not
24 sure what was process --

25 Q I'm just saying, looked at this and you were in his

1 file.

2 Is there any indication in the file that you
3 reviewed that Mr. Lewis ever received acting pay?

4 A In checking his personnel file, there's no
5 documents that indicate he received higher acting pay.

6 MR. KENNEDY: This is not a question. This is a comment
7 to the Court.

8 THE COURT: Not in front of this witness.

9 MR. KENNEDY: Okay. Then I have no other questions of
10 the witness. But I may, and that's the comment I was going
11 to ask the Court. It was just simply the --

12 MR. JENSEN: Are you going to ask it anyway?

13 MR. KENNEDY: -- to verify. If the Court wants me to
14 exclude the witness, I can.

15 THE COURT: What is it?

16 MR. KENNEDY: I had asked her to make an inquiry about
17 process that was different in 2004, 2005 time period, and I
18 assume that would be a simple phone call to talk to somebody
19 who was perhaps working there or --

20 THE COURT: Ma'am, is there are anyone that could you
21 ask to see whether or not the system was any different
22 before you got there?

23 THE WITNESS: I can tell you the staff has completely
24 changed. Anyone who was there before is no longer here.

25 MR. KENNEDY: Okay.

1 THE WITNESS: So even contacting them would be
2 difficult.

3 BY MR. KENNEDY:

4 Q Very good. But that was a system that was in
5 existence when you came; correct?

6 A From my recollection, yes. The process of any
7 changes to salary adjustments and so forth would be through
8 Personnel Action Forms filed in the employee's file.

9 Q Do you have a Personnel Action Form that we
10 discussed?

11 Do you know whether it got created, that system got
12 created before you arrived?

13 A It was before.

14 Q Okay. So it's reasonable to assume it was --

15 MR. JENSEN: Objection.

16 MR. KENNEDY: -- reasonable to believe and assume --

17 THE COURT: No. Counsel, you are arguing.

18 BY MR. KENNEDY:

19 Q So the system that you were referring to was in
20 existence prior to you coming to work?

21 A I would assume so.

22 MR. KENNEDY: Okay. No other questions.

23 THE COURT: Redirect?

24 MR. JENSEN: Yes.

25 ///

1 REDIRECT EXAMINATION

2 BY MR. JENSEN:

3 Q Do you know where the Fire Chief's certifications
4 are kept?

5 A The Fire Chief's certifications is in the personnel
6 file.

7 Q So all of his certifications for the in-field work
8 go into the personnel file?

9 A Well, it's depending if it's required for the job
10 spec, and so forth. It would need to go in there, but I'd
11 have had to check. But you are saying Fire Chief so I
12 needed to look.

13 Q And so is it --

14 THE COURT: Let me stop you there. When you're saying
15 Fire Chief Certification are you talking about what's in the
16 City charter about the Fire Chief certifying the action for
17 higher pay?

18 MR. JENSEN: Yes.

19 THE WITNESS: Oh --

20 (Simultaneous talking)

21 THE COURT: She's answering about a Fife Chief personal
22 certification for --

23 MR. KENNEDY: Certification pay.

24 MR. JENSEN: Oh, I'm sorry. Thank you for that.

25 THE COURT: You are welcome.

1 BY MR. JENSEN:

2 Q Are you familiar within the Charter where the Fire
3 Chief certifies individuals to act in a higher position
4 whether there's pay involved or not?

5 A That would require a documentation to go to the
6 personnel file.

7 Q Would that be the case even if there was no
8 increased salary associated with that increase responsibly
9 for the certification?

10 A If there's no monetary impact?

11 Q Yes?

12 A For higher acting?

13 Q Yes?

14 A I don't know.

15 Q So what is the practice if there is no specific
16 higher pay for being placed in an acting position?

17 A I've never ran across that, so I can't answer that.

18 Q So the only things that would be documented with
19 respect to acting pay is when this specific salary increase
20 is associated with that acting pay?

21 A Correct.

22 Q And are you aware that in Mr. Lewis's case he was
23 provided compensation at the pay rate of Battalion Chief?

24 A I'm not aware. Again, at that time I was not in
25 position to be involved in this process.

1 Q But at this time are you aware of it?

2 A If employees salary --

3 Q Let me just --

4 A Okay.

5 Q -- give you a hypothetical.

6 So Mr. Lewis was paid at the BC rate; okay? And
7 there's some documentation that gave him a title as Fire
8 Captain. If he was on a fire scene or scene of emergency
9 where he was acting as a BC, would that be documented
10 because he was already paid at the rate of a BC?

11 A But if the pay rate of the BC -- if he's getting
12 paid as BC, which is higher than his current position as a
13 Captain, that would go to his personnel file.

14 Q Right. But if the incidents were in an acting
15 position, would those be documents in a Personnel Action
16 Reports?

17 A Again, I've never seen -- run across that situation
18 where certain --

19 Q Let me give you the hypothetical again.

20 He's already receiving the higher compensation. So
21 when he's performing those duties, would there be a need to
22 document his performance of those duties in the Personnel
23 Action Report?

24 A I'm confused about your statement --

25 MR. KENNEDY: Incomplete hypothetical, your Honor.

1 THE WITNESS: -- again that higher pay would be --

2 THE COURT: Okay. Here is the hypothetical: Basically,
3 if he's getting the Battalion Chief pay, assume that.

4 THE WITNESS: Okay.

5 THE COURT: But his title is Fire Captain, because there
6 was a Settlement Agreement with the city -- that's the
7 facts -- and he goes on scene and he's doing Battalion Chief
8 work, but there's not going to be any difference in pay
9 because he's already getting the Battalion Chief pay, does
10 that have to be documented?

11 THE WITNESS: That should be.

12 THE COURT: And how?

13 THE WITNESS: There should be something in the file to
14 show that, so that way you can -- if you were to audit
15 something and track employees' rate of pay or acting --

16 MR. JENSEN: Let me just be clear --

17 THE WITNESS: But, again, if this happened at that time,
18 I can't answer.

19 MR. KENNEDY: Your Honor, the hypothetical --

20 MR. JENSEN: Mr. Kennedy --

21 THE COURT: Stop.

22 MR. JENSEN: But let --

23 THE COURT: No. You stop. He can make an objection.

24 MR. KENNEDY: Objection to the hypothetical because I
25 think what the witness, I think, has answered appropriately,

1 but the hypothetical didn't include the fact that he's
2 not -- he doesn't hold the position of a BC, and that the
3 claimed payments are being claimed as acting pay.

4 THE COURT: Yes. Didn't say that in my hypothetical, I
5 said he did the work of a BC, but he's titled as a Fire
6 Captain.

7 The objection is overruled.

8 BY MR. JENSEN:

9 Q So, Ms. Tran, I just to be clear about this.

10 So wherever someone performs duties or
11 responsibilities outside of their designated job title, that
12 has to be documented in a Personnel Action Report, even if
13 there is no pay associated with it?

14 A I can't answer that. Again, I haven't gone through
15 that scenario in my career here so...

16 Q So let me ask you in your personal experience, do
17 you have job duties and responsibilities in a job
18 description?

19 A Yes.

20 Q Do you ever performer job duties or
21 responsibilities that are higher than the job duties that
22 are in your job description?

23 A Yes.

24 Q Do you document the performance of those additional
25 duties and responsibilities in your Personnel Action Report

1 when you perform them?

2 A No.

3 Q Have you ever seen anybody else do that?

4 A No.

5 Q Would Mr. Lewis do it?

6 A Would --

7 Q Would it be appropriate for Mr. Lewis to write down
8 what he did everyday, even if he was receiving no pay for
9 it?

10 MR. KENNEDY: Objection, your Honor. Vague. Calls for
11 speculation.

12 THE COURT: Overruled.

13 BY MR. JENSEN:

14 Q Is it the practice of the City of San Bernardino to
15 require employees to file a Personnel Action Report whenever
16 they perform duties and responsibilities that are
17 potentially greater than what is in their job description
18 for that job title?

19 A Well, I know in general the MOU, there is a higher
20 act for a certain amount of days then you would record that
21 and then they get paid. But, again, if there's no financial
22 impact to that employee, then I have not seen any records.

23 Q You've never seen that happen?

24 A No.

25 Q If there's no financial impact?

1 A No.

2 Q And just so you know, you did answer earlier a
3 little -- it was inconsistent with that what I asked you --

4 MR. KENNEDY: Is this a question?

5 MR. JENSEN: Yeah.

6 THE COURT: You are arguing with her, Counsel.

7 MR. JENSEN: Okay. Can I just clarify --

8 THE COURT: Yeah.

9 BY MR. JENSEN:

10 Q When we talked about Mr. Lewis you said that it
11 would have to be documented in the personnel file even if
12 there was no pay for it.

13 A Okay. Maybe I misinterpreted that because I
14 probably heard that as though there was a financial impact.

15 Q Okay. And the financial impact, you mean basically
16 a separate or additional pay to the individual?

17 A Correct.

18 MR. JENSEN: I have no further questions.

19 THE COURT: Any redirect?

20 MR. KENNEDY: No.

21 THE COURT: Thank you.

22 MR. KENNEDY: Yes, I do have questions.

23 THE COURT: Oh, sorry.

24 MR. JENSEN: Oh, you do?

25 THE COURT: I though you said no.

1 MR. JENSEN: I thought you said no.

2 MR. KENNEDY: No, I said yes.

3 MR. JENSEN: I thought he said no too.

4

5 RECROSS-EXAMINATION

6 BY MR. KENNEDY:

7 Q Ms. Tran, when you worked in the higher positions
8 there, do you performer a higher function from time to time
9 on a sporadic basis?

10 A Yes.

11 Q Okay. And do you expect then to be -- if you do
12 you that periodically or sporadically to get upgraded pay
13 for that?

14 A If -- yes. If employees are higher acting in a
15 capacity as a different level, higher level but --

16 Q And what is your requirement for receiving acting
17 pay? Have you been paid --

18 MR. JENSEN: Objection, your Honor. He's asking her
19 requirement.

20 MR. KENNEDY: I am.

21 THE COURT: Sustained.

22 BY MR. KENNEDY:

23 Q And you understand that the payment that they are
24 talking about, that Mr. Lewis got was pursuant to a
25 Settlement Agreement --

1 MR. JENSEN: Objection, your Honor. It's --

2 MR. KENNEDY: -- of a lawsuit; correct?

3 MR. JENSEN: -- leading question.

4 MR. KENNEDY: I'm clarifying a hypothetical.

5 THE COURT: Exactly. Overruled.

6 BY MR. KENNEDY:

7 Q You are aware that's the payment they are talking
8 about, is a difference between a Fire Captain and he's
9 getting a side payment up to the level of BC as a settlement
10 of a lawsuit.

11 MR. JENSEN: Objection to characterization --

12 THE COURT: Sustained. Argumentative. Rephrase,
13 please.

14 THE WITNESS: I --

15 THE COURT: Wait, ma'am. I sustained the objection.

16 THE WITNESS: Okay. Sorry.

17 BY MR. KENNEDY:

18 Q If Mr. Lewis were getting this increase in pay from
19 Fire Captain, which was his position; correct?

20 A His position from our records is Fire Captain,
21 ending at Fire Captain.

22 Q And he was receiving an additional Delta -- if I
23 can use the phrase -- for a difference between a Fire
24 Captain pay and a higher pay as part of the settlement
25 agreement; are you aware of that?

1 A I haven't seen that, so I don't --

2 Q If the additional payment above the Fire Captain
3 were being paid to Mr. Lewis on account of his acting at a
4 higher level, then you would expect that pursuant to the
5 city's procedure and policy and the Charter, that there
6 would be a Personnel Action Form in the file to reflect
7 that; correct?

8 MR. JENSEN: Objection. Calls for --

9 THE WITNESS: Are you talking his --

10 THE COURT: Hang on, ma'am.

11 MR. JENSEN: I believe it's --

12 MR. KENNEDY: It's either --

13 (Simultaneous talking)

14 THE COURT: Stop.

15 Mr. Kennedy, don't interrupt the objection.

16 MR. JENSEN: I believe he's sort of asking her for --

17 THE COURT: No. What's your objection?

18 MR. JENSEN: He's asking for a legal interpretation.

19 THE COURT: Overruled. Basically what her testimony is
20 ma'am, correct me if I'm wrong, is: In Personnel Action
21 Forms you see that when there are cases where the person is
22 acting in a higher capacity and getting more money, and
23 there's a fiscal impact. You've never seen one where there
24 are no fiscal impact?

25 THE WITNESS: Correct.

1 BY MR. KENNEDY:

2 Q My question is: Assuming that there would be no
3 fiscal impact, because as a result of a settlement the
4 person is getting the money.

5 I'm just asking the question, if Mr. Lewis were
6 receiving an additional component of compensation in his
7 paycheck as a result of a lawsuit, and it was not for acting
8 pay, would you expect to see a Personnel Action Form to
9 reflect that in your file?

10 A I can't answer that since I don't have that
11 encounter. So I don't know what was done at that time. And
12 I wasn't there.

13 Q If an individual was being compensated for acting
14 in the capacity of higher rank, you would expect to see a
15 Personnel Action Form; correct?

16 A If an employee were acting and receiving higher
17 active pay, there would be a Personnel Action Form.

18 Q So each time that person is paid that amount or
19 during whatever period, you would you expect to see that,
20 that would be the requirement under the Charter and the
21 requirement under the Civil Service Rules; right?

22 A This process, for the time I've been there is
23 there's a Personnel Action Form completed. So I can't speak
24 to Charter. I'd have to look into it.

25 Q So it's your understanding that Mr. Jensen's

1 question that if Mr. Lewis was receiving pay through a
2 settlement for acting and was not necessarily -- and wasn't
3 being paid for specific periods of acting that you wouldn't
4 expect a Personnel Action Form to be in the file?

5 In other words, if it didn't have a fiscal impact
6 because he wasn't going to be paid any more money for it,
7 your answer was, "I've never seen it, but I guess there
8 would not be a reason why there would be a Personnel Action
9 Form; right?

10 MR. JENSEN: Objection. The whole thing is
11 incomprehensible.

12 THE COURT: Overruled. Do you understand the question?
13 If you don't, you can say no.

14 THE WITNESS: No.

15 THE COURT: Okay.

16 BY MR. KENNEDY:

17 Q I guess my last question to wrap it up would be,
18 again, if the payments reflected in his -- you saw his
19 paycheck; right?

20 Can I show you his pay stub again? It's in the
21 exhibit package.

22 THE COURT: I have it. It's one of the loose documents.

23 BY MR. KENNEDY:

24 Q And are you familiar with the pay warrants of the
25 City of San Bernardino?

1 May I approach the witness, your Honor?

2 THE COURT: Yes.

3 BY MR. KENNEDY:

4 Q These are Exhibit 30.

5 You see the reference there to BC pay in the
6 left-hand column?

7 A Yes.

8 Q And you see on the right-hand column the pay rate,
9 the regular pay rate?

10 MR. JENSEN: Objection. "Regular pay rate," it
11 misstates what the document says.

12 THE COURT: Does the document say that?

13 MR. KENNEDY: On the right-hand column --

14 MR. JENSEN: Is there --

15 (Simultaneous talking)

16 THE REPORTER: I'm sorry. One at a time, please.

17 MR. KENNEDY: Miss --

18 THE COURT: Stop. Stop.

19 MR. KENNEDY: I'll withdraw my question and start over.

20 THE COURT: Just so you know, ma'am, it's two separate
21 documents so you can move them apart.

22 THE WITNESS: All right.

23 BY MR. KENNEDY:

24 Q So on the right-hand column.

25 A This side?

1 Q That side, you're right.

2 A Okay.

3 Q Is there an indication of the employee's pay rate?

4 MR. JENSEN: Objection. Asks her for interpret the
5 document.

6 THE COURT: Yeah. The document speaks for itself.

7 MR. KENNEDY: Yes. It says pay --

8 THE COURT: Everyone stop. I sustained the objection.
9 Document speaks for itself.

10 What's your question, Counsel?

11 BY MR. KENNEDY:

12 Q What is the regular pay rate of the employee under
13 that document?

14 A It says rate of \$49.80. Is that what he's
15 referring to or...

16 THE COURT: I don't know.

17 MR. KENNEDY: Maybe if I had the other copy.

18 THE COURT: I never got an answer to your first
19 question.

20 Have you seen pay stubs before?

21 THE WITNESS: Yeah. Well, this is not coming from our
22 department, so I wouldn't be an expert.

23 THE COURT: Her answers to your questions are -- excuse
24 me -- are going to be irrelevant and persuasive.

25 MR. KENNEDY: She testified to the first part and I want

1 clarification --

2 MR. JENSEN: Well --

3 THE COURT: Whoa, whoa. Everyone stop.

4 Mr. Jensen, please stop.

5 BY MR. KENNEDY:

6 Q If you looked at the left-hand column and you see
7 something that as BC -- BC pay?

8 A It does say BC pay.

9 Q Right. Do you know what that is?

10 THE COURT: I don't want you guessing.

11 Do you know what it is? Yes or no?

12 THE WITNESS: I can assume but --

13 THE COURT: I don't want you to assume.

14 Do you know?

15 THE WITNESS: No then, because it's not my document.

16 BY MR. KENNEDY:

17 Q Have you ever heard the term BC pay?

18 A I've heard of it, but I don't know for this
19 document I'm looking at BC -- so for finance department --

20 Q And acting pay?

21 THE COURT: Counsel, she was called back to answer
22 questions about the documents that she filled out. This is
23 not going to help me in making my determination, her
24 guessing and speculation --

25 MR. KENNEDY: It's not guessing, your Honor.

1 BY MR. KENNEDY:

2 Q I can direct you to the question; if an employee
3 receives an acting pay, it's reported on the pay warrant;
4 correct?

5 MR. JENSEN: Objection. Lack of foundation, your Honor.

6 MR. KENNEDY: In your experience --

7 THE COURT: Stop. Stop. Stop.

8 Do you know whether or not how acting pay is
9 reported in a pay warrant?

10 THE WITNESS: It should say acting pay, but, again, I'm
11 not finance, so I can't speak for that.

12 BY MR. KENNEDY:

13 Q But you've worked here since 2006 in HR. You are
14 familiar with the system of warrants that's issued by the
15 City of San Bernardino; correct?

16 MR. JENSEN: Objection --

17 THE COURT: No, no. Stop.

18 Ma'am, I don't want -- and I'm looking at this
19 witness's face so it's really uncomfortable with this line
20 of questioning because she's said repeatedly this does not
21 come out of her department. So if she doesn't know, I don't
22 want her guessing, and it's not going help me.

23 MR. KENNEDY: The last testimony, your Honor, that
24 Mr. Jensen asked if the BC pay could be acting pay.

25 THE COURT: He didn't ask about the pay warrant --

1 MR. KENNEDY: He was asking about the pay warrant, about
2 the line item in the pay warrant, and all I wanted to
3 clarify was when they report acting pay, is it reported on
4 his acting pay?

5 THE COURT: When did he pull out Exhibit 30? He didn't.

6 MR. KENNEDY: All right. Let me ask another question.

7 THE COURT: Can I have the document back you took,
8 Exhibit 30?

9 BY MR. KENNEDY:

10 Q Is it your understanding that active pay is
11 equivalent to a regular pay rate?

12 MR. JENSEN: Objection --

13 BY MR. KENNEDY:

14 Q Is there a distinction between your mind and
15 regular pay rate?

16 MR. JENSEN: Objection.

17 THE COURT: Stop. What's the objection?

18 MR. JENSEN: Vague and ambiguous. For what purposes?

19 THE COURT: Overruled.

20 THE WITNESS: Acting pay on top of your regular base
21 pay.

22 BY MR. KENNEDY:

23 Q And is there such as thing as indefinite perpetual
24 acting pay?

25 A What do you mean by that?

1 Q In other words, can I project indefinitely into the
2 future acting pay without a specified document saying that
3 somebody is acting in that capacity for a period of time?

4 A Are you talking payroll stubs?

5 MR. KENNEDY: I withdraw the question, your Honor.

6 No other questions.

7 THE COURT: Any recross?

8 MR. JENSEN: No, your Honor.

9 MR. KENNEDY: Thank you, Ms. Tran.

10 MR. JENSEN: Thank you.

11 THE COURT: Thank you ma'am, you are released.

12 You are released from your subpoena.

13 THE WITNESS: Really? Okay.

14 THE COURT: Yes. Off the record.

15 (Lunch recess)

16 THE COURT: Back on the record.

17 We finished yesterday with going to go to the
18 cross-examination of Mr. Lewis. And so Mr. Kennedy, you
19 said you have no questions for him.

20 MR. KENNEDY: Yes. That's the assumption that his
21 testimony is closed.

22 MR. JENSEN: Your Honor, I'd just like to open up to
23 clarify a few issues. There's been no harm --

24 THE COURT: I'll allow it.

25 MR. KENNEDY: And then --

1 THE COURT: Then you are not done with your cross. Wait
2 and see what you have to say; right?

3 MR. JENSEN: Mr. Lewis, you can --

4 THE COURT: Prior to reading the rules of evidence are
5 construed in here and we finished at the end of the day
6 yesterday, so it's always possible that someone goes home,
7 and I also ask before we start whether or not you have
8 anything you thought of that you want to ask.

9 MR. KENNEDY: Your Honor, with that explanation I think
10 it would save everybody a lot of time, I can listen to the
11 redirect and if the Court won't strictly hold me to a scope,
12 then I'll let the redirect go and then if I have a cross --

13 THE COURT: No. I won't limit you at all.

14

15

RICHARD LEWIS,

16 recalled as a witness, and having been previously duly sworn
17 by the Court, was examined and testified as follows:

18 THE COURT: Sir, I remind you you are still under oath.

19 For the record, Mr. Lewis is now taking the stand.

20 THE WITNESS: Yes.

21 MR. JENSEN: Thank you, Mr. Lewis.

22

23

DIRECT EXAMINATION

24 BY MR. JENSEN:

25 Q And you just handed me a peace of paper which --

1 I'm going to show this to Mr. Kennedy.

2 You handed me the piece of paper which was your
3 recollection of how you were treated under the Collective
4 Bargaining Agreement that's applicable to Fire Management;
5 is that correct?

6 A Yes.

7 Q Okay. And I just want to hand this to Mr. Lewis.

8 MR. KENNEDY: Well --

9 MR. JENSEN: Or if he recalls, I mean --

10 MR. KENNEDY: I don't know what the purpose of this is
11 for? Refreshing recollection or what?

12 MR. JENSEN: He just wrote it down right now.

13 THE COURT: Up to Number 47 for Respondent's. Marking
14 47.

15 (Respondent's Exhibit 47 was marked for
16 identification by the Court.)

17 MR. KENNEDY: Can I go make copies of this?

18 THE COURT: We can do that at the end of day.

19 MR. KENNEDY: Well, if he's going to. I don't know what
20 Mr. -- I mean --

21 MR. JENSEN: He may add more things to it. I don't
22 know.

23 MR. KENNEDY: I don't understand the process here. This
24 is refreshing recollection, or what?

25 THE COURT: I don't know. We'll all find out.

1 MR. KENNEDY: Yeah.

2 BY MR. JENSEN:

3 Q So, Mr. Lewis, can you tell me factual occurrences
4 where you were treated under the Fire Management MOU?

5 A Yes, after the settlement --

6 MR. KENNEDY: Vague as to the Fire Management MOU.

7 THE WITNESS: It's in evidence.

8 MR. JENSEN: If I may turn your attention, Mr. Lewis, if
9 you can find in the blue binder in front of you the document
10 that --

11 THE WITNESS: What number?

12 MR. JENSEN: It's 22. And I believe you were looking at
13 page eight.

14 BY MR. JENSEN:

15 Q So, Mr. Lewis, are you referring to specific pages
16 in the exhibit in front of you with respect to what is the
17 Fire Safety Management MOU?

18 A Yeah. What I was doing was comparing the
19 differences between fire safety, which is the regular MOU
20 for the Rank and File, which all other captains were subject
21 to, and the Management Confidential MOU, which also included
22 fire management.

23 So they are all kind of lumped together, but
24 instances where it applied to Fire Management it's dictated
25 throughout this MOU.

1 Q Can you tell us what specific pages you are
2 referring to?

3 A It's really the whole MOU because as I went through
4 here -- there are things that are the same, and there are
5 things that are different that were applied to the Fire
6 Management that were not applied to the Rank and File.

7 Q Okay. Let me ask you, factual instances when you
8 were subject to the Fire Management MOU terms --

9 A When we finished the settlement --

10 MR. KENNEDY: Objection. It's vague to the term
11 factually subject to it.

12 THE COURT: Sustained.

13 BY MR. JENSEN:

14 Q Do you recall instances when the city applied the
15 terms of the Fire Management MOU to you?

16 MR. KENNEDY: Objection. It's vague. Calls for
17 speculation. Lack of competency.

18 THE COURT: Overruled.

19 THE WITNESS: Okay. After the settlement I went in and
20 met with Laura King at the time, and she went through the
21 MOU and explained to me what the changes would be because I
22 was then under the management MOU.

23 MR. KENNEDY: Objection. Move to strike. Hearsay and
24 calls for legal conclusion that he was subject to the MOU.
25 We're talking about did he get benefits similar to those

1 MOUs verses being subject to them.

2 THE COURT: Yeah. But the CalPERS letter, one of the
3 basis of denial, which was Exhibit 7, is whether or not he
4 did the duty of a Fire Captain or Battalion Chief.

5 Overruled.

6 THE WITNESS: So there were similar benefits to both the
7 Rank and File and the Fire Management. Generally, what
8 would happen is that the Rank and File fire would negotiate
9 and any benefits that they got, then when Fire Management
10 went in they would ask for those benefits and others.

11 So in just a real cursory overview of this, the
12 very first one is a uniform allowance, which was afforded to
13 the Fire Management, but not to the Rank and File. And so
14 there's a difference there. The EPMC is --

15 BY MR. JENSEN:

16 Q Mr. Lewis, hold on. Let me just ask you: What was
17 the difference in the uniform allowance between Rank and
18 File Fire and Fire Management?

19 A It was a one-time, once a year \$500 that they paid.
20 They paid the Fire Management.

21 Q And did the fire Rank and File get a --

22 A No.

23 Q -- uniform allowance?

24 Okay. Let me turn your attention to the -- would
25 this be reflected on the payroll slips that are in --

1 A No, because it only happened once. Unless you have
2 the ones that it was on. It wasn't on a monthly basis, it
3 was a single, once a year thing.

4 Q So prior to the effective date of the Settlement
5 Agreement, did you ever receive a uniform allowance?

6 A No.

7 Q And after the date of the uniform allowance, did
8 you receive -- after the effective date of the Settlement
9 Agreement, did you receive a uniform allowance?

10 A Yes.

11 MR. JENSEN: And, your Honor, do you have the payroll
12 slip?

13 THE COURT: There are in here.

14 MR. JENSEN: Thank you, ma'am.

15 THE COURT: Yep.

16 BY MR. JENSEN:

17 Q Can you look and see if that happens to be the
18 period with the uniform allowance?

19 A No. This is just two --

20 Q There's two different ones. Can you check?

21 A This is just two pay warrants for what looks like
22 the beginning of the fiscal year. I can point out one other
23 thing that is on here that might be helpful.

24 MR. KENNEDY: Objection, your Honor. No question
25 pending.

1 MR. JENSEN: Let me ask you a question.

2 THE COURT: I'll let him. Go ahead, sir.

3 THE WITNESS: The administrative balance right there,
4 those are for administrative days, I also got those.

5 So I had time off that was attributed the same as
6 it was to the Fire Management, and they kept track of those.
7 On the 31st of July, this payroll check, I had a balance of
8 120 hours, which was what our allotment was for each year
9 and we got it at the beginning of the fiscal year.

10 THE COURT: When you say we, which --

11 THE WITNESS: All of the Battalion Chiefs and myself.

12 BY MR. JENSEN:

13 Q Did you receive that --

14 A Yes.

15 Q Okay. Wait till I finish.

16 Did you receive that prior to the settlement when
17 you were working as a Fire Captain?

18 A No.

19 Q And to your knowledge who was entitled to
20 administrative pay?

21 A All of the administration. The Battalion Chiefs,
22 the Deputy Chiefs. The Fire Marshal, the Assistant Chief,
23 and the Chief.

24 Q And is that a term in the MOU for Fire Management?

25 A I think it's under -- they either call them

1 "e-days" or administrative leave.

2 Q Okay. Is there other instances that you can recall
3 when you were treated consistent to the terms in the Fire
4 Management MOU?

5 A You mean in the management MOU or in the --

6 Q The management MOU.

7 A Right. There was many things like that that were
8 the same. But we had at one time -- and I'm not sure if it
9 shows it in these checks --

10 MR. KENNEDY: Your Honor, if I could, this is not only
11 redundant, but I would agree that the Settlement Agreement
12 afforded, stipulated that it would afford Mr. Lewis some
13 benefits under the Battalion Chief. But they were also
14 distinctions that he got that weren't under Battalion Chief,
15 but he was never covered. As long as he -- I think the
16 testimony has been consistent that he wasn't covered under
17 that agreement. He got benefits pursuant to the Settlement
18 Agreement not as a Battalion Chief.

19 THE COURT: I'm going let him --

20 MR. JENSEN: So let's address Mr. Kennedy --

21 THE COURT: Let's not. Let's just ask the questions.

22 BY MR. JENSEN:

23 Q Okay. Were there instances where you had to take
24 reductions that were applied to all Fire Management
25 personnel under the MOU?

1 A Yes.

2 Q Tell us about those?

3 A I thought it was in here but I'm not sure if it is
4 or not. It's not under these two specific warrants.
5 Because they negotiated when the city was in really bad
6 financial condition, the Fire Management decided that it
7 would be beneficial to the city to take a reduction in pay,
8 which we did, and they had input from everybody including
9 me. Because whenever they were going to negotiate they came
10 to hear what I had to say because I was part of their group.
11 And we voted to -- or basically by consensus said yes, we
12 will relinquish this.

13 So for a period of a little over a year we had to
14 give up and it was about a thousand dollars a month.

15 MR. KENNEDY: Objection, your Honor. Move to strike as
16 vague to the term of "we."

17 THE COURT: I asked him who the "we" is, and he said
18 "we" is management.

19 MR. KENNEDY: I'm sorry?

20 THE COURT: "We" is the management; correct, sir?

21 THE WITNESS: Yes.

22 BY MR. JENSEN:

23 Q And let me clarify.

24 You said there was a process by which they came to
25 you, and you said, "They."

1 Can you tell us who came to you for what purpose
2 and what they asked from you?

3 A The people that were negotiating -- the Battalion
4 Chiefs, usually two Battalion Chiefs that were by consensus
5 going to be the people that did the direct negotiations with
6 the city.

7 Q Did they come to you in the capacity as
8 representatives of the Fire Management --

9 A Yes.

10 MR. KENNEDY: Objection. Calls or speculation. Lack of
11 foundation.

12 MR. JENSEN: Can I --

13 THE COURT: Overruled. You both, just so you know, your
14 record is a mess because you are both being really rude to
15 each other. And I've been trying all morning long to tell
16 you both to knock it off.

17 So please let each of you finish your question
18 before making your objection.

19 MR. JENSEN: I'm sorry, your Honor.

20 MR. KENNEDY: For the record, my objection would also be
21 hearsay.

22 THE COURT: Anything anyone told, I'll receive as
23 administrative hearsay.

24 BY MR. JENSEN:

25 Q Do you recall the name of the individual who came

1 to you regarding taking this reduction in benefits?

2 A Each year they were different, so Jessie Compost,
3 yes, I can recall.

4 Q And what was the position of the person who came to
5 you?

6 A Battalion Chief.

7 Q And what was the capacity that he represented
8 himself to you in this discussion?

9 A As the representative for the group.

10 Q And what was the group?

11 A The Fire Management Group.

12 Q And do you recall what he was seeking from you at
13 this time?

14 A Yes.

15 Q And what was that?

16 A Input as to what to negotiate for and what the
17 consensus was so far, because we didn't all get together and
18 vote on it. It was just a consensus and they went around
19 and gathered that from all the Battalion Chiefs.

20 Q And was there any non-Battalion Chief who was
21 voting in this matter?

22 A Just me.

23 MR. KENNEDY: Calls for speculation.

24 THE COURT: Overruled.

25 ///

1 BY MR. JENSEN:

2 Q And when you say you were not a Battalion Chief,
3 what do you mean?

4 A My title was Captain.

5 Q However, how did they treat new this instance?

6 MR. KENNEDY: Objection. Vague.

7 THE COURT: Sustained.

8 BY MR. JENSEN:

9 Q Were there other instances that you can recall
10 where you participated in the decisions of the Fire
11 Management Group?

12 A Yes.

13 Q Tell us what those were.

14 MR. KENNEDY: Relevancy.

15 THE COURT: Overruled. There's been an issue raised as
16 to he's one person by himself, so he can't be included. And
17 he's just refuting that. Go ahead.

18 THE WITNESS: So during negotiations we talked about
19 what our benefits should be, or could be. Or what we should
20 negotiate for if there was a takeaway, like the one time
21 when that was discussed and got input from all the members
22 of the Fire Management Group, which I was a member of the
23 Fire Management Group.

24 They came to me to discuss discipline issues with
25 other employees. They treated me like I was just one of

1 them; both on the emergency scene and in daily type duties.

2 BY MR. JENSEN:

3 Q And can you recall any factual incident where you
4 participated in the Fire Management decisionmaking that did
5 not relate specifically to benefits?

6 A As far as the fire ground; is that what you are
7 talking about? Or other administrative-type duties? I'm
8 not clear.

9 Q I'm talking about within the group of Fire
10 Management, were there any activities that the Fire
11 Management Group did together that you were included in?

12 A Any that they had to discuss, whether it was
13 discipline, or procedure issues, or safety issues, they
14 gathered input from all of us.

15 Q From all of the --

16 A All of the Battalion Chiefs and myself.

17 Q And how regularly did that occur?

18 A Mostly on an as-needed basis. It wasn't everyday,
19 obviously, but there were other issues. Mostly like
20 discipline took up more time than any, and I probably
21 advised them more on that than any other advice.

22 Q Let me sort of confine this.

23 The idea that we're talking about right now is the
24 facts of instances that occurred for you being treated as
25 one of the group of Fire Management.

1 So that's what I'm searching for; do you
2 understand?

3 THE COURT: Right. He's given you that answer.
4 What more do you want?

5 BY MR. JENSEN:

6 Q Let me ask you: Was there dues that had to be
7 paid?

8 A No.

9 Q Were there regular meetings that you had to attend?

10 A No.

11 Q Were there any other regular requirements of
12 participating in this Fire Management Group?

13 A No. No formal ones.

14 Q Now, you testified a little bit about the duties of
15 the BC position that you performed that were in addition or
16 greater than those listed in Fire Captain.

17 Are there any more that you've since recalled of
18 times when you performed the duties of BC other than what
19 we've discussed?

20 A I think for the most part I gave you
21 representations of what I did, both in emergency incidents
22 and some administrative things. There were things that I
23 managed that normally a Fire Captain wouldn't. Like, we did
24 remodels on the fire stations; I managed the budget for
25 that.

1 I was kind of instrumental in getting the fire
2 station built in the Cajon area, the one that we have the
3 most northwestern part of the city was completely
4 unprotected. And those were things I was involved in that
5 would have been administrative things that no -- that Fire
6 Captains wouldn't be involved in.

7 And then the disciplinary actions for specific
8 employees of the procedures. How the Battalion Chiefs would
9 proceed from a management prospective, and then, you know,
10 what my input was as to how the -- because we operated under
11 the Peace Officer Bill of Rights to begin with, and then
12 they developed the Fire Officer Bill of Rights, which was
13 similar. And I was very well-versed because I spent ten
14 years in the union prior to this.

15 Q Let me ask that --

16 MR. KENNEDY: Your Honor, this is entirely redundant of
17 the testimony in direct. And I would object to it. It's
18 cumulative.

19 THE COURT: You are getting cumulative. I did hear all
20 of this before.

21 MR. JENSEN: I was seeking other --

22 BY MR. JENSEN:

23 Q Let me ask you this specific question.

24 There's been testimony that sometimes Fire Captains
25 perform the duties of a Battalion Chief prior to a Battalion

1 Chief coming on the scene; do you recall that testimony?

2 A Yes.

3 Q And in your case, when a Battalion Chief did arrive
4 on the scenes, did you revert to a Fire Captain, or did you
5 remain performing the duties of a Battalion Chief?

6 A Most of the time I remained a as BC. They had a
7 great deal of confidence, and it's always better to have two
8 people in a uniform command than it is to just have one and
9 break down the unit.

10 I was specifically stationed at a four-person
11 station so they could use me whenever they wanted to and not
12 fall below the minimum three persons on an engine. I had a
13 car at the station -- or it was a Suburban -- that I could
14 respond in as a Battalion Chief if I needed to, or if I
15 needed to go do administrative things, I could go offsite
16 and the take care of those tasks.

17 Q And did other Fire Captains in their positions have
18 a Suburban available to them?

19 A No.

20 Q Were you the only person other than -- well, did
21 other BCs have a Suburban available to them?

22 A The Battalion Chiefs all had their own cars.

23 Q And so this comes back to a work location issue
24 that I wanted you to discuss.

25 Tell us how your position in the four-manned

1 station, how that would be consistent with the position of a
2 BC?

3 A Mostly to be able to be fluid enough to be able to
4 go to where you needed to go. To do whatever it was whether
5 it was an administrative action or emergency response.

6 The daily duties were sporadic in as much as the
7 emergency calls are throughout the day, and obviously not
8 planned or scheduled. So fill-in work was done all the
9 time, whether that was managing a budget, or doing employee
10 evaluations, or doing research on policy and procedures for
11 fire ground safety, or training.

12 I mean, there's just numerous amounts of things
13 that I did on a regular basis that was exactly what a BC
14 would do.

15 Q And were these things that a Fire Captain would not
16 do?

17 A Many of them they would not do. They still
18 supervise their own personnel and normally they wouldn't
19 have input on the other personnel. But the BCs would
20 frequently come to me when they were doing an evaluation and
21 talk about the evaluation and what I thought, and how they
22 were going to implement it.

23 Q And this would be something that Battalion Chiefs
24 would talk amongst themselves?

25 A Exactly.

1 Q And so let me just ask you this question:

2 How often or how regularly did you perform the
3 duties of a BC?

4 MR. KENNEDY: Objection. Vague. Asked and answered.
5 Cumulative.

6 THE COURT: Overruled.

7 THE WITNESS: Like I said, it's on a regular basis.
8 It's not our job where we would go in and two hours you do
9 this, two hours you do that; it's throughout the shift on an
10 as-need basis. So if I wasn't needed to go somewhere to
11 deal with some issue, I might be going over the budget on
12 the remodels for the stations or gathering information for
13 the new station to be built or --

14 BY MR. JENSEN:

15 Q And those would be?

16 A On a regular basis, whenever I was on shift. And
17 the day is full of stuff like that.

18 Q And was your work location consistent with the way
19 that a BC is work location?

20 A Yeah. The work is done all over the city.

21 Q And is there are any other logically related aspect
22 of what you did that would be similar to the Battalion Chief
23 or the management class of fire safety?

24 A Not that I can think of off the top of my head.

25 Q And you have some -- I just want to get back to

1 that document that you wrote there.

2 Can you just explain for us what that is --

3 MR. KENNEDY: Objection.

4 MR. JENSEN: -- why you wrote those down?

5 THE WITNESS: I was --

6 THE COURT: Stop.

7 MR. KENNEDY: The objection to the document is: It's
8 not been identified as to what it is. It was testified it
9 was created just before he took the stand while he was
10 sitting at the table. And the relevancy of why he wrote
11 that down, or what it is, I mean, if it's to refresh his
12 recollection then so be it, but it doesn't come into
13 evidence.

14 THE COURT: I don't know what it is, so the objection is
15 overruled.

16 What's is the document?

17 THE WITNESS: What I tried to do is to look at the Rank
18 and File MOU and Fire Management MOU.

19 The Fire Management MOU is a little more extensive
20 because it groups all the management for the city in one MOU
21 and isolates out the differences as it's goes to the
22 document.

23 THE COURT: So what's the Exhibit 47?

24 THE WITNESS: All this is what Fire Management got and
25 what Rank and File got. And I just started going down the

1 list as I worked my way through the MOUs.

2 BY MR. JENSEN:

3 Q And, Mr. Lewis, I'm going to hand you a pink
4 highlighter pen, and I'm going to ask you to indicate on
5 there which benefits you received that were as consistent
6 with a Fire Management MOUs that are not in the Rank and
7 File MOU?

8 A These, and there may be more. I only made it part
9 way through.

10 MR. JENSEN: And let the record reflect that on
11 Exhibit 47, Mr. Lewis has highlighted a uniform allowance,
12 one year EPMC education, FSLA, and take --

13 THE WITNESS: Takeaway pay that we paid back.

14 MR. JENSEN: And, Mr. Lewis, I have no further
15 questions.

16 THE COURT: Cross-examine?

17

18 CROSS-EXAMINATION

19 BY MR. KENNEDY:

20 Q Mr. Lewis, what is the difference, if there is any,
21 between the type of disciplinary actions or personnel
22 actions that a Battalion Chief is responsible for
23 undertaking that are different than those of the Captain, a
24 Fire Captain?

25 A The Battalion Chief's responsible for applying the

1 discipline on minor disciplines the Captains would do it.
2 But if you had something that had potential impact of
3 altering the employees's pay, time off, things like that,
4 then there needed to be true consistency across the board so
5 that all the Battalion Chiefs were treating the employees
6 the same way and applying the Firefighters Bill of Rights to
7 them equally.

8 Mr. Glave, who was here yesterday, made an awful
9 lot of money because that was not happening for a period of
10 time.

11 Q So what were the documentation, if any difference,
12 between the actions that would be taken by Battalion Chief
13 verses a Fire Captain?

14 A Like I said, it would be minor discipline,
15 corrective actions, counseling, things like that that the
16 Fire Captain would do. If that didn't correct the employee
17 and they disobeyed the rules, or got themselves in trouble,
18 then the Battalion Chief would enter in and assist the
19 Captain sometimes with the discipline, or sometimes just the
20 Battalion Chief would do the discipline.

21 Q So would the Battalion Chief then be signing any
22 kind of documentation or executing any kind of documentation
23 regarding the discipline of the subordinate?

24 A If they actually did the discipline there would be
25 a Disciplinary Action Form.

1 Q So they would sign a Disciplinary Action Form for
2 these higher level sanctions?

3 A Exactly.

4 Q And you signed those as Fire Captain?

5 A No, I just advised the Battalion Chiefs.

6 Q So you never signed one of those?

7 A I wouldn't say never.

8 Q You don't recall?

9 A I was involved in some directly, but I can't
10 specifically tell you when or what the incidents were. It
11 was more common that they would come to me and kind of
12 layout what the offense was, and how they were going
13 approach it, and to get feedback from me; not to do the
14 discipline, but to give them feed back. Because my
15 expertise --

16 Q But then the Battalion Chief would sign it?

17 A Whoever did the discipline. It could even be the
18 Captain with the Battalion Chief overseeing him while he did
19 the discipline.

20 Q I know. But these signatures of the Disciplinary
21 Action Forms, those are Battalion Chiefs?

22 A It could be the Captain if he delivered the
23 discipline. Even if the Battalion Chief was overseeing it.

24 Q Talking about the higher level --

25 A Higher-level discipline, then usually the Battalion

1 Chief.

2 Q And you never recall signing those specifically?

3 A I don't know if I did any as an acting Battalion
4 Chief or not.

5 Q Were you an acting Battalion Chief?

6 A Mm hmm.

7 THE COURT: Is that a yes?

8 THE WITNESS: Yes, sorry.

9 BY MR. KENNEDY:

10 Q When were you designated as an acting BC?

11 A From probably 2001 through 2012.

12 Q Okay. And how is this reflected in any document?

13 A There could have been -- on the rolls there may
14 have been documents depended on the time frame. But as far
15 as the action forms or the formal I worked from this date to
16 this date, they didn't do that. They didn't need to,
17 especially after the settlement because once the settlement
18 was done they were paying me regular anyway.

19 Q So because they were paying you regularly at a
20 higher level, they didn't need to undertake any Personnel
21 Action Forms -- can I finish my question, please, sir.

22 There was no necessity then to fill out a Personnel
23 Action Form; is that your testimony?

24 A They didn't. I can flat tell you they didn't.

25 Q Okay. So were you performing -- you said from 2001

1 to 2012?

2 A Mm hmm.

3 Q Okay.

4 A Yes.

5 Q Were you receiving a Battalion Chief pay in 2001?

6 A No.

7 Q 2002?

8 A Not that I recall.

9 Q 2003?

10 A Not that I recall.

11 Q 2004?

12 A I got retro paid.

13 Q 2005?

14 A I got retro paid.

15 Q 2006?

16 A I got retro paid.

17 Q 2007?

18 A I got paid from the time we settled all the way

19 until I retired.

20 Q So all that prior time you didn't get paid BC pay?

21 A I did get paid Battalion Chief pay the whole time.

22 Q Retroactively?

23 A Retroactively to November of 2004 all the way

24 through 2012.

25 Q Retroactively from the date of the settlement?

1 A From the date I should have been promoted.

2 Q You got paid retroactively from the date of the
3 settlement, after the settlement?

4 A No, no. On the settlement -- let me make sure I
5 understand what you are saying.

6 When we settled in 2007, they paid me back to
7 November of 2004 because that's when I should have got
8 promoted. And then they paid me into the future, along with
9 all of the benefits all the way until I retired.

10 Q My point is, sir, that you were -- if I understand
11 your position, and correct me if I'm wrong, is the reason
12 there was no Personnel Action Forms in your file is because
13 you were already getting paid --

14 MR. JENSEN: Objection --

15 MR. KENNEDY: -- at that rate; right?

16 MR. JENSEN: Objection. He said they did not do it.

17 THE COURT: Overruled. He's asking correct me if I'm
18 wrong. So he can correct him if he's wrong.

19 THE WITNESS: I don't know why they didn't, but usually
20 when you don't have to do something people don't do it. So
21 I didn't know how they did documentation in finance, or in
22 HR, or Personnel, or anything else. All I know is what they
23 told me, what I was privy to, and the fact that I was under
24 the Fire Management MOU and subject to all of the benefits
25 or negative benefits, if you will, that applied to them.

1 BY MR. KENNEDY:

2 Q But you had no earnings as Battalion Chief in
3 2000 -- between 2001 and 2007; correct?

4 A No, I didn't. I didn't get any money until they
5 paid me retroactively.

6 Q Now, the deductions you are talking about, are
7 those referred to as concessions?

8 A No, that was something different. It was -- we had
9 a city manager for a period of time that came in and said
10 that he would give us so many hours, but they wanted us to
11 pay them back in hourly concessions. So you can see that
12 they were doing it in 2011 because it shows the 716 that
13 they have took away --

14 THE COURT: For the record he's pointing to Exhibit
15 Respondent's 30.

16 THE WITNESS: 30. And then added it back in. So what
17 they did is, they said we want everybody to make a
18 concession so it doesn't look like just -- the personnel are
19 all contributing from fire to help reduce this budget
20 deficit and so they gave us ours. And there's a -- see
21 where it says -- you can't see it.

22 BY MR. KENNEDY:

23 Q 30?

24 A If you look a 30, there's a concession balance and
25 that balance was adjusted, and the money that it represented

1 was balancing what the takeaway was for the personnel.

2 Q And was there any differentiation on the concession
3 amounts between the Rank and File and the management?

4 A This was the same for everybody, but when the Fire
5 Management did their concession, the Rank and File did not.
6 They didn't do any concession. They didn't do any monetary
7 concession, it was only the Fire Management.

8 Q And is a personal vehicle, a Suburban, those
9 vehicles that were allowed for -- is that a benefit of a
10 Battalion Chief?

11 MR. JENSEN: Objection, your Honor. "Personal vehicle."

12 THE COURT: He said qualify -- you are talking about the
13 Suburban that's being used by Battalion Chief?

14 MR. JENSEN: This is his personal car, or the city's
15 car? Is the question --

16 THE COURT: That's what I just asked.

17 BY MR. KENNEDY:

18 Q I'm talking about it -- you drove a Suburban. They
19 provided you a Suburban?

20 A That's correct.

21 Q Okay.

22 A But it wasn't a personal vehicle.

23 Q I understand.

24 A It belonged to the fire department. I didn't take
25 it home.

1 Q But Battalion Chiefs had a vehicle that they would
2 use?

3 A Assigned to them. Just like that one was assigned
4 to me.

5 Q That was a benefit that they would have as well?

6 A It's not a benefit, it's a necessity in being able
7 to coordinate emergencies and respond to the incidents.

8 Q Now, you were never promoted to the position of
9 Battalion Chief?

10 A They never gave me the title.

11 Q You were never promoted to the position of
12 Battalion Chief?

13 A No. They didn't promote me.

14 Q And did you ever vote on any MOU under the
15 management agreement with Battalion Chiefs?

16 A We didn't vote, we just had input. We didn't vote
17 at the end when they went -- the people that were
18 representing Fire Management went to the management group
19 and then negotiated with the city. And whatever they
20 negotiated they came back and said, "This is what we got,"
21 or, "This is what we didn't get."

22 Q Did you ever vote -- did the Fire Captains, Rank
23 and File take votes?

24 A Yes, they did formally because there was so many.

25 Q Did you ever vote as a Fire Captain?

1 MR. JENSEN: Objection. Vague and ambiguous as to time.

2 THE COURT: Sustained. Qualify the time.

3 BY MR. KENNEDY:

4 Q Prior to the settlement, did you ever participate
5 in any vote as a Fire Captain?

6 A Prior to the settlement, yes.

7 Q After the settlement?

8 A No.

9 Q Were you ever asked to participate in a vote?

10 A No.

11 Q Were there any votes?

12 A I don't know.

13 Q Okay. And your direct line of supervision was to
14 whom?

15 MR. JENSEN: Objection. Vague as to --

16 MR. KENNEDY: I'm sorry. Withdraw the question.

17 BY MR. KENNEDY:

18 Q Prior to the settlement, say in 2006, who was your
19 direct line of supervision?

20 MR. JENSEN: Objection. "Direct line of supervision."

21 MR. KENNEDY: Immediate supervisor.

22 THE COURT: Overruled.

23 Who was your immediate supervisor?

24 THE WITNESS: My Battalion Chief, whoever it was at the
25 time.

1 BY MR. KENNEDY:

2 Q Okay. And after the settlement?

3 A I still had a Battalion Chief that I was assigned
4 to.

5 Q You were present for the testimony of Mr. Glave?

6 A Yes.

7 Q And did Mr. Glave represent what was it -- I can't
8 remember the full title, but it's 891?

9 A San Bernardino City Professional Firefighters,
10 Local 891.

11 Q And you were a member of that? Or you were?

12 A I was a member of that.

13 Q And when did you cease being a member?

14 A Well, technically, I guess, when I retired. I
15 still paid dues, several of the BCs paid dues into a Rank
16 and File to help support. And they also got there's --

17 Q My question, Mr. --

18 MR. JENSEN: Your Honor, the witness is trying to
19 answer.

20 THE COURT: No, he's not. He's going beyond the
21 question. I'm going sustain the objection.

22 BY MR. KENNEDY:

23 Q He was discussing how the negotiations went on the
24 settlement of your lawsuit; do you recall that?

25 A Yes.

1 Q And he indicated he had discussions with you
2 concerning the options that were made available for the
3 settlement?

4 A Some of them, yes.

5 Q And one of the options was let's promote Mr. Lewis;
6 right?

7 A Yes, that was one of the things I asked for --

8 Q Now, the other option was an lump-sum payment to
9 Mr. Lewis?

10 A You know, Cory never offered me a lump sum. I
11 think that was in his discussion with the judge and
12 Mr. Odlum. He never offered me a lump-sum settlement. I
13 might have taken the lump-sum settlement.

14 Q And do you remember him using the term
15 "million-dollar settlement"?

16 A Yeah. He said it was a million dollar case. He
17 was off a little bit.

18 Q Did he use those terms when you were negotiating --

19 A I wasn't present when he was negotiating.

20 Q And the third option was to pay you the Delta
21 between the Captain and the Battalion Chief, and to give you
22 any non-redundant benefits that would be received by the
23 Battalion Chief?

24 MR. JENSEN: Objection as to non-redundant.

25 THE COURT: Sustained.

1 BY MR. KENNEDY:

2 Q Give you some of the benefits of the Battalion
3 Chief; right?

4 MR. JENSEN: Objection to "some of the benefits."

5 THE COURT: Sustained.

6 BY MR. KENNEDY:

7 Q Did you receive benefits that weren't available to
8 the Battalion Chief?

9 A No.

10 Q How about your overtime pay?

11 A I guess you could. You -- it's not really a
12 benefit, it's just part of work.

13 Q You didn't consider overtime pay a benefit?

14 MR. JENSEN: Objection. Relevant to the --

15 THE COURT: Overruled.

16 THE WITNESS: I guess you can call it a benefit.

17 BY MR. KENNEDY:

18 Q So you chose in the settlement case to elect to get
19 the difference in pay and benefit; correct?

20 A I don't understand. What do you mean?

21 Q That you weren't given the option, that you are
22 aware of, of the lump-sum payment; right?

23 A That's correct. I was never offered --

24 Q Never offered?

25 A Correct.

1 Q It was something you and Glave discussed; is that
2 right?

3 A I think he discussed it in his negotiation, but he
4 didn't discuss it with me.

5 Q So as far as you are concerned, the discussion, "I
6 could be promoted to a Battalion Chief or they could just
7 give me the money benefits that I would have received, had I
8 been promoted as a Battalion Chief."

9 A No. He never discussed it with me. He came to me
10 with the Settlement Agreement, and I said, "Well, what about
11 getting promoted?" And he said, "We're going to get you
12 everything just as though you were promoted." And I said,
13 "That includes my retirement," because obviously that's the
14 biggest benefit of being promoted. And he said, "It says
15 all benefits." So I said -- I was the one that said, "Tell
16 them to give me a million bucks if they don't want to do
17 this."

18 Q Why did you say that?

19 A Because it was worth a lot of money. In the future
20 payments -- and obviously I wouldn't have to be doing
21 this -- but I never thought there was a problem. I thought
22 that the city was being upfront, that he negotiated in good
23 faith and after it was implemented, I checked to make sure
24 the correct percentage was being taken out of my Battalion
25 Chief's pay for PERS. And then subsequent to that,

1 Mr. Johnson directed the city on how to take the stuff
2 out --

3 Q Mr. Lewis, I'm just asking is it -- okay. You've
4 answered the question.

5 And I just want to move on for time sake.

6 A Sure.

7 Q When were you presented the Settlement Agreement by
8 Mr. Glave to review?

9 A Right before the signature dates. I can't tell you
10 the exact date.

11 Q And when you looked at it, you remarked on the fact
12 it didn't say anything in there about your retirement, and
13 Mr. Glave then responded, "It says all benefits." Okay.

14 THE COURT: He didn't say retirement. He said doesn't
15 say anything about being promoted.

16 MR. KENNEDY: Well, it does say something about being
17 promoted; doesn't it? And it says you weren't going to
18 be --

19 MR. JENSEN: Objection --

20 THE WITNESS: It's --

21 MR. JENSEN: Objection. Misstates. The document speaks
22 for itself.

23 THE COURT: Sustained.

24 BY MR. KENNEDY:

25 Q Does the agreement state that you are going to be

1 promoted?

2 A No.

3 Q When Mr. Glave presented it to you, did you ask him
4 to include any provision in there concerning the CalPERS?

5 A No. I asked him if it did include CalPERS.

6 Q But it doesn't mention CalPERS in there, does it?

7 A No. It says, "All benefits afforded to Battalion
8 Chiefs," which includes that. And that's how it was
9 explained to me.

10 Q Did you try to contact CalPERS at that time? Share
11 the Settlement Agreement with them, and ask if it would be
12 included in your pension?

13 MR. JENSEN: Objection. Compound.

14 THE COURT: Overruled.

15 THE WITNESS: I did not at that time. I guess if I had,
16 I'd end up with Mr. Johnson, then he would have told me this
17 is how we'll report it. Because that's what CalPERS did
18 shortly after we signed the Settlement Agreement. I mean,
19 that's what the city did. They contacted CalPERS, Johnson
20 respond, and they --

21 BY MR. KENNEDY:

22 Q You answered the question, sir.

23 A Okay.

24 Q How many Battalion Chiefs were there with the City
25 of San Bernardino in 2007?

1 A Six.

2 Q And were there any vacancies?

3 A There was from time to time.

4 Q And how long from time to time -- in 2007 there
5 were?

6 A That was vacancies for any vacations. They didn't
7 have any extra people.

8 Q I see. So the positions were all filled?

9 A Right.

10 Q And it is your testimony that the additional
11 payments that you received on top of the Captain's pay was
12 because you were acting in Battalion Chief?

13 MR. JENSEN: Objection. Misstates his testimony.

14 THE COURT: Overruled.

15 THE WITNESS: I don't know if I thought about it like
16 that. I was promised Battalion Chief pay, and that's what I
17 got, and that's what it said on my check, and that's what I
18 was being paid. I didn't characterize it as these are
19 isolated because of this or that.

20 It says I get Battalion Chief pay, and that's what
21 I was getting. It says Battalion Chief benefits, and that's
22 what I was getting. That's where I was. I don't know what
23 else to tell you. I didn't look at it in the terms that you
24 are looking at it.

25 ///

1 BY MR. KENNEDY:

2 Q If you look at Exhibit 30, you used this term, in
3 fact, regular pay.

4 What was your regular pay rate?

5 MR. JENSEN: I'm sorry. Would you just repeat that
6 because I don't know what you are referring to.

7 MR. KENNEDY: Referring to his prior testimony.

8 BY MR. KENNEDY:

9 Q You refer to the column where it talks about pay
10 rate on Exhibit 30.

11 A Yes.

12 Q Okay. That's your regular pay rate?

13 MR. JENSEN: The document speaks for itself, and there's
14 no column that says pay rate, your Honor.

15 THE COURT: Sustained.

16 BY MR. KENNEDY:

17 Q Is a salary reflected on that document?

18 A Yes.

19 Q Okay. On the left-hand side, your left.

20 A Yes.

21 Q And what is that salary?

22 A 674057.

23 Q And is that --

24 A That's all inclusive, and it's broken down by
25 different things that finance put in there.

1 MR. KENNEDY: If I may, your Honor?

2 THE COURT: Yes.

3 MR. JENSEN: And may I, your Honor?

4 THE COURT: Go ahead.

5 MR. KENNEDY: I'm sorry. I pointed you to my left,
6 excuse me. On the right-hand there's the first --

7 THE WITNESS: Just point out whatever.

8 MR. KENNEDY: Where is -- on this --

9 MR. JENSEN: Your Honor, document speaks for itself.

10 MR. KENNEDY: -- on the right-hand side.

11 THE COURT: Overruled.

12 If you don't know, you can just say that.

13 THE WITNESS: I'm not sure what you are asking.

14 BY MR. KENNEDY:

15 Q You get one of these every month for how many
16 years?

17 A No, twice a month.

18 Q Twice a month.

19 A And this is what my net salary is.

20 MR. JENSEN: Your Honor, let the record reflect he's
21 pointing to 6765.37, which is at the bottom, second-hand
22 column on the second page of Exhibit 30R.

23 MR. KENNEDY: And on the top left-hand column it says
24 the word "regular."

25 MR. JENSEN: Your Honor, objection. Document speaks for

1 itself.

2 THE COURT: It speaks for itself.

3 MR. KENNEDY: And I want his understanding of what that
4 means.

5 MR. JENSEN: I just provided that to you.

6 MR. KENNEDY: No. What he understands where it says
7 regular.

8 THE WITNESS: It's however finance characterizes it.
9 They've got all kinds of terminology all over this document
10 that I'm not totally sure --

11 BY MR. KENNEDY:

12 Q Prior to 2007, did you receive documents like this?

13 A Yes.

14 Q And that column "regular" was there; right?

15 MR. JENSEN: Objection.

16 THE COURT: You are being argumentative.

17 BY MR. KENNEDY:

18 Q What was your regular pay -- pay rate -- in 2006?

19 A In 2006, I have no idea.

20 Q Did you get a warrant?

21 A I did.

22 Q Was your regular pay rate indicated on that
23 warrant?

24 MR. JENSEN: Your Honor, document speaks for itself.

25 THE COURT: I don't think it says the word "rate," so

1 sustained.

2 MR. JENSEN: Your Honor, can I make an objection for the
3 record?

4 THE COURT: Go ahead.

5 MR. JENSEN: I just object to this line of testimony
6 where Mr. Kennedy tries to get the witness to interpret the
7 documents to support his legal theory.

8 THE COURT: Overruled.

9 MR. JENSEN: Thank you.

10 THE COURT: I will say the witness told me that this is
11 a finance document. He doesn't know what they use for the
12 different things; correct, sir?

13 THE WITNESS: That's correct. They have their own
14 language.

15 BY MR. KENNEDY:

16 Q When you were settling your case, sir, did you have
17 a sense that how much more you would get as compensation
18 after the settlement per month or biweekly, I guess, than
19 you would prior to the settlement?

20 A I knew what Battalion Chief pay was, yes. I knew
21 how much it was at that specific time.

22 Q And what was the difference between the two pays?

23 A At the time of the settlement, I have no idea.

24 Q What's the difference between -- on that document
25 in front of you, 30 -- can you tell me by looking at that

1 document what the difference between the regular pay of a
2 Fire Captain and that of a Battalion Chief is?

3 MR. JENSEN: Objection, your Honor. The document speaks
4 for itself.

5 THE COURT: I'm not going to have the guy do math in
6 front of me.

7 Objection sustained.

8 BY MR. KENNEDY:

9 Q Oh, the place you worked, you worked out of where,
10 after the settlement did you work out of?

11 A A bunch of different stations.

12 Q Okay.

13 A The regular was 227.

14 Q And were there firefighters there?

15 A Yes.

16 Q Fire Captains there?

17 A Yes.

18 Q Engineers there?

19 A Yes.

20 Q Battalion Chief there?

21 A Occasionally.

22 Q Okay. And you said you did some estimates for
23 remodel of the station?

24 A We kept track of what the remodels were going to be
25 for the station. I took care of that. I had the Captains

1 go out so we could evaluate how much and how it would be
2 allotted.

3 Q What did you do with that information?

4 A The Deputy Chief was running the program, so I met
5 with him and I said this is what I think we need, and this
6 is where I think we can trim. And consequently that's how
7 the budget went down and I made sure they were on track
8 doing the remodel.

9 Q What other budget items did you get involved in?

10 Did you directly get involved in as far as
11 preparing or signing off on --

12 THE COURT: After the Settlement Agreement?

13 BY MR. KENNEDY:

14 Q After the Settlement Agreement.

15 A The fire station in Devore. The --

16 Q Describe what you did?

17 A The fire station was going to be built, this was a
18 brand new fire station. We were out gathering information
19 for cost of building, which I wasn't directly involved with
20 the building itself cost, but the things that were going to
21 go in the building and the equipment and --

22 Q Did you prepare the budget?

23 A I prepared all that part of it. It was submitted
24 together with all the other pieces so they could get an
25 evaluation of what the estimated cost was going to be.

1 Q Anything else?

2 A We did some equipment estimations as far as -- we
3 used to buy the engines pretty bare, so we would get
4 materials and make compartments and that kind of thing. It
5 was a lot cheaper for us to do it that way. I was involved
6 in that. And --

7 Q How were you involved in that? What did you do?

8 A In the estimating of the material cost and how the
9 equipment could be laid out so that it would operate
10 properly.

11 Q How did you do that?

12 A By going and looking at the new equipment and
13 figuring out where things are going fit, and working with
14 the people that were actually going to be using the
15 equipment. The paramedics and engineers and things like
16 that.

17 Q What did you do with that information?

18 A Brought it back and put it in the budget package
19 for the supplies for the vehicles. The vehicles are --

20 Q When you mean "put it in the budget package," what
21 do you mean?

22 A Go and meet with the Deputy Chief and give them the
23 estimates that we had. He was the one that approved the
24 budget.

25 Q So he was preparing the final budget. He was

1 preparing the budget. He approved the budget. He's the one
2 who submitted it to the Counsel; correct?

3 A Well, he did the bulk of the work. The Fire Chief
4 actually submitted the budget, but it was pieces brought in
5 by mostly Battalion Chiefs, management people --

6 Q Captains?

7 A Sometimes they might get some input, depending on
8 what the item was. There were some Specialty Captains that
9 had their own specific budget.

10 Q Okay. And the remodel, when was that? What year?

11 A I want to say 2008, but I'm guessing, so --

12 Q And are you talking about the equipment; is that
13 any particular year?

14 A The equipment there was a couple of times that I
15 was involved in that. And definitely after the settlement.

16 Q Now, you were here for the testimony of Mr. Glave.

17 A Glave.

18 Q And Mr. Glave stated that you were a member of 891,
19 and you were in the Rank and File; correct?

20 A I was when he represented me in the lawsuit.

21 Q Okay. And you were after the lawsuit too; correct?

22 MR. JENSEN: Objection. Misstates his prior testimony.

23 BY MR. KENNEDY:

24 Q Were you a member of the 891 after the lawsuit?

25 A I wasn't an active member after 2007 because I was

1 under the MOU or Fire Management.

2 Q How were you under the MOU?

3 Were you actually part of the management group on
4 the MOU?

5 A Yes.

6 Q Really. And how do you know that?

7 A Because they sought my input and they applied
8 everything that they negotiated for to me, including the
9 takeaways.

10 Q But you also got benefits under the --

11 A No.

12 Q -- under the Captain?

13 MR. JENSEN: Objection, your Honor. Argumentative --

14 BY MR. KENNEDY:

15 Q Does the Management Unit have the overtime?

16 THE COURT: He said no.

17 MR. KENNEDY: No.

18 THE COURT: No, no. He said no.

19 MR. JENSEN: Objection. The question is argumentative
20 and it's contrary to the prior testimony.

21 THE COURT: Sustained.

22 BY MR. KENNEDY:

23 Q When was the last date that you physically showed
24 up for work?

25 A I was injured in June. I'm sorry, my brain is just

1 fried.

2 THE COURT: What year?

3 THE WITNESS: That's what I'm trying -- if it was '11 or
4 '10. I injured my knee, and subsequently I was diagnosed
5 with Lymphoma. So I'm thinking that that was 2010, and I
6 never did return to work after that.

7 After I injured my knee and was subsequently
8 diagnosed with Lymphoma, and then did the treatment for
9 that, and then after that came back and they finished doing
10 the treatment for my knee until I retired. Because I
11 retired in 2012.

12 MR. KENNEDY: And there are duty statements --

13 THE COURT: Geese are being quite loud.

14 MR. KENNEDY: I ignore them. Behind my house is a 24/7
15 flock of them.

16 BY MR. KENNEDY:

17 Q Can I ask you, when you filed for retirement you
18 put on the retirement application the position you are
19 retiring from as Fire Captain; correct?

20 A Yes, as directed by risk management staff. I went
21 in there and filled out the paperwork.

22 Q So the risk management people, the city told you to
23 put Fire Captain?

24 A They said here is how you fill this out. This is
25 what you need to do because I was filing for industrial

1 disability under their supervision.

2 Q Okay. But why didn't you say Battalion Chief?

3 A Because I didn't have the title of Battalion Chief.
4 But I didn't think it made any difference, apparently it
5 does.

6 Your Honor, did you want this?

7 THE COURT: Yes.

8 MR. KENNEDY: I have no other questions.

9 THE COURT: Redirect?

10 MR. JENSEN: Yes, your Honor.

11 First I would just like to admit that exhibit as
12 Mr. Lewis's admin explanation of his comparison right before
13 the hearing of the --

14 THE COURT: I'm going to receive it as notes.

15 MR. KENNEDY: Receive as what?

16 THE COURT: His notes.

17 MR. KENNEDY: For what relevancy --

18 THE COURT: Well, basically --

19 MR. KENNEDY: -- and what's the foundation?

20 THE COURT: Wait. Basically he talked about he went
21 through and looked at what he was doing as Fire Captain.

22 MR. KENNEDY: It's cumulative. Is it coming in as
23 evidence or just a document that was used to refresh his
24 recollection? He took it directly from he says the MOU.

25 THE COURT: Right. I'm going to take it as though he

1 testified. If asked these questions, this is what he was
2 getting.

3 MR. KENNEDY: He did testify.

4 THE COURT: Right. So I'm receiving it. 47 is in.

5 (Respondent's Exhibit 47 was received
6 in evidence by the Court.)

7 MR. JENSEN: Thank you, your Honor.

8

9 REDIRECT EXAMINATION

10 BY MR. JENSEN:

11 Q Mr. Lewis, just to the clarify, at some point there
12 was a Fire Management concession that was made that the Rank
13 and File did not make; is that correct?

14 A That's correct.

15 Q And did you make that concession?

16 A Yes.

17 Q And there was a response to Mr. Kennedy's question
18 about a line of reporting, you mentioned that you were still
19 assigned to a Battalion Chief.

20 Can you explain that?

21 A Yes. But technically there's a Rank and File all
22 the way throughout system, and so anybody that is holding a
23 rank of Captain -- the Battalion Chief is over or that's
24 their line of communication, or line of supervision is the
25 Battalion Chief or the Captain. So I was assigned -- my

1 station was assigned to a Battalion Chief.

2 Q And when there was actually duties to be performed,
3 were you treated by the BC in where you were assigned as an
4 equal BC?

5 A Yes, I think they all accepted me as -- I had all
6 the qualifications and most of those guys I had trained.

7 Q So when you say "still assigned" that's a technical
8 assignment of responsibly perhaps or reporting?

9 Or how would you explain it as far as the duties
10 that you performed?

11 A Well, I think I went through most of the duties
12 that I performed, but if I was filling in for a Battalion
13 Chief, then I would be supervising the other Captains that
14 were in that Battalion. So whatever incidents or whatever
15 day-to-day issues that needed to be dealt with, or if I
16 needed to go meet with someone, I took care of that.

17 Q So when there was a BC that was present, did you
18 ever perform any BC duties?

19 A Yes.

20 Q How about on a day-to-day basis?

21 A I did meet with them in preparation for them to go
22 in to do discipline. So I was there with them before they
23 went in. Usually not at the fire station because it was
24 confidential information. Employee disciplines are
25 protected so...

1 Q So in what capacity were you dealing with these
2 disciplinary issues?

3 THE COURT: Other than what he's already told me at
4 length?

5 Redirect is the not rehash.

6 MR. JENSEN: I know.

7 THE COURT: Let's go off the record.

8 (Discussion off the record)

9 THE COURT: Back on the record.

10 Sir, I remind you you are sill under oath.

11 THE WITNESS: Yes.

12 BY MR. JENSEN:

13 Q And is there a reason that you didn't sign any
14 disciplinary reports?

15 A I said I couldn't remember that I signed any, but I
16 probably did. I administered discipline. I didn't -- for
17 the bulk of it I was an advisor to help them through the
18 process so that they didn't violate the firefighters's
19 rights. So they stayed on target.

20 Q And you mentioned this issue when you were
21 improving the equipment engine and doing budgeting for that.

22 Were you doing that as Specially Captain or as
23 acting BC?

24 A No, it was administrative duty.

25 Q It was a BC?

1 A They could hand out whatever they wanted to. They
2 were paying me. They used me like they were paying me
3 because they were.

4 Q And was the Deputy Chief the supervisor of the BCs?

5 A Yes.

6 Q And you reported your budgeting material to the
7 Deputy Chief?

8 A To the Deputy Chief, or the Chief if he was gone.
9 Because the Chief collected some information as well.
10 Everybody kind of spanned over.

11 MR. JENSEN: I have no further questions.

12 THE COURT: Recross?

13

14 RE CROSS-EXAMINATION

15 BY MR. KENNEDY:

16 Q Mr. Lewis could you look at in the blue binder,
17 your Exhibit 11.

18 Now you had a --

19 THE COURT: Hang on. Let me get there.

20 BY MR. KENNEDY:

21 Q While you are getting that, you were looking at a
22 settlement or some workers' compensation claim before you
23 retired or shortly after?

24 A No. None of these have been settlement.

25 Q That document says findings of facts and

1 conclusions of law. It's your workers' compensation case;
2 right?

3 MR. JENSEN: Objection -- (unintelligible).

4 THE REPORTER: I'm sorry, what was that?

5 MR. JENSEN: The document lacks foundation.

6 MR. KENNEDY: It's admitted --

7 THE COURT: Overruled. He's asking what it is. It's in
8 evidence already.

9 MR. KENNEDY: It's already admitted into evidence and
10 it's his exhibit.

11 THE WITNESS: This is -- well, there's an application
12 for a workers' compensation on injuries that I sustained
13 over my career, many of which I still have so -- but it's
14 not settled and there's been no remuneration on any of this.
15 It's just in process.

16 BY MR. KENNEDY:

17 Q Okay. And so this finding of fact and conclusion
18 of law was -- you participated in a hearing?

19 A No. There's been no hearing.

20 Q Have you seen this document before?

21 A I have not. But I have been -- they have sent me
22 to doctors, my attorney has.

23 Q You've never seen this document before?

24 A I don't recall it.

25 Q How do you think your attorney got it?

1 MR. JENSEN: That's --

2 BY MR. KENNEDY:

3 Q Did you give it to your attorney?

4 A No.

5 MR. JENSEN: First of all, that's confidential
6 communication.

7 THE COURT: Sustained. The answer is stricken.

8 Sir, I really need you, Mr. Lewis, to wait until
9 the attorney objects.

10 THE WITNESS: I'm sorry.

11 MR. JENSEN: You are asking --

12 MR. KENNEDY: If I --

13 (Simultaneous talking)

14 THE COURT: Everybody stop. Mr. Lewis, stop -- I'm
15 sorry, Mr. Jensen. This is your exhibit.

16 MR. JENSEN: I'm not quite sure what --

17 THE COURT: He's allowed to ask about it.

18 MR. JENSEN: Yeah.

19 THE COURT: If you would wait for him to finish his
20 question, we can see what his question is.

21 Mr. Kennedy.

22 BY MR. KENNEDY:

23 Q Mr. Lewis, you see under findings of fact there it
24 states that under the findings there that it states that you
25 were employed by the City of San Bernardino as a fire

1 fighter in March 30th, 1981; is that a correct statement?

2 A Yes.

3 Q And that you were later promoted to a Fire Captain?

4 A That's right.

5 Q And that you remained in that position until you
6 retired in November 2012; is that a correct statement?

7 A That's what it says here.

8 MR. JENSEN: And --

9 BY MR. KENNEDY:

10 Q Is that a correct statement?

11 A That was the title I had, yes.

12 Q And you say this is still going on, this case?

13 A Yes.

14 Q And have you taken any steps to correct this
15 finding?

16 MR. JENSEN: Objection, your Honor. This --

17 THE WITNESS: I don't understand.

18 BY MR. KENNEDY:

19 Q Have you taken any steps to indicate that you
20 actually were retired in the position of Battalion Chief?

21 A I don't understand the question. Have I taken
22 any --

23 THE COURT: You told him you don't understand the
24 question.

25 THE WITNESS: I don't understand the question.

1 BY MR. KENNEDY:

2 Q Okay. Did you seek a finding from the Workers'
3 Comp. Board that in relation to your disability application
4 for retirement that the injuries were industrial related?

5 A Yeah. I think that's what this hearing was.

6 Q And this hearing was for the purposes of
7 determining whether your position -- whether your injury you
8 suffered as a position in San Bernardino were industrial
9 related for using your CalPERS retirement?

10 A Whatever position I held. At this time I was
11 injured. I was injured when I was acting as a BC, so that
12 was my first injury to my right knee. And I -- the problem
13 is that there's titles and then actual duties and what we
14 were doing. And so therein lies the complication.

15 This document I haven't seen. This came to my
16 attorney probably when he requested all documents from the
17 city. I know they had a hearing because the risk management
18 person that helped me fill out any application for
19 disability retirement said they had a hearing the following
20 week and they wanted to get it in. So they had me come down
21 and she helped me fill it out. And I filled it out and she
22 took it. And I knew that they were going to have a hearing,
23 but I didn't ever get a copy of this.

24 MR. KENNEDY: Nothing more.

25 MR. JENSEN: Just very quick followup to that.

1 FURTHER REDIRECT EXAMINATION

2 BY MR. JENSEN:

3 Q Mr. Lewis, are many of the duties of a BC similar
4 to the duties of a Fire Captain?

5 A Yeah. I would say a number of them are.

6 Q And are you familiar -- well, in your opinion, if
7 you were disabled for purposes of doing your duties as Fire
8 Captain, would that also mean you were disabled from doing
9 your duties as BC?

10 A That's correct.

11 MR. JENSEN: No further questions.

12 MR. KENNEDY: Just one last question.

13

14 FURTHER RECROSS-EXAMINATION

15 BY MR. KENNEDY:

16 Q Identify for me, if you can, is there any
17 particular duty that you performed on a daily basis, or even
18 a regular basis, that was exclusively something that would
19 be required only of a BC?

20 A On an everyday basis?

21 MR. JENSEN: He said regular basis.

22 THE WITNESS: Well, I regularly --

23 BY MR. KENNEDY:

24 Q Regularly, I mean -- at least on a weekly basis
25 let's say.

1 A Okay. Yeah. I probably talked to --

2 Q I don't want probably.

3 A Okay. All of the things I told you I did that were
4 administrative or acting as a BC whether it was
5 administrative kind of thing or an emergency situation --

6 MR. KENNEDY: Your Honor.

7 THE WITNESS: -- I did on a regular basis at least once
8 a week and probably more. With the way we work is three
9 shifts consecutively, on four shifts off, and then back to
10 three on. So basically, you did a cycle. That's what we
11 call the cycle, and we did those on a weekly basis.

12 And so during the course of that period of time,
13 all of the things that we've walked about, the advice to the
14 Battalion Chiefs, especially the discipline because it was
15 an ongoing thing with many employees.

16 MR. KENNEDY: I'm just asking, Mr. Lewis --

17 MR. JENSEN: Would you just let him finish, please?

18 THE COURT: He did.

19 BY MR. KENNEDY:

20 Q I want you to identify something.

21 Identify what you did then on each cycle that you
22 did that was only performable by a Battalion Chief?

23 THE COURT: Other than what he's told me at length?

24 MR. KENNEDY: He hasn't identified the fact that those
25 weren't also performed in his capacity as Fire Captain or on

1 delegation or request.

2 BY MR. KENNEDY:

3 Q But is there anything that you can tell me that you
4 did on a regular basis, something like --

5 A Oversight supervision of the Battalion.

6 Q You did that every cycle?

7 A I did it on a very regular basis.

8 Q Define for me what you mean.

9 A Sometime during the cycle.

10 Q Sometime during the cycle?

11 A Sometime during the 72-hour period I would end up
12 either in a BC position on an incident, because San
13 Bernardino is a very busy city, or as administrative
14 oversight for the Battalion. And --

15 Q Administrative --

16 A -- more regularly than that, maybe depending on the
17 time, I was actively involved in advising them on
18 disciplinary issues and doing administrative things as far
19 as the budgets, the equipment --

20 Q Mr. Lewis, just listen.

21 I'm asking you what you did on a regular basis, per
22 cycle, every cycle, during this time.

23 What one thing did do you --

24 MR. JENSEN: Objection. It's argumentative --

25 MR. KENNEDY: One thing --

1 (Simultaneous talking)

2 THE COURT: You need to let him finish the question,
3 okay? Do you understand?

4 MR. JENSEN: I do.

5 THE COURT: Do you understand? Okay. Thank you.

6 I understand you don't like the question, but
7 you've got to let him finish it so I can make a ruling
8 regarding your objection.

9 Start over, Mr. Kennedy.

10 BY MR. KENNEDY:

11 Q Identify for me something specific that you did,
12 that would only be performable by somebody; by a BC?

13 THE COURT: Other than all the stuff he's told me?

14 MR. KENNEDY: No. He said administrative duties, that's
15 nondescriptive. Disciplinary, he didn't explain that he
16 disciplinary -- he never actually signed off any
17 Disciplinary Action Forms. He maybe did some minor stuff
18 that would be done by a captain and maybe --

19 THE COURT: That's your argument, not his testimony.

20 MR. KENNEDY: I understand.

21 BY MR. KENNEDY:

22 Q Identify for me, is there something that you did on
23 a regular basis on each cycle that would only be performable
24 by a BC?

25 A All of those things that I told you were things

1 that only a BC would do that I did on a regular basis each
2 cycle. Whether it was filling in trying to prepare budgets,
3 or disciplinary things. Those were things that took up time
4 but they fit in between the emergency responses, the
5 training, the development of policies and procedure --

6 Q Did you develop policies and procedure?

7 A Yes.

8 Q And when?

9 A During the --

10 Q What policy -- name me a specific policy and
11 procedure you developed as a BC?

12 A I can't think of one off the top of my head --

13 MR. KENNEDY: That's fine.

14 THE COURT: Let him finish his answer.

15 THE WITNESS: It's been five years ago, and I had a
16 year's worth of chemo.

17 THE COURT: That's fine.

18 THE WITNESS: Sorry.

19 MR. KENNEDY: Just one last question.

20 BY MR. KENNEDY:

21 Q When you were a Captain, a Captain in the fire
22 department, when he was asked to move up, or he was put in
23 some acting situation for a brief period of time, that also
24 would put the Captain in the position of performing duties
25 similar to that of a Battalion Chief; correct?

1 A What do you mean? I don't understand.

2 Q Well, you used the term "move up" before.

3 If you showed up at a scene.

4 A Okay.

5 Q Showed up at a scene and you were the first person
6 to arrive, the Battalion Chief hadn't arrived, then the
7 Captains were required to function as the Battalion Chief?

8 A That's correct.

9 Q When you engage in the disciplinary actions, you
10 are talking about disciplinary procedure and you are talking
11 about you gave and they sought consultation from you; they
12 would do that also with the Captains; right?

13 A No.

14 Q They wouldn't ask you Captains? The BCs wouldn't?

15 MR. JENSEN: Objection. I withdraw.

16 THE WITNESS: It's very specific and employee discipline
17 is closely guarded as confidential. And, no, they didn't
18 ask other Captains.

19 BY MR. KENNEDY:

20 Q They only asked you?

21 A As far as I know they only asked me. They only
22 should have asked somebody who was in the confidential
23 management position because if they were discussing
24 disciplinary issues with nonconfidential employees, they
25 could find themselves in deep trouble.

1 Q And were there confidential employees that held the
2 rank of Captain?

3 A No. Only me.

4 Q So confidential employees -- only you. You are the
5 only Captain that had a confidential employee ranking?

6 A The only one I've ever known of, yes. I'm unique.

7 Q Other than that you never signed off on any
8 Disciplinary Action Forms?

9 A I may have signed off on some that I performed.
10 None that the BCs came to seek advice on. It was procedural
11 advisement where I thought it might help them to get to the
12 goal that they were trying to get to.

13 Q Because you were knowledgeable on firefighters
14 rules; right?

15 A I was knowledgeable on that and I had a
16 confidential qualification because I was in management
17 confidential. And they didn't have any problem discussing
18 it with me because they knew they hadn't violated any rules.

19 Q And you know of no other Captains ever held the
20 confidential?

21 A Not to my knowledge.

22 Q Anybody else?

23 A How --

24 Q Any other rank?

25 A No. I mean, Battalion Chief and above.

1 MR. KENNEDY: Okay. No other questions, your Honor.

2 I'm sorry one other.

3 BY MR. KENNEDY:

4 Q The confidential rating, how was that conferred
5 upon you?

6 A What?

7 Q How was that ranking conferred upon you? In other
8 words, that you were a confidential employee?

9 A That was told to me by finance when I went in and
10 they said you are going to be under this MOU, and this is
11 what you are going to receive, and you will be subject to
12 this MOU.

13 Q Even though you were not promoted to the rank of
14 Battalion Chief?

15 A Because of the Settlement Agreement, it dictated
16 that I would receive all benefits.

17 Q And the rank and position of being a confidential
18 employee is a benefit of a Battalion Chief?

19 A Or a responsibly.

20 Q Well, it's important. It doesn't say -- the
21 Settlement Agreement doesn't say responsibility, does it?

22 A Well --

23 Q Doesn't talk of duty, does it?

24 A Confidentiality is a responsibility.

25 Q You said it was a benefit?

1 A I believe it was a benefit. There were benefits
2 that I received that the Rank and File did not.

3 Q And does the Settlement Agreement speak to duties?

4 A It does not.

5 MR. KENNEDY: All right. No other question, your Honor.

6 MR. JENSEN: Just question quickly, your Honor.

7

8 FURTHER REDIRECT EXAMINATION

9 BY MR. JENSEN:

10 Q Mr. Kennedy had you describe your position as
11 unique, as though a group of one, and yet were your duties
12 unique?

13 A Not any different than any other Battalion Chief.

14 Q So what was unique about the position, the
15 situation, that you had?

16 A The uniqueness was that I also performed Captain's
17 duties when I needed to be a Captain.

18 Q And was it related at all to -- was this uniqueness
19 related at all to the title issue we have discussed?

20 MR. KENNEDY: I'm sorry. Vague.

21 THE COURT: What title issue? I've listened to four
22 days of testimony on this issue so...

23 MR. JENSEN: Right. Just very briefly.

24 THE COURT: You keep saying that.

25 MR. JENSEN: I'm trying.

1 BY MR. JENSEN:

2 Q I just want to -- you described the circumstances
3 as unique. And I just want to get your understanding of why
4 you describe it as unique in response to Mr. Kennedy's
5 questions?

6 A Because I had many of the duties but I never got
7 the title.

8 MR. JENSEN: No further questions.

9 MR. KENNEDY: Nothing.

10 THE COURT: Okay. Thank you, sir. You are released.

11 THE WITNESS: Thank you.

12 MR. JENSEN: Mr. Kennedy, are you getting Clement?

13 MR. KENNEDY: Yes.

14 MR. JENSEN: Let me just go to the bathroom.

15 May I step out, your Honor.

16 THE COURT: Yes, no problem.

17 (Off the record)

18 THE COURT: Back on the record.

19 Sir, could you raise your right hand.

20

21 DAVID CLEMENT,

22 called as a witness, and having been first duly sworn by

23 the Court, was examined and testified as follows:

24 THE WITNESS: Yes.

25 THE COURT: Thank you. State your full name and spell

1 your name for the record.

2 THE WITNESS: David Clement, C-l-e-m-e-n-t.

3 THE COURT: Thank you. Mr. Kennedy?

4

5 DIRECT EXAMINATION

6 BY MR. KENNEDY:

7 Q Mr. Clement, if I can take a bit of a privilege and
8 just ask the question quickly.

9 Would you please explain where you work, and what
10 your duties are. And then also give us a short iteration of
11 your educational and professional background?

12 A I am a Senior Pension Actuary.

13 THE REPORTER: Sir, can you please speak up?

14 THE WITNESS: Sure.

15 THE REPORTER: Thank you.

16 THE WITNESS: I'm Senior Pension Actuary with CalPERS.
17 I perform Actuary duties. I have a degree from UCLA in
18 mathematics.

19 BY MR. KENNEDY:

20 Q How long have you worked with CalPERS?

21 A 15 years.

22 Q And how long have you been an Actuary?

23 A About 14.

24 Q Are there any levels of credentialing that you
25 hold, other than a degree as an Actuary?

1 A Yes. I'm an Associate of the Society of Actuaries
2 and an enrolled Actuary.

3 Q Mr. Clement, prior to this hearing, did I request
4 you -- were you requested to make an evaluation of the
5 difference in the liabilities between Mr. Lewis's -- between
6 two salaries being claimed by CalPERS and Mr. Lewis in this
7 case?

8 A Yes.

9 Q Okay. And directing your attention to Exhibit 20.
10 Is this your calculation of the differences in
11 those liabilities?

12 A Yes.

13 Q Could you briefly go through starting at the top
14 after the date assumptions and just explain, briefly, what
15 each category is?

16 Just for purposes of familiarity?

17 MR. JENSEN: Your Honor, I just want to make this
18 observation and my objection at this point is that there's a
19 bunch of different pieces that are -- or documents that are
20 listed in data and assumption, and none of those are in
21 evidence. And therefore, the basis of this expert's opinion
22 is without -- lacks foundation.

23 THE COURT: Overruled.

24 MR. KENNEDY: Could you just go ahead and explain.

25 THE COURT: Just the categories.

1 MR. JENSEN: I'm going to -- should I address each one
2 as he phrases them?

3 THE COURT: Address them how.

4 MR. JENSEN: He's referring to mortality tables and
5 other issues that are not in evidence.

6 THE COURT: When you cross-examine you can ask him.

7 MR. JENSEN: I just want to make the objection lacks
8 foundation.

9 BY MR. KENNEDY:

10 Q Under dates and assumption, data and assumptions,
11 could you please just describe the data fields that are
12 entered after that?

13 A To perform the calculations that I performed, the
14 data pieces that I gathered are birth date, spouse's birth
15 date, retirement date, retirement age, the discount rate
16 used in the calculation of the mortality --

17 Q Let me stop you.

18 The biographical data, where did you obtain that?

19 A I'm sorry?

20 Q Where did you get that information?

21 A Some of the information was obtained from my
22 CalPERS. Some of it was resources that CalPERS has.

23 Q Did you obtain on -- are you referring to the
24 member file?

25 A Yes.

1 Q Thank you.

2 And when you speak of interest rate, what does that
3 derive from?

4 A That's the discount rate that was adopted by the
5 Board at that time. At the time of the retirement date.

6 Q And the inflation rate?

7 A That was the inflation rate that was adopted by the
8 Board as of the date of retirement.

9 Q And the mortality table, explain that, please.

10 A The mortality table was derived from a experience
11 study performed in 2009. And the mortality table was the
12 table in effect at the time of retirement.

13 Q When you say, "In effect at that time," it was
14 adopted by CalPERS at that time?

15 A Correct.

16 Q And the employer, again, from the membership file?

17 A Correct.

18 Q And skip the ID.

19 THE COURT: Stop there. Is the employer ID -- Counsel,
20 can you show it to your client. Is that his social security
21 number?

22 Mr. Jensen can you show it to Mr. Lewis?

23 MR. JENSEN: Mr. Lewis, is that number or this number
24 your social security number?

25 MR. LEWIS: No.

1 MR. JENSEN: No, I don't believe this is, your Honor.

2 THE COURT: Okay. I just want to make sure.

3 BY MR. KENNEDY:

4 Q And it says the Employer ID, that's the Employer ID
5 for San Bernardino County?

6 A Correct.

7 Q City of San Bernardino.

8 And then the type of plan non-pooled, explain that
9 briefly.

10 A We have two types of public agency plans. One is
11 non-pooled the other is pooled. And this plan is
12 non-pooled, so all the assets and liabilities of this plan
13 are separate from all the plans at CalPERS.

14 Q So it would be directly the responsibly of the City
15 of San Bernardino?

16 A Correct.

17 Q Now, as far as service credit, again, you indicated
18 that from the CalPERS membership file.

19 A Mr. Lewis's service credit was slightly above 30
20 years. I'm not sure of the exact amount, but for this --
21 this is a spreadsheet so the calculations are given by that.
22 But the benefit calculation is capped at 90 percent. So --

23 THE COURT: The question is: Where did you get the
24 service credit from?

25 THE WITNESS: My CalPERS.

1 BY MR. KENNEDY:

2 Q And the reason you used 30 percent?

3 A 30 years.

4 Q 30 years of service.

5 A I did not want to calculate a benefit higher than
6 the maximum allowable by CalPERS law.

7 Q So numbers over 30 in this instance would not be
8 material to your calculation?

9 A Yeah. Any service above 30 was irrelevant.

10 Q Now, salary information, the final compensation
11 determined by CalPERS; where did you get that information?

12 A From Lolita.

13 Q From Ms. Lueras?

14 A Ms. Lueras.

15 Q The Final Comp. Review Unit?

16 A The Comp. Review Unit, correct.

17 Q And then the final compensation claimed by
18 Respondent is the 13,500, same source?

19 A Correct.

20 Q And the additional final compensation is just the
21 Delta between those two; right?

22 A Yes.

23 Q Now, benefit provisions, again, are those derived
24 from the CalPERS system?

25 A Yes.

1 Q Going down to the benefit calculation, there's two
2 calculations. One is to the final compensation determined
3 at the \$10,000 per month, and then one at the 13,000;
4 correct?

5 A Yes.

6 Q And over to the right we see the unmodified monthly
7 allowance.

8 Just for the record's sake, you use that because
9 that's apples to apples --

10 THE COURT: Counsel, you are testifying. If you want to
11 take the stand, feel free, but otherwise --

12 MR. KENNEDY: Why did you --

13 THE COURT: I want direct questions to the witness.

14 MR. KENNEDY: I understand.

15 THE COURT: What is the unmodified monthly balance?
16 What is that?

17 THE WITNESS: The unmodified monthly allowance is the
18 benefit calculated based on the benefits and contracted by
19 the City of San Bernardino.

20 BY MR. KENNEDY:

21 Q And is there a reason why you use the unmodified
22 verses any other type of --

23 A The member can choose alternative option of
24 settlements; however, the actual office calculates actual
25 equivalents, reduction factors, so the benefits are

1 generally equivalent. So to calculate the liabilities I
2 just use the unmodified loans.

3 Q Would it be more accurate, I mean, is that for
4 accuracy sake or is it simply --

5 My question is: Would it be just as accurate to
6 the use an unmodified verses an optional --

7 MR. JENSEN: Objection, your Honor. Leading.

8 THE COURT: Overruled.

9 THE WITNESS: What does that mean? Do I answer?

10 THE COURT: Yes, sorry.

11 MR. KENNEDY: Is this done before --

12 THE COURT: No, you--

13 MR. KENNEDY: Because you --

14 THE COURT: There is one question at a time.

15 MR. KENNEDY: I'll withdraw the question.

16 BY MR. KENNEDY:

17 Q Do you use the unmodified because it represents the
18 highest amount because you are trying to compare similar
19 calculations?

20 MR. JENSEN: Objection. Vague.

21 THE COURT: Sustained.

22 BY MR. KENNEDY:

23 Q Now, getting down to the present value, and explain
24 briefly what is meant by the present value calculation
25 that's performed below.

1 A So the first calculation is what the single dollar
2 value of this retirement benefit for life, along with the
3 spouse with the value of that in a single dollar amount.
4 And that amount 1,463,873.

5 The second is using the compensation claimed by the
6 member, and the value of that was \$1,973,543. The
7 difference is --

8 MR. JENSEN: Objection. He's just doing a narration.

9 THE COURT: Overruled.

10 THE WITNESS: The additional liability due to the
11 increased compensation would be \$590,668.

12 BY MR. KENNEDY:

13 Q And that is discounted to present value?

14 MR. JENSEN: Objection. Leading.

15 THE COURT: Overruled.

16 THE WITNESS: Yes, these calculations are discounting
17 for mortality and interest rate.

18 BY MR. KENNEDY:

19 Q Okay. And is this difference in evaluations, does
20 it reflect the unanticipated increase of the liabilities to
21 the CalPERS system as a result of higher claim?

22 MR. JENSEN: Objection. Misstates the testimony.

23 THE COURT: Sustained.

24 BY MR. KENNEDY:

25 Q What does the difference represent?

1 MR. JENSEN: Objection. Vague and ambiguous as to
2 difference.

3 THE COURT: Overruled. What's the 509,668?

4 THE WITNESS: That's the additional liability that would
5 be -- the City of San Bernardino would take off. If the
6 benefit was calculated using the \$13,501 salary versus the
7 \$10,015 salary.

8 BY MR. KENNEDY:

9 Q And would you characterize that as an unanticipated
10 increase in the liability?

11 MR. JENSEN: Objection. Assumes facts not in evidence
12 and leading.

13 THE COURT: Sustained.

14 BY MR. KENNEDY:

15 Q Is this an unanticipated increase of liability?

16 MR. JENSEN: Objection.

17 MR. KENNEDY: I'm asking what the calculation is, your
18 Honor. I can't ask him what the calculation is without --

19 THE COURT: He just told me it's an additional liability
20 for the City of San Bernardino would take on, if he's given
21 the benefit that he's claiming verses what CalPERS
22 determined; is that correct, sir?

23 THE WITNESS: Yes.

24 THE COURT: Thank you.

25 ///

1 BY MR. KENNEDY:

2 Q And would you characterize that increase that the
3 City of San Bernardino would be taking on, based on that, as
4 an unanticipated liability?

5 MR. JENSEN: Objection. Misstates the facts, and
6 contrary to the testimony, and it's a leading questioning.

7 THE COURT: Sustained. It's leading.

8 MR. KENNEDY: Is --

9 THE COURT: It also calls for -- he's not here as a city
10 expert, so I don't know if the city is anticipating or not.

11 MR. KENNEDY: I know, but it's an actuarial term that
12 I'm using.

13 BY MR. KENNEDY:

14 Q Are you familiar with the term "unanticipated
15 increase in liability"?

16 A Depends on how you define it.

17 Q Pardon?

18 A Depends on how you define it.

19 Q And what is your definition?

20 THE COURT: If you have one. You look like you are
21 lost.

22 MR. JENSEN: Objection as to it being a term of art, or
23 just a regular interpretation of the English language in the
24 actuarial field.

25 THE COURT: Sustained.

1 BY MR. KENNEDY:

2 Q Is it a term of art in the actuarial field? In
3 your position with CalPERS, is it a term of art?

4 A What's the question? Rephrase the question.

5 THE COURT: If I anticipated increase in liability of
6 term of art in your field, your actuarial field?

7 And you're hesitating. I'm reading your body
8 language, so I'm assuming it's not.

9 THE WITNESS: I would say -- I don't know if it's a
10 common -- I wouldn't say a common term.

11 BY MR. KENNEDY:

12 Q So the increase in liability is reflected by this
13 calculation.

14 Can you explain to us how or if the increase would
15 be funded?

16 A The increase in liability would be funded through a
17 higher contribution by the City of San Bernardino.

18 Q And have you ever heard the term "unanticipated
19 increase in liability"?

20 MR. JENSEN: Objection. Asked and answered.

21 THE COURT: Sustained.

22 BY MR. KENNEDY:

23 Q Does CalPERS do experience studies?

24 A Yes.

25 Q What's an experience study?

1 A Every four years the actual office performs an
2 experience study. And what we do is we compare the current
3 assumptions to what actually happened.

4 So if we had an assumption in place in, say, 2000,
5 and four years later we would want to look at what happened
6 between 2000 and 2004 and compare that to what we assumed.
7 And we might make adjustments based on that study.

8 Q And what goes into -- the compensation that
9 employers provide, and the amount of compensation play any
10 role in the experience study?

11 What's the purpose, put it that way, of the
12 experience study?

13 A The purpose of the experience study is to make sure
14 our assumptions are correct, and one is to put together a
15 salary scale which anticipates salary increases for all the
16 members of the system.

17 Q And what is the result if the salary scale is
18 exceeded?

19 After you create a salary scale, is there an
20 assumption created by that?

21 MR. JENSEN: Objection. Relevance to this document that
22 he's supposedly testifying about.

23 THE COURT: He's not just testifying about the document.

24 Go ahead, sir, if you can answer.

25 THE WITNESS: Can you repeat the question?

1 BY MR. KENNEDY:

2 Q Is an assumption resulted from the experience
3 study?

4 A Yeah. All of our assumptions are derived from the
5 experience study.

6 Q And is there an assumption as to the result of that
7 that anticipates the increase and salary that employers
8 would be paying?

9 A Yes.

10 MR. JENSEN: Objection.

11 THE COURT: Hang on. What's the objection?

12 MR. JENSEN: Vague as to "increases in salary."

13 THE COURT: Overruled.

14 BY MR. KENNEDY:

15 Q And are you familiar with -- what was the
16 percentage of increase between the two salaries in this
17 case?

18 A I couldn't do the exact amount, but about
19 35 percent.

20 Q And is that, in your experience and knowledge of
21 CalPERS, is 35 percent an assumption used for the
22 extrapolation of increases for salary?

23 A 35 percent would generally be well above what we
24 expect to see in increase for salary.

25 Q You use the word expected. If I use the word that

1 it was unexpected increase and the salary, would that be
2 correct?

3 A Yes.

4 BY MR. KENNEDY:

5 Q And how would that unexpected increase be funded,
6 if at all?

7 A The unexpected increase would result in higher
8 liability, which would have to be funded by the City of San
9 Bernardino.

10 Q Okay. And one other question. When a member --
11 two other questions.

12 The payment of contributions, you are familiar that
13 employers and employees pay contributions that are based on
14 a percentage of salary?

15 A Correct.

16 Q Sometimes based on the liabilities, actuarial
17 accrued liability; right?

18 MR. JENSEN: Objection. Leading.

19 THE COURT: Sustained.

20 BY MR. KENNEDY:

21 Q Okay. But they paid a percentage of contributions
22 you said on salary; correct?

23 A Yes.

24 MR. JENSEN: Objection. Leading.

25 THE COURT: Overruled.

1 BY MR. KENNEDY:

2 Q And from an actuarial point of view, does the
3 payment of the contribution necessarily compensate or offset
4 the liability created by the -- in any given case offset the
5 liability for an increase such as 35 percent, or the payment
6 benefits of any individual case?

7 MR. JENSEN: Objection.

8 MR. KENNEDY: Do you understand the question?

9 MR. JENSEN: Vague and ambiguous.

10 THE COURT: Overruled. Do you understand the question?

11 THE WITNESS: Yes. Over time the increase in the rate
12 would collect the additional contributions to take the
13 additional liability, but over a short period of time it
14 would not.

15 BY MR. KENNEDY:

16 Q And when you mean a short period of time, what do
17 you mean?

18 A Three to five years.

19 Q Okay.

20 A It wouldn't get paid until it was paid over about
21 30 years. Basically, we take liability experience losses
22 and we amortize those over a 30-year period. So that would
23 be paid for over a 30-year period.

24 Q And would the increase in liability in this case --
25 would it affect the determination of the increase in

1 liability, the unexpected increase of liability in this
2 case, if a member were to have purchased military or
3 additional retirement service credit at a lower pay rate
4 than reflected at the higher rate here?

5 MR. JENSEN: Objection as to relevance.

6 THE COURT: Overruled.

7 THE WITNESS: I didn't hear you.

8 MR. KENNEDY: It's overruled. You can respond.

9 THE WITNESS: I didn't hear what she said. So I believe
10 the question was if the member bought at 10,000 and retired
11 at 13,5 would it be paid for? That depends on when it was
12 purchased and when the member retired.

13 If the member bought at 10,000 and then retired the
14 next day at 13,5, then no, it wouldn't be paid for. But if
15 it was bought at age 20 and then over 30-year period then we
16 would expect salary increases, so it goes up to 35 percent
17 over an extended period of time.

18 BY MR. KENNEDY:

19 Q But there is an increase in liability that occurs
20 in addition to what's reflected here if someone had
21 purchased airtime or additional service credit at a lower
22 rate than they retired on.

23 MR. JENSEN: Objection.

24 BY MR. KENNEDY:

25 Q Assume it was purchased within say ten years of

1 their retirement and their age at age 50.

2 Would that have an effect?

3 MR. JENSEN: Objection. Incomplete hypothetical.

4 THE COURT: Overruled. He's got to establish the facts.

5 You can answer.

6 MR. KENNEDY: Let's say that --

7 THE COURT: He's --

8 MR. KENNEDY: Withdraw the question.

9 THE COURT: Okay.

10 BY MR. KENNEDY:

11 Q Let's assume and, in fact, we don't have to assume
12 because we have some of airtime, some purchased. But if
13 Mr. Lewis had purchased in 2004, let's say, airtime at a pay
14 rate between eight and \$9,000, and then retired within -- or
15 retired in 2012 --

16 A I got to write down the status to do any
17 calculations, your Honor. I don't have a pen.

18 THE COURT: Here's a pen and paper for you, sir.

19 What's the question, Mr. Kennedy? Hang on.

20 THE WITNESS: I just want to say my left ear I can't
21 hear very well, but over here I can't hear anything.

22 MR. KENNEDY: Oh, I'm sorry. All right.

23 THE COURT: Are you ready, Mr. Kennedy?

24 MR. KENNEDY: Yes.

25 MR. JENSEN: Your Honor, I do want to reserve some time

1 to cross him.

2 THE COURT: We are going to cross him, don't worry. Or
3 you are -- should I turn him over to cross-examine?

4 MR. KENNEDY: I may have to withdraw the question. I'm
5 just looking -- or withdraw the question on a specific
6 basis.

7 MR. JENSEN: Longest ten minutes I've ever had.

8 MR. KENNEDY: Let me just back up and ask a general
9 question.

10 BY MR. KENNEDY:

11 Q If a member were to purchase additional member
12 service retirement credit within eight years of their
13 retirement, at a pay rate that was below \$10,000 in this
14 case, would that reflect -- would there be an additional
15 unexpected increase in liability or increase in liability in
16 addition to the 35 percent as you've reflected here?

17 MR. JENSEN: Objection. Compound. Incomplete
18 hypothetical. Irrelevant. And assumes facts not in
19 evidence.

20 THE COURT: Overruled. He's got to the establish all
21 the facts.

22 MR. KENNEDY: You know, I'd like to have marked as
23 Exhibit 21.

24 MR. JENSEN: This is new. Something new?

25 THE COURT: Clients Elections to Purchase Service

1 Credit.

2 Mark it Exhibit 21 Complainant.

3 (Complainant's Exhibit 21 was marked for
4 identification by the Court.)

5 MR. JENSEN: Do you mind if I overlook Mr. Clement?

6 Mr. Clement, may I approach and look over you?

7 THE WITNESS: Yeah.

8 MR. JENSEN: Is that cool?

9 THE WITNESS: Yeah, it's cool.

10 Were you going to go over this?

11 MR. JENSEN: It's his. I just haven't seen it.

12 THE COURT: So the question in front of you,
13 Mr. Clement, is: If you purchased additional service
14 retirement credit within eight years of retirement, at a pay
15 rate less than \$10,000, would there be an additional
16 increase of liability above the 35 percent you've already
17 testified about?

18 THE WITNESS: I can't answer that question. I don't
19 have a salary scale with me. Basically the purchase of
20 airtime does have an assumption for salary increases. I
21 don't know what those salary increases are over that
22 eight-year period, so I can't say if the 35 percent increase
23 is above or beyond the assumed salary increase.

24 MR. KENNEDY: Okay. No other questions, your Honor.

25 I'd like to admit at this time Exhibit 20.

1 THE COURT: Any objection to receiving Exhibit 20?

2 MR. JENSEN: Is 20 his demonstrative?

3 THE COURT: Yes.

4 MR. JENSEN: So solely for the purposes it's
5 demonstrative of his mathematical calculations and not for
6 any other purpose.

7 THE COURT: Correct. It's demonstrative of CalPERS'
8 position that to give your client what he's requesting is
9 \$509,668 difference; correct, Mr. Kennedy?

10 MR. KENNEDY: Yes.

11 THE COURT: This is their position.

12 MR. JENSEN: Okay.

13 THE COURT: I'm going to receive 20.

14 (Complainant's Exhibit 20 was marked for
15 identification by the Court and received
16 in evidence.)

17 THE COURT: Mr. Kennedy, what are we doing about 21?

18 MR. KENNEDY: I'd like that move of that in evidence,
19 your Honor.

20 MR. JENSEN: No objection.

21 THE COURT: Okay. Exhibit 21 will be received.

22 (Complainant's Exhibit 21 was received
23 in evidence by the Court.)

24 THE COURT: Cross-examine?

25 MR. JENSEN: Thanks.

1 CROSS-EXAMINATION

2 BY MR. JENSEN:

3 Q Did Counsel direct you on how to prepare this?

4 What did the CalPERS attorney say to you? What was
5 the purpose of this document?

6 MR. KENNEDY: Leading. But also --

7 THE COURT: Well, it's cross so he can lead.

8 MR. KENNEDY: I understand. The objection was to the
9 word "purpose."

10 THE COURT: Overruled.

11 THE WITNESS: I was asked to do a calculation. Was the
12 liability using CalPERS's compensation and what is the
13 liability using the Respondent's compensation.

14 BY MR. JENSEN:

15 Q And who directed you to perform this?

16 A Mr. Kennedy.

17 Q So let me just go down this.

18 What interest rate did you use?

19 A Seven and a half percent.

20 Q And why did you use that interest rate?

21 A That was the interest rate adopted by the Board at
22 the time of Mr. Lewis's retirement.

23 Q Is that the interest rate that's pending right now?

24 A No.

25 Q So that's not --

1 A Pending -- what do you mean by pending? Right now
2 is seven and a half percent.

3 Is there any pending, no, there's no pending
4 interest rate.

5 Q What is the rate that's used by the Board right
6 now?

7 A Seven and a half percent.

8 Q And what did you use this interest rate at seven
9 and a half percent for?

10 A To discount the benefit payments in order to
11 determine the present value.

12 Q So the future payments were discounted by seven and
13 a half percent?

14 A Correct.

15 Q And how did you come by this number 2.75 percent?

16 A That was the inflation rate that was in effect as
17 of the retirement date, November 1st, 2012.

18 Q And is that the current inflation rate?

19 A Yes.

20 Q That's prevailing right now?

21 A Yes.

22 Q And on this mortality table, how did you choose to
23 use the 2009 version of it?

24 A This was the mortality table in effect at the time
25 of retirement.

1 Q And is this the mortality table that's in effect
2 right now?

3 A No.

4 Q Is there not actually a review of the actuarial
5 assumptions and CalPERS experience study of January 2014?

6 A Yes.

7 Q And does it is significantly change the experience
8 study that CalPERS uses?

9 A There would be a difference.

10 Q And why didn't you use the prevailing actuarial
11 numbers that's currently prevailing?

12 MR. KENNEDY: I'm sorry. Incomplete question.

13 BY MR. JENSEN:

14 Q Why did you not use the 2014 experience study?

15 A Because the 2014 experience study wasn't into
16 effect at the time of retirement. So these calculations
17 were performed as of date of retirement.

18 Q But aren't we looking about future liabilities?

19 A This calculation was performed as of the retirement
20 date.

21 Q But you've since received better information; is
22 that correct?

23 A We have revised our assumptions.

24 Q Are they more correct about the future since the
25 2004 experience study?

1 A Who's to say if these numbers or the new mortality
2 is better than the old mortality? It was the assumptions
3 that were adopted by the Board in 2014.

4 Can't say either was better than the other.

5 Q You can't say the revisions were better than what
6 was existing before?

7 A I mean --

8 MR. KENNEDY: Asked and answered.

9 THE COURT: Overruled. You can answer, sir.

10 THE WITNESS: I would say the assumptions adopted in
11 2014 are the assumptions that --

12 (Cell phone ringing)

13 MR. JENSEN: Sorry.

14 THE WITNESS: (Unintelligible).

15 THE REPORTER: I'm sorry, I didn't hear the rest of his
16 answer.

17 MR. JENSEN: I'm sorry. This phone is busted.

18 THE COURT: "They are the best estimate as of that
19 time."

20 THE REPORTER: Thank you.

21 THE COURT: You're welcome.

22 BY MR. JENSEN:

23 Q Are you familiar with 2014 experience study?

24 A Yes.

25 Q Would you like me to show it to you?

1 A Do I have it memorized, no.

2 Q Would you like me to show?

3 A Sure.

4 MR. KENNEDY: Relevance, your Honor.

5 THE COURT: Overruled.

6 MR. JENSEN: May I approach?

7 THE COURT: Go ahead.

8 MR. JENSEN: Mr. Kennedy, this is --

9 MR. KENNEDY: Please show the witness.

10 MR. JENSEN: I just wanted to show you.

11 MR. KENNEDY: No, just please show the witness.

12 BY MR. JENSEN:

13 Q Do you recognize this document, and is this the --

14 A Cover page.

15 Q Is this the true and correct copy as far as you
16 understand?

17 A Based on the cover page it looks like the most
18 recent experience study.

19 Q And if you want to read this executive summary to
20 refresh your recollection of it.

21 Maybe I'll read it out loud?

22 MR. KENNEDY: Objection, your Honor.

23 THE COURT: What's the objection?

24 MR. KENNEDY: I'm sorry. The objection is the document
25 speaks for itself. If you want to printout a copy and have

1 it, that's fine, but just to simply recite the document into
2 the record -- if there's a specific question concerning it
3 then directing the witnesses attention to it --

4 THE COURT: Sustained.

5 BY MR. JENSEN:

6 Q Was the 2014 experience study to revise the
7 experience study that was in 2009? To correct it?

8 MR. KENNEDY: Objection. Compound.

9 THE COURT: Overruled.

10 MR. KENNEDY: Revised. Corrected.

11 THE COURT: Overruled.

12 THE WITNESS: Every four years the actuarial office
13 performs a new experience study.

14 Does it correct the old one, no. The new
15 experience study is based on more information. Newer and
16 more information.

17 BY MR. JENSEN:

18 Q And is the purpose of these experience studies to
19 estimate what's going to happen in the future?

20 A Yes.

21 Q And do you think that the 2014 experience study
22 more accurately estimates what's going happen in the future?

23 MR. KENNEDY: Asked and answered.

24 THE COURT: Overruled.

25 THE WITNESS: The assumptions derived from the 2014

1 experience study are our best estimate of future events.

2 BY MR. JENSEN:

3 Q And so why didn't you use the 2014 experience study
4 in this calculation?

5 A The optional benefit, optional settlement. The
6 factors used in this optional settlement benefits it would
7 have been chosen as of the retirement date,
8 November 1st, 2012. It would have been based on the 2009
9 experience study, so I went ahead and used what was the
10 mortality as of the retirement date to illustrate what the
11 increase of liability would be to use the 13,500 figure a
12 month verses the \$10,000 a month figure.

13 Q Is there anything in this calculation sheet about
14 optional benefits selection?

15 A No.

16 Q So then why did you find the optional benefit
17 selection if there's nothing in here on optional benefits?

18 MR. KENNEDY: I think it mischaracterized his statement.
19 I don't recall the term that Mr. Clement saying it was
20 important.

21 THE COURT: Overruled.

22 MR. KENNEDY: And, your Honor, I would just like to take
23 a privilege to ask -- the Court may want to ask this
24 question: Whether or not the difference between the two
25 assumptions would make a material change in the

1 calculations.

2 THE COURT: That was going to be my question.

3 THE WITNESS: The difference would be higher.

4 MR. KENNEDY: Would be what?

5 THE WITNESS: Bigger. Both liability calculations would
6 be higher. So the difference would be higher.

7 THE COURT: So it would be more than 509?

8 THE WITNESS: Yeah. 550 maybe.

9 BY MR. JENSEN:

10 Q And is there any basis for that? Did you run the
11 numbers?

12 A No, I did not.

13 Q So you don't know that for sure?

14 A Just from my actuarial experience.

15 Q So let me ask you a big question about -- did you
16 take into consideration that he went out on IDR, Industrial
17 Disability Retirement?

18 A No.

19 Q And do you know how Industrial Disability
20 Retirement is funded?

21 A Yes.

22 Q How is it funded?

23 A Through employee and employer contributions, and
24 investment return, same as the service retirement benefit.

25 Q And that actually is when there is a service

1 pending disability retirement, how is the disability part of
2 the service pending disability funded?

3 A That was confusing.

4 Q Let me ask you, are you aware of serviceman
5 disability retirement provisions?

6 A I don't understand what you are asking.

7 Q Do you understand that there is a retirement status
8 of service pending disability?

9 A So I guess what you are asking me is: Do I
10 understand if the member is service retirement --

11 Q No. Let me just ask you the question.

12 A Explain what you say.

13 THE COURT: He's withdrawing the question.

14 MR. JENSEN: I'm withdrawing the question, and turn your
15 attention to Exhibit 11.

16 THE COURT: Who's Exhibit?

17 MR. JENSEN: In CalPERS.

18 BY MR. JENSEN:

19 Q Are you familiar with these forms in Exhibit 11?

20 A Do I see these everyday, no.

21 THE COURT: That's not what he is --

22 THE WITNESS: This is probably the first time I've seen
23 these. Am I familiar with them, no, I'm not.

24 BY MR. JENSEN:

25 Q Do you see the service pending Industrial

1 Disability Retirement selection on the very top?

2 Your Honor, may I approach?

3 THE COURT: Yes.

4 MR. KENNEDY: 10 or 11?

5 MR. JENSEN: Do you see this?

6 MR. KENNEDY: I'm sorry, but 11 in mine is the workers'
7 comp. --

8 MR. JENSEN: That's mine.

9 MR. KENNEDY: Oh, is it my 11?

10 THE COURT: Yeah. Your 11.

11 MR. KENNEDY: Oh, sorry.

12 MR. JENSEN: Your Honor, do you see what I mean?

13 THE COURT: Yeah. His 11 is the IDR application.

14 MR. KENNEDY: CalPERS 11.

15 THE COURT: Correct. And, sir, do you see at the top
16 the service pending Industrial Disability Retirement.

17 THE WITNESS: So I assume --

18 THE COURT: No. Do you see it?

19 THE WITNESS: I see it.

20 THE COURT: Just answer the question, please.

21 BY MR. JENSEN:

22 Q Do you know what that is in the retirement log?

23 MR. KENNEDY: Objection. Vague.

24 THE COURT: Sustained.

25 ///

1 BY MR. JENSEN:

2 Q Do you know what -- are you familiar with the term
3 "service pending Industrial Disability Retirement"?

4 A No, but I can guess.

5 THE COURT: I don't want you guessing, sir.

6 BY MR. JENSEN:

7 Q Do you have any information on how a service
8 pending Industrial Disability Retirement is funded?

9 MR. KENNEDY: Asked and answered.

10 THE COURT: No, that wasn't. Overruled.

11 THE WITNESS: All the benefits of CalPERS are funded
12 through the employee, employer, contributions, and
13 investment return.

14 BY MR. JENSEN:

15 Q But do you know how a service pending Industrial
16 Disability Retirement is funded?

17 MR. KENNEDY: Asked and answered.

18 THE COURT: Sustained.

19 BY MR. JENSEN:

20 Q Do you know how the Industrial Disability portion
21 of the service pending Industrial Disability Retirement is
22 funded under?

23 MR. KENNEDY: Asked and answered.

24 THE COURT: Sustained. You said all retirements are
25 funded by employee and employer contributions and investment

1 return; correct, sir?

2 THE WITNESS: Yes.

3 MR. JENSEN: Your Honor, just like to make an offer of
4 proof.

5 The first 50 percent of the service pending
6 Industrial Disability Retirement is a tax free -- basically
7 the workers' comp. or a disability payment that's funded
8 purely by employer contributions.

9 THE COURT: That's not any different from his testimony.
10 They're all funded by employees, employers, and investment
11 return.

12 MR. KENNEDY: I think and, your Honor --

13 MR. JENSEN: And --

14 THE COURT: Stop.

15 MR. KENNEDY: I'd object to this because I think Counsel
16 is making an argument which I've heard articulated in other
17 cases. It's not an offer of proof.

18 MR. JENSEN: To the extent that their testimony is that
19 this increase in pay is going to increase the liability on
20 the fund, I think that they are failing to take into
21 consideration these basic aspects.

22 THE COURT: Why don't you ask him those questions
23 directly.

24 MR. JENSEN: And I was trying to.

25 ///

1 BY MR. JENSEN:

2 Q So how would it affect your calculations if you
3 took into consideration that he was on Industrial Disability
4 Retirement?

5 A I would use a Industrial Disability Retirement
6 mortality table as opposed to a service table -- service
7 retirement table.

8 Q So the mortality table that you used here is
9 incorrect?

10 THE COURT: That's not what he said. He said if there
11 was an IDR, he would use the IDR table.

12 BY MR. JENSEN:

13 Q Did you know that Mr. Lewis was entitled to a
14 service pending Industrial Disability Retirement?

15 MR. KENNEDY: Assumes facts not in evidence.

16 THE COURT: Well --

17 MR. KENNEDY: It assumes that he actually has received
18 an IDR retirement, which I don't think is a fact.

19 MR. JENSEN: Your Honor, the document is here that --

20 MR. KENNEDY: It's an application.

21 THE COURT: It's an application, it's not a
22 determination by CalPERS.

23 MR. JENSEN: And --

24 THE COURT: You can ask in the form of a hypothetical.

25 MR. JENSEN: Okay.

1 BY MR. JENSEN:

2 Q If Mr. Lewis is entitled to a Industrial Disability
3 Retirement benefit, would it change your calculations?

4 A If Mr. Lewis was entitled to an Industrial
5 Disability Retirement, then I would do the calculations
6 using Industrial Disability Retirement mortality table.

7 Q And did you use that in this calculation?

8 A I don't believe so. I can check my records.

9 Q Can you please do that.

10 A What is this --

11 THE COURT: No. You are not allowed to ask questions.
12 You are just here to answer questions.

13 MR. KENNEDY: Your Honor, considering the hour, again, I
14 would just ask the Court it might interject a question as to
15 the materiality of this difference.

16 MR. JENSEN: And, your Honor, if he's checking his
17 records, I'd like to look at them too.

18 THE COURT: Sure. Sir, is the IDR life expectancy
19 table, is that shorter life expectancy?

20 THE WITNESS: Slightly less.

21 THE COURT: Would that make the 509 go down?

22 THE WITNESS: Yes.

23 THE COURT: Do you know by how much?

24 THE WITNESS: No, I don't.

25 MR. JENSEN: And just --

1 THE COURT: Wait. And you just checked your records.

2 You didn't use the IDR table for life expectancy, did you?

3 THE WITNESS: I would have to go back to the office and
4 verify that, but I'm showing table 40 and 41 and usually
5 there's a difference of three. So I may have used the IDR
6 table, may not have. I can't say which table was used.

7 MR. JENSEN: Your Honor, may I see the folder?

8 MR. KENNEDY: No. Your Honor, he looked at one page in
9 the folder. I would say that one page --

10 THE COURT: I saw him look at two or three.

11 You can show the attorney what you looked at.

12 MR. KENNEDY: Mr. Jensen, she said --

13 MR. JENSEN: It's actually for me.

14 THE COURT: Yeah.

15 MR. JENSEN: Who gets to --

16 THE COURT: Show him.

17 MR. KENNEDY: Show me the pages.

18 Any others?

19 THE WITNESS: No.

20 MR. KENNEDY: The Court thought you looked at more than
21 one page.

22 THE WITNESS: I was flipping through but that's the page
23 that I was looking for.

24 THE COURT: That's page with 40 and 41?

25 THE WITNESS: Yeah. Table 40 and 41.

1 BY MR. JENSEN:

2 Q And are the documents in your hand other documents
3 you referred to in your calculation of this Matter?

4 A Are what?

5 Q Are the documents in that folder other documents
6 that you referred to in this Matter?

7 A I'm sorry.

8 Q Are the documents in that folder other documents
9 that you referred to in the calculation that you presented
10 to the Court?

11 A Some -- there's supporting documentation for this
12 summary.

13 MR. JENSEN: And, your Honor, I'd like to see that.

14 THE COURT: He's entitled to that. I'm going to let his
15 Counsel look at it first. I want to make sure there's
16 nothing attorney privileged in here, but if I'm getting
17 Exhibit 20, which is a calculation and he'd got a green
18 folder I'm looking at with a whole bunch of documents in it,
19 Mr. Jensen is entitled to look at them. We're going to go
20 off the record while everybody looks at them.

21 (Discussion off the record)

22 THE COURT: Back on the record.

23 Sir, you are still under oath.

24 BY MR. JENSEN:

25 Q So Mr. Clement, you mentioned that your experience

1 study shows salary increase; is that correct?

2 A The experience study studies salary increases, yes.

3 Q And did they take into account promotions?

4 A Salary -- the experience study examined salary
5 increases from the year.

6 Q From year to year.

7 THE COURT: Let me ask, the same salary? So I'm in this
8 position what my salary increase is year to year, or does it
9 consider if you are being promoted.

10 THE WITNESS: Each person is examined individually. We
11 don't know what their job title is, if they are getting
12 promoted. We don't have that information.

13 BY MR. JENSEN:

14 Q Is there any information about separate salary
15 increases for promotions?

16 A No, there is not a separate study for promotions --
17 salary increases for promotions.

18 Q And so is the experience study basically a salary
19 increases over the member's whole employment in CalPERS?

20 A The experience study examinations the salary
21 increases over a member's career, yes.

22 Q And did you do that calculation of what Mr. Lewis's
23 year-to-year salary increase would be over his full 30-year
24 career?

25 A Based on?

1 Q To be consistent with your methodology in your
2 experience study?

3 A Did I go back to his start date and look at his
4 salary increases from year to year? No, I did not.

5 Q So you essentially looked at one year of a large
6 promotion, large increase in compensation associated with
7 the promotion --

8 MR. KENNEDY: Objection.

9 THE COURT: Let him finish his questions.

10 MR. JENSEN: -- and found that inconsistent with a more
11 inexperienced study that looked at percentage increases of
12 compensation over the member's entire career?

13 MR. KENNEDY: Objection to the use of "promotion." But
14 also, I think we're mixing apples and oranges here. When we
15 talk about specific to his entire career verses the salary
16 for Fire Captain, let's say. There's a projection of
17 increases that are things --

18 THE COURT: Well, let's start with a little foundation.

19 Sir, could you explain the experience study, I know
20 you are saying it was accelerated members, but what exactly
21 does it do? What does affect?

22 THE WITNESS: He's got the salary, the experience study
23 there it shows the salary scale for each category basically
24 miscellaneous, fire, police, there may be some more
25 categories, but there's different scales depending on how

1 much service you have. Your entry age, if you enter at age
2 20 you have a certain salary scale. If you enter at age 30,
3 a different salary scale. If you enter at age 40, it's a
4 totally different salary scale.

5 But generally speaking, when somebody starts out
6 young they get higher salary increases because they get
7 promoted, more experience, kind of coming off green. They
8 get better experience, and get promotions. And you do reach
9 a point where you don't get too many promotions after that.
10 And the salary scale increases are smaller and the more
11 service you have or the older your age.

12 THE COURT: So it just looks like that across the board
13 for all the employees in CalPERS system?

14 THE WITNESS: And we do break it up between
15 miscellaneous fire, police, maybe sheriffs.

16 THE COURT: It's an average list of all those over time?

17 THE WITNESS: Yes.

18 THE COURT: Okay.

19 THE WITNESS: We don't look at the Battalion Chief, we
20 don't look at Fire Captain. We don't distinguish any of
21 that.

22 THE COURT: Okay. Looking back in your testimony about
23 the 35 percent which you're getting the difference between
24 the 10 and 13,5; correct?

25 THE WITNESS: Correct.

1 THE COURT: But an employee who went from a Fire Captain
2 to a Battalion Chief under the city of San Bernardino would
3 go from 10 to 13,5 -- their salary; correct?

4 THE WITNESS: Okay.

5 THE COURT: Correct?

6 THE WITNESS: I don't know the salary.

7 THE COURT: Well, look at the numbers you used, 10 and
8 13,5.

9 THE WITNESS: Okay. I was asked -- those are the
10 figures that I was asked to do the calculations on.

11 THE COURT: Okay.

12 BY MR. JENSEN:

13 Q Mr. Clement, did you use the experience study for
14 Public Agency Fire?

15 A Did I -- I'm sorry.

16 Q You just described that there's a separate
17 experience study for Public Agency Fire, did you use that in
18 your calculation?

19 THE COURT: No, I think he was saying -- correct me if
20 I'm wrong -- under the experience it's broken down by
21 public, miscellaneous, fire.

22 THE WITNESS: Yes.

23 THE COURT: Not a separate study of just fire people?

24 THE WITNESS: This is a study just for fire people
25 but --

1 THE COURT: It's all in the experience study?

2 THE WITNESS: These calculations were done at
3 retirement. So all that really matters at retirement is the
4 discount rate and mortality. The mortality is the same for
5 pretty much everybody across the board. So the salary
6 scale, prior to retirement, is different.

7 BY MR. JENSEN:

8 Q And does this refresh your recollection about the
9 salary schedule?

10 A I didn't use a salary scale for this calculation.

11 Q So you used the mortality scale?

12 How is it that you are comparing the increase in
13 salary to a mortality table?

14 A Which question should I answer? He asked -- he
15 paused, I was going answer, then he started again.

16 THE COURT: Right.

17 THE WITNESS: I don't know which.

18 THE COURT: Your objection to compound is sustained.

19 BY MR. JENSEN:

20 Q So did you use the salary schedule for the Public
21 Agency Fire?

22 A No.

23 Q And why not?

24 A I assumed that he wasn't going to get any salary
25 increases after retirement.

1 Q And you were looking at that one year of salary
2 increase; is that correct?

3 A It's my understanding that there was a \$3,500 spike
4 in his salary at a certain time period. And I was asked to
5 do the calculation: What is the liability at 10,000? What
6 is the liability at 13,500?

7 Q Okay.

8 A That's what I did.

9 Q I understand. And --

10 A If we want to pull up the salary scale, we can show
11 that the 35 percent is well above what we can assume for
12 somebody age 61, or whenever this salary increase happened.

13 THE COURT: Just so I understand your testimony.

14 You were given numbers with the 10,000 and 13,5,
15 but you don't know where those numbers came from; is that
16 correct?

17 THE WITNESS: They came from Comp. Review.

18 THE COURT: But you don't know how the 10 and the 13,5
19 were derived?

20 THE WITNESS: No.

21 THE COURT: They said run these calculations for
22 Exhibit 20 given 10 and 13,5?

23 THE WITNESS: Correct.

24 THE COURT: Thank you.

25 MR. KENNEDY: I mean it's more than that. It's

1 actually, your Honor, that's --

2 THE COURT: Counsel, you are not testifying, he is.

3 BY MR. JENSEN:

4 Q So let me just get to this idea about additional
5 liability claimed by a member above benefits determined by
6 CalPERS.

7 You mentioned that this is a -- you basically
8 calculated it as a present value with the assumption that
9 that liability, or with the representation that that
10 liability is the established right now; is that correct?

11 A As I stated earlier, the increase in liability
12 would have been as of the retirement date, November 1, 2012,
13 not right now.

14 Q But based on your assumptions about the mortality
15 study; is that correct? How long he would live?

16 A Based on the mortality table in effect at the time
17 of retirement.

18 Q And let me just ask you, would the City of San
19 Bernardino have to fund that amount itself?

20 A Yes.

21 Q And how are retirement benefits funded?

22 MR. KENNEDY: Asked and answered.

23 MR. JENSEN: How much percentage --

24 THE COURT: He said several times, employer
25 contributions, employee contributions, investment returns.

1 MR. JENSEN: And let me just follow up on that.

2 BY MR. JENSEN:

3 Q What percentage of the total liability is actually
4 provided by investments?

5 MR. KENNEDY: Relevancy.

6 THE COURT: Overruled. Do you know?

7 THE WITNESS: I don't know as of today, but recently the
8 fund was the perf consisted of about two-thirds of the fund
9 was from investment earnings and the other third came from
10 contributions. And I can't give you the breakdown but the
11 other third were from employee and employer contributions.

12 BY MR. JENSEN:

13 Q Is that including the last two years of the
14 superior investment returns?

15 A No.

16 Q Are you aware of the funds investment --

17 MR. KENNEDY: Relevancy.

18 MR. JENSEN: -- the past two years?

19 THE COURT: The objection is overruled.

20 THE WITNESS: Yes, I'm aware of the returns over the
21 last two years. I'm also aware of the return of the last
22 three years, and the return as of this year.

23 BY MR. JENSEN:

24 Q And let me just ask you: Over the last two years
25 and this year, has the investment earned more than the

1 actual assumed investment rate?

2 A As of June 30th, 2012, we had a zero rate return.
3 As of June 30th, 2013, and '14 we had investment returns
4 above the seven and a half percent.

5 Q And how much above?

6 A I don't recall the exact figure.

7 MR. KENNEDY: Your Honor, relevancy.

8 MR. JENSEN: This is about --

9 THE COURT: Overruled.

10 MR. JENSEN: This is about who funds this benefit.

11 BY MR. JENSEN:

12 Q And would it refresh your recollection that CalPERS
13 is 14 percent on its returns for the City of San
14 Bernardino in the last year?

15 A I can't say if that's correct or not.

16 Q We can get into that.

17 But would it be that those returns above CalPERS
18 assumed investment rate increased the portion of the
19 pensions funded by investments in addition to the 66 percent
20 that you mentioned was previously funded?

21 MR. KENNEDY: Your Honor, I'd like to argue relevancy
22 and one of the reasons is the assumption in the questions are
23 that all the return funds are available to offset the
24 liabilities of the City of San Bernardino in this case, and
25 that's just an assumption that's being made. Not the entire

1 purpose is not there for that purpose and --

2 THE COURT: I don't know that's the assumption being
3 made, but you introduced evidence of the liability that's
4 going to attributed to CalPERS. So he's allowed to probe
5 that. So overruled.

6 MR. KENNEDY: I see.

7 BY MR. JENSEN:

8 Q So assuming or with your knowledge of CalPERS
9 superior investment returns in the last two years and it's
10 higher investment, 66 percent plus investment funding of
11 retirement benefits, historically, what percentage of this
12 amount would be funded by investment returns?

13 A I'm not sure what the question is.

14 Q Isn't this one of your basic jobs as an Actuary to
15 find out how pensions are funded?

16 A Okay. As of June 30th, 2009 -- I'm answering the
17 question. You've got to the let me answer. I mean, you are
18 insulting my intelligence.

19 THE COURT: Sir, you need take a deep breath too.
20 Please don't argue with the attorney. If you don't
21 understand the question tell him that.

22 MR. JENSEN: I think just clarify, I'm not trying to
23 insult your intelligence.

24 THE WITNESS: You just asked me, "You are an actuary,
25 and this is what you do you; right?"

1 MR. JENSEN: Okay. That was --

2 THE WITNESS: You did.

3 THE COURT: Fair enough.

4 MR. JENSEN: But the idea is you should be able to
5 provide an answer about how much of this benefit is actually
6 funded by investment returns.

7 THE WITNESS: What do you mean --

8 MR. KENNEDY: Argumentative. That's not a question.

9 MR. JENSEN: You made a --

10 MR. KENNEDY: Objection. Your Honor.

11 THE COURT: No, no. Everybody stop.

12 What's the objection?

13 MR. KENNEDY: Objection is argumentative. You should be
14 able --

15 THE COURT: That parts sustained.

16 MR. JENSEN: Of this amount --

17 THE COURT: Counsel, I think the confusion is you said
18 "this." What "this"? I'm looking at a whole bunch of
19 numbers.

20 MR. JENSEN: The number at the bottom.

21 THE COURT: 509?

22 MR. JENSEN: 509688.

23 THE COURT: Okay.

24 BY MR. JENSEN:

25 Q Your best estimate of today of that, how much of

1 that amount is funded by investment returns?

2 A As of today?

3 Q As of today.

4 A I couldn't say.

5 Q And what piece of information is missing for you to
6 be able to make that estimate?

7 A I don't know what he's getting paid. I don't know
8 what was valued as of June 30th, 2012. I don't know what
9 was valued as of June 30th, 2013, so I can't say if there's
10 been an increase in contributions based on -- basically, as
11 of June 30th, 2013, if we were paying at the \$13,500 level,
12 an adjustment would have been made to the employer
13 contributions; therefore, catching up this amount. So I
14 can't tell you how much that money came in and how much
15 money he made. So I can't really answer that question.

16 Q Are you aware that the City of San Bernardino paid
17 contributions on the higher salary for the term when
18 Mr. Lewis was receiving it?

19 A No. I'm not aware of -- I don't know when this
20 started. I don't know when it ended. I don't know when the
21 City of San Bernardino made any contributions on this higher
22 salary.

23 Q So assume for these purposes at least since 2007 to
24 2012 that San Bernardino paid all employer-employee
25 contributions associated with the higher salary.

1 A So for five years the City of San Bernardino made
2 higher on contributions?

3 Q No. My question to you is -- and, again, it's --

4 THE COURT: No, no. He's just trying to clarify.

5 That's your question to him. You want him to assume that
6 San Bernardino made contributions for the five years on the
7 13,5; yes?

8 MR. JENSEN: Yes, that's the assumption.

9 THE COURT: Okay. Now, ask your question.

10 BY MR. JENSEN:

11 Q And now my question to you is: How much of this
12 amount of 509668 would be funded as of today by investment
13 returns and not have to be paid by the city?

14 A So what we would have to do is do a calculation of
15 the additional 3,500 for those five years, 2007 to 2012, and
16 2008 we lost six percent. 2009 we lost 24 percent on
17 investment return. 2010, I believe it was a good year,
18 20 percent. 2011 was a good year. 2012 was a zero percent
19 year, so the investment returns on those additional
20 contributions were probably either negative or minimal.

21 THE COURT: Assume that San Bernardino was taking
22 contributions on the 13,5 for those five or six years, would
23 that change your 509 calculation?

24 THE WITNESS: No. It's a purely liability calculation.
25 It has nothing to do with calculations coming in.

1 BY MR. JENSEN:

2 Q So the liability is not how much -- it shouldn't be
3 construed as the amount that San Bernardino has to pay this
4 benefit?

5 MR. KENNEDY: Misrepresents the testimony.

6 THE COURT: Overruled. You can answer.

7 THE WITNESS: All right. So we have two present value
8 calculations. I'd say if we can just round them for these
9 first calculations 1.5 million, the second is two million.
10 That's the amount of money that needs to be set aside to pay
11 the benefits, the \$9,000 benefit and the \$12,151 benefit.
12 If all assumptions were made at the seven and a half percent
13 mortality and that's just an estimate of what -- it's the
14 present value calculation.

15 Now, there's mortality rates in that calculation.
16 So Mr. Lewis when there's a probability of one in a thousand
17 he's going die the first year. Is one in a thousand he's
18 going to die, no. He's going die 100 percent in one year,
19 not piece by piece by piece. It's a calculation that is
20 derived from a large number, you know, a lot of large
21 numbers.

22 BY MR. JENSEN:

23 Q But actually in this case you are separating out
24 this additional amount and then saying that it accrued just
25 as a date of the promotion; is that correct?

1 MR. KENNEDY: Objection. No, that's not the testimony.
2 And, again, objection to the date of the promotion.

3 THE COURT: Overruled. Is that one of your assumptions?

4 THE WITNESS: The two bottom line numbers, the
5 1.5 million and the \$2 million figure, those are the amount
6 of money that needs to be there to pay those benefits.

7 THE COURT: I get that. He's trying to figure out where
8 you got these numbers from. Other than being given them
9 from the commission review, you don't really no what the
10 city funds are, what he made, if he got promoted --

11 THE WITNESS: We don't allocate money to each
12 individual. The money is all set aside for all the members
13 and retirees of the City of San Bernardino.

14 So there may be -- we add up all the liabilities
15 for everybody, that may be 100 million and they might have
16 allocated to them 75 million so there's 75 percent funded.
17 So you could say 75 percent, this member is 75 percent
18 funded, but that's just on a whole basis.

19 MR. KENNEDY: And you have to remember, your Honor, this
20 is projection of liability it's not a --

21 THE COURT: I understand.

22 MR. KENNEDY: -- static determination. It's a present
23 value based on a projection.

24 THE COURT: I understand that.

25 ///

1 BY MR. JENSEN:

2 Q I just think it's -- are you familiar with the
3 CalPERS smoothing rates for contributions from contracting
4 cities such as San Bernardino?

5 A Am I familiar with smoothing?

6 Q Yes.

7 MR. KENNEDY: What's the term "looting"?

8 THE COURT: Smoothing.

9 MR. KENNEDY: Looting?

10 MR. JENSEN: Smoothing, s-m-o-o-t-h-i-n-g.

11 MR. KENNEDY: By the way, are we finished with the
12 exhibits?

13 MR. JENSEN: No.

14 MR. KENNEDY: Okay. I want to make sure those are
15 returned to his file.

16 THE WITNESS: I'm familiar with the way CalPERS
17 currently calculates employee calculation rates and how we
18 did them in the past. And one of the terminologies was we
19 smooth assets values we smooth employee contribution rates,
20 so I'm not sure what you mean by "smoothing."

21 BY MR. JENSEN:

22 Q And when you say here that this additional
23 liability, would that have to be assumed by the City of San
24 Bernardino over a specific period of time?

25 A Yes.

1 Q And what is the period of time for which those
2 employer contribution rates are smoothed?

3 A Any experienced losses -- I would consider this an
4 experience loss -- would be amortized for a 30-year period.

5 Q Over 30 years.

6 And so approximately how much is that each year
7 spread over 30 years?

8 A The current policy or the prior policy?

9 Q Whatever policy you are applying.

10 A I assume you mean current policy, so how much has
11 been --

12 Q Over 30 years, you said. So is that approximately
13 15,000 a year?

14 A No. The calculation is a little more complicated
15 than that.

16 Q What would be the approximate?

17 A I couldn't give you that. I'd have to plug in a
18 spreadsheet.

19 MR. KENNEDY: Your Honor, I'd ask the relevance of this
20 is, as far as the determination of the increase in liability
21 cost by these two different rates.

22 THE COURT: You introduced evidence, Counsel, about the
23 other additional liability. That's going to be resulting.
24 I'm going to let him probe that.

25 MR. JENSEN: Your Honor --

1 MR. KENNEDY: My objection goes to the cumulative
2 discussion on the funding of that liability. Whether it's
3 funded by investments, by contributions, or not, it's an
4 increase that's unanticipated to the fund and born by
5 CalPERS in San Bernardino.

6 THE COURT: Well, I believe the defense argument is that
7 it's not unanticipated.

8 MR. JENSEN: And let me just probe that.

9 BY MR. JENSEN:

10 Q Mr. Clement, what is unanticipated as the
11 terminology as you understand it?

12 A I would define it as anything above and beyond what
13 we expect or above and beyond -- or below what we expect.

14 Q And do you expect promotions to occur for
15 firefighters?

16 MR. KENNEDY: Irrelevant.

17 THE COURT: Sustained.

18 BY MR. JENSEN:

19 Q Are promotions anticipated in the experience
20 studies?

21 A No.

22 Q So every promotion is unanticipated?

23 A Salary increases are anticipated. Promotions are
24 not.

25 Q And so --

1 A I mean, promotions would be intuitive in the salary
2 increase.

3 Q So do you have any experience in whether promotions
4 are attached to higher salary increases than simple steps in
5 a civil service position?

6 A Like I mentioned earlier, generally speaking,
7 employees in their early careers get higher salary
8 increases, 15, 20, 25 percent, due to promotions and their
9 increases. And promotions are less frequent later in
10 member's careers.

11 Q Are those promotions for younger workers
12 anticipated in the experience study?

13 A We don't look at promotions in the experience
14 study. All we look at is the change from one year to the
15 next.

16 Q So how do you address this issue that there are
17 some individuals who receive higher pay increase due to a
18 promotion?

19 A We have members who give salary increases above our
20 assumptions and we have some that give below. The ones that
21 give salary increases below our assumptions, we call
22 experience gains. The ones above our assumptions are
23 experience losses, and the gains and losses are over
24 30 years.

25 Q And so this issue about unanticipated, where does

1 that fall into this?

2 A I would characterize a 35 percent increase in a
3 member's one-year period late in the career to be much
4 higher than expected.

5 Q And so but what is this unanticipated? Where does
6 that language fit into this?

7 MR. KENNEDY: Objection. Vague. "Where does it fit
8 in?"

9 THE COURT: Sustained.

10 BY MR. JENSEN:

11 Q Did you ever characterize Mr. Lewis's salary
12 increases unanticipated?

13 A Should we check the record? I never --

14 THE COURT: He doesn't know where the 10 and the 13,5
15 came from.

16 MR. JENSEN: Right.

17 THE WITNESS: I characterize the 35 percent is much
18 higher than what we would expect.

19 MR. JENSEN: May I approach the witness, your Honor?

20 THE COURT: Yes.

21 BY MR. JENSEN:

22 Q And I just want to ask you, there's some yellow
23 markings on this page.

24 Your Honor I'd probably like to admit this
25 document.

1 What is this spreadsheet here?

2 A These are the results of a spreadsheet we
3 calculated the mitigating factors.

4 Q And why did you choose the highlighted figures
5 under factor 125 percent and factor 50 percent in that
6 column?

7 A That was the column for member age 61, beneficiary
8 age 49, and those are joint survivor at 25 percent and
9 50 percent. And initially I thought the City of San
10 Bernardino had a joint survivor 50 percent, in fact, they
11 have a joint survivor 50 percent inside of 25. So I
12 accidentally highlighted 25. 50 percent figure is the
13 number that's in the calculation down at the bottom 162418
14 is the annuity factor for the value of the dollar for the
15 rest of the life of the member at age 61 and at any age 49.

16 Q Where did you pull these numbers out of?

17 A Spreadsheet.

18 Q And where did these -- are these established
19 figures in the CalPERS database?

20 A These figures were derived using a macro that grabs
21 the mortality table for the member which was table 40 from
22 this spreadsheet, beneficiary table is 41, interest rate was
23 seven and a half, and inflation was 2.75.

24 Q And inflation, you use that as the cost of living
25 increases?

1 A Inflation is to calculate the protection, which was
2 80 percent for public agencies.

3 MR. JENSEN: Your Honor, I'd like to offer this into
4 evidence.

5 THE COURT: Mark it as Exhibit 22, Complainant's.

6 (Complainant's Exhibit 22 was marked for
7 identification by the Court.)

8 MR. KENNEDY: I can just ask the Court for these
9 exhibits, I think we lost the opportunity to make photo
10 copies since it's past 5:00 o'clock now.

11 THE COURT: I'm going to take these and get copies for
12 people.

13 MR. KENNEDY: Thank you.

14 THE COURT: Counsel, any objection my receiving 22?

15 MR. KENNEDY: No.

16 THE COURT: 22 will be received.

17 (Complainant's Exhibit 22 was received
18 in evidence by the Court.)

19 BY MR. JENSEN:

20 Q To your knowledge has the City of San Bernardino at
21 any point challenged the -- it's said it doesn't want to pay
22 the higher contribution associated with the promotion?

23 MR. KENNEDY: Objection, your Honor. Relevance. Calls
24 for speculation.

25 MR. JENSEN: To his knowledge.

1 THE COURT: Overruled. To his knowledge.

2 THE WITNESS: I'm not aware of the City of San
3 Bernardino's opinion on this situation.

4 BY MR. JENSEN:

5 Q Isn't it true that every increase in compensation
6 increases the liability to that employer?

7 A Yes.

8 Q Just one last thing about military and airtime.

9 Are you aware of who pays the employer and
10 employer's side contributions for military and airtime?

11 A Yes.

12 Q And what is that.

13 A The member.

14 Q The member pays the employer's side of that benefit
15 in addition to the employees's side?

16 A As of the date of the purchase, yes.

17 Q Okay.

18 MR. JENSEN: Your Honor. I think I have no further
19 questions.

20 THE COURT: Take your time, Counsel.

21 MR. JENSEN: I have no further questions.

22 THE COURT: Thank you. Redirect?

23 ///

24 ///

25 ///

1 REDIRECT EXAMINATION

2 BY MR. KENNEDY:

3 Q Mr. Clement, CalPERS -- the legislator has seemed
4 to terminate the purchase of airtime.

5 Are you familiar with that?

6 MR. JENSEN: Objection. Relevance.

7 THE COURT: Overruled.

8 THE WITNESS: Yes.

9 BY MR. KENNEDY:

10 Q And is one of the purposes in doing that because --

11 THE COURT: No, no, no.

12 BY MR. KENNEDY:

13 Q Are you aware of in any actuarial reason why it is
14 supporting that decision to terminate?

15 A I would only be speculating.

16 Q Okay. Are you familiar with any studies
17 represented that the payment for airtime under estimated
18 actually liability incurred by a significant percentage?

19 MR. JENSEN: Objection. Leading.

20 THE COURT: Sustained.

21 BY MR. KENNEDY:

22 Q Mr. Clement, the liability -- the anticipated or
23 unexpected liability that San Bernardino would incur by,
24 let's say, by paying a member a \$3,500 increase in salary,
25 there's been some questioning about whether or not

1 promotions are taken into consideration in your calculation
2 and whether or not that does or does not create -- have an
3 impact in whether the increase liability was expected or
4 unexpected.

5 If I were to give you the following facts at the
6 time that Mr. Lewis started receiving his additional pay,
7 and that additional pay was based on the salary pay to a
8 Battalion Chief with the city, but yet all positions at that
9 rank in City of San Bernardino were occupied with another
10 employee and not vacant, but the City of San Bernardino paid
11 him that amount of increase, would that have an effect upon
12 your determination as to whether or not it was expected or
13 unexpected liability?

14 MR. JENSEN: Objection, your Honor. Compound.
15 Irrelevant. Improper hypothetical. Attorney testifying.
16 Assumes facts not in evidence and it's --

17 THE COURT: Sustained. This is beyond the scope of what
18 this witness was called here to do.

19 MR. KENNEDY: No. It's the --

20 THE COURT: No. He told me he didn't know where the
21 numbers came from.

22 MR. KENNEDY: Yes, but Mr. Lewis has testified that --
23 I'm asking a hypothetical. And the hypothetical basically
24 is incorporating Mr. Lewis's statement that all positions at
25 the Battalion Chief were occupied during his tenure of

1 payment for the -- at the higher level; okay? And
2 therefore, when you do --

3 THE COURT: That's not exactly how he answered the
4 question --

5 MR. KENNEDY: When you --

6 THE COURT: That's assuming facts not in evidence, just
7 so you know.

8 BY MR. KENNEDY:

9 Q When you do an evaluations study, does the
10 evaluations study take into consideration a rates study?

11 Does it take into consideration the various ranks
12 and positions that are being funded?

13 MR. JENSEN: Objection. Assumes facts not in evidence.
14 Improper hypothetical.

15 MR. KENNEDY: I'm asking the question --

16 THE COURT: He started a new question. It's overruled.

17 MR. JENSEN: Then, your Honor, if I can move to strike
18 all of his testimony prior to that about what Mr. Lewis's --
19 his version that was about Mr. Lewis's testimony that the
20 witness heard and is now impossible for him to unhear.

21 MR. KENNEDY: He's now --

22 THE COURT: The question is all struck.

23 MR. JENSEN: Thank you.

24 THE COURT: And I also don't think it accurately stated
25 the facts that are in evidence.

1 MR. KENNEDY: Mr. Lewis previously testified that the
2 positions -- at the time that he settled his case in 2007,
3 that all positions at the rank of Battalion Chief were
4 occupied.

5 THE COURT: I want you to assume he said that. I don't
6 know for sure if he said that, Counsel.

7 BY MR. KENNEDY:

8 Q Let's assume that all positions at the rank of
9 Battalion Chief were satisfied, and that the increase in pay
10 was, in fact, an increase that would have paid Mr. Lewis at
11 a rank for a position that didn't exist. In other words, it
12 was a payment for a settlement, and not for occupying a
13 position at a Battalion Chief level.

14 Would that have any effect upon your determination
15 as to whether or not -- and taking into consideration the
16 rate -- does that have any effect upon your determination to
17 whether it was unexpected or unanticipated liability
18 incurred by the city?

19 MR. JENSEN: Objection, your Honor. Assumes facts not
20 in evidence. This is inconsistent with the testimony, is
21 improper hypothetical, and misrepresents the record, and
22 irrelevant.

23 THE COURT: It's also incomplete hypothetical because
24 the city reported it, the CalPERS.

25 MR. KENNEDY: No. They reported the pay. That's what

1 I'm saying. That's not material to the hypothetical.

2 MR. JENSEN: Your Honor. I'm sorry to object and break
3 off his testimony, or his long questions, but they just go
4 on and on and on, and I want to object earlier to be able to
5 keep the record --

6 MR. KENNEDY: Is there an objection, your Honor?

7 MR. JENSEN: -- clean. But there's a witness here who
8 is listening to this testimony and --

9 THE COURT: Right. The objection is sustained.

10 MR. JENSEN: Thank you.

11 BY MR. KENNEDY:

12 Q You used the term before "actuarial loss."

13 Am I using the correct term?

14 A You made a statement and a question.

15 Q You said a gain and a loss.

16 What were you referring to?

17 A Experience gain or loss.

18 Q Experience loss is what?

19 A We anticipate certain liabilities. If the
20 liabilities are higher than expected, we have an experience
21 loss. If the liabilities are lower than expected, then we
22 have an experience gain.

23 Q So when an employer pays a member an amount of
24 commission that purports to CalPERS for inclusion in their
25 calculation of their retirement benefit, that is not

1 allowable under the PERL, would that constitute an
2 experience loss?

3 MR. JENSEN: Objection, your Honor. He's talking about
4 not allowable in the PERL.

5 MR. KENNEDY: I know. That's your --

6 THE COURT: I don't know from what the witness has been
7 telling me -- it seems you are mixing apples and oranges,
8 Counsel.

9 THE WITNESS: Can I answer what he's trying to ask.

10 MR. JENSEN: No.

11 THE COURT: No. The objection is sustained.

12 BY MR. KENNEDY:

13 Q What constitutes experience loss as far as in your
14 evaluations of the -- what constitutes an experience loss?

15 MR. JENSEN: Objection. Asked and answered.

16 THE COURT: How he defines it, he's told me twice now.

17 BY MR. KENNEDY:

18 Q Okay. Would an experience loss occur if a
19 member -- if an employer let's say are passing through
20 CalPERS reporting an amount that is not reflective of the
21 actual salary of the member?

22 MR. JENSEN: Objection. Goes beyond the scope, and is
23 irrelevant to his professed expertise. And it assumes facts
24 not in evidence and --

25 THE COURT: Sustained.

1 BY MR. KENNEDY:

2 Q Does the experience study anticipate a certain
3 amount of compensation -- level of compensation to be
4 incurred or paid by each employer?

5 MR. JENSEN: Objection. Vague as to time.

6 THE COURT: Overruled.

7 THE WITNESS: Can you repeat the question?

8 BY MR. KENNEDY:

9 Q Does the experience study anticipate amounts of
10 compensation that will be paid by employers?

11 A No.

12 Q Does it anticipate an increase in payroll, or
13 assumptions in the increase in payroll, that will be paid by
14 an employer?

15 A The experience study will -- the salary scale will
16 be a result of an experience study and there are assumptions
17 about salary increases from year to year. So the salary
18 scale does have anticipated salary increases. In general,
19 if everything is equal and all the other assumptions are
20 met, if somebody gets a salary increase higher than what we
21 expected using the table, how much service they have, what
22 their age is. They get 2.48 salary increase. If that
23 increase is higher than that, in general we're going to have
24 an experience loss. If it's lower, we'll have experience
25 gain. In some ages its 15 percent. In some ages it's three

1 percent, 3.25.

2 Q The only other question I'm asking is when we
3 talked about promotions and you are talking about the same
4 experience -- same assumption as to increase it applies
5 whether it's promotion or not promotion; right?

6 MR. JENSEN: Objection. Asked and answered.

7 MR. KENNEDY: Right?

8 MR. JENSEN: He's not taking into consideration
9 promotions.

10 THE COURT: I think that's what he said. He doesn't
11 consider promotions.

12 MR. KENNEDY: Well, I need to set up my question.

13 THE COURT: What he testified earlier was promotions are
14 not anticipated and salary increases are anticipated. And
15 promotions are intuitive in salary increases.

16 BY MR. KENNEDY:

17 Q And if an increase in pay is not the result of a
18 promotion and far and exceeds the assumption, is that
19 considered an experience loss?

20 MR. JENSEN: Objection. Misstates his prior testimony.

21 THE COURT: Overruled.

22 THE WITNESS: In general, it doesn't matter if somebody
23 gets a promotion. Promotion or no promotion, if the salary
24 is above what we expect generally speaking we'll have an
25 experience loss. There will be an additional funding by the

1 employer.

2 BY MR. KENNEDY:

3 Q Now, if a person is in the rank of a Fire Captain
4 and gets paid an additional 35 percent higher than that, and
5 that's reported to CalPERS for incorporation into the
6 calculation of the retirement, is that going to result in
7 then the experience loss and unexpected liability to the
8 fund?

9 MR. JENSEN: Objection. Asked and answered.

10 THE COURT: Overruled.

11 THE WITNESS: Did you say overruled?

12 THE COURT: Overruled.

13 THE WITNESS: If there is a change from one year to the
14 next and that increase is greater than what we expect for
15 that particular individual, then in general we'll have an
16 experience loss that will have to be amortized over a
17 three-year period and paid for by the employer.

18 BY MR. KENNEDY:

19 Q My question -- narrow it even further.

20 Mr. Lewis was holding the position of a Fire
21 Captain. Whatever that level is, \$10,000 a month, okay.
22 And received a 35 percent increase in pay, but still -- in
23 that rank as Fire Captain -- it's a 35 percent increase in
24 his rate of pay and expected experience.

25 How does that fit into the assumptions that you

1 would expect of the fire safety payroll?

2 MR. JENSEN: Objection.

3 BY MR. KENNEDY:

4 Q Would that be in relation to what the assumptions
5 would be?

6 MR. JENSEN: Objection, your Honor. Assumes facts not
7 in evidence, and it's contrary to the testimony.

8 THE COURT: Overruled. It's a hypothetical. He's got
9 to the establish the fact.

10 THE WITNESS: Again, I don't have the salary scale in
11 front of me. I don't know the particulars of Mr. Lewis.
12 How old he was when this happened; however, in general,
13 35 percent is much higher than I would say almost any age or
14 service so I would expect an experience loss due to the 35
15 percent increase.

16 MR. KENNEDY: No further questions, your Honor.

17 THE COURT: Recross?

18 MR. JENSEN: Yeah.

19

20 RE-CROSS-EXAMINATION

21 BY MR. JENSEN:

22 Q So, Mr. Clement, at a certain point you said that
23 you look at the increases over an individual's whole career
24 to determine -- is that correct?

25 Do you look at the salary increases of an

1 individual's whole career to see if there's an experience
2 loss or gain?

3 A If I looked at every individual, every year I
4 wouldn't -- I couldn't do that.

5 Q In this case when you look at an experience loss
6 and experience gain, do you look at an individual's whole
7 career?

8 A I only look from one year to the next. I don't
9 look at the entire career.

10 Q So at any point did you look at whether there was
11 experience gains in the prior years of Mr. Lewis's
12 employment?

13 A No, I did not.

14 Q Would that be material to you?

15 A I only looked at the calculations that I performed,
16 which was based on 10,000 and 13,500. I didn't look at any
17 previous gains or losses --

18 Q But if --

19 A -- in Mr. Lewis's career.

20 MR. KENNEDY: Relevancy. There's no evidence that there
21 was ever a reduction in pay rate.

22 THE COURT: He testified about taking a pay cut for the
23 city.

24 MR. KENNEDY: That was --

25 THE COURT: Overruled.

1 MR. JENSEN: And I would also like to --

2 MR. KENNEDY: For one year? Okay.

3 BY MR. JENSEN:

4 Q So, Mr. Clement, when you talk about these
5 experience losses and experience gains, are they really
6 averages?

7 A Each individual is going to have an experience gain
8 or loss. In general, I'm looking at a plan as a whole, and
9 I'm going to look at the total gain or loss of the plan.

10 Q And so my question to you really is: Is a plan as
11 a whole, you would expect in every -- would you expect a
12 certain year, half of the members to have an experience loss
13 and half to have an experience gain?

14 A I would say 50/50, but I would say there are some
15 expected gains. There will be gains and losses, and they
16 will offset each other and there will be a net gain or loss.

17 Q And that's every year?

18 A Every year we do an annual evaluation and
19 redetermine the employer contribution.

20 Q And so what would you say the percentage of
21 experience losses are every year?

22 MR. KENNEDY: Relevance.

23 THE COURT: Overruled.

24 THE WITNESS: I'm not sure what you mean by percentage.

25 MR. JENSEN: Would you say --

1 THE WITNESS: No, no, no.

2 THE COURT: You've got to let him finish.

3 THE WITNESS: Don't interrupt me --

4 THE COURT: Sir, I'm the judge. I instruct that.

5 THE WITNESS: I can't hear you, I'm sorry.

6 THE COURT: I know. Okay.

7 THE WITNESS: When he says "percentage," are you looking
8 at the number of people getting a gain or a loss? Everybody
9 gets a gain or loss. What percentage of the population gets
10 a gain or loss? I don't look at that.

11 I look the total gain or loss. I look at how to
12 compare that to the expected liability and if it's within a
13 certain range I'm happy with the results of the plan. I
14 doubt that that's where you are going but...

15 BY MR. JENSEN:

16 Q Well, really what I'm trying to say is that an
17 experience gain is not unusual; is that correct?

18 A No, it's not unusual.

19 Q And experience loss is not unusual?

20 A Correct.

21 Q And approximately how many members -- what
22 percentage of members would cause an experienced loss to the
23 plan every year?

24 A I have no idea.

25 Q Could you estimate?

1 A Nope.

2 Q So what is the percentage increase that is the
3 point at which there is experience neutrality, either gain
4 or loss, in the year that Mr. Lewis had his promotion?

5 MR. KENNEDY: Objection. Mr. Lewis did not have a
6 promotion. Assumes facts not in evidence.

7 THE COURT: Sustained.

8 MR. KENNEDY: The pay increase.

9 MR. JENSEN: That Mr. Lewis had the --

10 THE COURT: Sustained.

11 BY MR. JENSEN:

12 Q What was the average increase in salary the year
13 that Mr. Lewis had an increase in his salary that is the
14 subject of this dispute?

15 A I don't know if you are asking what was the average
16 salary for the fire department for City of San Bernardino,
17 or Southern California or for all of CalPERS.

18 I'm not the actuary for the City of San Bernardino,
19 so I couldn't tell you what the salary increases for that
20 year were and nobody would because we haven't done an
21 experience study. I don't know when this salary increase
22 happened, so I can't really answer that question.

23 Q So in your line of work, is it a big deal that
24 there's an experience loss?

25 MR. KENNEDY: Objection. Vague. "Big deal."

1 THE COURT: Sustained.

2 BY MR. JENSEN:

3 Q So is there an actuary who works for the City of
4 San Bernardino?

5 Who does these calculations?

6 A That's two questions.

7 Q Is there an actuary for the City of San Bernardino?

8 A Yes.

9 Q And did you contact him?

10 A No.

11 Q Do you know who he is?

12 A No. I don't know if it's he or she.

13 Q Do you know would they be better informed about the
14 experience study of the City of San Bernardino?

15 A There is no experience study for the City of San
16 Bernardino.

17 Q Would they be more familiar with the actuarial
18 evaluations of the City of San Bernardino?

19 A Yes.

20 Q And was there any effort to reach them to have them
21 testify here?

22 A That's two questions.

23 Q Was there any effort to reach them that you are
24 aware of?

25 A Not that I'm aware of.

1 Q And was there any effort to have him or her testify
2 today?

3 A Not that I'm aware of.

4 MR. JENSEN: I have no further questions.

5 THE COURT: Thank you, sir. You are --

6 MR. KENNEDY: I just have one question, your Honor.
7 It's noncontroversial.

8

9 FURTHER REDIRECT EXAMINATION

10 BY MR. KENNEDY:

11 Q Mr. Clement, experience gain, is that a death also?

12 THE COURT: Is that a what?

13 BY MR. KENNEDY:

14 Q A member dies, does that result in a gain?

15 A Generally speaking a death would result in an
16 experience gain.

17 Q Okay. I just want to make sure we know what we are
18 talking about as far as he experience losses and gains.

19 All right. And if a member had a reduction let's
20 say even as high as a 25 percent reduction in one year of
21 service out of 30, would that necessarily offset eight years
22 of 35 percent increase in salary?

23 MR. JENSEN: Objection. Improper hypothetical. And
24 assumes facts not in evidence. It's vague and ambiguous.

25 THE COURT: Sustained.

1 BY MR. KENNEDY:

2 Q The Court had acknowledged that Mr. Lewis actually
3 had a concession payment for one year, I believe, back to
4 the city where certain employees took a voluntary cut in
5 pay.

6 Now, to the extent that this 35 percent increase
7 results in an experience loss to the city, would you
8 calculate that one-time reduction would offset that loss?

9 MR. JENSEN: Objection. Assumes facts not in evidence.

10 THE COURT: Overruled.

11 BY MR. KENNEDY:

12 Q In other words, would it wipe out the \$500,900?

13 A Stop. You asked a question. Let me --

14 MR. KENNEDY: Thank you, sir. And I will do that.

15 THE WITNESS: Don't start asking me a question -- I got
16 up at 4:30 this morning to go to the airport to fly down
17 here --

18 MR. KENNEDY: And you've been very patient all day, and
19 I appreciate that.

20 THE WITNESS: -- I'm very tired. So I apologize for
21 my --

22 THE COURT: I understand, sir.

23 THE WITNESS: -- tenseness. I forgot the question.

24 Okay. So the question is: There's a 35 percent
25 increase -- I wouldn't say spike. 35 percent adjustment to

1 the salary and it appears from the questions that were asked
2 that it occurred over a period from 2007 to 2012, this is a
3 five-year period. The City of San Bernardino has one year
4 final comp. so when a member retires we're going to look at
5 the highest 12 consecutive months to determine what their
6 compensation is.

7 So if there was a 25 percent cut for six months, it
8 is irrelevant. We're going look at the highest 12 month
9 period to determine the benefits -- I'm sorry -- to
10 determine the highest compensation to determine the
11 benefits.

12 BY MR. KENNEDY:

13 Q Okay. So that would be virtually irrelevant then
14 to whether or not there was an experience loss or gain?

15 A A 25 percent pay cut would not cancel out the
16 experience loss due to the 35 percent increase.

17 MR. KENNEDY: Thank you. No other questions.

18 THE COURT: Mr. Lewis?

19 MR. JENSEN: Yes.

20

21 FURTHER RECROSS-EXAMINATION

22 BY MR. JENSEN:

23 Q Does CalPERS control how much the employer decides
24 to pay it's employee?

25 MR. KENNEDY: Competency. Relevancy.

1 MR. JENSEN: In your experience?

2 THE COURT: Why would CalPERS control what an employee
3 pays?

4 MR. JENSEN: I just --

5 THE COURT: No.

6 BY MR. JENSEN:

7 Q Okay. So is your function and CalPERS function
8 simply to tell the city how much it needs to contribute in
9 order to fund the benefits that it has provided or it has
10 offered it's employees?

11 A Well, the city contracts with CalPERS, so it's a
12 contracted benefit. So that's one of our tasks as the
13 actual office, yes.

14 Q And if the city chose to increase Mr. Lewis's
15 salary by 50 percent, or 100 percent, and agreed to assume
16 the additional liability, is there any problem with that?

17 MR. KENNEDY: Objection. Vague as to the word
18 "problem."

19 THE COURT: Overruled.

20 THE WITNESS: Actuarially speaking, the City of
21 San Bernardino contracted to provide benefits for it's
22 employees, Mr. Lewis being one of them. If they decided to
23 increase the compensation by 100 percent, from our point of
24 view then their benefit would double, then the liabilities
25 would double, and they'd be responsible for it.

1 But I'm sure you've heard the testimony from the
2 Comp. Review Unit there are laws that have stated that there
3 has to be compensation tables recorded. I don't know what
4 the terminology is, but I'm sure you heard all that
5 testimony earlier.

6 BY MR. JENSEN:

7 Q But with respect to your job here, does it matter
8 to you how much the increase is, or how much the pay is?

9 MR. KENNEDY: Objection. Relevancy. Vague.

10 THE COURT: Overruled. His question is: CalPERS has no
11 say in what the city pays the employees.

12 THE WITNESS: Correct.

13 THE COURT: And basically if the city is willing to do
14 the employer contribution, whatever you calculate and they
15 do that, CalPERS doesn't get involved in that?

16 THE WITNESS: No, not until they can't fund the benefits
17 and they have to make sure you collect those contributions
18 and if they didn't get them, they have to terminate a plan
19 and reduce benefits.

20 BY MR. JENSEN:

21 Q Although the City of San Bernardino is in
22 bankruptcy, are they making contributions to CalPERS to your
23 knowledge?

24 A I believe they are, but I'm not 100 percent.

25 MR. JENSEN: No further questions.

1 THE COURT: Thank you, sir. You are released.

2 MR. JENSEN: And can we just go off the record?

3 THE COURT: Yep.

4 (Off the record)

5 THE COURT: Back on the record.

6 We've had discussion off the record. Written
7 closing will be simultaneously exchanged and they can be
8 exchanged via fax to my office and to each other on May 1st
9 with a simulations exchange of rebuttal closing arguments on
10 May 15th. At which time the record will close on May 15th
11 and the Matter will be submitted.

12 MR. KENNEDY: Your Honor, since we e-file it with the
13 Court enter the facts?

14 THE COURT: Either one.

15 MR. KENNEDY: So e-service it?

16 THE COURT: Yes.

17 MR. KENNEDY: Okay.

18 THE COURT: With our system when you fax it goes into
19 our e-file.

20 And we're off the record.

21 (Hearing concluded at 5:56 p.m.)

22

23

24

25